

No. 35531-1-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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MICHAEL MORRELL and NANCY  
MORRELL, husband and wife,

Plaintiffs/Respondents

v.

WEDBUSH MORGAN SECURITIES,  
INC., a California corporation,

Defendant/Appellant

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
(Hon. John A. McCarthy)

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iv-vii
I. SUMMARY OF REPLY.....	1
II. RESTATEMENT OF MATERIAL FACTS .....	1
III. ARGUMENT ON REPLY .....	4
A. The Morrells' Stated Standard of Review Illustrates Their Fundamental Misunderstanding of the Issue on Appeal: Whether the Trial Court Had the Power to Disturb the Arbitration Award on the Grounds Asserted by the Morrells.....	4
1. The Standard of Review of an Arbitration Award Is De Novo .....	4
2. The Morrells' Cite to the Abuse of Discretion Standard Demonstrates Their Misunderstanding of the Trial Court's Role in Reviewing the Arbitration Award.....	5
a. There Is a Strong Public Policy Favoring Arbitration, and Arbitration Is Not Intended Merely As a Prelude to Litigation .....	6
b. Arbitration Principles Mandate a Standard That Is Highly Deferential to the Arbitration Panel's Award .....	7
B. The Sole and Exclusive Grounds for Modifying or Correcting an Arbitration Award Are Statutory, and the Morrells Have Failed to Satisfy Their Heavy Burden of Showing that Any Statutory Grounds Justify the Trial Court's Extraordinary Award of Attorneys' Fees .....	8

1.	The Morrells Fail to Show that the Arbitration Panel "Exceeded Its Authority" Pursuant to Cal. Code Civ. Proc. § 1286.2 or § 1286.6 .....	9
	a.	The Morrells Admit that They Submitted the Attorneys' Fess Issue to the Arbitration Panel TWICE.....9
	b.	California Courts Have Already Roundly Rejected the Argument the Morrells Make to Salvage a Statutory Ground for Correcting the Arbitration Panel's Award: The Attorneys' Fees Issue, Twice Submitted to the Arbitration Panel, IS Part of the "Merits" of the Controversy, and the Trial Court Had No Legal Basis for Tinkering With the Award ..... 11
2.	The Morrells Similarly Fail to Establish Statutory Grounds for Modifying the Award Under Chapter 7.04A RCW: The Morrells Submitted the Attorneys' Fees Issue to the Arbitration Panel, and the Trial Court Had No Authority to Look Beyond the Arbitration Award to Grant Fees .....	12
	a.	It Is Undisputed that the Morrells Twice Submitted the Attorneys' Fees Issue to the Arbitration Panel..... 12
	b.	The Morrells Do Not Deny the Basic Tenet of Washington Law that Prohibits the Trial Court from Going Behind an Arbitration Award to Modify the Arbitration Panel's Award ..... 13
3.	The Morrells' Stubborn Insistence that Contract Principles Override the Exclusive Remedies Set Forth in the Statutes Is Flatly Misplaced.....	15

C.	The Trial Court Had No Authority To Interfere with the Arbitration Panel's Prevailing Party Ruling .....	17
D.	Once the Morrells Invoke the Reciprocal Fees Statute, They Must Then Satisfy the Statute's Requirements to Be Entitled To Attorneys' Fees .....	18
1.	The Morrells Are Not the Prevailing Party.....	19
2.	The Morrells Did Not Prevail on a Contract .....	19
3.	The Requirements of the Reciprocal Attorneys' Fees Statute Renders the Language in Section M of the Agreement Irrelevant.....	20
E.	California Law Governs this Dispute .....	21
F.	The Trial Court Had No Jurisdiction to Hear the Morrells' Motion to Modify and Confirm the Arbitration Award: The Parties Specifically Agreed to Submit to the Jurisdiction of the Courts of the State of California and the Morrells Have Presented No Evidence that the Provision Is Unreasonable .....	22
G.	The Morrells Are Not Entitled to Attorneys' Fees on Appeal .....	23
IV.	CONCLUSION .....	24

TABLE OF AUTHORITIES

Page

CASES

<u>A.M. Classic Constr., Inc. v. Tri-Build Dev. Co.</u> , 70 Cal. App. 4th 1470, 83 Cal. Rptr. 2d 449 (Cal. Ct. App. 1999).....	8
<u>Advanced Micro Devices, Inc. v. Intel Corp.</u> , 9 Cal. 4th 362, 36 Cal. Rptr. 2d 581 (Cal. 1994) .....	5
<u>Agnew v. Lacey Co-Ply</u> , 33 Wn. App. 283, 654 P.2d 712 (1982), <u>rev. denied</u> , 99 Wn.2d 1006 (1983).....	18
<u>Ajida Technologies, Inc. v. Roos Instruments, Inc.</u> , 87 Cal. App. 4th 534, 104 Cal. Rptr. 2d 686 (Cal. Ct. App. 2001).....	4, 5
<u>American Nursery Products, Inc. v. Indian Wells Orchards</u> , 115 Wn.2d 217, 797 P.2d 477 (1990).....	19
<u>Beroth v. Apollo College</u> , 135 Wn. App. 551, 145 P.2d 386 (2006).....	6, 8
<u>Betz v. Pankow</u> , 16 Cal. App. 4th 919, 20 Cal. Rptr. 2d 834 (Cal. Ct. App. 1993) .....	9
<u>BII Finance Co. Ltd. v. U-States Forwarding Servs. Co.</u> , 95 Cal. App. 4th 111, 115 Cal. Rptr. 2d 312 (Cal. Ct. App. 2002).....	15
<u>Davidson v. Hensen</u> , 135 Wn.2d 112, 954 P.2d 1327 (1998) .....	6-7
<u>Dayton v. Farmers Ins. Group</u> , 124 Wn.2d 277, 876 P.2d 896 (1994).....	8, 13, 14
<u>E. Associated Coal Corp. v. United Mine Workers of Am.</u> , Dist. 17, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000).....	7

