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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 54413-0-II

SERPANOK CONSTRUCTION, INC.,

Plaintiff-Respondent,

v.

POINT RUSTON, LLC; POINT RUSTON PHASE II, LLC; CENTURY
CONDOMINIUMS, LLC; and MICHAEL COHEN,

Defendants-Appellants.

APPELLANTS' REPLY BRIEF

DLA PIPER LLP (US)
Andrew R. Escobar, WSBA No. 42793
David I. Freeburg, WSBA No. 48935
Lianna Bash, WSBA No. 52598
Chelsea Mutual, *admitted Pro Hac Vice*
701 Fifth Avenue, Suite 6900
Seattle, Washington 98104
Tel: 206.839.4800
Fax: 206.839.4801
E-mail: andrew.escobar@us.dlapiper.com
E-mail: david.freeburg@us.dlapiper.com
E-mail: lianna.bash@us.dlapiper.com
E-mail: chelsea.mutual@us.dlapiper.com

LAW OFFICES OF JACK B. KRONA
Jack B. Krona, WSBA No. 42484
6509 46th Street N.W.
Gig Harbor, Washington 98335
Tel: 253.341.9331
Fax: 253.752.7083
E-mail: j_krona@yahoo.com

Attorneys for Defendants-Appellants
Point Ruston, LLC, Point Ruston Phase II, LLC, Century Condominiums, LLC, and
Michael Cohen

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I. INTRODUCTION

Serpanok’s answering brief is based on a fundamental misapplication of Washington law governing appellate review of arbitration awards. It is black-letter law in Washington that courts must review and vacate arbitration awards that contain “facial errors of law.” *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 237, 236 P.3d 182 (2010) (“We have repeatedly articulated a rule that explicitly includes facial errors of law as grounds for vacation.”). Here, the Award applied the wrong legal standards, and contains several facial errors of law. Although the Award found, *as a fact*, that Serpanok paid Hutchinson \$80,000 “for the improper purpose of attempting to procure” more favorable contract terms, the Award nevertheless enforced the contracts growing out of those illegal payments, in violation of Washington law. The Award also erred in failing to apply *Amtruck Factors v. Int’l Forest Prod.*, 59 Wn. App. 8, 15, 795 P.2d 742 (1990)—a case Serpanok all but ignores in its answering brief—which held the victim of a kickback scheme, like the Point Ruston Parties here, is not required to show damages stemming from that scheme, and erred in failing to recognize a public policy tort for victims of such a scheme. Finally, the Award erred in denying Michael Cohen—who prevailed on the only claim asserted against him—attorneys’ fees, and the Superior Court erred in awarding any portion of the judgment to Mr. Cohen.¹

¹ In an attempt to obscure the Award’s legal errors, Serpanok’s answering brief insinuates Defendant Michael Cohen is interchangeable with the three other Point Ruston Parties. While Serpanok’s answering brief confuses the

These legal errors are plain on the face of the Award and are sufficient, on their own, to support vacation. Despite Serpanok’s claims in its answering brief (“Opp. Br.”), the Point Ruston Parties are not asking this Court to “reweigh the evidence.” Opp. Br. at 22; *see* Point Ruston Parties’ Appellate Brief (“App. Br.”) at 31 (“To be clear, the Point Ruston Parties are not asking this Court to re-weigh the evidence.”); App. Br. at 30 n.4 (“[T]he Point Ruston Parties are not asking this Court to weigh or to reach any findings based upon this evidence.”). Rather, the Point Ruston Parties are asking the Court to remand with instructions for the Arbitrator to apply, to the facts he found, the correct legal standards that were plainly missing from the Award.

Accordingly, the Point Ruston Parties respectfully request that the Court reverse the Superior Court’s decision confirming and refusing to vacate the Award.

record, it is also misleading, because each of the three LLC defendants has its own members, and they are not simply “Michael Cohen’s companies.” Opp. Br. at 3. Regardless, the Court should not adopt Serpanok’s inaccurate definition of the Point Ruston Parties—who each had different roles in construction—as “collectively ‘Cohen.’” Opp. Br. at 1. Each of the Point Ruston Parties is a distinct legal entity and must be treated as such for all purposes, including in the Award and during this appeal. *Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 131, 325 P.3d 327 (2014) (“[W]e respect the LLC’s separate existence…”).

II. ARGUMENT

A. **Serpanok Misstates the Standard of Review; Washington Courts Cannot Confirm Arbitration Awards Containing Facial Errors of Washington Law.**

Serpanok’s answering brief misstates the standards for review of an arbitration award. While arguing that review of an arbitration award is “very narrow,” Opp. Br. at 13, Serpanok ignores numerous binding decisions, such as *Broom*, which hold Washington courts must review and vacate “facial errors of law” apparent in an arbitration award. *See, e.g.*, 169 Wn.2d at 237 (“We have repeatedly articulated a rule that explicitly includes facial errors of law as grounds for vacation.”). Serpanok also says nothing about *Tolson v. Allstate Ins. Co.*, which explains “internal inconsistency amounts to an error of law on the face of the award.” 108 Wn. App. 495, 499, 32 P.3d 289 (2001). Despite Serpanok’s claims, it simply does not matter whether arbitrators are, in the first instance, “the judges of both the law and the facts.” Opp. Br. at 13.² Once the face of an

