

No. 64518-8-1

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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ALASKA DISTRIBUTORS CO.,

Claimant/Respondent,

v.

ALASKAN BREWING COMPANY,

Respondent/Appellant

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RESPONDENT'S OPPOSITION BRIEF

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## I. INTRODUCTION

Challenges to an arbitration award are limited to legal errors on the face of the award. This is a frivolous appeal which goes far beyond the face of the award and into the evidence and the merits. Respondent Alaska Distributors Co. (“ADCO”) is simultaneously filing a motion on the merits pursuant to RAP 18.14.

In August 2008, Alaskan Brewing Company (“Alaskan”) terminated its distributorship agreement with ADCO. A binding private arbitration was commenced to determine the applicable measure of compensation for ADCO resulting from Alaskan’s termination. The arbitration was held on August 13, 2009. ADCO was awarded \$5,537,520 in damages, plus prejudgment interest and attorneys’ fees in accordance with RCW 19.126, *et seq.*

In addition to the award, and at the parties’ request, Arbitrator Thomas Brewer provided a statement of the “principal reasons for the relief awarded.” That statement was not part of the award.

Nevertheless, dissatisfied with Arbitrator Brewer’s ruling (and the \$6.3 million payment that resulted therefrom – a payment Alaskan has already made), Alaskan unsuccessfully moved to vacate the Award in King County Superior Court. In so moving, it misrepresented the boundaries of the face of the Award, distorted Arbitrator Brewer’s

reasoning, and offered previously rejected substantive arguments. The motion was denied.

On appeal, Alaskan presents, nearly verbatim, the same erroneous arguments to this Court. This Court, like the Superior Court, does not reexamine the merits and the evidence. Instead, it looks solely to the face of the award for the existence of a mistake of law. Here, the face of the award contains no such error. Even if this Court could address the reasoning that was provided, it would find no mistake. The Arbitrator made the right decision. There is no basis for vacating the award; the appeal should be denied.

ADCO also requests that it be awarded its attorneys' fees under RAP 18.1.

## **II. STATEMENT OF ISSUE**

1. Whether there was an error of law apparent on the face of the arbitration award without resort to evidence considered by the arbitrator.
2. Whether the arbitrator's grant of attorneys' fees to the prevailing party constituted an error of law when (i) the statute governing the claim provides for the awarding of attorneys' fees to the prevailing party and (ii) both parties requested attorneys' fees in their arbitration submissions.

### III. STATEMENT OF THE CASE

In Washington, the relationship between beer suppliers (e.g., Alaskan) and beer distributors (e.g., ADCO) is controlled by statute. That statute requires that when a beer supplier terminates a beer distributor, the supplier must pay the distributor the fair market value of the distribution rights. RCW 19.126.040.

Alaskan terminated ADCO in August 2008. ADCO filed an arbitration demand to determine the fair market value of the distributor rights.<sup>1</sup> The evidence at the hearing established that the fair market value of ADCO's distribution rights was \$5,537,520.<sup>2</sup> Alaskan sought to pay a fraction of the fair market value (\$1.4 million) by arguing that a liquidated damages provision in the agreement applied. That provision, by its express terms, only applied if Alaskan satisfied two conditions precedent: (i) Alaskan had to give ADCO 90 days' notice of termination; and (ii) Alaskan had to continue to ship product to ADCO during those 90 days.<sup>3</sup> Here, Alaskan gave four days' notice, stopped shipping product, and shifted the brand to a new distributor.<sup>4</sup>

The Arbitration occurred on August 13, 2009. After "[h]aving heard the witnesses, having reviewed the exhibits, proofs, written

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<sup>1</sup> CP 101-102.

<sup>2</sup> CP 12.

<sup>3</sup> CP 13-14.

<sup>4</sup> CP 14.

submissions and legal authorities offered by the parties; having heard the arguments of counsel; and otherwise having considered all of the evidence and other submissions offered,”<sup>5</sup> Arbitrator Brewer awarded ADCO \$5,537,520 on its claim for damages plus prejudgment interest and attorneys’ fees, as provided by statute and dismissed all of Alaskan’s claims with prejudice.<sup>6</sup>

ADCO filed a petition to confirm the award in King County Superior Court.<sup>7</sup> Alaskan cross moved to vacate the award.<sup>8</sup> Alaskan argued then (as it argues now and as it argued at the hearing), that the 90-day notice clause in the liquidation provision is not a condition precedent as a matter of law and thus the liquidated damages provision should have applied notwithstanding Alaskan’s failure to comply with its express terms.<sup>9</sup> It also argued that Arbitrator Brewer erred as a matter of law by awarding ADCO attorneys’ fees.

