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No. 71807-0-1  
(King County Superior Court No. 14-2-00764-7)

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IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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UNITY ELECTRIC CONSTRUCTION, INC. and BRIAN W. HICKS,  
Petitioners/Appellants,

v.

UNITY ELECTRIC INVESTORS, LLC, UNITY ELECTRIC, LP, JOHN C. GRAHAM  
and LISA GRAHAM,  
Respondents/Appellees,

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**RESPONDENTS' BRIEF**

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Michael L. Charneski, WSBA 15735  
Roundy Law Offices, P.S.  
506 North Main Street,  
Coupeville, WA 98239  
Telephone: (360) 678-6200

*Attorney for Respondents Unity  
Electric Investors, LLC and John and  
Lisa Graham*

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## I. Introduction

This Court should affirm the King County Superior Court order denying Appellants' ("Hicks's") motion for vacatur of the Arbitration Award signed by the Honorable Gerard Shellan (Ret.), arbitrator at JAMS. Contrary to the appellant's implicit request that this Court re-examine the evidence and second-guess Judge Shellan's decisions as arbitrator, court review of arbitration proceedings is extremely limited and does not encompass a review of the merits of the case. *See Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995) ("errors and mistakes contemplated by the statute must appear on the face of the award")(citation omitted); *see also Barnett v. Hicks*, 119 Wn.2d 151, 153-54, 829 P.2d 1087 (en banc 1992) (review of the merits is not permitted under the arbitration act: review is limited to the statutory factors). Mr. Hicks is asking this Court to review the hundreds and hundreds of pages of the record that he has designated, but even though this court's review of the trial court is *de novo* review, a court reviewing an arbitration award *is not permitted* to conduct a "trial *de novo*" as Hicks essentially requests. *See Boyd*, 127 Wn.2d at 262-63 (emphasis added). The State Supreme Court has directed that absent an error of law *on the face of the*

award,<sup>1</sup> the court will not modify or vacate the award. *See Boyd*, 127 Wn.2d at 262-63. And, as this Court recently noted, “[r]arely is it possible to have an arbitration award vacated for error of law on the face of the award...” *Cummings v. Budget Tank Removal & Env’tl. Servs., LLC.*, 163 Wn. App. 379, 382, 260 P.3d 220 (2011). The controlling statute permits vacatur only upon the very specific grounds enumerated in RCW 7.04A.230. The burden of proving by clear and convincing evidence that such grounds exist “is on the party seeking to vacate the award.” *Cummings*, 163 Wn. App. at 388; *Seattle Packaging Corp. v. Barnard*, 94 Wn. App. 481, 972 P.2d 577, 580 (Div. I 1999)(citation omitted). As recognized by Judge Inveen in the Superior Court, there are no grounds for vacatur in this case, and Judge Inveen’s Order Denying Vacatur of Judge Shellan’s arbitration order should be affirmed.

Respondents hereby request that this Court also rule that, pursuant to Section 10.9 of the parties’ contract (CP 1062), Respondents are entitled to an award of attorney fees and costs in an amount to be established by affidavit subsequent to this Court’s ruling.

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<sup>1</sup> See discussion below at pp. 36-41 for specific examples of errors on “the face” of arbitration awards.

## II. Assignments of Error/Issues

### *Appellants' assignments of error*

RAP 10.3(a)(4) requires that each assignment of error be set forth individually, along with issues pertaining to the assignments of error.

Hicks's appeal brief does not list assignments of error. Graham offers the following issue statements corresponding to sections of argument advanced by Hicks.

### *Issues*

1. As used in RCW 7.04A.230, does the term "undue means" mean something "inappropriate" or does it mean something akin to fraud or perjury?
2. May the Court rewrite RCW 7.04A.230 as Appellant implicitly requests to effectively eliminate from the statute the phrase "procured by"?
3. Was it error for the Superior Court to deny vacatur when the record in the arbitration proceeding established conclusively that there was no connection between the decision of the contractually-required "reviewing accountant" and the document about which Appellant complains?
4. Is it proper for the appellate court to reexamine the arbitration record and then second-guess the arbitration order that enforced the decision of the contractually-required "reviewing accountant"?
5. May this Court review the arbitration record in regard to the reviewing accountant's conduct and substitute its judgment for that of the arbitrator—Judge Shellan—who determined after depositions and hundreds of pages of briefing and argument that the reviewing accountant did not engage in any misconduct?

6. May this Court comb the record of the arbitration proceeding searching for issues, as Appellant implicitly requests, or must this Court affirm the trial court's order denying vacatur because there was no error "on the face of the award"?

7. Did the arbitrator, Judge Shellan, "exceed his powers" as arbitrator at JAMS by enforcing the parties' contract and requiring Appellant to make his accounting argument to a reviewing accountant when (a) the parties' contract expressly required that accounting disputes be resolved by a reviewing accountant and (b) the contract had an arbitration provision appointing JAMS arbitrator?

### III. Statement of the Case

RAP 10.3(a)(5) requires references to the record for each relevant factual statement, *without argument*. The Court will note that Appellants' Statement of the Case is almost entirely argument—interspersed with eleven argumentative headings—and as often as not lacks references to the record to support asserted statements of relevant facts. The Court should ignore the many unsupported statements of purported "fact." Respondents offer the following additional facts.

John Graham is the founder of Graham Capital Group, LLC, a Seattle-based private-equity firm. CP 811. Paul Raidna is the Managing Director of Graham Capital. CP 801, 811. Graham Capital occasionally invests in, or purchases, existing businesses and now owns, for example, Herzog Glass (commercial glass and architectural metals); PACO

Construction Equipment (construction supplies and heavy equipment); Simon Metals (scrap-metal recycling); and L&E Tubing (aerospace fabricator). *See generally* CP 811-12.

Mr. Hicks owned Unity Electric Construction, Inc. in California in 2008 when he met Mr. Raidna through a mutual friend. CP 801, 812. Hicks had been trying to sell Unity for about \$20 million through Moss Adams Capital. CP 801, 812. In an effort to interest Raidna in purchasing Unity, Hicks eventually confided that he would consider selling for \$15 million. CP 801. Mr. Raidna talked to at least six banks over six months in early 2009 about possibilities for financing a Graham Capital acquisition of Unity, but Raidna was unable to find a bank willing to finance anything in even the \$8-10 million range, let alone \$15 million, despite Hicks's representations as to how much his company was worth. CP 801, 802. Hicks wondered what price level could possibly work for Graham Capital, and Raidna eventually told him that Graham would not pay more than \$7.5 million, despite Hick's desire for \$15-20 million. CP 802.

Hicks said he would sell for \$7.5 million if Graham Capital would "sweeten the deal" by including performance incentives/rewards for the first two fiscal years; if agreed financial performance levels were not met, no additional funds would be paid. CP 802. Raidna spoke with John

Graham, and Graham ultimately agreed. CP 802, 812. In July 2009 Graham bought Hicks's company—or more technically certain named assets and liabilities—for \$7.5 million. CP 802, 812. The brevity of this recitation should not be taken as an indication that the negotiations and transaction were anything but complex. *See generally* CP 782-99, 801-04, 811-17, 830-31.

As the “incentive” to “sweeten the deal” beyond the \$7.5 million base purchase price, Graham agreed to a device by which Hicks would be rewarded financially in the event that the “new” Unity prospered to the extent of specifically-stated financial performance levels under Hicks at the helm as its President. CP 802. Specifically, if Unity met the performance thresholds—as determined in the event of any dispute by a Reviewing Accountant as set forth in the Purchase Agreement and related documents—then Hicks would be entitled to an “earnout” or “bonus.” CP 802-04, 806. If Unity did not “perform” under Hicks, Hicks would not get an “earnout. CP 802-04 and exhibits referenced therein.