² Serpanok’s answering brief states, incorrectly, that this quote can be found in *Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn. App. 898, 905, 359 P.3d 884 (2015). In fact, this quote comes from *Kennewick Education Associate v. Kennewick Sch. Dist. No. 17*, which recognized—in the same sentence—that Washington courts will still review and vacate an award when “its face shows adoption of an erroneous rule, or mistake in applying the law.” 35 Wn. App. 280, 282, 666 P.2d 928 (1983) (explaining that arbitration is a matter of contract, and “contract provisions are always subject to limitation and invalidation if they contravene public policy”).

award—like the Award here—reveals legal error, RCW 7.04A.230(1)(d) *requires* Washington courts to review and vacate it.³

Serpanok wrongly asserts that courts never “review an arbitrator’s interpretation of a contract.” Opp. Br. at 14. The case Serpanok misstates for that proposition, *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, held Courts only decline to review “contract language not quoted in the arbitration award,” while following the general rule that “arbitrators are deemed to have exceeded their authority when the face of the arbitration award exhibits an erroneous rule of law.” 8 Wn.App.2d 594, 608–11, 439 P.3d 662 (2019).⁴ Serpanok’s position is also inconsistent with *Agnew v. Lacey Co-Ply*, which reviewed—and vacated—an arbitrator’s contract

³ Serpanok’s reliance on Federal cases like *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401 (1992), is misplaced because the Washington Arbitration Act, unlike the Federal Arbitration Act, **requires** courts to vacate an erroneous award. *Compare* RCW 7.04A.230 (explaining that a Washington court “**shall** vacate an award” when the relevant factors are met) (emphasis added); *with* 9 U.S.C. § 10 (explaining that a U.S. District Court “may”—but is not required to—“vacate the award”).

⁴ The majority opinion in *Mainline Rock & Ballast* also explained that parties can protect their right to appellate review by requiring “that the arbitrator or arbitration panel provide a detailed and reasoned decision.” *Id.* at 614. Despite binding precedent from the Washington Supreme Court—and what the majority of Division III judges held in *Mainline Rock & Ballast*—Serpanok urges this Court to adopt one judge’s concurring opinion that preferred a narrower standard of review. Opp. Br. at 15. However, the Washington Supreme Court refused to adopt that concurring position, *see Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 193 Wn.2d 1033, 447 P.3d 158 (2019) (denying review), and “[u]ntil five justices agree to actually adopt such a ... rule, the previous rule remains in effect.” *State v. Meredith*, 178 Wn.2d 180, 184, 306 P.3d 942 (2013).

interpretation because his failure to award attorneys' fees to the defendant was inconsistent with a contract quoted in the Award. 33 Wn. App. 283, 289–90, 654 P.2d 712 (1982). As this Court recognized in *Agnew*, “[t]he authority of the arbitration tribunal derives from the contract of the parties,” and “[t]he policy which encourages arbitration would be undermined if contracting parties perceived that lawful contractual provisions, negotiated and expressly agreed upon, could be ignored by the arbitration tribunal.” *Id.* at 287–91; *see also Kennewick Educ. Ass’n*, 35 Wn. App. at 282 (vacating remedies prohibited by Washington law because “contract provisions are always subject to limitation and invalidation if they contravene public policy.”).⁵

B. The Award Rests on Numerous Facial Legal Errors.

1. Serpanok Failed to Rebut—and Therefore Conceded—That Kickbacks Cause Damages as a Matter of Law.

Serpanok’s answering brief did not contest, and therefore conceded, that the Award failed to recognize established Washington precedent that kickbacks cause damage as a matter of law. Like the Award and Superior Court before it, Serpanok’s answering brief does not address *Amtruck*, 59

⁵ Serpanok also discusses at length the standard for vacation of an award under RCW 7.04A.230(1)(a) (requiring vacation of an award “procured by corruption, fraud, or other undue means.”). But the Point Ruston Parties’ appeal does not rest only on RCW 7.04A.230(1)(a)—instead, RCW 7.04A.230(1)(d) is the primary basis for the Point Ruston Parties’ appeal.

Wn. App. at 8.⁶ Indeed, the Award and Superior Court never even **mentioned** this critical case, despite extensive discussion in the parties' briefing below. *See, e.g.*, CP 1135, 1246, 2691.⁷ This Court's decision in *Amtruck* recognized that "[w]hen a supplier of goods or services pays kickbacks in order to retain a customer's business, it is apparent that the supplier is willing to do the job for less than the amount actually billed to the customer." *Id.* at 15.⁸ Thus, *Amtruck* rightly held "it is not necessary to show out-of-pocket loss in order to prove damages" in "a kickback scheme." *Id.*

It is impossible to reconcile the Award's holding that the Point Ruston Parties suffered no damages under the contracts, CP 2745, with the holding of *Amtruck*. This incorrect holding that the Point Ruston Parties failed to prove damages was the Award's only reason for denying the Point

⁶ Serpanok's only mention of *Amtruck* merely summarized—without applying—a second holding in that decision, which recognized that kickbacks create a complete defense against contracts growing out of those illegal acts. Opp. Br. at 21.

⁷ In fact, Serpanok's trial court briefing attempted to distinguish *Amtruck* by **admitting** that it engaged in a kickback scheme, arguing—in Serpanok's own words, and contrary to *Amtruck*—"that Serpanok attempted kickbacks, but got nothing in return, a *quid pro no.*" CP 1204.

⁸ *See also Phillips Chemical Co. v. Morgan*, 440 So.2d 1292, 1295 (Fl. App. Ct. 1983) ("It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired."); *Kewaunee Sci. Corp. v. Pegram*, 130 N.C. App. 576, 580 (1998) ("[C]ommercial bribery harms an employer as a matter of law, and the proper measure of damages suffered **must include at a minimum** the amount of the commercial bribes the third party paid.").

