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No. 67306-8

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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**REGAL ALUMINUM PRODUCTS, INC, a Washington corporation,**

**and REGAL ALUMINUM PRODUCTS, INC., a Canadian**

**corporation,**

**Appellants,**

**v.**

**COSTCO WHOLESALE CORPORATION,**

**Respondent.**

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# REPLY BRIEF OF APPELLANTS

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## TABLE OF CONTENTS


I. The Final Reasoned Award stands alone as the basis for the arbitrator's substantive rulings; the Fee Award is relevant only to the amount of fees/costs award 2

II. Costco's assertion that the arbitral award was substantively premised in contract is untenable 6

III. Costco does not (and cannot) dispute non-payment for ladders received, receipt of ladders prior to demand for assurances, or Regal's completion of performance 8

IV. The standard of review applicable to arbitral awards does not prohibit review of undisputed evidence, particularly evidence referenced in the award 11

V. Even if a strict standard of review applies, the arbitrator's errors are apparent on the face of the Final Reasoned Award and require vacatur 14

A. The arbitrator erred in applying RCW 62A.2-609 to the case given the arbitrator's findings of ladder delivery 15

B. The arbitrator erred in concluding that Costco had a right to reject or return ladders as a consequence of Regal's failure to provide adequate assurances 18

C. The Final Reasoned Award displays clear errors in the arbitrator's calculation of damages stemming from the failure to provide adequate assurances 20

D. The trial court erred in dismissing Regal's claims for nonpayment of stored ladders on the basis of failure to give assurances 21

E. Following vacatur, the court does not remand to or seek clarification from arbitrator; it has only limited discretion to order a rehearing 22

VI. Considering the proper standard of review, the trial court erred in striking material evidence 23

VII. The trial court's entry of judgment against both Regal entities, neither of whom consent to the court's determination of a new fact issue, was erroneous and judgment must be vacated 24

## TABLE OF AUTHORITIES

Cases:


Agnew v. Lacy Co-Ply,
33 Wn. App. 283, 287 (1982) 7,12,13,21,23
Baillargeon v. Press,
11 Wn. App. 59, 67, 521 P.2d 746 (1974) 19
Boyd v. Davis, 127 Wn.2d 256, 897 P.2d 1239 (1995) 13,14
Broom v. Morgan Stanley DW Inc.,
169 Wn.2d 231, 237-40, 236 P.3d (2010) 15
Chronister Oil Co. v. Unocal Refining and Marketing,
34 F.3d 462, 464 (7th Cir. 1994) 11,16
H.B. Fuller Co. v. Kinetic Systems, Inc.,
932 F.2d 681, 687 (7th Cir. 1991) 18
Lindon Commodities, Inc. v. Bambino Bean Co., Inc.,
57 Wn. App. 813, 790 P.2d 228 (1990) 21
Magic Valley Foods, Inc. v. Sun Valley Potatoes, Inc.,
10 P.3d 734, 739 (Idaho 2000) 16,17
Peters v. Richwell Resources, Ltd.,
64 Wn. App. 424 430 (1992) 16
Sherry v. Financial Indemnity Co.,
160 Wn.2d 611, 160 P.3d 31 (2007) 24,25
Sumner v. Fel-Air, Inc.,
680 P.2d 1109 (AK. 1984) 11,16,17
T&S Brass and Bronze Works, Inc. v. Pic-Air, Inc.,
790 F.2d 1098 (4th Cir. 1985) 20
Tolson v. Allstate Ins. Co.,
108 Wn. App. 495, 499, 32 P.2d 289 (2001) 22


Statutes:


RCWA 7.04.160(5) 22
RCW 62A.1-102(3) 7
RCW 62A.2-601 18
RCW 62A.2-607(4) 18
RCW 62A.2-609 1,3,6,8,10,15,17,18,21
RCW 62A.2-711(1) 20
RCW 62A.2-711(1)-(2) 18
RCW 7.04A.040(3) 12

| | |
|---|---|
| RCW 7.04A.200 | 23 |
| RCW 7.04A.230 | 12 |
| RCW 7.04A.230(c)(d)(e) | 22 |
| RCW 7.04A.230(d) | 1, |
| RCW 7.04.A230(3) | 22 |
| RCW 7.04A.240 | 6,23 |

RCW 7.04A.230(d) requires vacatur where an arbitrator exceeds his or her power by making legal errors discernable from the award itself, including the adoption of an erroneous rule of law or misapplication of the law to the facts of the case. See, e.g., Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 237-40, 236 P.3d 182 (2010). Here, the arbitrator's errors in the selection of RCW 62A.2-609 and application thereof are apparent on face of the award given the arbitrator's findings therein. The magnitude of such errors is amplified when undisputed evidence referenced in the Final Reason Award on all Substantive Issues ("Final Reasoned Award") is considered. Accordingly, this court should vacate the arbitral awards and remand to the trial court for a decision as to whether a rehearing is warranted.

