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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 73199-8-I
King County Superior Court Cause No. 15-2-04826-1 SEA

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

v.

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

PETITION FOR REVIEW OF APPELLANT MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF SEATTLE, INC.

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I. IDENTITY OF PETITIONER

Petitioner Marcus & Millichap Real Estate Investment Services of Seattle, Inc. ("Marcus & Millichap"), Appellant in the Court of Appeals and Defendant in the Trial Court, respectfully requests that this Court review the decision of the Court of Appeals referred to in Section II, *infra*.

II. COURT OF APPEALS DECISION

Marcus & Millichap seeks review of the Court of Appeals Published Opinion in *Marcus & Millichap, Appellant, v. Yates, Wood & Macdonald, Inc., Respondent*, No. 73199-8-I, Washington Court of Appeals, Division One, filed February 1, 2016 (the "Opinion)" (CP 235-38), a copy of which included as part of the Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Is a member of a voluntary professional organization bound by a mandatory arbitration clause contained within the organizational bylaws solely by virtue of participation as a member of the organization based on *Keith Adams & Associates, Inc. v. Edwards*,[1] a 1970 Division Three decision decided under the former Arbitration Act, RCW Ch. 7.04, where the party seeking to compel arbitration cannot produce a "record"

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[1] *Keith Adams & Associates, Inc. v. Edwards*, 3 Wash. App. 623, 625, 477 P.2d 36, 38 (1970) *disapproved of by Godfrey v. Hartford Cas. Ins. Co.*, 142 Wash. 2d 885, 16 P.3d 617 (2001).

which evidences the parties' unambiguous intent to be bound by the arbitration clause in relation to their membership relationship as required by the operative Uniform Arbitration Act, RCW Ch. 7.04A (effective January 1, 2006 and applying retroactively)?

2. Even if there is an enforceable agreement requiring members of a commercial real estate multiple listing organization to arbitrate *some* disputes with the organization, should the parties be compelled to arbitrate a dispute involving a transaction in which the subject property was not listed or otherwise sold through the organization and is therefore outside of the scope of membership in such organization?

IV. STATEMENT OF THE CASE

Marcus & Millichap is a real estate brokerage firm specializing in real estate investment sales and financing. *See* Decl. Deis, ¶ 3. (CP 24) Yates, Wood & Macdonald, Inc. ("Yates"), Respondent in the Court of Appeals and Plaintiff in the Trial Court, is a real estate brokerage and property management firm. (CP 23, 117) Both firms have historically received the benefits of membership in a commercial real estate multiple listing service known as the Commercial Brokers Association ("CBA"). *See* Decl. Mills Clement, ¶ 2. (CP 66)

On the merits, Yates seeks one half of the commission earned by Marcus & Millichap on the sale of the Ticino Apartments located in

Seattle, WA (the "Property") pursuant to an exclusive representation agreement ("Exclusive Representation Agreement") between Marcus & Millichap and Goetzinger Family LLP ("Seller") dated July 31, 2014. *See* Decl. Deis, ¶ 8. (CP 26).[2] Yates had no agreement with the Seller to broker the Property and had no agreement with Marcus & Millichap for cooperate brokerage of the Property. *See* Decl. Moll, ¶ 9.[3] (CP 179).

The Property was not listed for sale through CBA and consequently CBA was uninvolved in the marketing or sale of the Property. *See* Decl. Deis, ¶ 9. (CP 26).

Despite the lack of an arbitration agreement between the parties, and the lack of involvement by CBA, Yates initiated an arbitration proceeding with the CBA seeking a portion of the commission. *See* Decl. Moll, ¶ 9. (CP 179) Over Marcus & Millichap's objection, CBA then scheduled an arbitration proceeding for March 23, 2015. *See* Decl. Deis, ¶ 15. (CP 28) To preserve its rights, Marcus & Millichap submitted an Answer in the proceedings. (CP 116-21)

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[2] Respondent Yates is a real estate brokerage and property management firm. (CP 23, 117) Yates was the property manager for the Property at the time Marcus & Millichap entered into the Exclusive Representation Agreement with the Seller. (CP 117)

[3] For a more detailed factual rendition, please see Appellant's Opening Brief at pages 4-7, incorporated by reference as if fully set forth herein.

Upon confirming the lack of any membership application or other agreement under which Marcus & Millichap agreed to arbitration, Marcus & Millichap demanded that CBA terminate the arbitration proceedings. *See* Decl. Deis, ¶ 15. (CP 28) When CBA refused, Marcus & Millichap thereafter initiated the underlying declaratory action in King County Superior Court seeking to stay the arbitration proceedings on the grounds that there is no valid arbitration agreement between the parties and Marcus & Millichap is not bound by the Mandatory Arbitration Clause contained in the CBA bylaws (and, therefore, that CBA lacked jurisdiction over the parties and the transaction which is the subject of this dispute).[4] (CP 1-5) On March 16, 2015, the Trial Court entered Orders compelling arbitration and denying Marcus & Millichap's motion to stay arbitration.[5] (CP 235-38)

V. ARGUMENT

A. Overview of grounds for acceptance of review.

As set forth in Section V(B), *infra*, this Court should accept review because the Court of Appeals' erroneous application of *Keith Adams* conflicts with the recent 2012 Washington Supreme Court decisions in

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[4] CBA had threatened litigation to compel Marcus & Millichap to proceed with the arbitration of Yates' claim. *See* Decl. Mott., ¶ 5 and Ex. A. (CP 30-35)

