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No. 60115-6-I

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

MICHAEL BROOM; KEVIN BROOM; and ANDREA BROOM,

Respondents,

v.

MORGAN STANLEY DW INCORPORATED and KIMBERLY ANNE
BLINDHEIM,

Appellants.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	COUNTERSTATEMENT OF ISSUES	2
III.	STATEMENT OF THE CASE	2
	A. Overview of Key Points Omitted by Morgan Stanley.....	2
	B. Procedural History in State and Federal Court	4
	1. Removal and Remand.....	4
	2. On Remand, MSDW Made a Strategic Decision to Defend the Washington RUAA	6
	3. The Parties Dispute Which Washington Arbitration Act Should Apply	10
	4. The Superior Court Grants the Motion to Vacate Under the Washington RUAA	11
IV.	ARGUMENT.....	11
	A. MSDW is Barred from Relying Upon the FAA at this Late Stage in the Proceedings.....	11
	1. MSDW has Waived the FAA, and Should be Barred from Raising it for the First Time on Appeal.....	12
	2. MSDW Cannot Assert Error in Applying the RUAA Because of the Doctrine of “Invited Error”	16
	B. The FAA Does Not Govern this Matter	18
	1. Federal Caselaw under the FAA Does Not Preempt Washington Arbitration Law on Scope of Review.....	19
	a. MSDW Bears a Heavy Burden of Showing the “Clear and Manifest Purpose” of Congress to Preempt Washington Arbitration Law on Vacatur / Confirmation of Awards	19
	b. The Purpose and Preemptive Scope of the FAA is Limited to Enforcement of Arbitration Agreements	21
	c. Caselaw Demonstrates that FAA Vacatur Law Does Not Preempt State Arbitration Law	25

2.	Any Possible Preemption is Abrogated by the Parties’ Agreement to Apply Washington Arbitration Law.....	33
C.	Under Washington Arbitration Law, the Trial Court Properly Reviewed for Error of Law on the Face of the Award	35
1.	Waiver Precludes MSDW from Asserting that “Error of Law” Does Not Apply Under the WAA	36
2.	<i>Malted Mousse</i> does not <i>Sub Silentio</i> Overrule the Long Line of Cases Establishing “Error of Law”	37
D.	The Superior Court Properly Vacated and Remanded for a New Arbitration Based on Error on the Face of the Award.....	42
1.	This Court Should Not Overrule <i>Thorgaard</i> and <i>City of Auburn</i> to Rule that Statutes of Limitation Govern Non-Judicial Private Arbitrations.....	42
2.	The Error Appears on the Face of the Award.....	49
V.	CONCLUSION.....	50

TABLE OF AUTHORITIES

Cases

<i>Ace Electrical Contractors, Inc. v. Int’l Brotherhood of Elec. Workers</i> , 414 F.3d 896 (8 th Cir. 2005)	16
<i>Ainsworth v. Skurnick</i> , 960 F.2d 939 (11 th Cir. 1992)	32
<i>Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co.</i> , 670 SW2d 841 (Ky. 1984)	26
<i>Beroth v. Appollo College, Inc.</i> , 135 Wn. App. 551, 145 P.3d 386 (2006)	36, 39
<i>Bishop v. Miche</i> , 137 Wn.2d 518, 973 P.2d 465 (1999)	41
<i>Boyd v. Davis</i> , 127 Wn.2d 256, 897 P.2d 1239 (1995)	30, passim
<i>Brannan v. United Student Aid Funds, Inc.</i> , 94 F.3d 1260 (9 th Cir. 1996)	16
<i>Byerly v. Kirkpatrick Pettis Smith Polian, Inc.</i> , 996 P.2d 771 (Col. App. 2000)	24, 26
<i>Capper v. Callahan</i> , 239 P.2d 541 (1952)	15
<i>Casper v. Esteb Enterprises, Inc.</i> , 119 Wn. App. 759, 82 P.3d 1223 (2004)	17
<i>City of Auburn v. King County</i> , 114 Wn.2d 447, 788 P.2d 534 (1990)	1, passim
<i>Davidson v. Hensen</i> , 135 Wn.2d 112, 954 P.2d 1327 (1998)	31, passim
<i>Dean Witter Reynolds, Inc. v. Byrd</i> , 470 U.S. 213 (1985)	23, 46
<i>DeBaker v. Shah</i> , 522 NW2d 268 (Wis. App. 1994)	22
<i>Department of Labor & Industries v. Lanier Brugh</i> , 135 Wn. App. 808, 147 P.3d 588 (2006)	16
<i>Douchette v. Bethell School Dist. No. 403</i> , 117 Wn.2d 805, 818 P.2d 1362 (1991)	48
<i>Drinkwitz v. Alliant Techsystems, Inc.</i> , 140 Wn.2d 291, 996 P.2d 582 (2000)	47
<i>Dueringer v. General American Life Ins. Co.</i> , 842 F.2d 127 (5 th Cir. 1988)	16
<i>Ekstrom v. Value Health, Inc.</i> , 68 F.3d 1391 (DC Cir. 1995)	26
<i>Expert Drywall, Inc. v. Ellis-Don Constr., Inc.</i> , 86 Wn. App. 884, 939 P.2d 1258 (1997)	36
<i>Federated Ins. Co. v. Estate of Norberg</i> , 101 Wn. App. 113, 4 P.3d 844 (2000)	36
<i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938 (1995)	27

<i>Friends of Snoqualmie Valley v. King Cty. Boundary Rev. Bd.</i> , 118 Wn.2d 488, 825 P.2d 300 (1992).....	41
<i>Gilchrist v. Jim Slemons Imports, Inc.</i> , 803 F.2d 1488 (9 th Cir. 1988).....	16
<i>Gonzales v. Surgidev Corp.</i> , 899 P.2d 576 (NM 1995).....	16
<i>Great Western Mortgage Corp. v. Peacock</i> , 110 F.3d 222 (3d Cir. 1997).....	24
<i>Gross v. City of Lynnwood</i> , 90 Wn.2d 395, 583 P.2d 1197 (1978).....	18
<i>Hansen v. Friend</i> , 118 Wn.2d 476, 824 P.2d 483 (1992).....	12
<i>Har-Mar v. Thorsen & Thorshov, Inc.</i> , 218 N.W.2d 751 (Minn. 1974).....	43
<i>Herberg v. Swartz</i> , 89 Wn.2d 916, 578 P.2d 17 (1978).....	12
<i>Holden v. Farmers Ins. Co.</i> , - Wn. App. -, 175 P.3d 601 (2008).....	38
<i>In re Thompson</i> , 141 Wn.2d 712, 10 P.3d 380 (2000).....	17
<i>In re Tortorelli</i> , 149 Wn.2d 82, 66 P.3d 606 (2003).....	17
<i>International Ass'n of Firefighters v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).....	46, 47
<i>Ives v. Ramsden</i> , - Wn. App. -, 174 P.3d 1231 (2008).....	15
<i>Johnson v. Armored Transport of California</i> , 813 F.2d 1041 (9 th Cir. 1987).....	16
<i>Kenneth W. Brooks Trust A v. Pacific Media, LLC</i> , 111 Wn. App. 393, 44 P.3d 938 (2003).....	36
<i>Kruger Clinic Orthopaedics, LLC v. Regence Blueshield</i> , 157 Wn.2d 290, 138 P.3d 936 (2006).....	46
<i>Kyocera Corp. v. Prudential-Bache Trade Services, Inc.</i> , 341 F.3d 987 (9 th Cir. 2003).....	32
<i>Leora v. Minneapolis, St. Paul Ry.</i> , 146 N.W. 520 (Wis. 1914).....	15
<i>Lewiston FF Assn. v. City of Lewiston</i> , 354 A.2d 154 (Me. 1976).....	43
<i>Lindon Commodities, Inc. v. Bambino Bean Co., Inc.</i> , 57 Wn. App. 813, 790 P.2d 228 (1990).....	36
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 139 Wn. App. 334, 160 P.3d 1089 (2007).....	38
<i>MacLean Townhomes v. Am. States Ins. Co.</i> , 138 Wn. App. 186, 156 P.3d 278 (2007).....	36, 39
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 79 P.3d 1154 (2003).....	1, passim
<i>Muao v. Grosvenor Properties Ltd.</i> , 99 Cal. App.4 th 1085, 122 Cal. Rptr.2d 131 (Cal. App. 2002).....	26

<i>NCR Corp. v. CBS Liquor Control, Inc.</i> , 874 F. Supp. 168 (S.D. Ohio 1993), <i>aff'd</i> , 43 F.3d 1076 (6 th Cir.), <i>cert. den.</i> , 516 U.S. 906 (1995).....	43
<i>New York v. United States</i> , 505 U.S. 144 (1992).....	21
<i>Northern State Construction Co. v. Banchemo</i> , 63 Wn.2d 245, 386 P.2d 625 (1963).....	27
<i>O'Brien v. Griffiths & Sprague Stevedoring Co.</i> , 116 Wash. 302, 199 P. 291 (1921).....	14, 15
<i>Ovitz v. Schulman</i> , 133 Cal. App.4 th 830, 35 Cal. Rptr.3d 117 (2005).....	20, passim
<i>Padrino Maritime, Inc. v. Rizo</i> , 130 S.W.2d 243 (Tex. App. 2004).....	16
<i>Peggy Rose Rev. Trust v. Eppich</i> , 640 N.W.2d 601 (Minn. 2002).....	43
<i>Phillips v. King County</i> , 87 Wn. App. 468, 943 P.2d 306 (1997)	12
<i>Preston v. Ferrer</i> , - US -, 2008 WL 440670	23, 25
<i>Progressive Animal Welfare Society v. Univ. of Washington</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	21, passim
<i>Reece v. Good Sam. Hospital</i> , 90 Wn. App. 574, 953 P.2d 117 (1998).....	21
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	40, passim
<i>Roadway Package System, Inc. v. Kayser</i> , 257 F.3d 287 (3d Cir. 2001).....	19, 20
<i>Schmidt v. Zilveti</i> , 20 F.3d 1043 (9 th Cir. 1994)	27
<i>Shoreline School Dist. No. 412 v. Shoreline Ass'n of Ed. Office Emp.</i> , 29 Wn. App. 956, 631 P.2d 996 (1981).....	15
<i>Siegel v. Prudential Ins. Co.</i> , 67 Cal.App.4 th 1270, 79 Cal. Rptr.2d 726 (1998).....	20, passim
<i>Skidmore, Owings & Merrill v. Connecticut Gen. Life Ins. Co.</i> , 197 A.2d 83 (Conn. 1963)	43
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984).....	16, passim
<i>St. Fleur v. WPI Cable Systems/Mutron</i> , 450 Mass. 345, 879 NE2d 27 (2008).....	20, passim
<i>State v. Devin</i> , 158 Wn.2d 157, 142 P.3d 599 (2006)	40
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	12
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	38, 47
<i>Stevedoring Services of America, Inc. v. Eggert</i> , 129 Wn.2d 17, 914 P.2d 737 (1996)	16, 21
<i>Stuewe v. State Dept. of Revenue</i> , 98 Wn. App. 947, 991 P.2d 634 (2000)	14

