

**FILED**

JAN 13 2017

No. 346927

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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**COURT OF APPEALS,  
DIVISION III  
OF THE STATE OF WASHINGTON**

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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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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

Respondent SVN CORNERSTONE, LLC (hereinafter “Cornerstone”) by and through its attorney of record, Matthew T. Ries of Stamper Rubens, P.S., ask this Court to affirm the Trial Court’s ruling that denied the Appellant’s Motion to Dismiss. This case arises from Appellant Henry Seipp’s violation of the Independent Contractor Agreement he entered into with Cornerstone, as well as associated tort claims that arise from that agreement and relationship. There is no arbitration provision the Independent Contractor Agreement. The Commercial Brokers Association (“CBA”) by-laws or rules concerning arbitration are not incorporated by reference to that contract. There was never any intent to have the disputes decided or adjudicated according to the CBA arbitration rules. In fact, Appellant Henry Seipp did not even become a member of the CBA until shortly after he left Cornerstone, engaged in the wrongful conduct, and then joined a competing real estate broker company, Appellant N. 807, Incorporated dba Berkshire Hathaway Homeservices First Look Real Estate (hereinafter “Berkshire”). Mr. Seipp became a member on the same day that Appellant Berkshire and its owner and designated broker, Appellant Henry Lewis, became members of the CBA. Cornerstone is not required to arbitrate this case according to a voluntary organization’s bylaws which was never incorporated into the

parties' Independent Contractor Agreement, from which this lawsuit arises.

## II. STATEMENT OF THE CASE

### A. Brief Overview of the Case.

On July 8, 2010, Appellant Henry Seipp entered into an Independent Contractor Agreement with Cornerstone to work as an independent contractor sales person and/or independent contractor/associate broker. Mr. Seipp had an office at Cornerstone's business located at 1311 N. Washington Street, Spokane, WA 99201. Mr. Seipp worked at Cornerstone's office as a real estate broker from 2010 until he began working as a broker for Berkshire on April 20, 2015. (CP 70).

This lawsuit stems from Mr. Seipp's violation of the Independent Contractor Agreement he entered into with Cornerstone, as well as associated tort claims that arise from that agreement and relationship. When Mr. Seipp left Cornerstone on April 20, 2015, he began to work for a competing real estate brokerage company, Berkshire. Prior to Mr. Seipp leaving Cornerstone, he had been working with EZ Properties, LLC to market and sell the Timber Court Apartments located at 2007 East 37<sup>th</sup> in the City of Spokane (hereinafter "Apartments"). Within two (2) days of

starting at Berkshire, on April 22, 2015, EZ Properties, LLC accepted an offer to buy the Apartments and signed a Purchase and Sale Agreement. The buyer made the offer on April 13, 2015, when he signed the Purchase and Sale Agreement. (CP 70-71, 91-118). On April 22, 2015, the seller, EZ Properties, LLC, also executed an Exclusive Listing Agreement with Berkshire which appointed Henry Seipp to be the Seller's Listing Broker. (CP 393, 401-404). The sale for Apartments ultimately closed on January 20, 2016, for a purchase price of \$2,100,000. Berkshire and Mr. Seipp obtained a commission of 2% of the sale price, which amounted to \$42,000. (CP 71, 320-321).

Mr. Seipp's conduct was in direct violation of numerous provisions of the Independent Contractor Agreement, as addressed below. On April 29, 2016, Cornerstone initiated this lawsuit against Mr. Seipp as well as Berkshire and Mr. Lewis. Cornerstone's complaint sought damages and injunctive relief for breach of contract, unjust enrichment claims, tortious interference claims, violation of the Uniform Trade Secrets Act claims, conversion claims, and breach of fiduciary claims. (CP 3-13). Cornerstone believes that Mr. Seipp's breach of the Independent Contractor Agreement involves more than this one transaction. Cornerstone believes that other violations of the contract have occurred with other transactions and other customers and pled its causes of action

seeking relief for other transactions. For example, paragraph 4.4 sought damages for income or profits received by Mr. Seipp “for any of Cornerstone’s customer/jobs . . . in an amount to be proven at the time of trial.” (CP 8-9). Paragraph 4.11 address claims of tortious interference with Cornerstone’s customers, and sought damages in amount to be proven at the time of trial in paragraph 4.14. (CP 8-9). In paragraph 4.16 provides that “the identities of the customers of Cornerstone and other information regarding Cornerstone’s business are valuable assets” and are trade secrets. “As such, the customer’s identities and other information utilized by Defendant Seipp are trade secrets that protected from misappropriation by the Uniform Trade Secrets Act (RCW 19.108).” (CP 10). Throughout the complaint Cornerstone clearly indicated that this dispute concerns more than simply the Apartments transaction. In the prayer for relief, Cornerstone asked for injunctive relief preventing the Appellants from using “any of Cornerstone’s business and customer information, [and] doing business with any of Cornerstone’s customers or former customers.” (CP13).

Cornerstone’s claims all stem from Mr. Seipp’s breach of the Independent Contractor Agreement and his working relationship with Cornerstone. The Independent Contractor Agreement provides the venue for legal action would be in Spokane County, Washington. (See

Paragraphs 7.3, CP 80). There is no arbitration provision the Independent Contractor Agreement. The Independent Contractor Agreement further contains an integration clause that provided that the Agreement and the attached exhibits represent the entire agreement between the parties, and that it cannot be modified unless done so in writing and signed by both parties. (See Paragraph 8.1, CP 80).

On May 27, 2016, the Appellants, who are all represented by the same law firm, filed a Motion to Dismiss this lawsuit based upon an arbitration provision in the by-laws of the CBA. The CBA rules have a three (3) month time limit to initiate an arbitration proceeding, and the Appellants argued that the matter was time barred. (CP 45-51, 34). Through the limited time to conduct discovery before filing the response memorandum and pleadings, Cornerstone learned that Appellants Mr. Seipp, Mr. Lewis, and Berkshire all became members of the CBA on April 24, 2015. (CP 141-142, 155-157, 234-236). This was two days after EZ Properties, LLC executed the Exclusive Listing Agreement appointed Mr. Seipp to be EZ Properties, LLC's Listing Agent, and two days after EZ Properties signed Purchase and Sale Agreement for the sale of the Apartments.

The CBA is a multiple listing company. It is a voluntary

organization that brokers may join in this State. There is no requirement by the State of Washington that a broker join the CBA. (CP 72). Mr. Seipp had never been a member in the all the years he worked at Cornerstone. (CP 72). Mr. Seipp, Mr. Lewis, and Berkshire all joined the CBA after the breach of the Independent Contractor Agreement in a clear attempt to try to take advantage of the arbitration provision in the CBA by-laws. The provision provides that the arbitration is to be decided by a panel of brokers who are not attorneys, and that the arbitrators may consider the law, but are not bound to follow it. (CP 190, 179 [Rule 4], 183 [Rule 32]). The Appellants apparently joined the CBA in an effort to recover the commission from the sale of the Apartments, and then roll the dice to retain the commission through the informal arbitration proceeding.

