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No. 69445-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Appellant/Cross Respondent,

v.

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

Respondents/Cross Appellants.

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

Appellant,

v.

CITY OF SEATAC, a municipal corporation,

Respondents.

OPENING BRIEF OF RESPONDENTS/CROSS APPELLANTS COLLIERS AND VANDER VEEN

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I. INTRODUCTION

Appellant Leibsohn was a licensed real estate broker and a member of the Commercial Brokers Association ("CBA"). Under the Bylaws of the CBA, his claim against Colliers and Vander Veen (collectively "Colliers") was subject to binding arbitration. When Leibsohn instead sued in Superior Court, Colliers successfully moved to compel arbitration and stay the case. In arbitration, and following briefing and oral argument, Leibsohn's claim was deemed time-barred under the CBA's rules, and dismissed. Leibsohn returned to Superior Court and moved to lift the stay based on arguments considered and rejected by the arbitration panel. The court granted Leibsohn's motion, imposed sanctions on Colliers, and awarded Leibsohn attorney's fees. The court reasoned that Colliers' earlier representation that the case was arbitrable was a misrepresentation because the CBA did not conduct a hearing on the merits but instead dismissed the claim as time-barred. But there were no misrepresentations, and in any event, it was the CBA, not Colliers, that dismissed the case as time-barred. Moreover, the Court's Order required that the arbitration be conducted "in accordance with the [CBA's] Bylaws." Those Bylaws contained the time limit at issue. The court abused its discretion in awarding fees and sanctions.

Meanwhile, although the case was reinstated, Leibsohn did not move to vacate the arbitration award. After the deadline to seek to vacate the award passed, Colliers timely moved to confirm the award. The Court declined to confirm the arbitration award and instead retroactively (and *sua sponte*) amended the earlier order lifting the stay to include a provision vacating the arbitration award. This was erroneous for several reasons. First, because the time to seek to vacate the award had passed, confirmation was mandatory under RCW 7.04A.220. Second, the procedural basis by which the Court amended the order vacating the award – CR 60 – was unavailable as a matter of law once the time to move to vacate expired. Third, there was no error on the face of the award – a requisite to vacating an arbitration award. Fourth, the award was correct – Leibsohn's claim was time-barred under the CBA's rules. Fifth, the court had no authority to amend the earlier order because there was nothing in the record in connection with that order evidencing an intent to vacate the award.

The issues relating to the arbitration award were not addressed by Leibsohn's appeal, but are set forth in Colliers' Cross Appeal (see §§ IV-VII). As a practical matter, the trial court's failure to confirm the arbitration award is dispositive of Leibsohn's claims, making it

unnecessary to reach Leibsohn's appeal. That leaves only the trial court's improper sanctions against Colliers, and failure to award Colliers its fees.

Ultimately, Leibsohn's claims were dismissed on summary judgment. Leibsohn's case was based on a contract containing a prevailing party fee award. Although Colliers was not a party to that contract, it is nevertheless entitled to the benefit of the fee clause under Deepwater Brewing, LLC v. Fairway Resources Ltd., 152 Wn. App. 229, 215 P.3d 990 (2009). The trial court improperly denied Colliers' Motion for Attorney's Fees.

Finally, Colliers is entitled to its fees in connection with the appeal and cross-appeal.

II. STATEMENT OF FACTS RELATING TO LEIBSOHN'S APPEAL

A. Background

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]

SeaTac was interested in acquiring land in the vicinity of the Property in connection with its long-term transportation corridor plans.[2] To that end, it

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[1] CP 1154.
[2] CP 1160 ¶ 3.

retained Colliers to assess potential acquisitions in the area.[3] In November 2008, with the real estate market sinking and no offers, Leibsohn reduced the price to $24.5 million.[4] But because the Property was still listed at more than double what the City thought it was worth, the City did not ask Colliers to pursue the Property at that time.[5]

Meanwhile, over the years, K & S had pledged the Property as security for multiple loans. In January 2005, before listing with Leibsohn, K & S provided a deed of trust to secure a $6,500,000 promissory note.[6] By 2009, K & S had granted four deeds of trust securing four loans totaling over twelve million dollars.[7] 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.[8] The relief sought included a foreclosure sale of the Property and deficiency judgments against Switzer and Kingen personally based on their guarantees.[9]

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[3] Id.
[4] Id. ¶¶ 4-5.
[5] Id. ¶ 5.
[6] CP 1172.
[7] See summary at CP 402.
[8] CP 1216-28.
[9] Id.

B. 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.[10] Leibsohn was still asking nearly $21,000,000,[11] 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.[12] If SeaTac could purchase the loans, it could potentially obtain a DIL from K & S.

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.[13] 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.[14] By early October, 2009, the framework was in place for SeaTac to purchase the debt and obtain the Property via a DIL.

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[10] CP 1160 ¶ 6.
[11] Id.
[12] CP 1161 ¶ 7.
[13] Id. ¶ 8.
[14] Id. ¶ 9.

Leibsohn argues that SeaTac's DIL plan was actually a scheme to obtain the Property without paying Leibsohn's commission or excise tax.[15] But SeaTac had no obligation to pay a commission to Leibsohn even if SeaTac had purchased the Property from K & S. K & S was the party obligated to pay a commission under Leibsohn's listing agreement.[16] And while Leibsohn correctly notes that SeaTac did not want to pay an excise tax, there was nothing wrong with structuring a transaction to minimize or eliminate taxes. Moreover, as detailed in Co-Respondent SeaTac's Opening Brief, no excise tax was owed given the structure of the transaction.