<i>Sweeney v. Westvaco Co.</i> , 926 F.2d 29 (1 st Cir. 1991).....	16
<i>Thorgaard Plumbing & Heating Co., Inc. v. County of King</i> , 71 Wn.2d 126, 426 P.2d 828 (1967).....	1, passim
<i>Tim Huey Corp. v. Global Boiler, Inc.</i> , 649 NE2d 1358 (Ill. App. 1995)	26
<i>Tolson v. Allstate Ins. Co.</i> , 108 Wn. App. 495, 32 P.3d 289 (2001).....	36
<i>Trombetta v. Raymond James Financial Services, Inc.</i> , 907 A.2d 550 (Pa. Super. 2006)	20, passim
<i>Van Vonno v. Hertz Corp.</i> , 120 Wn.2d 416, 841 P.2d 1244 (1992).....	12
<i>Virginia Mason Hosp. v. Washington State Nurses Ass'n</i> , 511 F.3d 908 (2007)	32
<i>Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University</i> , 489 U.S. 468 (1989).....	20, passim
<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	21
<i>Wells v. Chevy Chase Bank</i> , 768 A.2d 620 (Md. 2001)	24, 26
<i>Wingert v. Yellow Freight Systems, Inc.</i> , 146 Wn.2d 841, 50 P.3d 256 (2002).....	13, 14

Statutes and Court Rules

9 U.S.C. § 2.....	19, passim
9 U.S.C. § 3.....	28, passim
9 U.S.C. § 4.....	28, passim
9 U.S.C. §10.....	27, passim
9 U.S.C. §11.....	4, passim
9 U.S.C. §12.....	28, passim
9 U.S.C. §16.....	26, passim
RCW 4.16.005	45
RCW 7.04	4, passim
RCW 7.06	37, passim
RCW 49.48.030	47
McKinney's CPLR § 7502(b)	45
RAP 2.5(a).....	12, 14
RAP 12.2.....	20
RAP 12.3(a), (b).....	20
RAP 12.5(a).....	20

Other Authorities

1 APD § 17.3(1)..... 17
2 APD § 17.2(2)..... 12
1 WSBA, Appellate Practice Deskbook 12
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I. INTRODUCTION

This case will decide whether parties remain free in Washington to provide such limitations as they may choose on the claims they submit to arbitration, or whether the law will impose the technical defense of statutes of limitation on proceedings intended to be simpler and less technical than judicial actions.

Before the Court can reach this primary issue, it must deal with an issue raised for the first time on appeal: alleged preemption of State arbitration vacatur law by Federal common law under the Federal Arbitration Act (“FAA”). This issue is waived because Morgan Stanley DW, Inc. (“MSDW”) repeatedly urged the trial court to apply Washington arbitration law; because it was not argued below; and because any alleged error in applying Washington law is “invited error”. Furthermore, the law is clear that the FAA’s limited preemptive scope extends only to enforceability of arbitration agreements, and that the FAA leaves State law intact on other issues, including confirmation or vacatur of awards.

Under Washington law, the Superior Court properly applied the well-established “error of law on the face of the award” standard, to vacate an Award that on its face dismissed claims based on statutes of limitation,

in violation of clear Washington Supreme Court precedent holding that such statutes do not apply in arbitration.

II. COUNTERSTATEMENT OF ISSUES

- A. Is MSDW barred from relying upon the FAA at this late stage in the proceedings?
 - 1. Is MSDW barred from relying upon the FAA under the doctrines of waiver and issue first raised on appeal?
 - 2. Did MSDW invite the “errors” of which it complains?
- B. Does the FAA apply here?
 - 1. Does the limited preemptive scope of the FAA preempt State confirmation and vacatur law?
 - 2. Does the post-dispute consent of both parties to application of State law preclude application of the FAA?
- C. Is “error of law on the face of the award” a proper standard of review under Washington’s 1943 Arbitration Act?
 - 1. Is this issue waived?
 - 2. Did *Malted Mousse Sub Silentio* Overrule the Long Line of Cases Establishing “Error of Law”?
- D. Did the Superior Court properly vacate the Award?
 - 1. Should this Court overrule *Thorgaard* and *City of Auburn* to rule that Washington statutes of limitation govern the contractual, non-judicial proceeding known as arbitration?
 - 2. Did the error appear on the face of the award?

III. STATEMENT OF THE CASE

- A. **Overview of Key Points Omitted by Morgan Stanley**

The single most overriding fact not stated in the Brief of Appellants is that both parties to this case – the Brooms **and** MSDW – briefed and submitted this case to the Superior Court under Washington State law, but now that MSDW has learned that it must lose under Washington law, it is attempting to shift the entire argument to Federal law. CP 2, 210, 441-53, 510-11, 514, 517, 520. MSDW **first** argued that the FAA controls this case in its Opposition to the Brooms’ Motion to Dismiss Appeal, filed in this Court on August 15, 2007. Prior to that time, it consistently argued that Washington’s Revised Uniform Arbitration Act, Ch. 7.04A, RCW (“RUAA”), was the “controlling statute”. This Court should bar MSDW from changing the rules after the game has been played, based on waiver, issue first raised on appeal, and invited error.

The adult children of John R. (“Dick”) Broom (hereinafter “the Brooms”), brought this claim in arbitration against an inexperienced broker and the brokerage house for mis-management of funds and failure to supervise. CP 18-32. The basis of the claim is that the Brooms’ elderly father’s account was left undiversified in high tech securities, resulting in a drop in value from \$2.2 to \$0.6 million in the last two years of his life. CP 18-24, 33-45. The Brooms asserted nine legal theories, eight of which were under State law. CP 24-31. Seven of the Brooms’ State law claims

were dismissed based on the arbitrators' ruling, reflected on the face of the Award, that they were barred by the statute of limitations. CP 10.¹

The Award against the Brooms was entered July 12, 2006, on a slim 2-1 vote, with one of the two attorney Panel members dissenting (so the deciding vote was the securities industry insider). CP 6, 14-16; 445.

B. Procedural History in State and Federal Court

1. Removal and Remand

On October 9, 2006, the Brooms filed a Complaint and Motion to Vacate Arbitration Award in King County Superior Court. CP 1-4, 208-18. The Complaint and Motion relied exclusively upon Washington law to vacate the Award. CP 2 ¶ 3 (“This is an action under RCW 7.04A et seq. to vacate an NASD arbitration award entered on July 12, 2006”); CP 2 ¶ 4 (“Jurisdiction in this Court is proper under RCW 7.04A et seq.”); CP 210 (the first line of the Argument is, “A court may vacate an arbitration award pursuant to RCW 7.04A.230, as interpreted by our courts.”).

The Brooms argued **by analogy** to Federal law that “Washington applies a standard similar to the parallel federal statute, 9 U.S.C. §§ 10 and 11, under which an award is properly vacated if it exhibits a ‘manifest

¹ The Brooms' Consumer Protection Act claim was dismissed on non-statute of limitations grounds, and their Rule 10b-5 claim was dismissed on Federal statute of limitations grounds. CP 10-11, 51, 150, 234-35. The Brooms thereafter abandoned those claims. CP 536 n.1; 562-63.

disregard of law’.” CP 210. On October 31, 2006, MSDW seized upon this comparison of Washington to Federal law, to file a Notice of Removal to Federal Court. Supp. CP – (Docket #9). According to MSDW, the Brooms’ reference to the Federal common-law manifest disregard standard, plus the fact that the Rule 10b-5 claim was dismissed under a Federal statute of limitation, was sufficient to support Federal Court jurisdiction. Supp. CP – [Docket ##9, 14 (Fed. Docket #3)]. Significantly, in light of MSDW’s current effort to frame this entire case under the FAA, MSDW told the Federal Court that it was not relying upon the FAA:

Plaintiffs . . . argu[e] that the Federal Arbitration Act (“FAA”) does not provide an independent basis for subject matter jurisdiction. **Defendants did not base removal on the FAA.** The sole basis for removal is that, as written, the face of Plaintiffs’ Motion to Vacate Arbitration Award and, therefore, Plaintiffs’ complaint and Motion to Vacate Arbitration Award, present a federal question because of the federal law standard of review utilized and/or the challenge to the dismissal of the federal law securities claims based upon the federal statutes of limitation.

Supp. CP – (Docket #14 (Fed. Docket #3 at 5)) (emphasis added; record citations omitted). Therefore, when MSDW had a chance to place this case squarely upon the FAA before the Federal Court, it chose instead to expressly disclaim any such reliance.

In their November 2, 2006 Motion to Remand, the Brooms argued that their “**Complaint is Brought Under Washington Arbitration Law**”, CP 501, and added that they “did not file a motion for vacation of the

arbitration award pursuant to the provisions of the Federal Arbitration Act” CP 502. The U.S. District Court agreed, finding that “Plaintiffs’ complaint includes a short and plain statement of facts in support of a lone cause of action under Washington’s UAA [Uniform Arbitration Act].” CP 597. Noting that the Brooms were “well within their power to avoid federal court by electing a state law remedy, regardless of whether a similar federal cause of action exists,” *id.*, the Court granted the Brooms’ Motion for Remand, and awarded sanctions. CP 599-600.

2. On Remand, MSDW Made a Strategic Decision to Defend the Washington RUAA

On December 22, 2006, MSDW filed its Answer and Counterclaim to Confirm Award. CP 219. In response to the allegation of the Complaint that “[j]urisdiction in this Court is proper under RCW 7.04A et seq.,” CP 2 ¶ 4, MSDW stated, “Defendants admit that jurisdiction is proper.” In its Counterclaim, MSDW asserted that “[n]o grounds exist under RCW 7.04A.230 to vacate the Arbitration Award.” CP 223 ¶ 21. MSDW said nothing about the possibility that jurisdiction should properly lie under the FAA, or that the FAA preempts the Washington Revised Uniform Arbitration Act (“RUAA”). MSDW did mention the FAA as an alternate basis, along with RCW 7.04A.220 and 7.04A.230(4), to confirm the Award. CP 223 ¶ 23.

At this point, MSDW had two choices: (1) it could assert arguments based on the FAA (as it is doing now); or (2) it could embrace State law and structure its arguments on perceived advantages under Washington's Arbitration Act. **The record clearly demonstrates that it chose the second option, resting its case on State law.**

On April 30, 2007, MSDW filed its Opposition to Brooms' Motion to Vacate. CP 508-34. Under major heading "**III. Issues Presented**", MSDW framed the case solely in terms of State law:

(1) Have Claimants provided evidence sufficient to establish that the NASD Panel . . . exceeded their powers **under RCW 7.04A.230(1)(d)** by granting Defendants' motions to dismiss . . .?

