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No. 69445-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES,

Appellant,

v.

COLLIERS INTERNATIONAL REALTY ADVISORS (USA), INC., a California corporation and ARVIN VANDERVEEN and JANE DOE VANDERVEEN, and their marital community,

Respondents.

and

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES,

Appellant,

v.

CITY OF SEATAC, a municipal corporation,

Respondents.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. REPLY IN SUPPORT OF LEIBSOHN'S APPEAL

Had the City of SeaTac paid $12,270,000 to acquire K & S's property in the ordinary course—that is, via a sale facilitated by Leibsohn—there is no question that Leibsohn would have been entitled to a commission. And a sale is exactly what would have occurred but for the interference of SeaTac's agents, Colliers and Vander Veen.

Respondents interfered in two basic steps. First, they broke real estate industry rules by directly contacting K & S and inducing it to include an exception for a deed in lieu of foreclosure when extending the Exclusive Sale Listing Agreement with Leibsohn. Second, Respondents closed a transaction disguised as a "deed in lieu of foreclosure" when the substance of the transaction was unequivocally a sale, in an attempt to insulate themselves from Leibsohn's legal claim for tortious interference.

This Court should reject Respondents' attempt to gain a legal advantage from the exception in the listing agreement created by their own wrongdoing, recognize that the exception does not apply to Respondents' transaction by its own terms, and reverse the trial court's decision on summary judgment.

A. The transaction was not a deed in lieu of foreclosure.

Colliers and Vander Veen do not even challenge Leibsohn's central argument that the transaction was not a deed in lieu of foreclosure.

SeaTac makes one weak argument: that the transaction is a deed in lieu of foreclosure because of SeaTac's self-serving intent that it be so. *See* SeaTac's Brief at 16-19.

SeaTac's argument relies upon a distinguishable line of cases that determine the rights and obligations flowing from a deed by considering the intent of the original parties to that deed. *E.g., Carr v. Burlington N.*, 23 Wn. App. 386, 387, 597 P.2d 409 (1979) (whether successor to deed had the right to repurchase land under the deed's language); *Hoglund v. Omak Wood Prods.*, 81 Wn. App. 501, 502, 914 P.2d 1197 (1996) (whether deed conveying "all timber" gave grantee's successors the right to cut down certain trees).

This case, in contrast, is not a dispute between Centrum and K & S about their respective rights and obligations under the "Deed in Lieu of Foreclosure" or the accompanying transaction documents. Rather, the issue is what "deed in lieu of foreclosure" means as that term is used in the exception in Leibsohn and K & S's Exclusive Sale Listing Agreement. To determine the meaning of "deed in lieu of foreclosure" for purposes of the Exclusive Sale Listing Agreement, it is the intent of Leibsohn and K & S regarding that particular agreement that matters, not the intent of different parties to a different deed. Nor can K & S's unilateral and subjective intent be used to contradict the plain terms of its Exclusive Sale Listing

Agreement with Leibsohn. *See, e.g., DePhillips v. Zolt Const. Co., Inc.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998) (extrinsic evidence may not be used to contradict the express terms of a contract). If parties to a contract could unilaterally avoid obligations to a third party by titling a transaction something that it was not in substance, the law would promote fraud, interference, and conspiracies to avoid legitimate contractual obligations.

David Meyers, Inc. v. Anderson, 48 Wn. App. 381, 739 P.2d 102 (1987) illustrates these principles.[1] In *David Meyers*, a buyer and seller prepared misleading closing documents that listed the purchase price of property as $600,000 and required the seller to repay $30,000 via promissory note to avoid paying the real estate broker's commission. *Id.* at 387-88. If the seller had sued the buyer to enforce the $600,000 purchase price, or the buyer sued under the promissory note to force the seller to repay the $30,000, those parties' intentions presumably would have been binding. However, as between the real estate broker and the seller, the documents were a sham and could not be used to defeat the broker's tortious interference claim. *Id.* at 388.

Similarly, Centrum and K & S's intent to do a deed in lieu of foreclosure presumably would have been determinative in an action between them to enforce the deed, but it cannot be used to foreclose

[1] This case was discussed at length in Appellant's Opening Brief at 25-26.

Leibsohn's tortious interference claim. Of course SeaTac, Centrum, and K & S intended the transaction to be a deed in lieu of foreclosure. The whole transaction was designed "to make it tougher for Liebson [sic] to make a claim for a share of the $300k fee as a co-broker."[2] This self-serving intent cannot bind Leibsohn, a third party, or be used to import a definition of "deed in lieu of foreclosure" into his Exclusive Sale Listing Agreement that is wholly contrary to that term's plain meaning.

Rather, the Exclusive Sale Listing Agreement simply incorporates the ordinary meaning of a "deed in lieu of foreclosure" – that is, a deed conveyed to the holder of a primary obligation (the loan) as a remedy for default. *See* Leibsohn's Opening Brief at 22-28. This transaction, where SeaTac had the sole goal of acquiring the property and never held more than a nominal interest in K & S's debt, cannot meet that definition.

B. Leibsohn meets all the elements of tortious interference.

If this court rejects the trial court's conclusion that "the transaction was a deed in lieu of foreclosure,"[3] then the elements of tortious interference with a contract become apparent. With regard to tortious interference, Leibsohn can prove that (1) he had a valid contract and business expectancy, (2) Respondents knew of that relationship and business expectancy, (3) Respondents improperly interfered, causing

[2] CP 1094.
[3] CP 1655-57.

breach and termination, and (4) resultant damages.[4] *F.D. Hill v. Wallerich*, 67 Wn.2d 409, 413, 407 P.2d 956 (1965).

1. Leibsohn had a valid contractual right to a commission and business expectancy in the unaltered renewal of the Exclusive Sale Listing Agreement.

Respondents interfered with three valid contractual rights or business expectancies of Leibsohn's: (1) the right to exclusive communication with his client about potential purchasers under the 2008 Exclusive Sale Listing Agreement (2) the expectancy that K & S would extend the 2008 Exclusive Sale Listing Agreement with no change except to the list price, and (3) the right to a commission on December 31, 2009, regardless of whether the 2008 agreement's tail provision or the 2009 agreement was effective.

Leibsohn's relationship with K & S under the 2008 Exclusive Sale Listing Agreement was the first subject of Respondents' interference. The 2008 Exclusive Sale Listing Agreement gave Leibsohn the right to serve

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[4] The fact that Leibsohn's opening brief did not recite each element of his claims does not mean he failed to preserve them for appeal. Leibsohn assigned error to the dismissal of his claims on summary judgment and dedicated his opening brief to the legal errors in the trial court's rationale for doing so. "In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue." *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 582-83, 915 P.2d 581 (1996) (quoting *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995)). To decide this case on preservation grounds would be a gross miscarriage of justice. *See* RAP 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.").

as the sole broker representing K & S in the sale of its property.[5] Respondents do not dispute that when they first contacted Leibsohn's exclusive client about the proposed transaction, no later than October 2009, this agreement was in effect.

Second, Leibsohn had a reasonable expectation that K & S would extend the 2008 Exclusive Sale Listing Agreement for another year with no change except lowering the list price. K & S had extended the agreement with no other changes twice before.[6] In 2009, Leibsohn and Switzer orally agreed to extend it a third time at a reduced list price.[7] When K & S's principal Scott Switzer received a draft of the third extension from Leibsohn, he responded, "I think I can now sign the agreement."[8] Drawing all inferences in favor of Leibsohn, this is more than sufficient evidence for a finder of fact to conclude that Leibsohn had a valid business expectancy in the Exclusive Sale Listing Agreement's extension. Respondents' argument that Centrum's pending foreclosure action would have prevented extension of the listing agreement requires the court to disregard this evidence, impermissibly speculate on K & S's business judgment, and usurp the finder of fact's role.