<u>Federated Servs. Ins. Co. v. Norberg</u> , 101 Wn. App. 119, 4 P.3d 844 (2000) .....	13
<u>Harris v. Sandro</u> , 96 Cal. App. 4th 1310, 117 Cal. Rptr. 2d 910 (Cal. Ct. App. 2002) .....	10
<u>Hsu v. Abbara</u> , 9 Cal. 4th 863, 39 Cal. Rptr. 2d 824 (Cal. 1995).....	20
<u>Just Dirt Inc. v. Knight Excavating, Inc.</u> , 157 P.3d 431, 2007 Wn. App. LEXIS 865 (2007).....	5
<u>Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co.</u> , 271 Cal. App. 2d 675, 77 Cal. Rptr. 100 (Cal. Ct. App. 1969).....	6
<u>Moncharsch v. Heily &amp; Blase</u> , 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183 (Cal. 1992).....	6, 7, 8
<u>Moore v. First Bank of San Luis Obispo</u> , 22 Cal. 4th 782, 94 Cal. Rptr. 2d 603 (Cal. 2000) .....	11, 12, 15, 17
<u>Moshonov v. Walsh</u> , 22 Cal. 4th 771, 94 Cal. Rptr. 2d 597 (Cal. 2000) .....	10, 21
<u>Myers Bldg. Indus. v. Interface Tech., Inc.</u> , 13 Cal. App. 4th 949, 17 Cal. Rptr. 2d (Cal. Ct. App. 1993).....	19
<u>Nat'l Union Fire Ins. Co. v. Nationwide Ins. Co.</u> , 69 Cal. App. 4th 709, 82 Cal. Rptr. 2d 16 (Cal. Ct. App. 1999).....	6
<u>Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731</u> , 990 F.2d 957 (7th Cir. 1993).....	7
<u>Phillips Building Co. v. An</u> , 81 Wn. App. 696, 915 P.2d 1146 (1996).....	18
<u>Pierotti v. Torian</u> , 81 Cal. App. 4th 17, 96 Cal. Rptr. 2d 553 (Cal. Ct. App. 2000) .....	17

<u>Rettkowski v. Dep't of Ecology</u> , 128 Wn.2d 508, 910 P.2d 462 (1996).....	5
<u>Richmond, Fredericksburg &amp; Potomac R. Co. v. Transp. Commc'ns Int'l Union</u> , 973 F.2d 276 (4th Cir. 1992).....	7
<u>Riss v. Angel</u> , 80 Wn. App. 553, 912 P.2d 1028 (1996).....	16
<u>Scott Co. of California v. Blount, Inc.</u> , 20 Cal. 4th 1103, 86 Cal. Rptr. 2d 614 (Cal. 1999) .....	19, 20
<u>Singleton v. Frost</u> , 108 Wn.2d 723, 742 P.2d 1224 (1987).....	16
<u>State Farm Mut. Ins. Co. v. Guleserian</u> , 28 Cal. App. 3d 397, 104 Cal. Rptr. 683 (Cal. Ct. App. 1972).....	10
<u>United Steelworkers of Am. v. Enter. Wheel &amp; Car Corp.</u> , 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).....	7
<u>Voicelink Data Services, Inc. v. Datapulse, Inc.</u> , 86 Wn. App. 613, 937 P.2d 1158 (1997) .....	22, 23
<u>Westmark Properties, Inc. v. McGuire</u> , 53 Wn. App. 400, 766 P.2d 1146 (1989) .....	7, 15
<u>Wong v. Thrifty Corp.</u> , 97 Cal. App. 4th 261, 118 Cal. Rptr. 2d 276 (Cal. Ct. App. 2002).....	21

#### STATUTES AND COURT RULES

RAP 2.5 .....	22
RAP 18.1 .....	23
RCW 4.84.330 .....	3, 16, 21
RCW chapter 7.04A .....	12
RCW 7.04A.230(1)(d).....	13

RCW 7.04A.240(1)(b) .....	12, 13
Cal. Code Civ. Proc. § 1021 .....	20
Cal. Code Civ. Proc. § 1285.8 .....	9
Cal. Code Civ. Proc. § 1286.2 .....	9, 12, 17
Cal. Code Civ. Proc. § 1286.6 .....	9, 12, 17
Cal. Code Civ. Proc. § 1286.6(b) .....	11
Cal. Code Civ. Proc. § 1286.6(c).....	11
Cal. Code Civ. Proc. § 1717 .....	3, 17, 18, 19 20, 21

## I. SUMMARY OF REPLY

This is a simple case. The arbitration panel twice considered and twice denied the Morrells' request for attorneys' fees. Unhappy with the arbitration panel's award, the Morrells sought essentially "de novo" relief from the trial court. The law is clear that the trial court is restrained by statutory provisions that justify modifying an arbitration award only on very specific, limited, enumerated grounds. Here, the trial court overstepped its authority and granted the Morrells' motion for attorneys' fees disregarding the unambiguous statutory limitations on trial court review of arbitration awards.

Simply put, the trial court was wholly without authority to disturb the arbitration panel's award in this manner. To permit a trial court to ignore the strict limitations on its power to review an arbitration award would lead to untenable results and would turn the fundamental principles of arbitral finality on its head. The trial court's erroneous ruling should be reversed.

## II. RESTATEMENT OF MATERIAL FACTS

As stated in Appellant's opening brief, this case presents a straightforward legal issue: "whether the trial court erred by granting attorneys' fees to the Morrells where there were no statutory grounds for such an award and the trial court impermissibly disturbed the arbitrators' decision that no fees should be awarded." Appellant's Opening Brief at 1. The Morrells' Statement of the Case ignores the facts that are central to the resolution of this issue. Appellants submit the following restatement of the undisputed, relevant facts to simplify and clarify.

