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No. 73199-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

For more than two decades, Appellant ("Marcus & Millichap") has been a member of the Commercial Broker's Association ("CBA"). As a condition of membership, Marcus & Millichap (like all members of CBA) agreed to abide by CBA's Articles of Incorporation, Bylaws, and Rules & Regulations.

CBA's Bylaws contain an express duty to arbitrate all controversies involving commissions between or among CBA members. The underlying dispute is one such controversy involving commissions between two CBA members. The underlying dispute falls squarely within the scope of the arbitration provision. It must be arbitrated, as the trial court correctly held. The trial court's orders should be affirmed.

II. STATEMENT OF THE ISSUES

1. Whether this Court should affirm the trial court's orders (a) granting Yates, Wood & MacDonald, Inc.'s ("Yates") motion to compel arbitration and dismissing Marcus & Millichap's lawsuit, and (b) denying Marcus & Millichap's motion to stay arbitration where Marcus & Millichap assented to and owes a duty to arbitrate the underlying commission dispute as a CBA member?

2. Whether Yates is entitled to its costs on appeal pursuant to RAP 14.1 *et seq.* and RAP 18.1?

III. STATEMENT OF THE CASE

A. Statement of Facts Concerning Marcus & Millichap's CBA Membership and its Duty to Arbitrate.

At all relevant times, Marcus & Millichap and Yates were members of CBA and, like all CBA members, Marcus & Millichap and Yates agreed to arbitrate commission disputes with other CBA members. (CP 60-61, 67-69, 77.)

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.) Among its services, CBA provides a non-judicial process to settle commission disputes among its members. (CP 67 at ¶ 3.) 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. (*Id.*)

CBA's arbitration provision, specifying CBA members' duty to arbitrate commission disputes, is contained in CBA's Bylaws. (CP 67 at ¶ 5; CP 77-78.) It 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.
>
> Accordingly, no members may institute legal action involving such a controversy against any other member without the prior approval of the Board of Directors.
>
> ...
>
> C. Former Members – Must Still Arbitrate. In the event of the resignation or expulsion from membership of a party to a controversy, subsequent to the date on which the controversy arose or the rights of the parties became fixed, the Association shall continue to have exclusive jurisdiction to arbitrate the controversy. The decision of the Arbitration Panel shall be final and conclusive in the same manner as if resignation or expulsion had not occurred.
>
> D. Arbitration Procedures & Rules. The Board of Directors shall adopt and, from time to time, amend rules and procedures governing arbitration.

(CP 77-78.) Consistent with CBA's Bylaws, CBA's Board of Directors adopted rules and procedures that govern CBA arbitration. (CP 67 at ¶ 5; CP 81-86.)

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.)

Even before this dispute, Marcus & Millichap engaged in CBA arbitration. (CP 69 at ¶ 13; CP 125-67.) Marcus & Millichap is aware of its duty to arbitrate under CBA's Bylaws and it is familiar with CBA's Arbitration Rules. (CP 125-26, 135-67.) In prior CBA arbitration proceedings, Marcus & Millichap never contended 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.)

More specifically, in 2009, Marcus & Millichap participated in CBA arbitration as a respondent. (CP 69 at ¶ 13; CP 126, 162-67.)

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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.)

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 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.)

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 has been 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. Statement of Procedural History.

On December 9, 2014, Yates, through its broker Natalia Beran ("Beran"), initiated CBA arbitration against Marcus & Millichap. (CP 68 at ¶ 9; CP 112-14.) The arbitration concerns a commission dispute between Yates and Marcus & Millichap arising out the sale of the Ticino Apartments in Seattle in late 2014. (CP 112-14, 116-21.) Marcus & Millichap answered Yates's Arbitration Complaint on January 22, 2015. (CP 116-21.) In its Answer to Arbitration Complaint, Marcus & Millichap did not object to, or otherwise challenge CBA's authority or jurisdiction. (*Id.*)

