Supreme Court No. 89612-7

SUPREME COURT
OF THE STATE OF WASHINGTON

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES,
Petitioner,
v.
COLLIERS INTERNATIONAL REALTY ADVISORS (USA), INC., a California corporation, and ARVIN VANDER VEEN and JANE DOE VANDER VEEN, and their marital community,
Respondents.
and
LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES,
Petitioner,
v.
CITY OF SEATAC, a municipal corporation,
Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In a lengthy, detailed and well-reasoned opinion, the Court of Appeals concluded that appellant Leibsohn Property Advisors Incorporated's ("Leibsohn") claims against Colliers were subject to dismissal by the trial court for two independent reasons: (i) the claims were subject to arbitration and the arbitration award should have been confirmed; and (ii) the claims failed on the merits as a matter of undisputed fact and law. Both rulings are firmly grounded in longstanding, uncontroversial Washington authority. Neither warrants review by this Court.

Leibsohn was a licensed real estate broker and a member of the Commercial Brokers Association ("CBA"). Under the CBA Bylaws, its claims against Colliers and Vander Veen (collectively "Colliers") were subject to binding arbitration. When Leibsohn instead sued in Superior Court, Colliers successfully moved to compel arbitration. In arbitration, and following briefing and oral argument, Leibsohn's claims were deemed time-barred and dismissed. Leibsohn returned to Superior Court and moved to lift the stay based on arguments considered and rejected by the arbitration panel. The trial court granted Leibsohn's motion, reasoning that Colliers' prior statement that the case was arbitrable was a

misrepresentation because the CBA did not conduct a hearing on the merits but instead dismissed the claims as time-barred.

The Court of Appeals reversed the trial court. The Court of Appeals, applying well-established Washington authority, held that under RCW 7.04A, the trial court determined whether a claim is arbitrable, while the issue of whether that claim is time-barred is the province of the arbitrator. With no evidence that the arbitration panel arrived at its conclusion by fraud or undue means, there was no basis for vacating the arbitration. The Court of Appeals also correctly concluded that there was nothing untoward in arguing that a claim is substantively arbitrable to the trial court and then arguing that the claim is time-barred before the arbitration panel. Those two statements are not inconsistent, and therefore the trial court erred in applying judicial estoppel.

Second, both lower courts concluded that Leibsohn's tortious interference claim failed as a matter of law. Of the four elements of the claim, the Court of Appeals concluded that Leibsohn could not prove three as a matter of law. Leibsohn does not dispute that the Court of Appeals applied the proper standard for tortious interference claims, nor are the facts disputed. Leibsohn is simply dissatisfied with the result. That does not justify review.

II. COUNTER-STATEMENT OF THE FACTS

The Court of Appeals devoted nearly 20 pages to a comprehensive retelling of the facts—both the events giving rise to the litigation and the procedural history before the trial court. This counter-statement of facts provides an abridged version sufficient to provide support for the Court of Appeals' decision.

A. Facts Relating to SeaTac's Acquisition of the Property.

1. The Property Goes into Foreclosure After Years of Failed Efforts by Leibsohn to Market and Sell the Property.

This lawsuit involves commercial real estate formerly owned by K & S Developments located in SeaTac ("the Property"). Leibsohn first listed the Property in 2006.[1] In November 2008, with the real estate market sinking and no offers, Leibsohn reduced the price from $28 million to $24.5 million.[2] SeaTac had retained Colliers to assess potential real estate acquisitions in the vicinity of the Property in connection with its long-term transportation corridor plans.[3] But because the Property was still listed at far in excess of what SeaTac viewed as its value, the City chose not to pursue the Property at that time.[4]

Meanwhile, over the years, K & S had pledged the Property as security for multiple loans. In January 2005, before listing with Leibsohn,

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[1] CP 1154.
[2] CP 1160.
[3] Id. ¶ 3.
[4] Id. ¶ 5.

K & S provided a deed of trust to secure a $6,500,000 promissory note.[5] By 2009, K & S had granted four deeds of trust securing four loans totaling over $12 million.[6] All four loans included personal guarantees from the two K & S principals, Gerry Kingen and Scott Switzer.