Costco's arguments against vacatur and in support of the Order Granting Motion to Strike fail because they are premised upon (a) a misreading and/or misrepresentation of the arbitral awards and findings therein to support its flawed argument that the awards were based upon contract and not the UCC, (b) an unnecessarily restricted view of the scope of review, (c) confusion respecting the difference between undisputed facts and legal conclusions based thereon, and (d) a refusal or inability to rationalize the arbitrator's rulings with governing UCC law.

Costco's arguments in support of entry of judgment against two

defendants when only one was referenced in the arbitral awards (and all other pleadings) likewise fails. Costco attempts to overcome the very limited scope of a trial court's authority on a petition to confirm an arbitral award and obvious inability to enter a judgment against more parties than named in the award by baldly and incorrectly asserting that the Regal entities requested that the trial court determine who was party to the underlying arbitration. Nothing in the trial court record or the Clerks' Papers suggest that the Regal entities agreed to the trial court's resolution of such a critical matter and therefore it was clear legal error for the trial court to enter judgment against both Regal entities.

## I. The Final Reasoned Award stands alone as the basis for the arbitrator's substantive rulings; the Fee Award is relevant only to the amount of fees/costs award.

Costco's arguments respecting the Motion to Vacate all hinge on the untenable assertion that the arbitrator's decision was based upon the parties' contract and a finding that Regal breached it. However, as explained in the Appellants' Brief and more fully below, the Final Reasoned Award resolving the merits of the case, by its clear terms, was premised exclusively on the UCC concept of adequate assurances; it made no reference whatsoever to any breach by Regal of any contractual provision. The subsequently issued arbitral award awarding Costco prevailing party fees and costs does not change the nature or basis of the

Final Reasoned Award.

To refresh this Court's recollection, the arbitrator issued his "Final Reasoned Award on all Substantive Matters" (herein "Final Reasoned Award") on November 19, 2010. CP 121-128. In the analysis section of the Final Reasoned Award the arbitrator references key UCC phrases regarding the UCC right to demand assurances **six times.** See Appellants' Brief at p. 7 and CP 125 at line 10 ("Regal's assurance") 126 at line 20 ("reasonable assurances"). In marked contrast, the arbitrator did not find any breach or even use the word breach a single time in his analysis.[1] (This is not surprising considering that in Costco's post-hearing submission it argued exclusively that the UCC controlled and that liability was premised upon RCW 62A.2-609 regarding adequate assurances. (CP 211-214.)) While he set out, verbatim, two contractual provisions, he never referred to them, quoted them or used key words or phrases from them in his analysis, except to note that Costco had a right to test and re-test and to question product conformity (CP 124). Thus, on the whole, the Final Reasoned Award shows reliance on the UCC and RCW 62A.2-609.

Moreover, from the arbitrator's own words it is abundantly clear

[1] In the entire 8-page award the arbitrator does not make a single finding or conclusion respecting breach of contract by either party, or identify any contractual provision that was breached. Indeed, the word "breach" appears only three times, and only in the arbitrator's recitation of the parties' claims. CP 121-22 (Final Reasoned Award at p. 1, line 20, and p. 2 line 2.)

that his substantive liability and damages decisions were fully laid out in the "Final Reasoned Award on all Substantive Issues" (CP 121-128.) First, the title of the Final Reasoned Award indicates it was his final word and ruling on "all substantive issues". To drive that notion home, at the end of the Final Reasoned Award, the arbitrator stated, "a single issue remains in this case, but it is not a substantive issue as to the merits of the claims, counterclaims or defenses", referring to the determination of fees and costs awardable to the prevailing party. (CP 128 (emphasis added.)) These statements articulate the arbitrator's view that the Final Reasoned Award stands alone as his determination of all substantive issues and the merits of the parties' claims

On January 7, 2011, the arbitrator issued his supplemental award of fees and costs in a document entitled, "Final Award" (CP 433-442), but referenced herein as "the Fee Award" to better identify its scope and purpose. Per his statement in the Final Reasoned Award, the Fee Award was not "substantive" in nature and did not impact "the merits of the claims, counterclaims or defenses", which he had already resolved.

In the opening page of the Fee Award and presumably for contextual purposes, the arbitrator summarized the Final Reasoned Award, incorporating the same by reference. While he referenced the existence of

Costco's contractual and statutory rights,[2] the arbitrator described the Final Reasoned Award as making certain findings and rulings not contained in that document. He stated,

> In that Award, . . . I . . . found and concluded that [Costco] had and properly exercised its contractual and **statutory rights** when it conducted additional product tests, that it had acted in good faith in demanding certain assurances from [Regal], and that [Regal] had in response thereto not complied with its own contractual duties. [Costco] having thereby prevailed in proving that [Regal] breached its contractual duties, and [Regal] having failed to prove either that [Costco] had breached its contractual duties or violated any duty of good faith and fair dealing, I awarded damages to [Costco] . . .