Ruston Parties’ counterclaim and affirmative defenses of breach of the duty of good faith and fair dealing, and the vast majority of their counterclaim and affirmative defenses of common law fraud. App. Br. at 34–38. This is contrary to *Amtruck* and led to a multi-million dollar legal error on the face of the Award. The Court should vacate the Award with instructions that the Point Ruston Parties suffered damages as a matter of law.⁹

The Arbitrator’s failure to follow *Amtruck*—which is uncontested in Serpanok’s answering brief—is also grounds to vacate the Arbitrator’s rejection of the Point Ruston Parties’ illegality defense, discussed in more detail below. If the Arbitrator had correctly followed *Amtruck*, he would have found that the Point Ruston Parties prevailed on their separate, illegality defense **even under** the incorrect standard of proximate cause. Despite the clear holding of *Amtruck*, the Award said that the Point Ruston Parties’ “illegal contracts” affirmative defenses are “inapplicable” because “Respondents failed to prove ... that the misconduct proximately caused actionable contract overpayments.” CP 2765. In truth, *Amtruck* recognizes that Serpanok’s kickbacks caused “actionable contract overpayments” as a matter of law. *Id.* The Award’s failure to follow *Amtruck* is a clear legal error, which led to millions in profits for a party engaged in “deplorable”

⁹ Although Serpanok’s answering brief never distinguishes this holding of *Amtruck*, it also misstates the Award when claiming the Point Ruston Parties “saved millions of dollars by choosing to subcontract with Serpanok for the two buildings.” Opp. Br. at 4. In truth, the Award said only that “Respondents **initially** saved millions by choosing to contract with Serpanok”—without discussing the final (and far higher) price. CP 2745.

acts. CP 2747. On account of this legal error, the Court should hold that *Amtruck* requires it to vacate the Award and that a new award should be issued that applies *Amtruck*'s holding.

2. The Award's Failure to Apply the Correct "Grow Out Of" Standard Is a Legal Error on the Face of the Award.

a. The Award Found Serpanok Engaged in Illegal Conduct.

Serpanok's answering brief repeatedly mischaracterizes the Award, which never applied (or even mentioned) the correct legal standard that bars Washington courts from enforcing a contract that "grows immediately out of and is connected with an illegal act." *Golberg v. Sanglier*, 96 Wn.2d 874, 879, 639 P.2d 1347 (1982). Keenly aware that the Award applied the wrong legal standard, Serpanok's answering brief claims the Award found Serpanok's "contracts were untainted by any alleged kickback scheme," Opp. Br. at 2, "untainted by fraud or illegality," *id.* at 2, "separate and independent," *id.* at 7, and "collateral and severable." *Id.* at 17. The Award determined no such thing.¹⁰ In reality, the Award's factual findings showed

¹⁰ Likewise, despite what Serpanok suggests in its answering brief, the Award did not find that the Point Ruston Parties knew about—or approved—Serpanok's kickbacks to Hutchinson. For example, Serpanok claims that the Point Ruston Parties' "management team investigated Hutchinson's misconduct and fired Hutchinson in November 2015." Opp. Br. at 4. As confirmed by the actual language of the Award, Mr. Cohen fired Hutchinson after learning he had approved "change orders that imperiled the Project's continued bank financing"—not that Hutchinson had approved those change orders in response to kickbacks from Serpanok. CP 2745–2746. The Award also found "that Serpanok's improper payments provided Mr. Hutchinson with substantial encouragement and assistance in breaching his fiduciary duties to his principals, and that during

Serpanok's contracts grew out of and were connected with illegal acts, because Serpanok paid Mr. Hutchinson \$80,000:

for the improper purpose of attempting to procure favorable **change order** accommodations, [to] induce Hutchinson to share confidential PR information improperly with Serpanok, and [to] assist Serpanok in submitting change order pricing estimates **on the two PR subcontracts** based in part on such improperly-disclosed confidential information, or for the purpose of rewarding Mr. Hutchinson for his reports that he had engaged or would engage in such conduct.

CP at 1171.¹¹ The Award confirms these kickbacks were illegal in two different ways: **First**, "Serpanok's improper payments provided Mr. Hutchinson with substantial encouragement and assistance in breaching his fiduciary duties to his principals." CP 2758. It is indisputable that contracts encouraging such a breach of fiduciary duty are illegal and void. *Maryland Casualty Company v. City of Tacoma*, 199 Wash. 72, 82-83 (1939). **Second**,

the relevant two-year period the principals did not consent to or ratify those breaches of fiduciary duty." CP 2758.

¹¹ Elsewhere in the Award, the Arbitrator used "collateral" as a stray word to indicate that "Mr. Hutchinson was not a party" to the subcontracts he executed on behalf of the Point Ruston Parties. CP 2765. Nonetheless, the Award's express finding that Serpanok paid \$80,000 in an attempt to procure "favorable change order accommodations" and "change order pricing estimates on the two PR subcontracts" forecloses any attempt to suggest that Serpanok's kickbacks can be severed from its construction subcontracts. CP 1171.

the Award’s factual findings establish that Serpanok violated every element of Washington’s commercial bribery statute, RCW 9A.68.060.¹²

b. Despite Finding Serpanok Engaged in Illegal Conduct, the Award Never Considered Whether the Contracts Grew Out of That Conduct.

While the Award held the construction subcontracts themselves were not illegal, it never applied the correct legal standard and evaluated whether the contracts grow out of and were connected with Serpanok’s illegal acts. *Golberg*, 96 Wn.2d at 879. In other words, “the issue is not whether the ... agreements are illegal; rather, it is whether the existence of an illegal kickback scheme renders the ... agreements void and unenforceable.” *Amtruck*, 59 Wn. App. at 21.

