No. 92317-5
No. 72314-6-1 (Court of Appeals)

SUPREME COURT OF THE STATE OF WASHINGTON

Michael Salewski, D.V.M., an individual,
Petitioner,

v.

Pilchuck Veterinary Hospital, Inc., P.S., a Washington corporation,
Respondent.

PETITION FOR REVIEW

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A. INTRODUCTION AND IDENTITY OF PETITIONER

Petitioner Michael Salewski, D.V.M. seeks review of the Court of Appeals' decision designated in Part B of this petition.

This case raises important issues regarding the enforceability of noncompetition agreements in the State of Washington, including the requirement that a noncompetition agreement entered into or modified after initial employment requires separate and additional consideration under *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 836-838, 100 P.3d 791(2004). The case also raises important questions about the fundamental fairness of liquidated damages clauses in noncompetition agreements where the set damages do not represent reasonable forecasts of the harm caused by a potential breach.

For the following reasons, Petitioner respectfully requests that this Court accept review under RAP 13.4(b)(l) and (4).

B. DECISION OF COURT OF APPEALS

Petitioner seeks review of the decision filed by Division I of the Court of Appeals on August 31, 2015, confirming the Arbitration Award and affirming the Trial Court's judgment against Petitioner. A copy of the decision is attached to this petition. App. 1-12.

C. ISSUES PRESENTED FOR REVIEW

I. Issue No. 1.

Did the Court of Appeals erroneously find that there was adequate consideration for the modification of a noncompetition agreement entered

into by Petitioner after initial employment in the absence of additional and independent consideration?

II. Issue No. 2

Did the Court of Appeals erroneously hold that the promises of other shareholders in separate employment agreements provided adequate consideration to support the enforcement of the noncompetition agreement in Dr. Salewski's agreement?

III. Issue No. 3

Did the Court of Appeals err in upholding a liquidated damages clause that provided for $300,000 in damages for any single violation of a noncompetition provision?

D. STATEMENT OF THE CASE

Dr. Salewski is a veterinarian specializing in alternative medicines, in particular chiropractic, acupuncture and Chinese herbal medicines. CP 147. He became an employee of Pilchuck on December 17, 1992, and on that day, Pilchuck, as "Employer," and Salewski signed an Employment Agreement wherein Salewski agreed not to perform veterinary services of any kind for clients served by Pilchuck residing outside of the above stated areas for a period of three years." CP 146. The 1992 agreement provided for liquidated damages of $3,500 per month for each month of breach. CP 146.

Thereafter, Salewski became a shareholder in Pilchuck, buying into the practice and into the property upon which it operated, sometime between 1998 and 2000. CP 147. Each time a new owner was brought in as a shareholder, a new set of documents, including an agreement not to compete, were signed by the shareholders. CP 147. The terms of the agreements changed over time.

In January of 2007, (the agreement at issue in this case), seven shareholders, including Salewski, signed employment agreements. CP 147. The January 2007 agreement increased the liquidated damages to $300,000 and "for any violation of the covenant not to compete." CP 147, 150.

In 2008, Salewski indicated that he wanted to leave the ownership group. CP 147. As part of leaving the ownership group and again becoming an employee of Pilchuck, a stock redemption agreement was executed by Plaintiff and the remaining shareholders. CP 147. This Stock Redemption Agreement entered into in 2008 when Salewski became an employee again did not contain a new noncompetition agreement. Instead, a paragraph in the agreement merely referenced the noncompetition agreement between Salewski and Pilchuck executed on January 1, 2007. CP 147.

In December of 2010, after approximately two years working as an employee for Pilchuck, Salewski moved to Oregon and set up a practice there. CP 147.

The arbitrator found that Salewski violated the noncompetition agreement by providing veterinary services within 50 miles of Pilchuck and by performing veterinary services outside of the 50-mile radius for clients who had once been served by Pilchuck and awarded the amount of $300,000 to Pilchuck, based on the liquidated damages clause. CP 147.

In reaching this conclusion, both the arbitrator and the Trial Court (in refusing to vacate the award) misconstrued the requirement under Washington law that a subsequent modification to noncompetition agreement must be supported by additional, independent consideration. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 836-838, 100 P.3d 791(2004).

Rather, the arbitrator did not account for the fact Salewski's employment status changed when he left the ownership group and became an employee of Pilchuck in 2008, merely relying on the conclusion that the "promises" of other Pilchuck shareholders in their own previous employment agreements served as sufficient consideration for the modification of Dr. Salewski's agreement. CP 148.

