100306-4

No. 81132-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BOUNCE AND LASERTAG, LLC d/b/a PUMP IT UP, *et al*,

Petitioners,

v.

KENT EAST COMMERCIAL, LCC, *et al*,

Respondents.

PETITION FOR SUPREME COURT REVIEW

Jose F. Vera of Vera & Associates PLLC
WSBA #25534, Attorney for Petitioners
100 West Harrison Street, Suite 300
Seattle, WA 98119
(206) 793-8318
Josevera@veraassociates.com

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I. INTRODUCTION

Mr. Akthar Khan and his wife, Ms. Munna Choudhri (the "Khans") operate an activity and event center mostly for children. The center operates indoor inflatable rides with linked pizza parties for small groups. Before the pandemic, the Khan's Tacoma operation was filled with life, laughter, and relieved parents, who got to see their often tween children play like children again. The Khans are franchisees of "Fund Bands" and "Pump It Up Holdings, LLC." The Khans applied for, were granted, and purchased the franchisee medallion for area in which the underlying leasehold is located for $15,000. The Khans purchased a commercial pizza oven and expended sunk costs for starting a new service business. They did these things because they thought they had negotiated and signed an agreement for their future location in Kent Washington with Kent East Commercial LLC ("KEC").

KEC is the landlord on the commercial lease it foisted upon Bounce (the "Lease"). Pradeep and Sharmila Rathinam

(husband and wife) and Mr. Satwant Singh are all KEC members, voluntary parties to the arbitration, and none of them had a "Pump It Up" franchise medallion. They had millions of dollars, dozens of properties, and, in the case of Mr. Satwant Singh, more than 20 years of experience as a commercial real estate broker. Mr. Singh wrote the Lease. He drafted the Lease's Arbitration provision, and he required the application of the AAA Civil Rules to any dispute between the parties. He invoked AAA Civil Rule R-47. Despite months of joint planning and discussions, Mr. Singh gave the Khan's minutes (not hours) to review and sign the Lease. The March 22, 2017, Lease (the "Lease") filled KEC's space (about 50% of the Property's leasable space) that had been vacant since 2011.

The underlying dispute arose in August 2018 when KEC refused to grant Bounce access to the built-out space days before the arrival of Bounce's trade fixtures and final trade dress. The parties had worked together for almost 16 months to buildout the space to meet the franchisor's unique requirements. Initially,

Bounce was torn between this space and that of another landlord. KEC induced Bounce to execute the Lease by offering aggressive Lease terms, especially when it came to building out the space at KEC's costs. The Tenant Improvement (TI) work suffered from poor management and communications, responsibility for which the Arbitrator placed squarely on Mr. Singh. On August 18, 2018 (with the final trade fixtures arriving in less than 72 hours), Mr. Rathinam emailed the Khans that the Khans would need to agree to new, less favorable terms to gain access to the space. When Bounce protested and said they could not afford such terms, KEC cancelled the deal and refused all access to Bounce (KEC retains Bounce's commercial pizza equipment to this day). Mr. Singh then texted Bounce that KEC had its lawyers all ready to go, if Bounce sought to challenge them. On August 22, 2018, Ms. Rathinam emailed the franchisor to see if KEC could operate the franchisee business from the space. The lock out—the threat—and the takeover effort. The parties' arbitration followed.

Mr. Singh included an Arbitration Rider (the "Rider") in the Lease. The Rider required the parties to submit all disputes to arbitration with an attorney arbitrator with at least fifteen years of commercial real estate law experience and to conduct the arbitration under AAA Commercial Arbitration Rules with Expedited Procedures. The AAA Commercial Arbitration Rules include AAA Rule R-47 that grants the Arbitrator the authority to grant any remedy or relief that the arbitrator deems just and equitable within the scope of the parties' agreement. The arbitrator ruled in Bounce's favor.

The Arbitrator's October 10, 2019 Final Arbitration Award (**Appendix D**) awarded Bounce its resulting lost profits, $25,000 in miscellaneous damages, and $11,171 in terms, plus attorney's fees. KEC sought to vacate the Award at the trial Court level with the Honorable Judge Michael K. Ryan affirming the Award in a 10 page ruling on January 22, 2020. (**Appendix C**). Significantly, Judge Ryan raised the issue first raised by Justice Utter his concurrence (signed by four Justices) in ***Boyd v.***

Davis, 127 Wn.2d 256, 897 P.2d 1239 (1995), and by Division III Chief Judge Lawrence-Berrey in his concurrence in ***Mainline Rock & Ballast, Inc., v. Barnes, Inc***., 8 Wn.App.2d 594, 439 P.3d. 662 (Div. III 2019) that RCW 7.04A.230 (1)(d) (effective January 1, 2006) should be construed more narrowly than the former RCW 7.04.160(4) (effective 1943). KEC appealed Judge Ryan's Decision to Division I of Washington's Court of Appeals on February 14, 2020. Division I issued its Opinion on August 16, 2021 (the "Opinion"). (**Appendix A**)

In its Opinion, Division I declined to address the issue of whether the scope by which to assess arbitration awards should change in light of the 2006 statutory amendments, and instead, reversed the trial court's order confirming the arbitration award based on its determination that the arbitrator exceeded his authority in awarding lost profits under the Rider and AAA Commercial Rules (AAA Rule R-47). Division I remanded the matter to the trial court to vacate the award and to order a rehearing in arbitration. Division I declined to address the

arbitrator's award of miscellaneous damages and terms for discovery abuses, which are unrelated to the issue of lost profits and consequential damages. Bounce raised this specific issue on a Motion for Reconsideration. Division I denied the Motion for Reconsideration by a majority of the panel. (**Appendix B**). This Petition for review follows.

The Opinion presents the Supreme Court with three issues. First, is now the time to comment on the effect of the statutory omissions made by the 2006 Amendment to Washington's Arbitration Act as suggested by Division III Chief Judge Lawrence-Berrey.

Second, may the Court of Appeals properly reverse an Arbitrator's award of lost profits to an aggrieved tenant, when the Opinion fails to address the role that AAA Rule R-47 plays in the Final Award and when the Opinion defined an undefined term by resort to a legal dictionary in violation of Washington's substantive law of lease interpretation? ***Queen City Farms, Inc. v. Cent. Nat'l Inc. Co.***, 126 Wn.2d 50, 882 P.2d 703 (1994)

(courts may turn to Standard English dictionaries to define undefined words in an agreement). Here, the parties' Lease failed to define the term "consequential damages." The arbitrator choose to review the entire lease for a possible definition by the parties, and when that effort failed to produce a definition for the term, the Arbitrator construed the undefined term against the landlord and in favor of the tenant. Division I instead resorted to a Legal Dictionary and not a Standard English dictionary to construe the term undefined by the Lease against the tenant and in favor of the landlord, who drafted the lease. Did Division I's approach to this issue violate the Facial Legal Error standard and Washington's substantive law of contract interpretation?

Last, may the Opinion remand the award of damages in four different categories when the Opinion related only to one of the four awarded damage categories? Here, the Opinion remanded the entire arbitration award because it deemed that one of the four categories of awarded damages was improper. Should not the remaining categories of properly awarded damages be

affirmed? The award of $25,000 in miscellaneous damages and $11,171 for discovery violation terms should be affirmed under the Opinion's adoption of the Facial Legal Error Doctrine. The issue of awardable attorney's fees could be addressed at the trial level.

II. IDENTITY OF PETITIONER

The Petitioner is Bounce and Lasertag LLC d/b/a Pump It Up ("Bounce").

III. DECISION

Bounce respectfully requests this Court to accept review of the decision entered by Division I of Washington Court of Appeals on August 16, 2021 (Court of Appeals No. 81132-1-I)(the "Decision" or "Opinion"). Attached hereto as **Appendix A**.

IV. ISSUES PRESENTED FOR REVIEW

The Opinion gives the Supreme Court an opportunity to do the following:

A. To address if the accepted read of the Facial Legal Error Doctrine remains a proper basis by which to vacate an arbitration award in light of the analysis and urgings of Justice Utter, Division III Chief Justice Lawrence-Berrey, and the Honorable Judge Ryan that Facial Legal Error Doctrine is out of step with Washington's current Arbitration Act. Under the Facial Legal Error Doctrine, well-explained arbitration awards become invitations for endless litigation. This matter is a case in point. This matter has been anything but speedy, less costly, and efficient. The Opinion consigns Bounce to at least another two years of arbitration expenses before a JAMS arbitrator. The first arbitration was so bad that the Arbitrator had to impose discovery abuse terms against KEC. What new costly tactics will KEC inflict on Bounce this time?

B. To address whether the Opinion improperly applied the Facial Legal Error Doctrine and Washington's law of contract interpretation.

1. The Final Arbitration Award Letter shows that the Arbitrator engaged in a two-step process to award Bounce lost profits. **Appendix D** at ¶2 on P. 4. First the Arbitrator reviewed, not only Lease Section 21, but the entire Lease to determine that the Lease failed to define "consequential damages" as including the idea of lost profits and failed to prohibit the award of lost profits outright under the Lease as damages. The Arbitrator then determined that the Lease terms, the parties' course of dealings, and the nature of their multi-year relationship enabled him to award lost profits. This was especially true in light of AAA Rule R-47, which empowered him to grant any remedy that he deemed just and equitable within the scope of the parties' Lease and Rider.
2. Washington follows the objective theory of contract interpretation. Under this theory, the meaning of contract terms are to be determined from the face of the agreement when possible. Undefined or ambiguous terms are to be given meaning in accord with a Standard English Dictionary and to

be construed against the drafter of the agreement. Here, the Opinion improperly defined the term "consequential damages" by a Legal Dictionary and construed the term in favor of the drafter. In this regard, the Opinion is contrary to Washington law of contract interpretation and requires the Supreme Court's intervention to correct.

C. To address if the Opinion improperly remanded all categories of Arbitrator awarded damages for a rehearing when the Opinion only reversed the Arbitrator's award of lost profit damages and declined to address the Arbitrator's award of miscellaneous damages, award of terms for discovery violations, and award of related attorney's fees. Under the Facial Legal Error Doctrine, there is no basis to avoid affirming these latter damage awards. The Opinion should be revised to affirm these awards on appeal and to define Bounce as the prevailing party on appeal.

V. STATEMENT OF THE CASE

A. GENERAL BACKGROUND FACTS

The facts relevant to this Petitioner for Review are limited due to this being an appeal originating from a challenged Arbitration Award. **Appendix D.** The trial court affirmed the Arbitration Award to a Judgment. **Appendix C.** KEC appealed the trial court's Order and Judgment confirming the Arbitration Award. Division I of the Court of Appeals by its Opinion reversed and remanded the matter back to the trial court for a remand and rehearing before a JAMS arbitrator in accord with the Rider because the Arbitration Award exceeded the Arbitrator's authority under the Rider in awarding Bounce lost profits. **Appendix A.** In this context, the Supreme Court's review is limited to the courts' process for confirming or vacating of the Arbitration Award. ***Godfrey v. HartfordCas. Ins. Co***., 142 Wn.2d 885, 893, 16 P.3d 617 (2001) (Private arbitration in Washington State is governed exclusively by statute.)

The issues reviewable by the Supreme Court are thus limited to the following three primary issues: (1) whether the Facial Legal Error Doctrine now needs to be harmonized with

the 2006 Amendments to Washington's Arbitration Act; (2) whether the Opinion properly applied Washington substantive law (the Facial Legal Error Doctrine and Washington's law of contract interpretation) in deciding to reverse the trial court's affirmation of the Arbitration Award, and (3) whether the Opinion properly reversed and remanded the entire Arbitration Award to the trial court when two of the three categories of awarded damages were separate from the award of lost profits.

The following facts are taken from the Arbitrator's Final and Interim Award Letters. Consolidated in **Appendix D**. Although the entire arbitration process contributed to and shaped the Arbitrator's decision on damages, the July 9, 2019 and September 17, 2019 hearings (more than 5.5 hours of presenting exhibits, testimony, and arguments focused on awardable damages in this matter) contributed most to the final amounts awarded. (CP 47-8).

1. **Judicial Officers favor harmonizing the Facial Legal Error Doctrine with the 2006 Amendments to the Washington Arbitration Act**

In 2019 Chief Justice of Division III Justice Lawrence-Berrey specifically wrote his concurrence to encourage future litigants to argue that RCW 7.04A.230(1)(d) should be construed more narrowly than courts had construed former 7.04.160(4). ***Mainline Rock & Ballast, Inc., v. Barnes, Inc.***, 8 Wn.App.2d 594, 619, 439 P.3d 662 (Div. III 2019). The Honorable Michael K. Ryan agreed with Justice Lawrence-Berrey's observations and analysis in the problems created and furthered by the continued application of the Facial Legal Error Standard. **Appendix C** at Page 3 in fn. 1. Both Judge Ryan and Justice Lawrence-Berrey note that arbitration should be faster, less expensive, and more efficient than traditional litigation ***Id***. Yet when one party with nearly limitless resources engages in vexatious, hardnosed litigation during an arbitration that causes the arbitrator to issues a detailed arbitration letter—the parties, like here, are condemned to an expensive and time consuming trip through the court system's appellate process. This all but ensures the trampling and loss of dignity for the party of ordinary

means. What was not lost to the pandemic's fire is taken by the wealthy. Is this the new Washington? Is this realty what alarmed at least two judicial officers?

