No. 929700

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 73199-8-I
King County Superior Court Cause No. 15-2-04826-1 SEA

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF SEATTLE, INC., a California corporation, plaintiff,
Appellant,

v.

YATES, WOOD & MACDONALD, INC., a Washington corporation, defendant,
Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Marcus & Millichap Real Estate Investment Services of Seattle, Inc. ("Marcus & Millichap") was a member of the Commercial Brokers Association ("CBA") for over two decades. During that time, Marcus & Millichap took advantage of many benefits of CBA membership, including listing properties on CBA's multiple listing service and participating in two CBA arbitrations.

A commission dispute arose between Marcus & Millichap and Respondent Yates, Wood & MacDonald, Inc. ("Yates"). Yates brought an arbitration claim against Marcus & Millichap pursuant to the arbitration provision in the CBA Bylaws, which require CBA members to arbitrate "controversies involving commissions." Marcus & Millichap initially answered in arbitration, then filed a lawsuit in superior court, arguing it could evade its obligation to arbitrate because CBA did not retain a copy of the membership application submitted by Marcus & Millichap in 1993.

The trial court rejected Marcus & Millichap's argument and compelled arbitration, and the Court of Appeals correctly affirmed. No basis to review that decision under RAP 13.4(b) exists. The Court of Appeals' decision is consistent with this Court's decisions and with other Court of Appeals' decisions, and no substantial public interest would be served by this Court's review. The Court should deny the petition.

II. COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should this Court deny discretionary review under RAP 13.4(b)(1) where the Court of Appeals held that Marcus & Millichap is bound to the arbitration provision in CBA's Bylaws because it voluntarily joined CBA and enjoyed its benefits, which is fully consistent with this Court's holdings in *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 268 P.3d 917 (2012), and *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001)?

2. Should this Court deny discretionary review under RAP 13.4(b)(2) where the Court of Appeals properly held that Yates's commission dispute with Marcus & Millichap was within the scope of CBA's arbitration provision covering "controversies involving commissions" among members, consistent with *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 17 P.3d 1266 (2001), and *Todd v. Venwest Yachts, Inc.*, 127 Wn. App. 393, 111 P.3d 282 (2005)?

3. Should this Court deny discretionary review under RAP 13.4(b)(4) where the Court of Appeals' decision set a bright-line rule addressing a narrow issue: that membership in a voluntary organization, the bylaws of which contain an arbitration clause, is sufficient to bind a member to arbitrate?

4. Should this Court award Yates its costs under RAP 18.1(j)?

III. STATEMENT OF THE CASE

A. Marcus & Millichap takes advantage of the benefits of CBA membership for over two decades and participates in prior CBA arbitrations.

CBA is a member-owned trade association that provides commercial real estate multiple listing services to its members, along with many other services and benefits. (CP 66 at ¶ 2.) As a condition of membership, all members of CBA agree to submit disputes over commissions to CBA for binding arbitration before an arbitration panel of real estate broker peers. (CP 67 at ¶ 3.) CBA's arbitration provision, contained in CBA's Bylaws, states in relevant part:

> X. ARBITRATION
>
> A. Duty to Arbitrate. It is the duty of the members of this Association (and each so agrees) to submit all controversies involving commissions, between or among them to binding arbitration by the Association, rather then [sic] to bring a suit to law. The foregoing includes controversies which arose prior to one of the parties becoming a member.
>
> The term "commissions" as used above means commissions or fees arising from the real estate brokerage business as the same is now or in the future defined in RCW 18.85.010(1); together with interest and out-of-pocket costs or expenses related thereto. The terms shall include commissions or fees actually paid, as well as commissions or fees lost as a result of the acts of another member.

(CP 77-78.)

Marcus & Millichap became a CBA member in 1993. (CP 67 at ¶ 6.) During the more than two decades since, Marcus & Millichap and its participating agents have availed themselves of CBA's services and enjoyed the benefits of CBA membership.[1] (*Id.*) Marcus & Millichap has listed properties through CBA's multiple listing services and has paid CBA its required fees and dues. (*Id.*) At the time of the trial court's orders, Marcus & Millichap had eighteen of its agents in its Seattle office participating with CBA.[2] (CP 67-68 at ¶ 8; CP 105-08.)