(2) Does **RCW 7.04A.230, the controlling statute**, permit the use of Claimants' purported "error of law" theory to vacate an arbitration award . . .?

(3) Should this Court confirm the NASD Arbitration Award **pursuant to RCW 7.04A.230(4)** because the Claimants failed to establish any statutory basis recognized **under RCW 7.04A.230(1)** as sufficient to vacate the award?

CP 514 (emphasis added). Following closely on these State-law issues, each of MSDW's substantive arguments was likewise based on Washington law. Relying heavily on attached legislative history of Washington's RUAA, CP 447-53, MSDW crafted the primary argument that the RUAA had supposedly eliminated the "error of law" standard established by Washington case law under the prior 1943 Washington

Arbitration Act (“WAA”), and therefore MSDW claimed that enactment of the RUAA meant that the Court had to deny the Brooms’ Motion to Vacate. CP 514-20. MSDW also argued that even under the “error of law” standard in effect under the WAA, the Brooms had failed to show error of law. CP 520-28. MSDW also made numerous other Washington law arguments. CP 528-32. In the one place where MSDW cited the FAA (not until page 23), **the only substantive legal reasoning was based on Washington law**, and the Federal citation was merely thrown in without any explanation or legal argument:

“If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.” RCW 7.04A.230(4). As set forth above [all State law arguments], no statutory grounds for vacating the NASD arbitration award exist and, therefore, this Court has authority to confirm and enforce the award pursuant to RCW 7.04A.220 and 7.04A.230(4), as well as the Federal Arbitration Act, 9 USC § 9. Furthermore, Defendants request attorneys fees and other reasonable expenses incurred pursuant to RCW 7.04A.250.

CP 532.

Not only were all the issues stated and all the substantive arguments advanced by MSDW based on State law, but MSDW **repeatedly and with great emphasis** asserted throughout its Opposition to the Motion to Vacate that **the Washington RUAA statute governing vacatur of arbitration awards (RCW 7.04A.230), is controlling here:**

- The first page of MSDW's Opposition asserted that the Brooms were trying to take "an appeal which is not permitted by **the applicable statute, RCW 7.04A.230**. . . . **Washington law** does not permit disappointed parties who lose in arbitration, to use the Superior Courts as an appellate court to get a 'second bite at the apple.' . . . Instead, **the governing statute, RCW 7.04A.230**, limits the permissible challenges to arbitration decisions" CP 510 (emphasis added). In the statement of issues, MSDW again called RCW 7.04A.230 "**the controlling statute**". CP 514. MSDW had, at this point, already admitted that Washington arbitration vacatur law governs. But it was just getting started.
- The introductory section specifically requested relief under Washington arbitration vacatur law: "Accordingly, Defendants respectfully request that this Court deny plaintiffs' motion to vacate and confirm the arbitration award **pursuant to RCW 7.04A.230(4)**," CP 511; and also requested attorneys' fees under RCW 7.04A.250. CP 511.
- MSDW concluded this introductory section: "Nothing in this record supports anything close to the type of misconduct **specified in RCW 7.04A.230** as necessary to vacate an arbitration award." CP 514.
- **MSDW made no mention of the FAA** in the introductory section. *Id.* Nor did it state **any issue** arising out of the FAA in its statement of issues, which raised only Washington law. CP 514.
- MSDW's Opposition made repeated reference to what "**Washington law**" does and does not permit. *E.g.*, CP 511, 514, 517.
- Under the major heading "**Legal Analysis**", MSDW's first subheading was "**A. Washington's New Arbitration Act Imposes Strict Statutory Limits Upon Courts Which are Asked to Vacate Arbitration Awards . . .**" CP 514.
- MSDW argued: "RCW 7.04A.230 now provides this Court's sole basis to grant or deny Claimant's motion to vacate . . ."

CP 514-15 (emphasis in original). Obviously, this excludes any possible applicability of FAA § 10.

- MSDW urged the trial court to apply Washington arbitration vacatur law: “As the Legislature directs, **this Court should apply** the language of **the controlling statute, RCW 7.04A.230**, as interpreted by courts of states which have adopted the Uniform Arbitration Act (or prior versions). . . . In other words, ‘error of law’ is not a proper basis for vacatur **under RCW 7.04A.230(1)(d)**.” CP 517 (emphasis added).
- MSDW summarized its argument against vacating the Award in light of **Washington law only**: “Claimants are attempting to do what RCW 7.04A.230 does not allow: . . . Appeals for errors of law are not among the grounds for vacation of awards permitted by RCW 7.04A.230.” CP 520.

3. The Parties Dispute Which Washington Arbitration Act Should Apply

In response to MSDW’s argument that the RUAA abolished the “error of law” standard existing under the WAA, the Brooms made two arguments: (1) that because the arbitration proceeding was commenced before January 1, 2006, the RUAA does not apply, RCW 7.04A.903, and therefore the WAA applies, CP 537-38; and (2) because the RUAA carries over the language of the WAA, and the legislative history shows no intent to change the “error of law” standard, the Award should be vacated regardless of which version of the Washington Arbitration Act applies, CP 538-40. The dispute at this point was not over whether the State or Federal Arbitration Act should govern, but over **which Washington Arbitration Act should govern.**

MSDW filed a “Sur-Reply” to the Brooms’ Reply. While not disagreeing that under RCW 7.04A.903 the RUAA would not ordinarily apply to this case, CP 550 n.1, MSDW nonetheless argued that the Brooms waived or should be estopped against raising this argument:

Plaintiffs – having made their claim in this Court under the RUAA – should not be allowed to change the statute upon which they seek relief after Defendants relied upon their original pleading and responded accordingly.

CP 551. MSDW repeated this argument in its Motion to Stay. CP 584-85.

4. The Superior Court Grants the Motion to Vacate Under the Washington RUAA

On May 11, 2007, the Superior Court vacated the Award under the “erroneous rule of law” standard, citing Washington’s RUAA, RCW 7.04A.230. CP 556-57. The Court found that, “in Washington, statutes of limitations do not bar a claimant from pursuing a claim submitted to arbitration.” CP 556. Citing RCW 7.04A.230(3), the Court sent the case back for arbitration before a different NASD Panel. *Id.*

The Superior Court’s reliance upon the RUAA is consistent with accepting MSDW’s repeated arguments: (1) that the RUAA is the “controlling statute”; and (2) that the Brooms waived the WAA.

IV. ARGUMENT

A. MSDW is Barred from Relying Upon the FAA at this Late Stage in the Proceedings

1. MSDW has Waived the FAA, and Should be Barred from Raising it for the First Time on Appeal

It is axiomatic that “[a]n issue, theory or argument not presented at trial will not be considered on appeal.” *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978).² “The primary reason for the general rule is judicial economy.” 1 WSBA, Appellate Practice Deskbook § 17.2(2) at 17-6 (3d ed. 2005) [“APD”].

The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). “[T]he rule is also required as a matter of fairness to the opposing party.” 2 APD §17.2(2) at 17-7.

[T]he opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal.

2 Orland & Tegland, *Washington Practice* 483 (4th ed. 1991).

The procedural history, § III(B), *supra*, demonstrates: (1) the Brooms’ Motion to Vacate was solely under State law; (2) MSDW

² *Accord, e.g., Van Vonno v. Hertz Corp.*, 120 Wn.2d 416, 426-27, 841 P.2d 1244 (1992); *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992); *Phillips v. King County*, 87 Wn. App. 468, 481, 943 P.2d 306 (1997); RAP 2.5(a).

admitted jurisdiction under the RUAA; (3) MSDW did not assert preemption at all; (4) in its counterclaim to confirm, MSDW made one brief reference to the FAA as an alternative basis for confirming the award; (5) in its detailed legal briefing, MSDW rested its legal arguments solely on Washington law, especially application of the Washington RUAA, which it repeatedly urged the trial court to apply as the “controlling” statute; (6) the one reference to the FAA at page 23 of MSDW’s Opposition to the motion to vacate (CP 532) is an off-hand reference made with no legal analysis; (7) MSDW never made **any** Federal law legal argument to the Superior Court; and (8) MSDW first raised such arguments before the Commissioner in this Court.

Merely mentioning the existence of a possibly applicable Federal statute as an afterthought does not operate to change the entire system of law applicable to the case. In *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002), the trial court found that employees were entitled to recover back wages **under Washington law**, for working overtime without a break. *Id.* at 849-50. Like here, the employer briefly mentioned Federal law below, but relied primarily on State law:

In its answer and affirmative defenses, Yellow Freight alleges that its employees’ claims “are matters subject for collective bargaining pursuant to the National Labor Relations Act” and that the claims “are preempted by § 301 of the Labor Management Relations Act.” CP at 9. However, these defenses

were not pursued before the trial court. Yellow Freight's motion for summary judgment explicitly limits the issues for consideration to [State law].

Id. at 852-53. But again like in this case, on appeal the employer tried to assert the argument that Federal law preempted the applicable State law. The Washington Supreme Court refused to hear it. Quoting RAP 2.5(a), the Court relied on the well-established rule that “[a]rguments not raised in the trial court generally will not be considered on appeal.” *Wingert, supra*, 146 Wn.2d at 853-54 (internal quotes omitted). Clearly, the Court did not consider a cursory reference to Federal law below to be sufficient to raise the issue in the trial court.³

Similarly, in *O'Brien v. Griffiths & Sprague Stevedoring Co.*, 116 Wash. 302, 199 P. 291 (1921), where damages were awarded to a stevedore based on negligence, the Washington Supreme Court refused to allow the defendant to raise a Federal admiralty fellow-servant defense:

The case cannot be presented by the pleadings and proof and instructions in the lower court upon one theory, and then presented for the first time in this court upon a different one. . . .