The first fiscal year of performance relevant to Hicks's potential entitlement to an “Earnout Payment” ended on June 30, 2010: on August 3, 2010, Hicks notified Raidna in writing (CP 806) that he had *not* met the

minimum “earnout” threshold and was not therefore entitled to any earnout payment. CP 806. Hicks wrote (CP 806, 819) that

... I was thinking about the disappointment shared by the Key EEs [employees] and myself that despite best efforts we didn’t hit the minimum threshold of \$2mm for the earn out this first fiscal year of operations. I say “we” because I had committed to sharing 20% of my earn out with them. We Missed (sic) the mark by about \$210,000... .

After instructing Graham in writing that he was *not entitled to an earnout payment* (CP 806, 819), Hicks requested that he be paid \$393,000.00 as an earnout *anyway*, offering that it would “mean a lot” to him. See CP 806.

Raidna and Graham were not surprised when Hicks told them he had failed to meet the earnout threshold because the company had not been performing at the level that was hoped for in light of all of the representations that Hicks had made to induce the sale. CP 802-03, 813. Graham and Raidna were, however, surprised and taken aback that Hicks thought they would literally just hand him \$393,000.00 that he was admitting he wasn’t entitled to. CP 803-03, 813. Graham and Raidna said “no.” CP 803, 813. Hicks reacted by “reworking the numbers”: on

August 30, 2010, Hicks wrote to Raidna and Graham to retract his earlier admission of failure. CP 809. Hicks now asserted that after “restating” the numbers, the “restated” numbers *did* “exceed the minimum level for the earn out... .” CP 809. Hicks now wanted \$655,530.00. CP 803. Graham and Raidna were both very skeptical and very suspicious of Hicks’s reversal—an about-face that went from \$0.00 to \$655,530.00 in less than 30 days. See CP 802-03, 813-15. They concluded that they could not trust Hicks’s statements and projections about their company’s performance, and they rejected Hicks’s August 30 claim to an earnout. CP 803, 814.

Graham and Raidna told Hicks from August 2010 onward that any question as to an earnout should be submitted to the Reviewing Accountant in accordance with the Purchase Agreement and that Hicks would get whatever he was entitled to be paid.<sup>2</sup> CP 803-04, 815-16. In September, October, November, and continuing into December of 2010, Raidna and Graham continued to puzzle over Hicks’s “reversal bid” to gain an earnout payment despite having admitting failure on August 3,

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<sup>2</sup> Hicks was asked multiple times: “Will you abide a determination by the Reviewing Accountant?” Hicks always refused to answer. Raidna and Graham took Hicks’s refusal to answer as yet one more reason to be suspicious, to *not trust him*, and to insist that the dispute go the Reviewing Accountant pursuant to the terms of the Purchase Agreement. CP 803, 814-15.

2010. CP 803-04, 813-15. More broadly, they puzzled over how the company's performance could be so dismal—the company failed to meet bank covenants every quarter. CP 804-04, 815. Neither Raidna nor Graham trusted Hicks. CP 802-03, 813-14. They were not going to pay an earnout unless the Reviewing Accountant determined that Hicks was entitled to it, and they told him that yes—he would get an earnout *but only if the Reviewing Accountant found entitlement*. CP 803-04, 814-15. They continued to tell Hicks following his August 2010 “reversal” that yes—they *agreed* that he would eventually be paid but only if the Reviewing Accountant found entitlement. CP 804-04, 815-16.

On July 31, 2012, Mr. Hicks circumvented the Reviewing Account process set forth in the Purchase Agreement by filling in a three-year-old “fill-in-the-blanks” Confession of Judgment and filing it in King County Superior Court against John Graham and his wife Lisa in the amount of \$789,000.00. CP 923-27. Mr. Graham had signed the blank form at the time of purchase in 2009—to be filed *in the event of a default* by Graham. CP 812-13. Graham responded by initiating proceedings at JAMS pursuant to the contract and prevailed in (1) setting aside the Confession of Judgment that Hicks had filed in derogation of the contract requirements and (2) obtaining an order requiring that Mr. Hicks

participate in the Reviewing Accountant process mandated by the Purchase Agreement. That process led to the determination by Mr. McDaniel, the Reviewing Accountant, that Mr. Hicks was not entitled to the earnout that he sought. CP 1045-46. That decision was followed by (1) Hicks sending a six-page letter (CP 968-73) to Mr. McDaniel in which he railed against Mr. Graham, against Mr. Raidna, and against the process, and asked Mr. McDaniel to reverse himself; and (2) Hicks filing with JAMS the motion for vacatur (CP 1) that was eventually denied by Judge Shellan after extensive briefing and a six-hour deposition of the accountant, Mr. McDaniel.<sup>3</sup> Hicks then went to King County Superior

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<sup>3</sup> The following are excerpts from Reviewing Accountant Mr. McDaniel's deposition testimony (CP 974-1027) taken in front of Judge Shellan on August 23, 2012. Exhibit D at the deposition is the same as Exhibit T about which Hicks complains—the item that Mr. Raidna forgot to “cc” to Mr. Hicks. Mr. McDaniel testified, in pertinent part, as follows about the various specific allegations by Mr. Hicks:

Q: Accurate or not: the Reviewing Accountant relied heavily on Exhibit D in reaching his April 19 Opinion? [objections omitted]

A: Inaccurate. CP 991-92 (Transcript at 118:21-119:8).

Further questions allowed Mr. McDaniel to amplify and reiterate (CP 992-93—Transcript at 119:10-120:4) the fact that Exhibit D *was not the basis of his decision*:

Q: Accurate or inaccurate? The statement is "Unfortunately, the reviewing accountant considered and relied on Exhibit D, even though he had previously stated he would not do so."

A: Inaccurate.

Q: Accurate or inaccurate? The statement is "The reviewing accountant has, since the time of his April 19 decision, made clear that his April 19 opinion was based principally on the Exhibit D Labor Report."

A: Inaccurate.

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Q. Mr. McDaniel, was the Exhibit D Labor Report your principal focus in reaching your decision that Mr. Hicks was not entitled to an earnout?

A. No.

Q. Accurate or inaccurate? Here's the statement. "The Labor Report in Exhibit D was the principal factor in the reviewing accountant's opinion."

A. No. Inaccurate.

Mr. McDaniel went on to testify (CP 1001-1003—Transcript at 128:14-130:6) that his decision would have been the same had there been no Labor Report:

Q. If there had been no Exhibit D Labor Report, would your opinion have been the same, that no earnout was due? [Objections omitted]

ARBITRATOR SHELLAN: I think the witness is well-educated and well-experienced, and the question simply is, and he can answer "Yes" or "No," whether in his own mind he could answer the question propounded assuming that information in Exhibit D did not exist, would you have been able to make a final decision in this case? Is that basically the question?

MR. CHARNESKI: I would want to know whether --

Q. (By Mr. Charneski) Can you say whether your decision would have been the same?

[Objections omitted]

A. Yes, I can.

ARBITRATOR SHELLAN: You can answer it?

A. I can answer it.

Q. (By Mr. Charneski) Please do.

A. And it would be the same.

Mr. McDaniel was also asked quite simply (CP 1010—Transcript at 137:2-10) whether, based on the information provided to him by Mr. Hicks, Hicks was entitled to the earnout he sought. The answer was "no":

Q. And is it fair to say that you do not believe that Mr. Hicks's estimate changes, in other words, the information he presented to you, that information did not entitle him to an earnout, is that correct?