The Morrells omit any reference to the following key provisions of the Agreement:

- "ARBITRATION IS FINAL AND BINDING ON THE PARTIES." Holmes Decl., Ex. A (Customer Account Application and Agreement) (CP 55) (emphasis added).
- "THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL." Id. (emphasis added).
- "THE ARBITRATORS' AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED." Id. (emphasis added).
- "ALL CONTROVERSIES . . . SHALL BE DETERMINED BY ARBITRATION." Id. (emphasis added).

The Morrells also omit from their Statement of the Case the following facts:

- Section L of the Agreement expressly provides that California law "shall in all respects" govern the rights and liabilities of the parties. Id.
- The arbitration panel, citing Section L's choice of law provision, expressly held that "[t]he law of the state of California controls resolution of this case." Holmes Decl., Ex. E (Order on Motions to

Dismiss) (CP 79). The Morrells never challenged this ruling with the panel and did not raise the issue in briefing before the trial court.

- In Section M of the Agreement, the parties agreed that the courts of the state of California had jurisdiction over any disputes and that venue is proper in Los Angeles, California. Agreement (CP 55).

- The Morrells submitted the issue of attorneys' fees to the arbitration panel in their initial demand for arbitration. Holmes Decl., Ex. B, p. 9 (Demand for Arbitration) (CP 65). The arbitration panel confirmed that both parties submitted the issue of attorneys' fees to the arbitration panel. Holmes Decl, Ex. F, p. 2 (Award) (CP 89). Nonetheless, the arbitration panel specifically declined to award attorneys' fees to either party, concluding:

With due regard for all claims and defenses that have been presented by the parties and resolved in this Award, the Panel has determined that each party will be responsible for its own fees and costs.

Id., pp. 6-7 (CP 93-94).

- After being turned back to the arbitration panel by the Pierce County Superior Court, the Morrells asked the arbitration panel to reconsider its denial of fees, citing both Cal. Civ. Code § 1717 and RCW 4.84.330. Christensen Decl., Ex. E, pp. 3-4 (Motion for Review of Arbitration Award) (CP 135-36). As the Morrells' quotation to these statutes demonstrate, the party must be the "prevailing party" in an "action on a contract" in order to be entitled to attorneys' fees. Id.

- In response to the Morrells' Motion for Review of Attorneys' Fees, the arbitration panel issued a two-page ruling denying the

request for attorneys' fees, explicitly noting that its previous award "specifically addressed the subject of attorneys' fees." Holmes Decl., Ex. I, p. 1 (Ruling on Motion for Reconsideration Re: Attorneys' Fees) (CP 238). The arbitration panel also reminded the parties that arbitration awards issued under the NASD Code "shall be deemed final and not subject to review or appeal." *Id.*, p. 1 (CP 238) (emphasis added).

- Despite having already submitted the attorneys' fees issue to the arbitration panel twice -- and being twice denied -- the Morrells renewed their motion with the trial court, specifically requesting "an order vacating the arbitration panel's denial of attorneys' fees." Renewed Motion for Attorneys' Fees, p. 1 (CP 171) (emphasis added).

- The trial court granted the Morrells' Renewed Motion for Attorneys' Fees, but did not cite any statutory grounds for its decision. Findings of Fact and Conclusions of Law Re: Attorneys [sic] Fees (CP 302-07).

### III. ARGUMENT ON REPLY

A. The Morrells' Stated Standard of Review Illustrates Their Fundamental Misunderstanding of the Issue on Appeal: Whether the Trial Court Had the Power to Disturb the Arbitration Award on the Grounds Asserted by the Morrells.

1. The Standard of Review of an Arbitration Award Is De Novo. The case law is clear: the Court of Appeals' review of an order modifying an arbitration award is de novo, and this Court need not take into account the trial court's reasoning. Ajida Technologies, Inc. v. Roos Instruments, Inc., 87 Cal. App. 4th 534, 541, 104 Cal. Rptr. 2d 686 (Cal.

Ct. App. 2001). "The deference due an arbitrator thus 'requires a court to refrain from substituting its judgment for the arbitrator's in determining the contractual scope of [the arbitrator's] powers.'" Id. at 542 (citing Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal. 4th 362, 372, 36 Cal. Rptr. 2d 581 (Cal. 1994)). Yet the trial court here did just that -- substituted its judgment for that of the arbitration panel, which twice considered the Morrells' request for attorneys' fees. This was error and the trial court's decision should be reversed.

2. The Morrells' Cite to the Abuse of Discretion Standard Demonstrates Their Misunderstanding of the Trial Court's Role in Reviewing the Arbitration Award. The Morrells ignore the long-standing principles regarding review of an arbitration award set forth in Wedbush's Opening Brief, and instead argue for a highly deferential abuse of discretion standard. Respondents' Brief at 14. The case the Morrells cite is inapposite, however, because it does not involve the trial court's grant of attorneys' fees contrary to an arbitration award. Id. (citing Just Dirt Inc. v. Knight Excavating, Inc., 157 P.3d 431, 2007 Wn. App. LEXIS 865 (2007) (citing Rettkowski v. Dep't of Ecology, 128 Wn.2d 508, 519, 910 P.2d 462 (1996))).

The Morrells' proposed standard of review raises two scenarios: (1) the Morrells simply do not grasp the deference afforded the arbitration panel's award, or (2) they are attempting to coax the Court into applying the wrong standard of review. Based on the strong public policy favoring the finality of arbitration and severely limiting trial court review, this Court should not countenance either scenario.

a. There Is a Strong Public Policy Favoring Arbitration, and Arbitration Is Not Intended Merely As a Prelude to Litigation. There is a strong public policy favoring arbitration as a "speedy and relatively inexpensive means of dispute resolution." Moncharsch v. Heily & Blase, 3 Cal. 4th 1, 9, 10 Cal. Rptr. 2d 183 (Cal. 1992) (citations omitted). This public policy favoring arbitrations also favors "making the awards of arbitrators final and conclusive." Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co., 271 Cal. App. 2d 675, 702, 77 Cal. Rptr. 100 (Cal. Ct. App. 1969) (citations omitted; emphasis added). "Typically, those who enter into arbitration agreements expect their dispute will be resolved without necessity for any contact with the courts." Moncharsch, 3 Cal. 4th at 9 (internal quotation marks and citation omitted). The case of National Union Fire Insurance Co. v. Nationwide Insurance Co., is instructive in elucidating the purpose of arbitration and its relationship to other legal proceedings:

Arbitrations provide an alternative method of dispute resolution to legal proceedings. They follow different rules and serve different ends. They are as distinct in their elementary structure as dirt is to water. Mixing the two only produces mud -- not the sort of stuff [the appellate court] will willingly tread in.