“ . . . If a defendant can carry its case through the trial court without raising the question of the application of the federal law, and, when defeated, come to this court and for the first time raise the question successfully, it possesses a very valuable advantage. It can experiment through both courts with one law, and, if defeated, commence over again under the other law, thus securing two trials,

³ This is the trial court analog to the appellate rule that an issue merely mentioned in a brief, devoid of citation of authority or reasoned argument, is deemed waived. *E.g.*, *Stuewe v. State Dept. of Revenue*, 98 Wn. App. 947, 950 n.2, 991 P.2d 634 (2000).

even though the first trial be without objection or exception. Such a conclusion should not be reached unless it is inevitable. **Every instinct of fairness and justice cries out against it.** . . . If the question may lie dormant in the trial court and be raised for the first time in the court of last resort, it is very certain that many a case fairly tried under the terms of one law, and in which every right secured to the parties by that law has been carefully safeguarded, will have to be reversed, and a new trial awarded, because of an objection never brought to the attention of the trial court. There is a well-established legal principle which forbids this result, and that is the principle of **consent or waiver.**”

O'Brien, supra, 116 Wash. at 304-05 (quoting, *Leora v. Minneapolis, St. Paul Ry.*, 146 N.W. 520, 522 (Wis. 1914)) (emphasis added).⁴

“Waiver is the voluntary and intentional relinquishment of a known right.” *Ives v. Ramsden*, - Wn. App. -, 174 P.3d 1231, 1238 (2008) (internal quotes omitted). It can apply to the entire right to arbitrate, and therefore it can apply to the lesser issue of the law applicable to review of the arbitration award. *Id.* In *Ives*, the Court of Appeals held that a securities broker that answered the complaint, engaged in discovery and pretrial preparation, and did not assert the arbitration agreement until the eve of trial, had engaged in conduct “inconsistent with any other intention but to forego’ his right to arbitration,” and had therefore waived that right. *Id.* at 1238-39 (quoting, *Shoreline School Dist. No. 412 v. Shoreline Ass’n*

⁴ *Accord, e.g., Capper v. Callahan*, 39 Wn.2d 882, 886-87, 239 P.2d 541 (1952) (after relying upon State law below, Court will not permit appellant to switch to Federal admiralty law on appeal, because “[t]his court has always followed the rules that a case will not be reviewed on a theory different from that on which it was tried in the trial court, and questions not raised in that court will not be considered on appeal.”).

of *Ed. Office Emp.*, 29 Wn. App. 956, 958, 631 P.2d 996 (1981)). Similarly, by repeatedly urging application of Washington arbitration law upon the trial court, MSDW has engaged in conduct inconsistent with any other intention but to forego its right to seek application of the FAA.

“Preemption affecting the choice of law, but not choice of forum, may be waived if not raised in a timely manner.”⁵ *Padrino Maritime, Inc. v. Rizo*, 130 S.W.2d 243, 249 (Tex. App. 2004).⁶ Because the State Courts have power to hear claims under the FAA, *Southland Corp. v. Keating*, 465 U.S. 1, 12, 15-16 (1984),⁷ applicability of the FAA by preemption would only affect choice of law, not choice of forum. MSDW’s failure to raise this choice of law preemption claim before the trial court operates as a waiver of the claim under the above-cited authorities.

2. MSDW Cannot Assert Error in Applying the RUAA Because of the Doctrine of “Invited Error”

⁵ Preemption is an affirmative defense in Washington. *Stevedoring Services of America, Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996); *Department of Labor & Industries v. Lanier Brugh*, 135 Wn. App. 808, 815, 147 P.3d 588 (2006).

⁶ *Accord, Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1988) (preemption waived when raised for the first time on appeal); *accord, e.g., Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 1996) (same); *Johnson v. Armored Transport of California*, 813 F.2d 1041, 1044 (9th Cir. 1987) (preemption waived when not raised until post-trial motions); *Sweeney v. Westvaco Co.*, 926 F.2d 29, 37-40 (1st Cir. 1991) (Breyer, C.J.) (same); *Ace Electrical Contractors, Inc. v. Int’l Brotherhood of Elec. Workers*, 414 F.3d 896, 903 (8th Cir. 2005) (preemption waived when not raised before the trial court); *Dueringer v. General American Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988) (same); *Gonzales v. Surgidev Corp.*, 899 P.2d 576, 582-83 (NM 1995) (same).

⁷ This is admitted by MSDW in *Brief of Appellants* at 19.

“The doctrine of invited error prohibits a party from setting up an error in the trial and then complaining of it on appeal.” *In re Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003); *accord, e.g.*, 1 APD § 17.3(1). The doctrine applies when the party takes “knowing and voluntary actions to set up the error . . .” *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000); *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004). Here, believing that it would obtain a strategic advantage by what it perceived as a change in Washington law that limited the grounds for review of an arbitration award, MSDW very deliberately set out to convince the trial court that the Washington RUAA was the one and only governing statute. CP 447-53, 514-20. When the Brooms’ took the position that the WAA, and not the RUAA, was the applicable law, MSDW argued that the Brooms had waived that argument, or were estopped from asserting it. CP 551, 584-85.

As requested by MSDW, the trial court ended up applying Washington law, specifically the RUAA. CP 556-57. Having urged the trial court to do so, MSDW cannot now appear before this Court contending that it was error to apply State arbitration law, or that it was error to apply the RUAA instead of the WAA. *See, Tortorelli, supra*, 149 Wn.2d at 94. But that is exactly what it is trying to do.

The first two issues pertaining to assignments of error presented by MSDW are raised under the FAA. *Brief of Appellants* at 2. MSDW complains about the following alleged “errors” which it invited:

- “The trial court’s failure to even address the FAA was its first and perhaps most fundamental error.” *Id.* at 14-15.
- Trial court committed “error” by ignoring the FAA and relying upon State law to vacate the award. *Id.* at 21.
- “The trial court committed legal error by applying the RUAA,” when in fact (as MSDW finally concedes) the WAA is the properly applicable statute. *Id.* at 22.⁸
- Application of State arbitration law to the vacatur decision was “error” because that law is allegedly preempted. *Id.* at 27-31.

MSDW urged the opposite of each and every one of these arguments before the trial court. MSDW made its bed; now it must lie in it. Any other conclusion is wasteful of judicial resources, and would make a mockery of the litigation process.

B. The FAA Does Not Govern this Matter

Even if MSDW had not waived applicability of the FAA and invited the “errors” of which it complains, this case would still be governed by Washington arbitration law, not Federal law, for two reasons:

⁸ This Court should, of course, apply the properly applicable law – the 1943 WAA – but it should nevertheless affirm the trial court’s order either on the grounds that MSDW invited the alleged “error” of citing the RUAA, and/or because the appellate court will affirm the trial court on any ground supported in the record, even if not the ground relied upon by the trial court. *Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978); 1 APD § 17.3(3).

(1) the FAA only has limited preemptive effect, confined to the issue of enforcement of agreements to arbitrate, and it allows state law to govern the rest of the proceedings, including standards for vacatur or confirmation of awards; and (2) where both parties expressly consent to application of State arbitration law, the policy of the FAA is to enforce that agreement, rather than to displace the chosen State law.

1. Federal Caselaw under the FAA Does Not Preempt Washington Arbitration Law on Scope of Review

a. MSDW Bears a Heavy Burden of Showing the “Clear and Manifest Purpose” of Congress to Preempt Washington Arbitration Law on Vacatur / Confirmation of Awards

The parties agree on one point, but it does not have the effect claimed by MSDW: we agree that the underlying brokerage agreement could be litigated under the FAA, because it is a transaction involving commerce within the meaning of 9 USC § 2. “Our inquiry is not ended, however, simply because we have concluded that the FAA applies.” *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 292 (3d Cir. 2001). There is no doubt (even aside from MSDW’s multiple admissions) that either the WAA or the RUAA also apply on their face to this motion to vacate an arbitration award. RCW 7.04A.030(2), .230; former RCW 7.04.010, .160. Many areas of law are covered by parallel State and Federal statutory schemes, but the mere fact that a parallel Federal Act

exists does not mean that it automatically governs the case. As the U.S. District Court has already held in this very case, the Brooms were “well within their power to avoid federal court by electing a state law remedy, regardless of whether a similar federal cause of action exists.” CP 597.

Many arbitration cases have found that State arbitration law governs a transaction involving commerce, either because the FAA did not preempt State law on the issue in question, or because of consent of the parties to apply State law.⁹ MSDW’s analysis (*Brief of Appellants* at 18) that the FAA applies on its face so it necessarily supplants the State arbitration acts is overly simplistic, and contrary to law.¹⁰ Even the fact that the FAA is an exercise of Commerce Clause power is not enough to displace State law. “The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of

⁹ *E.g.*, *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 472-75 (1989); *Roadway Package, supra*, 257 F.3d at 292-93; *Ovitz v. Schulman*, 133 Cal. App.4th 830, 848-49, 35 Cal. Rptr.3d 117 (2005); *Siegel v. Prudential Ins. Co.*, 67 Cal.App.4th 1270, 1275-76, 1280, 79 Cal. Rptr.2d 726 (1998); *St. Fleur v. WPI Cable Systems/Mutron*, 450 Mass. 345, 879 NE2d 27, 30-33 (2008); *Trombetta v. Raymond James Financial Services, Inc.*, 907 A.2d 550, 562-69 (Pa. Super. 2006).

¹⁰ MSDW relies upon the Commissioner’s Ruling on Appealability, alleging that it found the FAA applies. *Brief of Appellants* at 13, 18. In fact, the Commissioner did not determine whether Federal or State law governed, but merely held that this matter was appealable of right under either body of law. *Commissioner’s Ruling* at 4 (9-24-07). Furthermore, being a mere interlocutory ruling issued for the limited purpose of determining appealability, the Commissioner’s Ruling is not binding, and could not determine the issue of governing law on the merits. RAP 12.2; 12.3(a), (b); 12.5(a).

interstate commerce.” *Trombetta, supra*, 907 A.2d at 568 (quoting, *New York v. United States*, 505 U.S. 144, 166 (1992)). This Court must face the hard question of preemption before it can agree to set aside State law.

Under Washington law:

Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.

Progressive Animal Welfare Society v. Univ. of Washington, 125 Wn.2d 243, 265, 884 P.2d 592 (1994) (quoting, *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 326, 858 P.2d 1054 (1993)). The Court in *PAWS* continued:

We have also repeatedly emphasized that “[T]here is a **strong presumption against finding preemption** in an ambiguous case and the **burden of proof is on the party claiming preemption....** State laws are not superseded by federal law unless that is the **clear and manifest purpose** of Congress.”

PAWS v. UW, supra (quoting, *Fisons, supra*, 122 Wn.2d at 327) (emphasis added).¹¹

b. The Purpose and Preemptive Scope of the FAA is Limited to Enforcement of Arbitration Agreements

The U.S. Supreme Court and many other Courts have already held

¹¹ *Accord, e.g., Stevedoring Svcs. of America, Inc. v. Eggert*, 129 Wn.2d 17, 24, 914 P.2d 737 (1996); *Reece v. Good Sam. Hospital*, 90 Wn. App. 574, 579, 953 P.2d 117 (1998).

that “[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.” *Volt, supra*, 489 U.S. at 477.¹² Therefore, the only ground for possible preemption here is the third ground, in which State law stands as an obstacle to the accomplishment of the purpose of the Federal law.

The purpose of the FAA is determined from its language and legislative history. The provision of the FAA relied upon in all the U.S. Supreme Court arbitration-preemption cases is FAA § 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. This provision, on its face, clearly addresses one issue, and one issue only: enforceability of agreements to arbitrate. Examination of the legislative history reinforces this conclusion:

The legislative history of the [FAA] establishes that the purpose behind its passage was **to ensure judicial enforcement of privately made agreements to arbitrate**. . . . The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement “upon the same footing as other contracts, where it belongs,” H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), and to **overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate**. . . .

¹² *Accord, e.g., Ovitz, supra*, 133 Cal. App.4th at 851; *Trombetta, supra*, 907 A.2d at 564; *DeBaker v. Shah*, 522 NW2d 268, 271 (Wis. App. 1994), *rev’d other grnds.*, 533 NW2d 464 (Wis. 1995).

