

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 41565-8-II

DANIEL OMER,

Plaintiff/Respondent,

v.

THE ALPS CREDIT UNION,

Defendant/Appellant.

On Appeal from the Superior Court of the State of Washington
In and for the County of Pierce
Superior Court Docket Number 08-2-15380-6

OPENING BRIEF OF APPELLANT

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ORIGINAL

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A. INTRODUCTION

This lawsuit arises from a real estate transaction gone bad. It all started in September 2007 when Plaintiff / Respondent Daniel Omer (“**Omer**”) sold his vacant lot in Puyallup (the “**Property**”) for \$70,000 to Defendant Anco Investments, LLC (“**Anco**”). Omer provided seller financing in connection with this sale by accepting a second position deed of trust on the Property to secure \$52,500 of the purchase price. Anco subsequently defaulted on its construction and development loan with Defendant / Appellant The Alps Credit Union (the “**Credit Union**”), the Credit Union in turn foreclosed its first position deed of trust on the Property, and in doing so foreclosed out Omer’s second position lien.

Omer filed this lawsuit in December 2008, in which he has alleged that all of the Defendants in this case — Anco, its principal, John Taylor, Defendant Endeavor, Inc., d/b/a Endeavor Consultants (“**Endeavor**”), Endeavor’s principal, Gordy S. Englert, the Credit Union, and Main Street Escrow (the closing agent for the subject sale transaction) conspired to defraud him of the \$52,500 that was secured by his second position lien. Omer is no stranger to litigation, as public records reflect he has been a party in forty (40) lawsuits in Pierce County going back to the late 1980s.

Omer obtained a default judgment against Anco and Mr. Taylor and subsequently settled his claims with Main Street Escrow while the Credit Union, Endeavor, and Mr. Englert vigorously defended themselves in this case throughout 2009 and well into 2010.

After most of the parties in this case had been deposed and other discovery had been conducted, the Credit Union, Endeavor, and Mr. Englert moved for the summary judgment dismissal of Omer's substantive claims, which consisted of fraud, conspiracy, and violation of the Washington Criminal Profiteering Act, on the grounds that there was absolutely no evidence reflecting any of these parties ever had any communications or correspondence with Omer prior to his initiation of this lawsuit. CP 26-41.

Although it is undisputed that the Credit Union, Endeavor, and Mr. Englert never did have any such communications or correspondence with Omer prior to his initiation of this lawsuit, the trial court denied the Credit Union's motion for summary judgment on March 26, 2010 because the real estate transaction at issue "was not a simple transaction" and because "most conspiracies are not proven by some written agreement notarized by parties as to what they are conspiring to do." Verbatim Report of Proceedings, Motion for Summary Judgment at 21, lines 2, 9-11.

This ruling led to the parties' agreement to submit this case to binding arbitration pursuant to a written CR 2A Agreement to Arbitrate (the "**Arbitration Agreement**") that was executed on or about June 3, 2010. Paragraph 1 of the Arbitration Agreement, entitled "Enabling Agreement to Arbitrate," provides the parties agreed to arbitration pursuant to RCW 7.04A "for the purpose of deciding the claims in Pierce County Superior Court Cause No. 08-2-15380-6." At the time the

Arbitration Agreement was executed, such “claims” consisted of Omer’s claims for fraud, conspiracy, and violation of the Little RICO statute, all of which are intentional torts. There were no contract-based claims pending at the time the parties executed the Arbitration Agreement.

The parties then proceeded to arbitrate Omer’s claims for fraud, conspiracy, and violation of the Washington Criminal Profiteering Act on September 13 and 14, 2010. During the arbitration proceeding, which was conducted without a court reporter, and much to the surprise of the Credit Union, Endeavor, and Mr. Englert, the Arbitrator asked Omer’s counsel why Omer did not assert a third-party beneficiary claim in this case. Not surprisingly, this inquiry led Omer’s counsel to orally move to conform the pleadings to the evidence in order to include an unjust enrichment claim and a third-party beneficiary claim against the Credit Union. Although the Credit Union vigorously objected to this motion, the Arbitrator granted it as to the third-party beneficiary claim and ruled in favor of Omer on this theory and this theory alone. Hence, although the Credit Union prevailed on Omer’s substantive claims for fraud, conspiracy, and violation of the Washington Criminal Profiteering Act, it lost at arbitration because of the unpleaded third-party beneficiary claim that the Arbitrator raised.

On November 19, 2010 the trial court entered judgment on the arbitration award in favor of Omer against the Credit Union and denied the Credit Union’s cross-motion to vacate the award. This ruling led to the

instant appeal, in which the Credit Union respectfully asks the Court of Appeals to reverse the trial court by vacating the judgment on the arbitration award and the award itself. The Credit Union submits this relief is warranted because (1) the award exceeds the claims submitted to arbitration; and (2) the Arbitrator acted improperly by raising the issue of the third-party beneficiary claim during the arbitration and then granting the Plaintiff's oral motion to amend the pleadings to conform to the evidence as to this claim over the Credit Union's objection.

B. ASSIGNMENTS OF ERROR

I. Assignments of Error

1. The trial court erred in entering judgment on the arbitration award against the Credit Union.

2. The trial court erred in denying the Credit Union's cross-motion to vacate the arbitration award.

3. The trial court erred in striking portions of the declaration of Kevin Wessell in support of the Credit Union's cross-motion to vacate the arbitration award.

II. Issues Pertaining to Assignments of Error

1. Whether the trial court erred in entering judgment on the arbitration award against the Credit Union and denying the Credit Union's cross-motion to vacate the award when (a) the Arbitration Agreement from June 2010 states the parties agreed to arbitration "to resolve the claims in the above-captioned lawsuit"; (b) there were no breach of

contract claims or third-party beneficiary claims in existence at that time; (c) the Credit Union prevailed on all of Omer's substantive pleaded claims at arbitration, which solely consisted of claims for intentional torts; and (d) the Credit Union provided the trial court with uncontroverted evidence reflecting the Credit Union never intended to nor agreed to provide the Arbitrator with the authority to amend pleadings to conform to the evidence and to rule on new, unpleaded claims like the third-party beneficiary claim. (Assignments of Error 1, 2, and 3).