Alaskan’s motion to vacate was denied; ADCO’s motion to confirm was granted.<sup>10</sup> Alaskan paid ADCO the amount of the judgment – \$6,355,869.10 – and then filed this appeal.

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<sup>5</sup> CP 10-11

<sup>6</sup> CP 19-21

<sup>7</sup> CP 1-3.

<sup>8</sup> CP 23-33.

<sup>9</sup> CP 29-30.

<sup>10</sup> CP 130-133.

#### IV. ARGUMENT

Consistent with Washington’s public policy strongly favoring the finality of arbitration awards, judicial review of such awards is strictly limited to the grounds set forth by the Washington Uniform Arbitration Act, RCW. 7.04A. Davidson v. Hensen, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998) (Judicial review of an arbitration award is “exceedingly limited.”); S&S Constr., Inc. v. ADC Props., LLC, 151 Wn. App. 247, 254, 211 P.3d 415 (2009) (same).

Alaskan seeks vacation exclusively under RCW 7.04A.230(1)(d), arguing that the arbitrator exceeded his powers by supposedly committing an error of law on the face of the Award. The error complained of is not on the face of Arbitrator Brewer’s Award. That is the end of the issue. Regardless, Arbitrator Brewer made no substantive error, and it is not the purview of this Court to apply a de novo review of his decision.

##### **A. There Is No Error of Law on the Face of the Award.**

In light of the limited statutory authority granted to a court reviewing an arbitration award, the court considers only the face of the award. Hanson v. Shim, 87 Wn. App. 538, 546, 943 P.2d 322 (1997). A statement explaining the arbitrator’s reasons for the award is not part of the award. Id. (citing Westmark Props., Inc. v. McGuire, 53 Wn. App. 400, 402-03, 766 P.2d 1146 (1989)) (emphasis added); Luvaas Family Farms v. Ferrell Family Farms, 106 Wn. App. 399, 404, 23 P.3d 1111 (2001) (same). Here, Arbitrator Brewer issued a 14-page ruling which

included a lengthy statement of the “principal reasons for the relief awarded.”<sup>11</sup> However, the Award itself – *i.e.*, the part reviewable by this court – is much more limited. It commences at the bottom of page 12 (CP 19):

**Award.** For the reasons given above, I hereby award and order the following relief:

1. All of the requests for relief asserted herein by Respondent Alaskan are denied and are hereby dismissed with prejudice.

2. Claimant ADCO is hereby awarded \$5,537,520 on its claim for damages.

3. Based on the evidence presented in this matter, Claimant ADCO is entitled to an award of pre-award interest in its favor at the 12% statutory interest rate from August 30, 2008 (the day following Alaskan’s termination of ADCO, which I find is the date when the money became due), through the date of this Final Award. *See, e.g., Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775 (2005), *citing cases*; RCW 4.56.110; RCW 19.52.020. Accordingly, Claimant ADCO is hereby awarded pre-award interest in the amount of \$744,606.20.

4. RCW 19.126.060 provides that “[i]n any action brought by a wholesale distributor ... pursuant to this chapter, the prevailing party shall be awarded its reasonable attorney’s fees and costs.” As discussed above, claimant ADCO’s claim herein was based on RCW 19.126.040(3). For the reasons given above, I find that Claimant ADCO is the prevailing party in this arbitration. Accordingly, RCW 19.126.060 requires Claimant ADCO to be awarded its reasonable attorneys’ fees and costs incurred in this matter. Based on the evidence presented, I find that the reasonable amount of such fees and costs is \$73,742.94. Accordingly, Claimant ADCO is hereby awarded \$73,742.94 pursuant to RCW 19.126.060 for its reasonable attorneys’ fees and costs incurred in this arbitration.

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<sup>11</sup> CP 10.

5. The total amount awarded to Claimant ADCO in this Final Award is \$6,355,869.10. Respondent Alaskan shall pay this amount to Claimant ADCO within thirty days of the date of this Final Award.

**All Other Claims Denied.** All other claims not specifically addressed herein are denied.<sup>12</sup>

These five enumerated paragraphs (and the footnote) is the “Award.” Only these paragraphs are subject to judicial review for a mistake of law on its face.