By spring of 2009, K & S was in default on all of the loans. One of the lenders, who was owed over $6,000,000, filed a judicial foreclosure action.[7] The relief sought included a foreclosure sale of the Property and deficiency judgments against Switzer and Kingen personally based on their guarantees.[8]

2. Colliers Negotiates on Behalf of SeaTac to Purchase the Notes and Obtain Deeds in Lieu of Foreclosure.

In late June 2009, SeaTac and Colliers met to discuss the foreclosure and the Property.[9] Leibsohn was still marketing the Property at nearly $21,000,000,[10] far beyond what they (or anyone) deemed a reasonable price. Accordingly, it was agreed that Colliers would instead determine whether the various K & S creditors were willing to sell their loans.[11] If SeaTac could purchase the loans, it could potentially obtain a deed in lieu of foreclosure ("DIL") from K & S.

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[5] CP 1172.
[6] See summary at CP 402.
[7] CP 1216-28.
[8] Id.
[9] CP 1160 ¶ 6.
[10] Id.
[11] CP 1161 ¶ 7.

Colliers began negotiating with the lenders. By the end of September, the first position lender agreed to sell its loan for $7,125,000, the second for $4,000,000, and the third and fourth lenders agreed to release their security interests on the Property for $100,000 each.[12] A few days later, K & S' Switzer confirmed that K & S would provide a DIL in exchange for releases of Kingen's and Switzer's guarantees.[13] By early October 2009, the framework was in place for SeaTac to purchase the debt and obtain the Property via a DIL.

Leibsohn criticizes Colliers for communicating with the lenders, as opposed to presenting an offer to purchase through Leibsohn.[14] Leibsohn ignores that a judicial foreclosure had been filed and the lenders effectively controlled the Property. More fundamentally, Leibsohn represented the borrower—K & S—not the lenders, and had no authority to act on behalf of the lenders.

3. Leibsohn Signs an Amended Listing Agreement That Carves out the Colliers/SeaTac DIL Transaction.

Meanwhile, Leibsohn's listing agreement was set to expire on November 1, 2009.[15] In mid-August, Leibsohn sent K & S a proposed new listing agreement that, like its predecessors, provided for a

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[12] Id. ¶ 8.
[13] Id. ¶ 9.
[14] Leibsohn's Pet. for Review at 2-4, 14-15.
[15] CP 1241.

commission if the Property was sold, made unmarketable by the owner, or withdrawn from sale.[16] With the Property already in a judicial foreclosure, K & S did not sign the proposed agreement as drafted.

Instead, on October 2, 2009, K & S offered to extend Leibsohn's listing agreement, but with a clause excluding the DIL transaction as a commissionable event:

> No commission will be due in the event that the owners sign a deed in lieu of foreclosure. The potential transaction in which a third party may ask the owners to give up the property in exchange for removal of personal guarantees is specifically excluded as part of this sales/fee agreement.[17]

In an email to Brian Leibsohn, K & S' Switzer explained that the exclusion was specifically intended to address the deed in lieu transaction that was being negotiated between the lenders and Colliers.[18] Leibsohn ultimately signed the new agreement with the exclusion.[19]

4. SeaTac Acquires the Property Via Deed in Lieu of Foreclosure.

Despite Leibsohn's objections, SeaTac purchased the debt and obtained title to the Property via a DIL transaction that closed in the last

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[16] CP 1247.
[17] CP 1253.
[18] CP 1251. ("I wrote in a fee exclusion for the proposed deed in lieu of transaction proposed through Tom Hazelrigg and Arvin Vander Veen . . . . Short of a sale by you, we will either lose the property to our lenders or lose it to our new note holders in exchange for the deed. . . . We will not pay a fee [to] give up our property to our lenders, no matter who they may be.").
[19] CP 1151:21-1152:11.

week of December 2009.[20] In total, SeaTac paid $12,283,987 for the transaction.[21]