[5] Marcus & Millichap timely appealed these decisions. (CP 232-33)

Townsend v. Quadrant Corp., 173 Wash. 2d 451, 461-62, 268 P.3d 917, 922 (2012) and *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wash. 2d 885, 16 P.3d 617 (2001) (partially disapproving *Keith Adams & Associates, Inc.*, 3 Wash. App. at 625 *disapproved of by Godfrey*, 142 Wash. 2d 885). *See* RAP 13.4(b)(1). Section V(C), *infra*, establishes that review by this Court is also warranted because the Opinion is in conflict with two Court of Appeals decisions, *Stein v. Geonerco, Inc.*, 105 Wash. App. 41, 46, 17 P.3d 1266, 1269 (2001) and *Todd v. Venwest Yachts, Inc.*, 127 Wash. App. 393, 397, 111 P.3d 282, 284 (2005). *See* RAP 13.4(b)(2). Finally, Section V(D), *infra*, demonstrates that review is further warranted based on the substantial public interest in establishing a bright-line test for determining whether a dispute is arbitrable by requiring a party seeking to compel arbitration to produce an "agreement to arbitrate" contained in a "record per RCW 7.04A.060(1) and RCW 7.04A.010(7). *See* RAP 13.4(b)(4).

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B. **The Opinion conflicts with this Court's *Townsend* and *Godfrey* decisions by binding Marcus & Millichap to the Mandatory Arbitration Clause in the CBA Bylaws based solely on Marcus & Millichap's participation as a member of the CBA, despite the absence of a record evidencing an intent on the part of Marcus & Millichap to be bound by the Mandatory Arbitration Clause in relation to their membership.**

1. The Uniform Arbitration Act imposed a new requirement that a party seeking to compel arbitration must produce a "record" evidencing a party's unambiguous intent to be bound by a mandatory arbitration clause in conjunction with their membership relationship.

Unlike its predecessor, the current/operative Uniform Arbitration Act requires a party seeking to compel arbitration to produce a "record", *i.e.*, a writing, which contains an enforceable agreement to arbitrate.[6] *See* RCW 7.04A.010(7); *cf.* RCW Ch. 7.04. The Opinion erroneously failed to acknowledge that Yates cannot satisfy this threshold requirement.[7]

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).

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[6] The Uniform Arbitration Act is the operative act because it retroactively "governs agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006. *See* RCW 7.04A.030(2); *see also Optimer Int'l, Inc. v. RP Bellevue, LLC*, 151 Wash. App. 954, 960, 214 P.3d 954, 956 (2009) (subsequent history omitted).

[7] 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).

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). *Keystone Land & Development Co.*, 152 Wash. 2d 171 or that it voluntarily utilized CBA's services. Rather, Yates must specifically provide a record which evidences an intent on the part of Marcus & Millichap to be bound, as a material term, to arbitrate disputes involving CBA and/or its members. *Id.* Yates cannot do so.

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.

Likewise, despite utilizing its services, 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 the other provisions of CBA's Articles of Incorporation Bylaws and Rules and Regulations. Beyond 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 prepared, submitted, signed or otherwise agreed to 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 prepare and 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 could not produce a copy of the CBA application under which Yates allegedly became a CBA member and 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)[8] (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 is compelled to 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 should have denied Yates' request to compel arbitration of this dispute. The position is supported by the plain language of 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 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)

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[8] 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.

An "undertaking" is "a promise or agreement to do or not do something".[9] Thus, even the CBA Bylaws 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 **<u>in addition</u>** to the act of applying for membership. Again, there is no evidence of a record containing an undertaking or promise by Marcus & Millichap to be bound by the with respect to the mandatory arbitration clause other than the mere fact of membership in CBA.

In short, the Uniform Arbitration Act requires that a party seeking to compel arbitration must produce a "record" which evidences the parties' unambiguous intent to be bound by the arbitration clause in their membership relationship. *See* RCW 7.04A.010(7); *cf.* RCW Ch. 7.04.

2. <u>The Uniform Arbitration Act imposed a new requirement that a party seeking to compel arbitration must produce a "record" which evidences the parties' unambiguous intent to be bound by the arbitration clause in their membership relationship</u>

The Court of Appeals erred by relying principally on *Keith Adams & Associates, Inc.*, 3 Wash. App. at 625 disapproved of in part by the opinion of this Court in *Godfrey*, 142 Wash. 2d 885, for the proposition that the mere act of applying to be a member in an association (such as

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

CBA) always binds the putative member to all aspects of the association's Articles of Incorporation, Bylaws, Rules and Regulations, including any mandatory arbitration clause contained therein. *See* Opinion at 10-17. Ultimately, *Keith Adams* is distinguishable because it is a 1970 case which interpreted the former Uniform Arbitration Act, RCW Ch. 7.04 (repealed in 2006), rather than the operative Uniform Arbitration Act codified under RCW Ch. 7.04A.

Relying principally on *Keith Adams*, the Opinion effectively rewrites the above-referenced 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 operative Uniform Arbitration Act. *See* RCW 7.04A.010(7). In particular, the Court of Appeals erroneously misplaced reliance on *Keith Adams* 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* Opinion at 10.

In support, the Opinion provides 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 has 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.

Keith Adams provides, in part, as follows:

> 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., 3 Wash. App. at 625.