The hearing date for Defendant's Motion for Summary Judgment was initially scheduled for June 24, 2016. The Honorable Annetter Plese recused herself from the case, and it was reassigned to the Honorable John O. Cooney. The hearing date was rescheduled to take place on July 26, 2016. Cornerstone cross-moved for summary judgment to establish liability and damages against Mr. Seipp due to the breach of the Independent Contractor Agreement pertaining to the sale of the Apartments. Cornerstone also sent out its first set of interrogatories and requests for production of documents to the Appellants on July 1, 2016.

(CP 388).

Judge Cooney heard the parties' competing Motions on July 26, 2017, and denied both Motions. In denying the Appellants' Motion for Summary Judgment, Judge Cooney recognized that this lawsuit and Cornerstone's causes of action stem from Defendant Seipp's breach of the Independent Contractor Agreement. Mr. Seipp did not become a member of the CBA until after he left working at Cornerstone. (VRP 18-19). Judge Cooney correctly recognized that the Independent Contractor Agreement did not contain an arbitration clause. The case that the Appellants primarily rely upon, Marcus & Millichap, was distinguishable because it did not involve a situation where there was a separate contract between the parties such as the Independent Contractor Agreement. Marcus & Millichap dealt only with two members of the CBA disputing a commission. Judge Cooney rejected the argument that the arbitration provision in the CBA bylaws would supersede the Independent Contractor Agreement. (VRP 19-20). To impose arbitration would modify the terms of the Independent Contractor Agreement which would violate the provisions of 8.1 of the Independent Contractor Agreement since such modification was not in writing and signed by both parties. (VRP 19-20).

Judge Cooney further rejected the Defendants' Motion because this

lawsuit involves more than simply a dispute over the division of a commission. Rather, this lawsuit involves not only this one transaction, but also claims involving Cornerstone's other customers and transactions. The informal arbitration process before a panel of three layperson realtors is not the appropriate venue for litigate breach of contract, unjust enrichment claims, tortious interference claims, violation of the Uniform Trade Secrets Act claims, conversion claims, and breach of fiduciary claims. (VRP 20).

The Appellants' answers to discovery were due in August 1, 2016. The Appellants, however, filed their Notice of Appeal on August 18, 2016, before they answered any of the written discovery. Cornerstone has not been able to engage in discovery of the Appellants' conduct with regard to not only the transaction involving the Apartments, but also the Appellants' conduct with regard to Cornerstone's other customers and other transactions.

**B. Factual background of the Dispute.**

**1. The Timber Court Apartments were marketed at Cornerstone.**

While Cornerstone's lawsuit concerns claims for other transactions, other causes of action, and against other parties, it became apparent to Cornerstone that Defendant Seipp was engaging in activity

that breached the Independent Contractor Agreement regarding the sale of Apartments.

In early March, 2015, EZ Properties, LLC contacted Cornerstone and wanted Cornerstone to list the Apartments. On March 3, 2015, Cornerstone's Managing Director, Matthew Byrd, asked Mr. Seipp to get the listing agreement for the Apartments signed with EZ Properties, LLC. (CP 329, 332-333).

Cornerstone then developed and put together a marketing package for the Apartments. EZ Properties, LLC wanted to sell the Apartments discretely, and did not want the onsite manager to know it was being marketed to be sold. Cornerstone thus worked to market it by contacting brokers and interested buyers instead of listing the Apartments on a multiple listing service. (CP 328-329, 334-338)

Cornerstone sent this marketing package to potentially interested buyers in March, 2015, and into April, 2015. Matthew Byrd introduced the ultimate buyer to the Apartments, Chris Nelson, by sending the information and marketing package to his business associate, Royce Nelson. Mr. Byrd engaged in a series of email exchanges from April 3, 2015, through April 9, 2015, with Royce Nelson regarding the Apartments. This included providing the marketing package, and

coordinating a site visit to allow Chris Nelson to review the Apartments.  
(CP 329-330, 339-357).

**2. Henry Seipp decides to terminate his services at Cornerstone.**

In April, 2015, Mr. Seipp notified Guy Byrd that he wished to terminate his working relationship at Cornerstone, and no longer work as a broker at Cornerstone. Article 7 of the Independent Contractor Agreement sets for the process for a broker, such as Mr. Seipp, to terminate his services at Cornerstone. Paragraph 7.4 provides:

Associate shall, on termination, complete the attached “Exhibit C” “ASSOCIATE CHECK-OUT LIST”. After termination no unpaid commissions will be disbursed by Broker, nor will Associate’s license be released until the “Associate checkout list” has been completed, fully complied with by Associate, and personally delivered to the designated broker of Broker.

(CP 318-319, 80).

On April 20, 2015, Guy Byrd conducted an exit interview with Mr. Seipp in accordance with the termination provision in the Independent Contractor Agreement. Mr. Seipp completed and signed a form entitled “EXHIBIT ‘C’ ASSOCIATE CHECK-OUT LIST”, which is an Exhibit to the Independent Contractor Agreement. (CP 319, 324-325). The first item in the check out form asks for “A completed list prepared by Associate of all pending transactions, offers, or letters of intent and work

in progress which are not listed on the transaction status report.” During the exit interview Mr. Byrd asked Mr. Seipp if he had any pending transactions to disclose pursuant to item one check-out list. He said that there were nothing pending, and that he had nothing to disclose. Mr. Byrd then specifically asked him what the status was on the Apartments transaction. Mr. Seipp told Mr. Byrd that there was nothing happening with the sale of the Apartments, and there was no longer any interest from the potential buyer for the Apartments. The potential sale was dead. (CP 319).

Two days later, on April 22, 2015, Mr. Seipp came back to Mr. Byrd’s office, and presented him with a list typed and signed. In this document he now referenced:

1. Pending Transactions  
John and Kathy Strohmeyer Timber court apartments.  
**This deal was not a transaction in progress until after the date of termination.**
2. There are no current LOI’s or Offers in play on any other deals associated with Cornerstone Property Advisors.

(CP 319, 326-327). (emphasis added).

Mr. Seipp, for whatever reason, decided to change his story and list the Apartments transaction. Mr. Seipp explained to Mr. Byrd that he did not want to receive a reduced commission as a pending transaction that

closed after he terminated his services at Cornerstone. Pursuant to paragraph 7.1 of the Independent Contractor Agreement, if he listed the Apartments as a pending transaction in the “EXHIBIT ‘C’ ASSOCIATE CHECK-OUT LIST” then Mr. Seipp stood to receive 70% of that which he would have been paid if the Agreement had not been terminated. (CP 319-320). Mr. Byrd explained to Mr. Seipp upon being provided the subsequent list that the listing and marketing of the Apartments originated at Cornerstone, and that Cornerstone is entitled to the commission as the Brokerage company listing that property. (CP 319-320).