Marcus & Millichap engaged in CBA arbitration proceedings twice before this dispute. (CP 69 at ¶ 13; CP 125-67.) In 2009, Marcus & Millichap participated in CBA arbitration as a respondent. (CP 69 at ¶ 13; CP 126, 162-67.) Then, in 2011, Marcus & Millichap commenced its own CBA arbitration against another CBA member. (CP 69 at ¶ 13; CP 125, 135-160.) In that 2011 arbitration proceeding, Marcus & Millichap

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[1] Marcus & Millichap is a brokerage member of CBA, having CBA Office Identification Number 974500. (*See* CP 71 (defining brokerage members and participating agents); CP 128-33 (examples of Broker Roster Updates concerning participating agents submitted by Marcus & Millichap, as the brokerage member or "Member Office").) Within a brokerage member's office, multiple agents or licensees may participate with CBA and obtain access to CBA's services under the brokerage member's office. (CP 71.)

[2] As a member of CBA, Marcus & Millichap is responsible to CBA and its members for Marcus & Millichap's actions, as well as the actions of its officers, branch managers, participating agents, associates, employees, subsidiaries and affiliates. (CP 67 at ¶ 7; CP 102.)

expressly referred to CBA's Bylaws and Arbitration Rules in its pleadings and argued that its arbitration should be allowed to proceed despite its failure to timely assert its claim in compliance with CBA's Arbitration Rules. (CP 135-38.) In neither proceeding did Marcus & Millichap contend that CBA lacked jurisdiction, nor did Marcus & Millichap suggest that it—a CBA member—was not subject to CBA's Bylaws, or CBA's Rules and Regulations. (CP 135-67.)

Marcus & Millichap's broker, Scott Morasch ("Morasch"), whose conduct is at the center of the underlying commission dispute here, was also directly involved in the dispute alleged in Marcus & Millichap's 2011 CBA Arbitration Complaint. (CP 135-60.) At all relevant times, Morasch was a participating agent with CBA under Marcus & Millichap's brokerage member office, thereby obtaining access to CBA's services and the benefits of CBA membership. (CP 67-68 at ¶ 8; CP 71, 106.) Marcus & Millichap and/or Morasch have paid Morasch's attendant CBA fees since Morasch became a participating agent on May 21, 2002. (CP 67-68 at ¶ 8.) Through the time of the trial court's orders, Marcus & Millichap and its participating agent Morasch continued to actively list properties with CBA. (CP 67-68 at ¶ 8; CP 110.) CBA rules prohibit non-members from listing properties on CBA's multiple listing services. (CP 67-68 at ¶ 8.)

B. The trial court grants Yates's motion to compel arbitration of its commission dispute with Marcus & Millichap.

On December 9, 2014, Yates, through its broker Natalia Beran, initiated CBA arbitration against Marcus & Millichap. (CP 68 at ¶ 9; CP 112-14.) Yates claimed that it was owed one-half of a commission on the sale of an apartment complex where Yates submitted an offer and procured the buyer. (CP 112-14, 116-21.) Marcus & Millichap answered Yates's Arbitration Complaint and, in its Answer, did not object to, or otherwise challenge CBA's authority or jurisdiction. (CP 116-21.)

Over a month later, however, Marcus & Millichap filed in King County Superior Court a complaint against Yates seeking declaratory relief and an injunction prohibiting Yates from proceeding with arbitration. (CP 1-5.) Marcus & Millichap then moved the Court to stay the arbitration. (CP 13-21.) Marcus & Millichap's primary argument was that no arbitration agreement existed because CBA did not retain a copy of Marcus & Millichap's CBA membership application from 1993. (CP 16-20.)

Yates responded to Marcus & Millichap's motion and moved to compel arbitration. (CP 51-59.) Yates submitted evidence that Marcus & Millichap had been a member of CBA since 1993, had taken advantage of CBA's services and benefits, and that the CBA Bylaws required arbitration of CBA members. (CP 66-121.) At the conclusion of the hearing on both

motions, the trial court granted Yates's motion to compel arbitration, denied Marcus & Millichap's motion to stay arbitration, and dismissed Marcus & Millichap's lawsuit. (CP 226-27, 230-31.)

C. The Court of Appeals affirms, holding that Marcus & Millichap's voluntary membership in CBA obligates it to comply with the arbitration provision in CBA's Bylaws.

Marcus & Millichap appealed. (CP 232-33.) After considering the parties' briefing and oral argument, the Court of Appeals issued a published opinion affirming the trial court. (Petition for Review, Appendix A-1 (hereinafter, "Slip Op.").)