Over a month later, however, on February 26, 2015, Marcus & Millichap filed in King County Superior Court a Complaint for Declaratory Judgment and Other Relief ("Complaint") against Yates. (CP 1-5.) In its Complaint, Marcus & Millichap claimed that no arbitration agreement existed. (CP 3.) Marcus & Millichap sought declaratory relief and an injunction prohibiting Yates from proceeding with arbitration. (CP 3-4.) On March 6, 2015, Marcus & Millichap moved the Court to stay the arbitration. (CP 13-21.) Yates responded to Marcus & Millichap's motion and moved to compel arbitration on March 9, 2015. (CP 51-59.) At the conclusion of the hearing on both motions held on March 16, 2015, 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.)

Marcus & Millichap appealed on March 17, 2015. (CP 232-33.) The arbitration hearing was scheduled to commence March 23, 2015. (CP 38.) On March 20, 2015, this Court stayed the trial court's order compelling arbitration pending appeal, or until further order of the Court.

IV. ARGUMENT

A. An enforceable agreement to arbitrate binds these parties and must be enforced.

By applying for and becoming CBA members, and by accepting the attendant privileges and benefits of CBA membership, Marcus & Millichap and its participating agent Morasch agreed to an explicit obligation to arbitrate. (CP 67-68, 77-78.) Under Washington law, agreements contained in an association's bylaws to submit future commission disputes to arbitration are valid and enforceable. *Keith Adams & Assocs., Inc. v. Edwards*, 3 Wn. App. 623, 625, 477 P.2d 36 (1970) (disapproved of on other grounds by, *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001)).[3] The trial court's orders should be affirmed and this case should proceed in arbitration.[4]

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[3] "'There is a strong public policy in Washington State favoring arbitration of disputes.'" *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002) (quoting *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997)). "Washington's policy favoring

The *Keith Adams & Associates* case is directly on point and is a guidepost for the present controversy. In *Keith Adams & Associates*, the defendant ("Edwards") was a real estate salesman employed by the plaintiff ("Keith Adams"). A dispute arose between Edwards and Keith Adams concerning a commission due on the sale of an apartment complex. *Keith Adams & Assocs.*, 3 Wn. App. at 624. Edwards and Keith Adams were both members of the Tri-City Board of Realtors. Edwards filed an arbitration complaint against Keith Adams pursuant to the bylaws of the Tri-City Board of Realtors, and Keith Adams answered the complaint in arbitration. *Id.* An award was entered in favor of Edwards. Thereafter, Keith Adams petitioned the Superior Court to vacate the arbitration award, arguing there was no written agreement to submit the dispute to arbitration. *Id.* at 625. The Superior Court dismissed Keith Adams's petition and confirmed the arbitration award. *Id.*

On appeal, the Court of Appeals affirmed. It stated:

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arbitration is grounded on the proposition that arbitration allows litigants to avoid the formalities, expense, and delays inherent in the court system." *Mendez*, 111 Wn. App. at 464.

[4] Yates agrees that this Court engages in *de novo* review of the trial court's decision to compel arbitration. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). Yates also agrees that, as the party opposing arbitration, Marcus & Millichap bears the burden of attempting to show that the arbitration provision is not enforceable. *Id.* Marcus & Millichap cannot meet its burden.

> Both defendant and plaintiff's president, in applying for membership with the Tri-City Board of Realtors, Inc., agreed to conform to the bylaws of the board which provided for the settlement of future disputes between members by arbitration....
>
> Agreements to submit future disputes to arbitration are valid. *Hanford Guards Union of America, Local 21 v. General Elec. Co.*, 57 Wash.2d 491, 358 P.2d 307 (1961); 5 Am. Jur.2d Arbitration & Award § 27, at 541 (1962).
>
> In the instant case there was no separate agreement to submit this particular commission dispute to arbitration prior to the filing of defendant's complaint. However, by requesting, and being granted, membership in defendant board, Keith Adams and defendant agreed to submit such disputes occurring in the future to arbitration.