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..." *Keith Adams & Associates, Inc.*, 3 Wash. App. at 625.

It follows that the result in *Keith Adams* does not govern this dispute in which there is no record containing evidence that Marcus & Millichap agreed to be bound to the mandatory arbitration clause within CBA's bylaws at the time it began using CBA's listing service (or thereafter). (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.

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.*, 3 Wash. App. at 625-26 disapproved of by *Godfrey*, 142 Wash. 2d 885. Neither circumstance is present here—Marcus & Millichap filed an answer in the arbitration to prevent any default, timely objected to arbitration and filed the underlying lawsuit seeking a determination that arbitration is not proper *prior* to any arbitration proceeding.

As a result, the Opinion improperly relied on *Keith Adams* (again, a 1970 Division Three decision) because *Keith Adams* is in conflict with the recent 2012 Washington Supreme Court decision in *Townsend*, 173 Wash. 2d at 461-62. *Townsend* emphasizes the principal that to be valid an agreement to arbitrate must generally be signed. *Townsend*, 173 Wn. 2d at 61 (*quoting Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 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.[10]

Likewise, the Opinion is directly at odds with the principle announced by this Court that the parties to a purported arbitration agreement cannot "fundamentally alter" the provisions of the Uniform Arbitration Act. *Godfrey*, 142 Wash. 2d at 897 (partially disapproving *Keith Adams & Associates, Inc.*, 3 Wash. App. 623) (deciding under former arbitration act, RCW Ch. 7.04). Because the Opinion conflicts with *Keith Adams* and *Godfrey*, this Court should accept review. *See* RAP 13.4(b)(2).

C. **Even if Marcus & Millichap has agreed to arbitrate *some* disputes involving the CBA or its members, the Opinion conflicts with the *Stein v. Geonerco, Inc.* and *Venwest Yachts* Division One decisions because the underlying commission dispute stems from a transaction that does not involve a CBA listing or otherwise relate to the CBA and is therefore beyond the scope of CBA's Mandatory 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*, 105 Wash. App. at 46. In this

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[10] Notably, 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 Intern., Inc.*, 170 Wash. 2d at 773.

regard, the Opinion conflicts with the Division One decision in *Stein*, 105 Wash. App. at 46, which provides 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." *Stein*, 105 Wash. App. at 46 (citing *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wash. App. 703, 714, 959 P.2d 1140, 1145 (1998)).

The Property which is the subject of the underlying proceedings 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.[11]

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

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[11] It is also noteworthy that Marcus & Millichap purportedly 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.

independent contractors, Marcus & Millichap's agents choose to be members of a variety of real estate organizations and use a variety of on-line tools to sell property. *Id.* Some agree to be members of CBA. Others do not. For example, Marcus & Millichap has 29 agents listed in the Seattle office.[12] 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).

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 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)

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[12] *See* www.marcusmillichap.com. It is proper for this Court to 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).

Consequently there is no evidence 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.

Similarly, the Opinion is in conflict with another Division One decision, *Todd*, 127 Wash. App. at 397. In particular, without specifically referencing the Uniform Arbitration Act (or otherwise citing to any portion of the Revised Code of Washington), the *Venwest* court determined that where the parties' governing agreement did not incorporate by reference an arbitration clause contained in the bylaws of regional yacht broker's association, the arbitration clause was not binding. *Todd*, 127 Wash. App. 393. Significantly, the *Venwest* court refused to imply an intent to be bound by the arbitration clause based solely on the parties' conduct as members of the yacht broker's association. *Id.*

The Opinion conflicts with *Venwest* by improperly compelling arbitration of a dispute outside of the scope of the (purportedly enforceable) Mandatory Arbitration Clause. Moreover, *Venwest* is

generally consistent with the new requirement in the Uniform Arbitration Act that a party seeking to compel arbitration must produce a "record" evidencing a party's unambiguous intent to be bound by a mandatory arbitration clause in conjunction with their membership relationship. However, *Venwest* is in conflict with the Opinion's application of *Keith Adams*. As a result, *Venwest* provides another ground for this Court to accept review. *See* RAP 13.4(b)(2).

D. **The Opinion involves an issue of substantial public interest that should be determined by this Court.**

As set forth above, the Opinion effectively rewrites 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.060(1) and RCW 7.04A.010(7). There is, however, a substantial public interest in adopting 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", as opposed to 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.060(1) and RCW 7.04A.010(7). The substantial public interest in establishing a bright-line

test for determining arbitrability of a dispute is grounds for acceptance. *See* RAP 13.4(b)(4).

VI. CONCLUSION

Review by this Court is warranted because the Opinion (i) conflicts with the recent 2012 Washington Supreme Court decisions in *Townsend*, 173 Wash. 2d at 461-62 and *Godfrey*, 142 Wash. 2d 885, (ii) conflicts with the Court of Appeals decisions in *Stein*, 105 Wash. App. at 46 and *Todd*, 127 Wn. App. at 397; and (iii) involves an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b)(1), (2), and (4).

Respectfully submitted this 1st day of March, 2016.