2. Whether the trial court erred in entering judgment on the arbitration award against the Credit Union and denying the Credit Union's cross-motion to vacate the award when (a) the Arbitrator asked Omer's counsel during the arbitration why Omer had not asserted a third-party beneficiary claim; (b) the Arbitrator subsequently granted Omer's motion to amend the pleadings to conform to the evidence over the Credit Union's objection as to the third-party beneficiary claim; (c) the Arbitrator ruled in favor of Omer on the third-party beneficiary claim but in favor of the Credit Union on all of Omer's pleaded claims for intentional torts; and (d) the arbitration award itself reflects the Arbitrator is the one who first brought up the idea of a third-party beneficiary claim. (Assignments of Error 1, 2, and 3).

3. Whether the trial court erred in striking portions of the declaration of Kevin Wessell in support of the Credit Union's cross-motion to vacate the arbitration award where (a) at least some stricken portions of this declaration were not offered for the truth of the matter asserted; (b) the arbitration award itself reflects the Arbitrator is the one who raised the third-party beneficiary theory; and (c) the uncontroverted Wessell Declaration is the only evidence in the record that speaks to what

the Arbitrator said during the arbitration proceeding, which was conducted without a court reporter. (Assignment of Error No. 3)

C. STATEMENT OF THE CASE

Public records reflect the Plaintiff / Respondent, Daniel Omer (“**Omer**”) has been a party in forty (40) lawsuits in Pierce County going back to the late 1980s. CP 64-65. Omer is a litigious, experienced real estate investor who filed this lawsuit over a year after he agreed to accept seller financing in connection with his sale of an undeveloped lot in Puyallup (the “**Property**”) to Anco Investments, LLC, one of the Defendants in this case. CP 3.

I. Background Concerning The Real Estate Transaction That Gave Rise To This Lawsuit.

The Credit Union is in the business of making speculative commercial loans secured by real estate, as allowed in the State of Washington under RCW 23B.15.010. CP 60. The Credit Union made such a loan (the “**Loan**”) to Defendants Anco Investments, LLC (“**Anco**”) and its principal, John Taylor (“**Mr. Taylor**”) on September 25, 2007. *Id.* Defendant Main Street Escrow handled the closing of the Loan and Omer’s sale of the Property to Anco at its Bonney Lake office in September 2007. *See id.*

Defendant Endeavor, Inc., d/b/a Endeavor Consultants (“**Endeavor**”) referred Mr. Taylor to the Credit Union to apply for the Loan. CP 60. Endeavor has referred a number of its clients to the Credit Union for commercial financing over the years. *Id.*

Prior to September of 2007, no one at the Credit Union had ever spoken with or corresponded with Mr. Taylor or Anco. *Id.* The Credit Union had never even heard of Mr. Taylor or Anco before Endeavor

referred these parties to the Credit Union for the Loan. *Id.*

The Credit Union has repeatedly stated it made the Loan in the hope of making money by way of an 18% interest rate and loan fees, and not to defraud Omer. *Id.* The Credit Union had never spoken with or corresponded with Omer prior to his initiation of this lawsuit, nor did the Credit Union ever make any representations to him. *Id.* The Credit Union has repeatedly stated it never defrauded anyone, nor has it ever conspired to defraud anyone. *Id.*

The purpose of the Loan was to enable Mr. Taylor to make money by purchasing the Property from Omer in order to build a home on it for resale at a profit. CP 60. Toward that end, Anco and Mr. Taylor executed and delivered to the Credit Union a Promissory Note (the “**Note**”) in order to obtain the Loan, which was actually a \$180,000.00 revolving line of credit. *Id.* The Note provides that interest shall accrue on the unpaid principal Loan balance at the rate of eighteen percent (18%) per annum. *Id.* The Note further provides that in the event of default, the default interest rate shall be increased to thirty percent (30%) per annum. *Id.*

As collateral for the Note, and in connection with Anco’s purchase of the Property from Omer, Anco executed and delivered to the Credit Union a Deed of Trust & Security Agreement. CP 61. The Deed of Trust was recorded with the Pierce County Auditor on October 4, 2007, and it provided the Credit Union with a first position lien on the Property. *Id.* Anco and Mr. Taylor were approved for the Loan on the condition that the Credit Union had a first position lien on the Property. *Id.*

Although Anco and Mr. Taylor were approved to borrow up to \$180,000.00 from the Credit Union secured by a first position lien on the Property, they never “maxed out” this credit line, nor did they ever come

close to doing so. CP 60-61. At Mr. Taylor's request, the Credit Union loaned Anco and Mr. Taylor a total of **\$50,404.00** under the Note by tendering \$19,000.00 to Defendant Main Street Escrow on September 25, 2007, \$21,000.00 to Mr. Taylor on October 25, 2007, and \$10,404.00 to Anco on January 8, 2008. CP 61.

Omer agreed to facilitate his sale of the Property to Anco by carrying back \$52,500.00 of the Property's \$70,000.00 purchase price secured by a deed of trust on the Property. CP 61. Numerous closing documents that Omer signed at Main Street Escrow reflect he was supposed to have a second position lien on the Property as opposed to a first position lien. CP 61-62. However, Omer has taken the position that he did not know this was the case because he claims he did not read the closing documents he signed at Main Street Escrow before he signed and initialed them. CP 434. Omer has also taken the position that he believed his seller carry-back was supposed to be secured by a first position lien on the Property as opposed to a second position lien. *Id.*

One of the documents executed during the closing at Main Street Escrow was the Speculative Construction Loan Agreement concerning Anco's acquisition and development of the Property (the "**Agreement**"). CP 62. The Credit Union and Anco executed the Agreement. CP 124. The Agreement reflects, among other things, the intent of Anco and Mr. Taylor to build a home on the Property and the Credit Union's commitment to provide financing for this purpose pursuant to construction draw requests. *Id.* There is no mention of Omer or any other third parties in the Agreement. *See id.*

Months after Main Street Escrow closed the Loan, Anco and Mr. Taylor defaulted on the Loan, the Credit Union non-judicially foreclosed

its Deed of Trust, and the Property was sold in December 2008 at a trustee's sale as a result. *Id.* The Credit Union was the only bidder at this trustee's sale, and the Credit Union purchased the Property at that time. *Id.* The Credit Union still owns the Property. *Id.*

Omer filed this lawsuit in December 2008 shortly before the trustee's sale concerning the Property. CP 3. Since that time, Omer has asserted that all of the Defendants in this case — namely Anco, Mr. Taylor, Endeavor, Endeavor's president, Gordy S. Englert, the Credit Union, and Main Street Escrow — conspired to defraud him of the \$52,500.00 that Anco owed him in connection with the subject real estate transaction. *See* CP 3-10, CP 406-416.