Justice Lawrence-Berry noted in his Concurrence that the 2006 Amendments to RCW 7.04.160(4) deleted the second phrase entirely in the provision's new iteration at RCW 7.04A.230(1)(d). ***Id.***, 8 Wn.App.2d at 620. The deletion or omission is intentional with the intent to narrow the ability of a court to vacate an arbitration award, yet no appellate court has addressed the intentional deletion and its impact on the Facial Legal Error Doctrine as applied in ***Boyd***. ***Id***. The two judicial officers both noted that arbitration is not final in those case when arbitrators assume the burden of explaining their awards to the parties. Finality in the context of arbitrations really only happens when the arbitrators narrowly or decline to explain their awards to the parties.

2. The Lease failed to define the term "consequential damages" and failed to preclude lost profits as damages awardable to Bounce

In the Final Award Letter, the Arbitrator addressed the question of whether the parties intended the Lease to require Bounce to release its *specific* right to claim "lost profits" as a part of a damage claim against KEC. (CP 50), and ***Appendix A*** at ¶ 2. The Arbitrator found and the parties agreed that the Lease required Bounce to release its *general* right to claim "consequential damages." ***Id***. The Arbitrator next reviewed the entire Lease to find that the Lease failed to define the term "consequential damages" and failed both to include the term "lost profits" in "consequential damages" and to exclude "lost profits" as a measure of damages awardable under the Lease. ***Id***. In fact, the term "lost profits" fails to appear in the Lease. ***Id***. Mr. Khan testified for the second time during the September 17, 2019 hearing that he read the Lease when Mr. Singh presented it to him and that he did not understand Lease Paragraph 21 or any other Lease provision to strip Bounce of its specific right to claim "lost profits" as damages if needed.

The Arbitrator wrote:

> But whatever the [lease] language means, it must be construed against the [landlord] who drafted the language.

(CP 60.) The Arbitrator found that KEC drafted the Lease and the Lease drafter had, at the time of execution, 20 years of experience as a commercial real estate broker. **Id.** The Arbitrator next stated that the Lease was a complicated document especially for Bounce, who had very limited real estate experience, and that KEC did not give Bounce adequate time to review the Lease, or make any effort to explain it to Bounce. ***Id***. The Arbitrator construed the undefined term "consequential damages" against KEC (the Lease drafter) and in favor of Bounce. The term "consequential damages" does not appear in Standard English dictionaries because it is a legal term of art.

The Opinion reached the opposite result from the Arbitrator by defining the term "consequential damages" for the parties by reference to a legal dictionary. **Appendix A** at P. 6. The Arbitrator's findings strongly indicate that Bounce had no knowledge of "legal terms of art" when it signed the Lease and

reasonably no expectation that terms from a legal dictionary would be applied to the Lease after Bounce executed it to change the meaning of words that Bounce understood from Standard English. The Opinion's application of a legal dictionary to change the meaning of lease terms after Bounce signed the Lease has created unreasonable and unfair surprise to Bounce.

3. The Arbitrator Awarded Bounce Damages unrelated to any Award of Lost Profits that should be affirmed on Appeal

The Arbitrator awarded Bounce damages unrelated to the award of "lost profits." The Opinion failed address the below three damage awards. The Arbitrator awarded Bounce $25,000 for Miscellaneous Damages (CP 51). The Arbitrator also awarded Bounce $11,171 in terms against KEC for discovery abuses by specific Order on January 10, 2019 (CP 53). Finally, the Arbitrator awarded Bounce attorney's fees on the arbitration (CP 53). These awarded damages are unrelated to any award of "lost profits."

The Opinion vacates the entire arbitration award without

addressing the award of damages unrelated to "lost profits." The Opinion fails to articulate a theory by which it would vacate these three damage awards even if it had addressed them. The Arbitrator's Final Award Letter makes these awards (miscellaneous damages, discovery abuse terms, and related attorney's fees) as bare conclusive statements. As such, these damage awards must be affirmed under the Facial Legal Error Doctrine.

A. Grounds for Relief Requested

1. No Court has addressed the fact that the 2006 Amendments to the Arbitration Act Delated a Phrase from the Provision that sets the Standard for Judicial Review of Arbitration Awards

As noted by Justice Lawrence-Berrey, the updated version of former RCW 7.04.160(4)—RCW 7.04A.230(1)(d) deleted the entire second phrase of RCW 7.04.160(4). Under the former RCW 7.04.160(4) an award could be vacated if "[1] the arbitrators exceeded their powers, or [2] so imperfectly executed them that a final and definite award upon the subject matter submitted was not made." ***Id***. (underline added). The amended

version of this provision states that "the court shall vacate an award if: (d) An arbitrator exceed the arbitrator's powers[.]" RCW 7.04A.230. The above second underlined phrase was intentionally deleted in the 2006 Amendment. ***Mainline Rock & Ballast, Inc.***, 8 Wn.App.2d at 619. No appellate court has determined the effect of this intentional deletion or omission on the standard by which courts are to assess arbitration awards. The change to the applicable statute is significant because private arbitrations are governed entirely by statute**. Godfrey v. HartfordCas. Ins. Co.,** 142 Wn.2d 885, 893, 16 P.3d 617 (2001) (hence the process by which to affirm or vacate an arbitration award is governed entirely by statute.) Thus how are courts to account for the above change to the statute without direction from the appellate courts when the process by which to affirm or vacate awards is governed entirely by statute?

2. The Opinion wrongly Applied the Facial Legal Error Doctrine and the Law of Contract Interpretation

A. The Opinion wrongly Found that the Arbitrator violated the Facial Legal Error Doctrine by citing out

of state Legal Authority for the Idea of Lost Profits as Direct Damages

The Opinion found that the Arbitrator exceeded his power when he awarded Bounce some of its lost profits as damages. Relying on a legal dictionary, the Opinion states that the award of lost profits was an improper award of consequential damages in violation of Washington law. **Appendix C** at P. 8. Yet here, the Rider submitted the parties' dispute both to Washington substantive law and the AAA Commercial Arbitration Rules that contains AAA Rule R-47. KEC drafted this Rider and included it in the parties lease. The Rider breaks down to including a general statement about applying Washington Substantive law and a specific provision about scope of remedies available to the Arbitrator. AAA Rule R-47 provides as follows:

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

Thus, once the Arbitrator reads the entire Lease to confirm that the Lease lacks a definition for "consequential damages" and

does not otherwise prohibit the award of lost profits, he properly exercises his authority to grant any remedy or relief that he deems just and equitable. AAA Rule R-47.

Bounce concedes as it must, however, if it is proper for courts under Washington contract interpretation law to interpret and apply terms in a commercial lease by resort to a legal dictionary when the parties otherwise failed to define the term themselves in their lease or by the conduct, then Opinion is correct on this point. Bounce does note that no existing legal authority appears to authorize courts to resort to legal dictionaries after the parties sign a lease to define terms not otherwise expressly defined by the leasing parties themselves—let alone to define such undefined terms in a way that benefits the party drafting the lease. In this sense, the Opinion broke new legal ground.

B. The Opinion wrongly applied Washington Contract Interpretation Law by citing a Legal Dictionary to define a Lease term not defined by the Parties in their Lease.

The starting point for interpreting contract terms used by the parties is the specific words the parties choose for their Lease to express their agreement. The key to understanding the lease terms is to understand the parties' intent underlying the specific terms. ***Go2Net, Inc. v. C I Host, Inc.***, 115 Wn. App. 73, 83-84, 60 P.3d 1245 (Div. I 2003). Washington courts follow the objective manifestation theory of contracts, which means looking for the parties' intent as objectively manifested in the Lease rather than their unexpressed subjective intent. ***Hearst Communication, Inc. v. Seattle Times Co.***, 120 Wn. App. 784, 791, 86 P.3d 1194 (2004), aff'd, 154 Wn.2d 493, 503 115 P.3d 262, (2005). Thus, a court considers only what the parties actually wrote; giving words in a contract their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates a contrary intent. ***Hearst***, 154 Wn.2d at 504. In addition, a court reads a contract as an average person would, giving it a practical and reasonable meaning, not a strained or forced meaning. ***Allstate Ins. Co. v Hammonds***, 72 Wn. App

664, 667, 865 P.2d 560 (1994). This meaning may be ascertained, if needed, by reference to Standard English dictionaries. ***Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.***, 126 Wn.2d 50, 77, 882 P.2d 703, 891 P.2d 718 (1994). If a term is not defined by the parties' agreement and otherwise ambiguous, the term is construed against the drafter. ***See e.g.***, ***Allstate Ins. Co. v. Peasley***, 131 Wash.2d 420,424, 932 P.2d 1244 (19997).

Significantly under Washington law, the inquiry itself is not a balanced inquiry because Washington law construes the lease terms against the drafting landlord, in favor of the tenant, and in a manner not to extend or enlarge the tenant's obligations under the lease term in question. In 1921, the Supreme Court stated that doubtful provisions must be construed in favor of the lessee. ***Salzer v Manfredi***, 114 Wash. 666, 195 P. 1046 (Wash. 1921). This Court also stated, if the provisions of a lease be doubtful, "the Court will adopt the interpretation which is the more, or most, favorable to the lessee." ***Murray***, 96. P.2d at 91, see also, ***National Bank of Commerce of Seattle v. Dunn***, 194

Wash. 472, 78 P.2d 535, 540 (En Banc. 1938). In 1950, this Court noted the following three rules of construction applicable to commercial leases: (1) Courts will not extend or enlarge the tenant's obligation beyond the plain meaning of the terms used and the intention existing at the time; (2) ambiguities in the lease must be resolved in the tenant's favor; and (3) an instrument prepared by the landlord must be construed most strongly in favor of the tenant. ***Puget Inv. Co. v. Wenck***, 36 Wn.2d 817, 221 P.2d 459, 464 (1950), ***and***, ***4105 1st Ave S. Invs., LLC v. Green Depot, WA Pac. Coast, LLC***, 179 Wn. App. at 784, 321 P. 3d 254 (2014) (words in a lease given their ordinary, usual, and popular meaning unless the agreement as a whole demonstrates a contrary intent).

Instead of following any of the foregoing rules of contract interpretation, the Opinion resorted to a legal dictionary to define a term not defined by the parties themselves. **Appendix C** at P. 6. The process used by the Opinion to define the term "consequential damages" is contrary to the rules of lease

interpretation laid down by Washington law. The Opinions approach to this issue amounted to changing the definition of the term "consequential damages" after the fact and in a manner contrary to Bounce's understanding of the term when it executed the Lease. The Supreme Court needs to correct this portion of the Opinion.

3. The Opinion Remanded Damage Awards that if Failed to Address

The Opinion remanded the entire Arbitration Award for rehearing before an arbitrator. **Appendix C**. Yet, the Opinion failed to address (or even acknowledge) the Arbitrator's award of miscellaneous damages of $25,000, terms for discovery abuses of $11,171, and award of related attorney's fees. ***Id***. Under the Opinion's application of the Facial Legal Error Doctrine, these latter awards should have been affirmed on Appeal. For a small party like Bounce, justice delayed is often justice denied.

VI. WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review because the Opinion touches on issues of both public interest related to the application of Washington's Arbitration Act and Judicial interest related to the Act. Moreover, the Opinion appears to create new law for interpreting and applying commercial lease terms not defined by the parties' lease by allowing court's to use legal dictionaries to define undefined lease terms in a manner that benefits the drafter of the lease. Finally, the Opinion remands the entire Arbitration Award for rehearing when at least two of the damage award categories were set by the award and are not related to issues of lost profits. The two awards were miscellaneous damages for $25,000 and terms for discovery abuses for $11,171. Both awards are not subject to remand under the Opinion and therefore both awards should be affirmed with Bounce declared the prevailing party on appeal.

The above issues in this appeal involve issues uniquely suited to the Supreme Court's authority and responsibility within our state. This is especially true with respect to the need to have

the Supreme Court inform the state's judicial officers and public as to the effect of the deleted second phrase from the former RCW 7.04.160(4) in the new, amended RCW 7.04.A.230(1)(d). Chief Justice of Division III Lawrence-Berrey ascribes meaning to this change in Washington's Arbitration Act not reflected in Washington's case law. Judge Ryan below was sympathetic to the points raised by Justice Lawrence-Berrey. This Court could address this issue definitively on review.

On review, the Supreme Court could also address if Washington contract interpretation law authorizes a court to determine the meaning of a term undefined by the parties' contract after the fact by resort to a legal dictionary in a manner that favors the contract's drafting party. In the context of commercial leasing, it would be a sea change event to authorize courts to define and apply previously undefined terms based on legal dictionaries when the current law is that such terms not defined by the parties' lease are to be defined by Standard English dictionaries and construed in a manner that favors the

non-drafting party. If the Opinion is correct on this issue, then review is mandated to inform all about this change in interpreting commercial leases.

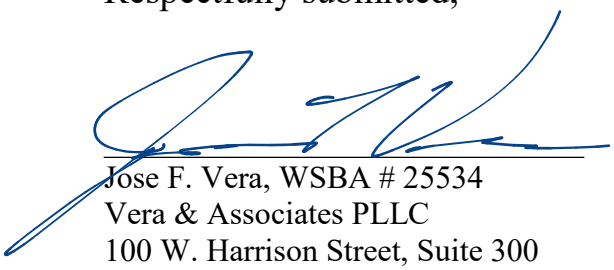
Finally, the Supreme Court needs to review this Opinion to affirm those portions of the Arbitration Award not related to the issue of awarding lost profits to Bounce. Under the Opinion's articulation and application of the Facial Legal Error Doctrine, the award of miscellaneous damages and terms for discovery abuses may not be reversed at any point and need to be affirmed on this Appeal. The dignity of small business owners are at stake and stripping them of awarded damages unrelated to lost profits does not affirm their sense of fundamental justice. Review by the Supreme Court is needed to redress this wrong and to provide them with a result to the appeal that is at least consistent with the Opinion's logic and application of the Facial Legal Error Doctrine.