Leibsohn also criticizes Vander Veen for communicating with the lenders, as opposed to presenting an offer to purchase through Leibsohn.[17] Leibsohn forgets 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.

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[15] Leibsohn's Opening Br. at 1.
[16] CP 1242 ¶ 5.
[17] Leibsohn's Opening Br. at 7.

C. After His Proposed Listing Extension Is Rejected, Leibsohn Signs (But Backdates) an Amended Listing Agreement for the Property

Meanwhile, Leibsohn's listing agreement was set to expire on November 1, 2009.[18] In mid-August, Leibsohn sent K & S a proposed new listing agreement which priced the Property at $27,500,000, and extended the term another year.[19] Leibsohn's proposed extension provided for a commission if the Property was sold, made unmarketable by the owner, or withdrawn from sale.[20] With the Property already in a judicial foreclosure and DIL discussions occurring, 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 DIL transactions as commissionable events:

> 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.[21]

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[18] CP 1241.
[19] CP 1246.
[20] CP 1247.
[21] CP 1253.

In an email to Leibsohn, K & S' Switzer explained that the exclusion was specifically intended to address the deed in lieu transaction that was being negotiated:

> I wrote in a fee exclusion for the proposed deed in lieu of transaction proposed through Tom Hazelrigg and Arvin Vander Veen.
>
> . . . .
>
> . . . We have hung in there with you as our broker for over 2 years. We hope that you can pull the rabbit out of the hat and sell the property as a whole and get us out clean.
>
> 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.[22]

When Leibsohn received this counterproposal, he "sat on it."[23] Accordingly, his existing listing agreement expired by its terms on November 1, 2009.[24]

Leibsohn did not sign the counter proposal until November 23, 2009.[25] When he signed it, he backdated it to appear as though he had signed it on October 2, 2009.[26] After signing the document (and backdating

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[22] CP 1251 (emphasis added).
[23] CP 1153.
[24] CP 1241.
[25] CP 1152.
[26] CP 1151:21-1152:11.

his signature), he never delivered or communicated his acceptance to K & S.[27] He did, however, begin threatening to sue Colliers just two days later for supposedly interfering with his back-dated, nonexistent listing.[28]

D. SeaTac Acquires the Property Via a Deed-in-Lieu of Foreclosure

The transaction by which SeaTac purchased the debt and obtained title to the Property via a DIL closed in the last week of December 2009.[29] In his brief, Leibsohn says that as a part of the transaction, SeaTac paid $12,270,000 to K & S.[30] This is incorrect. No money went to K & S.[31]

III. SUMMARY OF ARGUMENT IN OPPOSITION TO LEIBSOHN'S APPEAL

Leibsohn's brief does not address the merits of his substantive claims for tortious interference, violation of RCW 19.86 and unjust enrichment. He instead refers the Court to his summary judgment briefing below for those issues.[32] He devotes the bulk of his argument to whether the transaction at issue was a traditional sale or a deed in lieu of foreclosure. The brief of Co-Respondent SeaTac addresses that issue and explains that it was a DIL

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[27] CP 1156:2-13.
[28] CP 1263-65.
[29] CP 530.
[30] Leibsohn Opening Br. at 18-19.
[31] CP 530.
[32] Leibsohn Opening Br. at 18.

transaction and not a traditional sale. But even if it was a traditional sale, Leibsohn cannot satisfy the elements of his substantive claims.

Leibsohn's tortious interference claim fails for several reasons. First, he had no reasonable expectation that the listing agreement would be renewed on the terms he proposed. The property was in foreclosure, and Leibsohn's proposed extension made a foreclosure sale a commissionable event. No rational owner would sign such an agreement.

Second, by the time of the transaction, Leibsohn had no listing agreement because he had let it lapse. There was no contract with which to interfere.

Third, K & S did not breach the agreement or terminate it prematurely. K & S simply declined to renew the agreement on the terms Leibsohn proposed. Thus, Colliers did not induce any breach.

Fourth, the claimed damages – the loss of a commission – are impermissibly speculative. Leibsohn did not have a ready, willing and able buyer lined up, nor any buyer anywhere on the horizon.

The speculative nature of the damages claim is likewise fatal to his consumer protection claims.

Leibsohn's unjust enrichment theory argues that through his efforts, Colliers and SeaTac became aware that the property was for sale and benefitted as a result. But because Leibsohn's efforts were done pursuant to

his contract with K & S, unjust enrichment from Colliers – a third party – is not available as a matter of law.

IV. ARGUMENT

A. The Tortious Interference Claim Fails

A claim for tortious interference with a contract or business expectancy requires five elements: (i) the existence of a valid contractual relationship or business expectancy; (ii) defendants' knowledge of that relationship; (iii) an intentional interference inducing or causing a breach of the relationship or expectancy; (iv) defendants' interference for an improper purpose or by improper means; and (v) resultant damages. Leingang v. Pierce Cnty. Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997).

1. Because of the Pending Judicial Foreclosure, Leibsohn Had No Valid Business Expectancy Beyond November 1, 2009

Although Leibsohn's listing lapsed on November 1, 2009, it claims to have had a business expectancy in the extension of the agreement on the same terms,[33] i.e., with foreclosure sales and/or DILs as commissionable events. The undisputed facts show this element cannot be satisfied.

