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NO. 69500-2-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Ballard Leary Phase II, LP.; BRCP/CPI Phase II, LLC; Continental Pacific
Investments Real Estate Fund 1, LP; Continental Pacific Investments Real
Estate Fund 1, LP; Continental Properties, Inc.; Claudio Guincher and
Jane Doe Guincher; and Don Bowzer and Jane Doe Bowzer,

Appellants

v.

Canal Station North Condominium Association,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODCUTION

This is a condominium construction defect action brought by Respondent Canal Station North Condominium Association (the “Association”) against the declarant of the Canal Station North Condominiums, Ballard Leary Phase II (the “Declarant”), various entities related to the Declarant,¹ two individuals who served on the Association’s board of directors during the period that the Declarant controlled the Association² and four manufacturers of yellow brass plumbing fittings that the Association alleges are defective.³

The primary issue involved in this appeal case is whether Appellants waived the right to arbitrate under RCW 64.55.100(1)⁴ by asking the Trial Court to dismiss claims that would otherwise have been subject of the arbitration before Appellants filed their demand for arbitration.

¹ The related entities are Appellants BRCP/CPI Phase II LLC, Continental Pacific Investments Real Estate Fund 1 LP, CPI Fund 1 LLC and Continental Properties Inc. (collectively the “Related Entities”).

² The individual defendants are Appellants Claudio Guincher (“Guincher) and Don Bowzer (“Bowzer”). Guincher and Bowzer are named as defendants only in the Association’s Breach of Fiduciary Duty and Consumer Protection Act Violation causes of action.

³ The plumbing manufacturers are Defendants Uponor, Inc., Dahl Brothers Canada, LTD, Masco Corp., and Brass-Craft Manufacturing Company (the “Plumbing Manufacturers”).

⁴ RCW 64.55.100(1) provides in relevant part that a declarant, an association, or a party unit owner may initiate a private non-binding arbitration by filing a demand with the court not more than ninety days after service of the complaint.

Specifically, prior to filing a timely demand for arbitration under RCW 64.55.100(1), Appellants filed a Motion to Dismiss pursuant to CR 12(b)(6) wherein Appellants sought to dismiss the Association's claims for: (1) violation of the Consumer Protection Act ("CPA"), (2) negligent misrepresentation, (3) alter-ego liability, and (4) disgorgement of fraudulent transfers. (Clerk's Papers ("CP"), 439-452) As an alternative to dismissal of the alter ego and fraudulent transfer claims, Appellants asked the Court to bifurcate these claims and only allow prosecution and discovery as to the fraudulent transfers/alter ego claims if, and only if, the Association first established the Declarant's liability.

Appellants' Motion was denied on August 3, 2012. (CP, 713-715) Shortly after their Motion was denied, Appellants filed their demand for arbitration under RCW 64.55.100. (CP, 716-718)

Whereupon, the Association filed its Motion to Strike the arbitration demand on the grounds that Appellants had waived the right to arbitration by filing the Motion to Dismiss and because the Related Entities and Guincher and Bowzer were not declarants, they did not have a statutory right to demand arbitration under RCW 64.55.100. (CP, 722-734)

The Trial Court granted the Association's Motion to Strike finding that Appellants impliedly waived arbitration by filing their Motion to

Dismiss, that the Related Entities and Guincher and Bowzer did not have the right to invoke arbitration under RCW 64.55.100, and that the Plumbing Manufacturers could not be made parties to the arbitration. (CP, 851-853) In support of its determination that Appellants waived the right to arbitration, the Trial Court made specific findings (CP, 852-853) that: (1) Appellants CR 12(b)(6) motion sought to narrow specific liability issues for trial while expressly leaving others for determination by the trier of fact; (2) Appellants sought to stage the litigation with their alternative motion for bifurcating the trial of liability and damages from the trial of alter ego and Uniform Fraudulent Transfers Act claims; (3) Prior to losing their motions Appellants made no effort to invoke or preserve the arbitration forum; (4) Appellants' briefing referenced potential "jury confusion" as a basis for bifurcating or dismissing specific claims; and (5) granting Appellants' demand for arbitration immediately after Appellants lost a motion intended to shape the posture of the litigation at trial would tend to promote improper forum shopping.

In their Opening Brief Appellants claim that the use of the word "shall" in the portion of RCW 64.55.100 that provides that after a timely demand for arbitration "the parties **shall** participate in a private arbitration hearing," not only makes arbitration mandatory, but that, as a matter of law, eliminates any possibility of an implied waiver of the right to

arbitrate. In substance, Appellants are claiming that any time the word “shall” is used in a statute, the rights created by that statute cannot be waived as a matter of law.

Not only do Appellants fail to cite any authority for this novel argument, but they also ignore Washington case law that recognizes that the doctrine of waiver has generally been held to apply to **all** rights or privileges to which a person is legally entitled and further ignore numerous instances where, despite the use of the word “shall,” the Courts have found implied waivers of rights created by such provisions.

For example, Section 22 of Article I of Washington’s Constitution provides that in criminal prosecutions the accused “**shall** have the right” to counsel and “**shall** have the right” to an appeal in all cases. Despite use of the word “shall,” Washington Courts have long recognized that both the right to counsel and the right to an appeal may be waived by the defendant’s conduct.

Similarly, Appellants ignore the fact that when the Legislature wants to provide that a right created by statute cannot be waived it does so specifically rather than relying on the use of the word “shall” in the statute. Again by way of example, Section 64.34.030 of the Washington Condominium Act (“WCA”) provides that “...rights conferred by this

chapter may not be waived.” There is no similar anti-waiver provision in RCW 64.55.

In addition to its statutory interpretation argument, Appellants also claim that in *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 462-463, 268 P.3d 917 (2012) (“*Townsend*”) the Washington Supreme Court adopted a hard and fast rule that that the filing of a summary judgment motion cannot waive a right to arbitration so long as the moving party promptly thereafter seeks arbitration. However, in so arguing Appellants completely misrepresent what the Court held in *Townsend*.

In *Townsend*, the Court did not hold, as Appellants claim, that there was a hard and fast rule that the filing of a motion for summary judgment did not waive the right to arbitration if the moving party promptly thereafter sought arbitration. Rather, the *Townsend* Court acknowledged that the issue of waiver turned on a factual determination of whether the filing of the motion in question evidenced an intent to waive arbitration. Here, as set forth in the Trial Court’s findings, there was a clear intent by Appellants to waive arbitration and to pursue the action in the Trial Court. Only after Appellants lost their Motion did they reverse their position and file their demand for arbitration.