69 Cal. App. 4th 709, 715, 82 Cal. Rptr. 2d 16 (Cal. Ct. App. 1999) (emphasis the court's).

Washington courts agree. "Arbitration is favored in Washington as an expeditious means of resolving conflicts without involvement of the courts." Beroth v. Apollo College, 135 Wn. App. 551, 557, 145 P.2d 386 (2006) (citing Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327

(1998); Westmark Properties, Inc. v. McGuire, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989)). "It is designed to settle controversies, not to serve as a prelude to litigation." Westmark, 53 Wn. App. at 402.<sup>1</sup>

b. Arbitration Principles Mandate a Standard That Is Highly Deferential to the Arbitration Panel's Award. The California Supreme Court, in discussing the strong public policy favoring arbitration, reaffirmed the fundamental principles that "courts will indulge every intendment to give effect" to arbitration proceedings. Moncharsch, 3 Cal. 4th at 9 (citations omitted). As noted in Appellant's Opening Brief and wholly ignored by Respondents, the very essence of the term arbitration denotes a final and binding award. Appellant's Opening Brief at 15 (citing Moncharsch, 3 Cal. 4th at 9). To ensure finality "thus requires that

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<sup>1</sup>Federal cases regarding arbitration underscore the highly deferential standard afforded arbitration awards. For example, "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960); see also E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62, 69, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000) ("But as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'"); Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957, 960 (7th Cir. 1993) ("Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."). Indeed, the Fourth Circuit has recognized that "[n]othing would be more destructive to arbitration than the perception that its finality depended upon the particular perspectives of the judges who review the award." Richmond, Fredericksburg & Potomac R. Co. v. Transp. Comm'ns Int'l Union, 973 F.2d 276, 282-83 (4th Cir. 1992).

judicial intervention in the arbitration process be minimized." Id. at 10 (citations omitted). As discussed below, the trial court's ability to modify an arbitration award is strictly limited by statute, a principle the Morrells spend most of their brief trying to skirt, but to no avail. The trial court manifestly overstepped its authority in granting the Morrells' request for attorneys' fees contrary to the arbitration panel twice rejecting the very same request. This Court should reverse the trial courts erroneous decision in order to preserve the finality of the arbitration award.

B. The Sole and Exclusive Grounds for Modifying or Correcting an Arbitration Award Are Statutory, and the Morrells Have Failed to Satisfy Their Heavy Burden of Showing that Any Statutory Grounds Justify the Trial Court's Extraordinary Award of Attorneys' Fees.

The fundamental issue on appeal is what power does the trial court have to usurp the arbitration panel's authority and tamper with what should be a final and binding arbitration award. The answer is simple: the statutory grounds for vacating or modifying an award are the exclusive grounds for judicial review. See, e.g., Beroth, 135 Wn. App. at 557 ("Judicial review of an arbitration decision is entirely statutory."). Except on those limited statutory grounds, "arbitration awards are immune from judicial review in proceedings to confirm or challenge the award." Appellant's Opening Brief at 19, 20 (citing A.M. Classic Constr., Inc. v. Tri-Build Dev. Co., 70 Cal. App. 4th 1470, 1475, 83 Cal. Rptr. 2d 449 (Cal. Ct. App. 1999) and Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 279-80, 876 P.2d 896 (1994)).

The Morrells carry the heavy burden of showing that statutory grounds justify disturbing an arbitration award. Cal. Code Civ. Proc. § 1285.8; Betz v. Pankow, 16 Cal. App. 4th 919, 923, 20 Cal. Rptr. 2d 834 (Cal. Ct. App. 1993). The Morrells attempt to argue that Section 1285.8 does not require a cite to statutory grounds. Respondents' Brief at 29. This is nonsensical. California and Washington law expressly provide that the exclusive bases for upsetting an arbitration award are statutory, thus, the "grounds" the Morrells must set forth pursuant to Cal. Code Civ. Proc. § 1285.8 must necessarily be statutory grounds. The Morrells' stubborn cite to Section M of the Agreement as grounds for modifying the arbitration is legally insufficient to authorize the trial court's extraordinary grant of attorneys' fees. The Morrells have not -- and, as discussed below, cannot -- satisfy their heavy burden of showing the requisite statutory grounds for modifying the arbitration award.

1. The Morrells Fail to Show that the Arbitration Panel "Exceeded Its Authority" Pursuant to Cal. Code Civ. Proc. § 1286.2 or § 1286.6.

a. The Morrells Admit that They Submitted the Attorneys' Fees Issue to the Arbitration Panel TWICE. California courts' interpretation of the meaning of arbitrators exceeding their authority as contemplated by the governing statute is unequivocal: arbitrators do not exceed their authority "merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the

controversy submitted to the arbitrators."<sup>2</sup> Moshonov v. Walsh, 22 Cal. 4th 771, 776, 94 Cal. Rptr. 2d 597 (Cal. 2000) (emphasis added). The merits of a controversy that has been submitted to arbitration are not subject to judicial review. See, e.g., Harris v. Sandro, 96 Cal. App. 4th 1310, 1313, 117 Cal. Rptr. 2d 910 (Cal. Ct. App. 2002).

