

No. 346927

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION III  
SPokane, WA

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SVN CORNERSTONE, LLC, a Washington Limited Liability  
Company,

Respondent,

v.

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

Appellants.

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**BRIEF OF APPELLANTS N. 807 INCORPORATED, d/b/a  
BERKSHIRE HATHAWAY HOMESERVICES FIRST LOOK  
REAL ESTATE, KENNETH M. LEWIS AND MICHELLE S.  
LEWIS, AND HENRY SEIPP AND JANE DOE SEIPP**

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## **I. INTRODUCTION**

This appeal arises solely out of the commission earned by Appellant N. 807 Incorporated d/b/a Berkshire Hathaway HomeServices First Look Real Estate's ("Berkshire Hathaway") sale of the Timber Court Apartments, an apartment complex, commonly known as 2707 E. 37<sup>th</sup> Avenue, Spokane, Washington 99223, on or about January 20, 2016 ("the Property"). All parties to the present dispute are members of the Commercial Brokers Association ("CBA") which requires its members to submit all disputes involving commission to mandatory and binding CBA arbitration. Rather than submit its dispute to CBA arbitration, Cornerstone attempted to abrogate that binding arbitration agreement by filing a lawsuit against the Appellants.

In short, this is a dispute over commission subject to CBA arbitration. Had the commission not been earned, or had the commission been earned by Cornerstone, the parties would not be here today. Therefore, this Court should reverse the trial court's ruling, grant the motion to compel, and dismiss Cornerstone's lawsuit because Cornerstone's claim to commissions earned by Berkshire Hathaway is subject to mandatory CBA arbitration.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignment of Error.**

The trial court erred in denying Appellants' Motion to Dismiss and Motion to Compel Arbitration by order entered on July 26, 2016.

### **B. Issues Presented.**

1. Whether the CBA bylaw requiring that all disputes involving commission is a valid and enforceable arbitration agreement when all of the parties voluntary joined the CBA, a professional commercial real estate organization? (Assignment of Error No. 1).

2. Whether the scope of the valid, enforceable arbitration agreement, requiring all disputes involving commission to be submitted to CBA arbitration, covers the parties' present dispute over the commission earned by Berkshire Hathaway from the sale of the Property? (Assignment of Error No. 1).

3. Should arbitration be compelled when a valid arbitration agreement exists and the parties' dispute falls within the scope of the arbitration agreement in light of Washington's strong presumption in favor of arbitrability under which all doubts should be resolved in favor of arbitration? (Assignment of Error No. 1).

4. When the broad scope of a valid arbitration agreement indisputably covers the parties' dispute, must arbitration be compelled when all claims asserted are inextricably intertwined and the gravamen of the lawsuit is a claim to commission? (Assignment of Error No. 1).

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background.**

##### **A. Berkshire Hathaway Executed an Exclusive Listing Agreement, Sold the Property, and Earned Commission from the Sale of the Property.**

In 2015, Berkshire Hathaway procured the sale of the Property. (CP 392-393). Berkshire Hathaway and the seller executed an Exclusive Listing Agreement, entitling Berkshire Hathaway to a two percent commission for the sale of the Property. (CP 393). Just after the buyer and seller of the Property signed the Purchase and Sale Agreement, Respondent Cornerstone interjected itself into the closing of the sale of the Property. (CP 71; 393-394). Cornerstone proclaimed that it was entitled to the commission for the sale of the Property, despite its lack of any written agreement with the seller of the Property. *Id.*

Prior to the sale of the Property the seller contacted numerous commercial brokerage firms in the Spokane area and requested that these firms solicit informal offers for the sale of the Property. (CP 392-393). One of those firms was Cornerstone. *Id.* While working as a commercial broker for Cornerstone, Appellant Henry Seipp and Cornerstone's Managing Director, Matthew Byrd, worked to help the seller find a buyer. (CP 392-393; 328-329).