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APPENDIX

A-1 Published Opinion in *Marcus & Millichap, Appellant, v. Yates, Wood & Macdonald, Inc., Respondent*, No. 73199-8-I, Washington Court of Appeals, Division One, filed February 1, 2016

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APPENDIX A-1

Published Opinion in *Marcus & Millichap, Appellant, v. Yates, Wood & Macdonald, Inc., Respondent*, No. 73199-8-I, Washington Court of Appeals, Division One, filed February 1, 2016

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF SEATTLE, INC., a California corporation	DIVISION ONE
	No. 73199-8-I
Appellant,	PUBLISHED OPINION
v.	
YATES, WOOD & MACDONALD, INC., a Washington corporation,	
Respondent.	FILED: February 1, 2016

DWYER, J. — Forty-six years ago, this court set forth the principle that voluntary membership in a professional organization gives rise to a corresponding obligation to comply with that organization's bylaws.[1] Where those bylaws contain an agreement to arbitrate, this principle applies with equal force. Under such circumstances, a binding agreement to arbitrate is adequately evidenced by proof of membership in the organization; a signed agreement is not required. Notwithstanding the subsequent enactment of the uniform arbitration

[1] Keith Adams & Assoc., Inc. v. Edwards, 3 Wn. App. 623, 477 P.2d 36 (1970), disapproved of on other grounds by Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 16 P.3d 617 (2001).

act[2] (UAA), the rule enunciated by this court retains its viability. Thus, the trial court correctly applied this rule to the facts before it in determining that there exists a valid agreement to arbitrate the underlying dispute at issue herein. Accordingly, we affirm.

I

Marcus & Millichap Real Estate Investment Services of Seattle, Inc. (Marcus & Millichap) is a real estate brokerage firm with its principal offices located in Seattle. On July 31, 2014, Marcus & Millichap, through its agents Scott Morasch and Kellan Moll, executed an exclusive representation agreement with the Goetzinger Family LLP to sell the Ticino Apartments (the Property), located in Seattle. At this time, Yates, Wood & MacDonald, Inc. (Yates), a real estate brokerage and property management firm, was the Property's manager.

Following the execution of the exclusive representation agreement, Marcus & Millichap marketed the Property in-house to its list of potential buyers. It did not list the Property with any multiple listing service. In response to these marketing efforts, Marcus & Millichap received offers to buy the Property. As a result, the Goetzinger Family LLP accepted an offer to purchase the Property from the assignee of BriarBox LLC. On November 24, 2014, the sale of the property closed and Marcus & Millichap both earned and received a commission.

Marcus & Millichap and Yates are both voluntary members of the Commercial Broker's Association (CBA),[3] a member-owned trade association

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[2] Ch. 7.04A RCW.

[3] Although Marcus & Millichap vaguely questioned its status as a CBA member before the trial court, its membership status is not seriously disputed in its briefing on appeal.

that provides commercial real estate multiple listing services to its members. Section X.A of the CBA bylaws contains an arbitration provision requiring arbitration of commission disputes arising among or between CBA members:

> A. Duty to Arbitrate. 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 then [sic] to bring a suit to law. The foregoing includes controversies which arose prior to one of the parties becoming a member.
>
> The term "commissions" as used above means commissions or fees arising from the real estate brokerage business as the same is now or in the future defined in RCW 18.85.010(1); together with interest and out-of-pocket costs or expenses related thereto. The terms shall include commissions or fees actually paid, as well as commissions or fees lost as a result of the acts of another member.
>
> Accordingly, no members may institute legal action involving such a controversy against any other member without the prior approval of the Board of Directors.

The applicability of this arbitration provision is the central issue on appeal.

On December 9, 2014, Yates, pursuant to the CBA bylaw arbitration provision, initiated arbitration proceedings against Marcus & Millichap, seeking one-half of the commission earned on the sale of the Property. Marcus & Millichap answered Yates's arbitration complaint denying the allegations. It did not, however, challenge the CBA's arbitral jurisdiction in its answer.

Nevertheless, before arbitration commenced, Marcus & Millichap filed a complaint for declaratory judgment against Yates in the King County Superior Court, alleging that no arbitration agreement between the parties existed. Before substantial discovery had been conducted, Marcus & Millichap and Yates filed

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Nonetheless, Marcus & Millichap's CBA membership status is discussed below. Yates's status as a CBA member is undisputed.

cross motions pursuant to RCW 7.04A.070, seeking to stay and compel the arbitration, respectively. The superior court, finding the existence of a valid agreement to arbitrate, granted Yates's motion to compel arbitration and dismissed the suit. Marcus & Millichap appeals.

II

Marcus & Millichap first contends that because its signed CBA membership application form has not been produced by either party, it is under no duty to arbitrate the underlying dispute. This is so, it asserts, because absent a signed membership application form, there is no evidence that Marcus & Millichap manifested assent to the CBA bylaws or to the arbitration agreement contained therein. We disagree.

Where the parties dispute the validity of an agreement to arbitrate, RCW 7.04A.070[4] directs the court to "proceed summarily to decide the issue." While no Washington court has squarely addressed the requirements of this "summary proceeding," courts in other jurisdictions have considered the issue in greater depth.[5] See, e.g., J.A. Walker Co. v. Cambria Corp., 159 P.3d 126 (Colo. 2007); Moffett v. Life Care Ctrs. of Am., 219 P.3d 1068 (Colo. 2009); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266 (Tex. 1992). In J.A. Walker Company, the Colorado Supreme Court recognized that, pursuant to the Colorado UAA, the

[4] RCW 7.04A.070(2) provides:
On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

[5] Because the UAA instructs courts to consider "the need to promote uniformity of the law" when applying and construing the UAA, authority from other jurisdictions is instructive. RCW 7.04A.901.