II. Summary Of Omer's Claims Against The Credit Union.

In his original Complaint dated December 10, 2008, Omer asserted the following claims against the Defendants, which arose from Omer's sale of the Property to Anco: (1) judicial foreclosure of deed of trust; (2) fraud; (3) civil conspiracy; (4) piercing of the corporate veil as to Anco and Endeavor; and (5) the restraint of the Credit Union's trustee's sale concerning the Property. CP 508-509.

In his First Amended Complaint dated March 12, 2010, Omer added Rusty and "Jane Doe" Fields as Defendants and asserted claims for (1) judicial foreclosure of deed of trust; (2) fraud; (3) civil conspiracy; (4) piercing of the corporate veil as to Endeavor and the Credit Union; (5) agency; and (6) violation of the Washington Criminal Profiteering Act, otherwise known as the "Little RICO" statute. CP 509.

Omer did not pursue his claims against Mr. and Mrs. Fields to arbitration, nor did he present his claim for judicial foreclosure at arbitration. *Id.*

III. Omer And The Credit Union Agreed To Submit Omer's Claims To Binding Arbitration Under RCW 7.04A.

Omer obtained a default judgment against Anco and Mr. Taylor and subsequently settled his claims with Main Street Escrow while the Credit Union, Endeavor, and Mr. Englert vigorously defended themselves in this case throughout 2009 and well into 2010. *See* CP 595.

After most of the parties in this case had been deposed and other discovery had been completed, the Credit Union, Endeavor, and Mr. Englert moved for the summary judgment dismissal of Omer's substantive claims, which consisted of fraud, conspiracy, and violation of the Washington Criminal Profiteering Act, on the grounds that there was absolutely no evidence reflecting any of these parties ever had any communications or correspondence with Omer prior to his initiation of this lawsuit.

Although it is undisputed that the Credit Union, Endeavor, and Mr. Englert never did have any such communications or correspondence with Omer prior to his initiation of this lawsuit, the trial court nevertheless denied the motions for summary judgment filed by these parties on March 26, 2010 because the real estate transaction at issue "was not a simple transaction" and because "most conspiracies are not proven by some written agreement notarized by parties as to what they are conspiring to do." Verbatim Report of Proceedings Motion for Summary Judgment at 21, lines 2, 9-11.

This ruling led to the parties' agreement to submit this case to

binding arbitration pursuant to a written CR 2A Agreement to Arbitrate (the “**Arbitration Agreement**”) that was executed on or about June 3, 2010. CP 509. The parties selected former Pierce County Superior Court Judge Robert H. Peterson from JAMS as their Arbitrator. Judge Peterson was admitted to practice law in Washington in 1953, some fifty-eight (58) years ago.¹

Paragraph 1 of the Arbitration Agreement, entitled “Enabling Agreement to Arbitrate,” provides the parties agreed to arbitration pursuant to RCW 7.04A “for the purpose of deciding the claims in Pierce County Superior Court Cause No. 08-2-15380-6.” CP 509. At the time the Arbitration Agreement was executed, such “claims” were comprised of the intentional tort claims Omer asserted in his First Amended Complaint, which are listed above. *Id.* Such claims did not include any breach of contract or third-party beneficiary claims arising from the Agreement between the Credit Union and Anco. *Id.*

Kevin Wessell, a former director of the Credit Union, attended the arbitration hearing that was held in this case on September 13 and 14, 2010. CP 510. Mr. Wessell testified on behalf of the Credit Union at this hearing. *Id.* Omer testified at the arbitration hearing as well, as did Mr.

¹ The Court can take judicial notice of this fact based on the following link to the WSBA website and Evidence Rule 201(b): http://www.mywsba.org/default.aspx?tabid=178&RedirectTabId=177&User_ID=3127.

Taylor and Gordy Englert, Endeavor's president. *Id.*² Mr. Wessell listened to the testimony given by all of the witnesses at this hearing and made contemporaneous notes regarding their testimony. *Id.* The Credit Union, Mr. Englert, and Omer all testified that Omer never spoke with or corresponded with any of the Defendants before he signed the closing documents concerning the Property at Main Street Escrow. *Id.*

At the arbitration hearing, no one testified they intended Omer to be a third-party beneficiary of the Agreement, nor did anyone testify they intended Omer to derive any benefit from said instrument. CP 511. To the contrary, the only evidence on the subject came from Mr. Wessell, who testified that the Credit Union never expected Omer to benefit from the Agreement in any way, shape, or form. *Id.*

Omer's two Complaints and the other pleadings on file herein reflect the fact that Omer never pleaded a breach of contract claim or third-party beneficiary claim in this case. CP 510. Had Omer done so, the Credit Union might not have agreed to binding arbitration. *Id.* Regardless, the first time the third-party beneficiary claim came up was when the Arbitrator asked Omer's counsel at the arbitration hearing why Omer did not plead a third-party beneficiary claim. *Id.*

Not surprisingly, this "inquiry" led Omer to orally move to amend the pleadings to conform to the evidence at the close of the arbitration hearing, at which time Omer moved to assert claims for unjust enrichment

² At the arbitration hearing, the Credit Union, Endeavor, and Mr. Englert provided the Arbitrator with all of the summary judgment pleadings they previously filed in this case.

and third-party beneficiary against the Credit Union. *Id.* Counsel for the Credit Union vigorously objected to this motion at the arbitration hearing. *Id.*