VII. Conclusion

Based on the foregoing, Bounce respectfully requests the Supreme Court to accept review of this matter.

Submitted October 18, 2021.

Respectfully submitted,

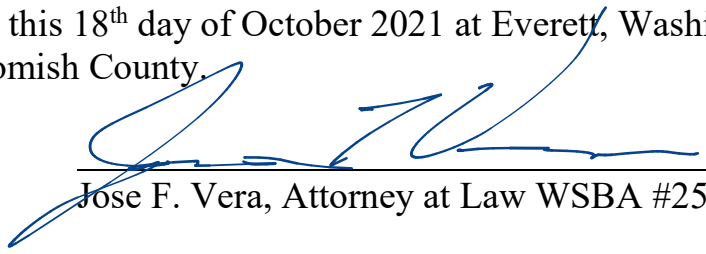


Jose F. Vera, WSBA # 25534
Vera & Associates PLLC
100 W. Harrison Street, Suite 300
Seattle, WA 98119
P. (206) 793-8318

CERTIFICATE OF WORD COUNT

The undersigned certifies that the foregoing Petition for Review is 14 point, New Times Roman font and contains 4,901 words from the beginning of the Introduction to the end of the Conclusions.

DATED this 18th day of October 2021 at Everett, Washington in Snohomish County.



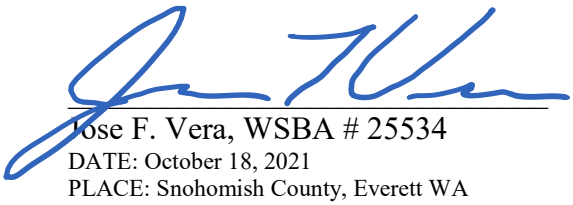
Jose F. Vera, Attorney at Law WSBA #25534

CERTIFICATE OF SERVICE

I, Jose F. Vera, hereby declare under penalty of perjury of the laws of Washington State, that on the dates listed below that I caused a true and correct copy of the documents listed below to be delivered to the below listed parties in the manner indicated.

PETITION FOR REVIEW

Mr. Christopher Constantine Of Counsel, Inc. P.S. P.O. Box 7125 Tacoma, Washington 98417-0125 Ofcounsl1@mindspring.com Date: October 18, 2021	☐ ☒ ☐ ☒	Cert. U.S. Mail, postage prepaid Delivered by Court E-filing System Overnight Courier Email
Court of Appeals Clerks Office One Union Square 600 University Street Seattle, WA 98101-1176 Date: October 18, 2021	☐ ☒ ☐ ☐	Cert. U.S. Mail, postage prepaid Filed by Court E-filing System Overnight Courier Email



Jose F. Vera, WSBA # 25534
DATE: October 18, 2021
PLACE: Snohomish County, Everett WA

APPENDIX A

FILED
8/16/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BOUNCE AND LASERTAG, LLC d/b/a, PUMP IT UP; and MUNNA CHOUDHRI, Respondents/Cross Appellants, v. KENT EAST COMMERCIAL, LLC; SATWANT SINGH; PRADEEP RATHINAM, and his marital community; and SHARMILA RATHINAM, and her marital community, Appellants/Cross Respondents.	No. 81132-1-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Kent East Commercial LLC (KEC) and Bounce and Lasertag LLC (Bounce) arbitrated a dispute over their commercial lease agreement. KEC appeals the trial court's order denying its motion to vacate and confirming the arbitration award. KEC argues the face of the award shows the arbitrator erred in awarding Bounce damages for lost profits. Bounce cross appeals, arguing the trial court erred in striking exhibits offered in opposition to KEC's motion to vacate. Because the face of the award shows the arbitrator exceeded his authority in awarding consequential damages prohibited under the lease, we reverse the trial court's order confirming the arbitration award and remand for the trial court to vacate the award and order a rehearing.

FACTS

In March 2017, KEC and Bounce executed a retail lease agreement for 10,000 square feet of commercial space in the city of Kent. Bounce planned to operate a Pump It Up franchise with "inflatable indoor playgrounds," laser tag,[1] and a pizzeria in the space. The lease included an "Arbitration Rider," calling for arbitration over most disputes.

A year and a half after executing the lease, Bounce requested arbitration, alleging KEC failed to complete tenant improvements and timely tender the space. Bounce named KEC and its members, Pradeep Rathinam, Sharmila Rathinam, and Satwant Singh, as parties to the arbitration. KEC alleged, among other things, that Bounce did not timely pay rent or its security deposit. An arbitrator held several hearings on the matter. He then issued an interim award, followed by a final award five months later.

In the final award, the arbitrator determined both parties had breached the lease. He awarded Bounce[2] $858,639 for lost profits and "miscellaneous" damages. He then reduced the award because the damages were "excessive and too speculative for a new operation that has not opened for business." The arbitrator also reduced the award to reflect that Bounce was 20 percent "culpable for what occurred." He settled on $500,000 in damages for Bounce.

The arbitrator awarded KEC $814,842 in damages for completed tenant improvements, lost rent, common area maintenance charges under the lease,

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[1] "Laser tag" is a game in which players use toy guns to shoot infrared beams at each other while wearing specially designed vests sensitive to infrared light.

[2] The award also named Munna Choudhri, a member of Bounce. Choudhri signed the lease on behalf of Bounce.

cost of demolition and disposal, and commissions to release the premises. He then reduced the award by 80 percent commensurate with KEC's "degree of culpability." The net result of the arbitration award was $337,032 in favor of Bounce. The arbitrator also concluded that Bounce was the substantially prevailing party and awarded $80,768 in attorney fees and costs under the lease. In total, KEC and its members were held jointly and severally liable to Bounce for $417,800 in damages, attorney fees, and costs.

Bounce petitioned the King County Superior Court to confirm the arbitration award. KEC moved to vacate the award, arguing that the arbitrator exceeded his authority in awarding Bounce lost profits and holding individual members of KEC jointly and severally liable. In the alternative, KEC moved to modify the award because the arbitrator improperly reduced damages using the "tort-based concept of comparative fault." Bounce opposed the motions. It offered exhibits to show that KEC "was once again trying to game the justice system." The trial court granted KEC's motion to strike the exhibits.

After oral arguments, the court entered an order confirming the arbitration award. The court denied KEC's motions to vacate or modify. It entered a joint and several judgment against KEC, Pradeep,[3] Sharmila, and Singh.

KEC, Pradeep, Sharmila, and Singh (collectively KEC) appeal and Bounce cross appeals.

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[3] We refer to Pradeep Rathinam and Sharmila Rathinam by their first names for clarity and intend no disrespect by doing so.

ANALYSIS

KEC argues that the trial court erred in confirming the arbitration award and entering judgment. Bounce cross appeals the trial court's order striking its exhibits offered in response to KEC's motions to vacate or modify the award.

Arbitration Award

KEC contends the trial court should have vacated the arbitration award because the face of the award shows that the arbitrator exceeded his authority in awarding Bounce its lost profits. According to KEC, lost profits are consequential damages, which the lease excludes. We agree.

Our courts encourage arbitration as a simpler, faster, and less expensive alternative to litigation. Mainline Rock & Ballast, Inc. v. Barnes, Inc., 8 Wn. App. 2d 594, 608, 439 P.3d 662, review denied, 193 Wn.2d 1033, 447 P.3d 158 (2019). To prevent parties from frustrating this goal by relitigating arbitration awards, we afford significant deference to arbitrators. Boyd v. Davis, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). Our review of an arbitrator's award is limited "to that of the court which confirmed, vacated, modified, or corrected that award." Cummings v. Budget Tank Removal & Envtl. Servs., LLC, 163 Wn. App. 379, 388, 260 P.3d 220 (2011). We review only whether one of the statutory grounds to vacate an award exists. Salewski v. Pilchuck Veterinary Hosp., Inc., PS, 189 Wn. App. 898, 903-04, 359 P.3d 884 (2015). The party challenging the award has the burden of proving the existence of one of the grounds to vacate under RCW 7.04A.230(1). Salewski, 189 Wn. App. at 904.

KEC contends that the arbitration award here should be vacated under RCW 7.04A.230(1)(d). That section requires vacation of an award if the "arbitrator exceeded the arbitrator's powers." RCW 7.04A.230(1)(d).

In considering a motion to vacate an award because the arbitrator exceeded his powers, we examine whether the arbitrator decided a nonarbitrable issue, or whether there is an error of law on the face of the award. Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 288, 654 P.2d 712 (1982); Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 239, 236 P.3d 182 (2010).

> The "facial legal error standard is a very narrow ground for vacating an arbitral award." It does not extend to a potential legal error that depends on the consideration of the specific evidence offered or to an indirect sufficiency of the evidence challenge.[4]

Salewski, 189 Wn. App. at 904 (quoting Broom, 169 Wn.2d at 239). Instead, the error must be recognizable from the " 'face of the award.' " Salewski, 189 Wn. App. at 904 (quoting Federated Servs. Ins. Co. v. Pers. Representative of the Estate of Norberg, 101 Wn. App. 119, 123, 4 P.3d 844 (2000)). When a final award sets forth the arbitrator's reasoning along with the amount awarded, "any issue of law evident in the reasoning may also be considered as part of the face of the award." Cummings, 163 Wn. App. at 389.

KEC contends the arbitrator exceeded his authority by awarding Bounce lost profits as damages for KEC's breach. To address KEC's claim, we first "look to the contract to identify the issues the parties agreed to arbitrate and, therefore,

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[4] Bounce invites us for the first time on appeal to abandon the facial legal error doctrine and "articulate a new standard that supports the policy underlying the 2005 Legislative changes to Washington's Arbitration Act," chapter 7.04A RCW. See LAWS OF 2005, ch. 433. We decline the invitation. We note, however, that we have continued to apply the facial legal error standard even after the 2005 amendments to the arbitration act. See Salewski, 189 Wn. App. at 904 (citing Broom, 169 Wn.2d at 239).

the scope of the arbitrator's authority." Morell v. Webush Morgan Sec. Inc., 143 Wn. App. 473, 485 n.4, 178 P.3d 387 (2008). Here, the parties executed an Arbitration Rider to their lease that subjects all claims "[o]ther than an action by Landlord against Tenant for nonpayment of Rent or for unlawful detainer" to arbitration. This includes "any controversy or claim arising out of or relating to the Lease, or the breach thereof." The parties agreed that they would conduct the arbitration "pursuant to the American Arbitration Association . . . Commercial Arbitration Rules with Expedited Procedures in effect on the date the parties entered into the Lease." They also agreed that the arbitrator "shall apply substantive law of the state in which the Premises are located and may award any remedy available at law or equity."

From the face of the arbitration award, we can determine that paragraph 21 of the lease provides, in part, " 'If [KEC] fails to cure any such default within the allotted time, [Bounce]'s sole remedy shall be to seek actual money damages (but not consequential or punitive damages) for loss arising from [KEC]'s failure to discharge its obligations." Under Washington law, "actual damages," otherwise known as "general damages," are awarded to compensate for actual and real loss or injury. Ellingson v. Spokane Mortg. Co., 19 Wn. App. 48, 57, 573 P.2d 389 (1978). General damages flow from the breach of a contract "in the ordinary course of events." RESTATEMENT (SECOND) OF CONTRACTS § 351(2)(a) (AM. LAW INST. 1981). In contrast, "consequential damages" are "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act." BLACK'S LAW DICTIONARY 472 (10th ed. 2014).

Lost profits may be awarded as damages "when (1) they are within the contemplation of the parties at the time the contract was entered, (2) they are the proximate result of [a party]'s breach, and (3) they are proven with reasonable certainty." Tiegs v. Watts, 135 Wn.2d 1, 17, 954 P.2d 877 (1998). Lost profits are consequential damages "when they would have been generated by transactions that were separate from, but depended upon, the contract that was breached." 25 DAVID K. DEWOLF ET AL., WASHINGTON PRACTICE: CONTRACT LAW & PRACTICE § 14:8, at 411 (3d ed. 2014).

The arbitrator awarded Bounce lost profits because "if the pizzeria had been able to open within a reasonable time frame, Claimant would have been able to make money from its operations." Profits generated from Bounce's operational pizzeria would be separate from, but depend on, the timely completion of tenant improvements under the lease. As a result, they are consequential damages disallowed under paragraph 21 of the lease.

Bounce contends the arbitrator "awarded lost profits based on his assessment of the Lease terms and the Parties' intent," which is not subject to review under the facial legal error doctrine. But the arbitrator's reasoning in the award does not support Bounce's argument. The arbitrator did not find that the terms of the lease reveal an intent by the parties to include lost profits as available damages. Rather, the arbitrator relied on New York case law to reclassify summarily the lost profits as actual damages.[5] He reasoned that the lost income "fall[s] naturally and necessarily from a breach of the Lease," was

[5] As much as the arbitrator relied on New York case law to reach this conclusion, he exceeded his powers. The Arbitration Rider called for resolving disputes using only Washington law.