(CP 433-34 (emphasis added.)) The underlined portion of the arbitrator's summary is consistent with the Final Reasoned Award but the remainder is not as the arbitrator made no findings whatsoever of contractual breach in the Final Reasoned Award. The arbitrator consumed the remaining 8 pages of the Fee Award addressing the parties' arguments respecting Costco's application for fees and costs. (CP 434-442)

The most that can be said of the Fee Award is that the arbitrator's summary therein was imprecise or the product of faulty recollection. His casual introductory reference to the Award was contextual, and based on his prior comments, not intended to be substantive. Accordingly, the

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[2] Costco misleads this Court by stating, "In the Final Award [Fee Award], the Arbitrator also specifically referenced the contract, not the UCC, in holding that Costco was entitled to relief . . ." Costco Brief, p. 20. This is patently wrong: the Fee Award expressly referred to Costco's statutory rights. (CP 433-34)

arbitrator's off-hand summary of the Final Reasoned Award cannot be read to change or supplement the arbitrator's analysis or the bases for his substantive rulings as articulated in the Final Reasoned Award. Nor could it as the American Arbitration Association rules and Washington statutory law expressly prohibit substantive modifications, alterations or supplementation of awards by arbitrators.[3]

## II. Costco's assertion that the arbitral award was substantively premised in contract is untenable.

Perhaps because it is rather obvious that RCW 62A.2-609 had no proper application in this case, Costco vehemently but wrongly asserts that the arbitrator's ruling was premised in contract. Costco's argument here is based almost exclusively on the Fee Award (CP 434-442) and the non-binding inaccurate summary of the arbitrator's previously issued Final Reasoned Award therein. Indeed, this Court should be aware that in each

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[3] The AAA Commercial Arbitration Rule 46 provides.

> **R-46 Modification of Award.** Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to re-determine the merits of any claim already decided. . . .

(CP 85.) Washington's Uniform Arbitration Act likewise prohibits arbitrators from amending or supplementing the merits of claims in an award. Per RCW 7.04A.240 an arbitrator may modify or correct an award only upon timely motion by a party and for the exclusive purpose of correcting computational or typographical errors or other matters "not affecting the merits of the decision on the claims submitted." Id. In any event, to the extent the arbitrator added contractual breach as an additional basis for his ruling, such a conclusion would also be a clear legal error because the arbitrator failed to identify any contractual duty or articulate how it was breached.

instance that Costco asserts that the arbitral awards were based in contract, Costco cites the Fee Award and/or combines the statements of the two arbitral awards as if there were one integrated ruling, which they were not. Costco's Brief at pp. 16, 20, 21 (CP 434), 23-24 (CP 434). As explained above, the Fee Award did not modify the substantive findings or bases for the arbitrator's rulings in the Final Reasoned Award.

Costco's argument that the arbitrator's rulings were based upon the parties' contract is belied by contract itself. The word "assurance" does not appear anywhere in the cited contractual provisions. Neither Section 11's right to test and re-test nor Section 20's bases for rejection constitute or create a right to demand assurances regarding conformity (as suggested by Costco (Brief at 22)), create an obligation for Regal to provide assurances, or provide a remedy for failure to give assurances. The importation of a right to demand adequate assurances into the parties' contract would violate Washington's prohibition against judicial supplementation of contracts. See, e.g., Agnew v. Lacy Co-Ply, 33 Wn. App. 283, 287 (1982).[4]

In sum, focusing on the arbitrator's language in the Final Reasoned

[4] Costco further asserts that the parties' contract gave Costco a right to reject or revoke acceptance of products with only "allegedly" inadequate labeling. Costco Brief at p. 22 at 24-25. Regardless of whether the contract created such a right, or whether such a contractual provision is enforceable considering the UCC's prohibition against waiver of the obligations of good faith, diligence and reasonableness, RCW 62A.1-102(3), the arbitrator did not find or conclude anywhere in either the Final Reasoned Award or the Fee Award that Costco had a right to reject because Regal labels were "allegedly misleading."

Award as this Court must, with its multiple references to the key UCC terms or phrases ("assurances" "adequate assurances" reasonable basis to demand assurances, etc.) and lack of any references to breach of contract, the Court can reach only one conclusion: that the arbitrator's liability determination was exclusively based upon RCW 62A.2-609.[5]

## III. Costco does not (and cannot) dispute non-payment for ladders received, receipt of ladders prior to demand for assurances, or Regal's completion of performance.