After receiving an offer on the Property that the seller rejected, Cornerstone forced Mr. Seipp to leave Cornerstone due its unethical practices, for reasons not relevant to the present appeal. (CP 392-394). Cornerstone terminated its relationship with Mr. Seipp on or about April 15, 2015, and then intentionally delayed returning Mr. Seipp's broker's license to the Department of Licensing until April 20, 2015. *Id.* On April 20, 2015, Mr. Seipp joined Berkshire Hathaway as a commercial real estate broker. *Id.*

After Mr. Seipp made the transition to Berkshire Hathaway, the seller executed the Exclusive Listing Agreement with Berkshire Hathaway. (CP 402-404). Prior to executing the Exclusive Listing Agreement, the seller had not committed to sell the property with any commercial brokerage, and had not agreed to provide any commercial brokerage with a commission for the sale of the

Property. Id.

On April 22, 2015, the seller accepted an offer on the Property of \$2,150,000. (CP 92-118). Months later, in October 2015, due to financing issues, the seller and the buyer executed a Rescission of Purchase and Sale Agreement, rescinding the April 2015 Purchase and Sale Agreement for the sale of the Property. (CP 139). In conjunction with the execution of the document rescinding the original Purchase and Sale Agreement for the sale of the Property for \$2,150,000, the buyer and seller executed a new Purchase and Sale Agreement on or about October 20, 2015, reflecting the new sales price, \$2,100,000, along with the new financing terms. (CP 120-137). Neither the original Purchase and Sale Agreement executed in April 2015, nor the entirely new Purchase and Sale Agreement executed in October 2015, mention Cornerstone, or any of its brokers. (CP 92-118; 120-137).

All of the parties to the present dispute are voluntary members of the Commercial Brokers Association (“CBA”). (CP 25-28). The CBA requires, and its members agree, to submit all claims between them involving commission to mandatory and binding CBA arbitration. (CP 32). The CBA bylaws state:

***It is the duty of the members of CBA (and each so agrees) to submit all controversies***

***involving commissions between or among them to binding arbitration by CBA pursuant to its then current arbitration rules and policies, rather than to bring a suit to law. The foregoing includes controversies which arose prior to one of the parties becoming a member. The term “commissions” as used above means commissions or fees arising from the real estate brokerage services as the same is now or in the future defined in RCW 18.85; together with interest and out-of-pocket costs or expenses related thereto and included commissions or fees actually paid, as well as commissions or fees lost as a result of the acts of another member.***

Id.

Rather than submit its claim over commission for the sale of the Property to arbitration, as required by the CBA's bylaws, and out of Cornerstone's animus for Mr. Seipp, Cornerstone filed a lawsuit in Spokane County Superior Court against Berkshire Hathaway, its owner Kenneth Lewis, his wife, Michelle Lewis, and its former commercial broker, Henry Seipp on April 29, 2016. (CP 3-13). Cornerstone claimed it is entitled to commission for the sale of the Property. Id. Specifically, Cornerstone claims damages in the amount of \$63,000, a three percent commission on the sale of the Property for \$2,100,000, as reflected by the new Purchase and Sale Agreement executed by the buyer and seller in October of 2015. Id. Cornerstone erred in commencing a lawsuit over the commission for the sale of the Property against Berkshire Hathaway, Mr. and

Mrs. Lewis, and Mr. Seipp because those claims are subject to the mandatory CBA arbitration clause. (CP 32).

The present dispute is a dispute over commission between two commercial brokerage firms, Cornerstone and Berkshire Hathaway; a dispute that is undoubtedly within the scope of the valid and binding CBA arbitration provision requiring its members to submit all disputes *involving* commission to CBA arbitration.

**B. The Commercial Brokers Association Requires That Its Members Submit All Disputes Involving Commissions to Binding CBA Arbitration.**

The CBA is a member-owned trade association that provides commercial real estate multiple listing services to its members. (CP 30-32; 189-190). Cornerstone, Berkshire Hathaway, Kenneth Lewis, and Henry Seipp are all members of the CBA. (CP 25-28). The CBA bylaws provide that:

***It is the duty of the members of CBA (and each so agrees) to submit all controversies involving commissions between or among them to binding arbitration by CBA pursuant to its then current arbitration rules and policies, rather than to bring a suit to law. The foregoing includes controversies which arose prior to one of the parties becoming a member. The term "commissions" as used above means commissions or fees arising from the real estate brokerage services as the same is now or in the future defined in RCW 18.85; together with interest and out-of-pocket costs or expenses***

*related thereto and included commissions or fees actually paid, as well as commissions or fees lost as a result of the acts of another member.*

(CP 32)(emphasis added). This provision unequivocally requires that all disputes between CBA members involving commission must be submitted to binding CBA arbitration rather than filing a lawsuit, even if the dispute arose prior to one of the parties becoming a CBA member. Id.