"certainly foreseeable to the Landlord," and "[f]or the Tenant operating a small business, loss of income is about the only meaningful remedy available." He noted that the lease does not define "consequential damages"—"[there is] nothing that says lost income is a component of consequential damages or that lost income is prohibited as damages under the Lease." But the parties agreed to resolve their disputes under Washington law. And lost profits as awarded here are consequential damages under Washington law. On the face of the arbitration award, the arbitrator exceeded his authority in awarding lost profits as damages for KEC's breach of the lease.

When an arbitrator exceeds their authority in issuing an arbitration award, the court "shall vacate" the award. RCW 7.04A.230(1)(d). Upon vacating an arbitration award, "the court may, in its discretion, direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the agreement." Davidson v. Hensen, 135 Wn.2d 112, 120, 954 P.2d 1327 (1998). Because the arbitrator exceeded his authority by awarding Bounce lost profits, we remand to the trial court to vacate the arbitration award and order a rehearing.[6]

Order Striking Exhibits

Bounce cross appeals the trial court's order striking several exhibits offered in response to KEC's motions to vacate or modify the arbitration award.

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[6] KEC also argues that the arbitrator exceeded his authority in naming individual members of KEC as parties to the arbitration and holding them jointly and severally liable. We do not reach this issue as we conclude that the trial court must vacate the arbitration award on separate grounds. Additionally, KEC contends that the arbitrator exceeded his authority by "importing the tort-based concept of comparative fault into an action for breach of a lease." We also do not reach this issue but note that the Arbitration Rider affords the arbitrator broad discretion to fashion damages in equity, so long as they are not contrary to Washington law.

According to Bounce, the court should have considered the exhibits in response "to the opposing party making false statements of fact about the substance of the underlying arbitration." We disagree.

We review a trial court's ruling on a motion to strike evidence for abuse of discretion. Southwick v. Seattle Police Officer John Does #s 1-5, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008). All relevant evidence is admissible. ER 402. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Evidence that is not relevant is not admissible. ER 402.

In opposition to KEC's motions to vacate or modify the arbitration award, Bounce offered several exhibits to "counter KEC's false statements and claims." The exhibits included the arbitrator's biographic information, evidence of discovery violations and sanctions incurred during arbitration, e-mails between Bounce and KEC members, and a summary letter from the arbitrator detailing a telephonic conference. But the trial court can determine any legal error in the arbitration award from only the face of the award. See Salewski, 189 Wn. App. at 903-04. As a result, evidence outside the confines of the face of the arbitration award was not relevant. The court did not abuse its discretion in striking Bounce's exhibits.

Attorney Fees

KEC argues that the trial court erred by confirming the attorney fees awarded to Bounce in the arbitration agreement. Because we vacate the

arbitration award, KEC's claim is moot. See Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005) ("A case is moot when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief.").

KEC also requests attorney fees on appeal under RAP 18.1, the terms of the lease, and RCW 4.84.330 (prevailing party in any action to enforce a contract or lease, which provides for attorney fees and costs, entitled to reasonable fees and costs). The lease agreement provides for an award of attorney fees to the prevailing party. We award KEC its fees on appeal as the prevailing party, subject to compliance with RAP 18.1(d).

Because the arbitrator exceeded his authority in awarding Bounce lost profits as damages for KEC's breach of the lease, we reverse and remand for the trial court to vacate the arbitration award and order a rehearing.

Brennan, J.

WE CONCUR:

Cox, J.

Dwyer, J.

APPENDIX B

FILED
9/17/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BOUNCE AND LASERTAG, LLC d/b/a, PUMP IT UP; and MUNNA CHOUDHRI, Respondents/Cross Appellants, v. KENT EAST COMMERCIAL, LLC; SATWANT SINGH; PRADEEP RATHINAM, and his marital community; and SHARMILA RATHINAM, and her marital community, Appellants/Cross Respondents.	No. 81132-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION AND PUBLICATION

Respondent Bounce and Lasertag LLC filed a motion for reconsideration and publication of the opinion filed on August 16, 2021 in the above case. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration and publication is denied.

FOR THE COURT:

Judge

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

BOUNCE AND LASERTAG, LLC d/b/a PUMP IT UP, Plaintiff, vs. KENT EAST COMMERCIAL, LLC, etal, Defendants.	No. 19-2-29762-0 KNT ORDER REGARDING ARBITRATION AWARD

Before the Court are several motions regarding a private arbitration award that arose out of commercial lease dispute. Petitioners, Bounce and Lasertag, LLC d/b/a Pump It Up (Bounce), seek an order confirming the arbitration award. The other parties to the dispute, Kent East Commercial, LLC, Sharmila Rathinam, Prandeep Rathinam, and Satwant Singh (collectively KEC), make two motions, one to vacate the arbitrator's award, and another to modify that award. KEC also makes a motion to strike certain exhibits provided by Bounce in its responsive briefing. For the reasons that follow, the Court GRANTS Bounce's motion to confirm the arbitration award, and denies KEC's motions to vacate and modify the award. The arbitrator's award is confirmed.

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Kent, WA 98032
(206) 477-4936

I RELEVANT FACTUAL HISTORY

This case involves a dispute over a commercial lease. Given the Court's limited review, an extensive recitation of the factual background of this case is unnecessary. The Court will, however, set out those facts that are relevant to its analysis.

The lease in question contains an arbitration rider, which notes that all disputes arising out of the lease, except those for nonpayment of rent and unlawful detainer or ejectment, "shall be resolved by arbitration." *See* Dkt. #10, Ex. 1 at Ex. A. The arbitration rider further provides that the arbitration "shall be conducted pursuant to the American Arbitration Association (the "AAA") Commercial Arbitration Rules with Expedited Procedures in effect on the date the parties entered into the Lease[.]" *Id.* The rider also includes a provision that the "arbitrator shall apply the substantive law of the state in which the Premises are located and may award any remedy available at law or equity[.]" *Id.*

After Bounce requested arbitration, the parties proceeded to arbitration. The matter was arbitrated by JAMS Arbitrator M. Wayne Blair. On May 31, 2019, the arbitrator issued a 12-page Interim Award, which left open certain questions regarding damages. On October 10, 2019, the arbitrator issued a 7-page Final Award, which awarded Bounce $337,032 in damages and $80,768 in fees and costs for a total amount of $417,800. The Final Award referenced and incorporated the Interim Award, as well as to two orders entered by the arbitrator on July 9 and August 12, 2019.

II LEGAL ANALYSIS

This Court's review of an arbitrator's award "is confined to the question of whether any of the statutory grounds for vacation [or modification] exist." *Cummings v. Budget Tank Removal & Envtl. Servs., LLC*, 163 Wn. App. 379, 388, 260 P.3d 220 (2011). The party seeking

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(206) 477-4936

vacation or modification bears the burden of demonstrating that the requisite statutory grounds exist. *Id.* Here, KEC moves to vacate the award under RCW 7.04A.230(1)(d), which provides for vacation of an award where an "arbitrator exceeded the arbitrator's powers." All parties agree that under this prong, it is appropriate for the Court to determine whether facial legal error exists under *Boyd v. Davis*, 127 Wn.2d 256, 899 P.2d 1239 (1995).[1] Exactly what constitutes facial legal error is not altogether clear to this Court because in the Court's view, the line between examining legal errors on the face of the award (which is permissible) is hard to distinguish between de novo review (which is prohibited). Perhaps that is why is its exceedingly rare for courts to vacate an award based on facial legal error. *See, e.g., Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010). Under the limited facial legal error review, "courts may not search the arbitral proceedings for any legal error; courts do not look to the merits of the case, and they do not reexamine evidence." *Id.* Allowing such searching review would be contrary to the underlying policy of arbitration—more efficient and less expensive litigation—and "[a]rbitration's desirable qualities would be heavily diluted, if not expunged, if a

[1] Despite the parties' agreement on this Court's review, this Court agrees with Division III's observation that the facial legal error standard may not have survived more recent amendments to the arbitration statute because prior case law relied on statutory language that expressly mentioned legal error and the current statute does not mention legal error. *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn. App.2d 594, 608, 439 P.3d 662 (2019) (citing *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995)); *see also id.* at 691 (Lawrence-Berrey, C.J., concurring). The Court also agrees with Judge Lawrence-Berrey's observation that allowing courts to examine arbitrator's awards for legal errors contained on the face of the award "discourages arbitrators from explaining their awards." *Mainline* at 620 (Lawrence-Berrey, C.J., concurring). Arbitration is supposed to be a less expensive, less vexing, and less time-consuming alternative to formal litigation. While that may be true in most cases, it does not appear to be the case here as the parties continue to argue about the substantive merits of this case. The arbitrator provided a thorough analysis of his reasoning on all fronts, and it was because he did so that the parties are now able to argue under the facial legal error doctrine that the entire arbitration award should be vacated and the parties should be sent back to arbitrator for proceedings anew. That is the "hazard" of providing a detailed and reasoned arbitration award. *Mainline Brick*, 8 Wn. App. at 614.

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trial court reviewing an arbitration award were permitted to conduct a trial de novo." *Mainline Rock*, 8 Wn. App.2d at 608 (2019) (citation omitted). It is against this legal backdrop that this Court reviews KEC's request to vacate the arbitrator's award.

A. Request to Vacate the Award.

KEC first requests that this Court vacate the arbitrator's award because the arbitrator made three legal errors that appear on the face of the award. The Court will discuss each in turn.

1. Delay Damages.

KEC's first argument is that the arbitrator misinterpreted the lease when it concluded that section 3.b of the lease did not apply to the facts of the case and this misinterpretation of the lease led the arbitrator to award "damages for delay." *See* Dkt. #6 at p. 7 ("The lease said there would be no damages for failure to deliver possession."). While KEC frames the issues as one regarding the enforceability of exculpatory clauses under Washington law, KEC is, in reality, requesting that this Court examine the arbitrator's legal reasoning and interpretation of the contract.

Under the facial legal error standard, this Court is not permitted to review an arbitrator's interpretation of a contract. *See, e.g.*, *Cummings*, 163 Wn. App. at 389-90 (2011) (citation omitted). Here, the arbitrator explained that section 3.b of the lease did not apply in this case because under his reading of the lease and the "circumstances" of the case, the lease provision in question only applied to "delay in possession," as opposed to "denied possession." *See* Dkt. #6 at p. 5 (quoting arbitrator's reasoning and interpretation of contract). Given this conclusion, the arbitrator determined that another section of the lease (section 21) applied to the assessment of actual damages. *See id.* Whether this Court agrees or disagrees with the arbitrator's interpretation of the lease provisions in question does not matter under the circumscribed review this Court is

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permitted to engage in. Engaging in a contractual analysis, as KEC asks this Court to do, is tantamount to de novo review, which is not appropriate. *Salewski v. Pilchuck Veterinary Hosp., Inc.*, 189 Wn. App. 898, 904, 359 P.3d 884 (2015). Doing so would ask this Court to delve into the substantive merits of the claim, which is prohibited territory. *Mainline Rock*, 8 Wn. App.2d at 610. For these reasons, the Court will not vacate the arbitrator's award on this basis.

2. Lost Profits.

KEC's second argument is that the arbitrator improperly recharacterized lost profits from consequential damages to actual damages, which KEC says is legally incorrect under Washington law and "displays a lack of impartiality" because the arbitrator's written decision cites a New York case to support its reasoning. *See* Dkt. #6 at p. 9. In explaining his award, the arbitrator wrote:

> As I read the Lease, there is no definition of consequential damages—nothing that says lost income is prohibited as damages under the Lease. Does any loss here such as lost income fall naturally and necessarily from a breach of the Lease? I conclude that it does. For the Tenant operating a small business, loss of income is about the only meaningful remedy available. It was certainly foreseeable to the Landlord. In this situation, I conclude that lost income constitutes actual damages and not consequential damages and is, therefore, not prohibited by the language of the Lease.

Id. at 8. In essence, the arbitrator made a factual finding that the lease itself did not preclude loss profits as a viable basis on which to award damages in this case.

In the context of this case and the arbitrator's factual determination, the fact that many courts view lost profits as consequential damages does not mean that the particular lease that the arbitrator was construing required a similar determination. Thus, this is not case where, for example, an arbitrator awards a party damages that are expressly prohibited under Washington law. *See, e.g., Kennewick Educ. Ass'n v. Kennewick Sch. Dist. No. 17*, 35 Wn. App. 280, 666

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P.2d 928 (1995) (vacating award or punitive damages because "[i]t has long been established that recovery of punitive damages is contrary to the public policy of the State and will not be allowed unless expressly authorized by statute."). Unlike punitive damages, there is no longstanding public policy expressly prohibiting lost profits from being considered actual, as opposed to consequential, damages. As with KEC's claims regarding delay damages, KEC is asking this Court to re-evaluate the evidence and re-interpret the lease in question. As previously explained, doing so would not be appropriate under the facial legal error standard. Accordingly, this Court will not vacate the arbitrator's award on this basis.