### **3. Mr. Seipp Decides to take the Sale of the Property.**

In an attempt to avoid any limitations on commissions by the Independent Contractor Agreement, Mr. Seipp decided to move the sale of the Apartments to his new brokerage company, Berkshire Hathaway, and cut out Cornerstone entirely. Cornerstone subsequently learned that on April 13, 2015, Mr. Seipp was involved in preparing the Commercial & Investment Real Estate Purchase and Sale Agreement (hereinafter “Purchase and Sale Agreement”) dated April 13, 2015, for the sale of the Apartments. The Purchaser, Chris Nelson, signed this Agreement on April 13, 2015. (CP 70-71, 91-118). The Purchase and Sale Agreement was signed by the managing member of the EZ Properties, LLC, John

Strohmaier beginning on April 18, 2015. (CP 112). Mr. Seipp then executed an Exclusive Listing Agreement with EZ Properties, LLC for the Property on April 22, 2015. (CP 393, 401-404). The Exclusive Listing Agreement appointed Mr. Seipp to serve as Seller's Listing Broker. (CP 402).

Mr. Seipp's conduct was in direct violation of numerous provisions of the Independent Contractor Agreement. Paragraph 3.1 provides that:

Associate shall not engage in any such activities in association with any other brokers, except for brokers who are acting in cooperation, or participation, with Broker. All listings shall be taken, and sales and leases and other covered transactions closed, in the name of Broker.

Paragraph 7.1 provides:

All listings and all written material containing information or analysis relating to any property which is, or has been, listed by Broker, or as to which a listing has been sought, shall remain the property of Broker. Associate shall not, following termination, be entitled to any commission derived from any such listings or with respect to any transactions which have not reached the point of being a binding agreement(s) at the time of termination.

(CP 80).

Section 7.2 of the Independent Contractor Agreement goes on to explain that Mr. Seipp, "during his association with Broker, and after the termination, shall not use or disclose any information gained from the files or business of Broker, including transactions in which Associate has been involved." (CP 80).

EZ Properties, LLC clearly listed the Apartments with Cornerstone. The first page of the marketing package next to Mr. Seipp's name states "**Confidential Listing – Do Not Contact Management**". (CP 335). The Apartments was, at a minimum, one "as to which a listing has been sought" as provided in paragraph 7.1. It does not matter that a formal written listing agreement was not executed until a few days after Mr. Seipp left Cornerstone. Courts have applied the dictionary definition of "listing". P.H.T.S., LLC v. Vantage Capital, LLC, 186 Wn. App. 281, 290-91, 345 P.3d 20, 24-25 (2015).

The Apartments and information and analysis relating to it, including the information about the buyer that Matthew Byrd at Cornerstone found for EZ Properties, LLC, all of that remained the property of Cornerstone. Mr. Seipp was not free to simply take that to Berkshire and close the sale there. This listing was to remain the property of Cornerstone upon the termination of Mr. Seipp's services at Cornerstone. Mr. Seipp again clearly breached the provisions in paragraphs 7.1 and 7.2 by using and disclosing information gained from the files of Cornerstone which was the name of EZ Properties, LLC and the listing of the Apartments, as well as the offer that was pending from Chris Nelson dated April 13, 2015. Mr. Seipp is further not allowed to be paid any commission derived from the listing of the Property pursuant to

paragraph 7.1. Mr. Seipp breached this paragraph of the Independent Contractor Agreement by receiving a commission derived from the Apartments.

**4. Mr. Seipp Cuts the Commission Rate Below Cornerstone's Limit.**

Pursuant to the Purchase and Sale Agreement, the Selling Broker and Listing Broker were to receive a commission which is five percent (5%) of sale price of \$2,150,000 for the Property. The commission was to be split whereby three percent (3%) of the commission went to the Selling Broker, Joel Crosby of Coldwell Banker Tomlinson's Commercial. Two percent (2%) of the commission was to be received by Mr. Seipp and Berkshire Hathaway. (CP 320-321, ¶ 26 at 100).

Paragraphs 5.1 and 5.2 of the Independent Contractor Agreement provided limitations on Mr. Seipp's ability to discuss and negotiate commission rates that Cornerstone would charge for listing or selling a property with any other Broker or real estate firm. Cornerstone's policy was to charge a minimum of 6% for a commission, which 3% to the listing broker as set forth in paragraph 6.1 of the Independent Contractor Agreement. (CP 321, 79).

Mr. Seipp never discussed with Guy Byrd prior to his termination of Independent Contractor Agreement that he was negotiating a Purchase

and Sale Agreement with Chris Nelson for the Apartments. Mr. Seipp never provided Mr. Byrd with a draft of the Purchase and Sale Agreement for his review and input before EZ Properties, LLC executed the contract document. Mr. Seipp never discussed that he was negotiating a commission price of 5% for the Property, and where the listing brokerage firm would receive 2% of the sale price. Mr. Byrd explains in his Affidavit that he would not have approved such a low commission percentage rate for sale of the Apartments. (CP 321).

**5. Seipp, Lewis, and Berkshire all become members of CBA on April 24, 2015 after discussion with Cornerstone regarding commission.**

On April 24, 2015, Henry Seipp became a member of the CBA. His membership number is 27451. (CP 141-142, 155-157, 234-236). Mr. Seipp had never been a member of the CBA while he worked at Cornerstone. (CP 72). Kenneth Lewis is the designated broker and owner of Berkshire also became a member of the CBA on April 24, 2015, with membership number is 27450. Berkshire also became a member of CBA on April 24, 2015. (CP 141-142, 155-157, 234-236).

Mr. Seipp, Mr. Lewis, and Berkshire all joined the CBA after the breach of the Independent Contractor Agreement in a clear attempt to try to take advantage of the arbitration provision in the CBA by-laws with its

informal proceedings before three layperson realtors who are not bound to follow the law.

**6. Berkshire and Mr. Seipp execute a replacement Purchase and Sale Agreement Documents.**

On September 22, 2015, attorneys Nicholas Kovarik and Whitney Norton contacted Mr. Byrd at Cornerstone and informed him that they represented Berkshire. The attorneys notified Mr. Byrd regarding the purchase and sale agreement signed by John Strohmaier /EZ Properties, LLC for the sales of the Apartments, and then set about explaining why Mr. Seipp and Berkshire were justified in signing the purchase and sale agreement. (CP 142, 186).

On September 28, 2015, Cornerstone, by and through its attorney, sent Berkshire's counsel and Mr. Seipp a letter notifying them that Cornerstone objected to Mr. Seipp's and Berkshire Hathaway's listing of the Apartments, and receiving compensation from the sale of the Apartments, due to Mr. Seipp's violation of the Independent Contractor Agreement. Cornerstone's counsel sent Mr. Seipp and Berkshire Hathaway a copy of the Independent Contractor Agreement that Mr. Seipp had signed, and specifically referenced the provisions which precluded Mr. Seipp from listing the Apartments, including paragraphs 7.1 and 7.2 referenced above. (CP 143).

In response to receiving Cornerstone's objection, Mr. Seipp and Berkshire executed a revised Commercial & Investment Purchase and Sale Agreement dated October 20, 2015 (hereinafter "Revised Purchase and Sale Agreement") between the Buyer, Chris Nelson, and the Seller, EZ Properties, LLC, Seller. Mr. Seipp and Berkshire continued to be the Listing Broker for the transaction. (CP 71, 119-137).