[P]assage of the Act was motivated, **first and foremost**, by a congressional desire **to enforce agreements into which parties had entered**, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20, 105 S.Ct. 1238 (1985) (emphasis added). Every U.S. Supreme Court decision to find arbitration preemption has involved a State law that in some way impaired the enforceability of the arbitration agreement, and in each case the Court relied upon FAA § 2 and the purpose to enforce arbitration agreements.¹³

The common denominator of the recent United States Supreme Court decisions that have held state laws preempted by § 2 of the

¹³ *Preston v. Ferrer*, - US -, 2008 WL 440670 at *5 (CA law assigning a dispute subject to arbitration to administrative agency; Court quotes FAA § 2 and states: "Section 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner. That national policy, . . . 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.'" (Citations omitted)); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 687-88 (1996) (relying on FAA § 2 to set aside Montana law requiring as prerequisite to enforceability of arbitration clause a notice of the clause in underlined capital letters on page one of the contract; Court stresses purpose of FAA to not discriminate against arbitration agreements, and "to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" (Citations omitted)); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55-56 (1995) (FAA § 2 preempts NY common law rule precluding arbitrators (but not courts) from awarding punitive damages; Court emphasizes that "Congress passed the FAA 'to overcome courts' refusals to enforce agreements to arbitrate.'" (Citation omitted)); *Allied-Bruce Terminix, Inc. v. Dobson*, 513 U.S. 265, 270 (1995) (FAA § 2 preempts Alabama statute voiding written predispute arbitration agreements, stating that "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."); *Perry v. Thomas*, 482 U.S. 483, 489, 491-92 (1987) (FAA § 2 preempts California Labor Code provision stating that wage collection actions may be maintained without regard to existence of any arbitration agreement; Court states broad purpose of FAA § 2 is to favor enforceability of arbitration agreements); *Southland Corp. v. Keating*, 465 U.S. 1, 5, 10 (1984) (first U.S. Supreme Court arbitration-preemption case; FAA § 2 preempts California franchise law provision voiding contract provisions that avoid compliance with Franchise Investment Law; Court finds that in FAA § 2, "Congress has thus mandated the enforcement of arbitration agreements.")

FAA seems to be that those state statutes targeted agreements to arbitrate and treated them less favorably than other contracts.

Wells v. Chevy Chase Bank, 768 A.2d 620, 627 (Md. 2001).¹⁴

This limited purpose – protecting enforceability of arbitration agreements – operates to limit the scope of FAA preemption, so that it does not cover many other issues, including the standard for review of awards after the arbitration agreement has been honored. *E.g.*, *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 230 (3d Cir. 1997) (finding that “the FAA is meant to have a preemptive effect, albeit a narrow one,” the Court holds that “the preemptive effect of the FAA is restricted to the question of arbitrability, and . . . whether the agreement to arbitrate is valid.”).¹⁵ Thus, in the seminal case of *Southland*, the U.S. Supreme Court expressly recognized limits on its preemption holding:

In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal

¹⁴ *Accord*, *e.g.*, *Siegel, supra*, 67 Cal. App.4th at 1286-87; *Trombetta, supra*, 907 A.2d at 567.

¹⁵ *Accord*, *e.g.*, *Siegel, supra*, 67 Cal. App.4th at 1286-87 (“the limited preemptive effect of the [FAA]” is “to ‘foreclose state legislative attempts to undercut the enforceability of arbitration agreements.’” (Citations omitted)); (*Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771, 774 (Col. App. 2000) (“The FAA preempts state law only to the extent that such laws purport to invalidate otherwise enforceable agreements to arbitrate. Where the FAA applies and the trial court has found a valid and enforceable agreement to arbitrate, the resulting arbitration thereafter proceeds pursuant to state procedural and substantive law.”); *St. Fleur, supra*, 879 N.E.2d at 31 (“consideration of the legislative history [of the FAA] reveals that what the Congress intended was merely to overrule by legislation long-standing judicial precedent, which declared agreements to submit judicable controversies to arbitration contrary to public policy . . .,” and the FAA “preempts State law only to the extent that it conflicts with” this purpose).

Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state court proceedings.

Southland, supra, 465 U.S. at 16 n.10.¹⁶ Likewise, the Supreme Court's most recent decision, *Preston v. Ferrer, supra*, 2008 WL 440670, expresses clear limits on the scope of FAA preemption. Although the FAA preempted the California Talent Agencies Act ("TAA") to the extent that it entrusted initial decision-making to the administrative agency rather than the arbitrator, the Court in *Preston* was careful to point out that preemption went **no further**, and that, "Ferrer relinquishes no substantive rights the TAA or other California law may accord him." *Id.* at *8.

c. Caselaw Demonstrates that FAA Vacatur Law Does Not Preempt State Arbitration Law

The U.S. Supreme Court held in *Volt*:

There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.

¹⁶ Even the narrow holding that FAA § 2 was intended to preempt state laws impairing enforceability of arbitration agreements has been highly controversial. Justice O'Connor wrote a scholarly dissenting opinion in *Southland, supra*, in which she meticulously demonstrated that the "unambiguous" legislative history of the FAA "establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts . . .," and that this history combined with the language and structure of the Act preclude preemption. *Southland, supra*, 465 U.S. at 25; *see, id.* at 23-33. At one time or another, Justices O'Connor, Rehnquist, Scalia and Thomas, have all shared this view, making it unlikely that FAA preemption will ever be expanded beyond its current narrow scope.

Volt, supra, 489 U.S. at 476. As MSDW admits (*Brief of Appellants* at 29), **no U.S. Supreme Court decision** has found preemption of State law by FAA §§ 9 or 10 (or, we might add, § 12), which govern procedures for confirmation or vacatur of awards. Nor does MSDW cite **a single case** finding that FAA §§ 9, 10 or 12 preempt State arbitration law. On the other hand, **many cases have found that the FAA does not preempt State law governing confirmation or vacatur of arbitration awards.** *E.g., Byerly, supra*, 996 P.2d at 774; *Ovitz, supra*, 133 Cal. App.4th at 848-54; *Siegel, supra*, 67 Cal. App.4th at 1280-91; *Tim Huey Corp. v. Global Boiler, Inc.*, 649 NE2d 1358, 1361-62 (Ill. App. 1995); *Trombetta, supra*, 907 A.2d at 567-69; *DeBaker, supra*, 522 NW2d at 271.¹⁷

Ovitz v. Shulman, supra, 133 Cal. App.4th 830, is a textbook example of the many reasons to find against preemption in this case. In *Ovitz*, the Court faced the question of whether FAA § 10's vacatur provisions preempted California arbitration disclosure and vacatur laws.

¹⁷ Many other cases find no FAA preemption of other issues arising after the initial question of enforcement of the arbitration agreement is settled. *E.g., Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1395-96 (DC Cir. 1995) (Connecticut law covers issue of time period for seeking vacatur); *Muao v. Grosvenor Properties Ltd.*, 99 Cal. App.4th 1085, 1090-91, 122 Cal. Rptr.2d 131 (Cal. App. 2002) (State law rather than FAA § 16 governs appealability of order compelling arbitration); *Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co.*, 670 SW2d 841, 846-47 (Ky. 1984) (FAA § 12 does not preempt State law on period for seeking vacatur); *St. Fleur v. WPI Cable Systems/Mutron*, 450 Mass. 345, 879 NE2d 27, 32-34 (2008) (FAA § 4 doesn't preempt State law governing stay of judicial action and compelling arbitration); *Wells, supra*, 768 A.2d at 625-29 (FAA § 16 does not preempt State law on appeal of order compelling arbitration).

Id. at 833. Under California law, vacatur is mandatory upon a showing that the arbitrator failed to disclose a ground for disqualification, whereas under Federal law, vacatur depends on whether the undisclosed facts create a “ ‘reasonable impression of partiality.’ ” *Id.* (quoting, *Schmidt v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994)). *Ovitz, supra*, held that, despite the fact that the transaction involved commerce, the FAA’s vacatur provisions did not preempt California arbitration law. *Id.* at 848-49.

First, because the “reasonable impression of partiality” rule is based on case law, not statutory language, *Ovitz* found it was a weak basis for preemption. *Id.* at 849; accord, *Siegel, supra*, 67 Cal. App.4th at 1290-91 (same re: “manifest disregard” standard of FAA). Likewise, the actual statutory provisions which would apply here under the FAA, RUAA, or WAA, **are virtually identical**; the only difference is the case law gloss placed on those provisions.¹⁸ Therefore, the case for preemption here is quite weak. Stated slightly differently, it is not “the clear and manifest purpose of Congress,” *PAWS, supra*, 125 Wn.2d at 265, that State law be

¹⁸ Under the RUAA, RCW 7.04A.230(1)(d), vacatur is permissible when “[a]n arbitrator exceeded the arbitrator’s powers”. Under the 1943 WAA, Former RCW 7.04.160(4), and FAA § 10(a)(4) (9 U.S.C. § 10(a)(4)), vacatur is permissible “[w]here the arbitrators exceeded their powers”. Clearly, the statutory provisions are identical in all material respects. Based on this statutory language, Washington case law permits vacatur based on “adoption of an erroneous rule, or mistake in applying the law . . .,” e.g., *Northern State Construction Co. v. Banchemo*, 63 Wn.2d 245, 249-50, 386 P.2d 625 (1963), whereas Federal case law permits vacatur upon a finding of “manifest disregard of law”. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

set aside where the statute enacted by Congress and the one enacted by the State are identical.

Second, *Ovitz* held that the many references to the “District Court”, “Marshall”, or “United States Court” in FAA §§ 10 and 12 strongly suggest that they only apply in Federal court proceedings:

Section 10(a) states the statutory grounds under the FAA for vacating an arbitration award upon application of a party. It expressly refers to orders to vacate made by “the United States court in and for the district wherein the award was made.” Similarly, subdivision (b) of Section 10, which governs the vacating of an award issued under 5 USC § 580, provides that “[t]he United States district court for the district wherein the award was made” may vacate the award. Section 12 of the FAA provides the procedure for presenting a motion to vacate. In relevant part, it refers to service of the motion on “a resident of the district within which the award was made,” and service on a nonresident “by the marshal of any district within which the adverse party may be found.” This language strongly suggests that Sections 10 and 12 apply only to federal district courts, not state trial courts. . . . Thus, the wording of the relevant sections of the FAA evidences a congressional intent not to preempt state law.

Ovitz, supra, 133 Cal. App.4th at 851-52.¹⁹ This mirrors the *Southland* analysis rejecting preemption under FAA §§ 3 and 4, *Southland, supra*, 465 U.S. at 16 n.10, and the analysis of other cases to find that provisions of the FAA were not intended to preempt State arbitration law.²⁰

¹⁹ Similarly, FAA § 9, governing confirmation, requires application to be made to the court agreed upon by the parties but, in the absence of agreement, “to the United States court in and for the district within which such award was made.” 9 U.S.C. § 9.