A. Based on my analysis of all the information, including those estimates.

Q. Yes.

A. I do not believe that he earned his earnout.

Later (Transcript at 149:14-16), in answer to questioning from Mr. Hicks's counsel, Mr. McDaniel testified yet again that Labor Report or no Labor Report, Mr. Hicks simply did not earn the earnout:

A. I requested this document, Exhibit D [the Labor Report]. *Even without this document, my opinion stands the same, that Mr. Hicks did not earn the earnout.*

Court, where the Honorable Laura Inveen denied vacatur, leading to Hicks's appeal to this Court.

#### **IV. Argument**

As a preliminary matter, the Court will note that the first 22 pages of argument in Mr. Hicks's appeal brief are set forth under the guise of a "Statement of the Case" which defies every convention of appellate brief writing and violates RAP 10.3(a)(5), which requires that the Statement of the Case be a "*fair statement* of the facts and procedure relevant to the issues presented for review, *without argument*. Reference to the record must be included for *each* factual statement." (Emphasis added.) Mr. Hicks has made no effort to provide the Court a fair statement. He has, instead, offered what reads like a closing statement to a jury, broken into 11 distinct arguments, each with its own argumentative heading, but labeled "Statement of the Case." Respondents urge that the Court be wary of Mr. Hicks's approach, and also that the Court disregard "argument offered as fact" as well as any purported factual assertions that are advanced throughout Mr. Hicks's "Statement of the Case" without any citation to the record, in violation of RAP 10.3(a)(5).

Leaving the Statement of the Case behind, appellant Hicks advanced five lines of argument—sections B through F of his brief, respectively. This response tracks Hicks’s organizational scheme. Vacatur should be denied because, first, Hicks advances an erroneous definition of “undue means” and cannot overcome the finding in arbitration that there was no connection whatever between Exhibit T<sup>4</sup> about which Hicks complains and the arbitration award that he opposes. Also, Hicks’s arguments and evidence *were already considered* in the arbitration proceeding, and this Court does not review the arbitration record and arbitration award in a “trial *de novo*” as Hicks suggests. Section A below. Hicks’s allegations of “accountant misconduct” (set forth in Section C of his brief) were, similarly, already considered and rejected, and it is not the function of this Court to reexamine the arbitration evidence and substitute its own findings for those of Judge Shellan, the arbitrator. Section B below. Mr. Hicks cannot reconcile his next claim (Section D of his brief)—“manifest disregard of the law”—with

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<sup>4</sup> As Judge Shellan noted (CP 726, which is page 4 of Judge Shellan’s Corrected Interim Arbitration Award, Exhibit T has at times been referred to as Exhibit D (as, for example, in Mr. McDaniel’s testimony). Exhibit T (aka D) is the document about which Hicks complains—the document that Mr. Raidna forgot to “cc” to Hicks (*see* CP 524-25) when responding to a request from Reviewing Accountant Douglas McDaniel. For consistency, the designation Exhibit T shall be used in this memorandum.

the fact that this narrow and rare basis for relief can only be established when a serious error is apparent “on the face of the award.” Section C below. Judge Shellan did not exceed his powers as an arbitrator. Hicks’s attack (Section E of Hicks’s brief) is based on an incorrect interpretation of the law and the nature of arbitration and on a mistaken characterization of the arbitration proceeding. Section D below. Finally, Hick’s reasserts his argument that Judge Shellan somehow “abdicated” his responsibility for deciding the “earnout” question (Section F of Hicks’s brief), but that irresponsible assertion ignores that mandate of the parties’ contract and then ignores completely Judge Shellan’s unassailable determination that the document that Hicks complains about had no connection whatsoever to the reviewing accountant’s decision rejecting Hicks’s ill-founded claim to an earnout payment. Hicks has no grounds for relief on appeal and the trial court order denying vacatur should be affirmed.

**A. The Arbitration Award issued by Judge Shellan was not  
“procured by undue means”**

Judge Shellan issued his “Corrected Interim Arbitration Award” (CP 723-36) on October 15, 2013, and the Final Arbitration Award awarding attorney fees (CP 739-42) on November 25, 2013. Mr. Hicks

sought vacatur In King County Superior Court under RCW 7.04A.230, alleging “undue means.” Mr. Hicks bore the burden, as he does in this Court, of proving that Judge Shellan’s award was *procured by* undue means. *Cummins v. Budget Tank Removal & Env’tl. Servs., LLC.*, 163 Wn. App. 379, 388, 260 P.3d 220 (2011)(the party challenging an award has the burden of showing that statutory grounds for vacatur exist)(citing *Pegasus Constr. Corp. v. Turner Constr. Co.*, 84 Wn. App. 744, 747-48, 929 P.2d 1200 (1997)). Mr. Hicks relies on *Nasca v. State Farm Mut. Ins. Co.*, 12 P.3d 346 (Colo. App. 2000), and as the Nasca court recognized, the burden imposed by the “plain meaning” of the statutory phrase “procured by” is that “there must be a causal relation between the [alleged] improper conduct and the arbitration award.” *Nasca*, 12 P.3d at 349 (citations omitted). Mr. Hicks cannot meet that burden, and Judge Inveen’s order denying vacatur must therefore be affirmed.

**1. Mr. Hicks asserts an erroneous definition of “undue means”**

Mr. Hicks claims that Judge Shellan’s arbitration award was “procured by undue means” merely because Mr. Raidna forgot to copy him on his email to Mr. McDaniel with Exhibit T. This claim finds no support in controlling case law.

Mr. Hicks falsely told the trial court (CP 18) that this Court interpreted the “undue means” provision in *Seattle Packaging Corp. v. Barnard*, 94 Wn. App. 481, 972 P.2d 577 (1999). In reality, *Seattle Packaging* dealt with the issue of whether perjury constitutes “fraud.” “Undue means” was neither addressed nor defined. Consequently, Hicks now resorts to several cases from New York and Illinois, backed by his out-of-context and non-legal affection for the Random House Dictionary, in an effort to fit a definition to the evidence, telling this Court that “undue” means “improper” or “inappropriate.” Appeal Brief at 26. The more relevant definition is one that does *not* fit the evidence but it is, nonetheless, the *legal* definition articulated by the Ninth Circuit Court of Appeals:<sup>5</sup> “Undue means” connotes “behavior that is immoral if not illegal.” *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403-404 (9th Cir. 1992), *cert. denied* 506 U.S. 1050 (1993); *see also American Postal Workers Union, AFL-CIO v. United States Postal Service*, 52 F.3d 359, 362 (D.C. Cir. 1995)(“undue means must be limited to an action by a party that is *equivalent in gravity to corruption or fraud*, such as a

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<sup>5</sup> The Washington Court of Appeals has relied on federal authority for guidance in understanding the standards to apply in weighing allegations under RCW 7.04A.230. *See, e.g., Seattle Packaging Corp. v. Barnard*, 94 Wn.App. 481, 486, 972 P.2d 577 (1999) (relying on federal authority to construe fraud under RCW 7.04A.230(1)(a)).

physical threat to an arbitrator or other improper influence” (emphasis added)); *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 108 (N.D. Ill. 1980) (“undue means’ requires some type of bad faith in the procurement of the award”) (emphasis added), *aff’d*, 653 F.2d 310 (7<sup>th</sup> Cir. 1981). This meshes with the explanation offered by the First Circuit: “[t]he best reading of the term “undue means” under the maxim *noscitur a sociis*<sup>6</sup> is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either.” *Nat’l Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 499 (1<sup>st</sup> Cir. 2005)(citation omitted).