In affirming the decision on appeal, the Court of Appeals noted those decisions, such as *Labriola*, which recognize that independent consideration is required for a subsequent modification of a noncompetition agreement, but reasoned that such limitations do not apply

"to the modification of a noncompete agreement mutually entered into by all shareholders of a corporation." App. 8-9.

In addition, the Trial Court and the Court of Appeals also should have vacated the arbitration award based on clear legal error on the face of the award on the ground that the liquidated damages clause in the January 2007 agreement, which provided for $300,000 in liquidated damages for any, single violation of the noncompetition provision constituted an unenforceable penalty.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court should accept review of this case to clarify the holding of *Labriola* and to ensure its proper application to the facts here.

This case asks important questions about the enforceability of noncompetition agreements Washington. More specifically, this case touches on the key requirement under Washington law that a subsequent noncompetition agreement and/or a modification of a noncompetition agreement must be supported by separate and independent consideration. *Labriola v. Pollard Group, Inc.*, 152 Wn. 2d 828, 100 P.3d 791 (2004); *Schneller v. Hayes*, 176 Wn. 115, 28 P.2d 273 (1934).

At every turn of this case, this fundamental requirement under Washington law has been sidestepped, misconstrued or minimized. The

proper application of the rule articulated in *Labriola,* applied to the facts of this case, yields a simple conclusion – that the noncompetition agreement at issue here lacked separate, independent consideration and was therefore unenforceable.

Washington Courts are clear that a noncompetition agreement entered into after initial employment will be enforced only if it is supported by separate, independent consideration. *See e.g.*, *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 836-838, 100 P.3d 791(2004); *Rosellini v. Banchero*, 83 Wn.2d 268, 273, 517 P.2d 955 (1974); *Schneller v. Hayes*, 176 Wash. 115, 118, 28 P.2d 273 (1934).

In cases where a noncompetition agreement is entered into after initial employment, this Court has explained that "[i]ndependent, additional consideration is required for the valid formation of a ***modification or subsequent agreement***" of a noncompete agreement. *Labriola*, 152 Wn.2d at 834 (emphasis added). Independent consideration may include increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information. *Schneller*, 176 Wash. at 118-19.

In *Labriola*, the Court held that consideration was absent in a noncompetition agreement where the employer promised nothing in the way of future employment and nothing was stipulated as to wages.

Labriola, 152 Wn.2d at 838, 100 P3d 791. While the employer attempted to argue that the employee's continued employment served as consideration for the noncompete agreement, the Court rejected that contention and concluded that consideration was lacking. *Id.*

The concurring opinion in *Labriola,* authored by Justice Madsen, also provided additional guidance. There, Justice Madsen clarified that under Washington law, "[c]ontinued at-will employment, without more, is never sufficient consideration for a noncompete agreement formed subsequent to employment." *Labriola*, at 844 (Madsen, J., concurring) Moreover, Justice Madsen reiterated that "[t]he general rule in Washington is that consideration exists [only] if the [e]mployee enters into a noncompete agreement when he or she is first hired." *Id.*

In finding consideration for the noncompetition covenant, the arbitrator misconstrued the holding of the Washington Supreme Court in *Labriola.* Instead, the arbitrator relied on the language in *Labriola* that discusses the rule that applies to noncompetition agreements entered into when an employment relationship begins, finding that consideration exists if the employee enters into a noncompete agreement when he or she is first hired. *See Labriola*, 152 Wn.2d at 836-38.

But *Labriola* does not stand for the proposition that consideration at the beginning of the employment relationship is a "blank check" that

stands as consideration for any subsequent agreement or modification. Instead, *Labriola* provides that even if there was consideration at the beginning of the employment relationship for a noncompetition agreement, any subsequent agreement or modification, after initial employment, must be supported by additional and independent consideration.[1] *Labriola*, 152 Wn.2d at 836-838.

As one in a series of agreements with changing terms, the January 2007 noncompetition covenant needed to be supported by separate and independent consideration as required by *Labriola* and it was error on the face of the award for the arbitrator to enforce the noncompetition agreement.

In addition, both the arbitrator and then the Trial Court compounded this error by failing to consider Salewski's change of employment status in 2008, instead reasoning that under *Labriola*, Salewski's continued employment served as sufficient consideration.