Keith Adams & Assocs., Inc., 3 Wn. App. at 625-26.

The same result should follow here. Marcus & Millichap was, at all relevant times, a CBA member. (CP 67 at ¶ 6.) By applying for and being granted membership in CBA, Marcus & Millichap agreed to submit future commission disputes with other CBA members to binding CBA arbitration. (CP 67, 77-78.)

Marcus & Millichap tries to distinguish *Keith Adams & Associates* by arguing that the real estate brokers in that case "executed written membership applications with their associations which included their agreement to abide by the organization's rules and regulations including submission of member disputes to arbitration." (Brief of Appellant at 21.) CBA also requires all applicants for membership to complete a "standard

form that includes the applicant's agreement to abide by CBA's Articles of Incorporation, Bylaws, Rules & Regulations, and amendments thereto."[5] (CP 67 at ¶ 4.) Even if that were not the case, Marcus & Millichap's argument finds no support in the *Keith Adams & Associates* decision; the decision does not turn on—and does not say anything about—production of any executed written membership application. *Keith Adams & Assocs.*, 3 Wn. App. 623-31. Rather, where the bylaws of a voluntary association require the arbitration of disputes, those bylaws constitute a binding agreement upon the association's members. *Keith Adams & Assocs., Inc.*, 3 Wn. App. at 625-26.

The Washington Court of Appeals's decision in *Keith Adams & Associates* is consistent with other cases and scholarly commentary around the country. For example:

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[5] Marcus & Millichap argues that "CBA has confirmed there is no record of an agreement with Marcus & Millichap authorizing it to arbitrate disputes with other brokers." (Brief of Appellant at 10.) Marcus & Millichap's assertion is untrue. CBA confirmed no such thing. Rather, CBA noted that it currently maintained membership applications and documents dating back to 2009, but that Marcus & Millichap applied for and became a CBA member even earlier in 1993. (CP 67-68 at ¶¶ 6, 11.) CBA, through its attorney, also wrote to Marcus & Millichap: "I checked and CBA does not have subscription agreements dating back to when [Marcus & Millichap] joined CBA in 1993. However, since then, [Marcus & Millichap] licensees have availed themselves of CBA's services, including the broker involved in this arbitration, and [Marcus & Millichap] has paid the requisite dues. I think it a bit disingenuous for [Marcus & Millichap] to claim that the rules don't apply to [Marcus & Millichap] and this licensee, if that is your position." (CP 3.)

> Whether bylaws of associations expressly refer to arbitration rules or not, the parties are generally presumed to have intended to make use of arbitration when they are both members of an association whose rules or bylaws require that members arbitrate their disputes. Membership in such an association has the same effect as a written agreement to submit to arbitration any controversy existing between members and also between a member and the association.
>
> The bylaws of an association that require the arbitration of disputes between members constitute a binding agreement on the part of members to submit such disputes to arbitration.[6]

MARTIN DOMKE, ET AL., 1 DOMKE ON COMMERCIAL ARBITRATION § 10:3 (2003).

Another instructive case is *Nellemann v. Spartan Sportswear, Inc.*, 201 N.Y.S.2d 52 (N.Y. Sup. Ct. 1960). In *Nellemann*, the parties were members of separate associations and those two associations had an agreement requiring the arbitration of all disputes between their respective members. Once again, there was no discussion in the case concerning any written or executed application for membership by the parties. One of the parties, Spartan Sportswear, Inc., claimed that "it was not aware of the

[6] *See also Fox v. Merrill Lynch & Co.*, 453 F. Supp. 561, 564 (S.D.N.Y. 1978) ("A party who agrees to abide by the rules of an organization is bound by its subsequently adopted rule calling for arbitration."); *Matter of Willard Alexander, Inc. (Glasser)*, 31 N.Y.2d 270, 273, 290 N.E.2d 813 (N.Y. 1972) ("[I]t is well settled that, when a person becomes a member of a labor organization, or any other association, he thereby agrees, as a matter of law, to abide by the duly enacted provisions of its constitution and by-laws unless they are contrary to good morals or public policy or otherwise illegal.").

agreement [to arbitrate] at the time it became a member." *Id.* at 53-54. The court held that "[t]his fact has no significance and fails to raise any issue as to the existence of a contract to arbitrate." *Id.* at 54. So holding, the court confirmed the petitioner's arbitration award and denied Spartan Sportswear, Inc.'s motion to vacate the award.

