No. _____

SUPREME COURT

OF THE STATE OF WASHINGTON

(Court of Appeals, Division III Cause No. 346927)

SVN CORNERSTONE, LLC,
a Washington Limited Liability Company,

Petitioner,

vs.

N. 807 INCORPORATED, a Washington corporation, d/b/a BERKSHIRE HATHAWAY HOMESERVICES FIRST LOOK REAL ESTATE; KENNETH M. LEWIS AND MICHELLE S. LEWIS, and the marital community composed thereto; HENRY SEIPP AND JANE DOE SEIPP, and the marital community composed thereof,

Respondents.

PETITION FOR REVIEW

Matthew T. Ries, Attorney for SVN Cornerstone, LLC, as Petitioner

Stamper Rubens, P.S.
West 720 Boone, Suite 200
Spokane, Washington 99201
(509) 326-4800
WSBA No. 29407

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

STATUTES

A. IDENTITY OF PETITIONER

Petitioner SVN CORNERSTONE, LLC, (hereinafter "Cornerstone"), by and through its attorney Matthew T. Ries of Stamper Rubens, P.S., hereby petitions this Court to accept review of the decision designated in Part B of this Motion.

B. DECISION BELOW

Cornerstone seeks review of the May 23, 2017 Court of Appeals Division III Opinion of SVN Cornerstone, LLC v. N. 807 Incorporated, et al., Court of Appeals Case No. 34692-7-III. A copy of the Decision is in the Appendix A at pages A1-A17.

C. ISSUES PRESENTED FOR REVIEW

1. Can Respondent Henry Seipp unilaterally modify the Independent Contractor Agreement which does not contain an arbitration clause, and which requires modifications to be in writing and signed by both parties, and force Cornerstone to arbitrate the dispute according to the Commercial Brokers Association ("CBA") by-laws?

2. Should the voluntary CBA organization's by-laws govern the dispute resolution procedure between Mr. Seipp and Cornerstone where the parties never intended for the by-laws to govern the dispute over the breach of the Independent Contractor Agreement and associated causes of action?

3. Should Respondents Berkshire and Mr. Lewis be bound to litigate this matter pursuant to their agency relationship with Mr. Seipp?

4. Should Respondents Berkshire and Mr. Lewis be equitably estopped from compelling arbitration?

D. STATEMENT OF THE CASE

On July 8, 2010, Respondent Henry Seipp entered into an Independent Contractor Agreement with Cornerstone to work as an independent contractor sales person and/or independent contractor/associate broker. Mr. Seipp had an office at Cornerstone's business located at 1311 N. Washington Street, Spokane, WA 99201. Mr. Seipp worked at Cornerstone's office as a real estate broker from 2010 until he began working as a broker for a competing real estate brokerage company, Respondent N. 807, Incorporated dba Berkshire Hathaway Homeservices First Look Real Estate (hereinafter "Berkshire"), on April 20, 2015. (CP 70).

This lawsuit stems from Mr. Seipp's violation of the Independent Contractor Agreement he entered into with Cornerstone, as well as associated tort claims that arise from that agreement and relationship. When Mr. Seipp left Cornerstone on April 20, 2015, he began to work for. Prior to Mr. Seipp leaving Cornerstone, he had been working with EZ

Properties, LLC to market and sell the Timber Court Apartments located at 2007 East 37th in the City of Spokane (hereinafter "Apartments"). Within two (2) days of starting at Berkshire, on April 22, 2015, EZ Properties, LLC accepted an offer to buy the Apartments and signed a Purchase and Sale Agreement. The buyer made the offer on April 13, 2015, when he signed the Purchase and Sale Agreement. (CP 70-71, 91-118). On April 22, 2015, the seller, EZ Properties, LLC, also executed an Exclusive Listing Agreement with Berkshire which appointed Henry Seipp to be the Seller's Listing Broker. (CP 393, 401-404). The sale for Apartments ultimately closed on January 20, 2016, for a purchase price of $2,100,000. Berkshire and Mr. Seipp obtained a commission of 2% of the sale price, which amounted to $42,000. (CP 71, 320-321).

Mr. Seipp's conduct was in direct violation of numerous provisions of the Independent Contractor Agreement. On April 29, 2016, Cornerstone initiated this lawsuit against Mr. Seipp as well as Berkshire and its owner and designated broker, Respondent Henry Lewis. Cornerstone's complaint sought damages and injunctive relief for breach of contract, unjust enrichment claims, tortious interference claims, violation of the Uniform Trade Secrets Act claims, conversion claims, and breach of fiduciary claims. (CP 3-13). Cornerstone believes that Mr. Seipp's breach of the Independent Contractor Agreement involves more

than this one transaction. Cornerstone believes that other violations of the contract have occurred with other transactions and other customers and pled its causes of action seeking relief for other transactions. (Paragraphs 4.4, 4.11, 4.14, and 4.16 of Complaint, CP 8-9).

Cornerstone's claims all stem from Mr. Seipp's breach of the Independent Contractor Agreement and his working relationship with Cornerstone. The Independent Contractor Agreement provides the venue for legal action would be in Spokane County, Washington. (See Paragraphs 7.3, CP 80). There is no arbitration provision the Independent Contractor Agreement. The Independent Contractor Agreement further contains an integration clause that provided that the Agreement and the attached exhibits represent the entire agreement between the parties, and that it cannot be modified unless done so in writing and signed by both parties. (See Paragraph 8.1, CP 80).