3. Individual Liability.

Finally, KEC claims the arbitrator made an error on the face of the award by holding KEC and its individual members jointly and severally liable. In support of this argument, KEC first argues that the Court should examine a specific lease provision (section 30) that was not addressed or referenced in the arbitrator's award. It is not, however, appropriate under the facial legal error standard for this Court to examine and interpret provisions of the lease that were not cited or discussed in the arbitrator's award. *See, e.g.*, *Mainline Rock*, 8 Wn. App.2d at 611 (2019) ("We follow the rule that the court may not review contract language not quoted in the arbitration award."). To do so, would require this Court to analyze and interpret the specific lease provision and doing so "goes beyond facial error . . . and conflicts with the goals of [arbitration which is] avoiding extensive and expensive litigation." *Id.*

Next, KEC argues that this determination should be vacated because the award itself "is simply devoid of any discussion of why the arbitrator entered the award jointly and severally." This is an inadequate basis upon which to vacate the award. Under the arbitration statute, arbitrators are not required to provide parties with any "findings of fact or conclusions of law"

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when issuing an award. *Barnett v. Hicks*, 119 Wn.2d 151, 156, 829 P.2d 1087 (1992); *see also Cummings*, 163 Wn. App. at 391 (2011) ("But in reviewing an arbitration award, a court does not insist upon or even look for a comprehensive explanation of the arbitrator's reasoning."). Accordingly, the arbitrator's failure to explain why he imposed joint and several liability is not a basis upon which to vacate the award.

Lastly, KEC cites to numerous decisions from federal and state courts around the country to support the proposition that an arbitrator may not bind someone who was not a party to the contract to arbitrate and therefore this is "truly a situation where an arbitrator went rogue." Dkt. #6 at p. 16. In making this argument, KEC acknowledges that "there are no Washington cases where an arbitrator tried to bind a nonparty to the arbitrator decision." *Id.* This argument is unconvincing because the individual members were parties to the arbitration, as is evident from the face of the award. If the individual members were not parties to the arbitration, KEC's arguments would have much more force. This fact, when combined with the fact that the arbitrator was under no statutory obligation to explain his reasoning in this regard and does not reference the lease provision KEC relies upon to support its argument, leads this Court to conclude that the arbitrator's award should not be vacated on this ground.

B. Modification of award.

Alternatively, KEC argues that this Court should modify the arbitrator's award. RCW 7.04A.240 notes the various statutory bases upon which this Court can modify an arbitration award. KEC argues that the arbitrator's award should be modified because the arbitrator "clearly made a mistake in applying the law by (1) including the Members in the award and (2) applying contributory fault concepts to reciprocal breaches." Dkt. #5 at p. 3. While KEC cites that statutory language that allows for modification of the arbitrator's award, it does not tie any

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(206) 477-4936

particular statutory provision to any particular alleged error. Instead, KEC complains that the arbitrator conducted the arbitration in a "lazy, slipshod manner," that the arbitrator could "not be bothered to even detail the damages in a contract dispute," and ultimately concludes "[t]he arbitrator did a horrible job. He got the law terribly wrong." Dkt. #11 at p. 11.

As to the first basis for modification, this Court has already determined that it will not vacate the award based on the arbitrator's conclusion that the arbitration award shall apply jointly and severally among KEC and its members. The Court will deny the modification request on the same basis. As to the second grounds for modification—that the arbitrator improperly incorporated tort law principles into a breach of contract/lease—this Court will not modify the award on this basis for two independent reasons. First, none of the statutory factors courts must consider when modifying an award apply to KEC's modification request.

Second, even if this Court reviews this as a proper request to modify the award, the Court concludes that in order for KEC to prevail, this Court would have to re-examine the merits of the arbitrator's decision, which is not appropriate. *See, e.g.*, *Clark Cnty. Pub. Utility Dist. No. 1 v. Int'l Brotherhood of Electrical Workers*, 150 Wn.2d 237, 239, 76 P.3d 248 (2003). KEC argues that the arbitrator's award is internally inconsistent because on the one hand the arbitrator noted that evidence of damages was speculative, while on the other hand he awarded a portion of those same damages. *See* Dkt. #5 at p. 5 ("It is clear, facial error to label the evidence as speculative and then award it."). It also argues that considering the "culpability" of the parties in discounting the award in the context of a breach of contract arbitration was a "blatant error of law." *See* Dkt. #5 at 7 ("But there is no authority to use culpability in a contract case."). KEC cites no Washington authority other than the comparative fault statutes in support of its position. It does, however, cite to federal and other state authority.

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401 Fourth Avenue N.
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(206) 477-4936

Even if this Court were to agree with KEC that it is not appropriate for tort principles to be utilized to determine a set-off in a contractual case, this Court cannot modify the award on this basis because KEC agreed to an arbitration proceeding governed by AAA Commercial Rules. And Rule R-47, entitled Scope of Award, provides the arbitrator with the authority to "grant any remedy or *relief that the arbitrator deems just and equitable* and within the scope of the agreement of the parties[.]" (emphasis added). And while KEC correctly points out that the arbitration rules cannot overcome the express dictates of Washington state law; *see, e.g.*, *Broom*, 169 Wn.2d at 241 (2010), the arbitration rider permitted the arbitrator to "award any remedy available at law *or equity*." (emphasis added). Under Washington law, "[e]quity includes the power to prevent the enforcement of a legal right when to do so would be inequitable under the circumstances." *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460, 45 P.3d 594 (2002). "The goal of equity is to do substantial justice to the contracting parties." *Id.* In this Court's view, the arbitrator's use of the term "culpability" in setting-off damages merely reflects the invocation of the arbitrator's equitable powers which were provided to him under the parties' contractual arrangement and which were consistent with Washington law. For these reasons, the Court will not modify the arbitrator's award.

C. Other Requested Relief.

Bounce argues that if this Court does not confirm the award, then it should vacate the award because the arbitrator apparently dismissed a claim that was not brought and because he made a facial legal error relating to the timing and legal consequences of that timing regarding the parties' respective breaches of the lease at issue. The Court understands that this is an alternative argument, and therefore because this Court confirms the arbitrator's award, the Court DENIES any request by Bounce to vacate or modify the award as MOOT. In its response papers,

MICHAEL K. RYAN, JUDGE
King County Superior Court
Maleng Regional Justice Center
401 Fourth Avenue N
Kent, WA 98032
(206) 477-4936

KEC filed a motion to strike certain exhibits attached to a declaration provided by Bounce's counsel. The Court GRANTS KEC's Motion to Strike and the Court did not consider any of those materials in making the ruling set out above.

III CONCLUSION

For the reasons stated above, this Court (1) GRANTS Bounce's Motion to Confirm the Arbitration Award; (2) DENIES as MOOT any alternative relief requested by Bounce; (3) DENIES KEC's Motion to Vacate the Award; (4) DENIES KEC's Motion to Modify the Award; and, (5) GRANTS KEC's Motion to Strike.

Accordingly, the arbitrator's award is CONFIRMED.

DATED this 22nd day of January, 2020.

Michael K. Ryan, Judge

MICHAEL K. RYAN, JUDGE
King County Superior Court
Maleng Regional Justice Center
401 Fourth Avenue N.
Kent, WA 98032
(206) 477-4936

APPENDIX D

JAMS ARBITRATION

No. 1160022690

Bounce and Lasertag, LLC d/b/a Pump It Up,

Claimant

and

Kent East Commercial, LLC, Pradeep Rathinam, Shamila Rathinam, and Satwant Singh,

Respondents.

FINAL ARBITRATION AWARD

With reference to the above arbitration, on May 31, 2019, I submitted an Interim Arbitration Award in this matter. Many of the terms used below are defined or described in the Interim Award. In the Interim Award, I asked to schedule an additional in-person hearing to receive more evidence and argument from counsel to determine damages.

An additional preliminary hearing was held by telephone on July 9, 2019, to plan for the hearing on damages and to set a date for that hearing. In that hearing, counsel for Respondents raised the question, now that many issues had been decided by the Interim Award, of the continued applicability of the economic loss rule (also now known as the independent duty rule) to the Claimant's claim against Respondents of tortious interference with business expectancy. Respondents' counsel argued that it was important to address that issue now before the hearing on damages because such would greatly simplify the discovery that would be needed for the damages hearing if the issue were still unresolved. I agreed to have another preliminary hearing without oral argument to consider that question. At the same conference call, I set the additional hearing on damages for September 17, 2019.

Submissions on the issue of the applicability of the independent duty rule were submitted to JAMS by July 19 as requested. The primary issue for me to address following a review of the submittals was the continued applicability of the economic loss rule to the Claimant's claim of tortious interference with business expectancy. I received a number

of submissions as described in my order dated August 12 and addressed the tortious interference claim. I decided that the tortious interference claim had not been adequately proved and should be dismissed. In some of the submittals received prior to the August 12 order, Claimant also moved to have me assess terms (a financial penalty) against the Respondents. I read and considered the information submitted requesting terms and hereby decide to deny the motion to assess terms as being inappropriate and without adequate justification.

The hearing on damages was held at the JAMS offices in Seattle on September 17, 2019, beginning at 9:30 a.m. The hearing ran almost continuously without a lunch break until 3:00 p.m. I received, prior to the hearing, additional briefs from all parties. I read and considered those briefs and other submissions. Both Jose Vera and Martin Burns, as counsel for the parties, were in attendance at the damages hearing to present evidence and argument on behalf of their respective clients. In addition, Akthar Khan Sherani, for the Claimant and Satwat Singh, for the Respondents, testified at the hearing. The hearing closed September 17, 2019.

1. **Who pays what damages?** As I said in the Interim Award, Tenant is to pay damages to Landlord for breach of the Lease in failing to pay in a timely way the prepaid Deposit and the Letter of Credit. Landlord is to pay damages to Tenant for failing to build out the Premises and to pay the full-cost of Tenant Improvements, which is a Landlord responsibility under Exhibit C and in seeking to have the Tenant begin to pay the rent as of August 1, 2017, before it was due (and when it was not paid within 5 days of notice declared a default and terminated the Lease) and finally in refusing to deliver a key to the Premises. The default here by Landlord occurred when the Landlord made demands upon Tenant which were not consistent with the Lease, would not turn-over a key to the Premises so that the Tenant could install its pizza-baking equipment and the Pump It Up playground equipment. All this occurred on or about August 18-22, 2018. Tenant informed Landlord on or about September 3, 2018 that Landlord was in default under the Lease and demanded that the tenant improvements be completed by Oct 1, 2018. When the tenant improvements were not completed, the Tenant demanded arbitration by letter dated September 24, 2018 contending that Landlord was in breach of the Lease by failing to complete the Lease's Tenant Improvements work that had been scheduled and by failing to deliver timely the Premises to Tenant so that the Lease Commencement Date could begin.

   Paragraph 21 of the Lease provides in part that "Landlord shall not be in default unless Landlord fails to perform obligations required of Landlord within a reasonable time, but in no event less than thirty days (30) after notice

by Tenant to Landlord. If Landlord fails to cure any such default within the allotted time, Tenant's sole remedy shall be to seek actual money damages (but not consequential or punitive damages) for loss arising from Landlord's failure to discharge its obligation under this Lease. . . ."

Landlord argues that the required notice of default was not effective because Landlord did not receive 30 days notice to cure the default—that it only received 28 days notice sent by email which was from September 4. I believe that 28 days notice is sufficient here since Landlord had no intention to cure anything by October 3 or at anytime after that. The purpose of the minimum 30 days notice was for Landlord to have an opportunity to cure the default, if it could and so desired, so that Tenant would not seek any remedies against Landlord. Substantial compliance seems sufficient here under the circumstances; but, in any event, the Demand for Arbitration dated September 24, 2018 described the default and provided more than 30 days notice. That step satisfied, in my view, any compliance issue.

Landlord also argues that it is not responsible for any damages for delay in the project under paragraph 3.b. of the Lease which provides that if possession by Tenant is delayed, Tenant's remedy is to delay the Commencement Date of the Lease or elect to cancel the Lease, but not to seek damages. As drafted, the language in paragraph 3.b. only addresses delay in possession. It does not address the situation we have here, which is denied possession by Landlord because of a dispute with the Tenant over interpretation of some of the provisions of the Lease. Until the dispute is resolved, Landlord had no intention of granting Tenant possession of the Premises. Under these circumstances, I do not believe that paragraph 3.b. is applicable to the issue of assessment of damages for delay. I think that paragraph 21, as cited above, is applicable and that actual damages can be assessed here for denial of possession.

Landlord also argues that Landlord by its conduct expressed in an email to Akthar dated August 18, demanding Tenant promptly comply with revised financial terms in the Lease as those terms are described in paragraph 13 of the Interim Award, did not breach the Lease. This demand was made approximately 13 days before Tenant was to take possession of the Premises. Landlord argues that such demand was merely an invitation for continued negotiation and could not constitute a breach of the Lease as I found Landlord's conduct to be. While Landlord makes a good point, I found that Landlord's conduct through Pradeep, who sent the email, to constitute a breach based on subsequent events which happened in rapid succession over the next couple of days. Akthar responded to Pradeep by email the next day that he could not afford to make those payments. Pradeep replied by text

message the next day (Aug 20) "Unfortunately, we are not in agreement with you and hence does not make sense to do any delivery [of pizza equipment]. Our stance is clear and so probably best that we part amicably and move forward." For all practical purposes, after August 20, 2018, the Landlord and Tenant were no longer working together. Landlord did no further work on Tenant Improvements and never provided a key to the premises to Akthar. I still consider that the breach by Landlord effectively occurred with the demand letter dated August 18, 2018, (unilaterally demanding a change in the financial terms of the Lease). I do not accept Landlord's argument.