The Court should reject Mr. Hicks’s dictionary definition of “undue” in favor of the Ninth Circuit’s standard for “undue means” as the term is used in the statute. Mr. Hicks has ignored that legal standard because Mr. Raidna’s forgetfulness in not “cc”-ing Hicks on the email to McDaniel cannot credibly be deemed immoral or illegal.

This Court must also be mindful of additional controlling legal realities and principles related to Hicks’s “undue means” argument. First,

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<sup>6</sup> The meaning of words can be understood from the words around them, hence the term “undue means” must be read in conjunction with the words “fraud” and “corruption” that precede it in the statute. See *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978), *cert. denied*, 436 U.S. 948 (1978).

vacatur in general is rarely granted and, more specifically, when there is no actual proof of the requisite connection between an “error” and a challenged outcome, vacatur is granted in only the most egregious circumstances where evidence of the causal connection is compelling. Subsection 2 below. The evidence in this case shows conclusively that there was *no* connection whatever between alleged undue means and the outcome. Subsection 3 below. This raises an additional critical, dispositive point: Judge Shellan *already heard and ruled upon* Hicks’s vacatur arguments and evidence. This Court *is not empowered* to conduct a *de novo* review of the arbitration record to second guess the arbitrator’s ruling. Subsection 4 below.

**2. Only in the most egregious and compelling circumstances has vacatur been granted absent proof of the required connection between the arbitration award and the alleged misconduct.**

In the fourth section of Mr. Hicks’s argument about “undue means” (Appeal Brief at Section 4, p. 33), Hicks asserts the novel proposition that he need not show any connection between the alleged error he clings to—Exhibit T—and the decision denying him an “earnout.” Equally oddly, he relies on *Seattle Packaging, supra*, for this proposition. In *Seattle Packaging*, this Court affirmed the trial court’s *denial* of a

motion for vacatur because, among other things, the party seeking vacatur was “unable to demonstrate from the face of the award that the arbitrators placed any weight whatsoever on the challenged testimony.” 94 Wn. App. at 584. The court found *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056 (1989) “instructive.” *Seattle Packaging*, 55 Wn. App. at 484 (citing *Peoples State Bank*). In *Peoples*, the bank took a default judgment in a foreclosure case after Hickey failed to appear, but in obtaining the judgment “the bank misrepresented to the court that Hickey’s lien was inferior and subordinate to that of the bank.” 55 Wn. App. at 371-372. Hickey sought to set aside the judgment, but was denied relief despite the bank’s material misrepresentation. The court was less concerned about the false premises and more concerned about the fact that

[a]pplying the above authorities to the facts at bar, we find vacation of the default judgment is not warranted. Although [the bank] misrepresented the status of Hickey’s lien, *there is no connection between the bank’s misrepresentation and Hickey’s failure to respond to the complaint or employ an attorney.*

*Peoples State Bank, supra*, 55 Wn. App. at 372 (emphasis added). Mr. Hicks’s claim that he need not establish a connection between Exhibit T and the arbitration award is contrary to these controlling Washington

authorities. *See also Sylvester v. Regents Bank*, 129 Nev. Adv. Op. 30, 300 P.3d 718, 722 (2013)(affirming denial of vacatur where moving party failed to show “any causal connection between the arbitration award and the alleged misconduct”).

Mr. Hicks also cites several federal cases in support of his claim, but these cases—discussed below— illustrate that only in the most egregious circumstances, coupled with compelling evidence of a “connection,” has vacatur been granted when there is no actual proof of the required connection between an arbitration award and alleged misconduct. In contrast to the very compelling evidence of the requisite “connection” in the cases that Hicks relies on, in the instant case there is conclusive testimony by Mr. McDaniel, and a finding by Judge Shellan, that there was *no connection* between the arbitration award and the conduct alleged by Hicks.

In the *Bonar* case referenced several times by Hicks, the court found there was clear and convincing evidence of perjury, constituting fraud. *See Bonar v. Dean Witter Reynolds Inc.*, 835 F.2d 1378, 1384 (11<sup>th</sup> Cir. 1988)(Dean Witter submitted “clear and convincing evidence” of perjury). Specifically, an expert witness, Nix,

testified that he was president and owner of an investment advisory firm, that he graduated from the University of Alabama in 1980 with a bachelor's degree in finance and that in 1981 he attended Columbia University and received a bachelor's degree in accounting. Nix further testified that after his graduation from Columbia he worked for St. Paul in New York as the money manager of a \$30 million portfolio and that in the summer of 1985 he received an honorary doctorate in finance from the Technical University of Vienna.

*Bonar, supra*, 835 F.2d at 1380. On the strength of this testimony, Nix was allowed to testify as an expert against Dean Witter. Following an award against Dean Witter for compensatory and punitive damages, Dean Witter learned that Nix was a perjurer and a sham: he had been an *engineering* student at Alabama but never graduated; he *never* attended Columbia; and he *never worked for St. Paul*. 835 F.2d at 1381, 1384. Nix was a fraud. Because Nix was the only expert and also the only witness at all who gave particular damning testimony that the court found was reflected in the arbitration award, the court vacated and remanded for a new arbitration. 835 F.2d at 1385. These compelling facts illustrate the egregious circumstances that can *sometimes* justify vacatur when there is no proven connection, but at least *very compelling evidence*, that fraudulent testimony may have been key to an award sought to be vacated. *See also Harre v. A.H. Robins*, 750 F.2d 1501 (11<sup>th</sup> Cir.

1985)(vacatur allowed in a patent case after an expert falsified his credentials and presented testimony detailing experiments he said he had conducted—all in an effort to gain permission to testify as an expert on the ultimate issue—and it later came to light that his testimony was false and that he “had never performed the experiments he described”).

Mr. Hicks also relies heavily on *Hazel-Atlas*, another case that illustrates vividly the very compelling facts that typify cases in which vacatur is granted. *Hazel-Atlas Glass v. Hartford Empire Co.*, 322 U.S. 238 (1994). *Hazel-Atlas* did not involve an arbitration, but the federal court vacated its own prior judgment in a patent case after learning that the successful litigant had perpetrated a fraud on the court. Without belaboring the details, suffice it to say that the court found “conclusive proof” (322 U.S. at 247) of “a deliberately planned and carefully executed scheme to defraud not only the Patent Office, but the Circuit Court of Appeals.” 322 U.S. at 245. The court’s other descriptors—“manifestly unconscionable” (322 U.S. at 244-245) and “sordid story” (322 U.S. at 243)—equally convey the magnitude and nature of circumstances that will move a court to vacatur. The Supreme Court also emphasized that “[t]here are issues of great moment to the public in a patent suit.” 322 U.S. at 247 (citations omitted).

With all due recognition of the displeasure that Mr. Hicks obviously feels in losing in the arbitration proceeding before Judge Shellan, his complaints about Mr. Raidna forgetting to “cc” him on the email to Mr. McDaniel with Exhibit T do not play on the same stage as the circumstances in any of the cases upon which Hicks himself relies. Even in comparison to Hicks’s out-of-jurisdiction cases involving serious schemes of fraud perpetrated against the federal courts and against the United States Patent Office, Mr. Hicks cannot reconcile the fact that in the instant case, unlike in those cases upon which he relies, *it has already been established in the arbitration proceeding itself* that Exhibit T made no difference whatsoever to the reviewing accountant, Mr. McDaniel, as shown in subsections 3 and 4 which follow immediately below. Hicks fails completely, therefore, to meet his burden of showing that the arbitration award he contests was “procured by” the alleged undue means.