On May 27, 2016, the Respondents, who are all represented by the same law firm, filed a Motion to Dismiss this lawsuit based upon an arbitration provision in the by-laws of the CBA. The CBA rules have a three (3) month time limit to initiate an arbitration proceeding, and the Respondents argued that the matter was time barred. (CP 45-51, 34). Through the limited time to conduct discovery before filing the response

memorandum and pleadings, Cornerstone learned that Respondents Mr. Seipp, Mr. Lewis, and Berkshire all became members of the CBA on April 24, 2015. (CP 141-142, 155-157, 234-236). This was two days after EZ Properties, LLC executed the Exclusive Listing Agreement appointed Mr. Seipp to be EZ Properties, LLC's Listing Agent, and two days after EZ Properties signed Purchase and Sale Agreement for the sale of the Apartments.

The CBA is a multiple listing company. It is a voluntary organization that brokers may join in this State. There is no requirement by the State of Washington that a broker join the CBA. (CP 72). Mr. Seipp had never been a member in the all the years he worked at Cornerstone. (CP 72). The CBA arbitration rules provide that the hearing is to be decided by a panel of brokers who are not attorneys, and that the arbitrators may consider the law, but are not bound to follow it. (CP 190, 179 [Rule 4], 183 [Rule 32]). The Respondents joined the CBA in a clear attempt to take advantage of the informal arbitration proceeding.

The Trial Court Judge, The Honorable John O. Cooney, denied the Respondents' Motion to Dismiss this lawsuit, recognizing that Cornerstone's causes of action stem from Mr. Seipp's breach of the Independent Contractor Agreement. Mr. Seipp did not become a member

of the CBA until after he left working at Cornerstone. (VRP 18-19). Judge Cooney correctly recognized that the Independent Contractor Agreement did not contain an arbitration clause. The case that the Appellants primarily rely upon, Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc., 192 Wn. App. 465, 473, 369 P.3d 503, 506 (2016), rev. denied 185 Wn.2d 1041 (2016), was distinguishable because it did not involve a situation where there was a separate contract between the parties such as the Independent Contractor Agreement. Marcus & Millichap dealt only with two members of the CBA disputing a commission. Judge Cooney rejected the argument that the arbitration provision in the CBA bylaws would supersede the Independent Contractor Agreement. (VRP 19-20). To impose arbitration would modify the terms of the Independent Contractor Agreement which would violate the provisions of 8.1 of the Independent Contractor Agreement since such modification was not in writing and signed by both parties contrary to the integration clause. (VRP 19-20).

Judge Cooney further rejected the Defendants' Motion because this lawsuit involves more than simply a dispute over the division of a commission. This lawsuit involves not only this one transaction, but also claims involving Cornerstone's other customers and transactions. The informal arbitration process before a panel of three layperson realtors is

not the appropriate venue for litigate breach of contract, unjust enrichment claims, tortious interference claims, violation of the Uniform Trade Secrets Act claims, conversion claims, and breach of fiduciary claims. (VRP 20).

The Appellants filed their Notice of Appeal on August 18, 2016, before they answered any of the written discovery. Cornerstone has not been able to engage in discovery of the Appellants' conduct with regard to not only the transaction involving the Apartments, but also the Appellants' conduct with regard to Cornerstone's other customers and other transactions.

The Court of Appeals issued its opinion on May 23, 2017, reversing the Trial Court in part, and ordering that certain matters proceed with arbitration pursuant to the CBA by-laws. Other matters such as injunctive relief for violations of the Trade Secrets Act would remain with the Trial Court. The Court of Appeals has improperly allowed the Independent Contractor Agreement to be modified to include an arbitration provision in a separate CBA by-laws. The parties to the contract never intended to have their dispute decided by arbitration in the by-laws. The Court of Appeals' decision has created a very complicated procedure that will create piecemeal litigation. Cornerstone respectfully

requests that this Court accept this Petition for Review to address this situation.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals' Decision is in Direct Conflict with the Published Division I Court of Appeals Decision of *Todd v. Venwest Yachts, Inc.*

This Court should accept Cornerstone's Petition for Review because the Court of Appeal's decision is in direct conflict with the published decision of Todd v. Venwest Yachts, Inc., 127 Wn. App. 393, 111 P.3d 282 (Div. I, 2005) rev. denied 156 Wn.2d 1025 (2006). RAP 13.4(b)(2). That case addressed a nearly identical situation as in this case and yet Division I of the Court of Appeals Division reached directly opposite conclusion as the Court of Appeals did in this case.

In the Todd v. Venwest Yachts, Inc. case, the commission based yacht salesmen sued his former employer for commissions allegedly owed. The employer moved for dismissal or stay pending arbitration of the dispute arguing that because both the commission based salesmen and the owner were members of the Northwest Yacht Brokers Association ("NYBA"), the matter should be arbitrated pursuant to the arbitration provision contained in the NYBA's by-laws. Todd v. Venwest Yachts, Inc., 127 Wn. App. at 396. The Court concluded that there was no evidence by either Todd or Venwest that the NYBA's arbitration clause

was ever intended to play a role in their employment relationship. In the absence of some indication that they intended to be bound by the NYBA's arbitration clause their employment agreement, the court would not imply that intent. Id. at 400.

The Court of Appeals in this case distinguished the holding of Todd v. Venwest Yachts, Inc. as follows:

> Because the court [in Todd v. Venwest Yachts, Inc.] could not determine a reasonable intended scope of the provision from its language, it necessarily looked to surrounding circumstances for the by-laws' drafter's intent, and concluded that the arbitration provision was not intended to cover members' employment relationships. *Venwest* reflects an approach to be followed only when intent cannot be determined from an arbitration provision's language. When (as here) intent *can* be determined from the language, it is irrelevant to the scope of an arbitration provision that membership in a professional organization is voluntary, *Marcus,* 192 Wn. App. at 475(citing *Keith Adams*, 3 Wn. App. at 624); or that the arbitration obligation is not reflected in a written agreement between the parties. *Id.* at 476 (*Keith Adams*, 3 Wn. App. at 625); or that the arbitration involves matters that are complex. . . .