The Arbitrator's preliminary decision dated September 21, 2010 reflects the Arbitrator granted Omer's oral motion to amend the pleadings to conform to the evidence as to the third-party beneficiary claim only. CP 510-511. Thus, although the Credit Union prevailed on all of the substantive pleaded claims set forth in Omer's First Amended Complaint, the Credit Union was nevertheless deemed to be liable to Omer in the amount of \$52,500.00 on a third-party beneficiary theory claim arising from the Agreement, which theory was never pleaded or otherwise addressed prior to the arbitration hearing. *Id.* In fact, the third-party beneficiary theory was never pleaded in almost two (2) years of litigation, and it only came about because of the Arbitrator's "inquiry" of Omer's counsel at the arbitration hearing. *Id.*

The Credit Union never agreed or intended to provide the Arbitrator with the authority to amend pleadings to conform to the evidence and rule upon new, unpleaded claims like the third party beneficiary claim. *Id.* Accordingly, the Credit Union maintains the Arbitrator did not have the authority under the Arbitration Agreement to grant Omer's oral motion to amend the pleadings to conform to the evidence in order to rule for Omer on a third-party beneficiary theory. *Id.* at 509-510.

After the Arbitrator issued his preliminary decision, Omer sought

to recover his attorneys' fees from the Credit Union, and the Credit Union ardently opposed this request. CP 511. In his final arbitration award dated October 29, 2010, the Arbitrator denied Omer's motion for an award of attorney's fees. CP 511. Page 1 of this final award reflects the Arbitrator's acknowledgment that he is the one who raised the issue of the third-party beneficiary or "breach of contract" theory that Omer ultimately prevailed upon. *Id.*

The Credit Union prevailed on all of Omer's pleaded claims at arbitration. CP 511. The Credit Union would have won this case had the Arbitrator not (1) raised the idea of a third-party beneficiary claim at the arbitration hearing; and (2) subsequently granted Omer's oral motion to amend the pleadings to conform to the evidence insofar as the third-party beneficiary claim was concerned, over the Credit Union's objection. *Id.*

IV. The Trial Court Confirmed The Arbitration Award In Favor Of Omer And Denied The Credit Union's Cross-Motion To Vacate The Award.

After the Arbitrator issued his final arbitration award, Omer moved for confirmation of the award. Curiously, in moving to confirm the arbitration award, Omer filed only the Arbitrator's *preliminary* award with the trial court. CP 490-498. Omer did not file the *final* award in support of his original motion to confirm the arbitration award. *Id.* The Credit Union suspects that Omer purposefully placed only the preliminary award before the trial court at the outset because the final arbitration award contains the Arbitrator's admission that he is the one who first proposed the only claim that Omer prevailed upon at arbitration.

Prior to the hearing on Omer's motion to confirm the arbitration award, the Credit Union specifically inquired of Omer's counsel, in

writing, why Omer moved for entry of judgment on the preliminary award, and Omer's counsel steadfastly remained silent on this topic. Verbatim Report of Proceedings, Motion to Vacate, at 3, lines 1-10.

At the beginning of the hearing on Omer's motion to confirm the arbitration award and the Credit Union's cross-motion to vacate the award, the Credit Union's counsel "respectfully ask[ed] the Court . . . to inquire of plaintiff's counsel why the plaintiff moved for the entry of judgment on the preliminary decision." Verbatim Report of Proceedings, Motion to Vacate, at 3, lines 7-10. This request garnered the following response from the trial court:

The Court doesn't appreciate when an attorney makes a motion to instruct or ask me to ask other counsel questions on a motion docket. If you have a statement you want to make, go ahead. But you are asking me to ask counsel something. I don't operate in that fashion.

Id., lines 11-16.

Although the trial court was fully informed as to the significant irregularities that occurred during the arbitration hearing — namely, the Arbitrator's decision to find for Omer on the third-party beneficiary claim that the Arbitrator himself raised, which claim was beyond the scope of the Arbitration Agreement — the trial court confirmed the award, denied the Credit Union's cross-motion to vacate the award, and made no mention of the fact in its oral ruling that the Arbitrator was the one who raised the idea of a third-party beneficiary claim. Verbatim Report of Proceedings, Motion to Vacate, at 18 – 21.

D. ARGUMENT

The trial court erred in confirming the arbitration award in favor of Omer and denying the Credit Union's cross-motion to vacate the award

for two reasons. First, the award exceeded the submission of the parties, as the parties only agreed to arbitrate the intentional tort claims asserted in the First Amended Complaint, which consisted of fraud, civil conspiracy, and the violation of the Little RICO statute. CP 406 – 416. Although this fact is evident from the plain language of the Arbitration Agreement, it is also borne out by the uncontroverted evidence supplied by the Credit Union.

The trial court also erred in confirming the arbitration award because the Arbitrator improperly inserted himself in this proceeding when he asked Omer’s counsel why Omer did not plead a third-party beneficiary claim and then granted Omer’s oral motion to amend the pleadings to conform to the evidence as to this claim over the Credit Union’s objection.

The Arbitrator acknowledged in his final arbitration award that he is the one who raised the third-party beneficiary breach of contract theory. Perhaps his final arbitration award reflects such because the Arbitrator belatedly recognized the error of his ruling. Regardless, by way of his final arbitration award, the Arbitrator properly framed the issues created by his ruling for review, both at the trial court level and in this Court.

I. The Trial Court Erred In Confirming The Arbitration Award And Denying The Credit Union’s Cross-Motion To Vacate The Award.

The trial court erred in granting Omer’s motion to confirm the arbitration award and denying the Credit Union’s cross-motion to vacate the award because (1) the arbitration award is beyond the claims the parties agreed to submit to arbitration; and (2) there was evident partiality by the Arbitrator, the Arbitrator engaged in misconduct that irreparably

changed the course of the arbitration proceeding, and the Arbitrator exceeded his powers within the meaning of RCW 7.04A.230(1).

1. The Trial Court Erred In Entering Judgment On The Arbitration Award Because The Arbitration Award Exceeds The Parties' Submission Set Forth In The Arbitration Agreement.

A trial court's jurisdiction in determining whether to confirm an arbitration award is limited by Washington's Uniform Arbitration Act, RCW 7.04A *et seq.*, and by the parties' submission. *See, e.g., Price v. Farmers Insurance Company of Washington*, 133 Wn.2d 490, 946 P.2d 388 (1997).