Next Landlord argues that lost income as that term is used by Tenant is nothing more than a form of consequential damages and is prohibited under the Lease as stated in Section 21 and in several other places in the Lease as well. As such, Landlord argues, Tenant is not entitled to any lost income in its pursuit of damages in this dispute. I agree that consequential damages are prohibited under the Lease.

2. **Are Claimant's Lost Profits Actual or Consequential Damages?** As stated above, the Lease provides in part in Section 21, "Landlord shall not be in default unless Landlord fails to perform obligations required of Landlord within a reasonable time, but in no event less than thirty (30) days after notice by Tenant to Landlord. If Landlord fails to cure any such default within the allotted time, Tenant's sole remedy shall be to seek actual money damages (but not consequential or punitive damages) for loss arising from Landlord's failure to discharge its obligations under this Lease." As part of its claim for damages, the Claimant is requesting, as a remedy for damages against the Landlord, lost income for a period of 48 months. Does the term lost income here mean actual damages or consequential damages? Actual damages are intended to put the Tenant in the position it would have been in had there been no breach of the Lease by the Landlord. As I read the Lease, there is no definition of consequential damages—nothing that says lost income is a component of consequential damages or that lost income is prohibited as damages under the Lease. Does any loss here such as lost income fall naturally and necessarily from a breach of the Lease? I conclude that it does. For the Tenant operating a small business, loss of income is about the only meaningful remedy available. It was certainly foreseeable to the Landlord. In this situation, I conclude that lost income constitutes actual damages and not consequential damages and is, therefore, not prohibited by the language of the Lease. *Biotronik A.G. v. Conor Medsystems Ir., Ltd., 22 N.Y.3rd 799, 806 (N.Y. 2014).* I find in general that if the pizzeria had been able to open within a reasonable time frame, Claimant would have been able to make money from its operations—in the same way that Claimant's current pizza operation is

making money in Tacoma. Lost profits are the only damages available to Claimant under the circumstances and, therefore, really fall in the category of actual damages.

3. **Culpability of the Parties.** In the Interim Arbitration Award, I described in some detail my view of what occurred and who was at fault and why. I found both Claimant and Respondents to have breached the Lease and to be answerable for damages. My approach to assessing damages following the hearing on damages is to base it on my view of the degree of culpability of the Landlord's and Tenant's conduct resulting in their respective breaches of the Lease. In my view, the Respondents are 80% culpable and the Claimant is 20% culpable for what occurred. The Claimant's breach of the Lease was technical and insubstantial. While the Respondent's breach of the Lease was substantial and fundamental. I will assess damages on the basis of the extent of culpability as I find it. Whatever damages I find below that Claimant is entitled to will be reduced by 20%. Likewise, whatever damages I find that Respondents are entitled to will be reduced by 80%.

4. **Claimant's Damages.** The below damages are based upon evidence submitted by Claimant at the arbitration hearing.

   The Claimant is asking for lost profits of $833,640.00 for a 48 month period, broken down into its component parts as follows:

   Lost annual income for Munna Choudhri for 48 months
   $286,000
   Lost monthly net income from failure to operate in-house pizza
   $167,640
   Lost monthly net income for Kent East location
   $379,999
   Total Lost Income
   $833,639

   Miscellaneous Damages
   $25,000

   Total Damages Claimed
   $858,639

While I believe the damages are real, I also think they are excessive and too speculative for a new operation that has not opened for business. I am going to reduce the lost income number to $600,000 plus miscellaneous damages of $25,000 for a total of (in round numbers) $625,000 and apply a 20% discount and arrive at **$500,000 in total damages.**

In this matter, damages are not subject to precise calculation; but they are real and I am making estimates of damages based upon my experience with this case. Such is true for both Claimant's damages and Respondents' damages.

5. **Respondents' Damages.** Respondents' claimed damages for building out the Tenant Improvements, lost rent during period of no occupancy (3/19 to 9/19), lost rent on reletting the Premises (15 months), common area maintenance charges (per the Lease), cost of demolition and disposal, commissions to release the Premises.

   Cost to build out the space (make Tenant Improvements)
   $487,759

   Lost Rent (between 3/19 and 9/19)
   $75,833

   Lost Rent on reletting Premises (15 months)
   $137,500

   CAM charges per Lease (15 months)
   $56,250

   Demolition improvements and disposal of waste
   $30,000

   Commissions to release Premises
   $27,500

   Total Damages Claimed
   $814,842

   As stated above, I am going to apply an 80% discount based upon culpability of Landlord for a total damage number of $162,968.

6. **Net Award to Claimant.** I will therefore grant to Claimant a net award of $337,032 and Respondents will take nothing in damages.

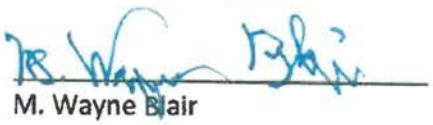
7. **Tortious Interference.** The claim for tortious Interference with business expectancy is hereby dismissed as provided in my order of August 12, 2019.

8. **Attorneys' Fees.** Both parties argue that they were the prevailing party in this arbitration and are entitled to attorneys' fees and costs as set forth in Section 27 of the Lease. Claimant is seeking total fees and costs of $108,624 which includes time through 9/23/2019 and this number includes $11,171 that I assessed in terms against Respondents by order dated January 10, 2019 and which number should be reduced by about $20,600 for JAMS arbitration fees. As stated below, each side will pay their own JAMS arbitration fees. Respondents are seeking fees and costs of $95,481.36. As stated above, no Party prevailed on all issues. I am therefore going to apply a flexible standard to the allocation of fees and costs. The use of the term fees means attorneys' fees and the term costs means out-of-pocket expenditures to carry-on the litigation. While Respondents prevailed on several issues, as argued in their brief, they did not prevail on the major issue in this case. I consider Claimant to be the substantially prevailing party and will award and do hereby award Claimant 90% of its fees and costs including the terms assessed for fees and costs less JAMS arbitration fees for a total in fees and costs of $80,768. I will not apply any discount to the amount assessed in terms.

9. **JAMS Arbitration Fees.** Each side will pay their own JAMS arbitration fees of about $20,600 each.

10. **Final Award.** Claimant is entitled to and is hereby awarded the sum of $337,032 against Respondents jointly and severally plus fees and costs of $80,768 for a total of $417,800. This Award is in full and final resolution of all claims and counterclaims submitted to this arbitration (or which could have been submitted) and is complete and final. All claims and counterclaims not expressly addressed herein are hereby denied. The Final Award includes the Interim Award dated May 31, 2019, the Orders of Arbitrator dated July 9 and August 12 of 2019. These documents are attached to this Final Award and incorporated herein by this reference and taken together constitute the complete and final arbitration award.

Dated: October 10, 2019.



M. Wayne Blair
Arbitrator

JAMS ARBITRATION
No. 1160022690

Bounce and Lasertag, LLC d/b/a Pump It Up,

Claimant

and

Kent East Commercial, LLC, Pradeep Rathinam, Shamila Rathinam, and Satwant Singh,

Respondents.

INTERIM AWARD

Counsel:

Counsel for Claimant:
Jose R. Vera Esq.
Vera & Associates
200 W. Thomas Street
Suite 420
Seattle, WA 98119
Tel: 206-217-9300
Fax: 206-217-9332
Email: josevera@veraassociates.com

Counsel for Respondents:
Martin Burns, Esq.
Burns Law, PLLC
524 Tacoma Ave. S.
Tacoma, WA 98402
Tel: 253-507-5586
Fax: 253-507-5713
Email: martin@mburnslaw.com

Arbitrator:
M. Wayne Blair
JAMS

Case Manager
Michele Wilson
JAMS
1425 Fifth Avenue, Suite 1650
Seattle, WA 98101
mwilson@jamsadr.com
Direct - 206.292.0457
Fax – 206.292.9082

Place of Arbitration: Seattle, Washington

INTERIM AWARD

The undersigned arbitrator, having been appointed by JAMS by Letter dated November 8, 2018, the Claimants at all times having been represented by Jose F. Vera of Vera & Associates PLLC and the Respondents having been represented by Martin Burns of Burns Law PLLC; having held the initial preliminary hearing on November 28, 2018; having used the Commercial Arbitration Rules and Mediation Procedures from the American Arbitration Association effective October 1, 2013; having held in-person arbitration hearings at the JAMS Seattle office on April 15, 16 17 and 23rd; having admitted Exhibits No. 1 to 108 submitted by Claimants and Exhibits No. 201 to 258 submitted by Respondents and also a set of drawings of the Premises dated 12-20-16; and having admitted all documents offered; having heard testimony from Munna Choudhri ("Mona"), Thomas Li "(Thomas"), Pradeep Rathinam, Luciano Juarez, Euntae Kim, Sharmila Rathinam ("Sharmila"), Akthar Khan Sherani ("Akthar") and Satwat Singh ("Satwat"); having received prehearing briefs from the parties; having requested and received post-hearing briefs from the parties on a legal issue relating to the "Economic Loss Rule"; having closed the hearing on May 3, 2019 and otherwise having reviewed and considered all of the pleadings, documentary evidence and testimony of the witnesses, having reviewed all the briefs, and having heard arguments of counsel, and otherwise considering myself fully informed, I make the following comments in support of my general findings (not considered findings of fact) and reach the following conclusions in support of this Interim Arbitration Award.

1. **Interim Arbitration Award.** This arbitration is a difficult case with many factual and legal issues to be addressed. Thank you, counsel, for your very professional work on behalf of your clients. The award is an Interim Arbitration Award for two reasons: (1) Because the Lease, described below, which is the basis for the dispute contains an arbitration clause that provides in Section 27 that the losing party shall pay the prevailing party a reasonable sum for attorneys' fees. I will decide the question of fees and costs at the time the Final Award is submitted; (2) I hereby reopen the hearing to schedule additional hearing time (to be held as soon as practicable) to consider additional evidence related to the "Economic Loss Rule" and the appropriate measure and calculation of damages.

2. **Nature of Dispute.** This dispute arises out of a Commercial Lease ("Lease") between Kent East Commercial LLC ("KEC"), as Landlord, and Bounce and Lasertag LLC D/B/A Pump it Up ("Bounce"), as Tenant, and is dated March 22, 2017. The Lease, among its

many provisions, provides for the lease of commercial premises located at 10210 SE 260th, Suite #103-106 located in Kent, Washington. The Tenant intended to own and operate a Pump it Up franchise (with inflatable playgrounds) and a Lasertag facility for the entertainment of children while engaging in family dining at a pizzeria. The term of the Lease was for a period of 120 months to commence August 1, 2017 or such earlier or later date as provided in Section 3 of the Lease. In Section 3, such earlier or later date as may be specified by the Landlord upon notice when the premises are ready for possession. Exhibit C of the Lease has a hand-written sentence in Section 1.6. which provides that "Rent will start from date of operation." The dispute in this arbitration centers upon the terms of the Lease relating to design and construction of Tenant Improvements in the Leased Space. Who pays for what Tenant Improvements? Who pays for the additional cost of delay?

3. **Key Words.** For purposes of reference, I will refer to the parties herein in the same way that the Lawyers did at the hearing. See above in the preamble paragraph. Sometimes I will refer to Landlord and other times to KEC ("KEC"). Sometimes I will refer to the Tenant and other times to Bounce ("Bounce").

4. **Parties to this Arbitration.** The Claimants are the Tenant, Bounce and Lasertag LLC D/B/A Pump it Up, and Munna Choudhri (Mona). Mona is the wife of Akthar and played an important role in this transaction on behalf of Tenant. Both Mona and Akthar are members of Bounce and Lasertag LLC. She not only signed the Lease as a member of Bounce; but she also signed a Guaranty of Tenant's Lease Obligation and she initialed Exhibit C to the Lease, the terms of which are in dispute. The Respondents, as named by Claimants, are Kent East Commercial LLC, the Landlord named in the Lease, and Pradeep Rathinam and Sharmila Rathinam, husband and wife, and Satwant Singh, who are all members of Kent East Commercial LLC.

5. **Applicability of Economic Loss Rule.** I asked the parties to comment on the applicability of the "economic loss rule" to the circumstances presented in this arbitration. I asked for and received briefs from both parties on Friday May 3, 2019. The economic loss rule is a creature the Washington Supreme Court first articulated in the case of *Berschauer/Phillips Construction C. v. Seattle School District No. 1*, 124 Wn.2d 816 (1994). In general terms, the rule bars a claimant from suing in tort for purely economic losses when the entitlement to recover damages arises only from a contract. The Economic Loss Rule has since been revised by the Washington Supreme Court in the case of *Eastwood v. Horse Harbor Foundation*, 170 Wn.2d 380 (2010) and is now referred to as the Independent Duty Doctrine and is best described in its revised form as the economic loss rule does not bar a party from bringing a tort claim where the tort duty is independent of the contract. The tort alleged by Claimants is that Sharmila interfered with the contractual relationship between PIU Corporate, as

franchisor, and Bounce, as franchisee by sending PIU Corporate an email dated August 22, 2018 that Bounce, as franchisee, does not intend to open its business at all. At the time of the email the statement was false. In order for me to reach a conclusion about the applicability of this rule, I need some additional information. The relevant contract here is not the Lease but the Franchise Agreement. I want a copy of that document admitted into evidence. I also wish to know the current status of the Franchise Agreement. Is it still effective? What was the effect upon the relationship between PIU Corporate and Bounce when advised by Sharmila that Tenant did not intend to open the business? Describe the negotiations leading to the Franchise Agreement. With additional information, I will rule on this issue at the time of the Final Award.