To establish an expectancy in an at-will relationship (or a contractual relationship set to expire by its own terms), Leibsohn must prove he "had every right to anticipate [it] would continue, and . . . would have continued

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[33] CP 1314.

but for the intervention of [Colliers.]" F.D. Hill & Co. v. Wallerich, 67 Wn.2d 409, 413, 407 P.2d 956 (1965). A plaintiff has no reasonable expectancy when the other party to the contract has and exercises a contractual right to withhold its consent. Broten v. May, 49 Wn. App. 564, 569, 744 P.2d 1085 (1987).

In Birkenwald Distributing Co. v. Heublein, Inc., 55 Wn. App. 1, 776 P.2d 721 (1989), the Court explained that because a supplier had the right to terminate the distributor at will, the distributor had no claim for tortious interference when the supplier refused to approve the transfer of the distributorship agreement to a new distributor. 55 Wn. App. at 10-11. The mere existence of a contract does not generate a valid "expectancy" of a continuation of that agreement past its express terms.

Here, Leibsohn had no reasonable expectancy that K & S would sign the extended listing agreement on the terms it proposed. The judicial foreclosure had been filed several months earlier. Under the terms Leibsohn proposed, the forced sale would have triggered a commission obligation. Likewise, the DIL discussions were well along. That too would have triggered a commission under Leibsohn's proposed agreement. Finally, K & S had an absolute right to reject the terms proposed by Leibsohn (and would have been crazy to sign it as presented). As Switzer explained when he made his counter-offer for the extension: "We would gladly pay you a fee

for selling the property. We will not pay a fee [to] give up our property to our lenders, no matter who they may be."[34]

2. Leibsohn Had No Contractual Relationship With K & S by the Time the Transaction Closed

By the time the DIL transaction closed in late December 2009, Leibsohn's listing had lapsed. Despite representing to the Court that he signed the extension on October 2, 2009,[35] he ultimately admitted that he did not sign it before the listing agreement expired. Rather, he waited until late November to sign it and backdated his signature to early October.[36]

Regardless of the backdating, Leibsohn never delivered or communicated his acceptance to K & S.[37] An acceptance must be delivered to be effective. See, e.g., Plouse v. Bud Clary of Yakima, Inc., 128 Wn. App. 644, 648, 116 P.3d 1039 (2005) ("Acceptance is 'an expression of the intention, by word, sign, or writing communicated . . . to the person making the offer.'"); see also RESTATEMENT (SECOND) OF CONTRACTS § 56 (1981) (The acceptance of an offer must be communicated unless waived by the terms of the offer.). Here, Leibsohn never sent the executed listing agreement to his clients because "[t]hey never asked."[38]

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[34] CP 1251.
[35] CP 96-97 ¶ 4 ("On October 2, 2009, the ESLA was amended to expire on November 1, 2010"). See also CP 43:9-10; CP 1272-73 ¶ 8.
[36] CP 1151:21-1152:11.
[37] CP 1156:2-13.
[38] CP 1156:4-6.

3. Colliers Did Not Induce or Cause a Breach of the Relationship or Expectancy

Colliers could not have induced or caused a breach because there was, in fact, no breach of the K & S-Leibsohn contractual relationship. While Leibsohn had a valid listing agreement, he aggressively promoted the Property. K & S never breached the agreement (i.e., refused to pay a commission) nor did it terminate the agreement prematurely. Rather, K & S merely declined to extend the agreement under the same terms for an additional year. That is not a breach. And, as discussed above, Leibsohn had no legitimate expectancy to an extension under the same terms.

4. Even If the Backdated Agreement Was Effective, It Excluded DILs As Commissionable Events

Even assuming for argument purposes that Leibsohn's back-dated extension was valid, he had no expectation of a commission for the transaction that occurred here. Whether or not the transaction is deemed a sale or a DIL, Leibsohn agreed to exclude the transaction at issue as a commissionable event:

> 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.[39]

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[39] CP 1253.

Here, K & S gave up the property in exchange for releases of the personal guarantees of Kingen and Switzer.

On this note, if Leibsohn is correct – that the transaction was actually a sale – that does not change the outcome. It simply means that his client – K & S – owes him a commission.

5. The Alleged Damages Are Too Speculative

As a matter of law, Leibsohn's alleged damages are too speculative to support a tortious interference claim. Despite years of marketing, Leibsohn could never produce a ready, willing, and able buyer. At the time of the transaction, there was no pending sale, nor any sale anywhere on the horizon, with which to interfere. The notion that Leibsohn could have produced a buyer, and at what price, is pure speculation.

6. Leibsohn Did Not Lose an Opportunity to Sell the Property

Leibsohn relies on a New Jersey case from over 60 years ago to argue that he has a viable tortious interference claim because the deed-in-lieu transaction denied him "an opportunity to negotiate for sale of the property."[40] The New Jersey case is easily distinguished. In that case, there was a realistic possibility of a sale which would have generated a commission. Here, because of the pending judicial foreclosure, there was

[40] Opening Br. of Appellant at 33 (citing McCue v. Deppert, 21 N.J. Super. 591, 91 A.2d 503 (N.J. 1952).

only a very limited window for Leibsohn to try to sell the Property. But, the evidence is undisputed that there was no willing and able buyer anywhere on the horizon for Leibsohn. Nor does Leibsohn offer any evidence showing that had Colliers presented SeaTac's $12.2 million offer to him, there would have been money to pay him a commission. In fact, Leibsohn concedes it would have taken a $14.5 million sale to free up money for his commission.[41] Thus, there is no evidence supporting the notion that had there not been this deed-in-lieu transaction, a buyer would have been located before K & S lost the Property in the foreclosure proceeding.