After securing and executing the Replacement Purchase and Sale Agreement, the Buyer and Seller, with the assistance of their Brokers, signed a one page document entitled "RESCISSION OF PURCHASE AND SALE AGREEMENT". This document was signed by the Buyer on October 21, 2015, and signed by the Seller on October 28, 2015. This document rescinded the original April 13, 2015, Purchase and Sale Agreement. The Buyer and Seller in the agreement directed First American Title, who was holding the \$25,000 Earnest Money for the original Purchase and Sale Agreement, to transfer the \$25,000 Earnest Money to "another transaction per Purchase and Sale dated October 20, 2015, filed with First American Title." (CP 71, 138-139).

Despite repeated demands by Cornerstone to Mr. Seipp and Berkshire Hathaway to not receive the commission from the sale of the Apartments, the sale of the Apartments closed on or around January 20,

2016. This was in direct violation of the Independent Contractor Agreement (CP 71-72). The sales price in the Revised Purchase and Sale Agreement was \$2,100,000. (CP120). Pursuant to the Revised Purchase and Sale Agreement, Mr. Seipp and Berkshire Hathaway received a commission of \$42,000 which is two percent (2%) of the sale price of \$2,100,000. (CP 321, 128).

### III. LEGAL ARGUMENT

A. **Appellant Seipp Should not be Allowed to Unilaterally Modify the Contract and Bootstrap this Dispute Into Arbitration.**

The Appellants rely almost entirely on the holding of Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc., 192 Wn. App. 465, 473, 369 P.3d 503, 506 (2016) as the basis of their appeal. Yet the Appellants do not address the significant distinction in Marcus & Millichap from the case at hand as pointed out by Judge Cooney. That case did not deal with a separate contract between the parties which set forth the rights and obligations of the parties such as the Independent Contractor Agreement. The Marcus & Millichap case did not deal with a situation where one of the parties breached the contract, and then joined the CBA and tried to impose the dispute resolution procedure in the CBA's bylaws. Instead the Marcus & Millichap case dealt with a factually different situation where both parties were always CBA members

at all times with regard to the dispute, and there was no need to determine when a cause of action accrued, or whether the parties mutually intended to arbitrate a particular dispute. That case did not deal with a situation where the breaching party attempted to unilaterally modify the terms of the Independent Contractor Agreement through the use of the CBA bylaws. The Courts which have dealt with this issue have rejected one party from modifying the terms of the Independent Contractor Agreement. The holding of the factually distinguishable case of Marcus & Millichap does not provide guidance to the issues in this case.

The Appellants' also cite to the case of Keith Adams & Assoc., Inc. v. Edwards, 3 Wn. App. 623, 477 P.2d 36 (1970) disapproved of on other grounds by Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885 (2001) apparently because it was cited and relied upon in the Marcus & Millichap case. That case is again clearly distinguishable from the case at hand. It did not deal with a situation where the dispute arose and accrued before the Appellants joined the CBA which had the arbitration provision in the by-law. Instead that case dealt with a factually different situation where both parties were always members of Tri-City Board of Realtors, Inc. at all times with regard to the dispute. There was no need to determine when a cause of action accrued. Further, there was no

indication if there was any written employment contract between the parties which had a dispute resolution provision which did not provide for arbitration such as the case at hand. The opinion merely indicated there “was no separate agreement to submit this particular commission dispute to arbitration prior to the filing of defendant's complaint.” Keith Adams & Assoc., Inc., 3 Wn. App. at 625-26. Also distinguishable in that case is that the parties both submitted the dispute to the Tri-City Board of Realtors, Inc., obtained an opinion from the Board before there was any challenge to the issue of whether the dispute was properly before the Board. In that situation, the Court rightfully found that the parties had picked their forum of the dispute, and that it was too late after conducting a hearing and agreeing to be bound by that decision to then attempt to challenge whether the case should have been arbitrated in front of the Board in the first place. Keith Adams & Assoc., Inc., 3 Wn. App. at 626-27. The holding of the factually distinguishable case of Keith Adams & Assoc., Inc. likewise does not provide guidance to the issues in this case.

The Independent Contractor Agreement provides that “In the event that it is necessary to enforce this Agreement through legal action brought by either party, venue shall be in Spokane County, Washington.” (See Paragraphs 7.3 of the Independent Contractor Agreement CP 80).

Moreover, the Independent Contractor Agreement provides that it is to be reviewed and enforced by a court of competent jurisdiction. “In the event that a court of competent jurisdiction finds any portion of this Agreement to be illegal or unenforceable, the remainder of this Agreement shall survive and bind Broker and Associate.” (See Paragraphs 8.2, CP 80). There is no arbitration provision in the Independent Contractor Agreement. Paragraph 8.1 of the Independent Contractor Agreement provides:

This Agreement, when signed by Broker and Associate, in conjunction with the attached exhibits, represents the entire Agreement between Broker and Associate. There are no other agreements, verbal or otherwise. This Agreement supersedes any prior agreement between Broker and Associate. **This Agreement may only be altered or amended by a written agreement signed by Broker and Associate.**

(CP 80) (emphasis added). These contract provisions limiting modifications are common and enforceable. 33 Wash. Prac., Wash. Construction Law Manual § 9:22. Professor DeWolf summarizes the law necessary for a modification to be effective.

Contract modifications will be recognized if they comply with several important requirements: first, the modifications must be mutual—there must be a manifestation of the objective intention of the parties mutuality of assent. Second, the modification must be supported by new consideration independent of the consideration involved in the original agreement. In other words, without a mutual exchange of obligations or rights, a subsequent modification lacks consideration. Third, a mutual modification by subsequent agreement must be

clear; it cannot be based on doubtful or ambiguous factors. DeWolf, 25 Wash. Prac., Contract Law And Practice § 11:1 (3d ed.)(footnotes omitted). In this case, there is no evidence to support a modification of the Independent Contractor Agreement. There is no evidence to support an argument that the parties agreed to modify the dispute resolution procedure in their contract by having the matter arbitrated by the CBA.

Several courts have considered the issue of a dispute that arises before a subsequent contract is entered into between the parties, and where the subsequent agreement contains a binding arbitration agreement. These cases are readily distinguishable because in those cases there was a subsequent contract negotiated and entered into which had an arbitration clause. That obviously did not occur in this case. Nevertheless, courts which have considered the issue look at the language of the arbitration agreement and the intent of the parties.

The conclusion that the 1994 ADR Clause is inapplicable to disputes arising under earlier contracts also is supported by *In re Hops Antitrust Litig.*, 655 F.Supp. 169 (E.D.Mo.), *appeal dismissed*, 832 F.2d 470 (8th Cir.1987). The defendants there also argued that an arbitration clause in a later agreement was applicable to disputes arising under earlier agreements that lacked the clause. The court disagreed noting that each contract was distinct and, significantly, that “[t]he record reflects no agreement by the parties to amend earlier contracts to provide for arbitration of disputes.” *Id.* at 172–73. The court did not

indicate whether the contract containing the arbitration provision in *Hops* included an integration clause.

Sec. Watch, Inc. v. Sentinel Sys., Inc., 176 F.3d 369, 373 (6th Cir. 1999)(emphasis added).