Oddly, Hicks now cites the Colorado court’s decision in *Nasca v. State Farm Mut. Ins. Co.*, 12 P.3d 346 (Colo. App. 2000), a case he did not raise before Judge Inveen in Superior Court. Hicks’s new reliance on *Nasca* is especially interesting because it *reinforces a required hurdle that Hicks cannot overcome*: “there must be a causal relation between the [alleged] improper conduct and the arbitration award.” 12 P.3d at 349

(citations omitted). The *Nasca* court cited the Ninth Circuit's decision in *A.G. Edwards & Sons, supra*, for the baseline rule: "the statute requires a showing that the undue means *caused the award to be given.*" *Nasca*, 12 P.3d at 349 (emphasis added) (citing *A.G. Edwards & Sons, supra*). In accord with the Ninth Circuit and as further emphasized in *Nasca*, the Fifth Circuit has also stated in plain terms that there must be "a nexus" between the misconduct and the arbitrator's decision. *Forsythe International, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990)(cited in *Nasca*, 12 P.3d at 349). Citing yet another consistent authority, the *Nasca* court observed that "[t]o interpret the statute otherwise would eliminate the requirement that the award be procured by one of the prohibited methods." *Nasca*, 12 P.3d at 349 (citing *PaineWebber Group, Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988 (8<sup>th</sup> Cir. 1999)). The Court, however, cannot simply ignore the phrase "procured by" as Hicks would do: "it is not the province of the court to amend or modify statutes...." *Association Collector's Inc. v. King County*, 194 Wash. 25, 35, 76 P.2d 998 (1938); *see also State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 146, 401 P.2d 635 (1965)("it is not the province of the court, but the province of the legislature to change the law").

3. **The evidence shows that Mr. McDaniel *did not rely on exhibit T* and that his determination that Mr. Hicks did not earn a bonus was made independent of that document.**

As already established, the cases upon which Hicks relies are as far from the instant case factually as can be imagined. The *Hazel-Atlas* patent case deserves further discussion. Mr. Hicks offers *Hazel-Atlas* for the proposition that a perpetrator of fraud on the court “is in no position to dispute its [the fraud’s] effectiveness.”<sup>7</sup> Indeed, *Hazel-Atlas* involved fraud of almost unimaginable magnitude: as the Supreme Court described it, there was “a deliberately planned and carefully executed scheme to defraud not only the Patent Office, but the Circuit Court of Appeals.” 322 U.S. at 245. And it *was* certainly the case in *Hazel-Atlas* that no one could discern the effects of the pervasive fraud, because nine

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<sup>7</sup> *Pumphrey* (cited in Hicks’s appeal brief) was another case in which a federal district court itself “was a victim of the fraud,” this time in a product liability trial. *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9<sup>th</sup> Cir. 1995). *Pumphrey* did not involve an arbitration. The Ninth Circuit Court of Appeals stated that the federal district court had the power to set aside the verdict because the court itself was the victim of the fraud: “[t]he public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.” 62 F.3d at 1133 (quoting *Hazel-Atlas, supra*, 322 U.S. at 246). There is no question in the instant case but that Judge Shellan could have vacated Mr. McDaniel’s determination that Hicks was not entitled to the earnout he sought had there been any basis for doing so, but Judge Shellan concluded after inquiry that there was *no basis* for doing so, and specifically that Exhibit T challenged by Hicks had nothing to do with Mr. McDaniel’s decision (“it is clear that exhibit T had no influence on his decision-making process”). CP 723-36.

years had passed between entry of judgment after a Federal Court of Appeals mandate and commencement of proceedings in U.S. District Court to have the judgment set aside. Three more years passed and the matter found its way to the Supreme Court. The Court emphasized that “[t]here are issues of great moment to the public in a patent suit.” *Hazel-Atlas, supra*, 322 U.S. at 247 (citations omitted).

There are no useful similarities between the arbitration with Judge Shellan in this case and the *Hazel-Atlas* patent case upon which Hicks relies. The dissimilarities are telling, however. While there is no fraud in this case, no issue of any concern to the public, no federal trial, no patent claim, and no passage of time after entry of judgment (here, Hicks submitted his “vacatur arguments” to Judge Shellan for consideration long before the final award was even issued), there is an opportunity in this case to explore how best to handle the question of whether challenged evidence is harmful and is actual grounds for vacatur. Another of Hicks’s cases (albeit another patent case and not an arbitration) provides insight.

In *Viskase Corp. v. American Nat'l Can Co.*, 979 F. Supp. 697 (N.D. Ill. 1997),<sup>8</sup> a jury in federal court awarded more than \$100,000,000.00 on a claim of patent infringement. As in *Hazel-Atlas*, questions arose later about possible perjury—not years later as in *Hazel-Atlas*, however, but even before post-trial rulings by Judge Bucklo, who was made aware of the perjury charges, just as Judge Shellan in the instant case was made aware of “Exhibit T” that Mr. Raidna had forgotten to “cc” to Mr. Hicks. What did Judge Bucklo do? Hicks would have urged him to “automatically grant a new trial” but he refused, deciding first to determine whether there was *any connection between the alleged problem and the outcome*. In Judge Bucklo’s words, “I could not determine without more information that they [the alleged altered documents] might not have affected the outcome of the case, [so] I agreed to allow ANC to take the deposition of the person [Dr. Porter—the alleged perjurer].” 979 F. Supp. at 700. Judge Shellan, similarly,

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<sup>8</sup> Mr. Hicks also cites *Fraige v. American-National Watermattress Corp.*, 996 F.2d 295 (Fed. Cir. 1993), but *Fraige* neither adds to nor detracts from the discussion. *Fraige* was yet another federal patent trial (not an arbitration proceeding) in which the court found a scheme that was “deliberately planned and carefully executed for the purpose of interfering with the judicial process, not only at the preliminary injunction hearing stage but also at trial.” 996 F.2d at 298. The *Fraige* court also emphasized that “like *Hazel-Atlas*, Am-Nat’s fraudulent conduct was a wrong against the judicial system... . Also, the fraud in this case concerned the validity of an issued patent, which is a matter of public concern.” 996 F.2d at 299 (citations omitted).

undertook to find out from Mr. McDaniel whether Exhibit T made a whit of difference by allowing the parties to examine McDaniel under oath.

Judge Bucklo examined the resulting testimony of Dr. Porter at length, 979 F. Supp. at 700-03, and found with the aid of additional post-trial depositions of other individuals that “much of what I have quoted from Dr. Porter’s testimony is false.” 979 F. Supp. at 702. Judge Bucklo found that “[a]ccording to my count, Dr. Porter lied at least 15 times during trial as well as in a post-trial affidavit submitted to try to prevent the discovery of his misdeed.” 979 F. Supp. at 706, footnote 1. After the depositions, Judge Bucklo was unable to conclude that the outcome might not have been different had there been no fraud and perjury—this bears stark contrast to the instant case, where Judge Shellan after a similar process expressly concluded that Exhibit T made no difference at all. *See* CP 723-36. After finding extensive perjury as well as the efforts at a cover-up, Judge Bucklo stated that “[the verdict that is the subject of this motion was in excess of \$100 million dollars. For all that a final judgment is desirable for parties and courts alike, a \$100 million dollar judgment should not be based on the record that has come to light in this case.” 979 F. Supp at 705.

If anything, *Viskase*—offered by Hicks himself—supports Judge Shellan’s determination to find out, just as Judge Bucklo sought to find out, whether in this case Exhibit T possibly made a difference when the reviewing accountant, Mr. McDaniel, determined that Hicks was not entitled to an earnout. After hours of deposition and many pages of briefing, Judge Shellan concluded that the answer was clear and the answer was no. It is not the province of this court to reexamine that finding or recreate the arbitration hearing that lead to that finding, and vacatur must be denied.