Like Spartan Sportswear, Inc. in the *Nellemann* case, in this case Marcus & Millichap (and its three brokers who submitted declarations to the trial court) claim ignorance of the duty of CBA members to arbitrate commission disputes.[7] (Brief of Appellant at 11-12, 20; CP 26 at ¶ 7; CP 178 at ¶ 4; CP 208 at ¶¶ 5-6.) This claimed ignorance by selected Marcus & Millichap agents has no legal significance.[8] *Nellemann*, 201 N.Y.S.2d at 53-54. Marcus & Millichap is bound by the Bylaws of CBA, a voluntary association that Marcus & Millichap chose to join and from

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[7] Not one of the Marcus & Millichap representatives who submitted declarations to the trial court claims to have been associated with Marcus & Millichap at the time it applied for and became a CBA member in 1993. Joel Deis, Marcus & Millichap's Regional Manager, did not join Marcus & Millichap until 2006. (CP 61 at ¶ 7; CP 63.)

[8] Marcus & Millichap criticizes CBA's record-keeping, but offers no indication that Marcus & Millichap undertook any effort to locate its original application for CBA membership. Further, it should be noted that Yates has had no opportunity to take discovery from Marcus & Millichap (or CBA), but has been put in the position of responding to the often qualified (or inaccurate) assertions of those declarants that Marcus & Millichap decided to present to the trial court.

which Marcus & Millichap has accepted and enjoyed the benefits of membership.

In addition, a Florida court, citing the Washington Court of Appeals's decision in *Keith Adams & Associates*, also held that an arbitration provision in the constitution, charter or by-laws of a voluntary association is binding. *Elbadramany v. Stanley*, 490 So. 2d 964, 966 (Fla. Dist. Ct. App. 1986). In *Elbadramany*, the appellant ("Elbadramany") and the appellee ("Stanley") were real estate brokers and members of the Daytona Beach Board of Realtors ("Board"). *Id.* at 964. Elbadramany and Stanley had a dispute over a commission and Elbadramany filed a complaint for arbitration with the Board. The Board's bylaws required disputes between realtor members to be settled by arbitration. *Id.* at 965. Stanley participated in the arbitration hearing over objection, refused to sign an arbitration agreement presented to him and, after an award was made in favor of Elbadramany, filed a complaint in court to vacate the award. The trial court held there was no written agreement and vacated the award. *Id.* The Florida court of appeals reversed, reasoning:

> The constitution and by-laws of a voluntary association, when subscribed or assented to by the members, becomes a contract between each member and the association. *Sult v. Gilbert*, 148 Fla. 31, 3 So.2d 729 (1941). Although the specific question involved here has not been ruled on by an appellate court in Florida, other jurisdictions have addressed it. In *Keith Adams & Associates, Inc. v. Edwards*,

> 3 Wash. App. 623, 477 P.2d 36 (1970), under an arbitration statute virtually identical to the Florida statute, the court held that in applying for membership with the Tri-City Board of Realtors, Inc., both parties to the dispute agreed to conform to the by-laws of the Board which provided for the settlement of future disputes by arbitration and that their membership application constituted a sufficient agreement to submit future disputes to arbitration. *See also Willard Alexander, Inc. v. Glasser*, 31 N.Y.2d 270, 338 N.Y.S.2d 609, 290 N.E.2d 813 (1972), cert. denied, 410 U.S. 983, 93 S.Ct. 1505, 36 L.Ed.2d 179 (1973) (obligation of union members to abide by union's constitution and by-laws requiring submission of disputes to arbitration constituted, as between the members, a "written agreement" to arbitrate their dispute); 5 Am.Jur.2d, Arbitration and Award, § 11 (1962) (agreements to arbitrate future disputes include provisions in constitution, charters, or by-laws of corporations or lodges which provide for arbitration of disputes arising thereunder, which provisions are construed as agreements on the part of members to arbitrate such disputes).