Despite Serpanok’s claims in its answering brief, Opp. Br. at 18–19, the “grow out of” standard is much broader than inducement or proximate cause. Contracts are tainted by illegal conduct regardless of whether they are “proximately caused” or “induced” by a kickback. In the seminal case *Reed v. Johnson*, the Washington Supreme Court explained that “**[t]he least taint of illegality or want of equity** will preclude” enforcement of contracts related to the breach of fiduciary duties. 27 Wash. 42, 50, 67 P. 381 (1901).

¹² The Award found Serpanok “confer[red] ... a pecuniary benefit,” *see* RCW 9A.68.060, through the “approximately \$80,000” that it “paid to Mr. Hutchinson.” CP 2758. According to the Award, Serpanok deliberately gave “substantial encouragement and assistance” to Hutchinson’s breach of fiduciary duties, which Serpanok “actually knew” that he owed. CP 2758. Thus, the Award showed that Serpanok paid Mr. Hutchinson \$80,000 “under a request, agreement, or understanding that the trusted person will violate a duty of fidelity or trust.” RCW 9A.68.060.

Describing the “grow out of” standard in a more recent case, this Court explained:

The test of public policy is not what the parties did or contemplated doing in order to carry out their agreement, or even the result of its performance; it is whether the contract as made has a “tendency to evil,” to be against the public good, or to be injurious to the public.

Golberg, 27 Wn. App. at 191.¹³

Courts have repeatedly applied the “grow out of” standard in a manner far broader than proximate cause. For example, it is irrelevant whether kickbacks are the cause of a contract or a reward for past acts. *GMB Enterprises, Inc. v. B-3 Enterprises, Inc.*—a significant case, which Serpanok simply ignores—held that an earlier bank loan was tainted by improper benefits given to a bank employee three months after the loan was made. 39 Wn. App. 678, 683–84, 695 P.2d 145 (1985). Similarly, *Amtruck* recognized that a contract is tainted by kickbacks even after a contract is signed, excoriating bribes not just to **obtain**, but “to **retain** a customer’s business.” 59 Wn. App. at 15. Likewise, *Morgan* found it irrelevant that a corrupt employee received payments **after** approving a purchase agreement,

¹³ The Court applied the same standard in *Marshall v. Higginson*, which held a release of liability in exchange for court testimony was illegal and void. 62 Wn. App. 212, 217, 813 P.2d 1275 (1991). The Court also rejected a key contention in Serpanok’s answering brief, holding it is irrelevant whether “other consideration supports the agreement.” *Compare Higginson*, 62 Wn. App. at 217; *with* Opp. Br. at 19–20 (arguing, contrary to *Higginson*, that the Court should ask whether Serpanok’ contracts were “supported by independent consideration”).

because a kickback scheme still shows a “blatant disregard” for the employee’s fiduciary duties. 440 So.2d at 1294.

Serpanok also failed to distinguish this Court’s decision in *State v. Pelkey*, 58 Wn. App. 610, 615, 794 P.2d 1286 (1990), which involved Washington’s general bribery statute, RCW 9A.68.010. *Pelkey* confirms that an illegality defense does not require damages or proximate cause. The only thing that the bribe in *Pelkey* “proximately caused” was the arrest of a woman who tried to bribe a police officer. *Id.*¹⁴ *Pelkey* also confirms that criminal statutes bar civil claims—even without a conviction. In *Pelkey*, the criminal bribery charges were dismissed, but the Court held that RCW 9A.68.010 **still barred the bribing party from asserting civil claims.**¹⁵

c. Serpanok’s Attempts to Avoid the Grow Out Of Standard Are Unavailing.

Serpanok makes several attempts in its answering brief to avoid application of the “grow out of” standard. Each must be rejected.

First, Serpanok relies on misleading quotations from WILLISTON ON CONTRACTS and *Maryland Cas. Co.*, 199 Wn. at 83, to argue that it can enforce the fruit of its illegal acts because the elements of Serpanok’s breach

¹⁴ To parrot words that Serpanok used for its own misconduct in lower court briefing, *Pelkey* involved “attempted kickbacks, but ... nothing in return, a *quid pro no.*” CP 1204.

¹⁵ Here, the Point Ruston Parties similarly request that this Court confirm that the commercial bribery statute, RCW 9A.68.060, also bars the bribing party from asserting civil claims.

of contract claim do not require proof that Serpanok engaged in illegal activity. Opp. Br. 19–21. WILLISTON ON CONTRACTS actually **criticized** Serpanok’s version of the ‘grow out of’ test, stating it is only true if “[f]ramed in the negative,” because “[e]ven when the plaintiff’s case can be established without indicating anything unlawful, proof is admissible to show that the plaintiff is endeavoring to enforce an obligation which is part of, or so closely connected with, an unlawful plan that recovery is opposed to public policy.” WILLISTON ON CONTRACTS, *Apparently legal contract that is connected with illegal scheme or plan—Test of proximity to illegal transaction* 8 § 19:12 (4th ed).¹⁶ This rule makes sense: a plaintiff does not need to prove it paid kickbacks when suing a defendant for breach of contract; it is the defendant who must prove the plaintiff engaged in illegal conduct to prevail on its affirmative defense. Nonetheless, the Court must **always** consider whether “the plaintiff is endeavoring to enforce an obligation which is part of, or so closely connected with, an unlawful plan that recovery is opposed to public policy.” *Id.*¹⁷