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[1] This requirement of additional, independent consideration for each subsequent noncompetition agreement or modification is driven home by the fact that here, each subsequent version of the noncompetition agreement was different. As noted by the arbitrator in his Findings of Fact, from 1992 to 2007, the noncompetition covenant changed dramatically. CP 146-47. The radius of the geographical restriction changed from 25 to 50 miles. CP 146-47. The liquidated damages provision increased, over time, from $3,500 per month for each month of breach, to $200,000, to ultimately $300,000 for any violation in the 2007 covenant. CP 146-147.

While noting Salewski's change in employment status in 2008 back to an employee in his Findings of Fact, the arbitrator did not account for this change in Salewski's employment status, an event which required additional, independent consideration for the subsequent noncompetition agreement to be enforceable. CP 147. The Trial Court made a further error in analyzing this question, recognizing the importance of, but ultimately concluding that *Labriola* stood for the proposition that continued employment was sufficient consideration. CP 23-24.

This error by the Trial Court highlights the need of this Court to accept review. Unlike the arbitrator, the Trial Court noted that one of the key issues when it came to determining whether there was adequate consideration for the noncompetition agreement was Salewski's change of employment status in 2008. CP 23:4-22. But while the Trial Court isolated the correct issue, it then reached the wrong answer by misconstruing *Labriola* and holding that continued employment can and does serve as consideration for a subsequent agreement. CP 24: 11-25.

Rather than concluding that *Labriola* required separate, additional consideration for a subsequent modification of a noncompetition agreement, the Trial Court concluded that there were inconsistencies in the holding of *Labriola*, with the Supreme Court stating at one point that there has to be independent, additional consideration when there are

re-modifications of the original employment contract (the Trial Court's reference to the "page 834" analysis) and at another point saying that continued employment does serve as consideration (the Trial Court's "page 836" analysis.) CP 24. In short, the Trial Court appears to have settled on the conclusion that the reference to the previous noncompetition agreement, along with continued employment, was sufficient consideration.

But this conclusion is inconsistent with the dictates of *Labriola.* In fact, Justice Madsen, in concurrence, expressly addressed this type of situation, explaining that "[c]ontinued at-will employment, without more, is never sufficient consideration for a noncompete agreement formed subsequent to employment." *Labriola*, at 844 (Madsen, J., concurring). The Trial Court's reading of *Labriola*, and its reliance on *Labriola* for the proposition that continued employment is sufficient consideration for a subsequent noncompetition agreement, is a misconstruction that this Court should clarify by accepting review.

As a final matter, the decision by the Court of Appeals also clouds rather than clarifies this Court's holding in *Labriola.* While the Court of Appeals' opinion noted *Labriola* and those decisions which recognize that independent consideration is required for a subsequent modification of a noncompetition agreement, the Court of Appeals reasoned that such

limitations do not apply "to the modification of a noncompete agreement mutually entered into by all shareholders of a corporation." App. 8-9.

But this conclusion is also mistaken and without support under Washington law. Instead, the reason that there is no "other" authority for applying the requirement of additional consideration to the modification of a noncompete agreement mutually entered into by all shareholders of a corporation is because it is not necessary to analyze such a situation any differently that this Court did in *Labriola*.

The rule articulated in *Labriola*, that additional, independent consideration is required for a subsequent modification of a noncompetition agreement is as logical in the context of a mutual agreement between shareholders as it is in the employment context.

Moreover, this case presents a prime example of why different levels of analysis or scrutiny should not be applicable in such a situation. Here, at least initially, Petitioner signed a noncompetition agreement as a shareholder, only to have his status change (becoming an employee again in 2008), without receiving any additional, independent consideration for the noncompetition agreement modification at that time. Such a change potentially implicates a corresponding change in bargaining power between the parties, making it incongruent to continue to analyze the agreement with the "lesser scrutiny" standard the Court of Appeals would apply to relationships between shareholders.

In short, the Court of Appeals' opinion implies that a different level of scrutiny should be applied depending on the nature of the relationship. *See* App. 9, fn 26. Yet there appears to be no authority in either Washington law, or the holding of *Labriola*, for this proposition.[2]

The issues at the heart of this case impact the enforceability of all noncompetition agreements Washington. This Court should accept review of this case to provide clarification as to the standard to be applied in assessing the validity of noncompetition agreements and to provide additional guidance as to the rule articulated in *Labriola* that a subsequent noncompetition agreement and/or a modification of a noncompetition agreement must be supported by separate and independent consideration.