**B. Procedural Posture.**

On April 29, 2016, Cornerstone filed a lawsuit against the Appellants in Spokane County Superior Court asserting that it was entitled to a commission for the sale of the Property in the amount of \$63,000, three percent of the sale price of the Property as reflected by the Purchase and Sale Agreement executed in October of 2015. (CP 3-13). In response, Appellants filed a Motion to Dismiss and Motion to Compel Arbitration because all parties are members of the CBA which requires and its members agree to submit any dispute involving commission to mandatory and binding CBA arbitration. (CP 42-66). The case was assigned to Judge Annette Plese and the hearing on Appellants' Motion to Dismiss and Motion to Compel Arbitration was set for June 24, 2016. (CP 14; 67-69). The morning of the hearing Judge Plese

recused herself and the case was then assigned to Judge John Cooney. (CP 301-307). The hearing on the Appellants' Motion to Dismiss and Motion to Compel Arbitration was then set for July 26, 2016 (CP 308-313).

Cornerstone filed a Motion for Partial Summary Judgment asking the trial court to rule that Mr. Seipp breached his Independent Contractor Agreement with Cornerstone, and that the trial court find as a matter of law that Cornerstone is entitled to \$63,000, a three percent commission on the sale price of the Property as evidenced by the Purchase and Sale Agreement executed in October 2015. (CP 358-373). The hearing on that motion was heard on July 26, 2016, in conjunction with Appellants' Motion to Dismiss and Motion to Compel Arbitration. (VRP 1-24). The trial court denied both Appellants' Motion to Dismiss and Motion to Compel Arbitration and Cornerstone's Motion for Partial Summary Judgment. (CP 464-466; 495-497). Cornerstone filed a Motion for Discretionary Review and on November 30, 2016, this Court issued a written ruling staying consideration of that Cornerstone's Motion for Discretionary Review pending the outcome of Appellants' appeal.

At the time the trial court denied Appellants' Motion to

Dismiss and Motion to Compel Arbitration on July 26, 2016, no decision from the Supreme Court of Washington had been issued on Marcus & Millichap Real Estate Inv. Services of Seattle, Inc. v. Yates, Wood & MacDonald, Inc., 192 Wn. App. 465 (2016), the case that controls the outcome of this appeal. Subsequently, on August 3, 2016, a Special Department of the Washington State Supreme Court unanimously denied review of Division I's ruling in Marcus & Millichap Real Estate Inv. Services of Seattle, Inc. v. Yates, Wood & MacDonald, Inc., 192 Wn. App. 465, review denied, 185 Wn.2d 1041 (2016). Appellants timely filed the present appeal as a matter of right pursuant to RAP 2.2(a)(3).

#### **IV. SUMMARY OF ARGUMENT**

Washington public policy strongly favors arbitration. As such, Washington law requires that all disputes over the scope of an arbitration provision must be resolved in favor of arbitration. All parties to this lawsuit are voluntary members of the CBA. The CBA requires, and its members agree, that all disputes involving commission must be submitted to mandatory and binding CBA arbitration. It is undisputed that the CBA arbitration provision is a valid and enforceable arbitration agreement. Marcus & Millichap, 192 Wn. App. 465. Yet, in an attempt to avoid its agreement to

arbitrate all disputes involving commission, Cornerstone filed a lawsuit against the Appellants claiming that it is entitled to commission for the sale of the Property sold by Berkshire Hathaway. Consequently, Washington law mandates that this Court reverse the trial court's decision denying the Appellants' Motion to Dismiss and Motion to Compel Arbitration because Washington law requires that the present dispute over commission be submitted to CBA arbitration.