Elbadramany, 490 So. 2d at 966.

Here, when Marcus & Millichap applied to become a CBA member and to avail itself of the privileges and benefits of CBA membership, Marcus & Millichap agreed to arbitrate commission disputes with other CBA members, just as it agreed to all other provisions of CBA's Articles of Incorporation, Bylaws and Rules and Regulations. (CP 67 at ¶¶ 4-8; CP 77-78.) Under Washington law, Marcus & Millichap's agreement and its duty to arbitrate, contained and specified in CBA's Bylaws, is valid and enforceable. The Court should affirm the trial court's orders granting Yates's motion to compel arbitration, denying

Marcus & Millichap's motion to stay arbitration, and dismissing Marcus & Millichap's lawsuit.

B. Marcus & Millichap's conduct confirms its assent to the agreement to arbitrate.

Marcus & Millichap's assent and agreement to arbitrate is conclusively shown by its conduct. Under Washington law, mutual assent may be deduced from the circumstances, or inferred based on the parties' course of dealing or a common understanding within a particular commercial setting. *E.g.*, *Hoglund v. Meeks*, 139 Wn. App. 854, 870-71, 170 P.3d 37 (2007). Implied acceptance occurs when an offeree accepts the benefit of offered services with an opportunity to reject them and chooses not to. *Id.* at 872 (citing *Goodman v. Darden, Doman & Stafford Assoc.*, 100 Wn.2d 476, 483, 670 P.2d 648 (1983); Restatement (Second) of Contracts § 69 (1981)); *see also, e.g.*, *Real Color Displays, Inc. v. Universal Applied Techs. Corp.*, 950 F. Supp. 714, 717-18 (E.D.N.C. 1997) (recognizing arbitration agreements need not be signed; rather, it is sufficient that parties commit themselves by acts or conduct); *Fox*, 453 F. Supp. at 564 (arbitration requirement binding on employee by agreement reasonably understood from his conduct).

Here, Marcus & Millichap's assent to the arbitration provisions contained in CBA's Bylaws are confirmed by, among other things:

(1) Marcus & Millichap's payment of applicable fees and dues to CBA; (2) Marcus & Millichap's acts previously availing itself to CBA arbitration; (3) Marcus & Millichap's participation in the pending arbitration with Yates when it answered the Arbitration Complaint without objection; and (4) Marcus & Millichap continually reaping the benefits of its CBA membership for more than two decades by, among other things, listing properties on CBA's multiple listing services (a privilege which is limited to CBA members), and facilitating and updating Marcus & Millichap's participating brokers under Marcus & Millichap's membership.[9] (CP 67-68 at ¶¶ 6-9, 11, 13; CP 88-91, 105-108, 110, 116-21; CP 125-26 at ¶¶ 2-4; CP 128-33, 135-67.)

Marcus & Millichap, in an earlier CBA arbitration also involving its broker Morasch, invoked the jurisdiction of CBA arbitration in reliance on its CBA membership and the very same duty to arbitrate commission disputes between or among CBA members that it now seeks to repudiate. (CP 135-60.) While Marcus & Millichap now feigns ignorance of its duty to arbitrate and falsely claims it never agreed to do so, Marcus &

[9] Marcus & Millichap has been a CBA member since 1993. (CP 67 at ¶ 6.) It has CBA membership number 974500. (CP 128-33.) At the time of the trial court's decisions, Marcus & Millichap had eighteen of its agents participating with CBA under its Seattle office's membership, including Morasch who has been a participating agent with CBA for approximately thirteen years. (CP 67-68 at ¶ 8; CP 88-91.)