2. **The Court should also accept review to clarify the boundaries of reasonableness with respect to liquidated damages found in noncompetition agreements in Washington.**

This case also raises important issues about the fundamental fairness of liquidated damages clauses in noncompetition agreements which, on their face, do not represent reasonable forecasts of the harm caused by a potential breach. The Court should accept review of this case

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[2] Indeed, the Court of Appeals, without citing the case advanced by Pilchuck, Georgia Court of Appeals case of *Pittman v. Harbin Clinic Professional Association*, 210 Ga. App. 767, 437 S.E.2d 619 (1993), appears to implicitly accept the position that less scrutiny should apply to an agreement between mutual shareholders (even one that arises in the employment context).

to address the question of the liquidated damages clause at issue here, which is squarely before the Court in the plain language of the arbitration award.

Washington Courts will not uphold a liquidated damages provision that constitutes a penalty or is otherwise unlawful. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 881 P.2d 1010 (1994). Liquidated damage clauses are considered penalties and consequently unenforceable when they are punitive in nature and not an attempt to estimate damages in the event of a breach. "Its essence is a payment of money stipulated as in terrorem of the offending party, while the essence of liquidated damages is a genuine covenanted pre-estimate of damages." *Lind Building Corp. v. Pacific Bellevue Developments*, 55 Wn. App. 70, 75, 776 P.2d 977 (1989).

In this case, the arbitration award sets forth the terms of the liquidated damages clause, which provides "Employee agrees to pay liquidated damages in the amount of Three Hundred Thousand Dollars ($300,000) for any violation of the covenant not to compete." CP 150.

The face of the arbitration award reveals that this $300,000 liquidated damages figure was the amount to be assessed for any, single violation of the noncompetition agreement – that is, any violation occurring at any time during the three-year period, whether inside the 50-mile geographic radius for a single patient who had no connection to

Pilchuck, or without geographic bounds for anyone formerly treated at Pilchuck. CP 150.

In analyzing whether the liquated damages clause was enforceable, the arbitrator engaged in, at best, a conclusory examination, reasoning that:

> Plaint [sic] has not persuaded this arbitrator that the liquidated damages amount was not a reasonable forecast of just compensation for the harm of violation of the non-compete agreement and was a mere penalty.

CP 150.

The arbitrator did not discuss, nor make any factual findings related to the fact that $300,000 for a single violation of a 50-mile noncompetition covenant was a reasonable forecast of damages. Instead, the arbitrator appeared to merely rely on the fact that the shareholders had previously agreed to raise the amount from $200,000 to $300,000, and cited boilerplate language in the agreement that the liquidated damages clause was necessary and did not create an undue hardship.

In upholding the arbitrator and Trial Court's decision, the Court of Appeals engaged in a similar cursory analysis, noting the arbitrator's conclusion that the $300,000 figure was reasonable, and reasoning that it was not appropriate to go beyond the face of the award to evaluate the evidence before the arbitrator. App. 11.

But here, it was not necessary for the Court of Appeals to go beyond the face of the award and evaluate the evidence before the arbitrator in order for the Court of Appeals to determine that the liquidated damages provision was unreasonable. Instead, by its very terms, the $300,000 figure for a single violation by Dr. Salewski for performing veterinary services simply cannot be construed as "a genuine covenanted pre-estimate of damages" and must be deemed a penalty. *Lind Building Corp.*, 55 Wn. App. at 75.

The $300,000 figure is not based on any formula and bears no reasonable relation to any actual damage that might befall Pilchuck if a veterinarian were to leave the practice and compete. This is especially the case here where the $300,000 must be paid for <u>any</u> violation during the three-year period, whether inside the 50-mile geographic radius for a single patient who had no connection to Pilchuck, or without geographic bounds for anyone formerly treated at Pilchuck. CP 150.

The shareholders' agreement as to this figure is simply not sufficient to justify it; following this logic, all cases and contracts with liquidated damages provisions would not be subject to challenge inasmuch as they are agreed to by the parties prior to the dispute arising. In sum, rather than serving as a reasonable forecast of just compensation for the

harm caused by a breach, this kind of an award is punitive in nature and it was clear error on the face of the award for the Trial Court to enforce it.

The issue of liquidated damages clauses and their reasonableness is also important and central to the enforceability of all noncompetition agreements Washington. This Court should accept review of this case to provide clarification as to the boundaries of this reasonableness when it comes to assessing the validity of liquidated damages clauses in noncompetition agreements, particularly in cases where the damages under the liquidated damages provision do not represent reasonable forecasts of the harm caused by a potential breach.

F. CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court grant review of the Court of Appeals' decision.

DATED this 30th day of September, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing PETITION FOR REVIEW was served on:

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by the following indicated method or methods:

_X_ by sending a full, true and correct copy thereof via **overnight courier** in a sealed, prepaid envelope, addressed to the attorney as shown above, to the last-known office address of the attorney, on the date set forth below.

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

MICHAEL SALEWSKI, D.V.M., an individual, Appellant, v. PILCHUCK VETERINARY HOSPITAL, INC., P.S., a Washington corporation, Respondent.	)	No. 72314-6-I PUBLISHED OPINION FILED: August 31, 2015

VERELLEN, A.C.J. — The mutual promises of shareholders are adequate consideration for a noncompete agreement among the shareholders, even if the noncompete takes the form of promises in the shareholders' individual employment agreements. And a liquidated damages clause is enforceable if it reasonably forecasts the unascertainable financial harm that would result from a violation of the noncompete agreement.

Michael Salewski, DVM, does not establish any error on the face of the arbitrator's award that relied upon the mutual promises of the shareholders of Pilchuck Veterinary Hospital, Inc. as the consideration supporting the noncompete agreements signed by each of the shareholders. Neither is there an error on the face of the award in concluding that the $300,000 liquidated damages clause was a reasonable forecast of damages. We affirm.

FACTS

On December 17, 1992, Pilchuck hired Salewski as an associate veterinarian. That same day, Salewski signed an employment agreement and an agreement not to compete. Sometime between 1998 and 2000, he became a shareholder in the professional services corporation and signed a new confidentiality and noncompete agreement. Subsequently, every time a new shareholder was brought in, a whole new set of documents, including agreements not to compete, were prepared and signed by all the shareholders. Consequently, Salewski signed a total of four noncompete agreements as a shareholder.

The terms of the noncompete agreements changed slightly over time. The agreement at issue here, signed by Salewski and the eight other shareholders on January 1, 2007, stated:

> 3. Agreement Not To Compete. Employee shall not practice veterinary medicine within 50 miles of the corporate offices of Principal during the Non-compete Period [of thirty-six (36) months following Employee's termination of employment with Principal]. Regardless of geographical location, Employee shall not render services to any Pre-existing Client who was a client at any time within the 24 months preceding termination of employment during the Non-compete Period. Each of the parties has reviewed the terms of the Agreement and acknowledges that the terms hereof are necessary for the protection of the Principal and the clients of Pilchuck Veterinary Hospital. The parties further acknowledge that the non-compete provisions contained herein do not create an undue hardship for either Employee or for Principal and are reasonable under the circumstances.
>
> . . . .
>
> 4. Remedies in an Event of Breach. Employee hereby recognizes that irreparable damage will result to Principal and to the business of Principal in the event of breach by Employee by any of the covenants set forth in this agreement. In the event of breach of any of the covenants and assurances contained in this Agreement, Principal shall be entitled to enjoin and restrain Employee from any continued violation of this

> agreement. This equitable remedy shall be in addition to (and not supercede) any action for damages Principal may have for breach of any part of this Agreement.
>
> 4.1 Additionally, Employee agrees to pay liquidated damages in the amount of Three Hundred Thousand Dollars ($300,000) for any violation of the covenant not to compete.[1]

This 2007 agreement reflected the same terms as the two noncompete agreements he signed in 2002 and 2005, except that the liquidated damages amount increased from $200,000 in the 2005 agreement to $300,000 in the 2007 agreement.

In 2008, Salewski indicated that he wanted to leave the ownership group. As a result, he and the remaining eight shareholders executed a stock redemption agreement effective December 31, 2008. The agreement provided that "a list or summary of any and all other agreements remaining in effect between Buyer and Seller from and after the date of mutual execution hereof is attached as Exhibit D hereto."[2] Exhibit D listed the noncompete agreement dated January 1, 2007.

Salewski continued to work for Pilchuck as a nonshareholder employee until December 2010, when he announced that he was moving to start a new practice in Oregon. Prior to terminating employment, Salewski met with Pilchuck's chief financial officer and chief executive officer to discuss the provisions of his noncompete agreement. Shortly after, Pilchuck discovered, and Salewski admitted, that he was providing veterinary services within 50 miles of Pilchuck, as well as services for former Pilchuck clients outside the 50-mile radius.

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[1] Clerk's Papers (CP) at 110.

[2] CP at 323.