²⁰ *E.g., Siegel, supra*, 67 Cal. App.4th at 1281-82 (FAA §§ 10 and 12 do not preempt, in part due to Federal-court specific language); *St. Fleur, supra*, 879 N.E.2d at 32 (FAA § 4 does not preempt, in part due to Federal-court specific language); *Trombetta, supra*, 907

Third, *Ovitz* comprehensively reviewed precedents holding that the essential purpose of the FAA was “to ensure that arbitration agreements are enforced according to their own terms,” *id.* at 852, and concluded that “[n]othing in the legislative reports and debates [concerning the FAA] evidences a congressional intention that postaward and state court litigation rules be preempted so long as the basic policy upholding the enforceability of arbitration agreements remained in full force and effect.” *Id.* at 852-53 (quoting, *Siegel, supra*, 67 Cal. App.4th at 1289).

By its terms, [the California vacatur statute] does not undermine the enforceability of arbitration agreements. It neither limits the rights of contracting parties to submit disputes to arbitration, nor discourages persons from using arbitration. . . . Indeed, because it applies to vacating an arbitration award, [the California statute] presupposes that the arbitration agreement has been enforced and the arbitration held. If an award is vacated, the result is not a preclusion of further arbitration, but rather a new arbitration held in accordance with the disclosure requirements.

Ovitz, supra, 133 Cal. App.4th at 853.

Everything the California Court says here is equally true about Washington vacatur law. It does not limit the rights of contracting parties to submit disputes to arbitration. Because it applies after the arbitration has been held, it presupposes that the arbitration agreement has been

A.2d at 568-69 (“Section 10 explicitly states: ‘*the United States court in and for the district where in the award was made ...*’ may vacate an arbitration award when certain circumstances are present. We believe this phrase constitutes plain language stating that FAA § 10 only applies to proceedings in United States district courts.” (Emphasis in original)).

honored. Furthermore, like the order on appeal here, the result of applying the State law is not preclusion of arbitration, but an order for further arbitration. Finally, it does not in any way discourage arbitration.

To the contrary, Washington vacatur law boosts public confidence:

[T]he legislative purpose of [the California statute], . . . does not reflect hostility to arbitration or an attempt to limit the ability to enter arbitration agreements. The California scheme seeks to enhance both the appearance and reality of fairness in arbitration proceedings, thereby instilling public confidence. With increased public confidence, arbitration is more attractive as a means of resolving private disputes. Hence, far from posing an obstacle to implementing the purpose of the FAA, [the California statute] actually *serves* that purpose.

Ovitz, supra, 133 Cal. App.4th at 853. Similarly, Washington's vacatur law, under which arbitration awards are rarely set aside, arbitrators are the judge of both the law and the facts of the case, and awards may only be set aside in the limited circumstances of error of law on the face of the award, *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995), strikes the right balance by protecting the right to arbitration, yet leaving open a safety valve against patently lawless decision-making. **Without such a safety valve, public confidence in arbitration would diminish, and the process itself be undermined.** This safety valve serves the shared Federal and State policy in favor of arbitration. *Southland, supra*, 465 U.S. at 10 (by enacting FAA § 2, Congress declared a strong national policy in

favor of arbitration); *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) (Washington has a strong policy in favor of arbitration).

MSDW has failed to carry its heavy burden to show it was the clear and manifest purpose of Congress to displace State arbitration confirmation and vacatur law with FAA §§ 9, 10 and 12. Therefore, the State's traditional powers over its own Court processes must prevail. *PAWS v. UW, supra*, 125 Wn.2d at 265.

We can discern no federal statutory scheme that purports to dictate the **standards of review state courts will apply**. Such a provision, therefore, is unprecedented. We feel it would stretch the bounds of federalism to conclude FAA § 10 mandates pre-emption based on such an antiquated historical foundation.

Trombetta, supra, 907 A.2d at 568 (emphasis added).

d. MSDW's Attempt to Recast Vacatur Law as an Obstacle to Enforceability is Unsupported by Law or Logic

Recognizing the novelty of its FAA § 10 preemption argument, MSDW suggests that review of the award for legal error on the face of the award conflicts with FAA § 2, because "if the parties contract to have an arbitrator resolve its controversy rather than a court, that agreement must be honored." *Brief of Appellants* at 30. MSDW cites **no authority** for the proposition that application of State vacatur rules conflict with FAA § 2, because there is none. Nor does the argument carry any logical force. The agreement of the parties to arbitrate in this matter **is being honored**,

subject only to **limited** judicial review under the standards set forth in RCW 7.04A.230, or former RCW 7.04.160. Washington law still makes the arbitrator the judge of the law and the facts, subject to only very limited review on the face of the award. *Boyd v. Davis, supra*, 127 Wn.2d at 263. That is no different from the rule under the FAA, where the agreement to arbitrate is subject to limited judicial review under FAA § 10 – indeed, as already noted, the statutory standards under State and Federal law are identical. *See, Note 18, supra*. Under neither State nor Federal law, does the right to arbitrate include an absolute right to shield the decision from all judicial review.

Under Federal common law, an arbitration award may be set aside if it is “completely irrational”, “arbitrary and capricious”, in “manifest disregard of law”, or in “violation of public policy”.²¹ Review for “irrationality” and “arbitrary and capricious” decisionmaking is unknown to the Washington general arbitration acts’ common law, and may even operate similarly to “error of law”. *See, e.g., Ainsworth, supra* (award that ignores the law and refuses to award damages for no discernable reason set aside). Whatever verbal test is applied, in all these cases **the arbitration agreement has been enforced, so the Federal policy is**

²¹ *Virginia Mason Hosp. v. Washington State Nurses Ass’n*, 511 F.3d 908, 915 (2007); *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 997 (9th Cir. 2003); *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992).

satisfied. *Ovitz, supra*, 133 Cal. App.4th at 853. MSDW has failed in its burden to demonstrate that FAA § 2 sets forth a clear and manifest objective of Congress to prevent Washington from developing its own common-law standards for review of awards.²²

2. Any Possible Preemption is Abrogated by the Parties' Agreement to Apply Washington Arbitration Law

As MSDW recognizes, agreement of the parties to apply Washington arbitration law changes the outcome of their preemption analysis. *Brief of Appellants* at 28 n.12. Although the predispute arbitration agreement is not of record,²³ MSDW asserts that the parties did not agree to apply Washington arbitration law in this case. *Id.* **That is not accurate.** As the procedural history makes clear, in post-dispute briefing the parties agreed that Washington arbitration law governs this matter, even if they could not agree on which Washington statute (WAA or RUAA) applied. CP 2 ¶¶ 3, 4, 6; 4 ¶ 13; 220 ¶ 4; 510-11, 514-20, 551.

In *Volt*, the U.S. Supreme Court found that an agreement to apply California law to a contract containing an arbitration clause was not

²² Such a broad reading of FAA § 2 would conflict with the holdings of *Volt*, *Siegel*, and *Trombetta, supra*, where the outcome would clearly have been more arbitration-friendly under Federal law, but the U.S. Supreme Court, and California and Pennsylvania appellate courts, nonetheless found that the narrow preemptive scope of the FAA left the States free to set procedures for conducting arbitrations and reviewing awards.

²³ MSDW failed to produce the arbitration agreement signed by Dick Broom. It did not seem important at the time, because the parties agreed to submit the claim to NASD arbitration. For this reason, there is no predispute arbitration agreement of record.

preempted by the FAA, even though California law permitted denial of arbitration pending completion of other related litigation. *Id.* at 470-73.

In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 . . . (1984) [other citations omitted]. **But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself.** Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, see *Mitsubishi, supra*, 473 U.S. at 628, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.

Volt, supra, 489 U.S. at 478-79.²⁴ Many cases hold that an agreement between the parties to apply State arbitration law will preclude FAA preemption, and be enforced because it is consistent with the policy of the FAA to enforce the private agreements of the parties.²⁵ Most of these

²⁴ Later, in *Mastrobuono, supra*, 514 U.S. 52, the Court limited *Volt* by making it clear that a general State choice of law provision would not be deemed clear consent to apply State arbitration law. *Id.* at 60-62. But here, MSDW has very precisely conceded that the Washington arbitration vacatur statute is the "controlling law", so there is no ambiguity.

²⁵ E.g., *Ekstrom, supra*, 68 F.3d at 1395-96; *Roadway Package, supra*, 257 F.3d at 292-93; *Valrose Maui, Inc. v. Maclyn Morris, Inc.*, 105 F. Supp.2d 1118, 1122 n.6 (D. Haw. 2000); *Ovitz, supra*, 133 Cal. App.4th at 854-55; *Southwire Co., Ltd. v. AAA*, 545 SE2d

cases involve pre-dispute agreements, but there is nothing in the reasoning of the decisions that would support a distinction between a pre-dispute and post-dispute agreement to apply State law.

Ovitz relied in part upon a party's **post-dispute** correspondence accepting "the California Code of Civil Procedure", to find that "vacating of the arbitration award [under California law] is not inconsistent with the parties' objectively expressed intent in their correspondence and arbitration agreement." *Ovitz, supra*, 133 Cal. App.4th at 854. Similarly, in the present case, vacating the award based on Washington arbitration vacatur law was completely consistent with the agreement of the parties that Washington law governs the case. Because MSDW agreed to application of Washington arbitration law below, the FAA mandates enforcement of that agreement, not preemption of Washington law.

C. Under Washington Arbitration Law, the Trial Court Properly Reviewed for Error of Law on the Face of the Award

The rule in Washington has long been as follows:

Arbitrators, when acting under the broad authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts, and, unless the award on its face shows their **adoption of an erroneous rule, or mistake in applying the law**, the award will not be vacated or modified.

681, 683 (Ga. App. 2001); *Tim Huey, supra*, 649 NE2d at 1362; *PerfectStop Partners, LP v. U.S. Bank*, 231 S.W.3d 260, 267 (Mo. App. 2007).

Northern State v. Banchemo, *supra*, 63 Wn.2d at 249-50 (emphasis added). This rule is firmly established by a long line of Washington cases.²⁶ The “error of law” standard is consistent with Washington’s strong policy favoring arbitration, because it is applied by the Courts as a strictly narrow standard of review that respects the arbitrator’s role as judge of the law and facts, accords “substantial finality” to the award, and only results in vacatur in the rare case of a prejudicial total failure to apply the correct legal standard, manifest on the face of the award.²⁷

**1. Waiver Precludes MSDW from Asserting that
“Error of Law” Does Not Apply Under the WAA**

MSDW argues that this long history of firm adherence to the “error of law” rule was overruled **even as to the 1943 WAA** by the Washington Supreme Court’s decision in *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003). *Brief of Appellants* at 26-27. This issue is raised for the first time on appeal, and waived because MSDW argued the

²⁶ *E.g.*, *Davidson v. Hensen*, *supra*, 135 Wn.2d at 118; *Boyd v. Davis*, *supra*, 127 Wn.2d at 263; *Thorgaard Plumbing & Heating Co., Inc. v. County of King*, 71 Wn.2d 126, 134, 426 P.2d 828 (1967); *Beroth v. Appollo College, Inc.*, 135 Wn. App. 551, 559, 145 P.3d 386 (2006); *Kenneth W. Brooks Trust A v. Pacific Media, LLC*, 111 Wn. App. 393, 396, 44 P.3d 938 (2003); *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 497, 32 P.3d 289 (2001); *Federated Ins. Co. v. Estate of Norberg*, 101 Wn. App. 113, 123-24, 4 P.3d 844 (2000); *Expert Drywall, Inc. v. Ellis-Don Constr., Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258 (1997); *Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990) (and cases cited therein).