6. **Lease Continues to be a Viable Document to be Interpreted and Enforced According to its Terms.** The lease continues to be valid and enforceable. A breach by one party or the other or both does not invalidate the lease. Did the parties, through their words and deeds, abandon the lease as the Respondents contend and therefore invalidate it? In my view, the Lease continued to be a viable document, relied upon by both parties if it suited their purposes and rejected if it did not. Both Landlord and Tenant at different times were prepared to walk away from the signed Lease because of differences over various issues. It happened two or three times by both parties where the Landlord or the Tenant, or both, at different times said "we cannot work together and we need to go our separate ways." Or, that the circumstances have changed, we need to "redo" the Lease. In each instance, after a 24-hour or 48-hour cooling off period the parties came back together and said one more time "Lets try and make it work."

   Landlord contends that Bounce and KEC started as partners, and structured the lease based on the idea that Landlord and Tenant were partners and that is why Landlord expressed its intent as reflected in Claimants' Ex. 22 that Landlord intended to cover most of the Tenant Improvements as formally expressed in Exhibit C. When the concept changed and Landlord and Tenant were no longer going to be partners but instead work at "arms-length" as Landlord and Tenant, then the concept, Respondents' contend, as expressed in Exhibit C in the Lease was no longer valid and the Lease no longer effective. I reject the argument. The problem with that argument is that the Lease does not say any of that. There is not a suggestion in the language of the Lease that it was structured with a Landlord/Tenant partnership in mind. If the parties intended to change the Lease, they never got around to changing it. And they seemed to be enforcing it according to its terms when it suited one or both of their purposes. There never was a written agreement to terminate the lease or to rescind the Lease or to abandon it. Section 22a of the Lease does provide that "no act by Landlord other than notice of termination from Landlord to Tenant shall terminate

this Lease." A simple agreement that both parties signed would have terminated the lease; but neither party did that. I conclude that the Lease continued in effect following its execution and at no time was it terminated either by written agreement or by conduct of the parties, until notices of default were sent by Landlord to Tenant in October 2018 as further explained below.

7. **Respondents Did not Engage in an Effort to Take the Pump It Up Franchise from the Claimants.** The evidence does not support the contention made by Claimants that Respondents were trying to take the franchise from Claimants as they allege in their pleadings. The initial efforts by Respondents to secure a franchise were made in 2011 which was too many years ago to be relevant to this dispute. And more recently the effort was too feeble (a passing question in an email dated August 22, 2018) and only occurred after the relationship between landlord and tenant completely broke down and Respondents were looking for tenants to occupy vacant space in their building which had been vacant since 2011.

8. **Miscommunication Between the Parties and Among Others.** Miscommunication between the Landlord and Tenant and among the architect, the contractor and several subcontractors was an issue in this dispute. Such matters as design and construction of Tenant Improvements, securing a loan by Landlord in a timely way using the Tenant's Lease as security, failure to incorporate PIU required specifications into the design and construction of the Tenant Improvements were issues in which English language difficulty was a contributing factor. All people involved in this effort used English as a second language including landlord, tenants, architect/engineer, general contractor, and several subcontractors speaking primarily other languages such as--Korean, Japanese, East Indian (not sure which dialect), Spanish and various languages of Pakistan. I could identify at least five different languages used by various people involved in the project, each using English as a second language.

   Communication was an issue particularly with constructing the Tenant Improvements according to Pump It Up ("PIU") specifications. PIU Corporate (the corporate entity of the PIU franchise) was slow in providing those specifications to Tenant. When they were provided to Tenant (by email dated June 2, 2017 Ex 28) Tenant in-turn provided them to Landlord. Landlord, however, did not provide them to the architect/engineer ("after all it was not his job to do so but Tenant's job"). The architect/engineer was not fully aware that he did not have the PIU specifications and therefore did not incorporate them into the design (see Ex 29). That lapse caused a delay in the project and required a redesign and a resubmission to the City of Kent. The Landlord here (Satwant Singh) had a duty to either forward the specifications to the architect/engineer or advise the Tenant that it was not his job. Remaining silent and then blaming others is not an acceptable procedure. Part of the issue here was the

reporting procedure. The architect/engineer was not comfortable taking orders from the Tenant. He wanted his orders to come from the Landlord (Satwant Singh) not the Tenant. Blame for the failure in communication and subsequent delay lies with Satwant and Thomas LI, the architect/engineer; as the experienced person, Satwant needed to lead by example. Time and again he did not and would not.

Another example related to the Electrical Plan. The electrical contractor testified that four or five times Mona wanted changes in the electrical work that was caused by Lasertag being deleted from the project. Euntae Kim testified that each time Mona wanted changes and he was required to make major changes to the electrical work, his work delayed the project about a month. While that delay seems excessive to me, Mona's requests clearly contributed to a significant delay in the project. Mona testified that each change was required by PIU Corporate and she was just requesting what PIU Corporate required her to do. While I accept what she says, the electrical changes should have been done in one comprehensive plan not in 4 or 5 segments. This example reflects Mona's lack of experience in construction and contributed to the project's delay.

9. **Tenants Breach the Lease. Why was the prepaid rent ("Deposit") as required by Section 1g of the Lease not paid? Why was the Letter of Credit as required by the Letter of Credit Rider not secured at the time of the execution of the Lease by Tenant as required by the Lease?** There is no question that these matters were not taken care of by the Landlord at the time Tenant executed the lease or shortly thereafter. Why not? In my view because, Satwant Singh, acting on behalf of the Landlord, said and meant it at the time the Lease was signed, "Don't worry about it." Both parties were concentrating on other matters and this Deposit and the Letter of Credit were not high on anyone's priority list. This statement did not mean, however, that the Landlord was "forfeiting" the Deposit or forever waiving the right to ask for the Letter of Credit later. Satwant Singh testified during the hearing that he always engaged in continuous efforts to collect the Deposit and have the Letter of Credit completed and was always asking the Tenant to get it done. I do not believe it. I find for about a year after the Lease was executed, the Landlord did not care that much about the Deposit and Letter of Credit. It was only when tensions arose between the Landlord and Tenant in discussing design changes and the work necessary in March 2018 that the Landlord began to care more about these matters and started demanding action and payment. I do not find any waiver or estoppel by the Landlord in demanding these things; the evidence to support the elements of both theories are not present. At that point, Landlord demanded payment of the deposit and action to secure the Letter of Credit. Because at that point the Tenant was mad at the Landlord, Tenant refused to make the payment or take action to secure the Letter of Credit. Such refusal under the circumstances, even if the temper tantrum was partially justified, constitutes a breach of the Lease by Tenant. More on this topic below.

10. **Respondents Breach the Lease.** Did the Respondents also breach the Lease in failing to follow the vague language of Exhibit C of the Lease? There is a dispute over what the language in Exhibit C means. But whatever the language means, it must be construed against the Respondents who drafted the language. The language is vague; but the Respondents did not even follow their own language in Exhibit C.

11. **Landlord prepared the Lease.** As stated above, the Landlord prepared the Lease and has 20 years' experience as a commercial real estate broker. Landlord did not give the Tenant adequate time to review the Lease, once it was prepared, or make any effort to explain it. While the Lease in many ways was a standard long-term commercial lease; it was, nonetheless, a complicated document especially for Tenants who had some but very limited real estate experience. The Tenant has leased a pizzeria with a PIU franchise in Tacoma.

12. **Rapprochement Agreement.** In March 2018, the tensions between the Landlord and Tenant increased and significant disagreement erupted. The issues related to the delay in completing the Tenant Improvements and the increased cost of construction. With Sharmila Rathinam's assistance, the parties met and entered into discussions to resolve their issues and eventually came to an agreement called a "Rapprochement Agreement." After the meeting, the parties agreed to work together more closely and with less disagreement and agreed to a punch list of items that needed to be completed, Ex 63. The parties then worked fairly well together until July 2017. One major item still needed to be resolved. PIU insisted that the Lease have a right-of-first refusal language added to the Lease—so that if Bounce breached the Lease and was terminated as a Tenant, PIU, as franchisor, had the first right to take over the property [or if Tenant desired to sell its interest in the Lease, PIU had the first right to buy it or sell it to a third party.] The Landlord also demanded but did not receive the Deposit or Letter of Credit. For reasons, I do not understand, the right of first refusal language was never inserted into the Lease and is absent today.

13. **What does Exhibit C provide in the Lease in Subsection 1?** Exhibit C is an exhibit to the Lease and has two subsections. Subsection 1 addresses "Tenant Improvements to be Completed by Landlord." Subsection 2 addresses "Tenant Improvements to be Completed by Tenant." Subsection 1 in summary form says Landlord to install HVAC, plumbing, electrical and sprinkler systems; to finish all ceiling or drop ceiling work; to complete floor as per plans; to complete "all construction work per approved TI plans; and to complete paint, drywall etc." There is additional language in subsection 6 that provides "Rent will start from date of operation;" and in subsection 7 the language provides "Landlord to waive first 4 months rent from date of operation." This language in subsections 6 and 7 was added by Mona in her hand-writing at the time

the Lease was signed and was done with Satwant's approval. Landlord contends that "approved plans" can only mean plans that had been approved by the City of Kent and are dated "12-20-16." No other plans had been approved by the date of the Lease March 22, 2017. The approved plans at that point in time did not show a completed building out of the Tenant Improvements and therefore, Landlord argues, the only conclusion one can fairly reach is that the Landlord is only obligated to pay for the improvements up to the point of the approved plans. I do not accept that interpretation of the language. The interpretation is too complicated for Tenants who have limited experience with commercial leases such as this one, compared to the Landlord's experience, to understand the restricted meaning of the term "approved plans" in this context. The only fair interpretation, and my interpretation, is that "approved plans" means the completed plans as eventually approved by the City and PIU. The language of Exhibit C, Subsection 1 means, taken as a hole, that the Landlord shall install at its expense the HVAC (heating, ventilation, air conditioning), plumbing, electrical, and sprinkler systems; finish the ceiling or drop ceiling work; complete the floor as per plans; complete paint and drywall, all per the TI (tenant improvement) plans as eventually approved by the City and PIU. The Landlord did not interpret the language that way. The email to Akthar dated August 18, 2018, stated that Landlord will only cover free rent for four months from the time Landlord turns over the premises to Tenant and not when the premises are operational contrary to the Language in Exhibit C 1.6; and demanded that Tenant must pay cost overruns of $11,000, Tenant must pay all of Thomas's time in the pizza shop, and must get the Comcast connection done. These demands are not consistent with Exhibit C. Landlord insisted that the demand be followed in order for Tenant to retain its position as a Tenant. In my view such insistence as a basis to continue to work together is itself a breach of the Lease.

14. **Who pays for delay in this project?** Once again, the language in Exhibit C must be construed against the Landlord. As stated above, there is no timeline set forth in Exhibit C for completion of Tenant Improvements. While the Lease contemplates 4 months to design, permit and construct the Tenant Improvements, that time frame is not stated anywhere in the Lease and in hindsight is wildly unrealistic. The delay in the project is attributable to the Landlord.

15. **What does Exhibit C address in the Lease in Subsection 2?** This conclusion as to the meaning of subsection 1 in Exhibit C is supported by the language in the Lease in Exhibit C Subsection 2 related to "Tenant Improvements to be Completed by Tenant." Tenant is to "purchase and install all inflatable playgrounds, Laser Tag and Pizza Store equipment." and to "purchase any furnishings required for their business." This section does not impose any requirement upon Tenant to pay for costs which exceed Landlord's undisclosed design or construction budget.

16. **Difficulty with the language as drafted in Exhibit C.** The difficulty with the language as drafted in Exhibit C is that it fails to anticipate all those matters which can and usually do go wrong in a construction project. Who pays if there is a substantial delay in construction? Who pays if there are one or more cost overruns? When should rent be paid if the time set aside in an agreed upon timeline for design and construction of Tenant Improvements exceeds what is originally scheduled? Neither the Lease nor Exhibit C addresses any of those contingencies. Who then should pay when these contingencies come to pass? As stated above, the Landlord drafted the Lease and has substantially more experience in real estate matters than the Tenant, I conclude that the Lease must be construed against the Landlord and that Landlord must pay.

17. **Consistent with Preliminary Negotiations.** This position taken by me is also consistent with preliminary negotiations between the parties as expressed in the email dated March 12, 2017, Ex 22, from Satwant to Akthar, which says in pertinent part "we are paying most of the TI money except equipment $ which is huge cost to us." Mr. Singh in the email was trying to convince Akthar that the Landlord could not make a better deal with the Tenant and that Akthar should not continue to look to other locations for his new business and should agree to East Kent location since it was just a good deal This email was sent about three weeks before the Lease was executed.

18. **Exhibit C was Effective without Landlord's Initials.** The Landlord contends that since Exhibit C was never initialed by the Landlord and only by the Tenant, that either it never took effect or was never approved by the Landlord. In my view the Landlord cannot have it both ways. It cannot seek to enforce those parts of the Lease with which it agrees or is supportive of its position and not those parts, for example, with which it disagrees, such as Exhibit C. Once the Lease was executed on April 3rd, 2017, the parties lived with this Lease for the next 18 months and relied upon it as the basis of their Agreement, even if they thought of changing it from time to time. It is too late to complain that Exhibit C was not initialed by the Landlord.