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[5] CP 637, § 2.
[6] CP 1393, ¶ 3.
[7] CP 1394, ¶ 8.
[8] CP 1438.

Third, Leibsohn had a valid contractual right to a commission when SeaTac's transaction closed on December 31, 2009, regardless of whether the 2009 Exclusive Sale Listing Agreement was valid (as SeaTac claims) or invalid (as Colliers claims). Leibsohn was entitled to a commission under either (1) the tail provision of the 2008 agreement, which entitled Leibsohn to a commission for a sale where the buyer submitted an offer while the agreement was effective and the sale occurred within six months after the agreement's expiration,[9] or (2) the 2009 Exclusive Sale Listing Agreement, which provided that Leibsohn was due a commission if a sale occurred during its effectiveness.[10] Because SeaTac offered to purchase the property in October 2009,[11] and in fact did so by the end of 2009, either provision could apply.

2. Respondents knew of Leibsohn's contractual relationship and business expectancy.

Respondents concede they knew that Leibsohn was the exclusive agent for the property. They received marketing materials from Leibsohn and specifically requested information from him that they relied upon in closing the transaction.[12] Colliers even initially acted as if it would work

[9] CP 638, § 5(c).
[10] CP 1443, § 5.
[11] CP 1086-88.
[12] CP 1334; 1404-12; 1418-20; 1422-23; 1429; 1447-50.

with Leibsohn on the purchase.[13] Colliers' agent Mike George wrote to Leibsohn in early September 2009:

> I'm working with a group that has shown some preliminary interest in your site in SeaTac. At this point they wish to remain anonymous. They have some basic questions...
>
> I look forward to your response and hopefully this turning into something serious.[14]

The commission agreement between SeaTac and Colliers also explicitly acknowledged Leibsohn's contract with K & S.[15]

It is also reasonable to infer that Respondents knew when they directly contacted K & S that it was about to extend the 2008 Exclusive Sale Listing Agreement with no material changes except a reduction of the list price. Just hours after Switzer told Leibsohn that "I think I can now sign the agreement,"[16] Vander Veen emailed Thomas Hazelrigg III, who shared an office with Switzer, "W]hat about K & S agreeing to the deed in lieu in exchange for their release? Will they sign something quickly so we can make this happen."[17] Hazelrigg marked the email "Urgent" and forwarded it to Switzer.[18] The only urgency that could have motivated this flurry of prohibited contact was K & S's impending agreement to extend its Exclusive Sale Listing Agreement with Leibsohn.

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[13] CP 1406-07.
[14] *Id.*
[15] CP 1470.
[16] CP 1438.
[17] CP 1088.
[18] *Id.*

3. Respondents intentionally and wrongfully interfered.

Respondents admit the key facts showing that they intentionally and wrongfully interfered with Leibsohn's Exclusive Sale Listing Agreement and his efforts to extend it. First, they do not dispute that they directly contacted K & S to propose SeaTac's acquisition of the property while the 2008 Exclusive Sale Listing Agreement was still in effect. They also do not dispute that presenting an offer directly to an exclusively listed client violates multiple commercial real estate brokerage rules and regulations, including those of the Commercial Brokers Association (CBA), Society of Industrial and Office Realtors, and the National Association of Realtors. As Leibsohn's expert opined,

> Colliers and Vander Veen's acts of directly approaching the seller and the seller's business partners to present its offer to purchase the property are an extreme deviation from the standards and practices in commercial real estate. It was wrongful for the city of SeaTac's offer to purchase the property to not be presented through Leibsohn.[19]

Colliers and Vander Veen explicitly conceded that for purposes of summary judgment, "we agree that the existence of [Leibsohn's] expert's declaration creates questions of fact on one element of the tortious interference claim ('improper purpose or improper means')."[20] Finally, Respondents do not dispute that this direct contact caused K & S to

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[19] CP 1352, ¶ 11.
[20] CP 1549.

modify the Exclusive Sale Listing Agreement, even touting the fact that Switzer explicitly attributed the exception to Vander Veen.[21]

Rather than disputing these facts, Respondents attempt to justify their actions via three theories: (1) SeaTac simply participated in an inevitable foreclosure, (2) the second sentence of the exclusion covers the transaction regardless of whether it is a deed in lieu of foreclosure, and (3) K & S did not breach the Exclusive Sale Listing Agreement because it had expired when the transaction closed. Each of these theories fails.

a. SeaTac could not foreclose on the property.

SeaTac first attempts to justify its actions by characterizing itself as an ordinary, and even beneficent, participant in an inevitable foreclosure. This is a farce. SeaTac had a single, professed goal: to acquire K & S's property for the cheapest possible price.[22] SeaTac didn't care whether the documents said "sale" or "deed in lieu of foreclosure" as long as it got a lower price by eliminating Leibsohn's commission from the obligations K & S believed it had to pay. In fact, as soon as Vander Veen thought Leibsohn's Exclusive Sale Listing Agreement had expired, he suggested that SeaTac characterize the transaction as a straightforward sale: "Remember we could not do a PSA [Purchase and Sale Agreement]

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[21] *See, e.g.*, SeaTac's Brief at 6 (quoting Switzer's statement at CP 494 that "I wrote in a fee exclusion for the proposed deed in lieu of [sic] transaction through Tom Hazelrigg and Arvin Vander Veen").
[22] *E.g.*, CP 606.

earlier because it was listed and now that listing has expired."[23] This email confirms Respondents' goal of purchasing the property while eliminating Leibsohn from the transaction.

Unlike a legitimate lender, SeaTac never had a more than nominal interest in K & S's debt and, due to the contingent nature of the transaction, was never positioned to actually foreclose on the property. Labeling the transaction as a deed in lieu of foreclosure, exempt from the Exclusive Sale Listing Agreement, was merely a sham to serve SeaTac's single purpose of acquiring the property at a discount.

b. The exclusion's second sentence does not apply.

SeaTac's attempt to characterize the transaction as covered by the second sentence of the transaction standing alone defies principles of contract construction. The goal of contract interpretation is to ascertain the parties' intent, and extrinsic evidence is admissible to do so when it does not contradict the agreement's plain language. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). The exception reads in full:

> No commission will be due in the event that the owners sign a deed in lieu of foreclosure. The potential transaction in which a third party may ask the owners to give up the property in exchange for removal of personal guarantees is specifically excluded as part of this sales/fee agreement.[24]

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[23] CP 1112.
[24] CP 1443.

Here, both parties to the Exclusive Sale Listing Agreement, K & S and Leibsohn, believed that the exception applied only to a single transaction that was a deed in lieu of foreclosure. Switzer, who drafted the exception, testified that "I intended the first and second sentences of this provision to refer to the same deed in lieu of foreclosure transaction."[25] Leibsohn testified that "I did not believe that the exception would apply unless the transaction that occurred was a true deed in lieu of foreclosure."[26] The fact that the "third party" in the second sentence refers to SeaTac does not mean that any transaction with SeaTac was covered.