¹⁶ WILLISTON ON CONTRACTS also rejected a strict proximate cause standard for illegality, explaining that “the line of proximity between the contract at issue and an alleged illegal plan or transaction will vary somewhat according to the gravity of the evil sought to be prevented.” *Id.*

¹⁷ Serpanok also distorts *Maryland Casualty Co.* in its answering brief, which discusses the Court’s description of the plaintiff’s **allegations** that one partner “induced” another, “unknowing partner” into a contract by concealing a secret side deal. *Compare* Opp. Br. at 20; *with* 199 Wn. at 78. First and foremost, the Court enforced the disputed contract because it found the plaintiff knew about the supposedly “secret” transaction—its ruling had nothing to do with ratification or inducement. *Id.*

Second, Serpanok argues that “Cohen’s ratification rendered the contract documents enforceable,” by approving certain change orders after Hutchinson was fired and by occupying the buildings where Serpanok had worked under Mr. Hutchinson’s conflicted supervision. Opp. Br. at 24.¹⁸ That is impossible. Because “[t]he nonenforcement of illegal contracts is a matter of common public interest, ... a party to such contract cannot waive his right to [assert] the defense of illegality in an action thereon by the other party.” *Reed*, 27 Wash. at 55.¹⁹ In suggesting that the Point Ruston Parties somehow ratified Serpanok’s illegal acts, Serpanok badly distorts *Kessler v. Jefferson Storage Corp.*, which actually says the opposite of what Serpanok claims. 125 F.2d 108 (6th Cir. 1941). According to *Kessler*: “[i]t is a well established rule that a contract against public policy **cannot** be made valid

¹⁸ Although based on a legal error, the Award’s conclusions about ratification are also inconsistent with its factual findings. The Award acknowledges that by the time of “Mr. Hutchinson’s departure in November 2015,” CP 2745, Serpanok had **already** “completed its work under the Building 1A subcontract.” CP 2756. Occupying a finished building does not ratify illegal acts. See *Bariel v. Tuinstra*, 45 Wn.2d 513, 524, 276 P.2d 569 (1954) (holding a fraudulent party was “in no position to complain [about ratification] because appellant continued to operate the dairy farm in order to preserve the fruits of the litigation for the prevailing party when he had no choice but to do just that.”).

¹⁹ See also *Sherwood & Roberts-Yakima, Inc. v. Leach*, 67 Wn.2d 630, 639, 409 P.2d 160 (1965) (“The nonenforcement of illegal contracts is a matter of common public interest, and a party to such contract **cannot** waive his right to set up the defense of illegality in an action thereon by the other party.”) (emphasis added); *In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 468 (E.D.N.Y. 2007) (“[I]f the contract was secured through bribery, it was **incapable** of ratification.”) (emphasis added).

by ratification; and it has been said that where the object or tendency of a contract is to constitute a breach of duty on the part of one who stands in a confidential or fiduciary relation, it is illegal and void, as tending to be, or being, a fraud on third persons.” 125 F.2d at 110 (emphasis added).

Finally, Serpanok claims any misapplication of the governing standard is irrelevant because the Arbitrator has authority to craft whatever remedy he sees fit. But an arbitrator does not have the “discretion” to “craft an equitable remedy” prohibited by Washington law. Opp. Br. at 27–29. Awards are only enforced by the courts, and once “the defense of illegality ... [is uncovered], it becomes the duty of the court to refuse to entertain the action.” *Reed*, 27 Wash. at 55. Washington courts will respect valid arbitration awards, but “like any contract, an arbitration decision ... can be vacated if it violates public policy.” *Int’l Union of Operating Engr’s v. Port of Seattle*, 176 Wn.2d 712, 721, 295 P.3d 736 (2013).

The Court’s duty to vacate the Award here is precisely like *Kennewick Education Association*, which explained “it would be a strange situation, indeed, where an arbitrator would be allowed to fashion punitive damages and for this Court—which could not, had this matter been heard by a Court—could not [*sic*] have awarded punitive damages, and this Court then affirm an arbitrator’s award of punitive damages.” 35 Wn. App. at 282 (an arbitrator’s discretion cannot be employed for the “adoption of an erroneous rule, or mistake in applying the law”). Serpanok’s only relevant authority, *Equity Grp., Inc. v. Hidden*, simply followed *Kennewick*, without

suggesting arbitrators can award remedies prohibited by Washington law. 88 Wn. App. 148, 159, 943 P.2d 1167 (1997). Washington law does not allow an Arbitrator to enforce contracts that grow out of and are connected with illegal acts, and RCW 7.04A.230 requires this Court to vacate the Award.²⁰

3. The Court Should Recognize a Public Policy Tort Based on Washington’s Commercial Bribery Statute.

The Court should respond to the Arbitrator’s request for judicial guidance by recognizing a public policy tort based on Washington’s commercial bribery statute. As explained above, the Award’s findings confirm that Serpanok violated every element of commercial bribery under RCW 9A.68.060(2).²¹ Just as in *Federated Servs. Ins. Co. v. Norberg*, the

²⁰ Serpanok also misstates the law when arguing that only an arbitrator can determine whether a contract grows from illegal acts. Opp. Br. at 16. Serpanok’s cases, *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 456, 268 P.3d 917 (2012), and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 440, 126 S. Ct. 1204 (2006), discuss only who determines whether a claim is subject to arbitration in the first instance. They are irrelevant to judicial review of an arbitration award. Moreover, the Washington Supreme Court recently rejected Serpanok’s position, holding that “where unconscionable provisions pervade an arbitration agreement, the entire agreement should be invalidated.” *Burnett v. Pagliacci Pizza, Inc.*, 470 P.3d 486 (Wash. 2020).