19. **No Fraud by Landlord.** Tenant is asking Landlord to pay for damages in tort for fraud and argues such fraud is an exception to the Economic Loss Rule and should not therefore apply. I do not find that the Landlord engaged in fraud. The elements of common law fraud have not been proved.

20. **Did KEC tortuously interfere with the franchise relationship between Bounce and PIU?** Did KEC make false statements to PIU about the status of the Lease which resulted in PIU sending a notice of default to the franchisee, Bounce? I believe Shamila Rathinam did make false statements. She told PIU by email dated August 22, 2018 that the Tenants were in default and did not intend to open their PIU Franchise

in Kent. At that point the parties had had words about not being able to work together; but had not yet abandon the Lease. Shamila Rathinam at that point was premature in her announcement and enough so that the information was false. Such false statement triggered an inquiry by PIU to Tenant and was a contributing factor in PIU Corporate declaring the franchise agreement between PIU and Bounce to be in default. I am not prepared to reach a conclusion on this issue until I receive more information as provided above.

21. **Does breach of the Lease by Bounce in not curing each alleged breach effectively terminate the Lease at of the end of the 5-day (or 30 day) cure period when the breach was not cured?** In August 2018 when Landlord and Tenant both appeared to be walking away from the Lease, they were back talking again a week or so later and discussing how to keep the project going. Pradeep's response was to "get into compliance with the Lease whereby he made "take it or leave it" demands that were not consistent with Exhibit C. He also instructed Landlord's lawyer to send out five notices demanding compliance (Cure the breach) or face termination of the Lease. The demands were to pay rent and back rent in the amount of $112,499.66 which rent started according to the notice December 2017; to pay for the cost of change orders in the amount $65,584, and to pay for CAM (Common Area Maintenance) charges in the amount of $41,250 beginning December 2017, all as required by the Lease. Akthar and Mona did not comply with the notices—any of them. They made a feeble attempt to make the Deposit payment by making a direct payment to JAMS and asking it to hold the money during the arbitration process. JAMS declined to hold the money. It is important to point out that two of the notices contained, in my view, erroneous information and were not effective—notices to pay rent and CAM charges. Since the Tenant Improvements had not been completed and the Pizzeria and PIU business were not operational, no rent began or CAM charges accrued under Exhibit C of the Lease. Likewise, the Lease in Exhibit C requires Landlord to pay for change orders—not Tenant--so that is not a basis for default under the Lease. The remaining notices about the Deposit and Letter of Credit were effective and when the default was not cured, the Lease was effectively terminated.

22. **Specific Performance as a Remedy.** One of the remedies that Tenant is seeking in this arbitration is to have the Lease specifically enforced so that the Landlord and Tenant could continue to work together. This case is not an appropriate one to authorize specific performance for several reasons. First, as stated above, the Lease in Section 21(f) does not authorize specific performance as a remedy. Second, the terms of the Lease in Exhibit C are so vague as to be difficult to agree upon in a number of critical areas such as who pays for what Tenant Improvements and how much. Third, the

parties have developed such hostility to one another that, I find, they can no longer work together in any event.

23. **Did the desire by Kent East to seek a loan for the development of Tenant Improvements play a role in Kent East's alleged effort to take control of the PIU franchise?** Tenant contends that the Landlord seeking a loan was really a subterfuge for having sufficient funds to buy a PIU franchise and, Tenant argues, supports Tenant's conspiracy theory that Landlord was really trying to take over the franchise and assume control of the business. I do not accept that theory. Landlord, in my view, needed money to pay for the Tenant Improvements which it agreed to do according to Exhibit C. The Loan was designed to provide sufficient proceeds to do that.

24. **What was the effect of Lasertag being added to the Lease as one of the entertainment components to the pizza operation in addition to the Pump It Up entertainment component?** When the Lease was first entered into (dated March 22, 2017), both Landlord and Tenant contemplated that the leased premises would be used for a Pump It Up and Lasertag play areas. The addition of Lasertag to the Kent East operation slowed the effort to finalize the plans and delayed the project. PIU was combining for the first time a Pump It Up operation with a Lasertag operation. PIU Corporate had not had a combined operation approved before by the regulatory authorities such as the City of Kent and was slow in considering the matter. Eventually after several months, PIU Corporate arrived at the conclusion that it would not authorize a Lasertag operation and told both Landlord and Tenant. Because of the delay by PIU Corporate in making such a decision, the leased space which had been in construction for several months now required extensive changes in the Tenant Improvements (walls had to be relocated, electrical systems had to be modified - among other changes). The City of Kent permit also had to be modified and approved. All these changes required more time and more cost. Who is to pay for the cost and delay? As stated above delay on this project is a Landlord responsibility.

25. **Who pays what damages?** So where are we left with damages? Tenant is to pay damages to Landlord for breach of the Lease in failing to pay in a timely way the prepaid Deposit and the Letter of Credit. Landlord is to pay damages to Tenant for failing to build out and to pay the full-cost of Tenant Improvements, which is a Landlord responsibility under Exhibit C and in seeking to have the Tenant begin to pay the rent as of August 1, 2017 before it was due.

26. **Reopen Hearing.** I hereby reopen the hearing to schedule additional hearing time (to be held as soon as practicable) to consider additional evidence related to the

"Economic Loss Rule" and damages. I am having a difficult time determining damages in this case. I do not believe the evidence and argument that I received on damages is sufficient. I would like counsel to provide me more legal authority and evidence on determining damages in this case.

27. **Compromise?** In a case like this, there are no winners—the final result leaves everyone in a difficult situation. The best solution would be for the parties to settle their differences and let the Lease continue. I have already decided that I cannot order that approach; but it would be best for all. Before the arbitration was filed and during one of the many discussions among the parties, the parties were about $11,000 apart in financial demands. A compromise would have been in order; but Akthar was at that point too angry to consider that a compromise might have been in his own best interests in the long run. The parties still might consider a mediation to get professional help to resolve the matter.

Based upon the foregoing general findings and conclusions, I will await until the final hearing to determine the prevailing party in this arbitration and which party is entitled to its attorney's fees and costs. I would like to schedule a brief hearing to consider additional evidence and information before reaching a Final Award.

Dated: May 31, 2019.

M. Wayne Blair
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Bounce and Lasertag, LLC d/b/a Pump It Up vs. Kent East Commercial, LLC et al.
Reference No. 1160022690

I, Michele Wilson, not a party to the within action, hereby declare that on June 3, 2019, I served the attached Interim Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Seattle, WASHINGTON, addressed as follows:

Jose F. Vera Esq.
Vera & Associates
200 W. Thomas Street
Suite 420
Seattle, WA 98119
Phone: 206-217-9300
josevera@veraassociates.com
Parties Represented:
Bounce and Lasertag, LLC

Martin Burns Esq.
Burns Law PLLC
524 Tacoma Ave. S.
Tacoma, WA 98402
Phone: 253-507-5586
martin@mburnslaw.com
Parties Represented:
Kent East Commercial, LLC
Pradeep Rathinam
Satwant Singh
Sharmila Rathinam

I declare under penalty of perjury the foregoing to be true and correct. Executed at Seattle, WASHINGTON on June 3, 2019.

Michele Wilson
mwilson@jamsadr.com

Michele Wilson

From:	Michele Wilson
Sent:	Tuesday, July 9, 2019 2:17 PM
To:	josevera@veraassociates.com; martin@mburnslaw.com
Cc:	michellevance@veraassociates.com; Shelley@mburnslaw.com
Subject:	Bounce and Lasertag, LLC d/b/a Pump It Up vs. Kent East Commercial, LLC et al. - JAMS Ref No. 1160022690

Dear Counsel –

In my Interim Arbitration Award dated May 31, 2019, I ordered an additional arbitration hearing on the question of damages. A telephone hearing was held this morning and included Jose Vera, counsel for the Claimant, and Martin Burns, counsel for Respondents. The purpose of the telephone hearing was to plan for the additional hearing on damages. Prior to the hearing, I received through JAMS a copy of a letter from Counsel Joshua Becker, on behalf of the Fun Brands Inc., the Franchisor of Pump It Up products, with whom the Claimant was trying to do business as part of its Bounce and Lasertag, LLC d/b/a Pump It Up family pizza operation. I also received a letter from Martin Burns raising a series of factual and legal questions. Mr. Burns asked me to clarify, if I could, questions related to the applicability of the economic loss (independent duty) rule to the Claimant's claim of tortious interference with business expectancy. If that issue needed more litigation, it would be necessary for him to conduct discovery depositions of witnesses on behalf of Fun Brands Inc., and to bring other witnesses to the hearing to testify and produce additional documentary evidence as well. After further discussion, without objection from either counsel, I asked to see a full copy of Exhibit 105 without redactions and a copy of the franchise agreement between Fun Brands and Bounce. I also asked for any additional comments in writing that counsel would like to make before I considered the questions raised in Mr. Burns letter. Addressing those issues, if I could, would simplify any additional hearing on damages. This information should be provided by July 19. In addition, we set a tentative date for the additional hearing of date for presentation of damages of September 17, 2019 at the JAMS offices in Seattle beginning at 9:30 a.m.

With no further discussion, the telephone hearing was concluded.

Dated: July 9, 2019

M. Wayne Blair

Michele Wilson
Senior Case Manager

JAMS - Local Solutions. Global Reach.™
1420 Fifth Ave. | Suite 1650 | Seattle, WA 98101
P: 206-292-0457 | F: 206-292-9082

Michele Wilson

From: Michele Wilson
Sent: Tuesday, August 13, 2019 7:54 AM
To: josevera@veraassociates.com; martin@mburnslaw.com
Cc: michellevance@veraassociates.com; Shelley@mburnslaw.com
Subject: Bounce and Lasertag, LLC d/b/a Pump It Up vs. Kent East Commercial, LLC et al. - JAMS Ref No. 1160022690

Dear Counsel:

I am writing this email as a follow up to my email of July 9, 2019. Since I sent that email, I have received from Bounce a submission entitled "Bounce's Cover re Default Notice and Franchise Agreement" dated July 19, 2019 together with exhibits; from Kent East Commercial, LLC a letter dated July 19, 2019 addressing the tortious interference claim of Bounce together with exhibits; an undated Notice from Bounce to Seek Terms together with exhibits; and a response from Kent East Commercial dated August 9, 2019. I have read the material. I have not entertained oral argument on these submissions. An additional hearing on damages has been scheduled for September 17, 2019 at the JAMS offices in Seattle. The issue before me is to set forth, if I could, questions relating to the applicability of the economic loss rule (independent duty rule) to the Claimant's claim of tortious interference with business expectancy. The Claimant's claim of tortious interference by Kent East Commercial as it relates to the applicability of the economic loss rule unduly complicated this case. After giving the matter considerable thought, I intend in the final award to dismiss the tortious interference claim for failure to prove the claim. I intend to find that the actions of Sharmila Rathinam in sending her email to Fun Brands LLC (franchisor) on August 22, 2018 responding to an inquiry from it and advising that the Lease between Landlord and Tenant "fell thru", while it contained erroneous information, was not taken with improper motive and was not done with the intent to take over the Tenant's franchise. For that reason, an important element of the tortious interference claim has not been proved. At the hearing scheduled for September 17, I will not need and do not want any evidence of damages as it relates to that Claim.

I will defer for now ruling on any motion for terms; but I must say that it does not seem appropriate.

Dated: August 12, 2019

Wayne Blair
Arbitrator

Michele Wilson
Senior Case Manager

JAMS - Local Solutions. Global Reach.™
1420 Fifth Ave. | Suite 1650 | Seattle, WA 98101
P: 206-292-0457 | F: 206-292-9082
Email: mwilson@jamsadr.com
www.jamsadr.com

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Re: Bounce and Lasertag, LLC d/b/a Pump It Up vs. Kent East Commercial, LLC et al.
Reference No. 1160022690

I, Michele Wilson, not a party to the within action, hereby declare that on October 11, 2019, I served the attached Final Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Seattle, WASHINGTON, addressed as follows:

Jose F. Vera Esq.
Vera & Associates
200 W. Thomas Street
Suite 420
Seattle, WA 98119
Phone: 206-217-9300
josevera@veraassociates.com
Parties Represented:
Bounce and Lasertag, LLC

Martin Burns Esq.
Burns Law PLLC
524 Tacoma Ave. S.
Tacoma, WA 98402
Phone: 253-507-5586
martin@mburnslaw.com
Parties Represented:
Kent East Commercial, LLC
Pradeep Rathinam
Satwant Singh
Sharmila Rathinam

I declare under penalty of perjury the foregoing to be true and correct. Executed at Seattle, WASHINGTON on October 11, 2019.

Michele Wilson
mwilson@jamsadr.com

VERA & ASSOCIATES PLLC

October 18, 2021 - 4:09 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	81132-1
Appellate Court Case Title:	Kent East Commercial, LLC, et al., App./Cross-Resp. v. Bounce and LaserTag, LLC, Resp./Cross-App.

The following documents have been uploaded:

- 811321_Other_20211018155501D1416170_8863.pdf
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  This File Contains:
  Petition for Review
  The Original File Name was Bounce Pet for Review for filing.pdf

A copy of the uploaded files will be sent to:

- martin@mburnslaw.com
- ofcounsl1@mindspring.com

Comments:

One Petition with 4 Appendix

Sender Name: Jose Vera - Email: josevera@veraassociates.com
Address:
100 W. HARRISON, SOUTH TOWER, SUITE 300
SEATTLE, WA, 98119-4218
Phone: 206-217-9300

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