The Court of Appeals held that "voluntary membership in a professional organization establishes assent to an arbitration agreement contained in that organization's bylaws" under *Keith Adams & Assoc., Inc. v. Edwards*, 3 Wn. App. 623, 477 P.2d 36 (1970). (Slip Op. at 8-10.) The Court of Appeals determined that the holding in *Keith Adams* retained its viability with Washington's enactment of the Uniform Arbitration Act ("UAA"). (*Id.* at 1-2.) The UAA provides that an arbitration agreement must be "contained in a record" and the Court of Appeals correctly noted that the CBA Bylaws were a "record" under the UAA. (Slip Op. at 13-14 (citing RCW 7.04A.060).) Moreover, the court concluded that "Marcus & Millichap's membership in the CBA is fully supported by the record," despite the assertion of counsel to the contrary. (Slip Op. at 10-11.) Marcus

& Millichap was therefore bound to arbitrate by virtue of its voluntary membership in CBA and the arbitration provision in CBA's Bylaws.

The court also held that the scope of the arbitration agreement in CBA's Bylaws encompassed the underlying dispute. (Slip Op. at 14.) The court noted that Washington's strong presumption in favor of arbitrability requires sending a dispute to arbitration unless "it may be said with positive assurance the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute" requiring arbitration of "controversies involving commissions." (Slip Op. at 14-15 (quoting *Peninsula Sch. Dist.*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996)) (emphasis in original).) The commission dispute here, the court concluded, was "squarely within the language of the bylaw arbitration provision." (Slip Op. at 15.) "It is inconsequential that the Property was never listed with the CBA ... because the plain language of the arbitration agreement is not so limited." (*Id.* at 15-16.)

The Court of Appeals awarded Yates its costs on appeal. (Slip Op. at 17 n.14.) Marcus & Millichap subsequently filed its Petition for Discretionary Review to this Court.

IV. ARGUMENT

None of the limited circumstances warranting this Court's review of a Court of Appeals' decision exist here. *See* RAP 13.4(b). Contrary to

Marcus & Millichap's argument, the Court of Appeals' decision is consistent with this Court's holdings in *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 268 P.3d 917 (2012), and *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001). *Townsend* and *Godfrey* announced general principles of arbitration that are fully in line with the Court of Appeals' decision.

The Court of Appeals' decision is also consistent with prior Court of Appeals' decisions regarding the scope of an arbitration clause, including *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 17 P.3d 1266 (2001), and *Todd v. Venwest Yachts, Inc.*, 127 Wn. App. 393, 111 P.3d 282 (2005). *Stein* set forth the general principle that arbitration clauses should be interpreted broadly, supporting the Court of Appeals' conclusion that the arbitration clause in CBA's bylaws readily encompassed the dispute at hand. *Stein*, 105 Wn. App. at 46. *Todd* is easily distinguishable because it involved a dispute regarding an employment relationship that was non-existent at the time the parties joined the association at issue and the parties necessarily could not have intended the association's arbitration provision to apply. *Todd*, 127 Wn. App. at 399. Here, in contrast, the dispute is precisely the type of dispute contemplated by the CBA Bylaws and that the parties intended to be covered.

Finally, no substantial public interest would be served by this Court's review. The case presents a relatively narrow issue and the Court of Appeals' decision set a bright-line, easy-to-apply rule in a published opinion. This Court should deny the Petition for Review.

A. Review is not warranted under RAP 13.4(b)(1) because the Court of Appeals' decision is consistent with the general principles of arbitration set forth by the Supreme Court in *Townsend* and *Godfrey*.

The Court should reject Marcus & Millichap's ill-disguised attempt to characterize its disagreement with the Court of Appeals' reasoning as a conflict with this Court's decisions in *Townsend*, 173 Wn.2d 451, and *Godfrey*, 142 Wn.2d 885. In nine pages of argument that the Petition for Review ostensibly dedicates to the conflict with Supreme Court caselaw, only the last two paragraphs actually discuss the *Townsend* and *Godfrey* decisions or to try explain the purported conflict with them. (*See* Petition for Review at 6-15.) The Court should not be misled by the mislabeling of Marcus & Millichap's argument as in conflict with this Court's holdings.