Appellate review of the confirmation of an arbitration award is limited to the statutory grounds for vacating an arbitration award. *See S & S Const., Inc. v. ADC Properties LLC*, 151 Wn. App. 247, 254, 211 P.3d 415 (2009) (“[A]ppellate review of arbitration proceedings is restricted to grounds identified in the Act. [citation omitted] An appellate court limits review of an arbitrator's award to that of the court that confirmed, vacated, modified, or corrected that award. [citations omitted]; *see also ACF Property Management, Inc. v. Chaussee*, 69 Wn. App. 913, 918-9, 850 P.2d 1387 (1993) (“A superior court has the limited power of either confirming, vacating, modifying, or correcting an arbitration award as set forth in RCW 7.04.150-.170.” [citation omitted] Appellate court review of an arbitration award “is limited to that of the court which confirmed, vacated, modified or corrected that award.” [citation omitted]

Although questions of arbitrability are reviewed *de novo*, *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45, 17 P.3d 1266 (2001), judicial scrutiny of an arbitration award does not include review of the arbitrator's

decision on the merits. [citation omitted]); *see also Barnett v. Hicks*, 119 Wn.2d 151, 153-4, 829 P.2d 1087 (1992).

The role of the arbitrator is “to resolve *only those questions properly submitted to the arbitrator . . .*” so that the trial court may “reduce to judgment only such matters *properly submitted to arbitration* and as the parties may otherwise agree.” *Price*, 133 Wn.2d at 498 (emphasis added).

While Washington recognizes a strong public policy in favor of the arbitration of disputes, Washington courts are also mindful that arbitration “should not be invoked to resolve disputes that the parties have not agreed to arbitrate.” *King County v. Boeing Co.*, 18 Wn. App. 595, 603, 570 P.2d 713 (1977).

The parties’ written agreement to submit to arbitration is critical for determining the scope of the arbitrator’s power: “An agreement for the submission of a dispute to arbitration defines and limits the issues to be decided. The authority of the arbitrator is wholly dependent upon the terms of the agreement of submission. The arbitration award must concern only those matters included within the agreement for submission and must not exceed the powers established by the submission.” *Sullivan v. Great American Ins. Co.*, 23 Wn. App. 242, 246, 594 P.2d 454 (1979). This is because mandatory arbitration is a wholly voluntary process. Just as parties are free to resolve their disputes only in a court of law and to forgo arbitration altogether, so too may they elect to submit only certain claims to decision by way of arbitration. The parties, via their submission to the arbitrator, are the masters of defining the arbitrator’s scope of authority.

It follows, then, that “any action by the arbitration panel beyond that which is submitted is subject to vacation by the court.” *Price*, 133

Wn.2d at 500. Simply put, “[a]rbitrators have no jurisdiction to determine any other issue absent agreement by the parties.” *Id.*; *see also ACF Property Management*, 69 Wn. App. at 920-21 (arbitration award issued without authority under parties’ agreement is void, and courts have no jurisdiction to confirm a void arbitration award).

If an arbitrator exceeds the parties’ submission by considering issues beyond the parties’ submission or enters findings as to claims not submitted for arbitration, *the trial court is without jurisdiction to enter or adopt those findings. Anderson v. Farmers Insur. Co.*, 83 Wn. App. 725, 733, 923 P.2d 713 (1996) (arbitrator’s findings and conclusions related to bad faith claim exceeded submission to arbitration of only the question of the extent of one party’s injuries) (emphasis added); *see also Ohio Council 8, Amer. Federation of State, County and Municipal Employees, AFL-CIO v. Central State Univ.*, 474 N.E.2d 647 (Ohio App. 1984) (“We find that the grievance citation did not incorporate an issue of overtime and that a resolution of such an issue would have been beyond the power conferred upon the arbitrator by the method and language of submission used in this case under the labor agreement.”).

If any portion of an arbitration agreement is deemed to be ambiguous, extrinsic evidence is admissible to provide meaning as to the ambiguous terms and the intent of the parties. *See, e.g., Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (2001) (“Under Washington law, all contracts, including agreements to arbitrate, are interpreted under the context rule enunciated in *Berg v. Hudesman*.”)

In this case, the trial court should have declined to confirm, and should have vacated, the arbitration award because it was plainly beyond the issues that were submitted to the Arbitrator for consideration. *See, e.g.,*

ACF Property Management, 69 Wn. App. at 920-21. The scope of the Arbitrator’s power was defined by the Arbitration Agreement that the parties entered into in June of 2010. CP 486-89. The Arbitration Agreement reflects the parties’ agreement to submit Omer’s claims to arbitration as follows: “The undersigned parties agree . . . to conduct an arbitration pursuant to RCW 7.04A *for the purpose of deciding the claims in Pierce County Superior Court Cause No. 08-2-15380-6.*” CP 486 (emphasis added).

Those “claims” were set forth in the First Amended Complaint, which asserted the following causes of action: (1) judicial foreclosure; (2) fraud; (3) conspiracy; (4) piercing the corporate veil; (5) agency; and (6) violation of the Little RICO statute, RCW 9A.82.100. CP 406-416. Of these claims, the only substantive claims the parties took to arbitration were fraud, conspiracy, and violation of the Little RICO statute, intentional torts one and all. *See* CP 599.

These were the only substantive claims the parties arbitrated that were subject to the Arbitration Agreement. As such, these were the only claims over which the Arbitrator had jurisdiction. Notably, the Arbitrator found in favor of the Credit Union on all of these claims. *See, e.g.*, CP 599 (“I . . . dismissed all three fraud theories which were alleged in the pleadings.”).³

However, after resolving all of the “claims” in favor of the Credit Union, the Arbitrator went on to find in favor of Omer with regard to a third-party beneficiary breach of contract claim that the Arbitrator determined came from the Agreement between the Credit Union and

³ However, the Arbitrator did conclude an agency relationship existed between the Credit Union and Endeavor.

Anco. Again, this claim was (1) never pled; (2) not a “claim” at the time the parties agreed to arbitrate; and (3) not within the parties’ contemplation at the time the parties entered into the Arbitration Agreement.