## **V. ARGUMENT**

### **A. De Novo Review.**

The appellate court engages in de novo review when the validity of an agreement to arbitrate is challenged. Marcus & Millichap, 192 Wn. App. at 473. “*The court shall decide whether . . . a controversy is subject to an agreement to arbitrate.*” RCW 7.04A.060(2). This is a “*threshold legal question*” that the court determines by “*examining the arbitration agreement without inquiry in to the merits of the dispute.*” Marcus & Millichap, 192 Wn. App. 474 (emphasis added).

When a motion is made pursuant to RCW 7.04A to compel arbitration, the court's only inquiries are whether the arbitration provision is valid and whether the present dispute falls within the

scope of that arbitration provision. RCW 7.04A.060, .070; see e.g., Marcus & Millichap, 192 Wn. App. at 472-473. Likewise, the Court has a duty to make these decisions, summarily. Id. When in doubt, Washington’s strong policy in favor of arbitration compels the Court to resolve disputes in favor of arbitration. Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula, 130 Wn.2d 401, 414 (1996). If the dispute can fairly be said to invoke a claim covered by the provision, the Courts inquiry must end. Heights at Issaquah Ridge v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 403 (2009).

**B. When Determining Whether a Dispute is Arbitrable, the Appellate Court Uses Familiar Summary Judgment Principles.**

The appellate court applies summary judgment principles to summarily decide whether a valid agreement to arbitrate exists. Marcus & Millichap, 192 Wn. App. at 472. In undertaking this inquiry, the court engages in an “*expedited process.*” Id. The court first considers “*affidavits, pleadings, discovery and stipulations’ submitted by the parties.*” Id. Next, “*the court determines whether material issues of fact are disputed and, if such factual disputes exist, it must conduct an expedited evidentiary hearing to resolve the dispute.*” Id. (internal quotations and punctuation omitted). An

evidentiary hearing is required only “*if the material facts necessary to determine the*” validity of an agreement to arbitrate “*are controverted, by an opposing affidavit or otherwise admissible evidence.*” Id. (internal quotations and punctuation omitted). If the material facts necessary to determine the validity of an agreement to arbitrate are undisputed, the court may resolve the issue on the record before it. Id.

A finding that a dispute is arbitrable is proper where there is no genuine issue of material fact. See CR 56. “*A material fact is one upon which the outcome of litigation depends.*” Tran v. State Farm Fire & Cas. Co., 136 Wn.2d 214, 223 (1998). In determining whether a genuine issue of material fact exists, the court assumes facts most favorable to the nonmoving party. Marcus & Millichap, 192 Wn. App. at 473. However, in order to defeat a motion to compel arbitration, the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions. Id. The nonmoving party “*may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.*” Id.

Here, the trial court erred in denying Appellants’ Motion to Dismiss and Motion to Compel Arbitration because the CBA

arbitration provision is a valid agreement to arbitrate the parties' dispute involving commission. *Marcus & Millichap*, 192 Wn. App. at 480. The scope of that provision requiring the parties to submit all disputes involving commission is broad and covers the present dispute over the commission for the sale of the Property. *Id.* at 481. There are no genuine issues of material fact; therefore, the Court can resolve the challenge on the record before it. This Court should reverse the trial court, compel arbitration, and dismiss Cornerstone's lawsuit.

**C. The Trial Court Erred When it Denied Appellants' Motion to Dismiss and Motion to Compel Arbitration.**

**i. The Commercial Brokers Association Bylaw's Arbitration Agreement is Valid as a Matter of Law.**

Washington's Uniform Arbitration Agreement ("UAA"), enacted in 2006, governs the validity of arbitration agreements entered into on or after January 1, 2006. RCW 7.04A.030(1)(a). The UAA provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." RCW 7.04A.060(1). When a party to an

arbitration agreement moves the court to compel arbitration, the court must proceed to summarily decide the issue. RCW 7.04A.070.

An express agreement to arbitrate is not required. Marcus & Millichap, 192 Wn. App. at 474. For over forty years, Washington courts have held that “[v]oluntary membership in a professional organization gives rise to a corresponding obligation to comply with that organization’s bylaws.” Id. at 469 (citing Keith Adams & Assoc., Inc. v. Edwards, 3 Wn. App. 623 (1970), disapproved of on other grounds by Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885 (2001)). And specifically, that voluntary membership establishes “assent to an arbitration agreement contained in that organization’s bylaws.” Id. at 475. Proof of membership in the organization is sufficient to establish a binding agreement to arbitrate. Id. at 469. “[A] signed agreement is not required.” Id.