Careful review of Costco's brief reveals that it does not truly dispute the dispositive facts. Costco's arguments do, however, display an intentional blurring of the distinction between facts with legal conclusions, and Costco's misunderstanding of the difference between completion of performance and breach. Costco even goes so far as to manufacture a factual finding that the arbitrator did not make. Costco's arguments and obfuscation are unavailing.

First, Costco did not dispute and admits in its brief that it failed to pay invoices for ladders received. Costco Brief p. 15. This failure to pay was likewise acknowledged by the arbitrator when he reduced Costco's

[5] Costco is likewise incorrect stating that "as Judge Alsdorf ruled, the terms of the parties' agreement govern this dispute." Brief at 22. As noted above, the arbitrator cited the UCC generally in the Final Reasoned Award (and the Fee Award) and no where did he say that contractual provisions controlled over the UCC. This argument is also contrary to Costco's assertions in its Proposed Final Award, wherein it argued that, "under . . . [Costco's Basic Vendor Agreement and the Import Agreement, the Uniform Commercial Code (UCC), as adopted by Washington, controls this dispute. See RCW 62A." CP 211-12 (emphasis added.)

award by the amount owing to Regal for ladders received and retained. CP 127-128. Costco disputes only the related legal conclusion that failure to pay amounted to a breach of the contract by first pointing to the Fee Award, which is inapposite on substantive issues. Costco also suggests that its admitted failure to pay was excused by some unidentified contractual provision—essentially asking the court to do what Costco says it cannot, i.e., consider matters outside the face of the arbitral award. But there is no contractual provision authorizing nonpayment and the arbitrator made no finding that Costco's failure to pay was excused.

Second, Costco cannot dispute that its demand for assurances came after it had received ladder shipments from Regal. This is what the arbitrator found—twice—in the Final Reasoned Award:

- "Costco had a reasonable basis . . . to seek assurances . . . [regarding] . . . product Costco had already received and was continuing to receive . . ." CP 124; and
- "[Costco] sought to confer with Regal and obtain Regal's assurance that the products that had been and were still being delivered in fact complied with the standards . . . claimed by Regal." CP 125

(Emphasis added.) Nonetheless, Costco attempts to create uncertainty in the facts and March 20, 2007 as the date of its first demand for assurances, claiming that its arbitration pleadings sponsoring that date are not evidence. Costco Brief at 16. Costco's attempt to distance itself from its Arbitration Brief, wherein Costco claimed that its first demand for

assurance was made on March 20, 2007 (CP 147) and its [Proposed] Final Award (CP 213) where Costco stated that demands for assurances were made "following the third (failing) BV test", i.e., March 15, 2007 (CP 206) is curious and perhaps revealing of its knowledge that RCW 62A.2-609 does not apply once performance is completed by delivery. But the precise date of Costco's first demand is arguably irrelevant since the arbitrator's findings that a reasonable basis to demand assurances arose and Costco's demand was made at a time when Regal had completed performance as to some of the ladder installment shipments, alone demonstrates the arbitrator's error in applying RCW 62A.2-609.[6]

Finally, Costco continues to confuse completion of performance with breach. And even worse, Costco entirely fabricates a finding on this subject by the arbitrator that he did not make. Costco claims, "when Regal failed to provide assurances to Costco about the ladders' quality, Judge Alsdorf held that Regal failed to fully perform under the contract. []CP 434 . . . " and "Judge Alsdorf specifically found . . . that Regal never did complete its contractual performance." Costco's Brief at p. 16 and 23, respectively. The arbitrator made no such finding in either award. Rather,

[6] Costco also misleads this Court by contending that there was arbitration testimony regarding un-addressed requests for assurances respecting the ANSI-compliance of Regal ladders in early 2007. Costco Brief at 16. This new allegation is flat untrue—there was no such testimony—, contrary to Costco's factual allegations in its arbitration submissions, and clearly designed to draw attention away from the arbitrator's binding finding that Costco's demand for assurance came after Regal delivered ladders to Costco.

he found—twice—that Regal had already delivered some quantity of ladders to Costco when Costco developed reasonable insecurity to justify a demand for assurances. And these findings are tantamount to a finding that Regal completed performance as to some of the purchase orders because a seller's performance is generally complete upon delivery, even if the product or delivery violates the contract in some way. See , e.g., Sumner v. Fel-Air, Inc., 680 P.2d 1109, 1116 (AK 1980) (performance complete upon delivery of plane even though seller breached contractual warranties) see also Chronister Oil Co. v. Unocal Refining and Marketing, 34 F.3d 462, 464 (7th Cir. 1994) (performance was completed by delivery of oil but tardiness of performance amounted to breach; UCC Section 2-609 did not apply due to completion of performance). Neither failure to give assurances nor breach by non-conformity impacts whether performance has been completed by delivery of the subject goods.