Leibsohn demonstrated his understanding of the exception by disputing that the transaction could be a deed in lieu of foreclosure.[27] Upon receiving the Exclusive Sale Listing Agreement with the handwritten exception, he noted that Vander Veen's actions were an attempt to "intentionally circumvent the Seller and Sellers Broker and try to deal directly with the Lenders."[28] Thereafter, Leibsohn consistently took the position that a sale to a third-party purchaser did not qualify as a deed in lieu of foreclosure, and that Vander Veen's scheme was an

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[25] CP 1587, ¶ 4.
[26] CP 1394, ¶ 9.
[27] CP 1394-95, ¶ 12.
[28] CP 1454.

unjustified attempt to avoid paying taxes and his commission.[29] As he summarized in an email to Switzer just days before the transaction closed:

> It was clear at the CC [SeaTac City Council] meeting tonight ...that the City was indeed purchasing real estate. The entire council and staff was just giddy that they were buying real estate, not Notes, at such a discount....
>
> It is now clear that my assertions were correct all along and that the Buyer is purchasing the real property at Seatac Center. In fact, there is no mention of the City "purchasing the Notes or Loans" in the agenda whatsoever. I know this is not your focus right now, but I wanted to make sure to point these facts out to you so that you are aware that a Brokerage commission is due if this transaction is consummated.[30]

SeaTac's attempt to rely solely on the reference to personal guarantees in the exception's second sentence also makes the exception untenably broad, effectively swallowing the rule. Any sale of the property would have involved the owners giving up the property in exchange for a "removal of personal guarantees." This was a natural consequence of the property being encumbered by $14,120,000 in debt. For example, if SeaTac had paid K & S $24 million for the property, the transaction still would have involved K & S giving up the property in exchange for the removal of personal guaranties, as well as additional consideration. Similarly, in the transaction that actually occurred, K & S received substantial additional consideration to the removal of personal guaranties:

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[29] CP 1394-95, ¶ 12.
[30] CP 1466-67.

namely, payment of its utility bills, property taxes, and contractor's bills. Because every sale of the property would have involved the removal of personal guaranties, reading the second sentence alone would render meaningless the fundamental provision that K & S would pay Leibsohn a commission in the case of a sale. This court should not accept an interpretation that, in focusing on a single sentence, eviscerates the central provision of the Exclusive Sale Listing Agreement. *See, e.g., Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009) ("Courts should not adopt a contract interpretation that renders a term ineffective or meaningless.").

c. It does not matter whether the 2008 Exclusive Sale Listing Agreement expired.

Colliers and Vander Veen's only protestation to the wrongful interference element of tortious interference is that K & S did not breach the Exclusive Sale Listing Agreement because it expired before the transaction closed. This argument ignores that when the transaction closed, K & S still would have owed Leibsohn a commission under the tail provision of the 2008 Exclusive Sale Listing Agreement because SeaTac submitted an offer to purchase the property while that agreement was in effect, as demonstrated by the letter of intent that K & S signed agreeing

to the proposed transaction.[31] The fact that the offer was to "purchase the debt," rather than the property, does not matter when the substance of the proposed transaction was clearly a sale, as detailed in Leibsohn's Opening Brief. Leibsohn's expert testimony that the direct contact was wrongful at least creates a genuine issue of material fact on this point.[32]

4. Leibsohn suffered concrete damages.

The accusation that Leibsohn's damages are speculative because he could not produce a buyer misses the point. Leibsohn's marketing efforts did produce a buyer for K & S's property: SeaTac. SeaTac's City Council authorized it to spend $12,700,000 to acquire the property.[33] K & S's lenders were willing to accept reduced payoffs totaling less than this amount, and SeaTac actually acquired the property for only $12,270,000.[34] This left $430,000 that SeaTac was authorized to spend that could have gone toward Leibsohn's commission. Had SeaTac followed real estate industry protocol and let Leibsohn facilitate the transaction, Colliers and Vander Veen would have received a smaller commission, leaving additional funds to pay Leibsohn.

Ultimately, the only factor that prevented Leibsohn from closing the sale with SeaTac was the fact that SeaTac's agents directly approached

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[31] CP 1086-88
[32] *See* CP 1349-1352.
[33] CP 1067-68.
[34] CP 1055.

K & S and induced it to enter a sham deed in lieu of foreclosure transaction, while their crony and agent Thomas Hazelrigg III instructed Leibsohn to "KEEP YOUR BUTT OUT OF THIS DEAL NOW."[35] Respondents' interference prevented Leibsohn not only from his rightful spot at the negotiating table, but from closing the sale that actually happened. These damages are the opposite of speculative; they are proven by the transaction that actually took place.

5. Leibsohn's CPA and unjust enrichment claims also should have survived summary judgment.

Dismissal of Leibsohn's Washington Consumer Protection Act (CPA) and unjust enrichment claims against Colliers and Vander Veen followed from the same legal error that disposed of his tortious interference claim: that the transaction was a deed in lieu of foreclosure, and thus, permissible under the Exclusive Sale Listing Agreement's exception. Once the transaction is properly characterized as a sale, the elements of the CPA and unjust enrichment claims become apparent.

To prove its CPA claim, Leibsohn must establish: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Here, Colliers and Vander Veen violated

[35] CP 1453.

real estate industry rules by contacting Leibsohn's exclusive client with an offer to purchase its property disguised as an offer to purchase the debt on the property. Purposefully excluding Leibsohn, they then closed a transaction structured to justify the evasion of his exclusive listing agreement and real estate excise tax. The public interest is impacted because the same structure could be used in any sale of encumbered property to evade the same obligations, as detailed in Leibsohn's Opening Brief at 29-31. Leibsohn was harmed by the loss of the commission he would have earned upon sale of the property to SeaTac but for Colliers' and Vander Veen's unfair and deceptive acts. A CPA claim lies.

To establish unjust enrichment, Leibsohn must prove that he conferred a benefit upon Colliers and Vander Veen, and that they knew of this benefit and accepted it under circumstances that would make it inequitable for them to retain it. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). Here, Colliers and Vander Veen actively solicited Leibsohn's marketing materials and expertise to gather information about the property.[36] They then used those materials to accomplish the sale to SeaTac and took a $275,000 commission while systematically excluding

[36] CP 1334; 1404-12; 1418-20; 1422-23; 1429; 1447-50.

Leibsohn from any profit.[37] Fairness and justice require Colliers and Vander Veen to disgorge their commission.

The fact that Leibsohn performed his work pursuant to a contract with K & S does not preclude his unjust enrichment claim. The case that Colliers and Vander Veen cite in support of their argument reasoned that:

> If a plaintiff has in fact received the equivalent which he expected in exchange for an act done by him, the fact that incidentally some one else has also derived a benefit should not give him a cause of action. In such a case it cannot properly be said that there is an unjust enrichment on the part of the defendant at his expense, since he has received an equivalent which he regarded as ample when he did the act.

Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591, 605-06, 137 P.2d 97 (1943) (quoting Keener on Quasi Contracts, p. 361). In this case, Leibsohn did not receive the payment he earned under his contract with K & S. As such, recovery under an unjust enrichment theory against Colliers and Vander Veen would not be duplicative, but rather, an appropriate application of that doctrine's underlying equitable principles.