(See page 9).

The Court of Appeals in this case, did not cite to any legal authority for its position that a court simply looks at the language in the arbitration clause to determine if it is ambiguous to determine its scope. The Court of Appeals in this case reached its conclusion by not following the legal analysis used by the Court in Todd v. Venwest Yachts, Inc. The

Court of Appeals in this case further did not consider or follow the substantial body of case law cited in Todd v. Venwest Yachts, Inc. addressing the scenario this case involves, and the rationale used by the courts. The courts which have addressed this issue analyze whether there was mutual *intent* of whether the parties to apply one contract document that contained an arbitration clause, to another contract that does not have an arbitration clause. The courts do not simply look at the language of the contract document that has the arbitration clause and determine if it is broad or narrow to determine if it applies to an earlier contract that does not have an arbitration clause, as the Court of Appeals has done in this case.

The Court of Appeals in Todd v. Venwest Yachts, Inc. began its analysis by explaining:

> "Our inquiry is two-fold: whether the parties agreed to arbitrate, and, if so, whether the scope of that agreement encompasses the asserted claims."[8] Venwest argues that the parties agreed to arbitrate by virtue of their memberships in the NYBA, so we must first determine whether the parties intended to be bound by the NYBA arbitration clause in their employment relationship.

Todd v. Venwest Yachts, Inc., 127 Wn. App. 393, 397, 111 P.3d 282, 284 (2005) (quoting David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London), 923 F.2d 245, 249 (2d Cir. 1991). In answering that question, the court did not look at the language of the arbitration clause to determine

if it was broad or narrow, or ambiguous. Rather, the court looked at contract law principles as to whether the latter contract (employment agreement) made the arbitration provision in the NYBA by-laws a term of that contract. The Court in Todd v. Venwest Yachts, Inc. analyzed two lines of cases where courts found the arbitration provision in a separate agreement applicable. The first was where the contract specifically incorporated the contract document including the arbitration clause by reference. Todd v. Venwest Yachts, Inc., 127 Wn. App. at 397-98. The second was where each of the security dealers were required to complete Uniform Application for Securities Industry Registration or Transfer Form U-4 (U-4) when they began work at a firm or transferred to a firm. Since all National Association of Securities Dealers' (NASD) members were required to execute those U-4 agreements which contained standard arbitration clauses, it was appropriate to require the members to arbitrate the dispute. Todd v. Venwest Yachts, Inc., 127 Wn. App. at 398. However, neither of those situations were applicable in that case. There was nothing to specifically reference the voluntary organization's by-laws into the parties' oral employment contract. The Court correctly concluded under common law contract principles that absent an intent by the parties to the subsequent employment contract to be bound the arbitration

provision in the earlier contract, that the Court would not imply that intent. Todd v. Venwest Yachts, Inc., 127 Wn. App. at 399-400.

A substantial body of law has addressed the issue where parties have entered into several written agreements, at least one of which provided for arbitration and others of which did not. Arbitrability in such a situation depends upon whether the agreement remained distinct and separate from the agreement containing the arbitration clause. See Necchi S.p.A. v. Necchi Sewing Machine Sales Corp., 348 F.2d 693, 698 (2d Cir.1965), cert. den., 383 U.S. 909, 86 S.Ct. 892, 15 L.Ed.2d 664 (1966). The court in David L. Threlkeld & Co., supra, explained the Necchi S.p.A. v. Necchi Sewing Machine Sales Corp., 348 F.2d 693 holding as follows:

> Necchi S.p.A., a foreign manufacturer of sewing machines, had entered into an exclusive distributorship agreement with Necchi Sewing Machine Sales Corporation ("Sales Corporation") in 1961. The agreement provided for arbitration of "[a]ll matters, disputes or disagreements arising out of or in connection with" the agreement. The Sales Corporation sought to compel arbitration pursuant to the 1961 agreement of, *inter alia,* a dispute stemming from a separate 1958 agreement which required Necchi to assume the Sales Corporation's obligations under certain licensing arrangements between the Sales Corporation and a third party. We refused to order arbitration of the claims that arose out of the licensing agreement, concluding that the 1958 contract, which did not provide for arbitration, had "remained distinct and separate from the 1961 exclusive distributorship agreement containing the arbitration provision." *Id.* at 698.

David L. Threlkeld & Co., 923 F.2d at 252.

Courts also look at whether the side agreement was one which "cannot be read apart from the other arbitrable contract[s] and must be viewed as a supplement [to those contracts]." See S.A. Mineracao da Trinidade-Samitri v. Utah International, Inc., 745 F.2d 190, 196 (2d Cir.1984)(finding disputes arising under subsequent agreements lacking arbitration clauses arbitrable because those agreements supplemented and restated original agreement containing an arbitration clause). In discussing these same principles in labor relations cases involving side agreements to collective bargaining contracts, the courts refer to this distinction as one in which two contracts are "collateral" to one another, in contrast to a situation in which a later contract containing no arbitration provision supplements an earlier "umbrella" agreement containing such a clause. Cornell University v. UAW Local 2300, 942 F.2d 138, 140 (2d Cir.1991).

It is apparent that the Independent Contractor Agreement is a separate and distinct contract document from the CBA by-laws that contained an arbitration provision. The Independent Contractor Agreement contained an integration clause which clearly indicated it could not to be modified unless in writing and signed by both parties. Since Mr. Seipp joined the CBA after he terminated working at Cornerstone, this is

not a situation where the Independent Contractor Agreement cannot be read apart from the CBA by-laws. It is clearly not a supplement to the by-laws. As in Necchi S.p.A. v. Necchi Sewing Machine Sales Corp., 348 F.2d at 698, the Court should not compel arbitration of a dispute which concerns the breach of the Independent Contractor Agreement since is a separate and distinct contract document and it did not have an arbitration clause.