The parties agreed to arbitrate the enforceability and application of the noncompete agreement and its corresponding liquidated damages provision. The arbitrator issued an award in favor of Pilchuck, concluding that "[t]he covenant not to compete in question is a valid and binding contract, and [Pilchuck] is entitled to judgment or credit in the amount of the liquidated damages of $300,000."[3]

Pilchuck filed a motion in Snohomish County Superior Court to confirm the arbitration award, including attorney fees and costs, and prejudgment interest. Salewski responded with a motion to vacate the arbitration award. After hearing oral argument, the superior court granted Pilchuck's motion to confirm the award and denied Salewski's motion to vacate, entering a judgment in favor of Pilchuck in the amount of $125,855.66,[4] prejudgment interest in the amount of $30,229.20, and statutory costs and attorney fees in the amount of $39,929.91.

Salewski appeals.

ANALYSIS

Salewski contends that the superior court erred in denying his motion to vacate the arbitration award. He argues the award is erroneous on its face because the noncompete agreement lacked valid consideration and because the liquidated damages provision was an unenforceable penalty. Neither argument is persuasive.

Appellate review of an arbitrator's award is limited to the same standard applicable in the court which confirmed, vacated, modified or corrected that award.[5]

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[3] CP at 150.

[4] This amount reflects the liquidated damages amount, $300,000, less the amount of the principal owed under the stock redemption agreement note, $174,144.40.

[5] Pegasus Constr. Corp. v. Turner Constr. Co., 84 Wn. App. 744, 747, 929 P.2d 1200 (1997) (quoting Barnett v. Hicks, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992));

Judicial review "is confined to the question of whether any of the statutory grounds for vacation exist."[6] The party seeking to vacate the award bears the burden of showing that such grounds exist.[7] "One of the statutory grounds for vacating an award exists when the arbitrator has 'exceeded the arbitrator's powers.'"[8] To vacate an award on this ground, the error must appear "on the face of the award."[9]

The "facial legal error standard is a very narrow ground for vacating an arbitral award."[10] It does not extend to a potential legal error that depends upon the consideration of the specific evidence offered or to an indirect sufficiency of the evidence challenge.[11] Courts are not permitted to conduct a trial de novo when reviewing the award, "do not look to the merits of the case, and they do not reexamine evidence."[12] "'The error should be recognizable from the language of the award, as, for instance, where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages.'"[13] "Where a final award sets forth the

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Cummings v. Budget Tank Removal & Envtl. Servs., LLC, 163 Wn. App. 379, 388, 260 P.3d 220 (2011).

[6] Cummings, 163 Wn. App. at 388.

[7] Id.

[8] Id. (quoting RCW 7.04A.230(d)).

[9] Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg, 101 Wn. App. 119, 123, 4 P.3d 844 (2000).

[10] Broom v. Morgan Stanley DW, Inc., 169 Wn.2d 231, 239, 236 P.3d 182 (2010).

[11] See Cummings, 163 Wn. App. at 389-90.

[12] Broom, 169 Wn.2d at 239.

[13] Cummings, 163 Wn. App. at 389 (quoting Estate of Norberg, 101 Wn. App. at 123-24).

arbitrator's reasoning along with the actual dollar amounts awarded, any issue of law evident in the reasoning may also be considered as part of the face of the award."[14]

Noncompete Agreement

Salewski argues that there is an error on the face of the award because "[t]here is no authority in Washington to support the arbitrator's conclusion that a promise by another shareholder . . . is sufficient consideration for a noncompetition agreement entered into by a different individual after the start of his or her initial employment."[15] We disagree.

Generally, owners of a business entity can agree to reasonable limits on their ability to compete with each other without regard to the terms of their employment. This concept is recognized in *Restatement (Second) of Contracts*: "Promises imposing restraints that are ancillary to a valid transaction or relationship include . . . a promise by a partner not to compete with the partnership."[16] This principle expressly applies both to partnerships and joint ventures,[17] and particularly to professional partners.[18]

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[14] Id.

[15] Appellant's Br. at 19.

[16] RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

[17] RESTATEMENT § 188 cmt. h; 6 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 13:18 (4th ed. 2009).

[18] 2 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 16:27, at 16-112 to -113 (4th ed. 2009) ("When a covenant not to compete is signed by a true partner in a professional partnership, some courts have recognized that this presents a situation which is entitled to a level of scrutiny intermediate between that which is applicable to an employment and that which is applicable to a sale of a business interest.").