²¹ Serpanok’s answering brief misstates the Award, which never found “Serpanok committed no crime,” Opp. Br. at CP 17, and instead held only that RCW 9A.68.060 should be “enforced by prosecutorial officials rather by private arbitral tribunals hearing construction disputes.” CP 2760. Furthermore, the Point Ruston Parties waived nothing by focusing their appellate brief on the most egregious errors in the Award, rather than the Superior Court’s exercise of its discretion not to refer Serpanok for criminal prosecution. See RAP 2.4(b) (allowing review of every trial court order that

Arbitrator plainly deferred to this Court for guidance about a public policy tort for commercial bribery. 101 Wn. App. 119, 125, 4 P.3d 844 (2000). Serpanok attempts to distinguish *Norberg* by claiming that the Award “needed no judicial guidance to reject Cohen’s legally unsupportable request to create a new tort.” Opp. Br. at 26 n.6. But, in reality, the Arbitrator specifically found he could not grant relief “until the courts have resolved this issue more clearly,” and that “[t]his uncertainty is appropriately a matter for the courts of this state, rather than a private arbitrator, to resolve.” CP 1173. Serpanok misconstrues the holding of *Norberg*, which recognizes that when “arbitrators chose not to shield from judicial scrutiny the component of their decision that they recognized as a novel legal issue, ... there is an issue of law apparent on the face of the award, making it a proper subject of a motion to vacate.” 101 Wn. App. at 125.

Just as in *Becker v. Community Health Systems, Inc.*, 184 Wn.2d 252, 260–61, 359 P.3d 746 (2015), the Point Ruston Parties have presented a “compelling case for protection under a public policy tort.”²² Florida courts

“prejudicially affects the decision designated in the notice”); *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984) (“An appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment.”); *Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986) (“[W]here the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, [this court] will consider the merits of the challenge.”).

²² Serpanok attempts to limit the principles of *Becker*, 184 Wn.2d 252, to “well-established” public policies like Washington laws against wrongful

have already recognized that the common law permits victims of commercial bribery to assert tort claims against a party who pay kickbacks “for any profit he derived from the transaction.” *See, e.g., Morgan*, 440 So.2d at 1295. This Court has already followed *Morgan* once before. *See Amtruck*, 59 Wn. App. at 15 (citing *Morgan* and stating “we agree with the rationale of these cases ...”). The Court should now follow *Morgan* a second time and hold that Washington law also allows victims of commercial bribery to assert a public policy tort for the disgorgement of profit from illegal acts.

C. The Superior Court Should Have Entered Judgment Awarding Mr. Cohen His Attorneys’ Fees and Sanctions Against Serpanok.

1. Mr. Cohen Is Entitled to an Award of His Attorneys’ Fees Below.

Serpanok’s answering brief does not cure the facial legal errors that led the Arbitrator to deny attorneys’ fees to Mr. Cohen. The Award reached two different, inconsistent conclusions about a single paragraph in the contract’s arbitration clause, which requires both mandatory arbitration and an award of attorneys’ fees to the prevailing party. *See* CP 2770 (quoting § 16.1 of the construction subcontracts in full). Like the Superior Court before it, *see* CP 220, the Award found that this provision required mandatory arbitration of Serpanok’s conversion claim against Mr. Cohen

termination. Opp. Br. at 26. This argument is insufficient, because Washington’s public policy has condemned commercial bribery since at least 1901. *See Reed*, 27 Wash. at 50–51 (condemning kickbacks to employees in charge of designating railroad depots).

because it was a “dispute[] ‘concerning this Agreement’ within the meaning of the relevant arbitration clauses.” CP 2741. But elsewhere in the Award, the Arbitrator reached the inconsistent conclusion that “Mr. Cohen is not subject to the Section 16.1 ‘one party’ fee-shifting procedure because he is not a party to the subcontracts, and also is not a party to the Notes.” CP 2863. That “internal inconsistency amounts to an error of law on the face of the award.” *Tolson*, 108 Wn. App. at 498–99.

The Award found that Mr. Cohen “prevailed on [Serpanok’s] claim of tortious conversion, the only claim asserted against him.” CP at 1185. As an entirely successful defendant who asserted no claims of his own, this means that Mr. Cohen is a prevailing party against Serpanok as a matter of Washington law. *See Agnew*, 33 Wn. App. at 283. *Agnew* involved a facial error just like the one in the Award, as the award in *Agnew* denied attorneys’ fees to an entirely successful defendant, even though the contract said the prevailing party “shall be entitled to reasonable attorneys’ fees.” *Id.* at 285. The Court held that the arbitrator’s failure to award fees required it to vacate the award, explaining that “because the parties agreed on the matter prior to arbitration, there was nothing left for the arbitrators to decide except the amount.” *Id.* at 288.

Likewise, because the Award in this case shows the Arbitrator was contractually required to award the prevailing party his “actual attorneys’ fees and costs,” CP 2770, the Court should remand with instructions for the Arbitrator to decide the amount of reasonable fees to which Mr. Cohen is

entitled. Although the Arbitrator believed that the “work done on the other issues litigated this case” was greater than the work required for Mr. Cohen, that does not provide the Arbitrator with the “discretion” to outright deny Mr. Cohen his entitlement to fees. CP 2772. “The question of whether or not attorney’s fees should be awarded to the prevailing party was not an issue submitted to the tribunal for arbitration with the other claims and disputes; having already been decided by the parties by agreement, it was not arbitrable.” *Agnew*, 33 Wn. App. at 288.