B. Facts Relating to the Leibsohn-Colliers Arbitration.

1. The CBA Bylaws and Leibsohn's Original Submission to the CBA.

All CBA members, including Leibsohn, are required to submit all controversies involving commissions to binding arbitration before the CBA.[22] Under the CBA's rules, a dispute involving a commission is not arbitrable until the transaction generating the commission has closed.[23] Any demand for arbitration must be filed within 90 days after closing.[24]

On October 13, 2009, before the transaction at issue closed, Leibsohn sent a letter to the CBA claiming that Colliers had violated a rule barring interference with its exclusive listing agreement.[25] Leibsohn asked the CBA to "[issue] some type of cease and desist notice to Colliers."[26] There was no dispute about a commission at that time as the DIL transaction was still months away from closing. Even though Leibsohn had not requested arbitration, the CBA initially (albeit correctly)

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[20] CP 530.
[21] CP 530.
[22] CP 24 ¶ X(A).
[23] CP 75 ¶ 6.
[24] Id.
[25] CP 341-42.
[26] CP 342.

responded that the matter could not be arbitrated. The CBA said it would take no action.[27]

2. Leibsohn Waits Eight Months to Sue, and Colliers Obtains an Order Compelling Arbitration and Staying the Lawsuit.

Post-closing, Leibsohn did nothing until eight months later—August 2010—when it sued Colliers in King County Superior Court. Leibsohn's suit alleged that Colliers had tortiously interfered with Leibsohn's listing with K & S, resulting in a lost commission.[28] Colliers moved to stay the case and compel arbitration as required by the CBA's Bylaws.[29] That motion was granted in September 2010, and Leibsohn was ordered to arbitration "in accordance with the bylaws of the Commercial Brokers Association."[30]

In response, Leibsohn made a CBA submission on the standard CBA's Arbitration Complaint form.[31] Leibsohn did not, however, pay the filing fee, and did not comply with the substantive requirements of the CBA's arbitration rules.[32] Rather than request arbitration, Leibsohn's submission claimed that the dispute was not arbitrable.[33]

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[27] CP 61.
[28] CP 1-6.
[29] CP 7-13.
[30] CP 81-82.
[31] CP 199-200.
[32] CP 197 ¶ 4.
[33] CP 200.

The CBA rejected Leibsohn's argument that the matter was not arbitrable,[34] and ruled that the dispute was subject to arbitration under the CBA's Bylaws.[35] It invited Leibsohn to file an amended arbitration complaint in compliance with the rules.[36] Although Leibsohn wrote a letter in response,[37] the complaint was not amended.

In November 2010, the CBA again invited Leibsohn to file an amended arbitration complaint.[38] Leibsohn declined to amend its filing, stating that the CBA was "confused," and Leibsohn would be "relying on the record."[39]

Nothing further happened until March 2011 when Leibsohn moved in Superior Court to lift the stay.[40] Pointing to the CBA's two requests that Leibsohn comply with the rules regarding arbitration complaints, Leibsohn said that the CBA was imposing unnecessary obstructions to the arbitration.[41] Leibsohn's motion was denied.[42] The Court also made a finding that Leibsohn was "willfully impeding the [arbitration] process" and imposed sanctions of $2,500.[43]

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[34] CP 209-10.
[35] CP 197 ¶ 5; CP 209.
[36] CP 209; CP 197 ¶ 7.
[37] CP 208.
[38] CP 211-13.
[39] CP 214.
[40] CP 83-95.
[41] CP 88-89.
[42] CP 237-38.
[43] CP 238.

Leibsohn then amended its arbitration complaint and the arbitration process began.[44] Colliers moved to dismiss Leibsohn's claim as time-barred.[45] Colliers argued that under the CBA's Bylaws, the complaint had to be made within three months after the closing of the transaction, but Leibsohn did nothing until eight months after the transaction closed.[46] Even then, Leibsohn sued instead of pursuing the required arbitration.