Millichap's prior participation in CBA arbitration, its acknowledgment of its CBA membership, its use of CBA resources, and its knowledge of both the duty to arbitrate and of CBA's arbitration rules are established by the evidentiary record. (*See, e.g.*, CP 135-60.) Marcus & Millichap agreed to arbitrate commission disputes with other CBA members and its conduct demonstrates its assent. The trial court's orders should be affirmed.

C. The arbitration agreement is in a record and Marcus & Millichap's signature is not required.

At its core, Marcus & Millichap's argument is that it cannot be required to arbitrate unless CBA (or Yates) produces Marcus & Millichap's signature on a written arbitration agreement. (*See* Brief of Appellant at 8-15.) Marcus & Millichap's position is not supported by the law. "A party may consent to arbitration without signing an arbitration clause, just as a party may consent to the formation of a contract without signing a written document." *Romney v. Franciscan Med. Group*, No. 71625-5-I, 2015 WL 668051, at *42, 349 P.3d 32, 42 (Wash. Ct. App. Feb. 17, 2015).

In Washington, an agreement to submit an existing or subsequent controversy to arbitration simply must be contained in a "record." RCW 7.04A.060. The term record is defined by statute. RCW 7.04A.010(7) ("'Record' means information that is inscribed on a

tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."). A signature is not required.[10]

Here, CBA's arbitration provision is in a record within the meaning of RCW 7.04A.010(7) and RCW 7.04A.060. (CP 77-78). At all relevant times, CBA's Bylaws and its Rules and Regulations have been available to and retrievable by all CBA members, or actually by anyone. *See* http://www.commercialmls.com/Resources/Rules-and-Legal/Bylaws. This obviously includes Marcus & Millichap, who expressly referenced CBA's Bylaws in its 2011 Arbitration Complaint. (CP 135-38.)

Marcus & Millichap argues that CBA's website does not contain an agreement to arbitrate, but merely sets forth CBA's Bylaws, regulations and rules. (Brief of Appellant at 11.) CBA's Bylaws, however, explicitly set forth the agreement and duty of all CBA members to submit all

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[10] Even under the terms of the Federal Arbitration Act ("FAA"), which requires "a written provision," not merely a "record," there is no requirement that the arbitration agreement be signed. 9 U.S.C. §§ 2-3; *e.g.*, *Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60, 63-64 (5th Cir. 1987) ("It is established that a party may be bound by an agreement to arbitrate even in the absence of his signature."); *Edwards v. Blockbuster Inc.*, 400 F. Supp. 2d 1305, 1308 (E.D. Okla. 2005) (recognizing "there is no requirement pursuant to either the FAA, or caselaw, that [the moving party] produce a signed version of the agreement"); *Collie v. Wehr Dissolution Corp.*, 345 F. Supp. 2d 555, 559 (M.D.N.C. 2004); *Clar Productions, Ltd. v. Isram Motion Pictures Prod. Servs., Inc.*, 529 F. Supp. 381, 383 (S.D.N.Y. 1982); *Ocean Indus., Inc. v. Soros Assocs. Int'l, Inc.*, 328 F. Supp. 944, 947 (S.D.N.Y. 1971); *AAACon Auto Transp., Inc. v. Teafatillier*, 334 F. Supp. 1042 (S.D.N.Y. 1971).

controversies involving commissions between or among them to binding arbitration. (CP 77.) At all relevant times, Marcus & Millichap was a CBA member. (CP 67.) Marcus & Millichap's argument, therefore, boils down to the false assertion that its signature or individual assent must also be contained in the same record.[11] No signature is required, however, and Marcus & Millichap's assent can be (and is) also established by its conduct and the circumstances here, including Marcus & Millichap's course of dealing during and through its membership with CBA. *See, e.g.*, *Romney*, 349 P.3d at 42; *Hoglund*, 139 Wn. App. at 870-71; *Keith Adams & Assocs., Inc.*, 3 Wn. App. at 625-26.