Such noncompete agreements are not uncommon, especially in small business entities where the owners are professionals who are also employees.[19] For purposes of restraints on competition, we see no distinction between the shareholders of Pilchuck and partners or joint venturers who have agreed to restrict their competition with the partnership or joint venture. Most importantly here, the adequacy of consideration should be viewed in the context of the agreement among owners and not merely as an employee/employer relationship.[20] The mutual promises of all the owners of a business are adequate consideration for a noncompete agreement among all the owners.[21]

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[19] See Emerick v. Cardiac Study Ctr., Inc., 170 Wn. App. 248, 255, 286 P.3d 689 (2012) (explaining that restrictive covenants are common among professionals because they allow a new professional to step into an already established practice while protecting the employer from future competition); see also Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., 168 Wn.2d 421, 430, 228 P.3d 1260 (2010) (concluding that the professional services for which a professional service corporation is incorporated and in which it may therefore engage are those for which the shareholders are licensed); RCW 18.100.010 (the shareholders in a professional services corporation, such as Pilchuck, are all required by statute to be licensed professionals rather than mere passive investors).

[20] See Ashley v. Lance, 75 Wn.2d 471, 475, 451 P.2d 916 (1969) ("In interpreting the partnership agreement, including the restrictive covenant, the agreement must be read as a whole. It must also be construed in the light of the history of the partnership and its purpose.").

[21] See generally id. (holding that in a five-man medical partnership, where a new partnership agreement was signed each time a new partner was added, the plaintiff doctor could invoke the partnership agreement despite being the only remaining partner after four partners left in concert to start a competitive practice); Alexander & Alexander, Inc. v. Wohlman, 19 Wn. App. 670, 682-84, 578 P.2d 530 (1978) (holding that there was adequate consideration to support noncompete agreements made by shareholders as part of the sale of an insurance business); Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1, 4 n.14 (1992) ("The requirement of consideration is not particularly problematic in the context of noncompetition clauses ancillary to partnership agreements, because all partners are equally benefitted and burdened by the provision and the parties' bargaining power is presumed to be equal.").

Here, the face of the award reveals the determination by the arbitrator that the shareholders all agreed to and signed new noncompete agreements each time a new shareholder joined the practice.[22] On the face of the award, the arbitrator relied upon the mutual promises of the shareholders as consideration for the noncompete agreements.[23] The agreements here took the form of ancillary promises contained in the individual "employment agreements" between each shareholder and the professional services corporation. But the arbitrator expressly found that new agreements were signed by all of the shareholders each time a new shareholder joined. Accordingly, the mutual agreement of all the Pilchuck shareholders not to compete with the professional service corporation provided adequate consideration for the 2007 noncompete agreement.[24]

Salewski relies upon employment law decisions recognizing that where a noncompete agreement is entered into or modified after employment, mere continued employment does not provide adequate consideration to enforce the agreement because independent consideration is required.[25] But he provides no authority that such limitations apply to the modification of a noncompete agreement mutually entered

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[22] CP at 147 ("Every time a new owner was brought in as a shareholder of [Pilchuck], a whole new set of documents, including agreement[s] to not compete, were prepared and signed by all.").

[23] CP at 148 ("The promises of the other shareholders were consideration for [Salewski]'s promise. Thus there was a bargained for exchange of promises.").

[24] Here, Salewski was not an employee who acquired a negligible or revocable ownership interest in order to qualify as a partial "owner" of the business for the purpose of enforcing the covenant not to compete. See 2 ALTMAN & POLLACK, *supra*.

[25] Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 100 P.3d 791 (2004).

into by all shareholders of a corporation.[26] Thus, there is no legal error revealed on the face of the award. To the extent Salewski suggests that we should somehow evaluate the strength of the evidence that the shareholders mutually agreed and mutually executed identical new "employment agreements" each time a new shareholder joined, that approach would far exceed our narrow review.

The impact of the stock redemption agreement by which Salewski became a former shareholder and employee does not alter our analysis. The redemption agreement expressly provides that the 2007 noncompete agreement continues in effect. The redemption agreement is entirely consistent with the arbitrator's determination that the 2007 agreement continued to apply after the stock redemption.[27]

There is no error on the face of the award. The 2007 noncompete agreement is supported by adequate consideration and applies to Salewski's post-2010 conduct.

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[26] Consistent with the arbitrator's observations, some courts and commentators recognize that the reason for greater scrutiny in an employee/employer noncompete agreement is the leverage held by the employer in that relationship. See 2 ALTMAN & POLLACK, *supra*, at 16-113 ("In one such case[,] the court said that a professional partner is like an employee, but does not suffer from the same inequality of bargaining power and impairment of his ability to find subsequent employment."); 10A WILLIAM MEADE FLETCHER & CAROL A. JONES, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4979, at 52-53 (perm. ed., rev. vol. 2011) ("The rationale behind the distinction in analyzing covenants not to compete is that a contract of employment inherently involves parties of unequal bargaining power to the extent that the result is often a contract of adhesion, while a contract for the sale of a business interest is far more likely to be one entered into by parties on equal footing."); see also RESTATEMENT § 188 cmt. g ("Post-employment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood.").