Assuming arguendo that this Court reverses the Trial Court on the issue of waiver and an arbitration is ordered, Appellants claim that the

Related Entities, Guincher and Bowzer, must be parties to the arbitration because the Association supposedly alleges in its Complaint that the Related Entities and Guincher and Bowzer are declarants and such allegations are either judicial admissions binding on the Association, and/or the Association is equitably estopped from denying that the Related Entities and Guincher and Bowzer are declarants.⁵

Appellants' arguments fail for a number of reasons. First, the Association never alleged that the Related Entities and Guincher and Bowzer are declarants. As to the Related Entities they allege that the Declarant is their alter ego. As to Guincher and Bowzer, they are named as defendants because they served on the Association's board of directors during the period that the Declarant controlled the Association. There are no allegations in the Association's Complaint that Guincher and Bowzer were declarants or alter egos of the Declarant.

Second, under RCW 64.55.100(1) only a declarant, a homeowners' association, or a party unit owner may initiate an arbitration. Here as stated in footnote 25 of the Opening Brief, Appellants have not admitted that they are the declarants or the alter ego of the Declarant. Consequently, Defendants cannot have it both ways by denying that they are declarants

⁵ Similarly, Appellants claim that because the Association alleges that the Plumbing Manufacturers "supplied" plumbing fittings, they must be "suppliers" within the meaning of RCW 64.55.150 and, therefore, proper parties to the arbitration.

on the one hand, and attempting to exercise a procedural right that is granted only to a declarant.

Third, Appellants reliance upon the doctrine of equitable estoppel is completely misplaced. The elements of equitable estoppel require proof of (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. Here, Appellants cannot show any reliance upon the Association's allegations that the Related Entities are the alter ego of the Declarant, or any injury resulting from the Association's conduct.

Finally, much of what Appellants claim in their Opening Brief is outside of the record and, therefore, should not be considered by this Court. For example, Appellants claim at page 22 of their Opening Brief that in considering whether they waived the right to arbitrate this Court should consider the fact that Appellants supposedly did not take or respond to any discovery and did not conduct any expert investigations at the project. However, there is nothing in the record before this Court concerning what Appellants did with respect to discovery or expert investigations. Consequently, such information should not be considered by this Court.

Unfortunately, this is not the only instance where Appellants simply make up their own record on appeal. Rather, invented statements that have no support in the record appear repeatedly in Appellants' Opening Brief. Again by way of example, at page 5 of the Opening Brief Appellants claim that the fact that an Association theoretically could be liable for the declarant's attorney fees if the Association continued on with the litigation after the arbitration and did worse than at the arbitration: "... has had a devastating effect on a plaintiffs desire to even take a matter to arbitration (i.e. they settle prior to the hearing), let alone reject an arbitration ruling." Because there is nothing in the record to evidencing what effect, if any, a demand for arbitration under RCW 64.55.010 has on the settlement rates of cases, Appellants' claims as to the impact of a demand for arbitration under RCW 64.55.010 should be ignored by this Court.

Focusing on the actual record before this Court, and what the controlling cases actually hold, the Trial Court's granting of the Motion to Strike was fully supported by the controlling case law and the applicable facts. Consequently, the decisions of the Trial Court should be affirmed.

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II. STATEMENT OF THE CASE

This matter was commenced by filing the Association's Complaint on April 27, 2012. (CP, 1-32). A First Amended Complaint was filed on May 25, 2012. (CP, 36-67)

As to the Declarant and Related Entities, the First Amended Complaint ("Complaint") alleged claims for: Breach of the Implied Warranty of Quality under the Washington Condominium Act; Breach of the Implied Warranty of Habitability; Negligent Misrepresentations or Omissions; Breach of Fiduciary Duty; Violation of the Consumer Protection Act; and Disgorgement of Fraudulent Transfers.

As alleged in the Association's Complaint, the relationship between the Related Entities and the Declarant was as follows: The Declarant is a Washington limited partnership. Respondent BRCP/CPI Phase II LLC is the general partner of the Declarant. (Complaint, ¶¶ 2.3, 2.4, CP 38)

Respondent Continental Pacific Investments Real Estate Fund 1 LP, ("Continental LP"), another limited partnership, is the managing partner of BRCP LLC, and Respondent CPI Fund 1 LLC ("CPI LLC") is the general partner of Continental LP. (Complaint, ¶¶ 2.5, 2.6, CP 38) Finally, Respondent Continental Properties Inc. is the manager of CPI LLC. (Complaint, ¶ 2.7, CP 38)

The Complaint alleges that BRCP LLC, Continental LP, CPI Fund, CPI LLC and Continental Properties Inc. are alter egos of the Declarant, but does not allege that they are themselves declarants. (Complaint, ¶ 2.14, CP 39)

The remaining Appellants are Claudio Guincher and Jane Doe Guincher, and Don Bowzer and Jane Doe Bowzer. (Complaint, ¶¶ 2.9, 2.10, CP 38-39) Guincher and Bowzer served on the Association's board of directors during the period that Declarant controlled the Association, and are accordingly named as defendants only in the Association's Breach of Fiduciary Duty and Consumer Protection Act Violation causes of action. There are no allegations in the Complaint that Guincher and Bowzer are declarants or alter egos of the Declarant.

The Plumbing Manufacturers were sued on theories of strict product liability, negligence, breach of express and/or implied warranty, breach of warranty of merchantability, and for violation of the Consumer Protection Act. (CP, 50-64)

On or about July 6, 2012, Appellants filed a Motion to Dismiss pursuant to CR 12(b)(6) wherein Appellants sought to dismiss the Associations claims for: (1) violation of the CPA, (2) negligent misrepresentation, (3) alter-ego liability, and (4) disgorgement of fraudulent transfers. (CP, 439-452) If the trial court was unwilling to

dismiss the alter ego and fraudulent transfer claims, Appellants asked the Court to bifurcate those claims and only allow prosecution and discovery as to the fraudulent transfers/alter ego claims if, and only if, the Association first established the Declarant's liability.

