**NO. 73199-8-I**

KING COUNTY CAUSE NO. 15-2-04826-1 SEA

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

v.

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

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# REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Simply put, the record on appeal lacks the evidence necessary to satisfy the basic statutory elements of an arbitration agreement under RCW 7.04A.010(7). There is no evidence that Marcus & Millichap ever applied for membership in the Commercial Broker's Association ("CBA") in 1993 as alleged (CP 67), or that Marcus & Millichap expressly agreed to arbitrate any and all disputes "with other CBA members" or agreed to "all other provisions of CBA's Articles of Incorporation Bylaws and Rules and Regulations." *See* Respondent Brief at 7-15. Despite the unsupported claim of recently hired CBA Executive Director/CEO Michelle Mills Clement that "[n]o applicant becomes a member or associate member of CBA" without agreeing to be bound by "CBA's Articles of Incorporation, Bylaws, Rules & Regulations", the record on appeal is devoid of evidence or testimony establishing that Marcus & Millichap, Yates or any other claimed member signed the "required" membership application, was advised that they were subject to CBA's bylaws or entered into an agreement to be bound by such provisions. *See* Decl. Mills Clement at 2, ¶¶ 4.

(CP 67) (CP 1-238). So although Yates and CBA claim its bylaws mandate that all members sign applications which bind them to the obligation to arbitrate, CBA apparently ignores its own bylaws by failing to require every member to execute such an application. Despite this glaring omission, CBA attempts to bind its members to rules and regulations which were never disclosed, discussed or agreed to.

Not only is there no signed contract, there is no record whatsoever: no written agreement, no draft agreement, no e-mail referring to an agreement and no claimed oral agreement. In fact, even Yates cannot provide a copy of the CBA application which Yates claims constitutes an agreement to arbitrate, let alone a copy of even one membership application executed by any Marcus & Millichap agent.

The two Marcus & Millichap agents involved in the transaction at issue have never seen or executed any agreement with CBA. *See* Decls. Moll, ¶¶ 5-6 (CP 178) *and* Morasch, ¶ 5 (CP 208). Further, in the many years that Marcus & Millichap and its agents have provided brokerage services in the greater Seattle area, CBA has never requested or required a managing broker or any

agent to acknowledge in writing or otherwise agree to be bound by its arbitration provisions. *See* Decls. Mott, ¶¶ 4-5 (CP 30), Deis, ¶ 7 (CP 26) *and* Morasch, ¶ 5 (CP 208).

Moreover, the only signed agreements Yates has placed in the record (Broker Roster Updates)[1] (CP 128-33) contain no reference to compliance with CBA bylaws or required arbitration. (CP 128-33) The Broker Roster Updates specifically state that Marcus & Millichap and CBA agree to two provisions: an "Agreement Not To Disclose" related to use of its website password and "Penalties" for disclosure of such website password. (CP 128-33) Notably absent is any agreement that Marcus & Millichap will arbitrate any disputes or be bound by CBA's Articles of Incorporation, Bylaws, and Rules & Regulations. (CP 128-33)

Given the lack of any written record containing an agreement between the parties to arbitrate, the trial court

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[1] The record on appeal does not establish or even address the authenticity of these documents or the signatures thereon. (CP 1-238) Marcus & Millichap reserves the right to address these issues on remand in any future proceedings.

should have denied Yates' request to compel arbitration of this dispute.

Section II(A), *infra*, establishes that Yates incorrectly relies on cases in Washington and other jurisdictions, some of which pre-date Washington's adoption of the Uniform Arbitration Act. The parties in each of such cases executed membership applications and/or expressly and unequivocally agreed to be bound by rules which included a duty to arbitrate at the outset of the contractual relationship with the association. Again, in contrast, there is no such agreement to arbitrate in this case.

Section II(B), *infra*, reiterates the point from the Opening Brief that Marcus & Millichap did not impliedly agree to arbitration based on any conduct over the years. Finally, Section II(C), *infra*, refutes Yates' argument and establishes that this dispute is <u>not</u> within the scope of any arbitration clause; particularly given that one of the agents involved in the underlying commission dispute, Marcus & Millichap agent Kellan Moll, is undisputedly not a member of CBA. (CP 178)

In short, the trial court erred by compelling arbitration. Reversal of the trial court's decision is warranted.