The Court of Appeals nevertheless provides in its opinion that even if the arbitration clause in the CBA by-laws does modify the Independent Contractor Agreement contrary to the integration clause that "it is well settled that the contract may be modified or abrogated by the parties in any manner they choose, notwithstanding provisions then the contract prohibiting its modification or abrogation accept in a particular manner." (Opinion pg. 12 citing Columbia Park Golf Course v. City of Kennewick, 160 Wn. App. 66, 82, 248 P.3d 1067 (2011)). In the Columbia Park Golf Course case, both parties to the contract engaged in conducted that evidenced their agreement to modify the contract despite the integration clause. In this case, there are no facts in the record, or cited by the Court of Appeals in the opinion, that Cornerstone did anything to show that it agreed to modify the terms of the Independent Contractor Agreement. Rather, Mr. Seipp is the one that unilaterally attempted to modify contract

by joining the CBA after leaving Cornerstone in order to take advantage of the arbitration provision in the by-laws. That limited exception cited by the Court of Appeals is inapplicable to this case.

2. Respondents Berkshire and Lewis as Principals are Bound to Litigate this matter pursuant to agency relationship with Seipp.

Cornerstone and Mr. Seipp are bound to litigate this case since there is not an arbitration provision in the Independent Contractor Agreement. The non-signatory Respondents, Berkshire and Mr. Lewis, are also bound by the same dispute resolution procedure under the principles of agency. See Powell v. Sphere Drake Ins. P.L.C., 97 Wn. App. 890, 892, 988 P.2d 12, 13 (1999), as amended (Sept. 10, 1999)

Under agency principles and the doctrine of respondeat superior, the principal may be bound to arbitrate a dispute even if the principal did not sign the contract containing the arbitration provision. To bind a principal by its agent's acts, the plaintiff must demonstrate that the agent was acting on behalf of the principal and that the cause of action arises out of that relationship. E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 198 (3d Cir. 2001)(citing Phoenix Canada Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1477 (3d Cir.1988)). The court in Phoenix Canada Oil Co., explained, "Not only must an arrangement exist between the two corporations so that one acts

on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing." 842 F.2d at 1477. The court focused on the specific transactions at issue in the case and looked at the extent of the involvement and control of the principal in transactions. Id. at 1478.

In this case, all of the claims derive from the Independent Contractor Agreement executed by Mr. Seipp with Cornerstone. That is the primary source of the duties owed by Mr. Seipp to Cornerstone. As set forth in the Complaint, Respondents Berkshire and Mr. Lewis are vicariously liable for wrongful conduct of Mr. Seipp in the causes of action, and particularly the violation of the Uniform Trade Secrets Act. Thola v. Henschell, 140 Wn. App. 70, 78, 164 P.3d 524, 528 (2007)("one may violate the UTSA vicariously and be held responsible for such violation."). Mr. Lewis is the designated broker for Berkshire, and thus liable for the conduct of its agents, such as Mr. Seipp. "Responsibility for any real estate broker, managing broker, or branch manager in conduct covered by this chapter shall rest with the designated broker to which such licensees shall be licensed." RCW 18.85.201; see Nat. Ass'n of Realtors v. Champions Real Estate Servs. Inc., 812 F. Supp. 2d 1251, 1258 (W.D. Wash. 2011).

Respondents Mr. Seipp, Berkshire and Mr. Lewis knowingly violated that Independent Contractor Agreement when they executed the listing agreement between customers of Cornerstone and began their tortious conduct, including violating the Uniform Trade Secrets Act. Respondents Berkshire and Mr. Lewis are bound by the dispute resolution procedure outlined in the Independent Contractor Agreement, which is litigation.

3. Respondents Berkshire and Mr. Lewis Should be Equitably Estopped from Compelling Arbitration.

This Court has recognized that non-signatories can be bound to arbitrate upon the theory of equitable estoppel.

> Equitable estoppel " ' "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." ' " Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1045-46 (9th Cir. 2009) (quoting *Comer v. Micor, Inc.,* 436 F.3d 1098, 1101 (9th Cir.2006) (quoting *Wash. Mut. Fin. Group, LLC v. Bailey,* 364 F.3d 260, 267 (5th Cir.2004))). In this regard, equitable estoppel may require a nonsignatory to arbitrate a claim if that person, despite never having signed the agreement, " ' "knowingly exploits" ' " the contract in which the arbitration agreement is contained. *Id.* at 1046 (quoting *Comer,* 436 F.3d at 1101) (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates,* 269 F.3d 187, 199 (3d Cir.2001)).

Townsend v. Quadrant Corp., 173 Wn.2d 451, 461, 268 P.3d 917, 922 (2012).

The Court of Appeals in this case sought to distinguish the Townsend case by arguing that in that case the children were attempting to enforce the terms of the contract, whereas in this case, Berkshire and Lewis have not initiated a lawsuit to enforce rights under the Independent Contractor Agreement. (Opinion pg. 14-15). Equitable estoppel, however, can be established when a non-signatory directly benefits from the contract, and where the non-signatory does not initiate a lawsuit to enforce the contract.

The estoppel theory "'involve[s] non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.'" Hellenic Inv. Fund, Inc. v. Det Norske Veritas, 464 F.3d 514, 517–18 (5th Cir.2006) (quoting E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 200 (3d Cir.2001)). "A non-signatory can 'embrace' a contract containing an arbitration clause in two ways: (1) **by knowingly seeking and obtaining 'direct benefits' from that contract**; or (2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract." Noble Drilling Servs, Inc. v. Certex USA, Inc., 620 F.3d 469, 473 (5th Cir. 2010) (emphasis added); See e.g. Deloitte Noraudit A/S v. Deloitte Haskins & Sells, 9 F.3d 1060, 1064 (2d

Cir.1993), (a Norwegian accounting firm improperly used the trade name in violation of a settlement agreement which it had a copy of, and thus was estopped from denying its obligation to arbitrate since it "knowingly accepted the benefits of" that agreement.)