Appellants' Motion was denied on August 3, 2012, and the Trial Court at the same time, without objection from the defense, granted the Association leave to amend its complaint to either narrow its allegations as to damages arising from loss of unit values, or to add unit owner class representatives to the action as plaintiffs. (CP, 713-715)

On August 8, 2012, Appellants served a "Demand for Arbitration" "pursuant to RCW 64.55.100." (CP, 716-718) Appellants also subsequently filed a "Notice to the Court Re: Defendants' Demand for Arbitration Pursuant to RCW 64.55.100." (CP, 719-721) This Notice purported to inform the trial court that "any and all claims related to all of the above-captioned parties (plaintiff and defendants) are compelled into arbitration. Jurisdiction to decide any matter now vests with the arbitrator(s) to be selected by the parties."

Whereupon, the Association moved to strike Appellants' Demand for Arbitration. (CP, 722-734) Appellants opposed the Motion to Strike. (CP, 821-831) Defendant Uponor, Inc. filed a response to and limited joinder in the Association's Motion to Strike. (CP, 848-850)

On August 21, 2012, the trial court issued its Order granting the Motion to Strike.⁶ (CP, 851-853)

Appellants then filed their Motion for Reconsideration. (CP, 856-869) While repeating some of the arguments from its Opposition to the Motion to Strike, in their Motion for Reconsideration Appellants raised for the first time their arguments based upon judicial admission and equitable estoppel.

King County Local Rule 59(b) provides that no response to a motion for reconsideration shall be filed unless requested by the court. While the Trial Court never requested the Association to file a response to the Motion for Reconsideration, the Association did file a brief that addressed only Appellants' request that the Trial Court certify the matter for discretionary review under RAP 2.3(b)(4). (CP, 916-925) Appellants then filed a reply to the Association's responsive brief. (CP, 955-974)

On September 28, 2012, the Trial Court denied Appellants' Motion for Reconsideration. (CP, 975-977) Whereupon, this appeal followed.

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⁶ While Appellants repeatedly characterize the Trial Court's Order as striking Appellants' arbitration demand in its entirety, in fact the trial court deleted the proposed language in the Order that Appellants' arbitration demand was stricken.

III. ARGUMENT

A. The Standard of Review For A Motion for Reconsideration is Abuse of Discretion.

As set forth above, Appellants are appealing from the Order granting the Association's Motion to Strike and the Order Denying their Motion For Reconsideration. In their Opening Brief, Appellants claim that the standard of review as to both motions is *de novo* because questions of arbitrability are generally reviewed *de novo*. (Opening Brief, p. 11).

In *River House Dev., Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 228-229, 272 P.3d 289 (2012) ("*River House*"), after River House 's motion to compel arbitration was denied, it filed a motion for reconsideration claiming that due to a lapse in office protocol its attorneys had not responded to the opposing party's briefing on the issue of waiver; and that after considering these new arguments the court should reconsider its ruling and find that there was no waiver of the right to arbitration and/or that the issue of waiver should have been referred to the arbitrator. River House's motion for reconsideration was denied.

With respect to the appropriate standard of review for the motion for reconsideration the *River House* Court stated at page 231 that:

By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely

related to a position previously asserted and does not depend upon new facts. (Citations Omitted) **But while the issue is preserved, the standard of review is less favorable.** Cf. 14A Karl B. Tegland, Washington Practice: Civil Procedure § 34:3, at 434 (2d ed. 2009) (effect on standard of review where error is preserved by motion for new trial)... **We review a trial court's denial of a motion for reconsideration for abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.** *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002).

Thus, while questions of arbitrability are generally reviewed *de novo*, because Appellants' argument regarding judicial admissions and equitable estoppel were raised for the first time in their Motion for Reconsideration (CP, 856-869), those issues should be decided under an abuse of discretion standard.

B. The Trial Court Correctly Determined That Appellants Waived Their Right To Arbitration By Filing Their Motion To Dismiss.

1. Use Of The Word "Shall" In RCW 64.55.100 Does Not Eliminate The Possibility That A Party Can Waive The Right To Arbitration.

Appellants claim that the use of the word "shall" in the portion of RCW 64.55.100 that provides that after a timely demand for arbitration "the parties **shall** participate in a private arbitration hearing," "...bestows an unequivocal right to arbitration" that cannot be waived. (Opening Brief, p. 23) Not only do Appellants fail to cite any authority to support their

argument that use of the word “shall” means, as a matter of law, that the right created by the statute cannot be waived, they simply ignore controlling authority that is directly contrary to their argument.

Specifically, with certain exceptions that are not germane here, Washington Courts recognize that a litigant may impliedly or expressly waive **any** legal right. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954) [“The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled.”]; *Peste v. Peste*, 1 Wn. App. 19, 24, 459 P.2d 70 (1969).

Furthermore, contrary to Appellants’ assertion that use of the word “shall” means no waiver is possible, there are numerous instances under Washington law where despite the use of the word “shall,” Washington Courts have found that an implied waiver of the right created by the provision in question is permissible. For example, Section 22 of Article I of Washington’s Constitution provides that in criminal prosecutions the accused “**shall** have the right” to counsel and “**shall** have the right” to an appeal in all cases. Despite use of the word “shall,” Washington Courts have long recognized that both the right to counsel and the right to an appeal may be waived by the defendant’s conduct. See *State v. Eckert*, 123 Wash. 403, 404, 212 P. 551, (Wash. 1923) [“While both the constitution and the statute give the defendant in a criminal case a right to

appeal, that right may be waived in many ways, and among others, by a plea of guilty, which is, in effect, a confession.”] and *In re Welfare of G.E.*, 116 Wn. App. 326, 334, 65 P.3d 1219 (2003) [“This court has identified three ways a criminal defendant may waive his or her right to counsel. A defendant may (1) voluntarily relinquish the right, (2) waive it by conduct, or (3) forfeit it through "extremely dilatory conduct." (Citations Omitted)”]

Again by way of example, even though RCW 5.60.060(2) states that an attorney **shall** not be examined as to any communications or advice by him to his client without consent of the client, the law is extremely well settled that there may be implied waivers of the attorney-client privilege. See *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 420, 635 P.2d 708, (1981); and *State v. Webbe*, 122 Wn. App. 683, 691, 94 P.3d 994 (2004).