For example, in Keith Adams, a dispute related to commission arose between a real estate broker and his brokerage over the sale of an apartment complex. Keith Adams, 3 Wn. App. at 624. The broker disagreed with his brokerage’s allocation of the commission paid on the sale. Id. Both the broker and the brokerage were voluntary members of the Tri-City Board of Realtors. Id. Thus, the broker filed a complaint with the board

pursuant to the Board's bylaws. Id. At the conclusion of the arbitration, the brokerage petitioned the superior court to vacate the arbitrator's award. Id. at 624-25. In response, the broker moved the court to dismiss the brokerage's petition and confirm the award. Id. at 625. The superior court granted the motion to dismiss and confirmed the arbitrator's award. Id. Thereafter, the brokerage appealed to this court, Division III. Id. This Court held that voluntary membership in the board constituted a binding agreement to arbitrate disputes pursuant to the board's bylaws. Id.

In Marcus & Millichap, Yates, Wood & MacDonald, Inc., ("Yates") a real estate brokerage firm, asserted that it was entitled to a portion of the commission earned by Marcus & Millichap Real Estate Investment Services of Seattle, Inc. ("Marcus & Millichap"), a real estate brokerage firm, that had an exclusive listing agreement to sell an apartment complex. Id. at 469-70. Both of the real estate brokerage firms were members of the Commercial Brokers Association. Id. at 470. Yates initiated arbitration proceedings against Marcus & Millichap seeking one-half of the commission earned by Marcus & Millichap on the sale of the property. Id. at 471. Before CBA arbitration commenced, Marcus & Millichap filed a

complaint for declaratory relief claiming that no arbitration agreement existed between the parties. *Id.* The parties then filed cross-motions for relief. *Id.* Marcus & Millichap moved to stay arbitration and Yates filed a motion to compel arbitration. *Id.* The superior court found a valid arbitration agreement, granted Yates' motion to compel arbitration and dismissed the lawsuit. *Id.* Applying the holding of Keith Adams, the Marcus & Millichap court held that the “***CBA bylaw provision constitutes a valid and enforceable arbitration agreement between the parties . . .***” *Id.* at 480 (emphasis added). Division I affirmed the trial court's ruling. *Id.* at 482. And, the Supreme Court of Washington denied review of that decision. Marcus & Millichap, 192 Wn. App. 465, review denied, 185 Wn.2d 1041 (2016).

Here the same CBA bylaw provision mandating arbitration of disputes involving commission is at issue:

*It is the duty of the members of CBA (and each so agrees) to submit all controversies involving commissions between or among them to binding arbitration by CBA pursuant to its then current arbitration rules and policies, rather than to bring a suit to law. The foregoing includes controversies which arose prior to one of the parties becoming a member.*

(CP 30-32). All of the parties to the present dispute are voluntary CBA members. (CP 25-28). Thus, as held by Marcus & Millichap,

the CBA arbitration agreement is valid and enforceable between the parties who are all voluntary CBA members. *Marcus & Millichap*, 192 Wn. App. at 480.

**ii. Washington Public Policy Favors Arbitration.**

***“Washington courts apply a strong presumption in favor of arbitrability and doubts should be resolved in favor of coverage.”*** *Marcus & Millichap*, 192 Wn. App. at 474. (internal quotations and punctuation omitted)(emphasis added). *“If the dispute can **fairly** be said to invoke a claim covered by the agreement, any inquiry by the courts must end.”* *Id.* (quoting *Heights at Issaquah Ridge, Owners Ass’n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 403 (2009)(emphasis added)). Furthermore, *“[i]f the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration.”* *Id.* at 480 (quoting *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 881 (2009)(citing RCW 7.04A.060(2), (3)), *aff’d* on other grounds, 173 Wn.2d 451 (2012)). *“An order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of **an** interpretation that covers the dispute.”* *Id.* (emphasis in original)(quoting *Council of Cty. & City*

Emps. v. Spokane County, 32 Wn. App. 422, 424-25).