B. The Consumer Protection and Unjust Enrichment Claims Fail

The consumer protection claim fails for a simple reason. Leibsohn has no damages. He was not entitled to a commission because the listing agreement had lapsed. Even if it had not, the contract provided that he was not entitled to a commission for a deed in lieu transaction. Finally, as with the tortious interference claim, the damages are impermissibly speculative.

Leibsohn claims unjust enrichment because, through his efforts, Colliers and SeaTac became aware that the property was available for sale.[42] But Leibsohn's efforts were pursuant to his contract with K & S. Under those circumstances, unjust enrichment is not available:

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[41] CP 1559-60.
[42] CP 359 ¶ 9.

> [A]n implied undertaking [i.e., unjust enrichment] cannot arise, as against one benefited by work performed, when the work was done under a special contract with other persons.

Chandler v. Washington Toll Bridge Auth., 17 Wn.2d 591, 605, 137 P.2d 97 (1943). In other words, work that benefits a third party but is performed pursuant to a contract does not support a claim of unjust enrichment against the third party.

V. ASSIGNMENTS OF ERROR ON CROSS APPEAL

1. The trial court erred in denying Colliers' motion to confirm the arbitration award, and *sua sponte* vacating the arbitration award.

2. The trial court erred in finding that "the issue of whether to confirm or vacate the arbitration award was before the Court" in connection with Leibsohn's motion to lift the stay.

3. The trial court erred in awarding sanctions and attorney's fees against Colliers.

4. The trial court erred in finding that (i) Colliers made misrepresentations in moving to compel arbitration, and (ii) the CBA's dismissal of Leibsohn's claim as time-barred did not constitute an arbitration "as expected by Plaintiffs [sic] and argued by Defendants. . . ."

5. The trial court erred in finding that defendants were estopped from objecting to Leibsohn's motion to lift the stay.

6. The trial court erred in denying Colliers' motion for attorney's fees after Leibsohn's case was dismissed on summary judgment.

VI. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court initially compelled arbitration of Leibsohn's claim and stayed the case. Leibsohn's claim in the CBA arbitration was dismissed as time-barred. Leibsohn did not timely seek to vacate the arbitration award. As a result, when Colliers later moved to confirm the award, confirmation was mandatory under RCW 7.04A.220. Instead of confirming the award, the trial court retroactively amended an earlier order pursuant to CR 60 to add a clause vacating the Arbitration Award. Did the trial court have the ability to deny the motion and instead amend the earlier order even though (i) confirmation was mandatory under RCW 7.04A.220, (ii) CR 60 is inapplicable once the statutory deadline to vacate an award has passed, (iii) there was no error on the face of the arbitration award, (iv) Leibsohn's claim was time-barred under the CBA's rules, and (v) there was nothing in the record of the earlier proceeding establishing the Court's intent to vacate the award? (Assignments of Error Nos. 1 and 2.)

2. After Leibsohn's claim was dismissed in the arbitration as time-barred, Leibsohn moved to lift the stay. The Court granted the motion and also sanctioned Colliers $500 and awarded Leibsohn approximately $50,000 in attorney's fees based on alleged misrepresentations made by Colliers in obtaining the order compelling arbitration. Did the trial court abuse its discretion in awarding sanctions and fees given that there were no misrepresentations and no procedural bad faith? (Assignments of Error Nos. 3, 4 and 5.)

3. The basis for Leibsohn's claim against Colliers was his listing agreement with K & S, which included a prevailing party fee clause. Under Deepwater Brewing, LLC v. Fairway Resources, Ltd., 152 Wn. App. 229, 215 P.3d 990 (2009), was Colliers, as a third party, entitled to claim fees under that clause? (Assignment of Error No. 6.)

VII. STATEMENT OF FACTS RELATING TO CROSS APPEAL

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

Leibsohn was a member of the CBA. Article X of the CBA By-laws contained the following arbitration clause:

> It is the duty of the members of this Association (and each so agrees) to submit all controversies involving commissions, between or among them to binding arbitration by the Association, rather than to bring a suit to law.

. . . .

> . . . . [N]o members may institute legal action…against any other member without prior approval of the Board of Directors.[43]

Under the CBA's rules for arbitration, a dispute involving a commission was not arbitrable until the transaction generating the commission had closed.[44] Any demand for arbitration must be filed within 90 days after closing.[45]

Separate and apart from arbitration, Article XI of the CBA By-laws contained a provision by which the CBA could discipline a member who has allegedly violated a CBA rule.[46] The disciplinary process was separate from the arbitration process.[47]

On October 13, 2009, before the transaction at issue closed, Leibsohn sent a letter to the CBA claiming that Vander Veen & Colliers had violated a rule barring interference with his exclusive listing agreement.[48] Leibsohn asked the CBA to "[issue] some type of cease and desist notice to Colliers…."[49] There was no dispute about a commission at that time, and the DIL transaction was months away from closing.

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[43] CP 24 ¶ X(A).
[44] CP 75 ¶ 6.
[45] Id.
[46] CP 25 ¶ XI.
[47] Id.
[48] CP 341-42.
[49] CP 342.

Leibsohn did not request arbitration and, because the sale had not yet closed, there was no arbitrable dispute at that time.