In arguing that the Legislature intended the use of word “shall” to imply that there can be no waiver, Appellants also ignore the fact that when the Legislature intends that a statutory right cannot be waived, it specifically so provides. For example, Section 64.34.030 of the WCA provides in relevant part that: “Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived.” Similarly, Section

7.04A.040 of the Uniform Arbitration Act sets forth with specificity what portions of the Uniform Arbitration Act cannot be waived by the parties.⁷

Because the Legislature is presumed to be familiar with the law at the time it enacted a statute (See *State v. Fenter*, 89 Wn.2d 57, 62, 569 P.2d 67 (1977); *Daly v. Chapman*, 85 Wn.2d 780, 782, 539 P.2d 831 (1975)), it must be presumed the Legislature was familiar with the concept that the mere use of the word “shall” does not mean that the rights conferred by the statute cannot be waived. In other words, the fact that when the Legislature enacted Chapter 64.55 it did not include an anti-waiver provision similar to Section 64.34.030 of the WCA, is fatal to Appellants’ argument that, as a matter of law, there can be no implied waivers of an arbitration provided for by RCW 64.55.100.

2. The Filing Of The Motion To Dismiss Clearly Evidenced An Unequivocal Intent To Litigate In The Trial Court Rather Than Through Arbitration.

Waiver is the voluntary and intentional relinquishment of a known right. *Ives v. Ramsden*, 142 Wn. App. 369, 383, 174 P.3d 1231 (2008).

⁷ For example subsection 3 of Section 7.04A.040 provides that:

The parties to an agreement to arbitrate may not waive or vary the requirements of this section or RCW 7.04A.030 (1)(a) or (2), 7.04A.070, 7.04A.140, 7.04A.180, 7.04A.200 (3) or (4), 7.04A.220, 7.04A.230, 7.04A.240, 7.04A.250 (1) or (2), 7.04A.901, 7.04A.903, section 50, chapter 433, Laws of 2005, or section 51, chapter 433, Laws of 2005.

The right to arbitrate a matter may be waived expressly or by implication. *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wn. App. 59, 62, 621 P.2d 791 (1980). However, Washington Courts also recognize that the waiver of the right to arbitration is disfavored and that a party seeking to prove waiver has a heavy burden of proof. *River House* at p. 237.

The right to arbitrate is waived by “conduct inconsistent with any other intention but to forego [the] right.” *Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582, 588, 201 P.3d 309 (2009); *Verbeek Props., LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 90, 246 P.3d 205 (2010). Whether a waiver has occurred “necessarily depends upon the facts of the particular case and is not susceptible to bright line rules.” *River House* at p. 237.

In *River House* at page 238, the Court also recognized that in determining whether a party’s conduct is inconsistent with any other intention but to forego the right to arbitration:

The party arguing for waiver is not required to show that its adversary has never mentioned arbitration or equivocated about the process to be followed. It need show only that as events unfolded, the party's conduct reached a point where it was inconsistent with any other intention but to forgo the right to arbitrate.

The concept of waiver by litigation conduct is based upon the principle that a party who has litigated certain issues and lost “may not

later seek to relitigate the same issue in a different forum.” *Otis Hous. Ass'n*, supra at 588; *Verbeek Props., LLC v. GreenCo Envtl., Inc.*, supra at 90.

In *Otis Housing Ass'n v. Ha*, supra, Otis Housing Association (“OHA”) and Ha entered into a lease for a hotel which also had a purchase option with an arbitration provision. When OHA stopped paying rent, Ha brought an unlawful detainer action.

OHA defended a show cause order in the unlawful detainer action by claiming that it had exercised the purchase option and, therefore, was entitled to possession. The trial court disagreed, finding that the option had expired and that Ha was entitled to possession of the hotel.

Several days after the trial court issued its order awarding possession of the hotel to Ha, OHA sent a letter to Ha demanding arbitration. Ha declined to arbitrate. OHA then filed an action to compel arbitration under the option agreement. OHA’s motion to compel arbitration was denied.

In affirming the trial court’s decision denying the motion to compel arbitration, the Court noted that:

The question is whether, by raising the issue of the purchase option that contained the arbitration clause [at the show cause hearing in the unlawful detainer action], OHA waived arbitration. Arbitration may be waived by the parties by their conduct. (Citations Omitted) The right to

arbitrate is waived by conduct inconsistent with any other intent... . OHA's conduct of submitting its claim that it exercised its option as a defense to the unlawful detainer action was completely inconsistent with an intent to arbitrate. **We hold that OHA did waive any claim it may have had to arbitrate by presenting the same issue—whether it had successfully exercised the option to purchase—before the unlawful detainer court. Having lost that issue, it may not later seek to relitigate the same issue in a different forum.** [Emphasis Added]

While Appellants characterize their Motion to Dismiss as: “a procedural motion that did not go to the merits of the issues” (Opening Brief p. 16), the facts are that in the Motion to Dismiss Appellants sought, among other things, to dismiss the Association’s claims for CPA violations and negligent misrepresentation on the grounds that the Association lacked standing to pursue these claims. Because the Association’s claims for CPA Violations and negligent misrepresentation sought essentially the same relief as do its implied warranty claims,⁸ pursuant to RCW 64.55.005(2),⁹ these claims would unquestionably have been part of an arbitration initiated under RCW 64.55.010. As such, the issue of whether the Association had standing to pursue its CPA and misrepresentation claims was an issue that could have been decided by the

⁸ Compare Paragraphs 4.7 (CP, 43), 7.7 (CP, 46) and 9.4 (CP, 49) of the Complaint.

⁹ RCW 64.55.005(2) provides in relevant part that section 64.55.100 applies: “to any action that alleges breach of an implied or express warranty under chapter 64.34 RCW or that seeks relief that could be awarded for such breach, regardless of the legal theory pled...”

arbitrators, but for Appellants' submission of the issue to the Trial Court. See *Northern State Constr. Co. v. Banchemo*, 63 Wn.2d 245, 249, 386 P.2d 625 (1963) ["To this end, an arbitrator becomes the judge of both the facts and the law.']; *Hanson v. Shim*, 87 Wn. App. 538, 550-551, 943 P.2d 322 (1997); and *Davidson v. Hensen*, 85 Wn. App. 187, 192, 933 P.2d 1050 (1997).

Just as in *Otis Housing Ass'n v. Ha*, supra, when Appellants submitted the question of whether the Association had standing to pursue its CPA and misrepresentation claims to the Trial Court to decide, they waived their right to arbitrate. Any other result would give them an opportunity to relitigate the issue of standing before the arbitrators, which as noted above, is prohibited as a matter of law.