As consistently argued by appellants, there remains no dispute that (a) Costco failed to pay for ladders received and retained, and (b) Costco's demand for performance was made after Regal completed performance.

## IV. The standard of review applicable to arbitral awards does not prohibit review of undisputed evidence, particularly evidence referenced in the award.

Costco characterizes the standard of review in an exceedingly narrow manner and uses the same as a sword to defend a decision that is

clearly legally flawed. Costco goes so far as to assert that "courts . . . may not review an arbitrator's decision on the merits" (Costco Brief at 2), that a reviewing court may not examine the arbitrator's language to identify the basis of the decision, and that "[t]he alleged legal error must be easily found on the face of the award . . ." (Costco Brief at 18-19.) But such assertions are, of course, preposterous. The purpose of RCW 7.04A.230 is to provide a mechanism for vacatur where the arbitrator has made obvious legal errors in resolving the merits of the dispute. Adoption of Costco's unsupported and exceedingly narrow view would eviscerate Regal's fundamental and unwaivable statutory right to an honest and thorough review of legal errors discernable from the award. RCW 7.04A.040(3).

While Washington law prohibits the "re-examination" of evidence and/or trials *de novo* (which would invade the fact finding province of the arbitrator), none of the cases expressly prohibit consideration of undisputed dispositive facts, particularly when those facts are referenced in the arbitral award. Consideration of such facts would not invade the arbitrator's fact-finding province.

Indeed, in Agnew v. Lacey Co-Ply , 33 Wn. App. 283, 654 P.2d 712 (1982), this very Court considered undisputed material facts; it reviewed the undisputed portion of the parties' contract making a fee and cost award to the prevailing party mandatory, and based thereon vacated

the arbitral award for failure to award fees and costs. The Agnew court's resort to and enforcement of the underlying contract was premised upon the principal that "[a] court may not create a contract for the parties which they did not make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties." Id. at 288. These general principles apply here too; neither the arbitrator nor the trial court could "write-in" to the Costco/ Regal contract a right to demand adequate assurances or a remedy for failure to provide such assurances, which did not exist.

Costco's attempt to distinguish Agnew is unpersuasive. Costco relies on Boyd v. Davis, 127 Wn. 2d 256, 897 P.2d 1239 (1995), which distinguished Agnew and other cases vacating awards after examining the contract in the underlying arbitration. Boyd attempted to distinguish Agnew, claiming the Agnew court reviewed the contract's attorney fee clause only to "ascertain the law governing the disputed point." Id. at 260-61. But the Agnew court's resort to the contractual attorney fee clause did not reveal anything about the controlling law; it disclosed only the parties' agreement regarding fee and cost liability. Moreover, the Boyd court's comments regarding review of the underlying contracts in Agnew and other cases are *dicta* and therefore not controlling. The Boyd court reversed the trial court not because it reviewed or relied upon the under-

lying undisputed contractual terms—there were no contractual terms on the main issue of severability of contracts—but because it decided the fact-dependant issue of whether there was mutual intent that the contracts be divisible thereby invading the exclusive province of the arbitrator.

There is no Washington case law prohibiting a court's consideration of undisputed dispositive facts, particularly where such facts are referenced—in some fashion—in the arbitral award. Here, the arbitrator acknowledged that Costco had failed to pay for ladders received, he adopted the analysis in and cited to illustrative exhibits incorporating arbitration exhibits showing Costco's receipt of 20 of 23 ladder shipments prior to March 20, 2007, and he twice found that reasonable grounds for insecurity arose and Costco's demand for assurance was made after Regal had performed some of the purchase orders by having delivered ladder shipments to Costco. The arbitrator's legal errors are obvious given these findings and referenced facts.

## V. Even if a strict standard of review applies, the arbitrator's errors are apparent on the face of the Final Reasoned Award and require vacatur.[7]

[7] Costco contends that Regal makes inconsistent arguments regarding the scope of review or the nature of the arbitrator's errors. Costco Brief at p. 13-14. Regal has not been inconsistent but it has advanced alternative arguments: (1) the standard of review permits review of undisputed material facts, particularly those referenced in the award in some fashion; and (2) even if the reviewing court restricted itself to the Final Reasoned Award, the legal errors are still obvious and require vacatur.

A. The arbitrator erred in applying RCW 62A.2-609 to the case given the arbitrator's findings of ladder delivery.

By applying the concept of adequate assurances, which could only have been derived from RCW 62A.2-609 since the contractual provisions cited in the Final Reasoned Award did not establish a right to demand assurances or an obligation to provide the same, the arbitrator adopted an erroneous rule of law. Application of an erroneous rule of law requires vacatur under RCW 7.04.230(d). Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231-237-40, 236 P.3d 182 (2010).