The Credit Union submits the four corners of the Arbitration Agreement amply reflect the parties did not agree to submit any breach of contract claim or third-party beneficiary claim to arbitration when they executed the Arbitration Agreement, nor did they intend to vest the Arbitrator with the authority to rule on such claims by way of the power to grant a motion to amend pleadings to conform to the evidence. Thus, this case is obviously different than *Peska Construction Company, Inc. v. Portz Investment*, 672 N.W.2d 483 (S.D. 2003) (“[T]he [arbitration] agreement *expressly allowed* the arbitrator to expand arbitrable claims by granting motions to amend.”) (Emphasis added).

Omer’s reliance below on RCW 7.04A.210, entitled “Remedies – Fees and expenses of arbitration proceeding” for the notion that the Arbitrator had the authority to rule on motions to amend the pleadings to conform to the evidence is misplaced, as that statute governs the Arbitrator’s authority to provide *remedies*. The Arbitrator’s errors in this case had nothing to do with the type of remedy ordered. These errors stem from the fact that the parties agreed to arbitrate only the six (6) “claims” pled in the First Amended Complaint, which did not include a breach of contract claim or third-party beneficiary claim. As such, the fact is the Arbitrator did not have the power or authority under RCW 7.04A.210 or any other statute to allow Omer to assert any other claims. The Arbitrator therefore lacked jurisdiction to find in Omer’s favor on the third-party beneficiary claim, which was never pled by the parties.

Further, the Credit Union's exhaustive legal research has yet to reveal a single Washington appellate case in which a party to a binding arbitration proceeding conducted under RCW 7.04A brought a motion to amend the pleadings to conform to the evidence.⁴

Nevertheless, by entering judgment on an arbitration award concerning a claim that was never submitted to arbitration, the trial court compounded the Arbitrator's error and acted beyond its jurisdiction. *Anderson v. Farmers Insur. Co.*, 83 Wn. App. 725, 730-31, 923 P.2d 713 (1996) ("If the arbitrators exceed their authority under the agreement, the award is deemed void and the court has no jurisdiction to confirm it under RCW 7.04.150."). Accordingly, the Credit Union respectfully asks this Court to reverse the trial court's entry of judgment on the arbitration award and vacate the award because the award exceeds the submission of the parties.

2. The Court Should Vacate The Judgment Entered On The Arbitration Award And The Award Itself Because The Arbitrator's Actions Evidence Evident Partiality, The Arbitrator Engaged In Misconduct That Prejudiced The Credit Union, And The Arbitrator Exceeded His Power As Arbitrator.

The Uniform Arbitration Act as adopted in Washington provides that upon motion of a party to the arbitration proceeding, the court shall vacate an arbitration award if: ... (b) There was: (i) Evident partiality by an arbitrator appointed as a neutral; ... or (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; or (d) An arbitrator exceeded the arbitrator's powers. RCW 7.04A.230(1).

⁴ Counsel for the Credit Union ran a Westlaw terms & connectors search of "RCW 7.04A" & "conform to the evidence" in Westlaw's Washington cases and Washington civil trial court filings databases; these searches did not uncover a single Washington appellate case.

Appellate review of an arbitration award is limited to the statutory grounds for vacating an arbitration award set forth in RCW 7.04A. *S & S Const., Inc. v. ADC Properties LLC*, 151 Wn. App. 247, 254, 211 P.3d 415 (2009) (“[A]ppellate review of arbitration proceedings is restricted to grounds identified in the Act. [citation omitted] An appellate court limits review of an arbitrator's award to that of the court that confirmed, vacated, modified, or corrected that award. [citations omitted].”); *see also ACF Property Management*, 69 Wn. App. at 918-9 (“A superior court has the limited power of either confirming, vacating, modifying, or correcting an arbitration award as set forth in RCW 7.04.150-.170. [citation omitted] Appellate court review of an arbitration award “is limited to that of the court which confirmed, vacated, modified or corrected that award.” [citation omitted] Further, judicial scrutiny of an arbitration award does not include review of the arbitrator's decision on the merits. [citation omitted]”); *see also Barnett*, 119 Wn.2d at 153-4.

In this case, it is readily apparent from the First Amended Complaint that Omer never pled any contract-based claims. CP 406-416. It is undisputed that the circumstances that led to Omer's assertion of a third-party beneficiary claim came as a direct result of (1) the Arbitrator's inquiry regarding why this claim had not been asserted; and (2) the Arbitrator's decision to grant Omer's oral motion to amend the pleadings to conform to the evidence as to this claim over the Credit Union's objection. *See Verbatim Report of Proceedings, Motion to Vacate*, at 4-20; CP 599-600. The final arbitration award itself, which came after the parties extensively briefed and fought over the issue of whether attorney's fees are available in third-party beneficiary cases, and the parties' briefing on the attorney's fees issue all reflect the Arbitrator is the one who came

up with the third-party beneficiary idea. CP 599-600; CP 511, lines 13-15; CP 540-551.

The Arbitrator's "inquiry" concerning the third-party beneficiary claim was entirely inappropriate. The Arbitrator did not have the authority to explicitly or implicitly suggest new legal theories to Omer's attorneys, nor to counsel for the Credit Union for that matter; *nor did the Arbitrator have the ability to rule in favor of Omer on the very same new legal theory that the Arbitrator himself put into play.*

The prejudicial nature of the Arbitrator's conduct in this case cannot reasonably be disputed, and is beyond compare. As a result of the Arbitrator's "inquiry" concerning the third-party beneficiary claim, and his subsequent decision to allow Omer to assert such a claim over the Credit Union's strident objection, the Credit Union was unfairly prejudiced. After all, the Credit Union had vigorously defended itself against Omer's intentional tort claims for almost two (2) years before the Arbitrator brought the third-party beneficiary breach of contract claim out from "left field."

The fact that the Credit Union lost the underlying lawsuit solely because of this particular claim — which happens to be a claim that is totally unlike Omer's pleaded claims for intentional torts, as this claim does not require *scienter* or subjective intent of any kind — is especially galling. *See Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385, 389-90 (1983); 25 Wash. Prac. Contract Law and Practice § 12:1 ("The test of whether the parties intended to create a third-party beneficiary contract is an *objective* one" that does not turn on their subjective intent) (emphasis added).