## II. ARGUMENT

### A. There is no express agreement to arbitrate as required; Yates misplaces reliance on cases in Washington and other jurisdictions which specifically state that the party seeking to avoid arbitration had agreed to arbitration in conjunction with applying for membership.

Yates principally misplaces reliance on *Keith Adams & Associates, Inc. v. Edwards*, 3 Wn. App. 623, 625, 477 P.2d 36, 38 (1970) disapproved of in part by *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn. 2d 885, 16 P.3d 617 (2001), for the proposition that the mere act of applying to be a member in an association (such as CBA) always binds the putative member to the association's Articles of Incorporation, Bylaws, Rules and Regulations. *See* Respondent Brief at 7-10, 14. In support, Yates claims without documentary support that its bylaws require all applicants to complete a form "that includes the applicant's agreement to abide by CBA's Articles of Incorporation, Bylaws, Rules & Regulations, and amendments thereto." *See* Decl. Mills Clement, ¶ 4. (CP 67) And yet, Yates does not (and apparently cannot)

provide a copy of any application form for Marcus & Millichap, any of its agents, for Yates or any other putative CBA member.

Yates' flawed argument highlights the following portion of the *Keith Adams* opinion:

> Both defendant and plaintiff's president, in applying for membership with the Tri-City Board of Realtors, Inc., agreed to conform to the bylaws of the board which provided for the settlement of future disputes between members by arbitration.

*Keith Adams & Associates, Inc. v. Edwards*, 3 Wn. App. 623, 625, 477 P.2d 36, 38 (1970); *see also* Respondent Brief at 9.

The record, however, lacks any evidence that Marcus & Millichap ever applied for membership; only that it pays monthly dues to use the CBA website. (CP 25-26)

Further, the above excerpt establishes that the *Keith Adams* court made the factual determination, presumably supported by substantial evidence, that both members had agreed to arbitration at the outset and in conjunction with applying for membership, *i.e.*, that "in applying for membership" the applicant/member had also "agreed to conform to the

bylaws…"[2] *Keith Adams & Associates, Inc. v. Edwards*, 3 Wn. App. 623, 625, 477 P.2d 36, 38 (1970). It follows that the result in *Keith Adams* does not govern this dispute in which there is no evidence that Marcus & Millichap agreed to be bound to CBA's bylaws at the time it began using CBA's listing service. (CP 1-238) Yates' inability to provide a copy of the required "form" application or any other record of an application, combined with Marcus & Millichap's testimony that no such form or other agreement was ever completed or signed supports the determination that Marcus & Millichap did not enter into an agreement to arbitrate disputes involving CBA members.

Notably, this conclusion is supported by the Brokerage Membership Definitions Section of the January 2007 CBA Bylaws, which provide, in part, as follows:

> Applications for membership **shall** be on the Association's standard form, and shall include an undertaking on the part of the applicant to abide by

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[2] Despite Yates' protestations to the contrary, *Keith Adams* does not stand for the broad sweeping proposition that under Washington law a member is always bound by the bylaws of an association, *i.e.*, even if the member has not otherwise agreed to be so bound. *Keith Adams & Associates, Inc. v. Edwards*, 3 Wn. App. 623, 625, 477 P.2d 36, 38 (1970).

> the Articles of Incorporation, Bylaws and Rules of the Association and amendments thereto.

*See* Decl. Mills Clement, Ex. 1, Bylaws at 1. (CP 71)(emphasis added)

An "undertaking" is "a promise or agreement to do or not do something".[3] Thus, even the CBA Bylaws provided by Yates contemplate the requirement for *brokerage* members (*i.e.*, such as Yates and Marcus & Millichap) to affirmatively promise or agree to be bound by the CBA Bylaws **in addition** to the act of applying for membership. Of course, as already discussed above, there is no evidence that Marcus & Millichap ever applied for membership or agreed to be bound by CBA's bylaws or other rules during the period in time in which Marcus & Millichap used CBA's listing service.

*Keith Adams* is also distinguishable because the member there sought to vacate an arbitration award after the member had "voluntarily submitted to arbitration" and participated in the entire arbitration process. *Keith Adams & Associates, Inc. v.*

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[3] *See* Merriam-Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/undertaking.