1. **There Is No Error of Law on the Face of the Award as to ADCO’s Damages.**

There was no error of law in this Award as to damages. The damage Award is captured in two simple sentences:

1. All of the requests for relief asserted herein by Respondent Alaskan are denied and are hereby dismissed with prejudice.
2. Claimant ADCO is hereby awarded \$5,537,520 on its claim for damages.<sup>13</sup>

This Award is simply not susceptible to attack for legal error. See Federated Servs. Ins. Co. v. Personal Representative of Estate of Norberg, 101 Wn. App. 119, 124, 4 P.3d 844 (2000) (“[A]rbitrators can (unless otherwise directed) make their award more or less susceptible to judicial review, depending on the level of detail in the statement of the award.”). In Federated Services, heavily relied upon by Alaskan, the award itself included an error on its face as it identified punitive damages as a portion of the award in a jurisdiction that does not allow punitive damages. 101 Wn. App. at 124. Thus, as appellant concedes, the dispute must be “about

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<sup>12</sup> CP 19-21 (footnote omitted).

<sup>13</sup> CP 19.

law, not about evidence. It can be decided by reference to existing law *without resort to the evidence that was before the arbitrators and without second-guessing their application of the law to the facts.*” App. Opening Br. at 10, quoting Federated Services, 101 Wn. App. at 125 (emphasis added). No such error exists on the face of this Award. Instead, appellants seek a *de novo* review from this Court, asking it to second guess the application of law to the facts.

Westmark Properties, Inc. v. McGuire, 53 Wn. App. 400, 766 P.2d 1146 (1989), is also illustrative. There, the arbitrator provided a three-page letter containing the award plus “observations about the case ... and about some of the evidence.” 53 Wn. App. at 403. Rather than treating the entire three-page letter as the award, the Court concluded that the award was contained in the two sentences of the letter that stated, “I find that the plaintiff is entitled to judgment against the defendant in the sum of \$24,789.92, by way of reimbursement.... I am finding that the balance due the plaintiff for management fees is offset by shortfall in rentals.” Id. The Court found that those two statements were “substantively sufficient on their face to settle the dispute on the merits [and] dispose[] of all the issues.” Id. at 403-04. Thus, “[j]udicial scrutiny stops here.” Id. at 404. Similarly, here, judicial scrutiny stops on the finding that the following statement has no legal error on its face: “Claimant ADCO is hereby awarded \$5,537,520 on its claim for damages.”

2. **There Is No Error of Law on the Face of the Award as to the Award of Attorneys' Fees to ADCO.**

As Arbitrator Brewer noted, ADCO brought its claim pursuant to RCW 19.126, which provides for the prevailing party to receive its attorneys' fees and costs. RCW 19.126.060. While Alaskan (unsuccessfully) raised a contract-based defense, Arbitrator Brewer rejected Alaskan's argument and granted ADCO the statutory remedy arising from RCW 19.126.040(3).<sup>14</sup> He therefore found that attorneys' fees should be awarded to ADCO as the prevailing party. Clearly, that ruling is supported by the statute and not erroneous.

Moreover, appellant first raised the contract-based argument in an errata filed with the Superior Court. The argument was never raised to the arbitrator. By failing to make the argument during the arbitration, Alaskan waived it. It cannot be said that the Arbitrator made an error of law on the face of the Award by not accepting an argument never made.<sup>15</sup> Cf. RAP 2.5(a) (a party that fails to make an argument to the trial court waives it on appeal).

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<sup>14</sup> CP 13-14.

<sup>15</sup> AAA Arbitration Rule R-43 provided yet another basis for fees. That rule permits the Arbitrator to award fees if "all parties have requested such an award." AAA R-43(d)(ii). Here, ADCO requested fees in its Arbitration Demand, and Alaskan requested fees in its answer. See CP 102, 108. Pursuant to the rule, an award of fees is proper. For example, in Warner Bros. Records, Inc. v. PPX Enters., Inc., 776 N.Y.S.2d 269 (N.Y. App. Div. 2004), the contract did not provide for fees but required arbitration and provided that AAA rules applied. Because both sides sought fees at the arbitration, the arbitrator had authority to award fees. Thus, the granting of fees in the Award is not a mistake of law.

**B. A Motion to Vacate Is Not a Trial De Novo.**

Because Alaskan cannot attack the “face of the Award” it instead tries to attack Arbitrator Brewer’s reasons supporting the Award. Engaging in an examination of the reasons supporting the Award impermissibly enlarges the role of the Court in reviewing an arbitration award. Judicial review of an arbitration award does not include a review of the merits of the case or the evidence before the arbitrator. Davidson v. Hensen, 135 Wn.2d at 119; Boyd v. Davis, 127 Wn.2d 256, 262-63, 897 P.2d 1239 (1995); S&S Constr., 151 Wn. App. at 261 (a court does not review alleged substantive errors in an arbitration award); Luvaas Family Farms, 106 Wn. App. at 404-05 (same). The desirable qualities of arbitration would be heavily diluted, if not lost, if the court reviewing an arbitration award proceeded de novo. Accordingly, a court cannot search the four corners of the contract to discern the parties’ intent. Boyd, 127 Wn.2d at 263 (“Arbitrators, when acting under the broad authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts...”) (quoting No. State Constr. Co. v. Banchemo, 63 Wn.2d 245, 249-50, 386 P.2d 625 (1963)).