Serpanok’s response—that Mr. Cohen only prevailed on “a tort claim,” Opp. Br. at 30, is contrary to binding precedent. “Under Washington law, for purposes of a contractual attorneys’ fee provision, an action is on a contract if the action arose out of the contract and if the contract is central to the dispute.” *Seattle First Nat. Bank v. Washington Ins. Guar. Ass’n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). The face of the Award confirms both of these factors are met. The Arbitrator and Superior Court both found that the construction contract was central to the claim for conversion, making it inconsistent—and facial error—for the Award to deny Mr. Cohen his right to fees. CP 220 (declaring the conversion claim “tied directly to the performance of the contract in that it concerns equipment used in the performance of the contract”); CP 2741 (declaring the conversion claim “inextricably intertwined” with the subcontracts).

Serpanok relies on a distorted reading of *Mainline Rock & Ballast* to suggest that two judges in that Division III panel “questioned the analysis” behind *Agnew*. 8 Wn.App.2d at 617. In fact, Division III distinguished *Agnew* because the award at issue in *Mainline Rock & Ballast* did not identify “any contract provision demanding that the prevailing party be awarded reasonable attorney fees and costs,” both parties prevailed on some issues, and it felt *Agnew* had gone “behind the arbitration award and engaged in contract analysis.” *Id.* at 616–17. But that is irrelevant to **this** case, where the Award directly quotes the contracts’ Section 16.1 in full, found Mr. Cohen entirely prevailed on “the only claim asserted against him,” and reveals the legal errors on its face. CP 1185, CP 2770. Thus, this Court should vacate and remand the Award with instructions for the Arbitrator to determine the reasonable amount of Mr. Cohen’s fees.

2. The Point Ruston Parties—Not Serpanok—Are Entitled to Attorneys’ Fees on Appeal.

Serpanok’s answering brief does not deny that the Point Ruston Parties will be entitled to attorneys’ fees, for all the reasons identified in their opening brief, if they prevail in this appeal. Moreover, Serpanok’s competing request for fees reveals precisely why the Award erred in denying fees to Mr. Cohen. If Serpanok is correct that all four Point Ruston Parties—including Mr. Cohen—could be liable for “fees on appeal under ... the parties’ contracts,” Opp. Br. at 35, then those same contracts also entitle Mr. Cohen to recover fees as the prevailing party below. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009)

(explaining that RCW 4.84.330 makes all “unilateral contract provisions bilateral”). The Court should vacate the Award and order that all four Point Ruston Parties are entitled to their fees on appeal.

3. The Superior Court Erred In Denying Mr. Cohen Any Portion of the \$500,000 in Sanctions Awarded Jointly Against Serpanok.

In entering final judgment in this matter, the Superior Court erred in applying all \$500,000 of the sanctions award, which all four Defendants were jointly awarded for Serpanok’s “spoliation and discovery abuse,” (CP at 1188–90), as an offset against Century Condominiums, LLC. Denying any portion of this Award to Mr. Cohen modified, rather than confirmed, the Award, without a permissible basis for modification under the limited grounds in RCW 7.04A.240.

In an attempt to conceal the gravity of its spoliation, Serpanok’s Answering Brief relegates the \$500,000 sanction to a footnote designed to minimize the severity of its misconduct. Serpanok claims the Point Ruston Parties ultimately “expressed satisfaction” with what they uncovered halfway through the arbitration hearing. Opp. Br. at 9 n.3. In reality, the Point Ruston Parties showed that Serpanok’s misconduct damaged the integrity of the arbitration hearing and resoundingly proved that Serpanok’s kickbacks were not “legitimate payments made to compensate Mr. Hutchinson for ‘moonlighting’ work for Serpanok on unrelated projects.” See CP 2758; CP 2456–60. In contrast to the misstatements in Serpanok’s answering brief, Arbitrator Brewer found that Serpanok’s spoliation was

“accurately described in Respondents’ Post-Hearing Brief,” which details egregious and deliberate evidence tampering. CP at 1174.

Serpanok attempts to minimize its misconduct, claiming that the Arbitrator found its destruction, alteration, and concealment of records “did not warrant an adverse inference of fraudulent intent against Serpanok.” Opp. Br. at 9 n.3. In fact, the Award found it was unnecessary to infer that Serpanok intended to commit fraud—because the evidence already proved Serpanok’s fraudulent intent. CP 2747–8 n.3 (“The requested inference would go to Mr. Kunitsa’s/Serpanok’s intent and would not tend to prove or disprove the different points on which I find the evidence to have been lacking – namely, whether Counterclaimants proved actual and reasonable reliance and ‘consequent damage.’”). Likewise, there is nothing in the record to suggest that “Serpanok had produced the primary-source payment documents” in discovery, Opp. Br. at 9 n.3, which is both untrue and another attempt to obfuscate the magnitude of Kunitsas’ “improper[] and surreptitious[]” alteration of records. CP 2761.

Nor did the Award find that its \$500,000 sanction for spoliation “fully compensate[d] [the Point Ruston Parties] for all attorneys’ fees and other expenses reasonably incurred on account of the misconduct.” Opp. Br. at 9 n.3. Serpanok’s answering brief quotes **the standard** that the Arbitrator sought to follow since it was unnecessary to infer fraudulent intent. Nonetheless, the Award found it impossible to know the true extent of the harm caused by Serpanok, recognizing that a “substantial amount of

legal work could have been avoided if the spoliation and discovery abuse had not been committed by Claimant.” CP 2767–2768. The Award estimated that Serpanok’s spoliation forced Respondents’ attorneys to perform \$500,000 of unnecessary work, while finding there were substantial “difficulties inherent in making a more precise attribution.” CP 2768.