For reasons unclear, and even though Leibsohn had not requested arbitration, the CBA initially (albeit correctly) responded that the matter could not be arbitrated. The CBA said it would take no action."[50]

Two days later, the CBA's counsel, in response to emails from Leibsohn concerning the CBA's policies and procedures for complaints and arbitrations said:

> CBA's procedures for considering a complaint alleging a *Rule Violation* are relatively simple: When CBA receives a complaint, it reviews the complaint to determine whether the complaint, if accurate, states a Rule Violation. If CBA determines that it does not, the complaint is retained and the matter is closed. If it appears to CBA that a Rule Violation has occurred or may have occurred if the facts alleged are accurate, a violation letter is mailed to the respondent. The respondent has ten business days to respond. CBA then decides the matter.
>
> . . . .
>
> The multitude of questions you have asked about CBA's administration regarding its *arbitration* processes and Rules are irrelevant because your complaint pertained to a Rule violation and not a matter of which is an arbitrable [sic] between members. **As you no doubt noted, CBA's arbitration process is available only for commission disputes between members, and then only after a closing has occurred.**[51]

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[50] CP 61.

[51] CP 66 (third emphasis added).

Leibsohn did not further pursue the matter with the CBA at that time, and the DIL transaction closed at the end of December 2009.

B. 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, and Leibsohn had lost a commission as a result.[52] Colliers moved to stay the case and compel arbitration as required by the CBA's Bylaws.[53] That motion was granted in September 2010, and Leibsohn was ordered to arbitration "in accordance with the bylaws of the Commercial Brokers Association."[54]

In response, Leibsohn made a submission to the CBA on the standard CBA's Arbitration Complaint form.[55] Leibsohn did not, however, pay the filing fee, and did not comply with the substantive requirements of the CBA's arbitration rules.[56] (Leibsohn failed to describe his claim or provide the requisite facts.)[57] Moreover, rather than

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[52] CP 1-6.
[53] CP 7-13.
[54] CP 81-82.
[55] CP 199-200.
[56] CP 197 ¶ 4.
[57] Id.

request arbitration, Leibsohn's submission claimed that the dispute was not arbitrable.[58]

The CBA rejected Leibsohn's claim that the matter was not arbitrable,[59] and ruled that the dispute was subject to arbitration under the CBA's Bylaws.[60] It invited Leibsohn to file an amended arbitration complaint in compliance with the rules.[61] Although Leibsohn wrote a letter in response,[62] he did not amend the complaint.

In November 2010, the CBA again invited Leibsohn to file an amended arbitration complaint:

> Pursuant to CBA's very clear rules, as soon as we receive a complaint that provides a full and complete statement of [Leibsohn's] claim – a complaint that not only provides enough substance that an arbitration panel will be able to understand that claim, but that will also allow Colliers to submit a meaningful response – we will forward it to Colliers without delay.[63]

Leibsohn declined to amend its filing, stating that the CBA was "confused," and Leibson would be "relying on the record."[64]

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[58] CP 200.
[59] CP 209-10.
[60] CP 197 ¶ 5; 209.
[61] CP 209; CP 197 ¶ 7.
[62] CP 208.
[63] CP 211-13.
[64] CP 214.

Nothing further happened until March 2011 when Leibsohn moved in Superior Court to lift the stay.[65] 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.[66] Leibsohn's motion was denied.[67] The Court also made a finding that Leibsohn was "willfully impeding the arbitration process" and imposed sanctions of $2,500.[68]

Leibsohn amended his arbitration complaint and the arbitration process began.[69] Colliers moved to dismiss Leibsohn's claim as time-barred.[70] 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.[71] Even then, he sued instead of pursuing the required arbitration.

After briefing and oral argument before the CBA, Leibsohn's arbitration complaint was dismissed as time-barred:[72]

> THIS MATTER was heard by the undersigned Arbitration Panel, Pursuant to the Bylaws of CBA

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[65] CP 83-95.
[66] CP 88-89.
[67] CP 237-38.
[68] CP 238.
[69] CP 324.
[70] CP 310-16.
[71] CP 312.
[72] CP 343-46.

> and the Agreement of the Complainant and Respondents. Having reviewed Respondents' Motion to Dismiss, Complainant's Opposition to the Motion to Dismiss, the Declaration of Brian Leibsohn, the First Amended Complaint, and Respondents' Reply; and having heard, and carefully considered, the oral argument of the Complainant's and Respondents' counsel, the Panel makes the following decision:
>
> > Respondents' Motion to Dismiss is hereby granted, and Complainant's First Amended Complaint is hereby dismissed.[73]

C. 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.[74] (As discussed in Section D below, Leibsohn did not move to vacate the arbitration decision.) Leibsohn claimed that Colliers was estopped to oppose the motion based on earlier statements regarding arbitrability.[75] (Leibsohn had unsuccessfully made the same estoppel argument in the arbitration.)[76]

The Court granted Leibsohn's motion.[77] 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 made

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[73] Id.
[74] CP 240-49.
[75] CP 247.
[76] CP 333.
[77] CP 353-56.

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."[78] The 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.[79]

The 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.[80] In finding this to be a misrepresentation, the Court did not acknowledge that the CBA had (i) concluded the matter was arbitrable, and (ii) taken jurisdiction over the claim.[81]

The Court concluded that:

> The court finds that in this case and under these facts, the CBA's subsequent summary dismissal without reaching the merits...did not constitute an arbitration as expected by Plaintiffs and argued by Defendants and, therefore, Defendants are estopped from

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[78] CP 354-55.
[79] CP 66.
[80] CP 355:2-5.
[81] CP 197 ¶ 5; CP 209.

objecting to Plaintiff's Motion to Lift the Stay and Re-Issue Case Schedule.[82]

Additionally, the court imposed sanctions of $500 against Colliers "for their misrepresentations regarding arbitrability."[83] The Court also awarded Leibsohn approximately $55,000 for attorney's fees incurred in the briefing relating to the initial motion to compel arbitration and the follow up motion practice.[84]

D. Leibsohn Fails to Timely Move to Vacate the Arbitration Award; the Court Denies Colliers' Motion to Confirm the Award

The CBA dismissed Leibsohn's claims on March 22, 2012.[85] Leibsohn did not seek to vacate that award within the 90-day period under RCW 7.04A.230(2).