After briefing and oral argument before the CBA, Leibsohn's arbitration complaint was dismissed as time-barred.[47]

3. After Colliers Prevails in Arbitration, the Trial Court Lifts the Stay and Awards Sanctions and Fees to Leibsohn.

After losing in arbitration, Leibsohn again moved in Superior Court to lift the stay and for issuance of a new case schedule.[48] Leibsohn claimed that Colliers should be estopped from opposing the motion based on earlier statements regarding arbitrability.[49] (Leibsohn had unsuccessfully made the same estoppel argument in the arbitration.)[50]

The Superior Court granted Leibsohn's motion.[51] Relying first on the statements made by the CBA (not Colliers) in connection with Leibsohn's pre-closing request for discipline, the Court said that "the CBA

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[44] CP 324.
[45] CP 310-16.
[46] CP 312.
[47] CP 343-46.
[48] CP 240-49.
[49] CP 247.
[50] CP 333.
[51] CP 353-56.

made multiple explicit representations to Leibsohn that his complaint was not arbitrable and, in reliance on such representations, Leibsohn did not pursue arbitration with the CBA within the three-month window."[52] The trial court did not acknowledge that: (i) the CBA's statements were made in response to Leibsohn's request for disciplinary action, which was before the transaction closed, i.e., before an arbitrable claim existed; and (ii) the CBA told Leibsohn that the arbitration clause of the Bylaws applied if there was a post-closing commission dispute.[53]

The trial court next noted that in moving to compel arbitration, Colliers represented that if the matter was ultimately deemed not arbitrable by the CBA, Colliers would not object to a motion to lift the stay.[54] In finding this to be a misrepresentation, it did not acknowledge that the CBA had (i) concluded the matter was arbitrable, and (ii) taken jurisdiction over the claim.[55]

4. The Court of Appeals Reverses and Remands to the Trial Court to Confirm the Arbitration Award.

The Court of Appeals reversed, holding that the trial court lacked authority to vacate the arbitration decision because Colliers (i) made no misrepresentation in telling the court Leibsohn's claim was arbitrable, and

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[52] CP 354-55.
[53] CP 66.
[54] CP 355:2-5.
[55] CP 197 ¶ 5; CP 209.

(ii) even if it did, such statements were not material because the trial court was required to compel arbitration regardless of any statute of limitations issue.[56]

First, Colliers accurately represented that Leibsohn's claim was substantively arbitrable under the CBA's Bylaws.[57] Thus, the court was required to compel arbitration and let the arbitrator resolve the timing issue.[58] Second, the arbitration panel was entitled to decide the time-bar issue "independent of how the trial court arrived at its decision to compel arbitration."[59] Because Leibsohn made its objections to the arbitration panel regarding the statute of limitations issues, and because Leibsohn did not argue (or offer any evidence) that the arbitration panel was biased, unfair, or otherwise arrived at its conclusion by undue means, there was no basis for vacating the arbitration panel's award of dismissal.[60]

III. ARGUMENT

A. The Court of Appeals Did Not Err in Instructing the Superior Court to Confirm the Arbitration Award.

In finding that the arbitration award should be confirmed and not vacated, the Court of Appeals properly applied RCW 7.04A and governing Washington authority, noting the strong public policy "favoring finality of

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[56] Op. at 27.
[57] Id.
[58] Id. at 28.
[59] Id.
[60] Id. at 28-29.

arbitration awards" and the limited role of the superior court in an arbitration proceeding. Op. at 21-22 (citing S&S Constr., Inc. v. ADC Props., LLC, 151 Wn. App. 247, 254, 211 P.3d 415 (2009); Munsey v. Walla Walla College, 80 Wn. App. 92, 95-96, 906 P.2d 988 (1995) and Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998)). Because the Court of Appeals neither erred nor contradicted prior Washington authority, Supreme Court review is not warranted.