3. Appellants Misstate the Washington Supreme Court's Holding in *Townsend v. Quadrant Corp.* That Case Does Not Support Appellants' Claim That They Did Not Waive The Right To Arbitration.

In arguing that they did not waive the right to arbitrate, Appellants rely primarily on *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 268 P.3d 917 (2012). At page 14 of their Opening Brief Appellants characterize the holding in *Townsend* as follows:

In *Townsend*, the Washington Supreme Court upheld the Division 1 Court of Appeals ruling that the filing of a summary judgment motion may not act to waive a right to arbitration so long as the moving party "promptly"

thereafter seeks arbitration - which is exactly what the defendants did here.

Thus, Appellants claim that in *Townsend* the Washington Supreme Court created a hard and fast rule that so long as the moving party promptly seeks arbitration after filing a motion for summary judgment there can be no waiver of the right to arbitrate. Simply put, this is a complete misrepresentation of the holding in *Townsend*.

In *Townsend* the Court did not create a hard and fast rule that the filing of a motion for summary judgment did not waive the right to arbitration so long as the party who filed the motion promptly moved for arbitration. Rather, the *Townsend* Court acknowledged that the issue of waiver turned on a factual determination of whether the filing of the motion evidenced an intent to waive arbitration.

Specifically, the *Townsend* Court found that on the specific facts before it, the filing of a motion for summary judgment, one which only addressed the question of whether two defendants were even proper parties to the entire lawsuit or were simply parent corporations to a subsidiary home seller having no possible liability to the plaintiff home purchasers, did not waive the right to arbitration.¹⁰ The *Townsend* Court explained at page 463:

¹⁰ As noted at page 15 of the Opening Brief the basis for the decision by Court of Appeals that there was no waiver was the fact that the issue being litigated was

In *Otis Housing Ass'n v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009), we cited with approval the rule that the right to arbitrate is waived by conduct inconsistent with any other intent and stated that “a party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.” Id. at 588 (quoting *Lake Wash. Sch. Dist. No. 414*, 28 Wn. App. at 64). We concluded that, “[s]imply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” Id. Here, WRECO and Weyerhaeuser moved to compel arbitration promptly after the superior court denied their motion for summary judgment based on their assertions that they had no connection to the lawsuit. **In our view, this conduct did not evince intent to waive arbitration.** Accordingly, we affirm the Court of Appeals' holding that WRECO and Weyerhaeuser did not waive arbitration. [Emphasis Added]

Unlike the situation in *Townsend*, here Appellants' Motion to Dismiss was a *direct challenge to the merits of two of the same claims that would be subject to the arbitration* and, therefore, the issues in question would have been decided by the arbitrators, but for Appellants' deliberate decision to submit the issue to the Trial Court. In addition, Appellants' moving papers were predicated on and sought to influence a litigation

whether the moving parties were proper parties to the arbitration agreement with the Court holding that:

We hold that a party may challenge before the court whether they are properly parties to an arbitration agreement, or whether a basis exists to revoke the arbitration agreement, without waiving the substantive right to invoke the arbitration clause if they lose these challenges.

Unlike the situation in *Townsend*, the issue presented to the Trial Court in this case was not whether Appellants were proper parties to an arbitration agreement, but, rather, whether the Association could pursue claims that should have been part of the arbitration.

path, with no mention of arbitration. Only when they did not get the specific litigation path they wanted did Appellants change course, and decide to try to opt for arbitration. Accordingly, the Trial Court correctly found that on the facts before it that a waiver had occurred.¹¹

That the *per se* rule claimed by Appellants does not in fact exist was made clear by the *River House* Court when it stated at page 237:

The determination of whether waiver has occurred “necessarily depends upon the facts of the particular case and is not susceptible to bright line rules.” *Steele*, 85 Wn. App. at 853 (quoting *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993)); see also *Lake Wash.*, 28 Wn. App. at 61 (“The requirements for waiver vary with the circumstances.”). [Emphasis Added]

4. Appellants Have Not Demonstrated Any Error In The Trial Court’s Findings Relating To Waiver

In arguing that its conduct in filing the Motion to Dismiss was consistent with an intent to arbitrate, Appellants initially claim at page 19 of their Opening Brief that: “The intent of the motion was to limit the

¹¹ In *River House*, the Court at pages 235-236 held that issues of waiver by litigation conduct were best decided by the trial court, quoting with approval the following language from *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 551-52 (Ky. 2008):

Questions of litigation-conduct waiver are best resolved by a court that “has inherent power to control its docket and to prevent abuse in its proceedings (i.e. forum shopping),” which has “more expertise in recognizing such abuses, and in controlling ... them,” and which could most efficiently and economically decide the issue as “where the issue is waiver due to litigation activity, by its nature the possibility of litigation remains, and referring the question to an arbitrator would be an additional, unnecessary step.”

number of claims to be presented at arbitration.”¹² Contrary to Appellants’ unsupported assertion, Washington Courts do not allow a party to *partially* litigate a claim in the trial court and then seek arbitration as to the remaining issues. Rather, the rule is that arbitration should be pursued before either party is entitled to judicial relief. *Tombs v. Northwest Airlines*, 83 Wn.2d 157, 162, 516 P.2d 1028 (1973); *Lake Wash. Sch. Dist. v. Mobile Modules Northwest*, 28 Wn. App. 59, 64, 621 P.2d 791 (1980).

Appellants also claim that they filed their Motion to Dismiss to gauge the full extent of potential exposure and liability on a *de novo* trial and that: “[Appellants are] entitled to determine what the litigation landscape would look like after an arbitration.” Such an argument might make sense if the claims in question were not subject to arbitration. However, as set forth above, whether the Association had standing to pursue its CPA and misrepresentation claims was an issue to be decided by the arbitrators, and as held by the Court in *Otis Housing Ass’n v. Ha*,

¹² Appellants did not introduce any evidence in the Trial Court of what their subjective intent was when they filed their Motion to Dismiss. Because there is nothing in the record concerning what Appellants’ subjective intent was when they filed their Motion to Dismiss, their claims in their Opening Brief as to what their subjective intent was should not be considered by this Court. *State v. Rice*, 159 Wn. App. 545, 575, 246 P.3d 234 (2011); *State v. Price*, 127 Wn. App. 193, 206-207, 110 P.3d 1171 (2005).

supra., Appellants cannot pre-litigate that issue in the trial court, and then seek to arbitrate the remainder of the case.