The Morrells concede that they requested attorneys' fees in their complaint and twice submitted the attorneys' fee issue to the arbitration panel. Respondents' Brief at 19-20. Thus, the arbitration panel did not exceed its authority by denying the Morrells' request for attorneys' fees. Moshonov, 22 Cal. 4th at 776. The Morrells' attempt to distinguish Moshonov on its facts cannot undo the fundamental principle set forth in the case, which bars any attempt to have the trial court review an issue the Morrells concededly submitted to the arbitrator.<sup>3</sup> Under governing California precedent, the trial court had absolutely no authority to override

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<sup>2</sup>The Morrells' repeated reference to the arbitration panel's decision as "clearly erroneous" is not grounds under either the statutes or the long line of case law specifically addressing the "exceeded authority" standard, and is not applicable to the issues on appeal. Respondents' Brief at 2, 20; cf. State Farm Mut. Ins. Co. v. Guleserian, 28 Cal. App. 3d 397, 402, 104 Cal. Rptr. 683 (Cal. Ct. App. 1972) ("An error of law committed by the arbitrator, no matter how gross, is not [a ground for setting aside an arbitration award]."); Moshonov, 22 Cal. 4th at 776 (arbitrators do not exceed their authority even if their decision is erroneous).

<sup>3</sup>The facts upon which the Morrells attempt to distinguish the case have no bearing on the express holding in the case. Any allegedly "different" language in the Moshonov contract does not alter the fact that the Morrells twice submitted this issue to the arbitration, precluding subsequent judicial review.

the arbitration panel's decision to twice deny the Morrells' request for attorneys' fees.

b. California Courts Have Already Roundly Rejected the Argument the Morrells Make to Salvage a Statutory Ground for Correcting the Arbitration Panel's Award: The Attorneys' Fees Issue, Twice Submitted to the Arbitration Panel, IS Part of the "Merits" of the Controversy, and the Trial Court Had No Legal Basis for Tinkering With the Award. The Morrells attempt to evade the requirements of Cal. Code Civ. Proc. § 1286.6(b) and (c) by claiming that the issue of attorneys' fees was not part of the "merits of the controversy" under the statute. The California Supreme court has already rejected this meritless argument.

In Moore v. First Bank of San Luis Obispo, 22 Cal. 4th 782, 94 Cal. Rptr. 2d 603 (Cal. 2000), the plaintiffs submitted a request for attorneys' fees, in addition to the other claims subject to arbitration. The arbitration panel ordered that each party would be responsible for its own attorneys' fees. Id. at 786. Plaintiffs moved for a correction of the award, claiming that the arbitrators had exceeded their authority in denying attorneys' fees. Id.

The Moore court rejected plaintiffs' argument that once the arbitrator determined who prevailed, that the arbitrator then had no power to deny attorneys' fees. Id. at 787. The court concluded:

the entire controversy, including all questions as to the ingredients of the award, was in fact submitted to the arbitrators in this case. . . . Having submitted the fees issue to arbitration, plaintiffs cannot maintain the arbitrators exceeded their powers,

within the meaning of [Cal. Code Civ. Proc.] Section 1286.6, subdivision (b), by deciding it, even if they decided it incorrectly.

Id. (emphasis added).<sup>4</sup> Just as in Moore, the issue of attorneys' fees was part and parcel of the "merits of the controversy." The trial court's extraordinary grant of attorneys' fees -- increasing the overall award by approximately 44% -- certainly "affected" the merits of the controversy as contemplated by Cal. Code Civ. Proc. § 1286.6 and the California Supreme Court. The Morrells' attempt to argue otherwise is preposterous and contrary to the controlling case law and the statute itself.

2. The Morrells Similarly Fail to Establish Statutory Grounds for Modifying the Award Under Chapter 7.04A RCW: The Morrells Submitted the Attorneys' Fees Issue to the Arbitration Panel, and the Trial Court Had No Authority to Look Beyond the Arbitration Award to Grant Fees.

a. It Is Undisputed that the Morrells Twice Submitted the Attorneys' Fees Issue to the Arbitration Panel. The Morrells specifically requested that the trial court "modify and confirm" the arbitration panel's award. (CP 28). RCW 7.04A.240(1)(b) is the exclusive grounds for modifying or correcting an arbitration award not defective in form and only permits modification where "[t]he arbitrator has made an award on a claim not submitted to the arbitrator." RCW 7.04A.240(1)(b) (emphasis added).

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<sup>4</sup>The Morrells' attempt to distinguish Moore is specious. See Respondents' Brief at 32. The "open" question the Morrells refer to is whether, when an arbitrator designates a prevailing party and the contract expressly calls for such a prevailing party to be awarded fees, the arbitrator exceeded his or her authority as contemplated by Cal. Code Civ. Proc. §§ 1286.2 and 1286.6. The Moore court left the issue open because there, as is the case here, the arbitrator did not designate the plaintiffs the prevailing party. Moore, 22 Cal. 4th at 788-89.

As discussed above, there is no dispute that the Morrells submitted the attorneys' fees issue to the arbitration panel twice, and that their request was twice rejected. Thus, under both Washington and California law, the arbitration panel's decision regarding attorneys' fees is immune from judicial review, and the trial court's ruling was error. Dayton, 124 Wn.2d at 279-80; A.M. Classic Constr., 70 Cal. App. 4th at 1475.

b. The Morrells Do Not Deny the Basic Tenet of Washington Law that Prohibits the Trial Court from Going Behind an Arbitration Award to Modify the Arbitration Panel's Award. The Morrells erroneously cite to RCW 7.04A.230(1)(d) to cobble together statutory grounds for the trial court's erroneous ruling. Respondents' Brief at 19. However, RCW 7.04.230(1)(d) governs motions to "vacate" arbitration awards, and does not apply to the Morrells' motion to "modify." The Morrells cling to the provisions of RCW 7.04A.230(1)(d) because they know that Washington's statutory provision governing "modification" of arbitration awards is fatal to their position. Nonetheless, the Morrells' argument fails under RCW 7.04A.230(1)(d), even if that subsection did apply.