Here, despite finding that Costco developed a reasonable basis for insecurity and demanded assurances at a time when it had already received and was continuing to receive ladder shipments, the arbitrator nonetheless applied the concept of adequate assurances, concluding that because Regal failed to provide assurances, respecting delivered and yet to be delivered product, Costco was entitled to reject or return delivered ladders. His application of RCW 62A.2-609 was erroneous, however, because RCW 62A.2-609, by the language used therein, makes it clear that the right created by the statute applies only to *future performance* not past performance. (Notably, Costco does not dispute Regal's plain reading of the statute to limit the right to demand assurances to the executory portions of the contract.)

Moreover, cases having addressed the applicability of UCC Section 2-609 in cases of full or partial completion of performance, uniformly hold that the provision does not apply to completed performance or in the case of installment contracts to the completed portions of the contract. Magic Valley Foods, Inc. v. Sun Valley Potatoes, Inc., 10 P.3d 734, 739 (Idaho 2000); Sumner v. Fel-Air, Inc., 680 P.2d 1109 (AK. 1980); see also Chronister Oil Co. v. Unocal Refining and Marketing, 34 F.3d 462, 464 (7th Cir. 1994). Another body of cases holds that a party may not resort to UCC Section 2-609 when that party is in breach for failure to pay for goods received or otherwise. Magic Valley, 10 P.3d 734 and cases cited at p. 24-25 n.13 and n.14 of Brief of Appellants. The absence of Washington authority on these precise legal issues is irrelevant as Washington courts generally look to out-of-state case law to resolve UCC issues of first impression, see, e.g., Peters v. Richwell Resources, Ltd., 64 Wn. App. 424, 430 (1992).

Costco's attempts to distinguish Sumner v. Fel-Air, Inc. and Magic Valley Foods, Inc. are unavailing. To the extent they are premised upon Costco's incorrect assertion that the arbitrator ruled that Regal's performance was incomplete due to failure to give assurances, they clearly fail as the arbitrator made no such finding. Additionally, the rulings in these cases were not premised on the buyer's breach as suggested by Costco. In each of these

cases, the seller had delivered the goods to the buyer *prior to the alleged demand for adequate assurances* and the courts therein concluded that the concept of adequate assurances had no application under such circumstances. Sumner involved the delivery of a single good—an airplane—whereas Magic Valley involved installment contracts for potatoes akin to the ladder purchase orders here. Moreover, the buyer in Sumner was not in breach when it demanded assurances; the Sumner court's ruling that the concept of adequate assurances did not apply was expressly based on the fact that the seller had completed performance by delivering the plane prior to the demand.

Based upon the language of the statute, and persuasive case law from jurisdictions confronting this issue, it was clear error for the arbitrator to apply RCW 62A.2-609 and the concept of adequate assurances when he acknowledged that Regal had performed at least some of the purchase orders by delivering ladders to Costco prior to Costco's demand. The gravity of the error is all the more evident when one looks at the undisputed factual information referenced in the Final Reasoned Award (CP 127-28): Costco Illustrative Exhibit Page 1 and Page 2 (showing Costco's possession of 28,800 ladders and referencing Exhibit 334 establishing that Costco received 20 of 23 shipments prior to March 20, 2007. Costco's admitted failure to pay for ladders received, likewise rendered RCW 62A.2-609 inapplicable and amounted to a violation of that statute.

B. The arbitrator erred in concluding that Costco had a right to reject or return ladders as a consequence of Regal's failure to provide adequate assurances.

The arbitrator's application of RCW 62A.2-609 was further fundamentally flawed because he grossly misstated the consequence for failing to give adequate assurances, conflating UCC law regarding adequate assurances and rejection. He stated that because Regal failed to give adequate assurances, Costco was entitled to reject or return delivered ladders. (CP 127) However, this statement is clearly contrary to UCC law. Notably, Costco does not address this error in its brief.

Under the UCC, the consequence for failure to give assurances is repudiation of the executory portion of the contract and possibly damages relating to that cancelled executory portion of the contract. RCW 62A. 2-711(1) and (2). A seller's failure to provide assurances regarding *future performance* does not entitle the buyer to reject *past performance*. Moreover, to establish a right to reject under the UCC the buyer must establish more than that the seller failed to give assurances; the buyer must affirmatively prove non-conformity. RCW 62A.2-601 (buyer may reject "if the goods or the tender of deliver fail in any respect to conform to the contract . . "); 62A.2-607(4) ("the burden is on the buyer to establish any breach with respect to the goods . . . "); HB Fuller Co. v. Kinetic Systems, Inc., 932 F.2d 681, 687 (7th Cir. 1991) (to have a right to reject or revoke

acceptance, buyer must establish non-conformity.)