***“Washington’s strong presumption in favor of arbitrability commands that all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.”*** Id. (quoting Council of Cty. & City Emps., 32 Wn. App. at 424-25)(internal quotations omitted)(emphasis added).

Here, the arbitration provision at issue provides that “[i]t is the duty of the members of CBA (and each so agrees) to submit all controversies involving commissions between or among them to binding arbitration by CBA pursuant to its then current arbitration rules and policies, rather than to bring a suit to law..” (CP 30-32). Undoubtedly, the current dispute between the parties can fairly be said to invoke a claim covered by the CBA arbitration provision because the parties dispute arises over the commission for the sale of the Property. (VRP 20-21). Likewise, the CBA arbitration provision does not expressly negate or by clear implication remove the parties dispute from its scope. (CP 30-32). And, the CBA arbitration is not susceptible of an interpretation that would take the dispute outside of its scope because the parties’

dispute involves commission. Therefore, Washington public policy demands that the parties dispute must be submitted to CBA arbitration.

**iii. The Scope of the Arbitration Agreement Encompasses the Parties' Dispute Because The Parties' Dispute Involves Commission.**

The parties' dispute arises out of the commission earned from the sale of the Property; therefore, the entirety of the dispute must be submitted to CBA arbitration. *"If the court finds as a matter of law that the arbitration clause is enforceable, **all issues covered by the substantive scope of the arbitration clause must go to arbitration.**"* *Id.* at 480 (quoting Townsend, 153 Wn. App. at 881)(finding that there is no bar in Washington to the arbitration of tort claims, as long as the language in the arbitration clause does not preclude it)). The burden of proof is on the party seeking to avoid arbitration. Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 302 (2004).

*"If any doubts or questions arise with respect to the scope of the arbitration agreement, the agreement is construed in favor of arbitration, unless the reviewing court is satisfied the agreement cannot be interpreted to cover a particular dispute."* Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 456

(2002). As set forth above, “[a]n order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of **an** interpretation that covers the dispute.” *Id.* (emphasis in original)(quoting Counsel of Cty. & City Emps., 32 Wn. App. at 424-25). “**Washington’s strong presumption in favor of arbitrability commands that all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.**” *Id.* (quoting Council of Cty. & City Emps., 32 Wn. App. at 424-25)(internal quotations omitted)(emphasis added).

Having found a valid agreement to arbitrate, the Marcus & Millichap court found that the arbitration provision covered the dispute at issue there – a dispute over commissions from the sale of a commercial property – because “**the language of the CBA arbitration provision is broad.**” *Id.* at 481 (emphasis added). The CBA bylaws, the same bylaws at issue here, provide that “[i]t is the duty of the members of this Association (and each so agrees) to submit all controversies involving commissions between or among them to binding arbitration . . . rather than to bring a suit to law.” *Id.* at 471; (CP 30-32). There, the court

asserted that the dispute fell squarely within the language of the bylaw arbitration provision because the claim involved a commission-related controversy. *Id.* at 481.

The property at issue in that case was never listed with the CBA and the CBA had no involvement in the sale. *Id.* at 481. The Marcus & Millichap court found this fact inconsequential as the CBA arbitration provision was not so limited. *Id.* The CBA arbitration provision “contains no requirement that the commission dispute involve the CBA or its multiple listing services.” *Id.*

Consequently, here, Cornerstone’s alleged claims against the Appellants fall squarely within the language of the CBA bylaw arbitration provision because the entire lawsuit revolves around one central allegation: “Cornerstone lost the opportunity to obtain a **commission** of 3% of the gross sale price of \$2,100,000 for the Property, which would have been the principal amount of \$63,000.” (CP 8)(emphasis added). Furthermore, as set forth above, all questions upon which the parties disagree are presumed to be within the arbitration provision unless negated expressly or by implication.