Colliers timely moved in the Superior Court to confirm the award on August 12, 2012.[86] Because Leibsohn failed to move to vacate the award within the statutory period, confirmation of the award was mandatory.[87]

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[82] CP 355.
[83] Id.
[84] CP 389-90.
[85] CP 343-46.
[86] CP 1472-91.
[87] RCW 7.04A.220 ("After a party to the arbitration proceeding receives notice of an award, the party may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is . . . [timely] vacated under RCW 7.04A.230." (emphasis added)).

The Court denied the motion to confirm the Arbitration Award.[88] Instead, the Court retroactively amended the post-arbitration order lifting the stay to add a provision vacating the Arbitration Award.

The Court's reasoning was as follows:

> While Plaintiff did not specifically request that the Arbitration Award be vacated, the underlying reason for the request [to the lift the stay] was the summary dismissal and perceived lack of fairness before the CBA.[89]

The Court also noted that:

> In response to Plaintiff's Motion, Defendants asked the Court to treat the motion as a Motion to Vacate the Arbitration Award and stated, "Plaintiff's Motion to Lift Stay is in substance a Motion to Vacate the Arbitration Award and should be treated as such."[90]

In making this observation, the Court overlooked that in Leibsohn's reply brief on its Motion to Lift the Stay, Leibsohn had specifically disclaimed that it was seeking to vacate the Arbitration Award.[91]

The Court concluded that it had "the authority to correct and/or clarify its orders so that they reflect the court's intent and decision" and concluded that:

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[88] CP 1658-59.

[89] CP 1659.

[90] Id.

[91] CP 350 ("[Colliers] incorrectly contends that Leibsohn['s]...motion is actually a motion to vacate an arbitration award."

> the issuance of a case schedule for trial in this court would have been totally inconsistent with leaving an arbitration [award] in place.[92]

VIII. SUMMARY OF ARGUMENT RE CROSS APPEAL

The Court erred in denying Colliers' motion to confirm the arbitration award. Instead of confirming the award, the Court retroactively amended the earlier order lifting the stay pursuant to CR 60 to vacate the award, even though Leibsohn had never sought such relief. This was erroneous because (i) confirmation was mandatory under the statute, (ii) CR 60 cannot be used once the statutory deadline to vacate an award has passed, (iii) there was no error on the face of the award, (iv) the claim was time-barred, and (v) a court can only retroactively amend a prior order if there is evidence on the record in connection with the earlier order making it clear that the failure to include the new language was the result of accident or inadvertence. There was no such evidence.

The court likewise erred in awarding sanctions and fees in connection with lifting the stay because there were no misrepresentations by Colliers or anyone else about whether the dispute was arbitrable. The matter was arbitrable and the CBA so determined. The fact that the claim was time-barred under the rules governing the required arbitration did not mean it was not subject to arbitration.

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[92] CP 1659.

Finally, Leibsohn's listing agreement contained a fee provision. Because the listing agreement formed the basis of his claim against Colliers, Colliers is entitled to the benefit of the fee provision even though it was not party to the contract.

IX. ARGUMENT ON CROSS APPEAL

A. The Court Was Obligated to Confirm the Arbitration Award

The standard of review of the court's order vacating the arbitration award is de novo. Mandez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 45 P.3d 594 (2002) (appellate court reviews question of arbitrability de novo).

The trial court's failure to confirm the award was erroneous for several reasons. First, it is undisputed that Leibsohn failed to move to vacate the arbitration award within the 90-day limit of RCW 7.04 A.230(2). The 90-day deadline is a statute of limitations. MBNA Am. Bank, N.A. v. Miles, 140 Wn. App. 511, 164 P.3d 514 (2007). Because the time to seek to vacate the award had passed, the court was required to confirm the award under RCW 7.04A.220.

Second, as authority for amending the order lifting the stay to add a provision vacating the arbitration award, the Court relied on CR 60:

> [T]he court hereby amends the order of April 24, 2012, as follows:

> IT IS FURTHER ORDERED that due to the unusual circumstances surrounding the procedures, the pre-hearing arbitration decision is vacated in accordance with RCW 7.04A.230(1)(a) and CR 60(b)(11).[93]

As a matter of law, CR 60(b) cannot be used to vacate an arbitration award once the statutory 90-day time limit has passed. ML Park Place Corp. v. Hedreen, 71 Wn. App. 727, 743, 862 P.2d 602 (1993):

> [T]he sole avenue for attacks on [an arbitration award] owing to defects in its procurement is a Section .180 motion to vacate an award. CR 60 cannot be used as an alternative route (*i.e.*, "a guise") to attack the award outside of the 3-month statutory limitations period.

Likewise, while RCW 7.04A.230(1)(a) sets forth a substantive basis for attacking an arbitration award, the challenge must still be made within the 90-day time period of RCW 7.04A.230(2).

Third, unless the award on its face showed application of an erroneous rule or a mistake in applying the law, the award cannot be vacated. Phillips Bldg. Co., Inc. v. An, 81 Wn. App. 696, 915 P.2d 1146 (1996). Here, the face of the award simply states that the claim is dismissed.[94] There was no error or mistake on the face of the award.