Here, the arbitrator made no findings on the issue of whether the Regal ladders conformed to Regal's ANSI-related representations, and Costco does not claim otherwise. He found only that Regal failed to provide adequate assurances respecting conformity. Such finding is legally insufficient to support a conclusion that Costco was entitled to reject under the UCC. Moreover, "[t]he failure of the [fact finder] to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof." Baillargeon v. Press, 11 Wn. App. 59, 67, 521 P.2d 746 (1974) (reversing judgment for respondent where trial court failed to make an express finding on a material element of respondent's case). Since Costco had the burden of proof as to conformity, the absence of an express finding on that issue requires the presumption that Costco failed to prove non-conformity.

Simply put, UCC law does not allow the arbitrator to get from his point A (Regal failed to give adequate assurances) to his point B (Costco was therefore entitled to reject delivered ladders.)[8]

[8] Costco's assertion that the contract allowed Costco to reject delivered ladders upon Regal's failure to give assurances fails for a number of reasons. First, the arbitrator's liability determination was based upon the UCC not the parties' contract. Second, the parties' contract did not afford Costco a right to demand adequate assurances re future (or past) performance. Third and most importantly, the arbitrator made no findings on the contractual bases for rejection, e.g., non-conformity or allegedly inadequate labeling.

C. The Final Reasoned Award displays clear errors in the arbitrator's calculation of damages stemming from the failure to provide adequate assurances.

Regal has explained that the arbitrator's award of damages equal to Costco's losses on salvage sales is not permitted under the UCC where liability is premised on a failure to give adequate assurances. Damages for such a failure relate to losses stemming from the repudiation and non-performance of the executory portion of the contract. RCW 62A.2-711(1) and (2). Appellants' Brief at pp. 28-31. Failure to give adequate assurances does not result in damages for past, defective performance. See T&S Brass and Bronze Works, Inc. v. Pic-Air, Inc., 790 F.2d 1098 (4th Cir. 1985) (illustrating proper application of UCC law on rejection and failure to give sufficient assurances in an installment contract case.)

Costco does not address this blatant error or even attempt to explain how the damages awarded for failure to give adequate assurances are justifiable under the UCC. Instead, Costco falls back on its unsupportable argument that the arbitrator's liability determination was based on the parties' contract and that the contract allowed such damages. But, again, breach damages would be available under the parties' contract only if Costco has established per Section 20 that the goods were non-conformity or there was allegedly inadequate labeling and the arbitrator made no findings on these subjects. Accordingly, the damages award cannot be

upheld on a contractual basis.

In sum, Regal has identified no less than three grave legal errors made by the arbitrator that are apparent on the face of the Final Reasoned Award. Like Lindon Commodities, Inc. v. Bambino Bean Co., Inc., 57 Wn. App. 813, 790 P.2d 228 (1990), the arbitrator's rulings here require vacatur because they are contrary to the UCC. To the extent the court believes the arbitrator's decision may have been based in contract, vacatur is also required under Agnew because the arbitrator judicially modified the contract, and because the absence of any factual findings of breach must be taken to be a finding against Costco who bore the burden of proof.

D. The trial court erred in dismissing Regal's claims for nonpayment of stored ladders on the basis of failure to give assurances.

It being established that it was erroneous for the arbitrator to apply RCW 62A. 2-609 given his factual findings, his dismissal of Regal's claims for payment of stored ladders to the extent based upon a conclusion that the executory portions of the contract were repudiated was likewise erroneous. Conversely, if his dismissal of Regal's claims was based upon some breach of contract, the dismissal was likewise erroneous since the arbitrator made no factual finding of non-conformity or other breach that might allow Costco to cancel remaining portions of the contract.

E. Following vacatur, the court does not remand to or seek clarification from arbitrator; it has only limited discretion to order a rehearing.

Costco incorrectly claims that, "[w]here the reviewing court suspects an error of law has been made, the remedy is for the trial court to first seek clarification from the arbitrator," citing Tolson v. Allstate Ins. Co., 108 Wn. App. 495, 499, 32 P.3d 289 (2001). Costco Brief at 32-33. While the Court in Tolson, indeed, directed the trial court to seek clarification from the arbitrator regarding internal inconsistencies in the arbitral award, that direction and the court's authority to obtain clarification of an arbitral was based upon former RCWA 7.04.160(5), which was repealed in 2005 and no longer applies.