The Morrells do not disagree that any error must be on the face of the award to establish that the arbitration panel exceeded its authority. Respondents' Brief at 19; cf. Federated Servs. Ins. Co. v. Norberg, 101 Wn. App. 119, 123, 4 P.3d 844 (2000) ("Limiting judicial review to the face of the award is a shorthand description for the policy that courts should accord substantial finality to arbitrator decisions."). The Morrells

are plainly wrong, however, when they assert that the trial court did not have to go behind the arbitration award to find grounds to award fees. Respondents' Brief at 24.

The Morrells concede that there is no mention of Section M and/or its attorneys' fees provision in the Award. Respondents' Brief at 27-28. Accordingly, the trial court could not discern from the face of the arbitration award whether the Morrells would have been contractually entitled to attorneys' fees. The Morrells go on to declare that their renewed motion for fees at the trial court "clearly state[d] a ground for relief: . . . Section M of the Agreement." Respondents' Brief at 29.

Thus, only after reviewing Section M of the Agreement could the trial court find a purported basis for attorneys' fees. Indeed, the trial court cites to the language of Section M in its Findings of Fact, which language the Morrells admit does not appear anywhere in the award. Finding of Fact 6, p. 3 (CP 304). This is the quintessential scenario where the trial court had to look past the arbitration award to find a basis for modifying the award. Washington courts flatly prohibit such an impermissible intrusion into the merits of the case, and the trial court's erroneous ruling must be reversed. Dayton, 124 Wn.2d at 280 (reviewing court "does not have collateral authority to go behind the face of an award to determine whether additional amounts are appropriate").<sup>5</sup>

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<sup>5</sup>The Morrells spend much of their briefing attempting to distinguish the myriad California and Washington cases that Wedbush cites in support of its arguments. See Respondents' Brief at 20-24. Wedbush believes the cases speak for themselves. The Morrells cannot

3. The Morrells' Stubborn Insistence that Contract Principles Override the Exclusive Remedies Set Forth in the Statutes Is Flatly Misplaced. The Morrells repeatedly claim that the mere existence of the contractual provision in Section M of the Agreement somehow authorized the trial court to meddle with the arbitration panel's award.<sup>6</sup> These assertions are baseless. For example:

- *"[T]his case is simply about enforcing a contractual obligation to award attorneys' fees upon the occurrence of an agreed upon triggering event."* Respondents' Brief at 15. The California Supreme Court's ruling in Moore, supra, definitively foreclosed this avenue for relief, reasoning the attorneys' fees issue was part of the "ingredients" of the award and not subject to judicial review. 22 Cal. 4th at 787. See also Westmark Properties, 53 Wn. App. at 404 (any part of the merits of the controversy is "forbidden territory" for a reviewing court).<sup>7</sup>

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change the fundamental holdings of those cases that are clearly fatal to their arguments.

<sup>6</sup>The Morrells' repeated insistence that they did not ask the trial court to review the arbitration award, but rather to simply enforce a contractual obligation, is disingenuous and contrary to the Morrells' own pleadings. For example, in the Morrells' Motion to Modify and Confirm Arbitration Award, the Morrells clearly state that "[j]udicial review of the arbitration award is proper in this case." Motion, p. 5(CP 32).

<sup>7</sup>The Morrells' challenge to the applicability of the accord and satisfaction doctrine fails for the same reason. The issue of attorneys' fees was part and parcel of the arbitration award. The Morrells openly concede that they have "received and accepted payment in 'full satisfaction' of the award." Respondents' Brief at 41. Full satisfaction of the award would include attorneys' fees, and thus the doctrine of accord and satisfaction bars their post-arbitration claim for fees. BII Finance Co. Ltd. v. U-States Forwarding Servs. Co., 95 Cal. App. 4th 111, 126, 115 Cal. Rptr. 2d 312 (Cal. Ct. App. 2002).

• *"When, as here, the terms of a contract are clear and unambiguous, the trial court is required to award attorneys' fees to the party identified in the contract."* Respondents' Brief at 16. In support of this proposition, the Morrells cite Riss v. Angel, 80 Wn. App. 553, 563-64, 912 P.2d 1028 (1996), and Singleton v. Frost, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987). These cases are inapposite. Neither case addresses the trial court's authority to grant attorneys' fees following the issuance of an arbitration award. Certainly neither case addresses the situation where, as here, the parties seeking fees are twice denied by the arbitrator and then, unhappy with this outcome, they seek relief from the trial court. Thus, Riss and Singleton do not imbue the trial court with the discretion the Morrells would have this Court believe.<sup>8</sup>

Again, this is a simple issue. The Morrells have not satisfied their burden of establishing statutory grounds for the trial court's interference with the arbitration panel's award. Thus, the trial court erred in granting the Morrells' motion for attorneys' fees, and this Court should reverse the trial court's erroneous ruling.

Even if the trial court had the authority to consider the attorneys' fee request -- which it undoubtedly did not -- the trial court erred in

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<sup>8</sup> The Morrells also misstate the holding in Riss. They claim that Riss provides that where the terms of the contract are "clear and unambiguous, the trial court is required to award attorneys' fees to the party identified in the contract." Respondents' Brief at 16 (citing 80 Wn. App. at 563-64). To the contrary, the Riss court confirmed that, under RCW 4.84.330, only the "prevailing party" is entitled to attorneys' fees under RCW 4.84.330.

finding that the Morrells were the prevailing party for purposes of Cal. Code Civ. Proc. § 1717.

C. The Trial Court Had No Authority To Interfere with the Arbitration Panel's Prevailing Party Ruling.

In response to the Morrells' Motion for Review of Arbitration Award, the arbitration panel issued the following:

As stated in the Award, the determination that each party shall be responsible for its own attorneys' fees was made with due regard for the resolution in the Award of the multiple claims and defenses that were presented and finally resolved. The Panel concluded that given these results, neither party could be deemed the prevailing party for purposes of an award of attorneys' fees.