In arguing that the Trial Court erred in finding a waiver of the right to arbitrate, Appellants also argue that the Trial Court failed to consider actions supposedly not taken by Appellants, such as taking or responding to discovery or conducting expert site investigations, and that such inaction by Appellants supposedly “screams out ‘we intend to arbitrate.’” (Opening Brief, p. 22)

Why the fact that Appellants had not supposedly conducted discovery shortly after being served with the Complaint and while their Motion to Dismiss was pending “screams” that they want to arbitrate is a mystery never answered in Appellants’ Opening Brief. This mystery need not be addressed by this Court, because the information that Appellants now claim screams “we want to arbitrate” was never presented to the Trial Court, and is not in the record before this Court. Consequently, the facts relating to what discovery was conducted or what Appellants’ experts did or did not do to investigate the Association’s claims cannot be considered by this Court. *State v. Rice*, 159 Wn. App. 545, 575, 246 P.3d 234 (2011); *State v. Price*, 127 Wn. App. 193, 206-207, 110 P.3d 1171 (2005).

Finally, while Appellants’ submission of the standing issue to the Trial Court was sufficient conduct in and of itself to waive arbitration, in

support of its waiver holding the Trial Court also found that Appellants sought to stage the litigation with their alternative motion for bifurcating the trial of liability and damages from the trial of alter ego and Uniform Fraudulent Transfers Act claims; that prior to losing those motions, Appellants made no effort to invoke or preserve the arbitration forum; and Appellants' briefing references "jury confusion" as a basis for bifurcating or dismissing specific claims.

With respect to the Trial Court's finding that with their alternative motion to bifurcate the Association's alter ego and fraudulent transfer claims and to stay discovery on those claims that Appellants were attempting to stage the litigation, Appellants on the one hand claim that the purpose of their motion was "to segregate the claims to first allow arbitration on the liability issues" (Opening Brief p. 20), and then on the other hand claim that: "There was no intent to "stage" litigation by filing this motion." (Opening Brief p. 20) Despite Appellants' attempt to deny the obvious, the Trial Court's finding that Appellants filed their alternative motion to bifurcate in an attempt to stage the litigation in a manner they deemed favorable to them, was clearly correct.

Similarly, while Appellants claim that the filing of the Motion to Dismiss was intended to streamline the arbitration and make it more effective by eliminating various claims, Appellants fail to explain why

they did not inform the Court or the other parties that they intended to file a demand for arbitration as soon as the Court ruled on the Motion to Dismiss. In Appellants' words, the failure to mention arbitration until after they lost their Motion to Dismiss screams "forum shopping" - as the Trial Court found.

The Trial Court found that arguing jury confusion as grounds for bifurcating or dismissing claims is inconsistent with an intent to arbitrate. How anyone could mistake "jury confusion" for any intent but proceeding to a jury trial is another mystery Appellants fail to answer. However, Appellants argue that while they used the phrase "jury confusion," what they really meant is confusion to *any* trier of fact, and that the use of the phrase does not connote an absolute intent to arbitrate. (Footnote 21, Opening Brief, p. 21)

If Appellants were being forthright, what they should have disclosed to the Trial Court was that after the Motion to Dismiss was ruled on, they intended to file a demand for arbitration and if there was a *de novo* trial after the arbitration, there could be a potential for jury confusion. Instead at page 7 of their Reply Brief (CP, 710), Appellants made the positive assertion that: "allowing such claims will result in jury confusion" indicating that they were concerned with the impact of allowing the Association's alter ego and fraudulent transfer claims to be

tried as the same time that the jury considers the Association's construction defect claims. Again, Appellants' actions scream of forum shopping, because they only decided to seek arbitration once they lost their Motion to Dismiss.

5. Appellants' Arguments With Respect To The Importance of Fee Shifting Under RCW 64.55.100 Completely Misstates The Law.

In an apparent attempt to show prejudice from the Trial Court's ruling, Appellants argue that under the WCA if an association prevailed on its claims it was entitled to recover its fees under RCW 64.34.455; that RCW 64.55.100(5) changed the law by putting an association at risk in that if the association proceeded with a *de novo* trial after the arbitration and failed to better its position, the association would have to pay the defendants' attorney fees and costs. According to Appellants: "Now the WCA puts plaintiff at risk of paying substantial monies to the defense – but only if there is an arbitration." (Opening Brief, p. 5) Appellants go so far as to claim that the fee shifting aspect of RCW 64.55.100 has "had a devastating effect on a plaintiff's desire to even take a matter to arbitration (i.e. they settle prior to hearing) ..." (Opening Brief, p. 5)¹³

¹³ As noted above, because there is nothing in the record to support Appellants' claims relating to the supposed "devastating" effect of RCW 64.55.100(5) on plaintiffs, this argument should be ignored by this Court.

Thus, what Appellants are claiming is that prior to the enactment of RCW 64.55.100, only the association could recover its attorney's fees, and that RCW 64.55.100 evened the playing field by putting the association at risk of paying the defendant's attorney's fees if, and only if, there was arbitration.

The problem with Appellants' argument is that it is based on the false assumption that prior to RCW 64.55.100's enactment only a plaintiff association could recover its fees in an action brought under the WCA. In fact, what RCW 64.34.455 actually provides is that a court may award the prevailing party its fees.¹⁴ Consequently, Appellants' argument relating to the supposed significance of the fee shifting aspect of RCW 64.55.010(5) is completely without substance.

C. The Trial Court Was Correct In Determining That The Related Entities And Guincher And Bowzer Were Not Alleged Or Shown To Be Declarants Having A Right To Initiate Arbitration Under RCW 64.55.100

As set forth above, under RCW 64.55.100, the only parties who can initiate an arbitration are the declarant, the homeowners' association, or a party unit owner. Appellants claim that because the Association

¹⁴ RCW 64.34.455 provides:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. **The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party. [Emphasis Added]**

supposedly alleges that the Related Entities and Guincher and Bowzer are declarants and/or seeks to enforce the WCA against them, under the doctrines of judicial admission and/or equitable estoppel the trial court should have found that the Related Entities and Guincher and Bowzer are declarants capable of initiating a RCW 64.55.100 arbitration. As demonstrated below, each of these arguments can be disposed of easily because Appellants once again completely misstate the applicable law.