Hicks also relies on *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9<sup>th</sup> Cir. 1995). *Pumphrey* was another case in which a federal district court itself “was a victim of the fraud,” this time in a product liability trial. *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9<sup>th</sup> Cir. 1995). *Pumphrey* did not involve an arbitration. The Ninth Circuit Court of Appeals stated that the federal district court had the power to set aside the verdict because the court itself was the victim of the fraud: “[t]he public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.” 62 F.3d at 1133 (quoting *Hazel-Atlas*, supra, 322 U.S. at 246). In the instant case, Mr. McDaniel’s sworn testimony (CP

974-1027, quoted at length in the footnote above) establishes conclusively that, as Judge Shellan found, there was no connection between Exhibit T and Mr. McDaniel's decision. Under controlling authorities, vacatur must therefore be denied: "the statute requires a showing that the undue means *caused the award to be given.*" *A.G. Edwards, supra*, 967 F.2d at 1403 (citation omitted).

**4. The Arbitrator already heard and ruled upon all of Hicks's arguments attacking Mr. McDaniel's determination.**

As noted, Mr. Hicks relies extensively on this Court's opinion in *Seattle Packaging*, the perjury/fraud case discussed above. The opinion reveals an additional roadblock for Hicks, however, that Hicks ignores completely. *Seattle Packaging* instructs that "[i]t is true that a reviewing court should not vacate the arbitration award if the movant presented the evidence ... to the arbitrators." *Seattle Packaging*, 972 P.2d at 581 (citing *Kirschner v. West Co.*, 247 F. Supp. 550, 553-54 (E.D.Pa.), *aff'd*, 353 F.2d 537 (3d Cir. 1965)). As this Court stated in *Cummings, supra*, "[i]n deciding a motion to vacate, a court will not review the merits of the case, and ordinarily will not consider the evidence weighed by the arbitrators." *Cummings*, 163 Wn. App. at 389 (citing *Davidson v. Hensen*,

135 Wn.2d 112, 119, 954 P.2d 1327 (1998)). The reason for this safeguard is that “[c]redibility of witnesses is always for the factfinder, and this is especially so when the factfinder is an arbitrator.” *Seattle Packaging*, 972 P.2d at 581. In noting this constraint, this Court was honoring the simple rule often repeated by the Supreme Court that “Courts do not ordinarily consider evidence presented to the arbitrators. This is because *courts are generally prohibited from reviewing an award on the merits.*” *Seattle Packaging, supra*, 972 P.2d at 581 (emphasis added) citing *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 496-97, 946 P.2d 388 (1997); *Barnett v. Hicks*, 119 Wn.2d 151, 153, 829 P.2d 1087 (1992).<sup>9</sup>

The *Seattle Packaging* court entertained a perjury-based motion for vacatur because the evidence of perjury *had not been heard* by the three-member arbitration panel.<sup>10</sup> In stark contrast, Mr. Hicks’s voluminous scattershot attack alleging undue means, fraud, corruption,

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<sup>9</sup> As the United States Circuit Court of Appeals has cautioned, “the scope of judicial review for an arbitrator’s decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.” *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007) (citation and internal quotations omitted).

<sup>10</sup> “SeaPak outlined the alleged perjury to the panel in its motion to reopen arbitration, but the panel denied the motion to reopen, without explanation, and thus did not ‘hear’ the new evidence.” *Seattle Packaging*, 972 P.2d at 581.

accountant breach of contract and accountant misconduct was all presented and argued in the arbitration proceeding below. *See, e.g.*, the 19-page Exhibit 1 to Hicks Motion (CP 43-61) (and the 19 additional exhibits (A through S) thereto – CP 63-183—and the 17-page Exhibit 2 to Hicks Motion (CP 184-201); *see also* CP 248-556 ( Exhibits 4, 5 and 6 to Hicks Motion (many additional pages of briefing to Judge Shellan with exhibits)); *see also* CP 968-973 (Mr. Hicks’s lengthy personal argument sent directly to Mr. McDaniel and later submitted before Judge Shellan). Judge Shellan read hundreds of pages of argument and exhibits from Hicks and ruled on Hicks’s attacks. *See* CP 723-36 (Judge Shellan’s Arbitration Award). The review sought by Mr. Hicks is not proper because Hicks arguments have already been made and ruled upon. The Washington Supreme Court emphasized in the recent case of *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 236 P.3d 182 (2010) that “courts may not search the arbitral proceedings for any legal error; courts do not look to the merits of the case, and they do not reexamine evidence.” *Broom*, 169 Wn.2d at 239 (emphasis added). This is consistent with this Court’s admonition in *Seattle Packaging* that “a reviewing court should not vacate the arbitration award if the movant

presented the evidence ... to the arbitrators.”<sup>11</sup> *Seattle Packaging, supra*, 972 P.2d at 581 (citation omitted). Mr. Hicks asks this Court to do precisely what the Supreme Court has said it may *not* do. *See also Barnett v. Hicks*, 119 Wn.2d 151, 153, 829 P.2d 1087 (1992)(“a court will not review the decision of an arbitrator on the merits” )(citing *Hatch v. Cole*, 128 Wash. 107, 113, 222 P. 463, *aff’d*, 130 Wash. 706, 226 P. 1119 (1924)). Vacatur must be denied.

**B. Judge Shellan already entertained Hicks’s arguments and evidence relating to Hick’s allegation of “accountant misconduct” and found the allegations to be meritless.**

Hicks’s request that this Court entertain his arguments about alleged “accountant misconduct” runs afoul of the same principles and authorities addressed above because Judge Shellan already entertained Mr. Hicks’s motion for vacatur and ruled (CP 731, which is page 9 of the Interim Corrected Arbitration Award ) that

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<sup>11</sup> In yet another case cited by Hicks, the Second Circuit cautioned against such judicial “intervention,” warning that it would “inevitably judicialize the arbitration process, thus defeating the objective of providing an alternative to judicial dispute resolution.” *Tempo Shain Corporation v. Bertek, Inc.*, 120 F.3d 16, 19 (2<sup>nd</sup> Cir. 1997) (citing *Ethyl Corp. v. United Steelworkers of America, AFL-CIO-CLC*, 768 F.2d 180, 183-184 (7<sup>th</sup> Cir. 1985)).

...[i]t is clear that he [Mr. McDaniel] conducted himself in an appropriate, transparent and unbiased fashion in dealing with both of the parties, and that he requested additional information from both when necessary for his opinion. Mr. McDaniel denied the various allegations made against him as to his handling of the situation and there is no credible evidence whatever that he was enmeshed in some kind of deceit or improper dealing with either party. Finally, it is clear that exhibit T had no influence on his decision-making process; that whether the document existed or not, his opinion would have been the same—namely that no “earn out” was due.

CP 731.

Mr. Hicks offers page after page of snippets from the record and asks this Court to supplant Judge Shellan and rule anew as to the allegations of accountant misconduct. A trial court reviewing an arbitral award, however, is not permitted to conduct a trial *de novo*. *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (Wash. 1995)(en banc). This Court— contrary to Hicks assertions—is neither obligated<sup>12</sup> nor empowered to “search the arbitral proceedings,” *Broom, supra*, 169 Wn.2d at 239, to reexamine the evidence, *id.*, or to review Judge

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<sup>12</sup> “If it was the intention of the legislature to require the court, upon hearing exceptions taken to awards, to examine the evidence submitted to the arbitrators, or, in other words, to try the cause *de novo*, it is but reasonable to presume that they would have so declared. And in the absence of such provision, we think we are justified in adopting the rule announced in many well considered cases, and which we believe is subject to but few exceptions, viz., that *the errors and mistakes contemplated by the statute must appear on the face of the award...*” *Boyd v. Davis, supra*, 127 Wn.2d at 262 (quoting *School Dist. 5 v. Sage*, 13 Wash. 352, 356-57, 43 P. 341 (1896))(emphasis added).