Fourth, whether the matter was time-barred under the CBA's arbitration rules had no bearing on whether the Court was required to compel arbitration in the first instance. Law Enforcement v. Yakima

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[93] CP 1659.
[94] CP 343-46.

Cnty., 133 Wn. App. 281, 287-88, 135 P.3d 558 (2006) (if court determines matter is subject to arbitration, procedural issues are left to the arbitrator). See also Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild, 157 Wn. App. 304, 320, 237 P.3d 316 (2010) (whether claim is time-barred is determined by the arbitrator, not the court). Stated otherwise, even if Colliers had said, in moving to compel arbitration, that it would be moving in arbitration to dismiss the claim as time-barred, the Court still had to grant the motion.

Fifth, the Court's modification of the order lifting the stay violated the rule that an order can only be retroactively amended to accurately reflect the court's intent as expressed **on the record** before the earlier order was entered. See, e.g., Shaw v. City of Des Moines, 109 Wn. App. 896, 901, 37 P.3d 1255 (2002). The rule does not allow an order to be changed by adding new provisions that were not part of the court's original intent as expressed on the record. Presidential Estates Apartment Assocs. v. Barret, 129 Wn.2d 320, 917 P.2d 100 (1996) (new provisions could not be added, even though trial judge later said he had intended to include the provisions in the original judgment).

Here, there was nothing on the record in connection with the order lifting the stay which indicated the Court's intent to vacate the arbitration

award. The matter was heard on the briefs without oral argument.[95] Moreover, Leibsohn had expressly disclaimed any intent to vacate the award in moving to lift the stay.[96]

The Court's explanation that issuing a new case schedule was inconsistent with not vacating the award does not meet the standard for amending the order. To the contrary, because Colliers had not yet sought to confirm the award, the issuance of a case schedule after lifting the stay was not inconsistent with anything. Lifting the stay simply ended the temporary suspension of proceedings and gave the Court power to decide issues between the parties. Everett Shipyard, Inc. v. Puget Sound Envtl. Corp., 155 Wn. App. 761, 769, 231 P.3d 200 (2010).

B. The Court Abused Its Discretion in Awarding Sanctions and Fees Because There Were No Misrepresentations Made by Colliers in Compelling Arbitration

The standard of review for the Court's imposition of sanctions and attorney's fees is whether there was an abuse of discretion.[97]

Attorney's fees may be awarded when "authorized by a contract, statute, or recognized ground in equity." Forbes v. Am. Bldg. Maint. Co. W., 170 Wn.2d 157, 169, 240 P.3d 790 (2010). One equitable ground that justifies attorney's fees is bad faith. Id. There are three types of bad faith:

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[95] CP 353.
[96] CP 350.
[97] Gander v. Yeager, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

(1) prelitigation misconduct; (2) procedural bad faith; and (3) substantive bad faith. Wright v. Dave Johnson Ins. Inc., 167 Wn. App. 758, 784, 275 P.3d 339 (2012). Here, although the Court did not articulate the specific ground for awarding fees, it was presumably acting pursuant to the procedural bad faith prong.

Procedural bad faith is designed "to protect the efficient and orderly administration of the legal process." Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 928, 982 P.2d 131 (1999) (quoting Jane P. Mallor, Punitive Attorney's Fees for Abuses of the Judicial System, 61 N.C. L. Rev. 613, 644 (1983)).[98] To assess potential procedural bad faith, the court considers the "conduct of the party in . . . maintaining the litigation." Dow Chem. Pac. Ltd. v. Rascator Mar. S.A., 782 F.2d 329, 345 (2d Cir. 1986). Bad faith is personal, requiring clear evidence of a particular party's actions in bad faith. Dow Chem., 782 F.2d at 344.

The Court abused its discretion in awarding sanctions and fees against Colliers. First, the Court relied on statements by the CBA (not Colliers) to the effect that Leibsohn's pre-closing, rules-based complaint

[98] There is little authority on procedural bad faith in Washington. Washington's leading case on the subject, Rogerson, cites to several of the federal cases as authority. 96 Wn. App. at 918.

was not arbitrable.[99] Although Colliers is a member of the CBA, there was no evidence showing that the CBA was acting as Collier's agent in making the statement.

Second, even if Colliers were somehow legally responsible for the CBA's statements, the CBA did not make any misrepresentations. When Leibsohn requested disciplinary action,[100] the CBA correctly stated that the matter was not arbitrable (the transaction had not yet closed), albeit for the wrong reason, i.e. that Leibsohn had "struck all of the language in his listing agreement pertaining to the CBA."[101] Two days later, in response to email inquiries from Leibsohn, the CBA clarified any confusion going forward:

> [The] complaint pertained to a Rule violation and not a matter which is an arbitrable [sic] between members. . . CBA's arbitration process is available only for commission disputes between members, and then only after closing has occurred – neither circumstance exists here.[102]

In any event, the CBA's rules provide that regardless of what a CBA staff person may say, the member is ultimately responsible for knowing the rules and the Bylaws:

> **Reliance on Staff Advice.** Every CBA member is responsible for knowing and complying with

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[99] CP 354.
[100] CP 341-42.
[101] CP 61.
[102] CP 66-67.

> the Rules and Bylaws of CBA, as well as the contents and proper use of CBA forms. CBA employees and agents may respond to oral inquiries of members in this regard, but the ultimate responsibility remains with the member.[103]

Third, there was no representation by anyone, after the transaction closed and the matter became ripe for arbitration, that Leibsohn's claim was not subject to arbitration.