Regardless, the unfortunate reality is the Arbitrator inserted himself as an advocate in the arbitration by positing an entirely new claim upon which the arbitration ultimately turned. In doing so, the Arbitrator committed prejudicial misconduct. There simply is no getting around this unfortunate reality.

The Arbitrator's conduct, in acting not as a third-party neutral but as an active and partial participant advocating on Omer's behalf, was quite clearly beyond the scope of his power. The role of the Arbitrator was to review the evidence and decide the "claims" that were properly submitted to arbitration via the Arbitration Agreement. The Arbitrator's authority did not extend to siding with either party, be it explicitly or implicitly, nor did his authority allow him to suggest, adopt, and rule upon an entirely new legal theory for Omer's benefit.

Taken together, the Arbitrator's actions in this case amount to evident partiality, misconduct prejudicing the Credit Union's rights, and the Arbitrator's surpassing of his powers within the meaning of RCW 7.04A.230(1). Based on the foregoing, it is abundantly clear the trial court erred in failing to vacate the arbitration award under RCW 7.04A.230(1)(b)(i), RCW 7.04A.230(1)(b)(iii), and RCW 7.04A.230(1)(d). As such, the Credit Union respectfully asks this Court to reverse the trial court's entry of judgment on the arbitration award and vacate the award.

3. The Court Should Also Vacate The Judgment Entered On The Arbitration Award Based On Sound Policy Considerations.

The Arbitrator never asked the parties to brief his third-party beneficiary idea, nor did he cite any legal authority in his arbitration award

concerning third-party beneficiaries. CP 594-600.

While the Credit Union is mindful that it cannot ask this Court to review the Arbitrator's findings of fact or conclusions of law as to the claims the parties submitted to arbitration, the Credit Union *can* rightly ask the Court to vacate the judgment that was entered on the arbitration award based on sound policy reasons, like the fact that the Legislature has decreed arbitrators cannot exceed their powers under RCW 7.04A.230 by ruling for one party on a legal theory that is *entirely inapplicable* to the case at hand (*i.e.*, the third-party beneficiary theory in this case) and beyond the scope of the parties' submission.

There is a copious amount of Washington case law concerning third-party beneficiaries. A third party beneficiary is one who, though not a party to the contract, will nevertheless receive direct benefits therefrom. *Kim v. Moffett*, 156 Wn. App. 689, 699, 234 P.3d 279 (2010). In determining whether or not a third-party beneficiary status is created by a contract, the critical question is whether the benefits flow directly from the contract or whether they are merely incidental, indirect, or inconsequential. *Id.* An incidental beneficiary acquires no right to recover damages for nonperformance of the contract. *Id.* (holding original property owner who contracted with architect to build residences on properties but who transferred such properties to successors was not a third-party beneficiary to the contract).

In the construction industry, the law generally presumes that the contracts between the general contractor and the subcontractor do not include the property owner as a third-party beneficiary. *Warner v. Design and Build Homes, Inc.*, 128 Wn. App. 34, 114 P.3d 664 (2005) (trial court properly rejected home buyer's claim that he was a third-party beneficiary

to contract between home builder and subcontractor, where home buyer's expected benefit was only from the successful completion of construction).

Here, the Arbitrator concluded Omer — the second position lienholder on the Property that Anco bought and started to develop — was a third-party beneficiary of the Speculative Construction Loan Agreement between the construction lender (the Credit Union) and Anco. *See* CP 595, CP 599-600. There is no mention of Omer or third-party beneficiaries anywhere in said Agreement. CP 511, lines 2-6; CP 519-538.

Despite conducting exhaustive legal research of state and federal cases throughout the country, the Credit Union did not find a single case in which a junior lienholder like Omer was deemed to be a third-party beneficiary of an agreement between a senior lienholder like the Credit Union and someone else.

The Credit Union submits that as a matter of sound public policy and the limits embodied in RCW 7.04A.230, the judgment on the arbitration award cannot stand because the Arbitrator exceeded his powers under this statute when he ruled for Omer on the third-party beneficiary claim.

In light of the legal authority concerning third-party beneficiaries set forth above, the Arbitrator's ruling on this claim is tantamount to a ruling that someone who was not a party to a contract, the successor in interest to a party to a contract, or the beneficiary of a contract (say, *C*) is liable for the breach of the contract; or a ruling that someone (*C*) who never borrowed any money from *A* or received any benefit from *A* and never had any dealings or interactions with *A* is nevertheless liable for

repaying *A*'s debt to *B*; or a determination that a party deemed liable for the repayment of a debt (*C* in the preceding example) should be sentenced to debtors' prison based on the nonpayment of this debt even if *C* does not abscond from the state.⁵

Thus, in sum, the Credit Union recognizes the arbitrator's legal conclusions are not subject to *de novo* review under RCW 7.04A; however, RCW 7.04A.230(1)(d) and the sound policies that support this statute do not allow the trial court to confirm an arbitration award when the conclusion that the arbitrator reached is *completely* lacking in legal basis. To hold otherwise would provide judicial sanction for the notion that arbitrators are free to make all kinds of rulings that are contrary to applicable law and in derogation of state and federal constitutional protections.

II. The Trial Court Erred In Striking Portions Of The Declaration Of Kevin Wessell That Was Submitted In Support Of The Credit Union's Cross-Motion To Vacate The Arbitration Award.

This Court should review the trial court's decision to strike portions of Mr. Wessell's declaration in support of the Credit Union's cross-motion to vacate the arbitration award *de novo*. See *Folsom v. Burger King*, 135 Wn.2d 658, 665, 958 P.2d 301 (1998).

In support of the Credit Union's cross-motion to vacate the arbitration award, Omer moved to strike Kevin Wessell's supporting declaration (CP 508 – 574) for two reasons. First, Omer argued that Mr. Wessell's statements regarding the Arbitrator's comments at the arbitration constituted hearsay. CP 575-582. Second, Omer contended that

⁵ Such a ruling would obviously violate article 1, section 17 of the Washington Constitution ("There shall be no imprisonment for debt, except in cases of absconding debtors.")

the error in the arbitration award must be present on its face, and that the parties cannot properly provide any context concerning the arbitration in connection with a motion to confirm or vacate an arbitration award. *See* CP 575-582.