Even a cursory examination shows that the holdings of *Townsend* and *Godfrey* support—rather than conflict with—the Court of Appeals' decision. Marcus & Millichap argues that the Court of Appeals' decision conflicts with the principle articulated in *Townsend* that: "to be valid an agreement to arbitrate must generally be signed." (Petition for Review at

14.) But there are exceptions to the general rule, and *Townsend* went on to identify those exceptions and to apply one to the parties in that case. *Id.* at 461. Specifically, the Court in *Townsend* held that plaintiffs whose parents signed Purchase and Sale Agreements ("PSAs") containing arbitration clauses, but who did not sign the agreements themselves, were nonetheless bound to arbitrate when they later attempted to enforce the terms of the PSAs. *Id.* at 461-62. Because the plaintiffs knowingly exploited the PSAs, they could not later avoid the arbitration clause within them. *Id.* at 462. Consistent with *Townsend's* holding, the Court of Appeals held in this case that Marcus & Millichap could not knowingly exploit the benefits of CBA membership for over two decades, then avoid the arbitration clause contained in CBA's Bylaws.

The Court of Appeals' decision also does not conflict with the footnote in *Godfrey* observing that parties may not "fundamentally alter" the provisions of the UAA by agreement—the second basis for the alleged conflict. *See* Petition for Review at 15 (quoting *Godfrey*, 142 Wn.2d at 897 n.8). The footnote in *Godfrey* supported the holding that an arbitration provision may not provide that an award is not binding if the parties disagree with the result, as such an agreement would fundamentally alter the UAA's statutory scheme. *Id.* at 896-97. No such agreement exists in this case.

In fact, the Court of Appeals' holding is wholly consistent with the UAA. (Slip Op. at 13-14.) The UAA provides that an arbitration agreement must be "contained in a record" to be enforceable. RCW 7.04A.060. A record is "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." RCW 7.04A.010(7). This provision does not require a signed agreement, the Court of Appeals explained, and was satisfied in this case by the record of the CBA Bylaws, which were submitted in the court record and available on CBA's website. (Slip Op. at 13-14.) No conflict with *Godfrey* exists.

Because the Court of Appeals' decision does not conflict with a Washington State Supreme Court decision, review is not warranted under RAP 13.4(b)(1).

B. Review is not warranted under RAP 13.4(b)(2) because the Court of Appeals' decision is consistent with the Court of Appeals' decisions in *Stein* and *Todd*.

Marcus & Millichap's contention that the Court of Appeals' decision conflicts with the Court of Appeals' decisions in *Stein*, 105 Wn. App. 41, and *Todd*, 127 Wn. App. 393, is unpersuasive. The Court of Appeals correctly concluded the underlying dispute in this case was within the scope of CBA's broad arbitration provision under the rules set forth in both these cases.

Marcus & Millichap concedes that *Stein* sets a liberal standard for interpreting the scope of an arbitration clause: "[a]s a rule, a contractual dispute is arbitrable unless the court can say with positive assurance that no interpretation of the arbitration clause could cover the particular dispute." Petition for Review at 16, citing *Stein*, 105 Wn. App. at 46. The arbitration clause in *Stein* required arbitration of any "unresolved dispute" between the parties. *Stein*, 105 Wn. App. at 46. The agreement contained conflicting definitions of "unresolved dispute," one of which was "all claims, demands, disputes, controversies, and differences that may arise between the parties...." *Id.* The Court refused to interpret the second, narrower definition as limiting the arbitration clause's broad scope and held that the trial court erred in denying the motion to compel arbitration. *Id.* at 46-47.

Here, no reasonable interpretation of CBA's arbitration clause would *not* encompass the dispute between Yates and Marcus & Millichap. The arbitration clause provides that CBA members and former members must arbitrate "all controversies involving commissions." (CP 77.) Yates's claim is that it is owed one-half of the commission taken by Marcus & Millichap on the sale of an apartment complex. (CP 112-14, 116-21.) The broad language of CBA's arbitration clause covers this dispute. As the Court of Appeals correctly observed, "[i]t is inconsequential that the

Property was never listed with the CBA...because the plain language of the arbitration agreement is not so limited." (Slip Op. at 15-16.)

Todd, in which the Court of Appeals concluded a dispute was outside the scope of an arbitration clause, is readily distinguishable from the instant case. In *Todd*, the plaintiff and defendant independently became members of the Northwest Yacht Broker's Association ("NYBA"), a voluntary association that required arbitration of disputes among members. *Todd*, 127 Wn. App. at 395-96, 399. *After* becoming members, plaintiff and defendant entered into an unrelated employment contract that did not incorporate or mention the NYBA arbitration clause. *Id.* at 396. The court concluded the arbitration clause did not cover the parties' dispute regarding compensation for plaintiff's employment because, "[a]t the times [plaintiff] and [defendant] each joined the NYBA, neither could have intended that the NYBA's arbitration clause would apply to their then-unknown employment relationship.... [T]he NYBA ... is not concerned with its members' employment relationship." *Id.* at 399.