Fourth, the Court found that in moving to compel arbitration, Colliers had represented that there would be a hearing on the merits:

> The court finds that...the CBA's subsequent summary dismissal without reaching the merits by way of the "pre-arbitration hearing" did not constitute an arbitration as expected by Plaintiffs and argued by Defendants. . . .[104]

But in moving to compel arbitration, Colliers never represented that (i) the CBA bylaws governing arbitration would not apply, (ii) Colliers was waiving any defense,[105] or (iii) that Leibsohn was guaranteed a trial on the merits. Moreover, Colliers submitted the arbitration rules to the Court and Leibsohn, including the limitations provision, in moving to compel arbitration.[106] For his part, although Leibsohn opposed arbitration

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[103] CP 367 n.1.
[104] CP 355.
[105] CP 7-13, 68-72.
[106] CP 75-80.

in the first instance, he never argued that the arbitration rules would not apply if the matter were subject to arbitration.[107]

Finally, the Court itself ordered arbitration "in accordance with the By-Laws of the [CBA]."[108] Those By-Laws included the limitations provision at issue.[109]

C. Colliers Is Entitled to Recover Its Attorney's Fees and Costs in Successfully Defending the Litigation

Attorney's fees may be awarded when authorized by a private agreement, a statute, or a recognized ground in equity. Deep Water Brewing, LLC v. Fairway Res., Ltd., 152 Wn. App. 229, 277, 215 P.3d 990 (2009) (citing Fisher Props., Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986)).

Leibsohn's agreement with K & S provided that:

> ATTORNEY'S FEES. In the event either party employs an attorney to enforce any terms of this Agreement and is successful, the other party agrees to pay a reasonable attorney's fee. In the event of trial the amount of the attorney's fee shall be fixed by the court.[110]

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[107] CP 41-50.
[108] CP 82.
[109] CP 24-25 ¶ X(D).
[110] CP 1243.

Although Colliers was not a party to the contract, the fee provision nevertheless applies because the agreement was the foundation for Leibsohn's claims.

A contractual fee provision can be enforced by third parties when the contract is "central to the existence of the claims, i.e., when the dispute actually arose from the agreements." Deep Water Brewing, 152 Wn. App. at 278 (citing, among other authority, W. Stud Welding, Inc. v. Omark Indus., Inc., 43 Wn. App. 293, 299, 716 P.2d 959 (1986) (contract-related tortious interference claim justified awarding contract-based fees)); see also Hemenway v. Miller, 116 Wn.2d 725, 742, 807 P.2d 863 (1991) ("If the contract containing the attorney fee provision is central to the controversy, the statute applies.").

In Deep Water Brewing, a restaurant owner gave a housing subdivision developer a right-of-way in exchange for money and the developer's height restriction covenant so as to protect the restaurant's view of Lake Chelan. 152 Wn. App. at 240. The parties' agreement included a prevailing party fee provision. The developer breached the agreement, and the restaurant sued the developer for breach of contract, and the homeowners' association and its president for tortious interference. Id. at 242-43. After concluding that the homeowners' association and its president did tortiously interfere, the trial court ruled

that they were jointly and severally liable for the attorney's fees under the contractual fee provision. Id. at 245-46. This Court affirmed, explaining that "enforcement of the agreements and the claims that followed their breach is the essence of [plaintiff's] tortious interference with contract claim against [defendants]." Id. at 279. It concluded:

> [B]ased on the fee provisions set out in the agreements that the [trial] court properly awarded fees jointly and severally against Key Development (for breach) and Jack Johnson and Key Bay Homeowners Association (for tortious conduct arising from the agreements. Id.

The same is true here. Leibsohn claimed the agreement entitled Leibsohn to a commission in the transaction involving SeaTac, K & S, and K & S' creditors. The trial court correctly concluded that the transaction was a deed in lieu of foreclosure and that the agreement therefore had not been breached, and dismissed the tortious interference claim as a matter of law. Therefore, Colliers, which incurred attorney's fees opposing Leibsohn's efforts "to enforce the provisions of such contract" is entitled to recover its attorney's fees under RCW 4.84.330.

Leibsohn cannot reasonably dispute the application of Deep Water Brewing to this case. In fact, Leibsohn's complaint alleged that Deep Water Brewing entitled it to recover attorney's fees from Colliers and Vander Veen for their alleged tortious interference:

> [Leibsohn] is also entitled to its attorneys' fees and costs under the ESLA. In Deep Water Brewing, LLC v. Fairway Resources Ltd., 152 Wn. App. 229, 278, 215 P.3d 990 (2009) the court held that where a defendant tortiously interferes with a contract that contains an attorneys' fee provision, an award of fees is appropriate.[111]

X. COLLIERS IS ENTITLED TO ITS FEES ON APPEAL

The CBA's Bylaws provide for attorney's fees if a party successfully seeks confirmation of an arbitration award, either at the trial court or the Court of Appeals.[112] If this Court reverses the order denying confirmation of the arbitration award, Colliers is entitled to its fees on this appeal.

XI. CONCLUSION

Colliers asks that the Court reverse: (i) the trial court's denial of Colliers' motion to confirm the arbitration award; (ii) the trial court's order vacating the arbitration award; (iii) the trial court's award of sanctions and fees against Colliers; and (iv) the trial court's denial of Colliers' motion for attorney's fees.

Alternatively, Colliers asks that the Court confirm the summary judgment in favor of defendants.

Finally, Colliers asks for its fees on this appeal.

DATED this 25th day of March, 2013.

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[111] CP 362 ¶ 27.
[112] CP 80 ¶ 39.

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CERTIFICATE OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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