Courts have applied estoppel to a nonsignatory under the agreement where the nonsignatory did not sue. The courts instead focused on whether the nonsignatory "*directly* benefitted" from the agreement. Legacy Wireless Servs., Inc. v. Human Capital, L.L.C., 314 F. Supp. 2d 1045, 1057 (D. Or. 2004)(citing Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995)).

In this case, the Respondents knowingly exploited the Independent Contractor Agreement by obtaining the benefits from the Contract, and then attempting to escape liability by forcing the matter into arbitration. For five years Mr. Seipp operated and benefited from Independent Contractor Agreement with Cornerstone. It was by virtue of the Independent Contractor Agreement that Mr. Seipp was able to operate at Cornerstone, be paid commissions, and gain valuable trade secrets from Cornerstone, including customers of Cornerstone. Respondent Berkshire knew about Mr. Seipp's Independent Contractor Agreement and the duties Mr. Seipp owed to Cornerstone, and exploited that contractual relationship between Mr. Seipp and Cornerstone to gain customers and other valuable

trade secrets. The exploitation is especially egregious in this case because shortly after committing the wrongdoing, the Respondents all became members of the CBA to take advantage of the arbitration provision in the by-laws where the arbitrators are three lay person brokers. Equitable estoppel prohibits the Respondents Mr. Seipp, Berkshire, and Mr. Lewis from benefiting from the Independent Contractor Agreement, and attempt to escape liability by compelling Cornerstone to arbitrate its claims in CBA arbitration.

F. CONCLUSION

For the reasons stated above, Cornerstone respectfully asks this Court to accept this Petition for Review and reverse the Court of Appeals decision and allow this matter to proceed to litigation as ordered by the Trial Court.

DATED this 21 day of June 2017.

STAMPER RUBENS, P.S.

By: _____
MATTHEW T. RIES
WSBA # 29407
Attorneys for Petitioner

APPENDIX A

FILED
MAY 23, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

SVN CORNERSTONE LLC, a Washington Limited Liability Company, Respondent, v. N. 807 INCORPORATED, a Washington corporation, d/b/a BERKSHIRE HATHAWAY HOMESERVICES FIRST LOOK REAL ESTATE; KENNETH M. LEWIS AND MICHELLE S. LEWIS, and the marital community composed thereto; HENRY SEIPP AND JANE DOE SEIPP, and the marital community composed thereof, Appellants.	)	No. 34692-7-III UNPUBLISHED OPINION

SIDDOWAY, J. — The defendants in the action below—a real estate brokerage firm, its owners, and the marital community of an associate broker—appeal the trial

court's denial of their motion to compel arbitration. In denying the motion, the trial court reasoned that the parties did not intend the tort- and contract-based claims asserted by SVN Cornerstone LLC (Cornerstone) to be subject to the arbitration provision contained in the bylaws of the Commercial Brokers Association (CBA), to which all parties belong.

The plain language of the CBA's bylaws requires arbitration of all of Cornerstone's claims that seek, as damages, commissions or fees lost as a result of the acts of the defendants. Every indication in the briefing below and on appeal is that such damages are the principal relief Cornerstone seeks to recover through its claims. While we affirm the trial court's decision not to dismiss the complaint, we reverse its denial of the motion to compel arbitration.

FACTS AND PROCEDURAL BACKGROUND

When Henry Seipp left his position as a real estate salesperson and associate broker for Cornerstone on April 20, 2015, he began working as a broker for Berkshire Hathaway HomeServices First Look Real Estate (Berkshire).[1] Before Mr. Seipp terminated his relationship with Cornerstone, it had developed a marketing package for the sale of the Timber Court Apartments (Apartments), owned by EZ Properties, LLC. According to Cornerstone, Mr. Seipp and other Cornerstone brokers had been trying to locate potential buyers for the Apartments for months, and had solicited purchase offers

[1] We refer to the corporation by its registered trade name; its legal name is N. 807 Incorporated.

for the Apartments from Royce Nelson as early as March 2015. Cornerstone asserts that acting on EZ Properties' behalf, it had negotiated initial terms of sale of the Apartments to Chris Nelson, a relative of Royce Nelson. Although Cornerstone appears to have created a listing, there is no evidence that a written listing agreement with EZ Properties was ever executed.

Two days after Mr. Seipp became associated with Berkshire, EZ Properties entered into an exclusive listing agreement with Berkshire for the sale of the Apartments. On the same day, EZ Properties accepted a $2,150,000 counteroffer for the Apartments from Mr. Nelson (Chris Nelson, the only "Mr. Nelson" we refer to hereafter). Cornerstone would later learn that on April 13, a week before Mr. Seipp changed affiliation, Mr. Nelson made a $1,900,000 purchase offer for the Apartments; that on either April 15 or 18, EZ Properties rejected Mr. Nelson's offer and made the counteroffer of $2,150,000;[2] and that Mr. Nelson accepted the counteroffer on April 20. The purchase and sale agreement that reflects these offers and the eventual agreement do not identify any listing or selling agent as having been involved.