1. The Doctrine of Judicial Admission Is Not Applicable To The Facts Of This Case.

At page 24 of the Opening Brief, Appellants cite Paragraphs 2.14, 2.15 and 2.16 of the Complaint (CP, 39-40) to support their claim that the Association “does allege that these defendants are declarants.” Appellants citation to paragraphs 2.15 and 2.16 is puzzling because paragraph 2.15 alleges only that the Declarant, Continental, LP, and certain Doe Defendants “each has or had an ownership interest in the Project and/or the sales proceeds from the Project”; likewise paragraph 2.16 simply alleges that certain Doe Defendants “who were appointed by the Declarant and/or its alter egos and owners to serve, as agents of Declarant during the period of declarant control of the Association.” Clearly neither paragraph 2.15 nor paragraph 2.16 support Appellants’ assertion that the Association alleged that the Related Entities and Guincher and Bowzer are declarants.

In paragraph 2.14 (CP, 39) the Association alleged that:

Pursuant to RCW 64.34.020(1) and/or RCW 19.40.011(1), all or some of Declarant, Continental, DOE AFFILIATES 1-50 and DOE PRINCIPALS 1-10 are alter egos of one another, and/or qualify as “affiliates” of the Declarant, and/or pursuant to RCW 19.40.011(7) qualify as “insiders” of Declarant and one another. **As alter egos of Declarant, these defendants are each responsible for all tort, contract, and warranty liabilities alleged herein against the Declarant.** [Emphasis Added]

Thus, the Association does not allege that the Related Entities are declarants, but rather that the Related Entities are the alter egos of Declarant and, therefore, responsible for the Declarant’s liabilities. Without citing any authorities, Appellants apparently claim that allegations that the Related Entities are the alter egos of Declarant is the same thing as alleging that the Related Entities are themselves declarants under the WCA, such that the Related Entities have a declarant’s right to initiate arbitration under RCW 64.55.100.

This Court does not have to decide whether an allegation that a party is the alter ego of a declarant is the same thing as alleging that the party is a declarant for the simple reason that whether the Association considers the Related Entities to be declarants is not determinative of the Related Entities’ right to initiate an arbitration under RCW 64.55.100. Rather, RCW 64.55.100 provides that a declarant has the right to demand an arbitration, and not that someone who the Association alleges to be a

declarant has the right to demand an arbitration. Thus, in order to be able to initiate an arbitration under RCW 64.55.100 the Related Entities would have to admit that they were in fact declarants. As the Related Entities specifically deny that they are declarants (see footnote 25 at page 24 of the Opening Brief), they have no power to invoke a right given specifically to a declarant.

As to Guincher and Bowzer, clearly none of the paragraphs of the Complaint cited by Appellants even mention Guincher and Bowzer, let alone claim that they are declarants or alter egos of the declarants. Instead, Appellants claim that because in paragraph 2.15 it is alleged that Guincher and Bowzer are agents of the Declarant, this is somehow an admission that Guincher and Bowzer are declarants. Not only does paragraph 2.15 not mention Guincher and Bowzer,¹⁵ but Appellants' unsupported assertion that alleging that Guincher and Bowzer are agents of the Declarant is an admission that Guincher and Bowzer are declarants has absolutely no support in agency law. Alleging that someone is the agent of a principal is not the same thing as alleging that someone is a

¹⁵ Paragraph 2.15 (CP, 39) provides:

The Plaintiffs are informed and believe, and on that basis allege, that Declarant, Continental, LP, DOE AFFILIATES 1-50 and DOE PRINCIPALS 1-10 each has or had an ownership interest in the Project and/or the sales proceeds from the Project.

principal. See *Hogan v. Sacred Heart Med. Ctr.*, 122 Wn. App. 533, 545, 94 P.3d 390 (2004).

2. The Doctrine of Equitable Estoppel Is Not Applicable To The Facts Of This Case.

In support of their argument that the Related Entities and Guincher and Bowzer are declarants, Appellants claim that: the Association has sought to enforce the WCA against all Defendants; “The WCA can only be enforced against a declarant;” therefore the Association is equitably estopped from claiming that the Related Entities and Guincher and Bowzer are not declarants (Opening Brief, p. 25).

Initially it should be noted that not every claim arising under the WCA can be enforced only against a declarant. Here, Guincher and Bowzer are being sued because as declarant-appointed board members, they owed the association and unit owners a fiduciary duty under Section 64.34.308(1) of the WCA. There are numerous other examples where liability for failure to comply with the WCA’s provisions is not limited to declarants,¹⁶ including the fact that an action for breach of implied warranty under RCW 64.34.445 can be brought against a “dealer” as well as a declarant.

¹⁶ For example, RCW 64.34.455 (quoted in footnote 14 above) provides that an action for failure to comply with any provision of the WCA can be brought against “a declarant or any other person subject to this chapter.”

With respect to its equitable estoppel argument, Appellants cite general law without discussing the specific elements that must be proven in order to establish that a party is equitably estopped. Once the elements of equitable estoppel are considered, it is absolutely clear that the doctrine is not applicable in this case.

In *River House*, River House argued that the party opposing arbitration was equitably estopped from claiming that River House waived its right to arbitration. In rejecting River House's equitable estoppel argument the Court summarized the law with respect to equitable estoppel as follows at pages 239-240:

Equitable estoppel is based on the notion that “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” (Citations Omitted) The elements of equitable estoppel are “(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.” *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) (alteration in original) (quoting *Bd. of Regents of the Univ. of Wash. v. City of Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987)). **Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie.** *Id.* Equitable estoppel must be shown by clear, cogent, and convincing evidence. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994). [Emphasis Added]

Here, Appellants have not (and cannot) demonstrate that they relied upon the Association's suing the Related Entities and Guincher and Bowzer in any manner, or that they are injured as result of such reliance. In addition, because Appellants can determine on their own the law with respect to the issues raised in the Association's Complaint and have knowledge of the underlying facts, as a matter of law, estoppel cannot lie. *River House*, p. 240.