II. RESPONSE TO CROSS-APPEAL RE: ARBITRAL AWARD

From start to finish, the actions of Colliers, Vander Veen, and the CBA regarding arbitration were just another attempt to make it tougher for Leibsohn to sue. Chris Osborn—the attorney simultaneously representing Colliers, Vander Veen, SeaTac, and the CBA—told Leibsohn that his

[37] CP 1334.

complaint was not arbitrable, confirming what the CBA had told Leibsohn two days earlier.[38] Based on these representations, Leibsohn did not file an arbitration claim and instead brought his claim in superior court. Osborn then changed his position entirely and convinced the court to compel arbitration by representing that Leibsohn's claim was arbitrable.[39]

In a "Pre-Arbitration Hearing Decision," the CBA concluded Leibsohn's claim was untimely—even though the only reason he had not filed it within the three-month window was the CBA's own representations that the claim not arbitrable.[40] The trial court correctly concluded that this "summary dismissal without reaching the merits by way of the 'pre-arbitration hearing' did not constitute an arbitration as expected by Plaintiffs and argued by Defendants," and that Colliers and Vander Veen were therefore estopped from opposing the resumption of Leibsohn's superior court case.[41] Substantial evidence supports the trial court's finding that Colliers and Vander Veen misrepresented that the claim was arbitrable, justifying the court's vacation of the Pre-Arbitration Hearing Decision and sanctions. This court should affirm the trial court's rejection of Respondents' misleading efforts to quash Leibsohn's claim via a meaningless CBA arbitration.

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[38] CP 61, 66-67.
[39] CP 7-13, 81-82.
[40] CP 343-46.
[41] CP 354-55.

A. Issues

1. Knowing Leibsohn had not filed a CBA arbitration claim due to the CBA's representations that his claim was not arbitrable, Respondents told the court that Leibsohn's claim was now arbitrable under CBA Rules, then successfully moved to dismiss his claim as time-barred in the arbitration. Does substantial evidence support the trial court's findings that Respondents made misrepresentations regarding arbitrability and that "the CBA's subsequent summary dismissal without reaching the merits by way of a 'prearbitration hearing' did not constitute an arbitration as expected by Plaintiffs and argued by Defendants"?

2. Did the trial court properly exercise its discretion when it estopped Respondents from objecting to Leibsohn's Motion to Lift Stay and Re-issue Case Schedule due to their misrepresentations?

3. Did the trial court properly exercise its discretion in amending its Order Granting Motion to Lift Stay and Re-issue Case Schedule under CR 60(a) to explicitly vacate the Pre-Hearing Arbitration Decision when the original order was made within the 90-day window for vacating arbitral awards and evidenced the trial court's intent to invalidate the Pre-Arbitration Hearing Decision based on Respondents' misrepresentations?

4. Did the trial court properly sanction Respondents and award Leibsohn the attorney fees incurred due to the meaningless arbitration and related proceedings?

B. Facts

1. Osborn tells Leibsohn his claim is not arbitrable while simultaneously representing Respondents in crafting the transaction.

In October 2009, soon after learning that Colliers and Vander Veen were trying to circumvent his Exclusive Sale Listing Agreement, Leibsohn filed a complaint with the CBA alleging that Vander Veen was tortiously interfering with his listing agreement.[42] At the time, Vander Veen was Treasurer of the CBA and on its Board of Directors.[43]

Mary Lyell-Larsen, a CBA Vice President, responded to Leibsohn in no uncertain terms that: "CBA staff...has concluded that your complaint against Mr. Vander Veen cannot be arbitrated by CBA... the CBA has concluded that it has no authority and will take no action."[44] Ms. Lyell-Larsen set forth two reasons for the CBA's decision.[45] First, Leibsohn's Exclusive Sale Listing Agreement with K & S struck the language pertaining to the CBA and stated that Leibsohn was not required

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[42] CP 51, ¶ 13.
[43] CP 65.
[44] CP 61.
[45] *Id.*

to comply with CBA regulations.[46] Second, the CBA concluded it could not do anything about Vander Veen's contact with the lenders, as distinguished from the property owner.[47] Nothing in Ms. Lyell-Larsen's email indicated that the CBA's objections were based on the timing of Leibsohn's claim or that it would later become arbitrable.[48] Ms. Lyell-Larsen instructed Leibsohn that he should conduct all future communication through the CBA's attorney, Chris Osborn.[49]

Two days later, Osborn wrote to Leibsohn confirming that his claim was not arbitrable:

> The multitude of questions you have asked about CBA's administration regarding its arbitration processes and Rules are irrelevant because your complaint pertained to a Rule violation and not a matter which is arbitrable between members. As you no doubt noted, ***CBA's arbitration process is available only for commission disputes between members***, and then only after a closing has occurred; ***neither circumstance exists here***. Accordingly, CBA respectfully declines to answer questions that have nothing to do with your rejected complaint....
>
> ***CBA has no authority whatsoever to interject itself into your dispute with Colliers and Mr. Vander Veen.***[50]

Osborn's reference to "commission disputes between members" refers to a CBA bylaw defining the scope of a member's duty to arbitrate as limited

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[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] CP 66-67 (emphasis added).

to "all controversies involving commissions."[51] Thus, Osborn's statement that Leibsohn's situation did not involve a "commission dispute" implied that no duty to arbitrate existed under CBA bylaws. Like Lyell-Larson, Osborn said nothing to indicate that Leibsohn's arbitration complaint was simply unripe or that he would eventually have an arbitrable claim.

While Osborn was rejecting Leibsohn's complaint on behalf of the CBA, he was also representing Colliers, Vander Veen and SeaTac by drafting the documents for the purported deed in lieu of foreclosure.[52] The representation was simultaneous; Osborn rejected Leibsohn's complaint on behalf of the CBA on October 23, 2009, while on October 20, 21, 27, and 30, 2009, he accepted meeting invitations with titles such as "K&S Final Doc Review."[53] When Leibsohn questioned Osborn's involvement, however, Osborn responded: "You have asked for information with regard to my relationship to CBA, Colliers, and Mr. Vander Veen. The relationship between Foster Pepper, myself and my clients is, to be blunt, none of your business."[54]

Given the direct representations from the CBA and its attorney that Leibsohn's claim was not arbitrable, and his suspicions that Osborn was

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[51] CP 24; *see also* CP 11-12 (Colliers' and Vander Veen's motion to compel arbitration, filed by Osborn, referencing this same language).
[52] CP 110, ¶ 17; CP 158- 187.
[53] CP 158, 159, 168, 169.
[54] CP 67.

also working with Colliers and Vander Veen, Leibsohn concluded his only recourse was a lawsuit in superior court.[55] In August 2010, well within the statute of limitations, Leibsohn filed a complaint against Colliers and Vander Veen for tortious interference in superior court.[56]

2. Represented by Osborn, Colliers and Vander Veen move to compel arbitration based on an argument contrary to the earlier position advanced by Osborn and the CBA.

Soon after Leibsohn filed his complaint, Osborn appeared and filed a motion on Colliers and Vander Veen's behalf to compel arbitration before the CBA.[57] Directly contradicting his earlier representation that Leibsohn's complaint was not arbitrable because it did not involve a commission dispute, Osborn devoted extensive legal argument to the position that Leibsohn's complaint did, in fact, involve a commission.[58]

Leibsohn opposed the motion to compel arbitration, arguing that Colliers and Vander Veen should be estopped from moving to compel arbitration given that their counsel and the CBA told Leibsohn a year earlier that the dispute was not arbitrable.[59] In reply, Colliers and Vander Veen reassured the court that the CBA would hear Leibsohn's case:

> If [Leibsohn's] claim is not arbitrable, Defendants concede it is cognizable before this Court...If [Leibsohn] demands

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[55] CP 97-98, ¶ 7.
[56] CP 1.
[57] CP 7-13.
[58] CP 9-12.
[59] CP 47-48.