*Edwards*, 3 Wn. App. 623, 625-26, 477 P.2d 36, 39 (1970) disapproved of by *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn. 2d 885, 16 P.3d 617 (2001). Neither circumstance is present here—Marcus & Millichap timely objected to arbitration and filed the underlying lawsuit seeking a determination that arbitration is not proper *prior* to any arbitration proceeding.

Likewise, *Keith Adams* is distinguishable because it is a 1970 case which interpreted the prior version of the Uniform Arbitration Act, RCW Ch. 7.04 (repealed in 2005), rather than the current version codified under RCW Ch. 7.04A. Unlike the prior version, the current version of the statute requires a party seeking to compel arbitration to produce a "record", *i.e.*, a writing, which contains an enforceable agreement to arbitrate. *See*, RCW 7.04A.010(7); *cf.* RCW Ch. 7.04. Despite ample opportunity, Yates cannot satisfy this threshold requirement.[4]

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[4] CBA has confirmed there is no record of an agreement with Marcus & Millichap authorizing it to arbitrate disputes with other brokers. *See* February 13, 2013 9:45 a.m. E-mail from Osborn to Mott (CP 33); *see also* Decl. Moll, ¶ 9. (CP 179) Marcus & Millichap requested evidence of any such agreement from CBA when Yates initiated the arbitration proceedings. *See* February 11, 2015 2:06 p.m. E-mail from Mott to Osborn (CP 34). No such agreement to arbitrate has been produced. *See* Decls. Deis, ¶ 12 (CP 27), Morasch, ¶ 5 (CP 208), *and* Mott, ¶ 4, Ex. A (CP 30, 33).

As established in the Opening Brief, accepting the rule of the trial court would effectively rewrite the Uniform Arbitration Act by eviscerating the requirement of establishing a valid "agreement to arbitrate" contained in a "record"—contrary to the plain language of the Uniform Arbitration Act. *See* RCW 7.04A.010(7). Such a ruling would replace the clear, bright line statutory requirement that a party seeking to compel arbitration must produce a "record" of the purported arbitration agreement that is "retrievable in perceivable form" with an ambiguous rule requiring fact intensive, case-by-case analysis that would almost certainly result in non-uniform application and needless litigation on the arbitrability of disputes. *See* RCW 7.04A.010(7).

The determination that *Keith Adams*, a 1970 Division 3 decision, does not apply is strengthened by the recent 2012 Washington Supreme Court decision in *Townsend v. Quadrant Corp.*, 173 Wn. 2d 451, 461-62, 268 P.3d 917, 922 (2012). *Townsend* emphasizes the principal that to be valid an agreement to arbitrate must generally be signed. *Townsend*, 173 Wash. 2d, 460-61 (*quoting Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn. 2d 781, 790, 225 P.3d 213, 219 (2009)). Again, there is

no evidence that any application which purportedly contains the agreement to arbitrate exists, let alone a copy signed by Marcus & Millichap.[5]

Ultimately, *Keith Adams* does not stand for the proposition that under Washington law the mere act of applying for membership in an association necessarily binds the member to an arbitration agreement contained in the association's current bylaws. Cases from other jurisdictions cited by Yates accord with the view that more than the mere act of applying for membership is required to bind members to its bylaws, *i.e.*, that the members must actually agree to be bound under principles of contract interpretation.

For example, unlike the present case, in a Florida decision cited by Yates, *Elbadramany v. Stanley*, 490 So. 2d 964 (Fla. Dist. Ct. App. 1986). (CP 55-57), real estate brokers had executed written membership applications with their

[5] It is also noteworthy that the Washington Supreme Court determined that the Division 3 *Keith Adams* court erred by incorrectly determining that parties could waive the right to seek vacation, modification, or correction of an arbitration award in the superior court under the (prior) Uniform Arbitration Act, RCW. Ch. 7.04. *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 170 Wn. 2d 768, 773, 246 P.3d 785, 787 (2011).

associations and had also "signed copies of the Board's by-laws" which included their agreement to abide by the organization's rules and regulations including submission of member disputes to arbitration.[6] *Elbadramany v. Stanley*, 490 So. 2d 964-65 (Fla. Dist. Ct. App. 1986)

Likewise, in *Nellemann v. Spartan Sportswear, Inc.*, 201 N.Y.S.2d 52, 53 (Sup. Ct. 1960), a cursory two paragraph New York opinion, the court made the factual determination that the member had "specifically agreed" to arbitration at the outset and in conjunction with applying for membership:

> Respondent is a member of National Skirt and Sportswear Association Inc., an association of manufacturers. In joining the association it specifically agreed to abide by any agreement made by the association. Petitioner is a member of Greater Blouse, Skirt and Neckwear Contractors Association, Inc. The two associations have an agreement for the arbitration of all disputes between their respective members. Respondent does not dispute this.