determination of "the existence of an arbitration agreement is an expedited process that starts with the trial court considering 'affidavits, pleadings, discovery, and stipulations' submitted by the parties." 159 P.3d at 130 (quoting Jack B. Anglin Co., 842 S.W.2d at 269). "The court must then determine 'whether material issues of fact are disputed and, if such factual disputes exist, [it must] conduct[ ] an expedited evidentiary hearing to resolve the dispute.'" J.A. Walker Co., 159 P.3d at 130 (alterations in original) (quoting Haynes v. Kuder, 591 A.2d 1286, 1290 (D.C. 1991)). "Thus an evidentiary hearing only is necessary if 'the material facts necessary to determine the issue are controverted, by an opposing affidavit or otherwise admissible evidence . . . .'" J.A. Walker Co., 159 P.3d at 130 (quoting Jack B. Anglin Co., 842 S.W.2d at 269). "If the material facts are undisputed, then the trial court can resolve the challenge on the record before it." J.A. Walker Co., 159 P.3d at 130 (citing Jack B. Anglin Co., 842 S.W.2d at 269).

This case authority properly describes the procedure envisioned by RCW 7.04A.070. Thus, both trial and appellate courts act properly by applying familiar summary judgment principles when the validity of an agreement to arbitrate is challenged under RCW 7.04A.070.

When reviewing an order granting summary judgment this court "perform[s] the same inquiry as the trial court." Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (citing Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004)). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); see also Owen, 153 Wn.2d at 787.

In determining whether a genuine issue of material fact exists, we must "assume facts most favorable to the nonmoving party." Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)); Braegelmann v. County of Snohomish, 53 Wn. App. 381, 383, 766 P.2d 1137 (1989)). The nonmoving party "must set forth specific facts that sufficiently rebut the moving party's contentions" and "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (citing Dwinnell's Cent. Neon v. Cosmopolitan Chinook Hotel, 21 Wn. App. 929, 587 P.2d 191 (1978)); see also Lane v. Harborview Med. Ctr., 154 Wn. App. 279, 288, 227 P.3d 297 (2010) ("A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment." (citing Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993))).

Moreover, we review a trial court's order granting a motion to compel or deny arbitration de novo. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213 (citing Adler v. Fred Lind Manor, 153 Wn.2d 331, 342, 103 P.3d 773 (2004)). "Courts resolve the threshold legal question of arbitrability of the dispute by examining the arbitration agreement without inquiry into the merits

of the dispute." Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 403, 200 P.3d 254 (2009).

Washington courts apply a "'strong presumption in favor of arbitrability,'" and "'[d]oubts should be resolved in favor of coverage.'" Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula, 130 Wn.2d 401, 414, 924 P.2d 13 (1996) (quoting Council of Cty. & City Emps. v. Spokane County, 32 Wn. App. 422, 424-25, 647 P.2d 1058 (1982)). "If the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end." Heights at Issaquah Ridge, 148 Wn. App. at 403.

The UAA, which governs the validity of arbitration agreements, provides that "[a]n agreement contained in a record[6] to submit to arbitration any existing or subsequent controversy arising between the parties is valid, enforceable, and irrevocable." RCW 7.04A.060(1). Because arbitration is a matter of contract, "'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" Satomi, 167 Wn.2d at 810 (internal quotation marks omitted) (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)).

Under Washington law, an express agreement to arbitrate is not required. As a matter of contract, "[a] party may consent to arbitration without signing an arbitration clause, just as a party may consent to the formation of a contract without signing a written document." Romney v. Franciscan Med. Grp., 186 Wn. App. 728, 747, 349 P.3d 32 (citing Fisser v. Int'l Bank, 282 F.2d 231, 233 (2d Cir.

[6] A "[r]ecord" is defined as information "inscribed on a tangible medium" or stored electronically, which is "retrievable in perceivable form." RCW 7.04A.010(7).

1960)), review denied, 184 Wn.2d 1004 (2015). Absent an express bilateral contract, voluntary membership in a professional organization establishes assent to an arbitration agreement contained in that organization's bylaws. See, e.g., Keith Adams & Assoc., Inc. v. Edwards, 3 Wn. App. 623, 477 P.2d 36 (1970), disapproved of on other grounds by Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 16 P.3d 617 (2001); Lane v. Urgitus, 145 P.3d 672, 681, 686 (Colo. 2006) ("[A]rbitration provisions and procedures contained in a voluntary membership organization of real estate professionals are binding on its members." (citing Jorgensen Realty, Inc. v. Box, 701 P.2d 1256, 1257-58 (Colo. App.1985))) ("[T]he relationship between a voluntary association and its members is a contractual one and, by joining such an organization, a member agrees to submit to its rules and regulations and assumes the obligations incident to membership."); Elbadramany v. Stanley, 490 So. 2d 964, 966 (Fla. Dist. Ct. App. 1986) ("The constitution and by-laws of a voluntary association, when subscribed or assented to by the members, becomes a contract between each member and the association." (citing Sult v. Gilbert, 3 So. 2d 729 (Fla. 1941))); Rogers Realty, Inc. v. Smith, 76 P.3d 71, 72 (Okla. Civ. App. 2003) ("[W]hen realtors voluntarily submit to their organizations' authority, then they are bound by its rules.").