> arbitration in accordance with the CBA Arbitration Rules and CBA concludes that the matter is not arbitrable, Defendants will not object to a lift of the stay so that the matter can proceed in this Court.[60]

The trial court granted the motion to compel arbitration, cautioning in its order: "Given the prior e-mail exchanges and representations by CBA, if CBA concludes that the matter is not arbitrable, the Ct. may consider imposing terms against Defendants."[61]

3. After the CBA dismisses Leibsohn's claim as time-barred, the trial court sanctions Respondents.

For several months, the CBA rejected Leibsohn's attempts to proceed with the arbitration, objecting on technical bases such as whether his complaint was adequately detailed.[62] When the CBA finally accepted Leibsohn's complaint, Colliers and Vander Veen moved to dismiss the claim as time-barred under the CBA's three-month statute of limitations.[63] The CBA, which had no procedures for dealing with motions to dismiss, convened an executive session and determined that Colliers' and Vander Veen's motion would be heard in a pre-arbitration hearing.[64] The subsequently appointed panel issued a "Pre-Arbitration Hearing Decision" dismissing Leibsohn's complaint and determining that the case was not

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[60] CP 68.
[61] CP 81-82.
[62] *See* CP 87-89.
[63] CP 310-16.
[64] CP 324.

arbitrable because it had not been filed with the CBA by March 31, 2010—three months after the transaction closed, and several months before Leibsohn had even filed his superior court claim.[65]

Following the CBA's decision, Leibsohn moved to lift the stay, re-issue a case schedule, and sanction Respondents as suggested in the court's order compelling arbitration.[66] Colliers and Vander Veen cross-moved to confirm the Pre-Arbitration Hearing Decision under RCW 7.04A.230, [67] contravening their earlier representation that "If [Leibsohn] demands arbitration in accordance with the CBA Arbitration Rules and CBA concludes that the matter is not arbitrable, Defendants will not object to a lift of the stay so that the matter can proceed in this Court."[68] Respondents' motion, titled "Defendants' Response to Plaintiff's Motion to Lift Stay and Defendants' Motion to Confirm Arbitral Award," began by stating that, "Defendants hereby oppose plaintiff's Motion to Lift Stay and further move the court to confirm the arbitration award."[69] "'Plaintiff's 'motion to lift stay' is in substance a motion to vacate the arbitration award and should be treated as such," it argued.[70]

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[65] CP 343-46.
[66] CP 240-49.
[67] CP 301-307.
[68] CP 68.
[69] CP 301.
[70] CP 305.

The court granted Leibsohn's motion, lifted the stay of proceedings, and issued a new case schedule.[71] The court's order set forth the basis for its decision:

> [T]he CBA made multiple explicit representations to Leibsohn that his complaint was not arbitrable and, in reliance on such representations, Leibsohn did not pursue arbitration with the CBA within the three month window. Following Leibsohn's complaint filed with this court, the Defendants, on two separate occasions, explicitly represented to this court that the matter was arbitrable, and assured the court that if the matter was not arbitrable, then the Defendants would not object to a motion to lift the stay and re-issue a case schedule. The court finds that in this case and under these facts, ***the CBA's subsequent summary dismissal without reaching the merits by way of the "pre-arbitration hearing" did not constitute an arbitration as expected by Plaintiffs and argued by Defendants*** and therefore, Defendants are estopped from objecting to Plaintiff's Motion to Lift the Stay and Re-Issue Case Schedule.[72]

For Respondents' misrepresentations regarding arbitrability, the court imposed sanctions in the amount of $500 (the filing fee Leibsohn had paid for the arbitration), plus his attorney fees for all proceedings beginning with the motion to compel arbitration.[73]

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[71] CP 353-355.
[72] CP 354-55 (emphasis added).
[73] CP 355.

4. Respondents move to confirm the Pre-Arbitration Hearing Decision, and the court modifies its order to explicitly vacate the decision.

Leibsohn's case proceeded in superior court with significant efforts by both parties. Leibsohn amended his complaint; Respondents answered; both sides disclosed their primary witnesses; and the parties engaged in extensive discovery. Colliers and Vander Veen noted and took Leibsohn's deposition and the depositions of three Department of Revenue employees. Leibsohn moved for partial summary judgment, and Respondents cross-moved for summary judgment dismissal of Leibsohn's claims. Then, less than two weeks before the summary judgment hearing, Colliers and Vander Veen filed a Motion to Confirm Arbitration Award.[74]

The trial court denied the motion and revised its earlier order to clarify that the Pre-Arbitration Hearing Decision was vacated.[75] The court pointed out that while Leibsohn had not explicitly requested vacation of the award, Colliers and Vander Veen had moved to confirm the award and argued that Leibsohn's motion should be treated as a motion to vacate.[76] "Without question, the issue of whether to confirm or vacate the arbitration order was before the court," the court concluded.[77] It therefore amended its earlier order to explicitly vacate the decision pursuant to

[74] CP 1472-76.
[75] CP 1658-59.
[76] CP 1659.
[77] CP 1659.

RCW 7.04A.230(1)(a) (which allows vacation of an arbitral award procured by corruption, fraud, or other undue means) and CR 60(b)(11).[78]

C. Argument

1. Standard of review

A trial court's decision to apply equitable doctrines such as judicial or equitable estoppel is reviewed for abuse of discretion. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007); *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). Similarly, a trial court's decision to amend an earlier order under CR 60(a) is reviewed under an abuse of discretion standard. *Green v. Cmty. Club*, 137 Wn. App. 665, 700, 151 P.3d 1038 (2007).

A trial court's findings of fact must be affirmed if supported by substantial evidence, that is, "when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154 (1997). An appellate court reviews de novo a trial court's decision to confirm or vacate an arbitration award. *See Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1311 (9th Cir. 2004).

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[78] *Id.*

2. Substantial evidence supports the trial court's finding that Respondents made misrepresentations.

Substantial evidence supports the trial court's finding that Respondents misrepresented that Leibsohn's claim was arbitrable and that the dismissal of Leibsohn's claim as time-barred "did not constitute an arbitration as expected by Plaintiffs and argued by Defendants."[79]

The CBA represented in two emails that Leibsohn's claim was not arbitrable for immutable reasons, not that it was merely not ripe because a closing had not yet occurred.[80] Under CBA Rules, a dispute must involve a commission to be arbitrable in the first instance, regardless of when the arbitration claim is filed.[81] In rejecting Leibsohn's arbitration claim, Osborn took the position that Leibsohn's case did not meet this threshold requirement: "***CBA's arbitration process is available only for commission disputes between members***, and then only after a closing has occurred; ***neither circumstance exists here***."[82] Osborn's email came just two days after another CBA email giving Leibsohn more substantive reasons that his claim was not arbitrable and never would be: (1) he had struck language in the Exclusive Sale Listing Agreement relating to the CBA, and (2) the violations Leibsohn complained of involved contact with

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[79] CP 354-55.
[80] CP 61, 66-67.
[81] *See* CP 11-12 (citing CBA Bylaws X.A).
[82] CP 66.

the lenders, not the property owner.[83] Respondents' suggestion that Leibsohn should have concluded from these emails that his CBA arbitration claim was simply unripe is utterly implausible.

In this context, substantial evidence supported the trial court's finding that the Pre-Arbitration Hearing Decision dismissing Leibsohn's claim as time-barred "did not constitute an arbitration as expected by Plaintiffs and argued by Defendants," and that Respondents' statements that Leibsohn's complaint was arbitrable were thus misrepresentations made in bad faith. The only reason Leibsohn did not file a CBA arbitration claim within three months of the transaction closing was the CBA's repeated assertions that his claim was not arbitrable.[84] Dismissing Leibsohn's claim based on the CBA's statute of limitations had the exact same result as if the CBA had continued to maintain that Leibsohn's claim was never arbitrable for jurisdictional reasons. The same fairness and estoppel arguments applied in both cases.