Shellan's specific determinations as to Mr. McDaniel's conduct or that "Exhibit T" had no influence on the outcome. *Id.* Judge Shellan considered and rejected Hicks's vacatur arguments, and "review of an arbitrator's award *does not include* a review of the merits... ." *Barnett v. Hicks, supra*, 119 Wn.2d 151 at 157 (citing *Hatch, supra*, 128 Wash. at 109, 113, 222 P. 463; *School Dist. 5, Snohomish Cy. v. Sage*, 13 Wash. 352, 356-57, 43 P. 341 (1896)). Plainly, Hicks urges review and intervention that are beyond the scope of this Court's powers, and his motion should be denied.

**C. Judge Shellan did not "manifestly disregard the law"**

Suspiciously absent from Mr. Hicks's brief is any meaningful discussion or presentation of the actual content of Judge Shellan's arbitration award. This is odd because when considering Mr. Hicks's allegations of "manifest disregard," this Court must limit its review to just that: "the face of the award." *Boyd, supra*, 127 Wn.2d at 262 ("the errors and mistakes contemplated by the statute must appear on the face of the award")(citation omitted). *See also Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wn. App. 813, 790 P.2d 228 (Div. III 1990); *Federated*

*Services Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 4 P.3d 844 (Div. I 2000); *Tolson v. Allstate Insur. Co.*, 108 Wn. App. 495, 32 P.3d 289 (Div. I 2001); *Comedy Club Inc. v. Improv West Associates*, 553 F.3d 1277 (9<sup>th</sup> Cir 2009). Each of these cases is discussed below. The essence of Mr. Hicks's argument is that vacatur should be freely, if not "automatically," granted, but as Washington's Supreme Court has very recently explained, "[t]hrough the years, our courts have applied the facial legal error standard carefully, vacating an award based on such error in only four instances... ." *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010)(citations omitted).

In deference to the controlling legal parameters and the narrow standard of review, this Court should not proceed without first carefully reading Judge Shellan's Arbitration Award (CP 723-36, 739-42). That review should be all that is required of the Court to easily reject Section D (Appeal Brief at 38) of Mr. Hicks's argument.

Mr. Hicks's cites the Second Circuit's opinion in the *Halligan* case for the broad proposition that "manifest disregard of law" is *ever* even a recognized grounds for vacatur, but as the Second Circuit more specifically clarified, "[w]e have also pointed out, however, that the reach of the doctrine is 'severely limited.'" *Halligan v. Piper Jaffray, Inc.*, 148

F.3d 197, 202 (2<sup>nd</sup> Cir. 1998)(citing *Government of India v. Cargill, Inc.*, 867 F.2d 130, 133 (2<sup>nd</sup> Cir. 1989)). In the words of the Ninth Circuit Court of Appeals, “[r]eview of arbitration awards is more limited than review of trial court decisions. An arbitrator’s award will not be vacated because of erroneous findings of fact or misinterpretations of law.” *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9<sup>th</sup> Cir. 1991)(quoting *American Postal Workers Union v. United States Postal Serv.*, 682 F.2d 1280, 1285 (9<sup>th</sup> Cir. 1982)). Referring to the *American Postal Workers* case, the *Pacific Reinsurance* court took care to recognize that “the court reaffirmed” that vacatur for alleged manifest disregard “is warranted only in egregious cases.”<sup>13</sup> 935 F.2d at 1025.

The cases cited by Mr. Hicks himself vividly illustrate the “severely limited” application of the “manifest disregard” doctrine and the extreme circumstances that rise to the requisite level of egregiousness, all showing that in the case at bar, there are no grounds for finding “manifest disregard” by Judge Shellan. In *Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wn. App. 813, 790 P.2d 228 (Div. III 1990), the

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<sup>13</sup> In *American Postal Workers*, vacatur was upheld because “the arbitrator held, contrary to undisputed evidence of picketing activity, that a government employee had not “participated in a strike....” *American Postal Workers Union, supra*, 682 F.2d at 1284-85.

arbitrator's award found there was no binding contract modification because, as stated *on the face* of the award, "I have found no evidence of any consideration for any modification of the contract after the payment due date." 57 Wn. App. at 814. The problem was that the matter was governed by RCW 62A.2-209, and under RCW 62A.2-209 contracts for the sale of goods *need no consideration* to be binding. Accordingly, the Court of Appeals took the rare step of granting vacatur.

In *Federated Services Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 4 P.3d 844 (Div. I 2000), damages for "loss of a prospective inheritance" in a wrongful death action by an estate under RCW 4.20.046—the Survival of Actions statute—were prohibited, but the arbitration award *stated on its face* that "[t]he arbitration panel further finds on a more probable than not basis that the wrongful death of D.J. Norberg caused his estate to sustain an additional loss of \$400,000 *in the form of lost inheritance* from his parents." 101 Wn. App. at 124 (emphasis added). Vacatur was granted because of that error *on the face of the award*.

In *Tolson v. Allstate Insur. Co.*, 108 Wn. App. 495, 32 P.3d 289 (Div. I 2001), the arbitrator's award *on its face* both (a) indicated that Tolson had suffered brain damage and memory loss in particular, but (b) failed

to award any damages for that memory loss. 108 Wn. App. at 498-499. The Court of Appeals found that this was an inconsistency on the face of the award, but at the same time was unable to tell for certain whether the arbitrator might have denied damages because perhaps he did not find that the memory loss was even attributable to the accident in question. Rather than vacate the award, the Court of Appeals *directed the trial court to seek clarification from the arbitrator himself*. 108 Wn. App. at 499.

Finally, in *Comedy Club Inc. v. Improv West Associates*, 553 F.3d 1277 (9<sup>th</sup> Cir 2009), the Court of Appeals for the Ninth Circuit vacated an arbitration award that enjoined non-parties from certain conduct because, under established law, an injunction issued in an arbitration proceeding *cannot* enjoin non-parties. 553 F.3d at 1287-88.

In each of the foregoing cases—the very cases upon which Mr. Hicks himself relies—the court looked only at the face of the award. That is all that this Court is *empowered* to do: “a court can review an alleged error *only if it appears on the face of the award*.” *Federated Services Ins. Co.*, *supra*, 101 Wn. App. at 124 (emphasis added)(citing *Boyd v. Davis*, 127 Wash.2d 256, 262, 897 P.2d 1239 (1995), citing *Northern State Construction Co. v. Banchemo*, 63 Wash.2d 245, 386 P.2d 625 (1963)).

“The error should be recognizable from the language of the award, as, for instance, where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages.” *Federated Services Ins. Co., supra*, 101 Wn. App. at 124 (citing *Kennewick Educ. Ass’n v. Kennewick School Dist. 17*, 35 Wn. App. 280, 282, 666 P.2d 928 (1983)). This Court must reject Hicks’s plea that it go beyond the face of Judge Shellan’s award and sift the hundreds of pages of the record. The Court need not go beyond, and *may not go beyond*, the face of the arbitration award.

Mr. Hicks’s real issue, of course, is that the reviewing accountant saw that Hicks was not entitled to an earnout and that Judge Shellan subsequently did not agree with *Hicks’s* arguments and briefing. In his motion to the trial court, Hicks asserted that the controlling law was “Hicks’s briefing on the governing law.” CP 23-24. That vague and arrogant statement to Judge Inveen hardly afforded the trial court a basis for vacating Judge Shellan’s award, and likewise with the equally vague, arrogant and unsupported assertion from Hicks that Judge Shellan had the audacity to disregard the law that Hicks “had cited to him.” CP 24.