Here, in contrast with *Todd*, the dispute between Yates and Marcus & Millichap is precisely the type the arbitration clause is intended to address. A "controvers[y] involving commissions" between these CBA members is precisely the type of dispute that the arbitration clause applies to, as is illustrated by its plain language.

To support its claim that it did not intend to arbitrate disputes like this one, Marcus & Millichap submitted an evasive and misleading declaration of its regional manager, Joel Deis. Mr. Deis made sworn statements such as that he "[d]oes not believe Marcus & Millichap is a member of [the CBA]," and that he has "never previously seen or been provided a CBA application form or other document which requires that members of CBA resolve broker disputes through arbitration with CBA." (CP 26; *see also* Slip Op. at 12-13 (discussing Deis's declaration).) As the Court of Appeals correctly pointed out, "[d]espite these hedged assertions, the record shows that Deis, as Marcus & Millichap's 'authorized broker' entitled to act on behalf of Marcus & Millichap, has completed numerous 'Broker Roster Updates' using Marcus & Millichap's unique 'CBA Office ID' number." (Slip Op. at 12.) The Court went on to conclude:

> Deis's carefully crafted, prevaricating assertions do not rebut or even contradict the direct evidence of Marcus & Millichap's status as a CBA member.
>
> ... Marcus & Millichap previously evidenced awareness of the CBA bylaws and attempted to utilize the bylaw provision in its favor. Marcus & Millichap cannot escape its obligation to arbitrate this dispute by submitting declarations in which witnesses artfully set forth their ignorance of reality.

(Slip Op. at 13.)

Because no conflict exists between the Court of Appeals' decision in this case and any other Court of Appeals' decision, review is not warranted under RAP 13.4(b)(2).

C. Review is not warranted under RAP 13.4(b)(4) because the Court of Appeals' decision does not involve an issue of substantial public interest and it set a clear, bright-line rule.

A case involves an issue of "substantial public interest" where it affects individuals and cases beyond the parties to the particular proceeding. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). The issue of whether a member of a voluntary organization is bound to an arbitration provision in the organization's bylaws is a narrow one. It appears that no Washington appellate court has addressed this specific issue since the *Keith Adams* decision in 1970. The Court of Appeals' holding is also consistent with a substantial body of law governing the arbitrability of disputes. Marcus & Millichap offers no reason to believe the issue is of substantial public interest. Rather, Marcus & Millichap ignores that the CBA arbitration provision is contained in a "record" within the meaning of the UAA, as the Court of Appeals properly concluded, and falsely argues that the Court of Appeals' opinion eviscerates the requirement of such a record. (Petition for Review at 19.) The Court of Appeals' opinion does no such thing.

Marcus & Millichap also argues that there is a substantial public interest in creating a "bright line" rule. (Petition for Review at 19.) But the rule set forth by the Court of Appeals is clear: a voluntary member of an association assets to and is bound by an arbitration provision in the association's bylaws. This straightforward rule makes no change in the existing law of arbitrability, as it was set forth in *Keith Adams* over forty years earlier. Review is not warranted under RAP 13.4(b)(4).

D. Yates should be awarded its costs for answering the Petition for Review pursuant to RAP 18.1(j).

RAP 18.1(j) provides, "[i]f attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review." Yates was awarded its costs by the Court of Appeals. Slip Op. at 17 n.14. Yates therefore requests that this Court award its costs upon denying the Petition for Review.

V. CONCLUSION

The Court of Appeals' decision is consistent with Washington law, which favors arbitration and broadly interprets the scope of arbitration

clauses. The decision does not present an issue of substantial public interest. This Court should deny the Petition for Review.

Respectfully submitted this 31 day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2016, I electronically served a true and correct copy of this Answer to Petition for Review upon the following individuals:

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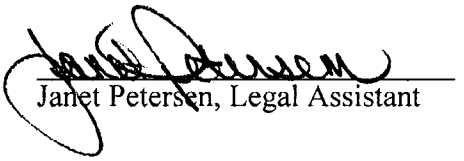

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The attached document is for filing in the following case:

Case Name: Marcus & Millichap Real Estate Investment Services of Seattle, Inc., Appellant v. Yates, Wood & MacDonald, Inc., Respondent

Case Number: 73199-8-I

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