Christensen Decl. Ex. F (Ruling on Motion for Reconsideration of Attorneys' Fees) (CP 168) (emphasis added). Thus, there is no reasonable dispute that the arbitration panel squarely considered the prevailing party issue and expressly determined that the Morrells did not qualify as the prevailing party. The trial court had no authority to override this unambiguous conclusion.

Indeed, both California and Washington law strictly prohibit the trial court's interference with the arbitration panel's conclusion that "neither party prevailed for purposes of awarding attorneys fees." Holmes Decl., Ex. I (CP 238-39). An arbitrators' determination that no party had unequivocally prevailed, even if legally erroneous, is not reviewable under Cal. Code Civ. Proc. § 1286.2 or § 1286.6. See, e.g., Moore, 22 Cal. 4th at 788; Pierotti v. Torian, 81 Cal. App. 4th 17, 24 n.3, 96 Cal. Rptr. 2d 553 (Cal. Ct. App. 2000) (challenge to arbitrator's designation of prevailing

party is nothing more than an attack on the arbitrator's reasoning and not subject to judicial review); see also Phillips Building Co. v. An, 81 Wn. App. 696, 704, 915 P.2d 1146 (1996) (court cannot go behind face of the award to determine who is the prevailing party).<sup>9</sup>

Thus, the trial court was explicitly prohibited from upsetting the arbitration panel's express finding that neither party prevailed for purposes of an attorneys' fees award. The law is clear on this point and the trial court erred by granting the Morrells' request for fees. Even if the trial court had the power to second guess the arbitration panel, the grant of fees was erroneous because the Morrells failed to satisfy the statutory requirements, and were thus not entitled to their fees.

D. Once the Morrells Invoke the Reciprocal Fees Statute, They Must Then Satisfy the Statute's Requirements to Be Entitled To Attorneys' Fees.

There is no dispute that Cal. Code Civ. Proc. § 1717 transforms a unilateral attorneys' fee provision into a reciprocal fee provision. There are, however, two conditions precedent for a party invoking Section 1717

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<sup>9</sup>The Morrells' continued reliance on Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 654 P.2d 712 (1982), rev. denied, 99 Wn.2d 1006 (1983), is misplaced. As discussed in Wedbush's Opening Brief and acknowledged by the Morrells, the fact that Agnew prevailed on all claims was clear on the face of the award. Appellants' Opening Brief at 36-37. What is apparent on the face of the original arbitration Award here and is patently clear on the panel's ruling on the Morrells' motion for reconsideration, is that neither party prevailed for purposes of an attorneys' fees award. The trial court would have to look beyond the face of the award to determine that the Morrells prevailed, especially considering the trial court awarded the Morrells' attorneys' fees based on Section M of the Agreement, which appears nowhere in either of the arbitration panel's rulings.

to be entitled to attorneys' fees: (1) the party seeking fees must have been the prevailing party; and (2) must have prevailed on the contract. The party must prevail on the contract, rather than prevail in the lawsuit, to obtain attorneys' fees under § 1717. Myers Bldg. Indus. v. Interface Tech., Inc., 13 Cal. App. 4th 949, 975, 17 Cal. Rptr. 2d 242 (Cal. Ct. App. 1993).

1. The Morrells Are Not the Prevailing Party. Wedbush will not rehash the final outcome of the arbitration other than to note the Morrells prevailed on just one of their eight claims and recovered less than 20 percent of the compensatory damages they sought. Considering the relief awarded as compared to the Morrells' demands on those claims, the Morrells were not the prevailing party for purpose of Cal. Code Civ. Proc. § 1717. See, e.g., Scott Co. of California v. Blount, Inc., 20 Cal. 4th 1103, 1109, 86 Cal. Rptr. 2d 614 (Cal. 1999). If, "on balance, neither party prevailed sufficiently to justify an award of attorney fees," the arbitration panel could properly decline to award fees. Id. Here, the arbitration panel expressly considered the claims and defenses submitted and expressly concluded that neither party prevailed. Christensen Decl., Ex. F, p.1 (Ruling on Motion for Reconsideration re Attorneys' Fees) (CP 168).<sup>10</sup>

2. The Morrells Did Not Prevail on a Contract. The arbitration panel unequivocally based its March 2003 Award in this matter

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<sup>10</sup>Washington law further mandates the same conclusion: when both parties prevail on major issues, there is no prevailing party, and neither party is entitled to an award. American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990).

on Plaintiffs' breach of fiduciary duty theory, a theory sounding in tort, not in contract. See Award, p. 6 (CP 93). The arbitration panel specifically declined to find for the Morrells on their breach of contract claim. Id. "When a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action and the contract contains a provision for attorney fees, Section 1717 entitles the successful party to recover reasonable attorneys' fees incurred in prosecution or defense of those claims. Scott, 20 Cal. 4th at 1109 (citing Hsu v. Abbara, 9 Cal. 4th 863, 877, 39 Cal. Rptr. 2d 824 (Cal. 1995)). Indeed, if anyone completely prevailed on the contract claim, it was Wedbush. The Morrells are not entitled to attorneys' fees under either reciprocal fee statute.<sup>11</sup>

3. The Requirements of the Reciprocal Attorneys' Fees Statute Renders the Language in Section M of the Agreement Irrelevant. The Morrells simply fail to acknowledge that, once they invoke the benefits of the reciprocal attorneys' fees statutes, the terms of the statute control -- not the terms of the contract. Respondents' Brief at 36-38. They simply continue to argue that "[t]he issue is not, as Appellant claims, who is the 'prevailing party,'" but rather who is entitled to fees under the terms of the contract. Respondents' Brief at 36 (emphasis added). Again, the Morrells' analysis is contrary to the applicable law.