Marcus & Millichap next argues that since CBA has not retained copies of applications for membership submitted prior to 2009 that the "parties are left to guess as to the terms of any alleged agreement" and "the terms of any agreement are purely speculative." (Brief of Appellant at 15.) Marcus and Millichap's argument is not true. The terms of CBA's arbitration provisions and rules are explicitly set forth with specificity. (CP 77-78, 81-86.) And, to the extent there were any changes to the arbitration rules over time, Marcus & Millichap (like all CBA members)

[11] Marcus & Millichap's assent to CBA's arbitration provisions are also contained or shown in the record of its executed Arbitration Complaint dated March 7, 2011, as well as in the records demonstrating Marcus & Millichap's acceptance of the privileges and benefits of its CBA membership. (CP 135-38; *see* CP 88-91, 110, 128-33.)

agreed to "abide by the Articles of Incorporation, Bylaws and Rules of the Association and amendments thereto." (CP 71); *see also Fox*, 453 F. Supp. at 564 ("A party who agrees to abide by the rules of an organization is bound by its subsequently adopted rule calling for arbitration."). The agreement to arbitrate is in a record within the meaning of RCW 7.04A.010(7) and RCW 7.04A.060. This Court should affirm the trial court's orders and the underlying dispute should be allowed to proceed without further delay in arbitration where it belongs.

D. The scope of the arbitration agreement clearly encompasses this commission dispute.

"As 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." *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 46, 17 P.3d 1266 (2001). Here, CBA's arbitration provision clearly covers the underlying dispute.

This case presents precisely the type of "controvers[y] involving commissions" between CBA members to which CBA's arbitration provision applies. (CP 77-78.) Yates's Arbitration Complaint seeks fifty percent of a $226,000.00 commission paid to Marcus & Millichap following the sale of the Ticino Apartments and alleges that Marcus &

Millichap's broker Morasch reneged on an agreement to co-broker after Yates's broker Beran procured the buyer. (CP 112-14.)

Marcus & Millichap states that the Ticino Apartments were not listed on CBA's multiple listing services and argues it is, therefore, "illogical" to apply CBA's arbitration provision to the dispute. (CP 18.) Marcus & Millichap's argument ignores the controlling language of the arbitration clause and Washington law requiring arbitration unless the Court can say with "positive assurance" that the dispute is not covered by any interpretation of the arbitration provision. *Stein*, 105 Wn. App. at 46.

The scope of Marcus & Millichap's duty to arbitrate, as a CBA member, is not limited to disputes concerning commissions on properties listed on CBA's multiple listing services; rather the arbitration clause applies to "all controversies involving commissions, between or among" members. (CP 77-78) The arbitration clause clearly covers the underlying dispute.

V. COSTS ON APPEAL

Yates respectfully requests an award of costs and expenses on appeal pursuant to RAP 14.1 *et seq.* and RAP 18.1.

VI. CONCLUSION

Marcus & Millichap, a long-time member of CBA that availed itself of all the benefits and privileges of CBA membership for more than

two decades, seeks to avoid its corresponding duty and agreement to submit commission disputes with other CBA members to binding arbitration. The law does not allow it. The arbitration provision in CBA's Bylaws is binding on Marcus & Millichap. The underlying commission dispute falls squarely within the scope of CBA's arbitration requirement. The trial court properly granted Yates's motion to compel arbitration, correctly denied Marcus & Millichap's motion for a stay, and dismissed Marcus & Millichap's lawsuit. This Court should affirm.

DATED this 21st day of July, 2015.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 22nd day of July, 2015, I caused to be served the foregoing document on counsel for Appellant, as noted, at the following address:

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Dated: July 22, 2015

Place: Seattle, WA