First, the Court of Appeals properly concluded—and Leibsohn does not refute—that the Superior Court's only task was to determine whether the dispute was subject to an arbitration agreement, it was not responsible for determining whether a statute of limitations applied to the claim. Op. at 22 n.16 & 27-28 (citing Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild, 157 Wn. App. 304, 321, 237 P.3d 316 (2010)). Thus, under RCW 7.04A.70 and the CBA's Bylaws, the Court had to compel arbitration regardless of whether the case would be dismissed based on the statute of limitations. Op. at 28. Leibsohn does not challenge the Court of Appeals' proper application of RCW 7.04A.70. Thus, the Superior Court properly ordered the parties to arbitrate.

Instead, Leibsohn argues in its Petition for Review that the Court of Appeals erred in its application of the "undue means" test for vacating

an award.[61] However, the Court of Appeals made no such error in the application of law or fact. As to the law, the Court of Appeals properly looked to analogous federal authority for persuasive guidance for the standard for finding undue means. Op. at 23. It concluded that setting aside the arbitration award because it was procured by fraud or undue means is comparable "to the test for setting aside a judgment under CR 60(b) by reason of fraud." Op. at 23 (citing Seattle Packaging Corp. v. Barnard, 94 Wn. App. 481, 493, 972 P.2d 577 (1999)). Thus, the "conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense." Op. at 23-24 (quoting Seattle Packaging, 94 Wn. App. at 493).

Properly applying that test, the Court of Appeals concluded that the arbitration award could not be vacated for undue means. First, it correctly noted that Leibsohn made the same exact arguments against the statute of limitations to the arbitration panel as it did to the Superior Court. Op. at 27- 28 & n.18. And, second, it correctly concluded that Leibsohn did not object to the composition of the panel or otherwise show that the panel was biased or unfair. Op. at 28 & n.18. Thus, as a matter of law, the Court of Appeals was correct: no grounds exist to vacate the award under RCW 7.04A.230(1).

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[61] Pet. for Review at 19-20.

B. The Court of Appeals Did Not Err in Concluding That Colliers Is Not Subject to Judicial Estoppel.

Recognizing that the Court of Appeals properly applied the Uniform Arbitration Act in ordering the arbitration award confirmed, Leibsohn argues that the Court of Appeals erred in concluding that Colliers is not subject to judicial estoppel.

The Court of Appeals accurately identified the standard for applying judicial estoppel with the three primary factors being: (i) the non-moving party's later position being inconsistent with its earlier position; (ii) judicial acceptance of the second position would create a perception that either the first or second court was misled; and (iii) the party asserting the inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Op. at 29 (quoting Ashmore v. Estate of Duff, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009).

Judicial estoppel does not apply to Colliers for multiple reasons. First, as the Court of Appeals correctly concluded, the statements made in October 2009 before the transaction closed about the claim not being arbitrable were made by the CBA and are not attributable to Colliers.[62] Second, the appellate court correctly concluded that Colliers' statements to

[62] Op. at 25 ("Regarding CBA's initial statements about arbitrability, we first note that Colliers and Vander Veen are not legally responsible for CBA's statements.").

the trial court were neither misrepresentations nor inconsistent with the CBA's prior statements on arbitrability. Op. at 27 ("While Colliers and Vander Veen never told the court Leibsohn's claim was time barred or that they intended to move for dismissal, Leibsohn cites no authority requiring them to do so. Colliers and Vander Veen represented that Leibsohn's claim was substantively arbitrable under CBA's bylaws. The bylaws support this conclusion.").

In short, Colliers did not adopt inconsistent positions and it did not mislead as a matter of law. And, finally, because the arbitration panel had the authority to decide the statute of limitations issue and because Leibsohn made its objections to the application of the statute to its claim, Colliers did not receive "an unfair advantage or impose an unfair detriment on [Leibsohn]." Ashmore, 165 Wn.2d at 951.

C. Both Lower Courts Properly (and Easily) Concluded That Leibsohn's Tortious Interference Claim Fails on the Merits.

In affirming the Superior Court's grant of summary judgment to Colliers and SeaTac, the Court of Appeals concluded that: (i) Leibsohn had no valid business expectancy to a continuation of its listing agreement because of the existence of the judicial foreclosure;[63] (ii) there was no improper means used because there is no rule preventing Colliers and

[63] Op. at 43-44.