Likewise, in the case of Thomas v. Carnival Corp., 573 F. 3d 1113, 1116-17 (11<sup>th</sup> Cir. 2009), the court refused to retroactively apply an arbitration clause that provided any subsequent executed contract. The Court looked at the intent of the parties and the language of the contract. There is no indication that they ever intended to retroactively apply an arbitration provision to a previous dispute. Similarly, the Courts have refused to enforce and compel arbitration of disputes that arise before an arbitration agreement entered into.

In the case of Int'l Bhd. of Elec. Workers, Local 1200 v. Detroit Free Press, Inc., 748 F.3d 355, 359 (D.C. Cir. 2014), the court similarly rejected the union's attempt to bootstrap a pre-contractual dispute with an arbitration provision in the new contract. In that case, an employee was terminated on January 30, 2012. This was after the previous collective bargaining agreement ended and before the new one took effect and was entered into on February 2012. The Court explained:

The union also argues that Peterson's grievance is arbitrable under the 2012 agreement. We cannot see how. The letter Peterson received stated that she was terminated on January 30, 2012. The grievance form filed by the union confirms

that she was in fact “terminated on 1/30/12.” Because no agreement was in effect on that date, the station was not obliged to provide her with two weeks' notice. Thus the layoff was effective on the date Peterson was notified. Nothing in the 2012 agreement suggests that it requires arbitration of grievances arising before it became effective.<sup>2</sup> **And the union cannot bootstrap itself into a longer contract duration by waiting to file its grievance over a pre-contractual dispute.**

Int'l Bhd. of Elec. Workers, Local 1200, 748 F.3d at 359 (emphasis added).

In this case, there was never any discussion, nor agreement between Cornerstone and Mr. Seipp to have the enforceability or claims arising from the Independent Contractor Agreement adjudicated or arbitrated by the CBA by-laws or rules. Instead, Mr. Seipp has unilaterally attempted to change the dispute resolution process by becoming a member of the CBA after he had committed the wrongful conduct with respect to the Apartments. Mr. Seipp is attempting to unilaterally modify the parties' contract, despite the clear language of the Independent Contractor Agreement, so that the matter could be adjudicated, and liability limited, by having three laypersons attempt to sort through and adjudicated theories such Uniform Trade Secrets Act violations. Mr. Seipp cannot unilaterally bootstrap this matter into arbitration in a forum which Cornerstone never intended to have the matter adjudicated, and which is not suited to adjudicate this type of

dispute.

**B. The Independent Contractor Agreement is Not Governed by the CBA Arbitration Rules.**

The Washington Courts have addressed nearly identical situation in the case of Todd v. Venwest Yachts, Inc., 127 Wn. App. 393, 111 P.3d 282 (Div. I, 2005) rev. denied 156 Wn.2d 1025 (2006), and refused to compel arbitration under an organization's by-laws. In that case, the commission based yacht salesman sued his former employer for commissions allegedly owed. The employer moved for dismissal or stay pending arbitration of the dispute arguing that because both the commission based salesman and the owner were members of the Northwest Yacht Brokers Association ("NYBA"), the matter should be arbitrated pursuant to the arbitration provision contained in the NYBA's by-laws. The bylaws contained an arbitration clause requiring arbitration "[w]hen a dispute arises between members, between members and nonmember, or between members and the public[.]" Todd v. Venwest Yachts, Inc., 127 Wn. App. at 396. The court rejected that argument concluding that the NYBA is a purely voluntary organization. The yacht salesman, Todd, was not required to be a NYBA member. The owner, Venwest, did not require Todd to be a member. At the time, Todd and Venwest each joined the NYBA, neither intended that the NYBA's

arbitration clause would apply to their than unknown employment relationship. Todd v. Venwest Yachts, Inc., 127 Wn. App. at 399.

The Court explained that because the NYBA's arbitration clause was not incorporated by reference into their employment agreement, it did not apply to their dispute. The NYBA did not purport to regulate its members' businesses. It was not concerned with its members' employment relationships. Id. at 399. The Court concluded that there was no evidence by either Todd or Venwest that the NYBA's arbitration clause was ever intended to play a role in their employment relationship. In the absence of some indication that they intended to be bound by the NYBA's arbitration clause, the court would not imply that intent. The court of appeals affirmed the trial court's ruling and remanded for further proceedings. Id. at 400.

In this case, there was clearly never an intent to incorporate by reference the CBA rules or its arbitration clause in the contractual relationship between Mr. Seipp and Cornerstone. It is not referenced anywhere in the Independent Contractor Agreement. Paragraph 7.3 provides that "In the event that it is necessary to enforce this Agreement through legal action brought by either party, venue shall be in Spokane County, Washington." (CP 80). In this case, Mr. Seipp was not a member

of the CBA at the time he elected to cease working at Cornerstone, and began working with Berkshire. The CBA similarly does not purport to regulate its member's businesses. The CBA is likewise not concerned with its member's employment relationships. There is no evidence that either Cornerstone or Mr. Seipp ever intended that CBA arbitration clause would play a role in the adjudication of a dispute concerning the Independent Contractor Agreement. Just as in Todd v. Venwest Yachts, Inc., the Court does not imply that intent. Accordingly, the Court should affirm the denial of Appellants' Motion to Dismiss with regard to Cornerstone's claims against Mr. Seipp.

At the trial court level the Appellants attempted to distinguish the holding in Todd v. Venwest Yachts, Inc. in their Reply Memorandum in several respects, all of which were unavailing. The Appellants argued that the holding predated the adoption of the Uniform Arbitration Act which took effect January 1, 2006, and thus it was somehow distinguishable. RCW7.04A.900. (CP 285). The Appellants also argued that since both Todd v. Venwest Yachts, Inc. and Marcus & Millichap cases are Division 1 Court of Appeals decisions, and since Marcus & Millichap was decided more recently, that the Court should follow the holding of Marcus & Millichap. These arguments are distinctions without a difference. Todd v. Venwest Yachts, Inc. is the most factually on point

case to the present dispute, and has been cited as precedent by Division 1.

First, there was an Arbitration Act before the adoption of Uniform Arbitration Act which had similar procedures for initiating and enforcing arbitrations. See RCW 7.04.100 et seq. (repealed in 2005). The adoption of the Uniform Arbitration Act had no impact on the holding or rationale set forth in Todd v. Venwest, *supra*.

Second, the Appellants cite to and rely upon older case law that pre-dates the adoption of the Uniform Arbitration Act, such as Keith Adams & Assoc., Inc., 3 Wn. App. 623. The Appellants apparently do not believe that adoption of the Uniform Arbitration Act had any impact on that holding.

Third, Todd v. Venwest remains valid law and continues to be followed such as in the case of Weiss v. Lonquist, 153 Wn. App. 502, 511, 224 P.3d 787, 792 (Div. 1, 2009), where the court again emphasized that the court looks to the parties' intent on whether to arbitrate a dispute.