For example, in Keith Adams, defendant Dick Edwards was employed by plaintiff Keith Adams & Associates as a real estate salesperson when a dispute arose in relation to a commission due on the sale of an apartment complex. 3 Wn. App. at 624. Keith Adams & Associates asserted that its president, Keith Adams, was the selling salesperson of the property and, thus, was due the

majority of the commission paid. Keith Adams, 3 Wn. App. at 624. Disagreeing with the allocation of the commission paid on the sale, Edwards filed an arbitration complaint against Keith Adams & Associates with the Tri-City Board of Realtors pursuant to that board's bylaws. Keith Adams, 3 Wn. App. at 624. At the time of the dispute, Edwards and Keith Adams & Associates were both voluntary members of the Board. Keith Adams, 3 Wn. App. at 624. After Edwards prevailed at arbitration, Keith Adams & Associates petitioned the superior court to vacate the award. Keith Adams, 3 Wn. App. at 624-25. Edwards answered, moved the court to dismiss Keith Adams & Associates' petition, and requested confirmation of the arbitration award. Keith Adams, 3 Wn. App. at 625. The superior court granted both of Edwards' motions, and Keith Adams & Associates appealed. Keith Adams, 3 Wn. App. at 625.

On appeal, Keith Adams & Associates contended that there was no written arbitration agreement between the parties as required by former RCW 7.04.010 (2005)[7] and, thus, that it was not required to arbitrate the dispute. Keith Adams, 3 Wn. App. at 625. Division III rejected this claim, holding that, despite the absence of an independent written agreement between Edwards and Keith Adams & Associates, the parties, "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, 3 Wn. App. at 625. Thus, "by requesting, and being granted,

[7] Former RCW 7.04.010 stated, in part, "[t]wo or more parties may agree in writing to submit to arbitration." The current version of the UAA, RCW 7.04A.060(1), requires only that an arbitration agreement be "contained in a record," but does not mandate a written agreement between the parties.

membership" in the Tri-City Board of Realtors, Keith Adams & Associates "agreed to submit such disputes occurring in the future to arbitration." Keith Adams, 3 Wn. App. at 626. Notwithstanding former RCW 7.04.010's language requiring the parties to "agree in writing to submit to arbitration," the court held that the parties' voluntary membership in the Tri-City Board of Realtors constituted a binding agreement to arbitrate future disputes pursuant to that board's bylaws. Keith Adams, 3 Wn. App. at 626.

The court's ruling in Keith Adams controls the outcome of this matter. Marcus & Millichap's membership in the CBA is fully supported by the record. Michelle Mills Clement, executive director and chief executive officer of the CBA, testified that Marcus & Millichap has been a CBA member since 1993, is currently a CBA member, and has paid the requisite fees and dues during this time. Accordingly, Marcus & Millichap has been assigned the "CBA Office ID" number 974500, a number unique to Marcus & Millichap. This CBA Office ID number allows Marcus & Millichap to sponsor "participating agents" from its office, a designation that allows these agents to "have full access to all services under the brokerage member's office" "upon payment of [the] attendant fees." At the time of the trial court's decision, 18 of Marcus & Millichap's 29 agents in the Seattle office were members of the CBA.[8]

Additionally, Marcus & Millichap's CBA membership is evidenced by the fact that it has previously availed itself of CBA arbitration proceedings on at least

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[8] A printout from the CBA's website showing the search results for Marcus & Millichap's page identifies the names and contact information of Marcus & Millichap's participating CBA members and their association with "Marcus & Millichap, Inc."

two occasions;[9] a procedure limited to CBA members. Notably, on March 7, 2011, "Marcus & Millichap Real Estate Investment Services," the entity, filed an arbitration complaint with the CBA against Westlake Associates, Inc. in connection with a commission dispute. In its arbitration complaint, Marcus & Millichap specifically invoked the CBA's arbitral jurisdiction, requesting "an arbitration hearing on an infraction of *[the CBA's] rules and bylaws* by Westlake Associates Inc.," while simultaneously recognizing that its complaint was untimely under the CBA arbitration rules.[10] (Emphasis added.) As an addendum to the arbitration complaint, Marcus & Millichap attached, and in its complaint explicitly referred to, the CBA arbitration rules. Furthermore, Scott Morasch, a broker involved with the sale of the Property at issue herein, was similarly involved in the dispute giving rise to the 2011 arbitration proceedings.

Nevertheless, at oral argument, counsel for Marcus & Millichap asserted that there is no evidence that Marcus & Millichap is even a member of the CBA. This is so, counsel asserts, because neither party has been able to produce Marcus & Millichap's original signed CBA membership application form.[11] This contention is unavailing.

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[9] In addition to the March 7, 2011 complaint described herein, in May 2009, "Marcus & Millichap, Seattle," the entity, was named as a respondent in an arbitration complaint filed by The Foundation Group in connection with a dispute regarding a commission agreement between brokers. There is no evidence that Marcus & Millichap objected to the CBA's arbitral jurisdiction at that time.

[10] In this 2011 arbitration complaint, Marcus & Millichap noted that, although the "CBA Arbitration Rules require an action to be filed within 90 days, good cause exists to allow the Arbitration to proceed under the current circumstances."

[11] Indeed, the CBA concedes that it does not maintain or possess copies of any records, including membership agreements, that predate 2009.