[27] Salewski did not become a mere employee; he was a former shareholder/employee who was owed more than $200,000 under the redemption agreement.

Liquidated Damages

Salewski argues that the liquidated damages provision "is not based on any formula and bears no reasonable relation to any actual damage that might befall Pilchuck if a veterinarian were to leave the practice and compete."[28] We disagree.

Washington courts "are loath[ ] to interfere with the rights of parties to contract as they please between themselves."[29]

> It is not the role of the court to enforce contracts so as to produce the most equitable result. The parties themselves know best what motivations and considerations influenced their bargaining, and, while "[t]he bargain may be an unfortunate one for the delinquent party, . . . it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence . . . ."[30]

Liquidated damage clauses "are favored and are enforceable if they do not constitute a penalty or are otherwise unlawful."[31] The arbitrator correctly stated the test for the enforceability of such clauses, that "(1) the amount fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach, and (2) the harm must be such that it is incapable or very difficult of ascertainment."[32]

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[28] Appellant's Reply Br. at 7.

[29] Mgmt., Inc. v. Schassberger, 39 Wn.2d 321, 326, 235 P.2d 293 (1951).

[30] Watson v. Ingram, 124 Wn.2d 845, 852, 881 P.2d 247 (1994) (alterations in original) (quoting Reichenbach v. Sage, 13 Wash. 364, 368, 43 P. 354 (1896)).

[31] Knight, Vale & Gregory v. McDaniel, 37 Wn. App. 366, 371, 680 P.2d 448 (1984).

[32] Id.

"Harm resulting to one business from the competition of another business is difficult to estimate accurately."[33] The main inquiry is "whether the specified liquidated damages were reasonable at the time of contract formation."[34]

> The reasonableness of liquidated damages is not determined retroactively by their correspondence with actual damages, but by reference to the prospective difficulty of estimating the possible damages that would flow from a breach. . . . The greater the prospective difficulty of estimating possible damages, the greater the range of reasonableness used in assessing a liquidated damages provision.[35]

Here, the arbitrator determined that the 2007 agreement to pay $300,000 for violation of the noncompete agreement was a reasonable forecast of damages. This agreement was negotiated and signed by all of the shareholders. As the arbitrator observed, it "was not something rammed down the throat of an employee" by someone with unequal bargaining power.[36] We do not go beyond the face of the award to evaluate the evidence that was before the arbitrator. The face of the award reveals no legal error. To the extent Salewski's arguments imply that there could not have been adequate evidence to support the arbitrator's determination that $300,000 was a reasonable forecast of damages, such an inquiry would require us to go behind the face of the award to consider evidence not before us.[37]

Accordingly, there is no error on the face of the arbitration award.

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[33] Id.; Walter Implement, Inc. v. Focht, 107 Wn.2d 553, 559, 730 P.2d 1340 (1987).

[34] Watson, 124 Wn.2d at 853.

[35] Id.

[36] CP at 150.

[37] We note that the amount that would likely be owing to a redeemed shareholder could be considerable, more than $200,000 in this case. Such a factor might be a valid consideration in forecasting the harm if a redeemed shareholder chooses to breach the noncompete agreement.

Attorney Fees

Lastly, Pilchuck contends it is entitled to attorney fees and costs as provided in the noncompete agreement. In Washington, reasonable attorney fees may be awarded when authorized by a contract.[38] "A contract which provides for attorney fees to enforce a provision of the contract necessarily provides for attorney's fees on appeal."[39] Here, the noncompete agreement provides that "[s]hould the Principal be the prevailing party in any action to enforce this Agreement (Contract) the Principal shall be entitled to all attorneys' fees and costs incurred enforcing its right under this Agreement."[40] Pilchuck remains the prevailing party and thus, is entitled to an award of reasonable attorney fees and costs on appeal upon compliance with RAP 18.1.

We affirm.

WE CONCUR:

Trickey, J

Cox, J.

[38] Marine Enters, Inc. v. Sec. Pac. Trading Corp., 50 Wn. App. 768, 771, 750 P.2d 1290 (1988).

[39] Id. at 774.

[40] CP at 111.