Serpanok asserts that the Point Ruston Parties’ arguments about the harm to Mr. Cohen are “made for the first time on appeal.” Opp. Br. at 32. Serpanok is wrong, as the Point Ruston Parties repeatedly raised the same arguments before the Superior Court. *See* RP 87:12–20 (“Mr. Cohen won the only claim against him, and there’s no reason why Mr. Cohen shouldn’t get paid \$500,000, or he could choose to have that applied against whatever claim he sees fit.”); RP 17:7–12 (“[E]quity allows the Point Ruston parties to apply the offsets in the manner that they see fit. Especially since Cohen was awarded \$500,000 of the offsets, he deserves a voice in how they’re applied.”).²³ The Superior Court’s failure to allocate even a portion of the \$500,000 sanction to Mr. Cohen was an abuse of discretion and

²³ Different court reporters applied the same page numbers to several different volumes of the Verbatim Report of Proceedings. To avoid confusion, these citations refer to the transcript of Superior Court hearings on February 21, 2020 and March 6, 2020. Evidence that the Point Ruston Parties preserved their appellate arguments is also included in a Supplemental Designation of Clerk’s Papers, dated September 16, 2020, which the Clerk has not yet numbered. *See* March 4, 2020 Declaration from Jack Krona at Ex. A, page 4 (“All of the Point Ruston Parties were awarded damages, which should be recorded in the final judgment. Serpanok’s proposed final judgment does not reflect that.”).

impermissibly modified the Award without any valid basis under RCW 7.04A.240.

Although Serpanok cites a number of cases in an attempt to block Mr. Cohen from receiving any of the sanctions award, none of Serpanok's authorities involved a court stripping recovery from one party and assigning it to another. *See Harrison v. Puga*, 4 Wn. App. 52, 64, 480 P.2d 247 (1971) (allowing two plaintiffs joint recovery against defendants); *Olmsted v. Mulder*, 72 Wn. App. 169, 182, 863 P.2d 1355 (1993) (offsetting a judgment and promissory note between the same set of parties); WILLISTON ON CONTRACTS, *Discharge of a joint right by a single obligee*, 12 § 36:20 (4th ed.) (discussing when two parties contract to assume the same debt). By contrast, there is nothing equitable about taking all recovery from one party, in favor of another. Because the Superior Court abused its discretion in failing to allocate any monetary award to Mr. Cohen, the Court should vacate the Judgments and allow the Point Ruston Parties to allocate the awards between those parties in the manner that they see fit.

III. CONCLUSION

For these reasons, and those in their opening brief, the Point Ruston Parties respectfully request that the Court vacate the Superior Court's order confirming and refusing to vacate the Award, and then remand this case with instructions that Arbitrator must apply the correct legal standards to the Point Ruston Parties' counterclaims and affirmative defenses.

Respectfully submitted this 24th day of September, 2020.

DLA PIPER LLP (US)

s/ Andrew R. Escobar

Andrew R. Escobar, WSBA No. 42793
David I. Freeburg, WSBA No. 48935
Lianna Bash, WSBA No. 52598
Chelsea Mutual, *admitted Pro Hac Vice*
701 Fifth Avenue, Suite 6900
Seattle, Washington 98104
Tel: 206.839.4800
Fax: 206.839.4801
E-mail: andrew.escobar@dlapiper.com
E-mail: david.freeburg@dlapiper.com
E-mail: lianna.bash@us.dlapiper.com
E-mail: chelsea.mutual@dlapiper.com

AND

LAW OFFICES OF JACK B. KRONA

s/ Jack. B. Krona

Jack B. Krona, WSBA No. 42484
6509 46th Street N.W.
Gig Harbor, Washington 98335
Tel: 253.341.9331
Fax: 253.752.7083
E-mail: j_krona@yahoo.com

*Attorneys for Defendants-Appellants
Point Ruston, LLC,
Point Ruston Phase II, LLC,
Century Condominiums, LLC, and
Michael Cohen*

CERTIFICATE OF SERVICE

I declare that on September 24, 2020, I caused a true and correct copy of the foregoing **Appellants' Reply Brief** to be served on the following in the manner indicated:

<p>Alan B. Bornstein, WSBA No. 14275 JAMESON PEPPLE CANTU, P.L.L.C. 801 Second Avenue, Suite 700 Seattle, Washington 98104-1515 Tel: 206.292.1994 Fax: 206.292.1995 E-mail: abornstein@jpcclaw.com E-mail: twaggoner@jpcclaw.com E-mail: kchapman@jpcclaw.com</p> <p><i>Attorney for Respondent Serpanok Construction, Inc.</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-mail <input checked="" type="checkbox"/> Via the Court's E-Service Device</p>
<p>Howard M. Goodfriend, WSBA No. 142355 Catherine W. Smith, WSBA No. 9542 SMITH GOODFRIEND, P.S. 1619 8th Avenue North Seattle, Washington 98109 Tel: 206.624.0974 E-mail: howard@washingtonappeals.com E-mail: cate@washingtonappeals.com E-mail: sarah@washingtonappeals.com</p> <p><i>Attorneys for Respondent Serpanok Construction, Inc.</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-mail <input checked="" type="checkbox"/> Via the Court's E-Service Device</p>

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 24th day of September, 2020.

s/ Alicia Morales

Alicia Morales, Legal Practice Specialist

DLA PIPER LLP (US)

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