Sometime in or before September 2015, Cornerstone learned of the sale of the Apartments and of Berkshire's exclusive listing agreement. It notified Berkshire that it was entitled to a three percent commission. Berkshire disagreed. For as-yet unexplained

[2] The signatory for EZ Properties initially dated the document April 15, 2015, but crossed that date out and wrote April 18, 2015.

reasons, on October 20, EZ Properties and Mr. Nelson entered into a new purchase and sale agreement for the sale of the Apartments for the reduced price of $2,100,000. This agreement named Berkshire as the listing firm and Mr. Seipp as the listing broker. EZ Properties and Mr. Nelson then rescinded the April 2015 purchase and sale agreement.

In April 2016, Cornerstone filed a complaint in Spokane County Superior Court against Berkshire; its owners, Kenneth and Michelle Lewis; and Mr. Seipp and his marital community. The complaint alleged that Mr. Seipp's activities in connection with the sale of the Apartments as an associate broker of Berkshire and his disclosure of information to that firm breached provisions of an independent contractor agreement he had signed with Cornerstone in 2010. It asserted claims against all of the defendants for unjust enrichment, tortious interference with business relations, violation of chapter 19.108 RCW (the Uniform Trade Secrets Act), conversion, and breach of the fiduciary duty of loyalty.

Berkshire responded by moving to compel arbitration and dismiss the lawsuit. It relied on the fact that all parties to the lawsuit were members of the CBA, a member owned cooperative that provides a commercial real estate multiple listing service and other products to its members. CBA members are required to agree to abide by its bylaws and rules, which require arbitration of some member disputes. The relevant bylaw provision states:

> It is the duty of the members of CBA (and each so agrees) **to submit all controversies involving commissions between or among them to binding arbitration by CBA** pursuant to its then current arbitration rules and policies, rather than 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 services as the same is now or in the future defined in RCW 18.85; together with interest and out-of-pocket costs or expenses related thereto and included commissions or fees actually paid, **as well as commissions or fees lost as a result of the acts of another member.**

Clerk's paper's (CP) at 32 (emphasis added).

Cornerstone responded with a cross motion for partial summary judgment against Mr. Seipp on its breach of contract claim. It sought $63,000 in damages for the three percent commission it would have received on the Apartments' gross sale price of $2,100,000. Resisting the motion to compel arbitration, Cornerstone argued that the parties never intended to arbitrate what it characterized as an employment dispute, particularly one that arose before Mr. Seipp, Mr. Lewis, and Berkshire became members of the CBA on April 24, 2015.

The trial court refused to compel arbitration, stating that its decision was based on "two things: one being the independent contractor agreement and the second being that this isn't a simple dispute over commission. The dispute goes well beyond commission." Report of Proceedings (RP) at 21. The trial court also denied Cornerstone's motion for partial summary judgment.

The defendants appeal denial of their motions to compel arbitration and to dismiss.

ANALYSIS

Under the Uniform Arbitration Act, chapter 7.04A RCW, courts address two issues in deciding whether claims are subject to an agreement to arbitrate: "first, whether the arbitration agreement is valid, and if so, whether the agreement encompasses the claims asserted." *Wiese v. Cach, LLC*, 189 Wn. App. 466, 474, 358 P.3d 1213 (2015) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)); *see also* RCW 7.04A.060(2) ("The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."). Cornerstone does not dispute that the CBA bylaws create a valid arbitration agreement among CBA members, nor could it—as Division One of this court observed last year, "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"—and specifically a bylaw requiring arbitration of member disputes. *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 469, 369 P.3d 503, *review denied, Marcus & Millichap Real Estate Inv. v. Yates, Wood & MacDonald*, 185 Wn.2d 1041 (2016) (citing *Keith Adams & Assoc. v. Edwards*, 3 Wn. App. 623, 477 P.2d 36 (1970).

Instead, Cornerstone contends that the CBA arbitration provision cannot apply to the claims asserted in its complaint for several reasons: *first*, the CBA bylaws are not

incorporated into Cornerstone's and Mr. Seipp's independent contractor agreement, and cannot modify it; *second*, the defendants joined the CBA after the wrongful conduct occurred; *third*, Mr. Seipp's independent contractor agreement, which does not provide for arbitration, binds Berkshire Hathaway and the Lewises; and *fourth*, its claims do not fall within what it contends is the "very narrow" scope of arbitration required by the CBA bylaws. CP at 202.

We review a trial court's order granting or denying a motion to compel de novo. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). We first address the scope of the CBA arbitration provision and then address Cornerstone's remaining arguments in turn.

I. Cornerstone's principal claims fall within the scope of the CBA arbitration agreement, which is broad

Division One of this court had occasion to apply this same CBA arbitration provision in *Marcus*, and observed that "[t]he language of the CBA arbitration provision is broad." 192 Wn. App. at 481. We agree. Noteworthy for present purposes is the provision's language that "commissions," for purposes of its application to "all controversies involving commissions," is defined to include "commissions or fees lost as a result of the acts of another member." CP at 32. Plainly, this language covers claims for commissions that are lost as a result of torts or breaches of contractual or fiduciary duties.

Cornerstone asserts that the CBA arbitration provision does not apply because the property was not listed with the CBA and there were no ties to the CBA. But as *Marcus* points out, and we agree, that does not matter; "the plain language of the arbitration agreement is not so limited." 192 Wn. App. at 481. Cornerstone further asserts that the provision does not apply because it suspects the defendants' wrongdoing to involve more than one transaction, and the CBA arbitration provision "is clearly limited to a dispute over one particular transaction" and to having "a panel of three brokers look over the facts of a transaction and determine which broker is entitled to a commission and how much." Br. of Resp't at 39-40. Again, the language of the arbitration agreement is not so limited.

To determine the intent of contracting parties, we begin with the objective manifestations of their agreement, imputing an intention corresponding to the reasonable meaning of words used. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Cornerstone's opinion about what the provision was intended to cover lacks support in its language, which is our touchstone. The most reasonable inference from the breadth of the CBA arbitration provision is that the drafters believed that peer arbitrators, being familiar with real estate industry practice and norms, will be able to resolve disputes more efficiently and fairly than courts. That inference can be drawn whether a dispute involves one lost commission or more than one.