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[6] Yates also misplaces reliance on *Elbadramany* because it stands for the proposition that the constitution and bylaws of an association can only become a binding contract between each member and the association if "subscribed or assented to by the members." *Elbadramany v. Stanley*, 490 So. 2d 964, 966 (Fla. Dist. Ct. App. 1986). Here, there is no signed agreement to arbitrate and the evidence on the record reveals that Marcus & Millichap did not assent to arbitration.

*Nellemann v. Spartan Sportswear, Inc.*, 201 N.Y.S.2d 52, 53-54 (Sup. Ct. 1960).[7]

In contrast, there is no evidence that Marcus & Millichap applied for membership in CBA or "specifically" executed/agreed to the terms of any membership application (or other document) containing an agreement to be bound by CBA's Bylaws. Nor is there evidence that Marcus & Millichap otherwise expressly assented to the terms of any membership application or purported agreement to arbitrate. It is noteworthy that Yates has even failed to produce evidence that *it* signed an agreement with CBA to arbitrate disputes. Accordingly, Yates is not entitled to compel arbitration.

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[7] To the extent this Court is inclined to consider authority from other jurisdictions, *see Bank of Am., N.A. v. UMB Fin. Servs., Inc.*, 618 F.3d 906, 909-11 (8th Cir. 2010) (arbitration proper only as to members of Financial Services Regulatory Authority ("FINRA") who executed and form U-4 which "contains an agreement to arbitrate" but not proper to non-FINRA member that did not execute the form and "did not directly agree to subject itself to arbitration under FINRA's terms"); *Dunn Industrial Group, Inc. v. Lafarge Corp.*, 112 S.W.3d 421 (Mo.2003) (third party guarantor could not be bound by an agreement to arbitrate in a construction contract to which it was not a signatory, where the contract to which it was a signatory did not incorporate the arbitration provision of the construction contract).

### B. Marcus & Millichap did not by its conduct impliedly agree to arbitrate disputes involving CBA or its members.

Despite a record devoid of any record containing an agreement entered into by Marcus & Millichap which provides for mandatory arbitration, Yates incorrectly asserts that Marcus & Millichap is impliedly bound to arbitrate disputes with CBA members. In this regard, the failure to agree on mere details will not vitiate a contract, but the failure to prove agreement on material terms will. *Sea-Van Investments Associates v. Hamilton*, 125 Wash. 2d 120, 128, 881 P.2d 1035 (1994). For a contract to form, the parties must objectively manifest their mutual assent to all material terms of the agreement. *P.E. Sys., LLC v. CPI Corp.*, 176 Wash. 2d 198, 209, 289 P.3d 638, 644 (2012). Moreover, the terms assented to must be sufficiently definite. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wash. 2d 171, 177-78, 94 P.3d 945, 949 (2004).

These contract principals reveal that it is insufficient for Yates to establish only that Marcus & Millichap entered into some sort of agreement with CBA (and/or its members). *Id.* Rather, Yates must specifically prove that based on conduct

Marcus & Millichap entered into an agreement with CBA containing a specific, material term that obligates Marcus & Millichap to arbitrate disputes involving CBA and/or its members. *Id.* This Yates cannot do.

Here, again, there is no evidence that Marcus & Millichap consented to the mandatory terms of CBA's arbitration provisions. There is no evidence that any agreement related to arbitration was presented to Marcus & Millichap, discussed or consented to in any fashion. Again, despite Yates' claims that every CBA member is required to complete an application which includes the applicant's agreement to arbitrate, Yates has failed to produce even **one** agreement to arbitrate completed by **any** Marcus & Millichap agent. Surprisingly, it has also failed to produce any agreement between Yates and CBA or any other purported CBA member under which it agreed to arbitrate disputes. Consequently, there is no evidence of any terms or conditions of any agreement, leaving the court to guess at what any agreement might be.