Nevertheless, Alaskan addresses the merits of the case and attacks the evidence (the contract) presented to the arbitrator. In the arbitration proceeding, ADCO raised a statutory claim for damages pursuant to Washington’s Wholesale Distributor/Supplier Equity Agreement Act, RCW 19.126. Evidence presented at the arbitration demonstrated that the

fair market value of the distributorship rights for statutory purposes was \$5,537,520 (three times annual gross profits). Alaskan responded to this statutory claim with a contract-based defense arguing that the parties' agreement included a liquidated damages provision which established Alaskan's liability for termination at approximately \$1.4 million. However, that provision required that Alaskan provide sixty days' notice of termination and that Alaskan continue to supply product to ADCO during this sixty-day period. Alaskan failed to do either. After hearing the arguments of the parties and reviewing all the evidence, Arbitrator Brewer determined that these requirements were conditions precedent (not promises as Alaskan argued) that must be satisfied before ADCO had any obligation to be bound by the liquidated damages provision.<sup>16</sup> Alternatively, Arbitrator Brewer explained that the provision can be viewed as a limitation of liability provision that could only be invoked by Alaskan in certain circumstances, and thus was not applicable because those circumstances did not exist.<sup>17</sup> Thus, Alaskan's contract-based defense was rejected and ADCO was awarded \$5,537,520 in damages (plus prejudgment interest and attorneys' fees).

Now, Alaskan comes to this Court (after having the same arguments denied by the Superior Court) seeking vacatur arguing that Arbitrator Brewer made an error of law in "erroneously construed paragraph III(I) as mandatory rather than permissive." (App. Opening Br.

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<sup>16</sup> See CP 13-17.

<sup>17</sup> See CP 17.

at 13.) Alaskan hardly hides its intent to obtain a review of the merits. In fact, not only does its motion excerpt the relevant contract language, the overwhelming majority of the motion is nothing more than a rehashing of its failed arguments to the arbitrator and the Superior Court.<sup>18</sup> Alaskan invites the Court to examine the contract and (re)consider their legal arguments in the hopes the Court comes to a different result than Arbitrator Brewer.<sup>19</sup> However, that is not the role of the Court in deciding whether to confirm or vacate an arbitration award. See S&S Constr., 151 Wn. App. at 261 (“S&S asks us to review contract language and make conclusions in opposition to those the arbitrator made. Given that ‘judicial review of an arbitration award ... does not include a review of the merits of the case,’ we will not conduct one here.”) (quoting Davidson v. Hensen, 135 Wn.2d at 119).

**C. ADCO Should Be Granted Its Attorneys’ Fees and Expenses.**

ADCO seeks its reasonable attorneys’ fees and costs in this judicial proceeding affirming the Superior Court’s confirmation of the arbitration award and denying the motion to vacate the award. RAP 18.1(a) provides

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<sup>18</sup> E.g., compare, App. Opening Br. at 12-16 with CP 29-32 & CP 92-93.

<sup>19</sup> Even if this Court were to review the reasons supporting the award rather than just the face of the award, it could not reasonably conclude as a matter of law that Arbitrator Brewer’s ruling was erroneous as a matter of law. Whether a provision in a contract is a condition or a promise depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in light of all the circumstances. Ross v. Harding, 64 Wn.2d 231, 236, 391 P.2d 526 (1964). Thus, the Court could not make such a ruling as a matter of law, but instead must be determined by the fact finder, in this case, Arbitrator Brewer. However, the Court could not make that determination without reviewing the contract and intent of the parties, an exercise not permitted in this proceeding.

for a party to recover reasonable attorneys' fees if applicable law so allows. Here, the applicable law is RCW 7.04A.250(3), which permits the court to add attorneys' fees and other reasonable expenses of litigation incurred by the prevailing party to a contested judicial proceeding regarding confirmation and vacation.

#### V. CONCLUSION

For the foregoing reasons, Alaskan's appeal to vacate the arbitration award should be denied and ADCO should be awarded its attorneys' fees for this proceeding.

DATED this 8<sup>th</sup> day of March, 2010.

BYRNES & KELLER LLP

By   
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Joshua B. Selig, WSBA #39628  
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**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that on the 8th day of March, 2010, a true copy of the foregoing pleading was served upon the following individuals:

**VIA HAND DELIVERY**

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