In addition to the absence of a signed membership application form, which is not required to form a valid agreement to arbitrate, Marcus & Millichap's repudiation of its membership status seemingly relies upon statements of its regional manager, Joel Deis, who has worked for Marcus & Millichap since 2006.[12] Deis, in his role as the regional manager and designated broker of the Seattle office, is "authorized to make decisions on behalf of Marcus & Millichap on a day to day basis." Deis testified that he "do[es] not believe Marcus & Millichap is a member of [the CBA]," that he has "never previously seen or been provided a CBA application form or other document which requires that members of [the] CBA resolve broker disputes through arbitration with [the] CBA," and that he has "never seen [the] CBA's rules, regulations or bylaws or been advised that Marcus & Millichap might be bound by them." Despite these hedged assertions, the record shows that Deis, as Marcus & Millichap's "authorizing broker" entitled to act on behalf of Marcus & Millichap, has completed numerous "Broker Roster Updates" using Marcus & Millichap's unique "CBA Office ID" number to report changes to Marcus & Millichap's currently participating CBA brokers. Moreover, Deis recognized that Marcus & Millichap's agents utilize the CBA's multiple listing services in order to research and advertise properties.

Deis further testified that, to the best of his knowledge, "Marcus & Millichap has never participated in any form of arbitration proceeding with [the]

[12] Marcus & Millichap also points to declarations of its real estate agents Scott Morasch and Kellen Moll. Moll is not a member of the CBA. Like Deis, Morasch, a CBA member, testified that he had "never been provided or reviewed CBA's rules, regulations or bylaws or been advised by CBA that [he] might be bound by them." These statements do not rebut evidence of Marcus & Millichap's membership status.

CBA," when, in fact, Marcus & Millichap has participated in at least two other CBA arbitration proceedings during Deis's tenure. Deis's carefully crafted, prevaricating assertions do not rebut or even contradict the direct evidence of Marcus & Millichap's status as a CBA member. Where there is direct evidence of a fact, a witness does not raise an issue as to the truth of that fact merely by stating that the witness is ignorant of the truth of that fact.

Accordingly, on the question of Marcus & Millichap's membership status, the evidence supports only the conclusion that Marcus & Millichap is a voluntary CBA member that assented to the terms of the arbitration provision contained in the CBA bylaws when it was granted membership in 1993. On the question of Marcus & Millichap's corporate knowledge of the circumstance, this conclusion is reinforced by the established facts that Marcus & Millichap has previously engaged in CBA arbitration proceedings on multiple occasions and, in one instance, complained of another member's violation of the CBA "rules and bylaws." Marcus & Millichap previously evidenced awareness of the CBA bylaws and attempted to utilize the bylaw arbitration provision in its favor. Marcus & Millichap cannot escape its obligation to arbitrate this dispute by submitting declarations in which witnesses artfully set forth their ignorance of reality. See Seven Gables Corp., 106 Wn.2d at 13. Such declarations do not create a dispute as to a material question of fact.

Furthermore, the arbitration agreement is sufficiently "contained in a record," as required by the UAA. A "record" of an arbitration agreement may exist on any tangible or electronic medium and must be "retrievable in

perceivable form." RCW 7.04A.010(7). A signed agreement is not required. Romney, 186 Wn. App. at 747. In this case, the court was presented with a physical copy of the CBA bylaws, which are also reproduced on the CBA's website.[13] Consequently, the arbitration agreement, to which Marcus & Millichap assented, is contained in the CBA bylaws, a "record" as defined by the UAA.

The trial court did not err in determining that the CBA bylaw arbitration provision constitutes a valid and enforceable arbitration agreement between the parties to this dispute.

III

Marcus & Millichap further contends that even if the CBA bylaw arbitration provision constitutes a valid agreement to arbitrate, the scope of the agreement does not encompass the dispute at issue herein. This is so, it asserts, because the sale of the Property is unrelated to the CBA, the Property was never listed with the CBA, and the CBA had no involvement with the listing of the property. This contention is unavailing.

"If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration." Townsend v. Quadrant Corp., 153 Wn. App. 870, 881, 224 P.3d 818 (2009) (citing RCW 7.04A.060(2), (3)), aff'd on other grounds, 173 Wn.2d 451, 268 P.3d 917 (2012). "'An order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not

[13] *Bylaws*, COMMERCIAL BROKERS ASS'N, http://www.commercialmls.com/Resources/Rules-and-Legal/Bylaws (last visited January 25, 2016).

susceptible of *an* interpretation that covers the asserted dispute.'" Peninsula Sch. Dist., 130 Wn.2d at 413-14 (quoting Council of Cty. & City Emps., 32 Wn. App. at 424-25). Washington's strong presumption in favor of arbitrability commands that "'all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.'" Peninsula Sch. Dist., 130 Wn.2d at 414 (quoting Council of Cty. & City Emps., 32 Wn. App. at 424-25).

Having found a valid agreement to arbitrate, the arbitration provision covers the dispute at issue herein. The language of the CBA arbitration provision is broad. The bylaws provide that "[i]t is the duty of all 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 then [sic] to bring a suit to law."

The underlying claim in this matter involves a commission-related controversy between two CBA members. In the arbitration complaint, Yates alleges that Marcus & Millichap refused to co-broker the sale of the Property and asserts that it is owed one-half of the total commission earned on the sale. Because the underlying dispute between Marcus & Millichap and Yates falls squarely within the language of the bylaw arbitration provision, arbitration of the matter is required.