²⁷ *E.g.*, *Davidson*, *supra*, 135 Wn.2d at 118; *Boyd*, *supra*, 127 Wn.2d at 263; *MacLean Townhomes v. Am. States Ins. Co.*, 138 Wn. App. 186, 189, 156 P.3d 278 (2007); *Brooks Trust*, *supra*, 111 Wn. App. at 396; *Federated Ins.*, *supra*, 101 Wn. App. at 123-24.

opposite to the trial court: “**Even Applying the Pre-RCW 7.04A.230 ‘Error of Law’ Basis for Vacating, Which is Now Invalid Under the New Statute, . . .**” CP 520 (emphasis in original). “Before enactment of the Revised Uniform Arbitration Act in 2006, Washington courts recognized the ‘error of law’ basis for vacatur.” CP 521.

2. *Malted Mousse* does not *Sub Silentio* Overrule the Long Line of Cases Establishing “Error of Law”

Even if not waived, *Malted Mousse* does not overrule the long line of authority establishing the “error of law” rule under the 1943 WAA. The issue in *Malted Mousse* was not confirmation or vacatur of a private arbitration award under the 1943 WAA (Ch. 7.04, RCW), but the proper method of review of a **mandatory arbitration under Ch. 7.06, RCW**. *Malted Mousse, supra*, 150 Wn.2d at 522. Indeed, the Court in *Malted Mousse* very clearly enumerated “[t]he distinction between chapter 7.04 RCW and chapter 7.06 RCW,” in that the former provides for review by a motion to confirm and/or vacate the award, whereas the latter only allows a trial *de novo*, and bars all review of the award except to determine attorneys’ fees. *Id.* at 528-29. As stated by the Court:

Private arbitration and mandatory arbitration serve different purposes. . . . [T]he standards by which an aggrieved party appeals an arbitral proceeding differ between private arbitration and mandatory arbitration. We hold these standards may not be intertwined.

Id. at 531-32. In light of these differences, and the express holding that the standards applicable to the two procedures “may not be intertwined”, it is clear that *Malted Mousse* is distinguishable from the present case arising under Ch. 7.04, RCW, and anything it might have said about private arbitration proceedings is pure *dicta*.

Justice Sanders, writing on behalf of the Court, stated:

When reviewing an arbitrator's decision [in a private arbitration], the court's review is limited to the grounds provided for in RCW 7.04.160-.170. [Citation omitted] In *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995), we recognized that every case addressing a court's ability to reverse an arbitrator's error in law was based on a statute repealed by the current arbitration act, and that a reviewing court is limited to the statutory grounds. *Boyd*, 127 Wn.2d at 267-68 . . . This case, however, deals with mandatory arbitration with an appellate process discussed next.

Malted Mousse, *supra*, 150 Wn.2d at 527. MSDW's contention that this *dicta* is sufficient to overrule the many cases establishing the “error of law” standard cannot withstand analysis.

First, it is the express policy of the Washington Supreme Court that it will not overrule binding precedent *sub silentio*. *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999).²⁸ Especially when a rule has been long and firmly adhered to, only the clearest overruling can be recognized. The *Malted Mousse dicta* does not clearly demonstrate an intent to

²⁸ *Accord*, *Holden v. Farmers Ins. Co.*, - Wn. App. -, 175 P.3d 601, 603 n.1 (2008); *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 345, 160 P.3d 1089 (2007).

overrule decades of Washington precedent. Indeed, *Malted Mousse* itself recognizes the rule that “[s]tatements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum*, and need not be followed.” *Malted Mousse, supra*, 150 Wn.2d at 531. The Court never uses the word “overruled”, and does not even cite the many decisions applying the “error of law” vacatur standard. This passage read literally would eliminate all common-law precedent under the vacatur statute, including the narrow “public policy” exception as well as any standard of “error of law” or even “manifest disregard”. This goes well beyond Federal law, and the wholesale jettisoning of decades of judicial experience cannot be premised on a few offhand remarks, not essential to the decision before the Court.²⁹

The quoted *Malted Mousse dicta* actually mis-states the holding of *Boyd*, when it says that in *Boyd* “we recognized” a flaw in the error of law standard, and rejected it in favor of nothing but statutory grounds. *Malted Mousse, supra*, 150 Wn.2d at 527. “We”, used in the opinion of the Court, properly refers to another opinion of the Court. But the “we” referred to here is in fact **not the majority opinion, but the concurring**

²⁹ The *sub silentio* overruling asserted by MSDW has gone unnoticed by the Courts. Since *Malted Mousse*, the Court of Appeals has applied the “error of law” standard without giving any indication that it might have been overruled. *MacLean Townhomes, supra*, 138 Wn. App. at 189; *Beroth, supra*, 135 Wn. App. at 559.

opinion, compare Boyd, supra, 127 Wn.2d at 263 (Majority), *with, id. at* 266-67 (Concurrence), and therefore “we” the Supreme Court did not recognize any infirmity in the error of law rule when the issue was squarely presented in *Boyd*. Indeed, the fact that Justice Utter clearly articulated the argument that the “error of law” standard was based on a repealed statute, but that argument **did not carry the Majority**, demonstrates that the Supreme Court knowingly decided in *Boyd* to retain the “error of law” standard.³⁰

“The doctrine of stare decisis ‘requires a clear showing that an established rule is **incorrect** and **harmful** before it is abandoned.’” *State v. Devin*, 158 Wn.2d 157, 161, 142 P.3d 599 (2006) (*quoting, Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)). Honoring *stare decisis* is vital to the proper operation of the legal system:

Stare decisis “ ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’ ” *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (*quoting Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). **Overruling a prior decision is a serious step, not to be undertaken lightly.** *Keene*, 131 Wn.2d at 831, 935 P.2d 588.

³⁰ *Malted Mousse* also rejects the argument that mandatory arbitration awards can be reviewed for “manifest procedural error”, by stating that this standard is derived from the WAA, not from Ch. 7.06, RCW. *Malted Mousse, supra*, 150 Wn.2d at 531. Thus, *Malted Mousse* not only cryptically undercuts the “error of law” standard in the earlier *dicta* relied upon by MSDW, but it suggests in further *dicta* that a “manifest error” standard “derives from . . . chapter 7.04, RCW”! *Id. Malted Mousse* is a muddle on the meaning of the WAA, and by its own admission its conflicting *dicta* should not be followed.

Bishop v. Miche, 137 Wn.2d 518, 529, 973 P.2d 465 (1999) (emphasis added). If overruling a prior decision is a serious step, overruling multiple precedents going back forty-five years is even more serious.

The longstanding rule that a facially lawless decision of an arbitrator exceeds the arbitrator's authority is not "incorrect". Applied sparingly as it has been, such a rule is a necessary and salutary adjunct to arbitration, which increases public confidence in the process. *See, Ovitz, supra*, 133 Cal. App.4th at 853. A minimal level of judicial review such as that established by the "error of law on the face of the award" standard is not only **not** a "harmful" rule, but doing away with it could be harmful, since it would confer absolute, unchecked power on arbitrators.

"Further, '[t]he Legislature is presumed to be aware of judicial interpretation of its enactments,' and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Riehl, supra*, 152 Wn.2d at 147 (quoting, *Friends of Snoqualmie Valley v. King Cty. Boundary Rev. Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)). Here, the Legislature allowed the WAA to stand unchanged from the date of the 1963 *Northern State* case, until enactment of the RUAA, at which time it carried forward the exact same "exceeded authority" language in the new Act, and made

no mention of any intent to alter or abolish the “error on the face of the award” standard in the legislative history. CP 447-53. Under these circumstances, *stare decisis* is especially strong. “Error of law on the face of the award” is the proper standard of review of an arbitration award under the WAA.

D. The Superior Court Properly Vacated and Remanded for a New Arbitration Based on Error on the Face of the Award

1. This Court Should Not Overrule *Thorgaard* and *City of Auburn* to Rule that Statutes of Limitation Govern Non-Judicial Private Arbitrations

In *Thorgaard, supra*, 71 Wn.2d 126, the Washington Supreme Court held (with lengthy analysis and discussion) that arbitration is not an “action” to which non-claim statutes apply. *Id.* at 130-32. Thereafter, in *City of Auburn v. King County*, 114 Wn.2d 447, 788 P.2d 534 (1990), the Supreme Court extended this holding to **statutes of limitation**, holding that “[t]he trial court correctly concluded that the statute of limitations by its language does not apply to arbitration.” *Id.* at 450. MSDW’s statement that no Washington case holds that the statute of limitations is not available in arbitration is not accurate; indeed, the opposite is true: no Washington case holds that the statute of limitations does apply in arbitration, and MSDW has cited no such case.

Thorgaard explained that it was not necessary to file a claim within 90 days of injury in order to have a valid arbitration of a claim against the County, because an arbitration is not an “action”:

If one intends to bring an action (e.g., a lawsuit) against a county, he must do so in the manner provided by RCW 36.45.010. **However, this has nothing to do with a statutory arbitration proceeding. . . .**

RCW 7.04 et seq. provides a means by which disputants may dispose of controversies other than by an action in court. They may resort to arbitration.

An arbitration proceeding is not had in a court of justice. It is not founded on the filing of a claim or complaint as they are generally understood. The very purpose of arbitration is to *avoid* the courts insofar as the resolution of the dispute is concerned. [Citation omitted.] It is a substitute forum designed to reach *settlement* of controversies, by extrajudicial means, *before* they reach the stage of an *action* in court.