Leibsohn had no chance of his dispute being arbitrable under the CBA rules; even at the moment the Court granted Respondents' motion to compel, his claim was time-barred and would never be heard on the merits by the CBA. The court justifiably found that Respondents made misrepresentations to conceal this reality from the court.

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[83] CP 61.
[84] CP 97-98, ¶ 7.

3. The trial court properly exercised its discretion by estopping Respondents from confirming the Pre-Arbitration Decision.

The doctrines of judicial and equitable estoppel justify the trial court's denial of Respondents' motion to confirm the arbitral award.

Judicial estoppel precludes a party from asserting one position to the court and later seeking an advantage by taking an inconsistent position. *Arkison*, 160 Wn.2d at 538. The purpose of judicial estoppel is to preserve respect for judicial proceedings and avoid waste of time, inconsistency, and duplicity. *Id.* The three core factors are whether (1) a party's later position is clearly inconsistent with its earlier position, (2) judicial acceptance of an inconsistent position would create the perception that the court was misled, and (3) the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 538-39.

Here, the trial court did not abuse its discretion by determining that Respondents were judicially estopped from objecting to reopening Leibsohn's case based on their earlier misrepresentations about arbitrability. The court's order specifically referenced two instances where defendants represented to the court that Leibsohn's claim would be arbitrable.[85] As explained above, the court reasonably interpreted

[85] CP 54-55.

"arbitrable" to mean the claim would be heard on the merits, not time-barred, given that Leibsohn missed the CBA's three-month deadline as a direct result of the CBA's assertion that it had no authority over his claim.

The trial court explicitly relied on Respondents' assertion that the claim would be arbitrable, as its order compelling arbitration stated, "[g]iven the prior e-mail exchanges and representations by CBA, if CBA concludes that the matter is not arbitrable, the Ct. may consider imposing terms against Defendants."[86] This clear import of the order was not only jurisdictional, but also substantive: the case needed to be heard on its merits. If the court subsequently allowed Respondents to take the position that Leibsohn's claim was not arbitrable, but in fact had been time barred for months, the court would appear to have been (and actually would have been) misled. The potential harm to Leibsohn is clear: without estoppel, Respondents' misrepresentations would have precluded any decision-maker from evaluating his claim on the merits. The court was well within its discretion to prevent Respondents from taking advantage of Leibsohn via their misrepresentations to the court.

A closely related doctrine, "equitable estoppel is based on the notion that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to

[86] CP 81-82.

another party who has justifiably and in good faith relied thereon." *Brevick v. City of Seattle*, 139 Wn. App. 373, 379, 160 P.3d 648 (2007) (quoting *Lybbert v. Grant County,* 141 Wn.2d 29, 35, 1 P.3d 1124 (2000)). The elements of equitable estoppel are: "(1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission." *Peterson v. Groves*, 111 Wn. App. 306, 44 P.3d 894 (2002).

Courts have applied equitable estoppel to prevent a party from asserting the statute of limitations. For example, in *Brevick*, the court applied equitable estoppel to prevent the defendant from asserting the statute of limitations where it conceded in an earlier case that the plaintiff's filing was timely. 139 Wn. App. at 378-80. The court further held that the defendant had waived the statute of limitations defense by litigating for 18 months without raising it. *Id.* at 381. Similarly, in *Dyson v. King County*, 61 Wn. App. 243, 809 P.2d 769 (1991), the defendant claimed that plaintiff had not timely filed the required written complaint with the city before filing his lawsuit only after the statute of limitations ran on the plaintiff's claim and both parties had litigated the case. *Id.* at 244. The court held that the defendant was estopped from raising the

defense based on the misleading choice to litigate and delay raising it until the deadline for filing had passed. *Id.* at 245-46. *See also Peterson v. Groves*, 111 Wn. App. 306, 44 P.3d 894 (2002) ("Estoppel is appropriate to prohibit a defendant from raising a statute of limitations defense when a defendant has fraudulently or inequitably invited a plaintiff to delay commencing suit until the applicable statute of limitations has expired.")

Here, the trial court had discretion to equitably estop Respondents from confirming the arbitral award or opposing the resumption of Leibsohn's superior court case. Respondents' position directly contradicted the CBA's earlier statements that it did not have jurisdiction, and substantial evidence supported attributing those statements to Respondents. Regarding Osborn's statement, the statements of a counsel are binding on a party. *See Haller v. Wallis*, 89 Wn.2d 539, 547-48, 573 P.2d 1302 (1978). Osborn was in the midst of drafting the documents for Colliers, Vander Veen, and SeaTac's transaction when he rejected Leibsohn's claim that the same transaction was interfering with Leibsohn's rights under the CBA rules.[87] At the same time, Vander Veen was the CBA Treasurer and on its Board of Directors.[88] Given these ties, substantial evidence supported the conclusion that any distinction between Respondents and the CBA was illusory, and the statements of one were

[87] CP 66-67, 158, 159, 168, 169.
[88] CP 65.

equivalent to statements of the other. Accordingly, the trial court had the right to equitably estop Respondents from contradicting the explicit representations to Leibsohn that his case was not arbitrable.

Equitable estoppel is particularly appropriate given that Respondents (1) delayed raising the statute of limitations until after the court had compelled arbitration, and (2) did not file their second motion to confirm the arbitral award until they had engaged in substantial litigation, including taking multiple depositions and moving for summary judgment. Cases like *Brevick* and *Dyson* show that the court will reject an attempt to game the system by delaying raising a statute of limitations defense until the deadline has passed. Colliers and Vander Veen engaged in just this type of procedural gamesmanship when they moved to compel arbitration, never mentioning that they believed the statute of limitations had run months earlier.

Furthermore, after the court reclaimed jurisdiction, Respondents' actions of aggressively litigating the superior court case misled Leibsohn and the court into believing they understood the Pre-Arbitration Hearing Decision was rejected, as did their earlier explicit statement that "If [Leibsohn] demands arbitration in accordance with the CBA Arbitration Rules and CBA concludes that the matter is not arbitrable, Defendants will not object to a lift of the stay so that the matter can proceed in this

Court."[89] Like the trial court, this Court should estop them from benefitting from their late insistence that the statute of limitations applied and that the Pre-Arbitration Hearing Decision should be confirmed.

4. The trial court properly amended its order to vacate the award.

Civil Rule 60(a) provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative." The trial court may correct an error under CR 60(a) if the correction is "clerical," that is, in accordance with the trial court's original intent. *In re Marriage of Getz*, 57 Wn. App. 602, 604, 789 P.2d 331 (1990). "Judicial errors"—those errors resulting from the court's intentional acts—may not be corrected via CR 60(a). *Id.* The key to determining whether an error is clerical or judicial is the court's intent:

> I]f the trial judge signs a decree...which does not represent the court's intentions in the premises, an error contained therein may be corrected under Rule 60. The testimony of the trial judge signing the judgment or decree will be received in this connection.
>
> A comparison of the clear evidence adduced on the trial and the findings of fact with the provisions of the judgment or decree entered may reveal that the error was clerical. But where there is no evidence of clerical error, and where the "correction" is contrary to the court's findings and contrary to . . . other clear evidence, Rule 60(a) may not be applied to correct the error.

[89] CP 68.

Id. (citing 4 L. Orland, Wash. Prac., Rules Practice § 5712, at 540 (3d ed. 1983)).