Regardless of whether the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, or the Washington Uniform Arbitration Act (UAA), chapter 7.04A RCW, applies, our analysis as to whether Weiss's claims are subject to arbitration begins in the same manner.<sup>7</sup> **As arbitration is a matter of contract, parties cannot be compelled to arbitrate unless they agreed to do so.**

Weiss v. Lonquist, 153 Wn. App. at 511 (citing Todd v. Venwest Yachts,

Inc., 127 Wn. App. at 397) (emphasis added). This Weiss decision post dates the adoption of the Uniform Arbitration Act RCW7.04A.900, and thus Defendants' attempt to distinguish the Court's analysis in Todd v. Venwest on that basis is unavailing. (CP 359).

Finally, the Defendants fail to explain why merely because Marcus & Millichap was decided later in time that this Court should not follow the very factually similar case of Todd v. Venwest Yachts, Inc. Division 1 has never overruled or distinguished the holding of Todd v. Venwest Yachts, Inc. Rather, Division 1 cited to it as precedence in the employment case of Weiss v. Lonnquist.

This Court should similarly follow the holding of Todd v. Venwest Yachts, Inc. and affirm the denial of Appellants' Motion to Dismiss. Neither Cornerstone nor Mr. Seipp ever intended that CBA arbitration clause would play a role in the adjudication of the dispute concerning the Independent Contractor Agreement.

**C. Appellant Seipp's Wrongful Conduct Accrued Prior to His Joining the CBA, and Thus Arbitration Must Not Be Compelled.**

As explained in Weiss v. Lonnquist, 153 Wn. App. at 512, the Court must analyze when a dispute arose, to determine whether or not to compel arbitration. In that case, the contract ended that had the arbitration

clause before the plaintiff's claims accrued. Thus, the court denied the defendant's motion to compel arbitration. Weiss v. Lonquist, 153 Wn. App. at 512.

With respect to whether the 2005 contract itself requires the parties to arbitrate Weiss's claims, we conclude that it does not. Lonquist terminated the 2005 contract as of August 13, 2006. Weiss's claims did not accrue during the time that the 2005 contract was effective. Rather, her claims relate to her employment during August 2007, a full year after Lonquist terminated the 2005 contract.

Weiss v. Lonquist, 153 Wn. App. at 512.

In this case, the dispute regarding the Apartments arose and accrued before Defendants joined CBA which had the arbitration provision in its by-laws. There is no arbitration provision in the Independent Contractor Agreement when the cause of actions against Mr. Seipp accrued. Following the holding and rationale of Weiss v. Lonquist, the Court should uphold the denial of the Appellant's Motion to Dismiss. This lawsuit concerns claims against the Appellants for more than just this one transaction as set forth above, but it is clear that CBA by-laws provision does not apply to the Apartment transaction since Cornerstone's cause of actions accrued against the Appellants before they joined the CBA.

**D. Appellant Berkshire and Lewis are Required to Litigate This Matter.**

For the reasons outlined above, the Spokane Superior Court is the proper venue for the adjudication of Cornerstone's claims against Appellant Seipp. Appellants Berkshire and Lewis participated and benefited from Mr. Seipp's wrongful conduct. They should not be permitted to escape liability by arguing that their claims are subject to arbitration.

Appellants Berkshire and Mr. Lewis are required to litigate this matter on three bases. First, the dispute accrued before either Appellants Mr. Lewis or Berkshire joined the CBA and thus this dispute is not subject to the arbitration provision. Second, Berkshire's and Mr. Lewis' liability stems from the wrongful conduct of their agent, Mr. Seipp. As principals, they should both be ordered to adjudicate the matter in the same venue as their agent. Third, the Appellants Berkshire and Mr. Lewis should be equitably estopped from compelling arbitration.

**1. The Causes of Action Accrued Before the Appellants joined the CBA and are not subject to arbitration.**

The Appellants repeatedly argue in their Appellate Brief that this lawsuit only concerns one transaction, the sale of the Apartments. Cornerstone disputes that contention and characterization, and has asserted a number of claims against Defendants Seipp, Berkshire and Lewis beyond just the Apartment transaction as set forth above. The Appellants

filed this appeal before any discovery was answered or could be conducted regarding Mr. Seipp's activities upon joining Berkshire. However, if the Court followed the Appellants' argument and it was just about this one transaction, the wrongful conduct which serves as the basis of Cornerstone's claims under Appellants' rationale accrued before the Defendants joined the CBA.

As explained in Weiss v. Lonquist, 153 Wn. App. at 512, the Court must analyze when a dispute arose, to determine whether or not to compel arbitration. Applying the same analysis for Mr. Seipp set forth above, the dispute regarding the Apartment transaction arose before the parties' were all members of the CBA. Accordingly, the arbitration provision in the CBA by-laws does not apply. The Court should deny Berkshire's and Mr. Lewis' attempt to have the matter adjudicated in a different forum from Mr. Seipp on this basis alone.

**2. Appellants Berkshire and Lewis as Principals are Bound to Litigate this matter pursuant to agency relationship with Seipp.**

Appellants Berkshire and Mr. Lewis are vicariously liable for the acts of Mr. Seipp, but they argue that the case is to be heard and considered in a different forum – arbitration per the CBA by-laws. Courts have applied the legal theories of agency to compel a principal to

adjudicate the plaintiff's claims it has against the principal, in the same forum as the plaintiff's claims against the agent. The more typical situation is where there is an arbitration clause in the contract between the plaintiff and the agent, but not a contractual basis to arbitrate between the plaintiff and the non-signatory principal.

Washington courts have followed federal precedent and addressed the issue of whether a principal may be bound to arbitrate pursuant to an agent's contract with the plaintiff. "A person who is not a party to an agreement to arbitrate may be bound to such an agreement only by ordinary principles of contract and agency." Powell v. Sphere Drake Ins. P.L.C., 97 Wn. App. 890, 892, 988 P.2d 12, 13 (1999), as amended (Sept. 10, 1999) (citing Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir.1995)). When a nonsignatory plaintiff bases its right to sue on the contract, rather than an independent basis such as a statute or some other theory outside the contract, the provision requiring arbitration must be observed. Id. at 896-97, 988 P.2d 12.

Under agency principles and the doctrine of respondeat superior, the principal may be bound to arbitrate a dispute even if the principal did not sign the contract containing the arbitration provision. To bind a principal by its agent's acts, the plaintiff must demonstrate that the agent

was acting on behalf of the principal and that the cause of action arises out of that relationship. E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 198 (3d Cir. 2001)(citing Phoenix Canada Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1477 (3d Cir.1988)). The court in Phoenix Canada Oil Co., explained, “Not only must an arrangement exist between the two corporations so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff’s claim of wrongdoing.” 842 F.2d at 1477. The court focused on the specific transactions at issue in the case and looked at the extent of the involvement and control of the principal in transactions. Id. at 1478.