Thorgaard, supra, 71 Wn.2d at 130 (boldface added; italics in original).³¹

³¹ A number of other jurisdictions are in accord with Washington’s rule that the statute of limitations does not apply in arbitration. *NCR Corp. v. CBS Liquor Control, Inc.*, 874 F. Supp. 168, 172 (S.D. Ohio 1993), *aff’d*, 43 F.3d 1076 (6th Cir.), *cert. den.*, 516 U.S. 906 (1995) (“the effect of a statute of limitations is to bar an action at law, not arbitration”); *Skidmore, Owings & Merrill v. Connecticut Gen. Life Ins. Co.*, 197 A.2d 83, 84 (Conn. 1963) (“Arbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitations.”); *Lewiston FF Assn. v. City of Lewiston*, 354 A.2d 154, 167 (Me. 1976) (“Arbitration is not an action at law and the statute [of limitations] is not, therefore, an automatic bar to the Firefighters’ recovery.”); *Peggy Rose Rev. Trust v. Eppich*, 640 N.W.2d 601, 608 (Minn. 2002) (“arbitration is not the bringing of an action under any of our statutes of limitation” (internal quote omitted)); *Har-Mar v. Thorsen & Thorshov, Inc.*, 218 N.W.2d 751, 754-55 (Minn. 1974) (“Based upon the special nature of arbitration proceedings and both the statutory and common-law meaning of the term ‘action,’ we feel compelled to hold that [the statute of limitations] was not intended to bar arbitration of Thorsen’s fee dispute solely because such claim would be barred if asserted in an action in court.”).

The holding of *Thorgaard* is supported by the statutory language of **both** the Washington arbitration statutes, and the Washington statutes of limitation. *Thorgaard* relied upon former RCW 7.04.030,³² the provision requiring a court in which an arbitrable action is pending to stay the action in favor of arbitration, to hold that “RCW 7.04.030 makes it clear that there is a difference between an action and an arbitration proceeding . . .” *Thorgaard, supra*, 71 Wn.2d at 131-32. The RUAA scrupulously refers to the arbitration as a “proceeding”, not an “action”, RCW 7.04A.040(1), .070(2), .080(1), .090(1), .100, .110, .120(1), .150, .160, .180, .190(2), .200, .220, .230, distinguishes between a “judicial proceeding” and an “arbitration proceeding”, RCW 7.04A.060(4), .070(5), (6), .140(4), and further distinguishes between an “arbitration proceeding” and a “civil action”. RCW 7.04A.080(2). Indeed, the RUAA states: “All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding **as if the controversy were the subject of a civil action** in this state.” RCW 7.04A.170(6) (emphasis added); *see also*, .210(1), (2), (3) (requiring arbitrator to award punitive

³² “If any action for legal or equitable relief or other proceedings be brought by any party to a written agreement to arbitrate, the court in which such action or proceeding is pending, upon being satisfied that any issue involved in such action or proceeding is referable to arbitration under such agreement, shall . . . stay the action or proceeding until an arbitration has been had in accordance with the agreement.” Former RCW 7.04.030.

damages and attorneys fees if “authorized by applicable law in a civil action”; permitting arbitrator to award other relief authorized by applicable law even if it would not be awarded in court). In enacting these provisions, the Legislature clearly recognized that arbitrations are **not** “judicial proceedings” or “civil actions”, and that in the absence of positive law, the procedures applicable to civil actions **do not apply to arbitrations**. Significantly, there is no provision in the WAA or RUAA making statutes of limitation applicable to arbitration proceedings.

On their face, the Washington statutes of limitation bar “actions”, not “arbitration proceedings”. RCW 4.16.005 (“Except as otherwise provided in this chapter, . . . **actions** can only be commenced within the periods provided in this chapter after the cause of action has accrued.”). Therefore, the rule of *Thorgaard* precludes operation of statutes of limitation in arbitration. The Supreme Court recognized this expressly in *City of Auburn, supra*.³³

Thorgaard's recognition of the obvious fact that arbitration is the opposite of a judicial action finds support in US Supreme Court precedent:

³³ The Washington legislature could have amended RCW 4.16.005 after *Thorgaard* and *City of Auburn*, but chose not to, thus indicating that these cases are entitled to be upheld under the doctrine of *stare decisis*. *Riehl, supra*, 152 Wn.2d at 147. Thus, for example, the New York statute expressly provides that “[i]f . . . the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration.” McKinney’s CPLR § 7502(b). If a comparable change is to be made to RCW 4.16.005, it should be done by the Legislature, not the Courts.

The full-faith-and-credit statute requires that federal courts give the same preclusive effect to a State's *judicial proceedings* as would the courts of the State rendering the judgment, **and since arbitration is not a judicial proceeding**, we held that the statute does not apply to arbitration awards.

Dean Witter, supra, 470 U.S. at 222 (italics in original; bold added). Nor is the post-arbitration proceeding in Superior Court for confirmation or vacatur of an arbitration award an **action**. Instead, it is treated as a civil motion. RCW 7.04A.220, .230(1), (2); *Davidson v. Hensen, supra*, 135 Wn.2d at 127; *Thorgaard, supra*, 71 Wn.2d at 132.³⁴

Against all this, MSDW relies upon *International Ass'n of Firefighters v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), a case involving attorneys' fees under a wage statute, to claim that *Thorgaard* is no longer controlling. Rather than rejecting the rule of *Thorgaard*, the Court in *Firefighters* **accepted and relied upon it**, but held that whether an arbitration is deemed a judicial action depends on the **legal context in which the question arises**:

In determining whether an arbitration is an exercise of a judicial function, we have noted that “[a]rbitration has been viewed as both nonjudicial or the exercise of a judicial function depending upon the context of the question.” [*Grays Harbor Cty. v. Williamson*, 96 Wn.2d 147] at 152, 634 P.2d 296 [1981]. For example, in the context of due process, arbitration must meet the same

³⁴ Similarly, the Washington Supreme Court recently held that “the limited judicial review under the WAA” does not constitute “judicial remedies” within the meaning of a insurance regulation prohibiting carriers from requiring ADR to the exclusion of judicial remedies. *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 157 Wn.2d 290, 304-05, 138 P.3d 936 (2006).

requirements as a traditional judicial action. *Id.* at 152-53, 634 P.2d 296. **But when dealing with the nature of arbitration itself, “it has been deemed a substitute for judicial action.”** *Id.* at 153, 634 P.2d 296 (citing *Thorgaard*, 71 Wn.2d at 131-32, 426 P.2d 828).

Firefighters, supra, 146 Wn.2d at 37-38 (emphasis added). The context in which the issue arose in *Firefighters* was whether fees would be awarded under RCW 49.48.030 to a union that successfully recovered unpaid wages for two employees. *Id.* at 32-34. In light of “Washington’s ‘long and proud history of being a pioneer in the protection of employee rights,’” *id.* at 35 (quoting, *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)), and the fact that RCW 49.48.030 is a remedial statute liberally construed to benefit employees, *Firefighters, supra*, 146 Wn.2d at 35, the legal context was very different from the context in *Thorgaard* (non-claim statute) or *City of Auburn* (statute of limitation), and very different from this case (statute of limitation), and so it dictated a different result. *Id.* at 40-41. Nothing in *Firefighters* states or implies that it constitutes an overruling or even a limitation on *Thorgaard’s* holding in the context of *time limits on claims*.³⁵

MSDW’s argument that *Thorgaard’s* rule contradicts the policies behind arbitration stands logic on its head.

³⁵ Once again, MSDW’s argument is premised on *sub silentio* overruling of Supreme Court precedent, which is contrary to Washington Supreme Court policy. *State v. Studd, supra*, 137 Wn.2d at 548.

[Arbitration] is in a forum selected by the parties in lieu of a court of justice. The object is to avoid, what some feel to be, the formalities, the delay, the expense and vexation of ordinary litigation. It depends for its existence and for its jurisdiction upon the parties having contracted to submit to it, and upon the arbitration statute.

Thorgaard, supra, 71 Wn.2d at 132. **Because the statute of limitations is itself a potential vexatious formality**, the rule of *Thorgaard* and *City of Auburn* accords with the policy of NASD arbitration to avoid technicalities. CP 168-69 (Securities Industry Association President testifies before Congress that NASD arbitration gives “[a]ggrieved customers . . . what . . . they really want: their ‘day in court’ . . . in sharp contrast to court proceedings where a significant percentage of claims are dismissed . . . on technical, or procedural grounds . . . [including] statute of limitations bars.”). Furthermore, because the policy of arbitration is to let the parties themselves set the parameters of dispute resolution by contract, it makes sense to allow the parties to establish contractual time limits (or not) if they so desire. The combination of contractual time limits, and the six-year outer limit prescribed by NASD Rule 10304(a), CP 455, refutes MSDW’s suggestion that *Thorgaard* opens parties to unlimited stale claims.³⁶

³⁶ MSDW cites *Douchette v. Bethell School Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991) for the proposition that “[t]he policy behind statutes of limitation is ‘protection of the defendant, and the courts, from litigation of stale claims . . .’” *Brief of Appellants* at 43. We couldn’t have said it better: the policy behind statutes of

MSDW claims that “[t]he NASD Code of Arbitration Procedure § 10304 . . . expressly directs arbitrators to apply and enforce statutes of limitation.” *Brief of Appellants* at 41. This mis-states the language of the applicable section. NASD Rule 10304(c) provides: “This Rule shall not extend **applicable** statutes of limitations . . .” CP 455 (emphasis added). Clearly, if the statute of limitations is not applicable, this Rule does not direct the arbitrator to apply it.

Finally, MSDW advances the strained argument that the rule that statutes of limitations are not applicable in arbitration is somehow inconsistent with the parties’ power to submit a matter pending in court to arbitration, because it would mean that the limitations initially applicable would suddenly become inapplicable. *Brief of Appellants* at 45. The answer is simple: parties can provide in their submission for the arbitrator to apply or not apply the relevant statutes of limitation or some other time limitation – as a matter of *agreement*, not *judicial mandate*.

2. The Error Appears on the Face of the Award

The Award states on its face that all the Brooms’ claims aside from the CPA claim were dismissed “on the ground that the claims were barred by applicable statutes of limitation.” CP 10. MSDW admits that “the

limitations is to protect the **courts** – not private arbitrations. This is entirely consistent with *Thorgaard* and *City of Auburn*, and inconsistent with MSDW’s own argument.

award does verify that the claims are barred by the statutes of limitation,” but argues this is not an error on the face of the award because the award does not contain legal analysis. *Brief of Appellants* at 46. This goes too far. The face of the Award reflects, and MSDW has previously admitted, that the Panel considered all briefing, including the briefing on non-applicability of the statute of limitations to arbitration. CP 10-11, 223 ¶ 20, 510. The Award purports to dismiss state-law claims based on “applicable statutes of limitation”, CP 10, when **under Washington law statutes of limitation are not applicable in arbitration**. That is an error on the face of the award.

V. CONCLUSION

For all the foregoing reasons, this Court should AFFIRM, and send this matter back to a new NASD Panel for rehearing in arbitration.

Dated at Seattle, WA, this 3rd day of March, 2008.

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CERTIFICATE OF SERVICE

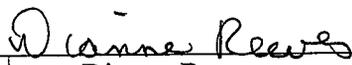
I, Dianne Reeves, legal assistant at Sullivan & Thoreson, hereby certify that on the date set forth below I served the within BRIEF OF RESPONDENTS, on all parties of record by delivering the same via ABC legal messenger service, addressed as follows:

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Dianne Reeves

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