In *Marriage of Getz,* the trial court entered a dissolution decree for a couple whose principal assets consisted of two separate pension plans. 57 Wn. App. at 63. The court's decree expressly divided one of the plans equally between the spouses, but did not mention the other. *Id.* After the wife tried to receive half the benefits from the omitted plan and was denied, she requested that the court modify the order under CR 60(a) to include the omitted plan. *Id.* The trial court did so, and the Court of Appeals affirmed. *Id* at 604. The Court of Appeals gave great weight to the testimony of the trial judge, who heard both the dissolution action and the CR 60(a) motion, and testified that he intended for the original order to split both pension plans equally. *Id* at 604-05.

Here, the record clearly indicates that the trial court intended to invalidate the Pre-Arbitration Hearing Decision and reclaim jurisdiction over the case when it lifted the stay and reissued the case schedule. A case schedule, which includes a trial date and discovery cutoff, would have been entirely unnecessary if the court intended to end the case via a later confirmation of the arbitration award. As the court later noted, "the issuance of a case schedule for trial in this court would have been totally

inconsistent with leaving an arbitration order in place."[90] Moreover, if the court intended to confirm the award at a later date, it would not have granted Leibsohn's motion without reservation and entirely disregarded Respondents' cross-motion to confirm the award. At oral argument on summary judgment, the court characterized the error as its own, noting "There is no question that this Court had decided, after reading those pleadings, that this was a matter that the court was going to hear."[91] The court's order amending its order to vacate the award confirms that the amendment's purpose is to "reflect the court's intent and decision."[92]

Respondents' opposition to Leibsohn's motion to lift the stay and reissue a case schedule argued, "'Plaintiff's 'motion to lift stay' is in substance a motion to vacate the arbitration award and should be treated as such."[93] Respondents cannot now complain when the court accepted its suggestion and treated Leibsohn's motion as a motion to vacate.

The court's clarification of its order under CR 60(a) is distinguishable from collateral attacks on the substance of an arbitration award under CR 60(b) that this court has rejected. For example, Respondents cite *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 741, 862 P.2d 602 (1993) for the proposition that CR 60 cannot be used as

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[90] CP 1659.
[91] Verbatim Report of Proceedings (VRP) at 8.
[92] CP 1659.
[93] CP 305.

an alternate route to attack an arbitration award outside the 90-day statutory limit. In *ML Park Place*, the trial court confirmed an arbitral award after hearing cross-motions to vacate and confirm. *Id.* at 731. The appellant then moved under CR 60(b) to vacate the trial court's judgment confirming the award for substantive reasons regarding the award. *Id.* at 732. The trial court denied the appellant a second bite at the apple, and the Court of Appeals affirmed. *Id.* at 729. In contrast, CR 60 was not a vehicle for Leibsohn to renew objections regarding the substance of the award. Rather, the court simply amended an existing order, made within the 90-day limitations period, to clarify its consistent intention.

Having determined the trial court properly amended its order, the question is whether vacation of the arbitral award was warranted in the first instance. The court based its decision to vacate the award on RCW 7.04A.230(1)(a),[94] which provides that an arbitral award shall be vacated if "procured by corruption, fraud, or other undue means." Undue means began when Osborn, operating under a conflict of interest, rejected Leibsohn's CBA arbitration claim about the impropriety of a transaction that Osborn was currently drafting. As discussed above, substantial evidence supports the trial court's finding that Respondents made misrepresentations in compelling arbitration. Absent these irregularities,

[94] CP 1659.

Leibsohn's claim never would have been dismissed in a Pre-Arbitration Hearing Decision: either Leibsohn would have filed a timely arbitration claim with the CBA in the first place, or the court would not have compelled arbitration. Vacation under RCW 7.04A.230(1)(a) is proper.

5. The trial court had grounds to disregard an arbitration compelled based on misrepresentations.

In the alternative, this court could affirm the trial court's decision because CR 60(b) provides a basis for disregarding the arbitral award when arbitration is compelled based on misrepresentations. *See Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) ("an appellate court may sustain a trial court on any correct ground").

Leibsohn's Motion to Lift Stay and Re-Issue Case Schedule asked the Court to vacate its order compelling arbitration under CR 60(b), which allows a court to revisit its prior orders and relieve parties from the obligations of those orders when required by equity. *See People's State Bank v. Hickey*, 55 Wn. App. 367, 370, 777 P.2d 1056 (1989). A court has broader authority to vacate an order compelling arbitration under CR 60 than it does to vacate the arbitral award itself:

> Although we review arbitration awards to determine only whether any statutory grounds for vacation exist under RCW 7.04A.230, reviewing the superior court's 2008 decision on [appellant's] motion to compel arbitration does not require us to review the arbitration award itself. Because we are not reviewing the arbitration award itself,

> we are not confined to the enumerated statutory grounds in RCW 7.04A.230. Instead, the ruling on the motion to compel is a decision separate from the arbitration award.

Saleemi v. Doctor's Associates, Inc., 166 Wn. App. 81, 92, 269 P.3d 350 (2012), *affirmed*, 176 Wn.2d 368 (2013).

The effect of granting a CR 60(b) motion is that the problematic order becomes a nullity and the parties are left as if the order had never been entered. *Anacortes v. Demopolis*, 81 Wn.2d 166, 170, 500 P.2d 546 (1972); *In re Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1013 (1989). Doing so results in a domino effect, invalidating subsequent orders. For example, in *Gustafson v. Gustafson*, 54 Wn. App. 66, 772 P.2d 1031 (1989), after the court granted summary judgment in the defendant's favor, the defendant stipulated to dismissal of its cross-claim. The summary judgment decision was reversed on appeal. The trial court granted the defendant's CR 60(b) motion to vacate the stipulated dismissal of the cross-claim and the Court of Appeals affirmed, holding that the equitable principles underlying CR 60(b) required vacation of the stipulated dismissal where the underlying summary judgment decision upon which it was based was reversed.

Here, Respondents' misrepresentations that Leibsohn's claim was arbitrable by the CBA were an irregularity that justified vacating the court's order compelling arbitration under CR 60(b). As such, any sequella to the order compelling arbitration—including any award confirming the

Pre-Arbitration Hearing Decision—would also be invalid. To leave the parties as though no order compelling arbitration was ever entered, the court had the authority to vacate the order compelling arbitration and disregard the Pre-Arbitration Hearing Decision that resulted therefrom.

6. The trial court properly exercised its discretion in sanctioning Respondents for their misrepresentations and awarding Leibsohn his attorney fees.

Colliers and Vander Veen concede that misconduct and bad faith, including misrepresentations, are equitable grounds that support sanctions and an award of attorney fees. *See* Opening Brief of Colliers and Vander Veen at 33-35. Their only objection to the trial court's award is a series of unconvincing challenges to its finding that they made misrepresentations.

As briefed above, Respondents made direct misrepresentations to the court when they said that Leibsohn's claim was arbitrable. Specifically, Respondents' representations that Leibsohn's claim was "arbitrable" were inaccurate and misleading given that Leibsohn only missed the 90-day window to file an arbitration claim because of the CBA's statements that Leibsohn's claim was not arbitrable for permanent reasons, not that it simply was unripe. Beyond these direct misrepresentations, substantial evidence supports attributing the CBA's statements to Colliers and Vander Veen given their close relationship. The court warned Respondents when it compelled arbitration that it would

consider sanctions if Leibsohn's claim was not arbitrable—and the court did not abuse its discretion when it acted on that promise.

III. RESPONSE TO CROSS-APPEAL RE: ATTORNEY FEES

To grant Respondents' request for attorney fees would do away with the "American Rule" on attorney fees and disregard precedential authority that litigants must have a right to enforce a contract before they can enforce its fee provision. Like the trial court, this court should reject this claim.