### C. Even assuming Marcus & Millichap agreed to arbitrate some disputes involving CBA and its members, Yates cannot provide the needed "positive assurances" that this dispute is within the scope of any purported arbitration clause.

Assuming (but not conceding) that Marcus & Millichap agreed to arbitrate *some* disputes involving CBA and its members, the trial court erred because Yates cannot establish that this dispute is within the scope of any such agreement to arbitrate. *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 46, 17 P.3d 1266, 1269 (2001). In raising this issue, Yates concedes that "[a]s a rule, a contractual dispute is arbitrable unless the court can say with positive assurance that no interpretation of the arbitration clause could cover the particular dispute." *Id.*; *see also* Respondent Brief at 20.

In this regard, Yates claims Marcus & Millichap joined CBA in 1993 and agreed to be bound by a mandatory arbitration provision contained in CBA's bylaws. Even if accepted as true, there is no evidence such bylaws would encompass this dispute. The only version of the bylaws in the record are dated 2007. (CP 71-19) The record lacks evidence of the terms of the purported

agreement to arbitration which Marcus & Millichap allegedly entered into in 1993.

Likewise, in addition to the lack of any agreement to arbitrate, the Property which is the subject of this action and for which Yates seeks a commission was never listed with CBA. (CP 26) Moreover, CBA had no involvement with the listing of the Property and no involvement in the sale of the Property whatsoever. (CP 27) CBA's rules and regulations related to arbitration of commission disputes between brokers cannot apply when Marcus & Millichap has not contracted with CBA for this purpose and the Property subject to this claim was never listed with CBA.

In this regard, Marcus & Millichap's agents are independent contractors that are hired and paid on a contractual basis. *See* Decls. Deis, ¶ 3 (CP 25), Moll ¶ 3 (CP 177), *and* Morasch, ¶ 3 (CP 207-08). As independent contractors, Marcus & Millichap's agents choose to be members of a variety of real estate organizations. *Id.* Some agree to be members of CBA. Others do not. For example, Marcus & Millichap has 29

agents listed in the Seattle office.[8] Of those 29 agents, only 18 were listed as members of CBA as of March 5, 2015. *See* Decl. of Clement, ¶ 8 and Ex. 5. (CP 68, 105-08) CBA stated it would terminate the CBA memberships of all Marcus & Millichap agents and accordingly terminated the agents' CBA listings and removed access to CBA's systems. *See* Decl. Mott, ¶ 5 and Ex. A. (CP 30-32)

Further, even had they signed agreements with CBA (which they did not) (CP 177-79, 207-10), as independent contractors Marcus & Millichap agents have no authority to bind Marcus & Millichap to CBA rules simply because of their membership with CBA. (CP 25) Mr. Morasch, one of two Marcus & Millichap agents that earned a commission in this transaction, previously paid a fee to use the CBA listing services, *i.e.*, prior to his termination from CBA. *See* Decl. Mott, ¶ 5 and Ex. A. (CP 30-32) However there is no evidence that he has ever received or signed an application or other agreement with CBA, has ever

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[8] *See* www.marcusmillichap.com. The Court can take judicial notice of such factual information available on the internet. *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224-25 (10th Cir. 2007); *Gildon v. Simon Prop. Grp., Inc.*, 158 Wash. 2d 483, 145 P.3d 1196 (2006).

been advised that his membership obligates him to arbitrate disputes and has ever been provided or reviewed CBA's bylaws, rules or regulations. (CP 207-10) Consequently there is no evidence that Mr. Morasch has agreed through his limited use of CBA's resources to be bound by its arbitration provisions.

In short, even if we assume a binding agreement to arbitrate exists, the terms of that purported agreement are unclear, and therefore, Yates cannot provide the requisite "positive assurance" that this dispute is within the scope of the terms of the purported agreement to arbitrate (*i.e.*, again, which Yates has not provided). This determination provides another basis on which to reverse the decision of the trial court.

## III. CONCLUSION

The trial court erred by compelling Marcus & Millichap to participate in the arbitration proceedings commenced by Yates with CBA. Consequently, this Court should reverse the trial court's March 16, 2015 Order Denying Plaintiff's Motion to Stay Arbitration (CP 235-36) and Order Granting Defendant's Motion to Compel Arbitration and Dismissing Case (CP 237-38).

Respectfully submitted this 21st day of August, 2015.

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