In this case, all of the claims derive from the Independent Contractor Agreement executed by Mr. Seipp with Cornerstone. That is the primary source of the duties owed by Mr. Seipp to Cornerstone. As set forth in the Complaint, Appellants Berkshire and Mr. Lewis are vicariously liable for wrongful conduct of Mr. Seipp in the causes of action, and particularly the violation of the Uniform Trade Secrets Act. Thola v. Henschell, 140 Wn. App. 70, 78, 164 P.3d 524, 528 (2007)(“one may violate the UTSA vicariously and be held responsible for such violation.”). Mr. Lewis is the designated broker for Berkshire, and thus

liable for the conduct of its agents, such as Mr. Seipp. “Responsibility for any real estate broker, managing broker, or branch manager in conduct covered by this chapter shall rest with the designated broker to which such licensees shall be licensed.” RCW 18.85.201; see Nat. Ass'n of Realtors v. Champions Real Estate Servs. Inc., 812 F. Supp. 2d 1251, 1258 (W.D. Wash. 2011).

Appellants Mr. Seipp, Berkshire and Mr. Lewis knowingly violated that Independent Contractor Agreement when they executed the listing agreement between customers of Cornerstone and began their tortious conduct, including violating the Uniform Trade Secrets Act. Appellants Berkshire and Mr. Lewis are bound by the dispute resolution procedure outlined in the Independent Contractor Agreement, which is litigation. From the above case law, if the Independent Contractors Agreement contained an arbitration clause, Cornerstone would be entitled to compel Appellants Berkshire and Mr. Lewis to arbitrate this dispute since they are vicariously liable for the conduct of Mr. Seipp, and their liability is based upon agency principals. Cornerstone likewise has the right to compel Appellants Berkshire and Mr. Lewis to have this matter adjudicated in the same forum—litigation in the Superior Court—as Cornerstone’s claims against their agent, Mr. Seipp. Accordingly, the

Court should affirm the denial of Berkshire's and Mr. Lewis' Motion to Dismiss. The Trial Court should adjudicate and rule on all claims against all parties in one forum in this lawsuit.

**3. Appellants Berkshire and Mr. Lewis Should be Equitably Estopped from Compelling Arbitration.**

Washington Courts have likewise recognized that non-signatories can be bound to arbitrate upon the theory of equitable estoppel. That theory of equitable estoppel should likewise apply to this case where the underlying contract has litigation as the dispute resolution process with the agent, and yet the principal is trying to escape liability by forcing Cornerstone's claims against it into arbitration provision pursuant to the CBA by-laws.

This theory of equitable estoppel was addressed in Townsend v. Quadrant Corp., 173 Wn.2d 451, 461, 268 P.3d 917, 922 (2012). In that case, homeowners and their children brought an action against the builder and its parent company for fraud, negligent misrepresentation, rescission, and a declaration of the unenforceability of the arbitration clause and unconscionability. The court addressed the issue of whether the children's' claims would be bound by the arbitration provision in the purchase and sale agreement signed by the parents by the legal theory of equitable estoppel.

Equitable estoppel “ ‘ “precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.” ’ ” Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1045-46 (9th Cir. 2009) (quoting *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir.2006) (quoting *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir.2004))). In this regard, equitable estoppel may require a nonsignatory to arbitrate a claim if that person, despite never having signed the agreement, “ ‘ “knowingly exploits” ’ ” the contract in which the arbitration agreement is contained. *Id.* at 1046 (quoting *Comer*, 436 F.3d at 1101) (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 199 (3d Cir.2001)).

Townsend v. Quadrant Corp., 173 Wn. 2d at 461. The Court explained:

Although the children received the benefit of the bargain in the transaction with Quadrant to the same extent as their parents, they now seek to avoid the burden of arbitration imposed by the PSA. The children, therefore, can be said to be knowingly exploiting the terms of the contract and, under *Mundi*, cannot avoid the arbitration clause within it. The children are, thus, bound by the arbitration agreement to the same extent as their parents.

Townsend v. Quadrant Corp., 173 Wn.2d at 461-62, 268 P.3d 917, 922 (2012) (footnotes omitted).

In this case, the Appellants knowingly exploited the Independent Contractor Agreement by trying to circumvent it and bootstrap this into a private arbitration. For five years Mr. Seipp operated and benefited from Independent Contractor Agreement with Cornerstone. It was by virtue of the Independent Contractor Agreement that Mr. Seipp was able to operate at Cornerstone, be paid commissions, and gain valuable trade secrets from

Cornerstone, including customers of Cornerstone. Appellants Berkshire knew about Mr. Seipp's Independent Contractor Agreement and the duties Mr. Seipp owed to Cornerstone, and exploited that contractual relationship between Mr. Seipp and Cornerstone to gain customers and other valuable trade secrets. The exploitation is especially egregious in this case because shortly after committing the wrongdoing, the Appellants then all decided to join up and become members of the CBA which as an arbitration provision in the by-law where the arbitrators are three lay persons who are members of the CBA. Equitable estoppel prohibits the Appellants Mr. Seipp, Berkshire, and Mr. Lewis from trying to exploit the Independent Contractor Agreement, and attempt to escape liability by compelling Cornerstone to arbitrate its claims in CBA arbitration. The Court should therefore affirm the denial of the Appellants' Motion based upon equitable estoppel.

**E. The Arbitration Provision Contained in the CBA is Very Narrow and Does Not Apply to the Claims in this Case.**

The Appellants argue that this entire lawsuit is somehow controlled by the arbitration agreement by the CBA. However, looking at the scope of the CBA it is clearly limited to a dispute over one particular transaction which is ruled on by three realtors who do not have a law degree. CBA is a multiple listing company. If there is a dispute over the

commission owed one of the properties listed on the CBA, the purpose of the limited arbitration agreement was to have a panel of three brokers look over the facts of a transaction and determine which broker is entitled to a commission and how much. This case involves far more than one incident as addressed below. Moreover, the Apartments referenced in the Complaint was never listed on CBA. There were simply no ties to the CBA until after Mr. Seipp ceased working at Cornerstone and joined up with the CBA with Mr. Lewis and Berkshire. (CP 72).

Cornerstone believes that Defendant Seipp has breached the Independent Contract Agreement in numerous ways, and involving more than simply one transaction. Cornerstone believes that Mr. Seipp has engaged in the unlawful taking of trade secrets for the starting of a new commercial real estate group. This dispute concerns the use of contacts, forms, use of trade secret information that Cornerstone developed. CBA by-laws were never intended to be used to arbitrate extensive trade secrets act violations with all of the associated claims. It is absolutely inappropriate to compel Cornerstone to arbitrate extensive breach of contract disputes, unjust enrichment claims, tortious interference claims, violation of the Uniform Trade Secrets Act claims, conversion claims, and breach of fiduciary duties claims before a panel of three real estate brokers. Cornerstone has sought injunctive relief afforded it under the

Uniform Trade Secrets Act. There is no such remedy available in the limited scope of the arbitration provision.

The Court “look[s] to the language of the agreement to determine the scope of the arbitration clause. “ Nelson v. Westport Shipyard, Inc., 140 Wn. App. 102, 116, 163 P.3d 807, 814 (2007) rev. granted 163 Wn.2d 1033. “Whether and what the parties have agreed to arbitrate as an issue for the Court’s to decide unless otherwise stipulated by the parties.” Nelson v. West Port Shipyard, Inc., 140 Wn. App. at 117 (citing Tacoma Narrows Constructors v. Nippon Steel–Kawada Bridge, 138 Wn. App. 203, 156 P.3d 293 (2007) rev. granted 163 Wn.2d 1011.<sup>1</sup> The Nelson court refused to compel claims to the arbitration because they were not within the scope of the arbitration clause.