3. *Neither All The Parties Nor All The Claims Are Subject To Arbitration*

RCW 64.55.100(1) provides in relevant part that: "If the declarant, an association, or a party unit owner demands an arbitration by filing such demand with the court not less than thirty and not more than ninety days after filing or service of the complaint, whichever is later, *the parties* shall participate in a private arbitration hearing." [Emphasis Added]

Despite the fact that the term "parties" as used in the phrase "the parties shall participate in a private arbitration hearing" obviously refers back to the parties who can demand arbitration, i.e., a declarant, an association, or a party unit owner, Appellants argue that RCW 64.55.100(1) should be interpreted to mean that while only a declarant, an association, or a party unit owner can demand arbitration, once one of those parties demands arbitration the phrase: "the parties shall participate

in a private arbitration hearing” means that “all the parties to the lawsuit” shall participate in the arbitration.

Appellants’ interpretation of RCW 64.55.100(1) literally requires rewriting the statute so that the term “parties” is changed to “all the parties to the lawsuit.” Appellants’ interpretation is thus improper, and should not be adopted by this Court. See *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 681-682, 80 P.3d 598 (2003) [“Our review always begins with the plain language of the statute..... Further, a court must not add words where the legislature has chosen not to include them....”]

Appellants’ interpretation of RCW 64.55.100(1), that all parties to the action are automatically required to arbitrate once a proper demand for arbitration has been made, would also render RCW 64.55.150 superfluous. That section provides that subcontractors or suppliers only become a party to an arbitration under RCW 64.55.100(1) if an additional demand is made by a party already to the arbitration. If all parties to litigation automatically become part of any properly-demanded arbitration, as Appellants contend, then there is no need for RCW 64.55.150 to specify how subcontractors and suppliers can be joined in the arbitration. Because a statute should not be interpreted so as to render another statute meaningless or superfluous, Appellants’ interpretation of RCW 64.55.100(1) is again improper and should not be adopted by this Court.

State v. Ervin, 169 Wn.2d 815, 823, 239 P.3d 354 (2010); *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010).

As set forth in the Trial Court's Order, the Trial Court also found that the phrase "the parties shall participate in a private arbitration hearing" did not include the Plumbing Manufacturers. For the reasons set forth above, this determination by the Trial Court was clearly correct.

However, Appellants argue that because the Association alleges that the Plumbing Manufacturers supplied plumbing fittings used at the project they are "suppliers" as that term is used in RCW 64.55.150 and, therefore, proper parties to be brought into an arbitration initiated under RCW 64.55.100.

RCW 64.55.150 provides in relevant part that:

Upon the demand of a party to an arbitration demanded under RCW 64.55.100, any subcontractor or supplier against whom such party has a legal claim and whose work or performance on the building in question becomes an issue in the arbitration may be joined in and become a party to the arbitration.

Thus, under RCW 64.55.150 a "supplier" can only be made a party to the arbitration if a party to the arbitration who has a legal claim against the supplier makes a specific demand to join the supplier as a party to the arbitration. As the Association did not demand that the Plumbing Manufacturers be made parties to the arbitration, the fact that the

Association alleged that they supplied plumbing fittings used at the project does not in and of itself trigger the application of RCW 64.55.150.¹⁷

IV. CONCLUSION

Washington law is absolutely clear that the right to arbitrate may be waived by litigation conduct that is inconsistent with any other intention but to forego the right to arbitrate. As demonstrated above, the Trial Court's determination that Appellants waived their right to arbitration when they asked the Trial Court, rather than the arbitrators, to dismiss some of the Association's claims, is fully supported by the record and consistent with controlling authorities.

In an effort to create grounds for reversal of the Trial Court's decision, Appellants repeatedly misstate the law, or invent facts not in the record. Focusing on the actual record before this Court, and what the controlling cases actually hold, the Trial Court's granting of the Motion to Strike and denying Appellants' Motion for Reconsideration was correct

¹⁷ Nor did Appellants serve a demand to join the Plumbing Manufacturers under RCW 64.55.150. Specifically, Appellants original arbitration demand (CP, 716-718) did not mention the Plumbing Manufacturers or "suppliers". While Appellants did file a subsequent Notice To The Court Re: Defendants' Demand For Arbitration Pursuant to RCW 64.55.100 (CP, 719-721), that Notice was not a demand for arbitration as required by RCW 64.55.150. In other words, because there never was an actual demand under RCW 64.55.150 to join the Plumbing Manufacturers as parties to the arbitration, Appellants' argument on this issue is irrelevant.

and should be affirmed by this Court.

RESPECTFULLY SUBMITTED this 20th day of May, 2013.

STEIN, FLANAGAN, SUDWEEKS &
HOUSER, PLLC

A handwritten signature in black ink, appearing to be "J. Stein", written over a horizontal line.

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NO. 69500-2-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Ballard Leary Phase II, LP.; BRCP/CPI Phase II, LLC; Continental Pacific
Investments Real Estate Fund 1, LP; Continental Pacific Investments Real
Estate Fund 1, LP; Continental Properties, Inc.; Claudio Guincher and
Jane Doe Guincher; and Don Bowzer and Jane Doe Bowzer,

Petitioners

v.

Canal Station North Condominium Association,

Respondent.

CERTIFICATE OF SERVICE

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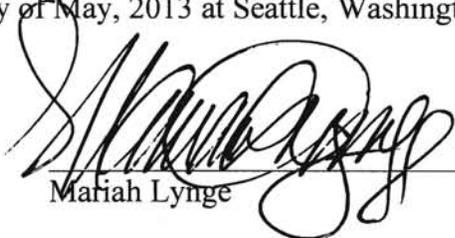
to be delivered to the persons listed below by the method(s) as indicated:

<p>Attorneys for Petitioners: John E. Zehnder, Jr. Jennifer M. Smitrovich Scheer & Zehnder LLP 701 Pike Street, Suite 2200 Seattle, WA 98101</p>	<p><input checked="" type="checkbox"/> via US Mail, first class prepaid <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile <input type="checkbox"/> via legal messenger <input checked="" type="checkbox"/> via E-Mail</p>
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<p><u>Courtesy Copy to:</u> Gregory A.V. Clark FOSTER PEPPER PLLC 1111 Third Avenue, Suite 3400 Seattle, WA 98101-3299</p>	<p><input checked="" type="checkbox"/> via US Mail, first class prepaid <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile <input type="checkbox"/> via legal messenger <input checked="" type="checkbox"/> via E-Mail</p>

I certify under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 20th day of May, 2013 at Seattle, Washington.



Mariah Lyng