A. The trial court denies Respondents' requests for fees as lacking a contractual or statutory basis.

Following the court's grant of Respondents' summary judgment motions, they moved for an award of attorney fees and costs.[95] Their requests were based on the attorney fees provision in the Exclusive Sale Listing Agreement between Leibsohn and K & S. SeaTac claimed to be a third-party beneficiary of the Exclusive Sale Listing Agreement, and as such, entitled to enforce its fee provision.[96] Colliers and Vander Veen relied on a single Division III Court of Appeals case, *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 215 P.3d 990 (2009), to argue that the Exclusive Sale Listing Agreement was

[95] CP 1811-17, 1824-29.
[96] CP 1811-17.

central to the contract, and thus, that its fee provision was enforceable in a tortious interference case.[97]

The court denied Respondents' fee requests, reasoning that, "The court does not find that there is any contractual or statutory basis to award the fees since the Defendants were not parties to the listing agreement nor was the City a third-party beneficiary such that fees should be awarded." On appeal, Respondents have renewed the same arguments for fees.[98]

B. Respondents cannot enforce the Exclusive Sale Listing Agreement, so they cannot use it to claim fees.

Washington uniformly applies the "American Rule" under which each party will pay its own attorney fees and costs unless there is a contract, statute, or a recognized ground in equity that provides otherwise. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont*, Inc., 159 Wn.2d 292, 296-97, 149 P.3d 666 (2006). Attorney fees are generally not available to a party that prevails on a tort claim. *Pearson v. Schubach*, 52 Wn. App. 716, 724, 763 P.2d 834 (1988).

SeaTac tries to find a contractual basis for its attorney fees claim by arguing that it is a third-party beneficiary of the Exclusive Sale Listing Agreement. "A third party beneficiary contract exists when the contracting parties, 'at the time they enter into the contract, intend that the promisor

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[97] CP 1824-29.
[98] CP 1891-92.

will assume a direct obligation to the claimed beneficiary.'" *Kim v. Moffett*, 156 Wn. App. 689, 701, 234 P.3d 279 (2010) (quoting *Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 43, 114 P.3d 664 (2005)). To determine the intent of the contracting parties, courts apply an objective test, looking to the terms of the contract rather than the minds of the parties. *Id.* Performance of the contract must "necessarily and directly" benefit the third party; "incidental, indirect, or inconsequential" benefits are insufficient. *Id.* "The requisite intent is not a desire or purpose to confer a benefit upon the third person nor a desire to advance his interests but ***an intent that the promisor shall assume a direct obligation to him.***" *Id.* at 699 (emphasis added).

The mention of an unnamed "third party" in the Exclusive Sale Listing Agreement's exception is far from sufficient to make SeaTac a third party beneficiary. There is no evidence that the exception was intended to create a direct obligation to SeaTac. To the contrary, logic suggests that the benefit of that provision was aimed entirely at K & S; K & S wanted to get out from under its debt, and cutting out Leibsohn's commission would facilitate a potential transaction that would make this happen. The exclusion did not obligate K & S to sell the property to SeaTac or bestow any other direct benefit on SeaTac. Any advantage

SeaTac gained was entirely incidental and cannot meet the high standard for third party beneficiary status.

Colliers and Vander Veen attempt to depart from the American rule based on a single, distinguishable case. In *Deep Water*, the beneficiary of a covenant restricting building height sued a developer and the developer's sole shareholder to enforce the covenant. 152 Wn. App. 229. The court held that the developer breached the height restriction and that its sole shareholder tortiously interfered by "dishonestly...knowingly and deliberately ignoring the height restriction" within the covenant. *Id.* at 265-66. Accordingly, the court imposed attorney fees against the developer and sole shareholder. The Court of Appeals affirmed, reasoning the tortious interference claim could support the attorney fees award against the sole shareholder because the party seeking fees had a right to enforce the covenant and the sole shareholder's duty not to build above a certain height arose from the covenant. *Id.* at 279.

In contrast with *Deep Water*, Respondents seek fees even though, as non-parties and non-beneficiaries of the Exclusive Sale Listing Agreement, they have no right to enforce it. In the five cases that *Deep Water* cited in support of its attorney fee award, the party requesting fees was also a party to the agreement or had a right to enforce the agreement as a successor or third-party beneficiary. *Id.* at 278. Defendants have not

cited a single case where the court awarded attorney fees to a party based on a contract that party did not have the right to enforce.

Additionally, the non-party against whom the attorney fees provision was enforced in *Deep Water* was extremely close to the contract; the court observed there was "no difference, no separation of interests" between the developer (actually party to the covenant) and sole shareholder (who signed the covenant on the developer's behalf). *Id.* at 262. Here, Respondents have no such close relationship with Leibsohn or K & S. An award of attorney fees on the basis of a contract to which they are complete strangers would be unprecedented.

Finally, the Exclusive Sale Listing Agreement's attorney fee provision is narrow and does not apply by its own terms. It provides: "In the event ***either party*** employs an attorney ***to enforce any terms of this Agreement*** and is successful, the other party agrees to pay a reasonable fee."[99] "Either party" refers to the two parties to the contract, not strangers to the agreement. The language "enforce any terms of this Agreement" narrows the causes of action justifying a fee award to those claims specifically seeking to enforce a provision of the agreement against the other party. *Burns v. McClinton*, 135 Wn. App. 285, 309, 143 P.3d 630 (2008) (rejecting attorney fee award where provision allowed fees in an

[99] CP 639, § 7 (emphasis added).

action to "enforce" the agreement); *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009) (same). This language contrasts with the broad language used in *Deep Water,* where the provision entitled the prevailing party to recover attorney fees for "any controversy, claim, or dispute ***relating to*** this Agreement or the prior Agreement, or their breach." 152 Wn. App. at 277 (emphasis added). Leibsohn sued to enforce common law duties that Respondents owed him as fellow real estate professionals and their client, not duties that Respondents owed under the Exclusive Sale Listing Agreement. Under the agreement's plain language, these claims cannot support a fee award.

IV. CONCLUSION

Respondents admit that they directly contacted Leibsohn's exclusive client while the 2008 Exclusive Sale Listing Agreement was in effect, and that a genuine issue of material fact exists about whether that contact was wrongful. Their only escape from Leibsohn's tortious interference claim is the argument that the transaction was a "deed in lieu of foreclosure" covered by the exception in the 2009 agreement. But Respondents, who wrongfully solicited that exception, cannot benefit from its terms. Even if they could, it does not apply. The transaction was a transfer of property for consideration (a sale), not the transfer of property in substitution for a mortgage debt (a deed in lieu of foreclosure). Because

the trial court came to the incorrect conclusion on this core issue, it improperly dismissed Leibsohn's partial summary judgment motion and granted Respondents' motions.

From the moment it compelled arbitration, the trial court sent a clear message to Respondents that it would not play procedural games. Respondents did so anyway. The trial court correctly used its discretion to sanction Respondents accordingly and to clarify its clear intent to vacate the arbitral award. The trial court also properly denied Respondents' fee request on the basis that they, who were not parties to the Exclusive Sale Listing Agreement or third-party beneficiaries, could not enforce its attorney fee provision.

This court should reverse the dismissal of Leibsohn's partial summary judgment motion and the grant of Respondents' cross-motions, and affirm the court's vacation of the Pre-Arbitration Hearing Decision and denial of attorney fees.

DATED this 24th day of April, 2013.

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DECLARATION OF SERVICE

I declare under penalty of perjury that on the 24th day of April, 2013, I caused to be served the foregoing document on counsel for Respondents, as noted, at the following addresses:

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Diana Jones, Legal Assistant

Dated: April 24th, 2013
Place: Seattle, WA