Todd v. Venwest Yachts, Inc., 127 Wn. App. 393, 111 P.3d 282 (2005), on which Cornerstone places substantial reliance, is distinguishable. That case involved an arbitration provision in the bylaws of the Northwest Yacht Broker's Association (NYBA) that was unlimited, applying "'[w]hen a dispute arises between members, between members and nonmember [sic], or between members and the public.'" *Id.* at 396 (first alteration in original). If applied literally, it would have required the plaintiff, Mr. Todd, to use Yacht Broker's Association arbitration to resolve disputes over *e.g.*, a motor vehicle accident, a boundary dispute with a neighbor, or a medical malpractice claim against a health care provider. Because the court could not determine a reasonable intended scope of the provision from its language, it necessarily looked to surrounding circumstances for the bylaws' drafter's intent, and concluded that the arbitration provision was not intended to cover members' employment relationships. *Venwest* reflects an approach to be followed only when intent cannot be determined from an arbitration provision's language. When (as here) intent *can* be determined from language, it is irrelevant to the scope of an arbitration provision that membership in a professional organization is voluntary, *Marcus*, 192 Wn. App. at 475 (citing *Keith Adams*, 3 Wn. App. at 624); or that the arbitration obligation is not reflected in a written agreement between the parties; *id.* at 476 (citing *Keith Adams*, 3 Wn. App. at 625); or that the arbitration involves matters that are complex. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 239, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) (observing that

neither antitrust nor RICO claims had been deemed too complex to be resolved in arbitration).

Cornerstone also argues that it seeks relief other than lost commissions, pointing to its prayer for injunctive relief to protect its trade secrets. Br. of Resp't at 3-4. To the extent Cornerstone seeks relief having no relation to lost commissions, we agree that arbitration need not be compelled. We address that in the final section of this opinion. But the lost commission claim is clearly the principal part of the parties' dispute at this point. This is clear from the section of Cornerstone's appellate brief devoted to the "factual background of the dispute," *see id.*, at 8-19 (capitalization omitted), and from Cornerstone's earlier motion for partial summary judgment, which relied solely on the Apartments transaction. *See* CP at 369 ("There is . . . no dispute that Cornerstone lost the commission sale . . . as a proximate result of Defendant's breach . . . . Cornerstone therefore asks for . . . a . . . finding that Mr. Seipp is liable for the principal amount of $63,000.").

Cornerstone's legal claims for lost commissions on the Apartments transaction or any other transaction, regardless of the legal theory, are subject to the CBA arbitration provision.

II. The duty to arbitrate does not conflict with Mr. Seipp's independent contractor agreement

Cornerstone argues that even if the dispute below would otherwise fall within the scope of its obligation to arbitrate under the CBA bylaws, Mr. Seipp's act of joining the CBA in 2015 cannot modify the independent contractor agreement that he signed with Cornerstone in 2010. It relies on three provisions of the independent contractor agreement that it contends would be impermissibly modified if its duty to arbitrate under the CBA bylaws is enforced. They are paragraph 7.3, which states:

> In the event that it is necessary to enforce this Agreement through legal action brought by either party, venue shall be in Spokane County, Washington[,]

paragraph 8.2, which states:

> In the event that a court of competent jurisdiction finds any portion of this Agreement to be illegal or unenforceable, the remainder of this Agreement shall survive and bind Broker and Associate[,]

and paragraph 8.1, which states:

> This Agreement, when signed by Broker and Associate, in conjunction with the attached Exhibits, represents the entire agreement between Broker and Associate. There are no other agreements, verbal or otherwise. This Agreement supersedes any prior agreement between Broker and Associate. This Agreement may only be altered or amended by a written agreement signed by Broker and Associate.

CP at 80.

Paragraph 7.3 does not require that disputes be resolved in a court of law. "Venue," to which it refers, is a concept common to arbitration and litigation. *See, e.g.*,

Gandee v. LDL Freedom Enters., Inc., 176 Wn.2d 598, 604, 293 P.3d 1197 (2013); *Saleemi v. Doctor's Assocs., Inc.*, 166 Wn. App. 81, 86, 269 P.3d 350 (2012), *aff'd*, 176 Wn.2d 368, 292 P.3d 108 (2013). The defendants did not ask the court to compel arbitration in a venue other than Spokane County. "Legal action" can obviously refer to arbitration.

Paragraph 8.2 addresses what happens *if* a court of competent jurisdiction finds a portion of the agreement to be illegal or unenforceable. It does not require that disputes be resolved in court.

Paragraph 8.1 was accurate in stating that at the time it was signed, it was the parties' only agreement; Mr. Seipp was not a member of the CBA at the time. Mr. Seipp's act of joining the CBA—thereby accepting other CBA members' standing offer to arbitrate in accordance with the bylaws—did not alter or amend his independent contractor agreement, which created no obligation to resolve disputes in court. And even if it had, it is well settled that a contract may be modified or abrogated by the parties in any manner they choose, notwithstanding provisions in the contract prohibiting its modification or abrogation except in a particular manner. *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 82, 248 P.3d 1067 (2011).

III. Berkshire and the Lewises are not obliged to resolve the claims against them in court

Cornerstone argues that Berkshire and the Lewises are required to litigate rather than arbitrate for three reasons.