RCW 7.04A.230(3) provides that in vacating award on any ground other than the absence of an agreement to arbitrate, , . . ., "the court *may* order a rehearing before a new arbitrator" and if an award is vacated under RCW 7.04A.230(c), (d) or (e), "the court *may* order a rehearing before the arbitrator who made the award or the arbitrator's successor." (Emphasis added.) Nothing in statute allows the court to remand to the arbitrator or to "seek clarification from the arbitrator" as suggested by Costco. To do so would contravene other binding law stating that substantive "clarification" or "clarification" as to the merits of the case is prohibited following issuance of the arbitral award. AAA Commercial Arbitration Rule R-46

(*supra* n. 3) and RCW 7.04A.200 and --.240 (both prohibiting modifications and/or corrections of an arbitral award that would affect the merits of the original decision.) If vacatur is ordered here, the trial court has the limited discretion to decide only whether to order re-hearing and whether re-hearing must occur before a new arbitrator. In light of the volume and gravity of the errors here, rehearing before a new arbitrator is appropriate. See Agnew, 33 Wn. App. at 290.

## VI. Considering the proper standard of review, the trial court erred in striking material evidence.

As noted above, Agnew permits and other Washington case law does not prohibit review and examination of undisputed dispositive evidence, particularly evidence that is referenced and/or incorporated in the arbitral award. In light of this standard of review, it was an abuse of the trial court's discretion to strike declaration exhibits containing the very evidence referred to and incorporated by the arbitrator in the Final Reasoned Award, i.e., Costco Illustrative Exhibit Page 1 and Page 2 (CP 357-360) and Exhibit 334 (CP 341-344), cited and incorporated in Costco Illustrative Exhibit Page 2 (CP 360). Such materials were relevant to review of the arbitral awards. See CR 12(f); Appellants' Brief at 43-47.

The trial court further abused its discretion by basing its Order Granting Motion to Strike on untenable grounds: the unsupported

assertion that the materials at issue were not before the arbitrator or not part of the arbitration award. Regal has demonstrated that all materials were presented in the arbitration and Costco does not dispute this. Regal has also demonstrated that many of the records were referenced in the award. The order also is manifestly unreasonable and must be reversed because it is hopelessly vague.

## VII. The trial court's entry of judgment against both Regal entities, neither of whom consented to the court's determination of a new fact issue, was erroneous and judgment must be vacated.

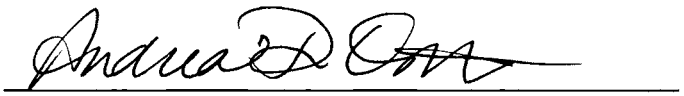
Costco does not dispute that in an arbitration award confirmation proceeding the trial court's jurisdiction is limited to the mere ministerial act of reducing the award to judgment. Costco Brief at p. 26. However, it attempts to circumvent this rule of law and justify the trial court's entry of judgment against two entities when the arbitral awards refer to only one by asserting that the Regal entities *consented to* the trial court's determination of the factual issue of who was party to the arbitration. Id. Costco relies upon Sherry v. Financial Indemnity Co., 160 Wn.2d 611, 160 P.3d 31 (2007), wherein the parties to an insurance contract "explicitly agreed to have the same judge, who confirmed the arbitration award and reduced it to judgment, also decide whether an offset was appropriate" and where the parties "explicitly waived any objection to the trial court's deciding the offset issue during the confirmation action." Id. at 614 and 616 (emphasis

added.) The Sherry court took great pains to limit its ruling to the unusual facts of the case, noting three times that its ruling was limited to the facts before it. Id. at 614, 618 and 626.

Sherry is inapposite and the trial court here lacked jurisdiction to reach the issue of who was party to the underlying arbitration because neither Regal entity expressly or impliedly agreed to have the trial court decide a new factual issue of fundamental importance, i.e., whether an approximate $800,000 judgment should be entered against an additional entity. Certainly, the Regal entities' defensive argument that the trial court could not enter judgment on the award against two parties when only one appeared at the arbitration and was named in the arbitration pleadings and arbitral awards was not an "explicit" request by them for the court to decide who was party to the underlying arbitration or a "knowing" or "voluntary" waiver of a right to object to dramatic expansion of the trial court's jurisdiction and summary determination of a very important factual matter. Sherry is distinguishable because here was no "explicit agreement" to submit the new issue to the trial court and no "explicit waiver of an objection" to the expansion of the trial court's jurisdiction. Because the trial court dramatically exceeded its jurisdiction in entering judgment against two entities, the judgment must be vacated.

DATED this 18th day of November, 2011.

BUCKNELL STEHLIK SATO & STUBNER, LLP



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DECLARATION OF SERVICE

I, the undersigned, hereby certify that on the 18th day of November, 2011, a copy of REPLY BRIEF OF APPELLANTS was sent via LMI Legal Messengers, to:

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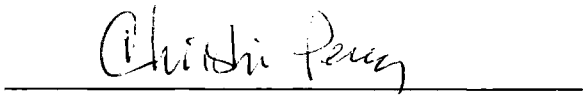
DATED this 18th day of November, 2011.



Christie Percy