Because our review is de novo, we must determine whether the 2004 Shareholders Agreement arbitration clause, to which Nelson and Westport agreed, covers disputes about breach of fiduciary duties and minority shareholder oppression. In so doing, we look to the plain language of the arbitration clause itself, which says that it applies to disputes “arising out of this Agreement.”

The 2004 Shareholders Agreement embodies the parties' intentions for the transfer of Westport shares. It covers no other relationship between the parties, and it does not purport to cover their employment and other business relationships. Instead, the Agreement (1) limits the transferability of Westport shares; (2) includes the original

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<sup>1</sup> Both the Nelson and Tacoma Narrows cases were subsequently dismissed by the Washington Supreme Court without opinion.

purchase price for shares held by current Shareholders, including Nelson; and (3) includes a provision whereby Westport has the right to repurchase shares in the event any shareholder terminates employment or there is an unresolvable difference between shareholders. It is undisputed that there is an unresolvable difference between shareholders.<sup>10</sup>

The 2004 Shareholders Agreement does not grant any additional shareholder rights. Nor does it define the Board of Directors' duties towards shareholders in general or Nelson in particular. Rather, by its own terms, the Agreement is limited in scope to the acquisition, sale, and other transfer of Westport shares.

Accordingly, we hold that the 2004 Shareholders Agreement arbitration clause does not generally encompass Nelson's fourth cause of action for the Directors' breach of \*119 fiduciary duties and minority shareholder oppression except to the extent this cause of action includes the price that Westport must pay Nelson to buy back his shares.

Nelson v. Westport Shipyard, Inc., 140 Wn. App. at 118-19.

Other courts have similarly held that the trial court had the responsibility for determining whether claims relating only to the period the plaintiff was a contract worker, are subject to arbitration in the employment agreement. Davis v. Gen. Dynamics Land Sys., 152 Wn. App. 715, 719, 217 P.3d 1191, 1193 (Div. II, 2009) rev. denied 168 Wn.2d 1022 (2010). “The Arbitration Agreement, by its plain terms, does not apply to Davis's claims arising out of his time as a contract worker. Instead, it applies to his ‘application for employment, employment, or termination of employment.’” Davis v. Gen. Dynamics Land Sys., 152

Wn. App. at 719.

[T]he trial court, not an arbitrator, generally determines the arbitrability of a dispute. *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula*, 130 Wash.2d 401, 413, 924 P.2d 13 (1996); RCW 7.04A.060(2) (“The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”). The trial court had the responsibility for determining arbitrability, and it erred in sending that issue to the arbitrator because the Arbitration Agreement does not apply to Davis's pre-employment application claims.

Davis v. Gen. Dynamics Land Sys., 152 Wn. App. at 719; see also Weiss v. Lonquist, 153 Wn. App. at 512 (where court made the decision whether a particular claim was subject to an arbitration clause).

In this case, the arbitration provision in the by-laws, even if applicable, is very narrow, and it does not encompass this type of litigation between the parties. The Trial Court properly denied the Defendants' motion to compel arbitration because there are obviously a number of matters that exceed the narrow scope of the arbitration provision. “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 arbitration agreement is intended to render decisions as all of these causes of action.” (VRP 20). The Trial Court was not determining the merits of the case in making the decision, as argued by the

Defendants, but simply applying the allegations and facts alleged and reviewing the arbitration clause language. The Trial Court properly recognized from reviewing the complaint and briefing that the Cornerstone sought damages beyond just commission for the Defendants' wrongful conduct. (VRP 21).

The Trial Court also properly recognized that this lawsuit does not pertain to just one transaction, but also addresses other Cornerstone customers and transactions. "In addition, damages are being sought for misappropriation of trade secrets and for losses for any other of Cornerstone's customers or jobs. In short, the damage portion of this matter goes beyond more than just a mere dispute over which percentage of the commission each party ought to receive." (VRP 21). The Trial Court properly ruled that a former broker going to work with a competitor and impacting Cornerstone's business is not required to be arbitrated before a panel of three brokers who are not attorneys.

**F. The Court Must Not Dismiss the Case as Timeliness Issues are Decided by the Arbitrator.**

Finally, even if the Court rejects all of Cornerstone's arguments, and the Appellants are allowed to proceed with arbitration, the Court must not dismiss this case as sought by the Appellants in their Motion. The arbitration clause does contain a three (3) month time period to bring a

claim. “[W]hether or not time limits act as a bar to arbitration should be decided by the arbitrator as a threshold question.” Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 405, 200 P.3d 254, 256 (Div. I, 2009) (citing Yakima Cty. Law Enf't Officers Guild v. Yakima Cty., 133 Wn. App. 281, 287, 135 P.3d 558, 561 (Div. III, 2006)). The rules provide that the arbitrators may consider factors such as fraud or justifiable reliance, or where there has been good faith on-going attempt by at least one of the parties to resolve the dispute. (CP 179 [Rule 6]). Those issues would need to be considered by the arbitrator panel before ruling on whether the claims are timely. The Court should therefore not dismiss this lawsuit, but simply stay the case pending the outcome of arbitration as provided for by RCW 7.04A.070.

Noticeably absent from the Appellants' Brief is any argument as to why they believe the Court has authority to simply dismiss the case. At the Trial Court level, the Appellants did not dispute the legal authority set forth above in their Reply Memorandum, nor did the Appellants cite to any legal authority that would allow the Court to simply dismiss the case due to a three month time limit. (CP 290-91). Appellants have likewise not attempted to make any such argument or cite to any such authority in this Appellate Brief. The Appellants instead argued in their Reply

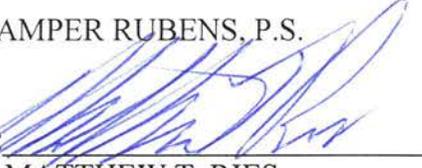
Memorandum by simply focusing on one of the reasons why the arbitrators may not dismiss the case based upon the timeliness issue for fraud, but conveniently ignored the other bases set forth above. (CP 290-91). While the Appellants repeatedly ask in their Brief that this Court to dismiss the case without any legal support, that timeliness issue is a decision to be made the arbitrators, and thus the case should, at the very least, simply be stayed pending that decision by the arbitrators.

#### IV. CONCLUSION

Based upon all of the foregoing, Cornerstone respectfully requests that the Court Affirm the denial of the Appellants Motion to Dismiss. Cornerstone asks that the Court allow this matter to be remanded to the Trial Court so that Cornerstone may proceed with discovery protect its company from the Appellants' unlawful conduct.

RESPECTFULLY SUBMITTED this 13 day of January 2017.

STAMPER RUBENS, P.S.

By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 13 day of January 2017, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Mr. Nicholas D. Kovarik  
Ms. Whitney L. Norton  
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LAUREL K. VITALE