It first contends they must litigate because the dispute arose before Berkshire and the Lewises joined the CBA on April 24, 2015. But the CBA arbitration provision states, plainly, that the duty to submit controversies involving commissions to arbitration "includes controversies which arose prior to one of the parties becoming a member." CP at 32. *Weiss v. Lonnquist*, 153 Wn. App. 502, 224 P.3d 787 (2009), *aff'd*, 173 Wn. App. 344, 293 P.3d 1264 (2013), on which Cornerstone relies, does not hold that arbitration contracts cannot cover preexisting disputes. They plainly can. By statute, "[a]n 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." RCW 7.04A.060 (emphasis added).

Cornerstone next invokes a body of case law that, on several theories, will find that a nonsignatory to an arbitration agreement is bound by an arbitration agreement signed by its agent. Whether the nonsignatory is bound turns on traditional principles of agency law. Cornerstone cites *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 198 (3d Cir. 2001), for example, in which the

defendant unsuccessfully argued that the plaintiff, DuPont, was bound to arbitrate a dispute based on the arbitration clause in a joint venture agreement between the defendant and DuPont's Chinese subsidiary. Two facts must appear: (1) an arrangement must exist so that the signatory was acting on behalf of the other under usual agency principles in entering into the arbitration agreement, and (2) the same arrangement must be relevant to the facts giving rise to the cause of action. *Id.*

The cases on which Cornerstone relies extend the operation of an *agreement to arbitrate* beyond signatory parties. Cornerstone argues that Mr. Seipp's *agreement to litigate* can be extended beyond himself, but we have already held that the independent contractor agreement imposes no duty to litigate. And no facts support a finding, under usual agency principles, that Mr. Seipp was acting on behalf of Berkshire and the Lewises when he signed the independent contractor agreement in 2010. For both reasons, the case law relied on by Cornerstone does not apply.

Finally, Cornerstone invokes the doctrine of equitable estoppel, which precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that the contract imposes, citing *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012). In *Townsend*, our Supreme Court held that the children of homeowners were bound by an arbitration clause in their parents' purchase and sale agreement where the children were attempting to enforce the terms of that agreement, including its warranties. Here, Berkshire and the Lewises—*defendants* in this action—

are not trying to enforce rights under Mr. Seipp's independent contractor agreement. And, again, the independent contractor agreement creates no duty to litigate that Berkshire or the Lewises need to avoid.

IV. We affirm the trial court's denial of the motion to dismiss

The defendants moved to dismiss Cornerstone's complaint on the basis that its claims were subject to mandatory arbitration. But RCW 7.04A.070(6) provides that "[i]f the court orders arbitration, the court shall on just terms *stay* any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may sever it and limit the stay to that claim." (Emphasis added.) Cornerstone contends that at least some claims are not subject to arbitration. Even if it did not, staying rather than dismissing litigation preserves the court's jurisdiction to confirm an award following arbitration or take other actions authorized by chapter 7.04A RCW. *See* RCW 7.04A.220 (court may confirm unless the award is modified, corrected, or vacated).

The defendants further contend that dismissal was appropriate because Cornerstone's claims are time barred under the CBA's arbitration rules. Whether the claims are time barred is an issue for the arbitrators. *See* RCW 7.04A.060(3) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled.").

Finally, we address the need on remand to determine what issues, if any, will remain before the court to be litigated. Decisions of the United States Supreme Court

provide that trial courts must compel arbitration of "pendent arbitrable claims." The defendants misconstrue the requirement when they turn to a dictionary for a definition of "pendent" and construe "pendent arbitrable claims" as meaning claims that do not fall within the scope of the parties' arbitration agreement but arise out of the same "transaction or occurrence" as the arbitrable claims. Reply Br. at 7-9. "Pendent arbitrable claims" are, instead, claims that *do* fall within the scope of an arbitration agreement but that a court might resist ordering to arbitration because they are closely related to nonarbitrable claims that will remain before the court. "[I]f a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation. . . . A court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration." *KPMG LLP v. Cocchi*, 565 U.S. 18, 19, 132 S. Ct. 23, 181 L. Ed. 2d 323 (2011) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)).

Accordingly, although we direct the trial court to compel arbitration of all of Cornerstone's claims for relief that seek to determine or recover commissions, or commissions or fees lost as a result of the acts of the defendants, it is conceivable that some claims for relief will not be arbitrable—for example, a request for an injunction against use of trade secrets or for the court-ordered return of Cornerstone's property

would not be.[3] In making the determination, the court must bear in mind that 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 County & City Emps. v. Spokane County*, 32 Wn. App. 422, 424-25, 647 P.2d 1058 (1982).

We reverse denial of the motion to compel arbitration and remand for proceedings consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

[3] Claims for commissions or fees derived from the defendants' use of such property, including trade secret information, would of course be arbitrable.

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of June 2017, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Mr. Nicholas D. Kovarik
Ms. Whitny L. Norton
Piskel Yahne Kovarik, PLLC
522 W. Riverside Ave, Ste 410
Spokane, WA 99201

_____ U.S. Mail, Postage Prepaid
__✓__ Hand Delivered
_____ Overnight Mail
_____ Telecopy (Facsimile)
__✓__ Email

Laurel K. Vitale

LAUREL K. VITALE

STAMPER RUBENS, P.S.

June 21, 2017 - 1:37 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Trial Court Case Title:	

The following documents have been uploaded:

- PRV_Petition_for_Review_20170621114334SC823961_0774.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PetitionReview.pdf

A copy of the uploaded files will be sent to:

- nick@pyklawyers.com

Comments:

I will be mailing the filing fee of $200 by Fed Ex to the Clerk's Office today.

Sender Name: Laurel Vitale - Email: lvitale@stamperlaw.com
Filing on Behalf of: Matthew Thomas Ries - Email: mries@stamperlaw.com (Alternate Email:)

Address:
720 W. Boone, Ste. 200
Spokane, WA, 99201
Phone: (509) 326-4800

Note: The Filing Id is 20170621114334SC823961