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<sup>11</sup>For these same reasons, the Morrells cannot recover attorneys' fees pursuant to Cal. Code Civ. Proc. § 1021, i.e., by its plain terms, Section M of the contract does not entitle the Morrells to attorneys' fees. Thus, Section 1021 is not applicable.

The California Supreme Court has already rejected the argument that the arbitrator's ruling should be overturned even where the refusal to grant attorneys' fees was in "direct conflict with the express terms of the arbitrated contract." Moshonov, 22 Cal. 4th at 777. The Morrells do not even address the case law that unequivocally states that contractual provisions conflicting with Section 1717's prevailing party requirements are void. See, e.g., Wong v. Thrifty Corp., 97 Cal. App. 4th 261, 264, 118 Cal. Rptr. 2d 276 (Cal. Ct. App. 2002). The Wong court expressly held: "Language in the attorney fee provision that conflicts with the prevailing party definition is void." Id. at 265 (emphasis added). The Morrells' blind reliance on the provisions of Section M is not legally cognizable grounds for recovery of attorneys' fees under Cal. Code Civ. Proc. § 1717 (or RCW 4.84.330), and the trial court's ruling to the contrary should be reversed.

E. California Law Governs this Dispute.

Paragraph L of the Agreement expressly states: "The provisions of this Agreement shall in all respects be construed according to, and the rights and liabilities of the parties hereto shall in all respects be governed by the laws of the State of California."<sup>12</sup> Agreement (CP 55) (emphasis added). The parties submitted the issue of governing law to the arbitration

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<sup>12</sup>Wedbush raised the issue of the choice of law provision in its Opening Brief merely to set out for the Court which state's law applies, not because the choice of law provision is a subject of this appeal. Moreover, as is the crux of this appeal, because the choice of law issue was submitted to the arbitration panel, the trial court would not have had any authority to have ruled on any such challenge by the Morrells. See Section III.B.1, supra.

panel, which expressly concluded that "[t]he law of the state of California controls resolution of this case." Holmes Decl., Ex. E, p. 2 (Order on Motions to Dismiss) (CP 79) (emphasis added). The Morrells, however, never challenged the arbitration panel's ruling on the choice of law provision with the panel itself, nor did they challenge the ruling or the application of California law to this dispute when it twice moved for post-arbitration relief with the trial court. Any belatedly asserted "materially greater interest" analysis is not properly before this Court. See RAP 2.5 (claims of error not raised at the trial court are not properly before this Court on appeal).<sup>13</sup> The Morrells are precluded from bringing an eleventh-hour challenge to the choice of law provision.

F. The Trial Court Had No Jurisdiction to Hear the Morrells' Motion to Modify and Confirm the Arbitration Award: The Parties Specifically Agreed to Submit to the Jurisdiction of the Courts of the State of California and the Morrells Have Presented No Evidence that the Provision Is Unreasonable.

Wedbush cites to, but the Morrells do not acknowledge or address, Voicelink Data Services, Inc. v. Datapulse, Inc., 86 Wn. App. 613, 618-19, 937 P.2d 1158 (1997), which requires that a party challenging a forum selection clause must provide evidence in the form of testimony or exhibits to demonstrate that a forum selection clause is unreasonable and, thus, unenforceable. The court observed that that the party seeking to show that a forum selection clause is unreasonable carries a "heavy burden

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<sup>13</sup>The Morrells also belatedly claim that the choice of law provision in the Agreement "is in violation of fundamental state policy," but they never identify what fundamental state policy they are referring to. Respondents' Brief at 12.

of proof." Id. at 618. Thus, in the absence of such evidence, the expressed intent of the parties should be upheld. Id. The Voicelink court upheld the challenged forum selection clause even where the plaintiff alleged that (1) the work at issue was performed in Washington; (2) payments for the work were mailed to Redmond, Washington; and (3) the Nevada forum selection clause was included in the contract by mistake. Id.

Here, the Morrells provided no evidence that the forum selection clause was unreasonable.<sup>14</sup> Section M ("ATTORNEY'S FEES") of the Agreement makes clear that the California courts have jurisdiction over this dispute, and that venue is proper in Los Angeles, California. Agreement (CP 55). The Morrells have simply not satisfied their heavy burden of proof, and the trial court's Conclusion of Law No. 1, that it has jurisdiction over this matter, is erroneous. This Court should reverse and remand to the trial court to dismiss the proceedings.

G. The Morrells Are Not Entitled to Attorneys' Fees on Appeal.

The Morrells have failed to prove any statutory grounds for the trial court's modification of the arbitration panel's award, and thus should

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<sup>14</sup>As a basis for challenging the forum selection clause, the Morrells claim that this "case has been litigated in Washington State for over five years, and the Appellant has fully participated." Respondents' Brief at 11. The Morrells, however, do not identify any litigation that has occurred in the trial court other than the parties stipulating to stay the trial court proceedings pending the outcome of the arbitration and the current post-arbitration motions for attorneys' fees. To imply that the parties have been actively litigating this case in the Pierce County Superior Court is misleading.

not prevail in this appeal. Moreover, for the same reasons explained in detail above, Section M of the Agreement does not entitle the Morrells to attorneys' fees, and any request pursuant to RAP 18.1 should be denied.

IV. CONCLUSION

The trial court erroneously granted the Morrells' Renewed Motion for Attorneys' Fees. Appellants respectfully request that this Court reverse the trial court's ruling and remand the matter for confirmation of the arbitration award that has already been paid in full.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of July, 2007.

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DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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MICHAEL MORRELL and NANCY  
MORRELL, husband and wife,

Plaintiffs/Respondents

v.

WEDBUSH MORGAN SECURITIES,  
INC., a California corporation,

Defendant/Appellant

---

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
(Hon. John A. McCarthy)

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CERTIFICATE OF SERVICE

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**CERTIFICATE OF SERVICE**

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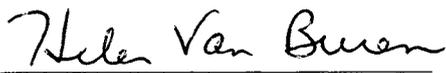
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