Moreover, it is inconsequential that the Property was never listed with the CBA or that the CBA had no involvement with the listing or sale of the Property. This is so because the plain language of the arbitration agreement is not so

limited. The bylaw contains no requirement that the commission dispute involve the CBA or its multiple listing services. Thus, the arbitration agreement governs the commission dispute between Marcus & Millichap and Yates.

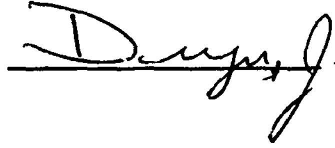
Next, despite the plain language of the arbitration clause, Marcus & Millichap contends that because the arbitration provision as it existed at the time Marcus & Millichap became a CBA member in 1993 is not in the record, there is no evidence that the 1993 CBA bylaw provision would apply to the dispute at hand. This argument misses the mark.

The CBA bylaws explicitly contemplate amendment by the CBA board of directors and give the board the authority to amend the rules and procedures governing arbitration. Thus, it need not be established how the bylaw provision read in 1993, when Marcus & Millichap became a member. Instead, it is only necessary to establish how the bylaw arbitration provision read at the time that this dispute arose. Because, at the time the dispute arose in 2014, the CBA bylaws mandated arbitration of "all controversies involving commissions, between or among" members, the applicable CBA arbitration provision encompasses the controversy between Marcus & Millichap and Yates.

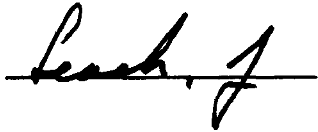
Accordingly, Marcus & Millichap, as a voluntary member of the CBA, sufficiently manifested assent to the CBA arbitration agreement when it was granted CBA membership status in 1993 and continued its membership through the years. As the plain language of the bylaw arbitration provision covers the

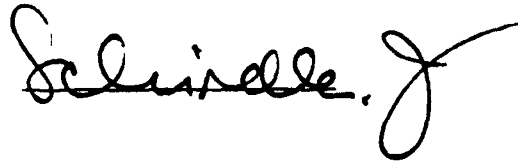
parties' dispute, Marcus & Millichap is obligated to arbitrate this commission-related controversy with Yates.[14]

Affirmed.



We concur:





[14] Yates, as the prevailing party on appeal, is entitled to an award of appellate costs. RAP 14.2, 18.1.

APPENDIX A-2

RCW 7.04A.030(2)

RCW 7.04A.030

When chapter applies.

(1) Before July 1, 2006, this chapter governs agreements to arbitrate entered into:

(a) On or after January 1, 2006; and

(b) Before January 1, 2006, if all parties to the agreement to arbitrate or to arbitration proceedings agree in a record to be governed by this chapter.

(2) On or after July 1, 2006, this chapter governs agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006.

(3) This chapter does not apply to any arbitration governed by chapter **7.06** RCW.

(4) This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees.

[2005 c 433 § 3.]

APPENDIX A-3

RCW 7.04A.060(1)

RCW 7.04A.060

Validity of agreement to arbitrate.

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

[2005 c 433 § 6.]

APPENDIX A-4

RCW 7.04A.010(7)

RCW 7.04A.010

Definitions.

The definitions set forth in this section apply throughout this chapter.

(1) "Arbitration organization" means a neutral association, agency, board, commission, or other entity that initiates, sponsors, or administers arbitration proceedings or is involved in the appointment of arbitrators.

(2) "Arbitrator" means an individual appointed to render an award in a controversy between persons who are parties to an agreement to arbitrate.

(3) "Authenticate" means:

(a) To sign; or

(b) To execute or adopt a record by attaching to or logically associating with the record, an electronic sound, symbol, or process with the intent to sign the record.

(4) "Court" means a court of competent jurisdiction in this state.

(5) "Knowledge" means actual knowledge.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(7) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

[2005 c 433 § 1.]

No. ___________

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 73199-8-I
King County Superior Court Cause No. 15-2-04826-1 SEA

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

v.

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

DECLARATION OF SERVICE OF APPELLANT MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF SEATTLE, INC.

Michael T. Callan, WSBA #16237
Joshua D. Brittingham, WSBA #42061
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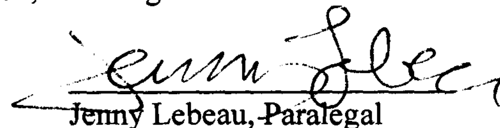
I, Jenny Lebeau, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am employed with the law firm of Peterson Russell Kelly PLLC, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to this action, and am competent to be a witness herein.

I hereby certify that on March 1, 2016, I caused to be served a copy of the following pleadings to the following party and/or attorney(s) at their last known address via the method(s) indicated below:

1. Petition For Review Of Appellant Marcus & Millichap Real Estate Investment Services Of Seattle; and
2. Declaration of Service.

	Via Stipulated E-Service Agreement
Shannon J. Lawless, WSBA#43385 Bryan C. Graff, WSBA#38553 Roger J. Kindley, WSBA#11875 Ryan, Swanson & Cleveland, PLLC 1201 3rd Avenue, Suite 3400 Seattle, WA 98101-3034 Attorney for Defendant Yates, Wood & MacDonald, Inc.	Via Email: Lawless@ryanlaw.com Graff@ryanlaw.com Kindley@ryanlaw.com; Dominique@ryanlaw.com; Fisher@ryanlaw.com

Dated: March 1, 2016, at Bellevue, Washington.



Jenny Lebeau, Paralegal