Here, none of Cornerstone's alleged claims against the Appellants are expressly or implicitly negated. From the face of Cornerstone's Complaint it is abundantly clear that all of the alleged claims arise out of Cornerstone's alleged right to a portion of the commission from the sale of the Property. (CP 3-13). Therefore, this Court must dismiss Cornerstone's Complaint with prejudice as its alleged claims all revolve around its alleged right to three percent commission for the sale of the Property and are subject to mandatory and binding CBA arbitration.

Just like the commission dispute in Marcus & Millichap, here, Appellants entered into an exclusive listing agreement with the seller of the Property. (CP 5). Likewise, Appellants did not list the property with the CBA. (CP 202). And, just as in Marcus & Millichap, a third party, Cornerstone, asserts a right to the commission for the sale of the Property. (CP 190-191). Cornerstone alleges it is entitled to any commission earned by Berkshire Hathaway from the sale of the Property. *Id.* Consequently, Marcus & Millichap controls the outcome of this case, as the nearly indistinguishable case, exactly on point with the present commission dispute. The CBA bylaw arbitration provision is valid and its broad scope covers the present dispute

involving commission. Therefore, arbitration must be compelled and Cornerstone's lawsuit should be dismissed.

**iv. The Trial Court Further Erred When it Considered the Merits of the Parties' Dispute.**

The trial court unequivocally found that “[t]his matter arises out of a loss of commission.” (VRP 20)(emphasis added). Yet, in error, it went on to consider the merits of the myriad of causes of action Cornerstone lodged against Appellants. (VRP 20-21). “Courts resolve the threshold issue of arbitrability of the dispute by examining the arbitration agreement **without inquiry into the merits of the dispute**. If the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end.” Heights at Issaquah Ridge, 148 Wn. App. at 403 (emphasis added). As set forth herein, in determining whether parties agreed to arbitrate a particular dispute, the court is guided by four principles: “(1) the duty to arbitrate arises from the contract; (2) a question of arbitrability is a judicial question unless the parties clearly provide otherwise; (3) a court should not reach the underlying merits of the controversy when determining arbitrability; and (4) as a matter of policy, courts favor

*arbitration of disputes.” Mendez, 111 Wn. App. at 455-56 (emphasis added).*

To be subject to arbitration, the claims in the complaint need only “*touch matters*” covered by the arbitration agreement. Wiese v. Cach, LLC, 189 Wn. App. 466, 477 (2015). Here, it is impossible to separate Cornerstone’s claims as each claim arises out of the same transaction or occurrence, the sale of the Property, and the alleged damages arising out of its claims against Appellants \$63,000, three percent of the sale price of the Property based upon the October 2015 Purchase and Sale Agreement. (CP 3-13; 190-191).

In its oral ruling, the trial court declared, “***[t]his matter arises out of a loss of commission. The commission is, more or less, the damage portion of these causes of action. It is not the subject of these causes of action. The plaintiff filed a claim for breach of contract[,] for unjust enrichment, for tortious interference with business relations, violation of the Uniform Trade Secrets Act, for conversion and breach of fiduciary duties. It doesn’t seem that [the arbitration agreement is intended to render decisions as to all of these causes of action. . . One of the issues here isn’t how the commission ought to be divided but***

*whether or not the appropriate commission was received. . .*”  
taking into consideration the merits of the parties’ dispute. (VRP  
20-21)(emphasis added).

Thus, the trial court erred when it considered the merits of the underlying dispute. When looking solely at the question of arbitrability as required by a motion to compel arbitration brought under chapter 7.04A RCW, it is clear that: (1) a valid arbitration exists in the CBA bylaws; and (2) the scope of that agreement is broad and covers the present dispute because the parties’ dispute involves commission. Marcus & Millichap, 192 Wn. App. at 480; (CP 3-13). Therefore, this Court should reverse the trial court, compel arbitration of the parties’ dispute and dismiss Cornerstone’s lawsuit against the Appellants.

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**VI. CONCLUSION**

The trial court erred when it denied the Appellants' Motion to Dismiss and Motion to Compel Arbitration. Appellants respectfully request that this Court reverse the trial court's denial of its Motion to Dismiss and Compel Arbitration, compelling arbitration and dismissing Cornerstone's lawsuit.

DATED this 17<sup>th</sup> day of December 2016.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of December 2016, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FAX TRANSMISSION
- EMAIL

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