Neither of these contentions justified the trial court's decision to strike portions of the declaration of Kevin Wessell, particularly where (1) Neither Omer nor his attorneys disputed the veracity of Mr. Wessell's declaration testimony by way of a responsive declaration of their own; (2) the Verbatim Report of Proceedings concerning the hearing on the cross-motion to vacate the arbitration award at least tacitly reflects the veracity of Mr. Wessell's assertions; and (3) the arbitration award effectively invited opposition from the Credit Union by reflecting the fact that the Arbitrator is the one who raised the third-party beneficiary theory.

As for the hearsay argument, although Omer moved to strike portions of Mr. Wessell's declaration testimony on hearsay grounds, Omer notably did not cite or quote the definition of hearsay in his pleadings below, which is as follows: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

Mr. Wessell's declaration testimony regarding the Arbitrator's statements at the arbitration hearing was obviously not offered to prove the truth of the matter asserted. Indeed, whether the Arbitrator's errant comments regarding a third-party beneficiary theory could properly be characterized as an "assertion" provably true or false is questionable. *See* 5B Wash. Prac. Evidence Law and Practice § 801.3 (5th ed.) ("According to traditional hearsay analysis, at least, the definition of hearsay includes only statements describing an event or condition in the past. It does not

include . . . questions . . .”).

Regardless, the truth of the Arbitrator’s statements is entirely irrelevant; the fact is the Wessell declaration was offered to prove the mere fact that the Arbitrator *made* the statements. The following example from Washington Practice illustrates the point:

[T]he classic textbook example hypothesizes a case in which the issue was whether X was dead at 8:00 p.m. A witness will testify that at 8:05 p.m., X said, “I own a red car.” The statement is relevant simply because it was made — *i.e.*, relevant to show X was alive — and thus is not hearsay.

See 5B Wash. Prac. Evidence Law and Practice § 801.8 (5th ed.). In other words, “If the statement is relevant only if true, it is hearsay.” *Id.*

Of course, such is hardly the case here. Here, the Arbitrator’s question as to why Omer did not assert a third-party beneficiary claim is relevant merely because the Arbitrator uttered it. Its truth or falsity (to the extent that such a question could fairly be construed as either true or false) is entirely irrelevant. Thus, the Arbitrator’s statement was not offered in the Wessell declaration to prove the truth of the matter asserted, and this statement simply does not fall within the definition of hearsay. To the extent that the trial court’s order striking portions of Mr. Wessell’s declaration was based on the hearsay rule, it was in obvious error. CP 601-604.

As for the idea that portions of the Wessell declaration should be stricken on the grounds that the error in the arbitration award must be present on its face and no context can be provided in connection with a motion to confirm or vacate the award, the Credit Union does not question the idea that the error in the arbitration award must appear within (or close to) the four corners of the document. *See Lent’s, Inc. v. Santa Fe*

Engineers, Inc., 29 Wn. App. 257, 265, 628 P.2d 488 (1981) (“[T]he errors and mistakes must appear on the face of the award, or, at least, in some paper delivered with it.”) Indeed, the Credit Union submits that the Arbitrator’s error is readily apparent from the face of the award. CP 599-600. Regardless, Omer cannot seriously dispute that the facts supplied in Mr. Wessell’s declaration provide helpful context; indeed, Omer also described what occurred during the arbitration in his briefing to the trial court, CP 575-582, although his contrary description of certain events at the arbitration hearing was noticeably unsupported by a citation to the record or made under oath and under penalty of perjury. *See* CP 579.

The Credit Union will also take this opportunity to highlight the fact that the Wessell declaration does not offend the policy behind limiting review of arbitration awards to the face of the arbitration award. After all, Mr. Wessell’s declaration was not offered to contradict the factual findings embodied in the arbitration award, and this declaration offers useful context for understanding and assessing what appears to be a highly irregular error that ultimately determined the result of the arbitration proceeding. Under these peculiar circumstances, and considering there was no court reporter at the arbitration hearing, judicial consideration of the context surrounding the facts that the Arbitrator recited in the face of his award was not inappropriate, and the trial court erred in striking portions of Mr. Wessell’s undisputed declaration testimony for this reason and for the other reasons set forth above.

Further, enabling one of the participants in the arbitration to submit a declaration under penalty of perjury reflecting what actually transpired in this proceeding in which no court reporter was present also operates as a necessary safeguard against arbitrations like this in which the Arbitrator

exceeded his authority and improperly inserted himself into the proceedings.

To his credit, although the Arbitrator could have tried to shield his error from judicial review by declining to concede in the written arbitration award that he himself had proposed the very claim upon which the arbitration ultimately turned, he did not do so. CP 599. By proceeding in this fashion, the Arbitrator effectively invited the judicial review of the arbitration award.

For these reasons, the Credit Union respectfully asks this Court to reverse the order striking portions of the Wessell declaration *en route* to vacating both the judgment that was entered on the arbitration award and the award itself. Alternatively, the Credit Union submits Omer's First Amended Complaint and the arbitration award itself provide ample basis for vacating the judgment that was entered on the award even if this Court determines the trial court did not err in striking portions of the aforesaid Wessell declaration.

E. CONCLUSION

Based on the foregoing, the Credit Union respectfully asks this Court to vacate the judgment that was entered on the arbitration award and vacate the arbitration award itself.

RESPECTFULLY SUBMITTED this 9 day of May, 2011.

EISENHOWER & CARLSON, PLLC

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Certificate of Service

I certify that on the 9th day of May, 2011, I caused to be served on the person(s) below a true and correct copy of the foregoing document at the address(es) and in the manner(s) stated below:

<u>Counsel for Respondent</u> Douglas Vincent Alling Russell Andrew Knight Smith Alling Lane, PS 1102 Broadway Ste 403 Tacoma, WA, 98402-3526	<input type="checkbox"/>	U.S. Mail, postage prepaid
	<input checked="" type="checkbox"/>	Hand Delivered
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Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	<input type="checkbox"/>	U.S. Mail, postage prepaid
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington this 9th day of May, 2011.

Alex Kleinberg

Alexander S. Kleinberg, WSBA # 34449

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