Vacatur for manifest disregard is a rare occurrence, shown by relevant cases to be justified only in the most egregious cases where a

serious error is plain *on the face of the arbitration award*. *Lindon Commodities, Inc., supra; Federated Services Ins. Co., supra; Tolson, supra; Comedy Club, supra*. Hicks can identify no such error. Vacatur must be denied.

**D. Judge Shellan did not “exceed his powers”**

Mr. Hicks contends that Judge Shellan exceeded his powers by enforcing the parties’ contract in the first place when Graham requested an order directing the “earnout” to be submitted to the Reviewing Accountant. Mr. Hicks asserts that because Graham’s standard form arbitration demand attacked Hicks’s wrongful filing of the confession of judgment, but did not expressly reference the contract requirement necessitating the Reviewing Accountant, Graham’s 18-page memorandum and more than 100 pages of supporting exhibits<sup>14</sup> requesting that the “earnout” entitlement be turned over to the Reviewing Accountant<sup>15</sup> was not something that Judge Shellan could

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<sup>14</sup> See CP 787-966.

<sup>15</sup> In its 18-page submission to JAMS on November 6, 2012, supported by more than one hundred pages of declarations and exhibits, Graham asserted that entitlement to and amount of any earnout were questions for the Reviewing Accountant, and specifically requested relief as follows: “Hicks’s Motion should be denied and the disputed issues should proceed to arbitration resulting in an order that (a) the question of Hicks’s entitlement to any earnout payment at all (and the amount, if any) must be submitted to a reviewing accountant pursuant

consider. That cavalier assertion is directly addressed to Hicks's detriment in the *Swift Industries* case that Hicks himself relies on in Section E of his Appeal Brief. *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125 (3<sup>rd</sup> Cir 1972). The Court's words could not be more on point:

Arbitration may or may not be a desirable substitute for trial in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they must not hedge it about with those procedural limitations which it is precisely its purpose to avoid...." *Swift Industries*, 466 F.2d at 1129 (quoting *American Almond Prod. Co. v. Consolidated Pecan S. Co.*, 144 F.2d 448, 451 (2<sup>nd</sup> Cir. 1944)). ...

We do not construe the rules of arbitration so narrowly as to foreclose the arbitrator from granting relief requested by the parties after the filing of the demand. 466 F.2d at 1129 (citations omitted).

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to the parties' Purchase Agreement... ." CP 782-783. Similarly, Graham concluded its submission by stating that "Graham and Unity Investors seek a ruling that (1) the Confession of Judgment be vacated and that (2) the disagreement as to entitlement to an earnout payment (and the amount, if any) be ordered to go to the Reviewing Accountant as required by the Purchase Agreement. ." CP 798. *See also* CP 966 ("The claimants will ask the arbitrator for an order requiring that (1) the Confession of Judgment filed by Mr. Hicks against John and Lisa Graham in King County Superior Court be vacated, and (2) the question whether Hicks is entitled to any earnout payment at all (and if so, the amount) for the fiscal year ending June 30, 2010, be submitted to a reviewing accountant pursuant to the terms of the parties' Purchase Agreement.")

See also *Tombs v. Northwest Airlines, Inc.*, 83 Wash.2d 157, 161, 516 P.2d 1028 (1973) (arbitrators are not expected or required to always follow the strict and technical rules of law); *Northern State Constr. Co. v. Banchemo*, 63 Wash.2d 245, 248, 386 P.2d 625 (1963) (although arbitration is “in the nature of” a judicial inquiry, the standards of judicial conduct and efficiency to which arbitrators are held are markedly different from those imposed on judicial officers); see also *Barnett v. Hicks*, 119 Wash.2d 151, 160, 829 P.2d 1087 (1992) (noting that the object of arbitration is to *avoid* the formalities, delay, expense and vexation of ordinary litigation).

In Graham’s motion papers that followed the filing of the arbitration demand, Graham expressly requested that the earnout question be ordered submitted to the Reviewing Accountant.<sup>16</sup> That relief was granted and is not subject to this Court’s review.

**E. Judge Shellan did not abdicate responsibility for deciding whether Hicks was entitled to an earnout**

As a seeming afterthought (Appeal Brief at Section F), Hicks asserts that his “motion to vacate” is “properly before this court” just as it was previously before the trial court, and he criticizes the arbitrator—

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<sup>16</sup> See footnote 15 above.

Judge Shellan—for allegedly “deputizing” accountant McDaniel to make, or “abdicating” the responsibility to make, the decision as to whether Mr. Hicks was entitled to an earnout payment. This is an appeal, of course, *not a motion to vacate*, and Hicks’s allegation that Judge Shellan somehow “abdicated” his responsibility to decide the earnout question (Appeal Brief at 43) is false and irresponsible. The parties’ July 2009 purchase and sale agreement *required* that such accounting questions be decided by a reviewing accountant. It was Hicks’s breach of that agreement that forced Graham into arbitration at JAMS in the first place, to *compel* Hicks to comply with the contract and to abide the decision of a reviewing accountant. Hicks fought tooth and nail to circumvent the contract; he lost and was *forced* to comply; and Hicks’s ongoing arguments afford this Court no basis to reverse the King County Superior Court. Judge Inveen’s order denying vacatur should be affirmed. The vast arbitration record shows conclusively that, as Judge Shellan found, there was no connection between the reviewing accountant’s decision and the alleged “inappropriate document” that Hicks complains about. CP 731 (page 9 of Judge Shellan’s “Corrected Interim Arbitration Award”). It is not the province of this Court to rehash the arbitration record and second-guess Judge Shellan’s determination.

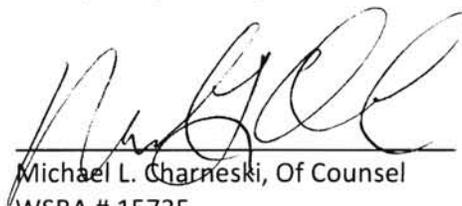
**F. Respondents are entitled to an award of attorney fees and costs on appeal.**

Pursuant to Section 10.9 of the parties' contract (CP 1062) as well as RAP 14.1 *et seq.*, respondents should be awarded their attorney fees and costs on appeal in an amount to be determined consistent with the rules following the Court's decision terminating review.

**V. Conclusion**

This Court should affirm Judge Inveen's denial of Mr. Hicks's motion for vacatur. In addition, pursuant to Section 10.9 of the parties' contract (CP 1062), this Court should rule that Respondents are entitled to an award of fees on appeal in an amount to be established by affidavit submitted subsequent to this Court's ruling.

Respectfully submitted this 2nd day of September, 2014.



Michael L. Charneski, Of Counsel  
WSBA # 15735  
Roundy Law Offices, P.S.  
506 N Main Street,  
Coupeville, WA 98239

*Attorney for Respondents*

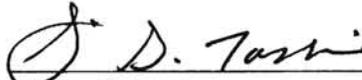
**CERTIFICATE OF SERVICE**

I hereby certify that on this date I caused to be served a copy of the foregoing on the following by the method indicated:

Peter Ehrlichman, Esq.  
Shawn Larsen-Bright, Esq.  
Dorsey & Whitney LLP  
701 Fifth Avenue, Suite 6100  
Seattle, WA 98104  
Email: [ehrllichman.peter@dorsey.com](mailto:ehrllichman.peter@dorsey.com)  
[larsen.bright.shawn@dorsey.com](mailto:larsen.bright.shawn@dorsey.com)

Via Email  
 Via U.S. Mail

Dated this 2<sup>nd</sup> day of September, 2014.

  
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Sharlie G. Tassie

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