SeaTac from contacting the lenders directly;[64] and (iii) the alleged damages were too speculative to raise a material issue of fact.[65] In other words, Leibsohn failed to prove three of the four elements of its claim as a matter of law.

Yet, Leibsohn asks this Court to review the case because it alleges that the parties mischaracterized the transaction as a "deed-in-lieu" instead of a short sale.[66] As the Court of Appeals explained, the "transaction's characterization as a deed in lieu, a short sale, a stock sale, or any other type of transaction is **irrelevant given the exclusion's unambiguous language**." Op. at 35-39 (emphasis added).

Leibsohn argues that Supreme Court review is necessary because the Court of Appeals' decision contradicts David Meyers, Inc. v. Anderson, 48 Wn. App. 381, 739 P.2d 102 (1987).[67] No such conflict exists; David Meyers is easily distinguishable. First, the primary issue in David Meyers is whether a lessee's right of first refusal to match a third party's offer to buy property must include the amount of a broker's commission when the broker would not receive a commission on the lessee's purchase. David Meyers, 48 Wn. App. at 383. In other words, does the matching offer need to be the full $600,000 when the seller will

[64] Op. at 45.
[65] Op. at 46.
[66] Pet. for Review at 11-13.
[67] Id. at 11-12.

only receive $570,000 from the third-party bid. That issue has no relevance here.

Second, the conduct complained of in David Meyers that Leibsohn alleges is analogous to this case was a sham, circular transaction with no true economic purpose. It was completely illusory. To hide the fact that the matching offer did not include the broker's commission, the buyer and seller represented in the closing statement that the amount of the broker's fee was paid while at the same time secretly providing for a two-sentence promissory note for that same amount payable right back to the buyer. David Meyers, 48 Wn. App. at 387.

Here, there is no sham, circular transaction. Regardless of how Leibsohn (or the Department of Revenue) chooses to characterize the transaction, the closing statement accurately depicts how the proceeds of the transaction were deployed to pay off K & S' creditors and other interested parties. Comprehensive legal documents were drafted to effectuate a complex transaction. SeaTac acquired the Property, K & S' creditors received millions of dollars and K & S' principals received releases for millions of dollars of personal guarantees. There was nothing illusory about any element of this transaction.

Leibsohn also argues that the Court of Appeals' decision is in conflict with an 87-year old case that merely stands for the general

proposition that no party shall be permitted to take advantage of his own wrongdoing. Pet. for Review at 13 (quoting In re Estate of Tyler, 140 Wash. 679, 684-85, 250 P. 456 (1926)). However, there was nothing wrongful about approaching the lenders and pursuing a financially-advantageous transaction given that the property was in foreclosure. Op. at 45-46. Moreover, both lower courts concluded that there was no valid expectancy that K & S would have extended the listing agreement under the same terms as previous years because the judicial foreclosure action changed the complexion. Op. at 44-45 (noting that K & S made clear that given the pending foreclosure, it could not accept Leibsohn's proposal).

Leibsohn was always free to reject K & S' counter-proposal with the exclusion for the DIL transaction. However, he knowingly signed the extension and worked diligently to find a better deal in the months before the DIL transaction closed. There is no legitimate claim that Colliers tortiously interfered with any listing agreement that Leibsohn had in place with K & S.

IV. CONCLUSION

In a thorough and well-reasoned opinion, the Court of Appeals properly applied governing Washington law to each argument raised on appeal. There are no valid arguments supporting Supreme Court review. Leibsohn's petition should be denied.

DATED this 27th day of December, 2013.

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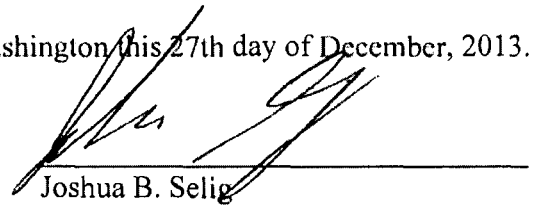
DATED in Seattle, Washington this 27th day of December, 2013.



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