

FILED
SUPREME COURT
STATE OF WASHINGTON
4/6/2023 2:09 PM
BY ERIN L. LENNON
CLERK

NO. 101872-0

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II: No. 56658-3-II

AURC III, LLC, an Oregon limited liability company,

Respondent,

v.

POINT RUSTON PHASE II, LLC, a Washington limited liability company, POINT RUSTON, LLC, a Washington limited liability company, CENTURY CONDOMINIUMS, LLC, a Washington limited liability company, THE SHOPS AT POINT RUSTON I, LLC, a Washington limited liability company, PR RETAIL, LLC, a Delaware limited liability company, PR BUILDING 11/9, LLC, a Washington limited liability company, POINT RUSTON THEATRE, LLC, a Washington limited liability company; PR MAIN STREET RETAIL, LLC, a Delaware limited liability company; and RAINIER PROPERTY SERVICES, LLC, a Washington limited liability company,

Appellants.

PETITION FOR REVIEW

Jack B. Krona Jr.
j_krona@yahoo.com
Law Offices of Jack B. Krona Jr.
6509 46th Street NW
Gig Harbor, WA 98335
Telephone: (253) 341-9331

Attorney for Appellants/Petitioners POINT RUSTON PHASE II, LLC, a Washington limited liability company, POINT RUSTON, LLC, a Washington limited liability company, CENTURY CONDOMINIUMS, LLC, a Washington limited liability company, THE SHOPS AT POINT RUSTON I, LLC, a Washington limited liability company, PR RETAIL, LLC, a Delaware limited liability company, PR BUILDING 11/9, LLC, a Washington limited liability company, POINT RUSTON THEATRE, LLC, a Washington limited liability company; PR MAIN STREET RETAIL, LLC, a Delaware limited liability company; and RAINIER PROPERTY SERVICES, LLC, a Washington limited liability company.

I. IDENTITY OF PETITIONERS

Petitioners are Point Ruston Phase II, LLC (“PR Phase II”), Point Ruston, LLC (“PR”), Century Condominiums, LLC (“Century”), The Shops at Point Ruston I, LLC (the “Shops”), PR Retail, LLC (“PR Retail”), PR Building 11/9 (the “Garage”), Point Ruston Theatre, LLC (“PR Theatre”), PR Main Street Retail, LLC (“PR Main Street”), and Rainier Property Services, LLC (“RPS”) (collectively “Petitioners”).

II. THE DECISION DESIGNATED FOR REVIEW

Petitioners seek review of the March 7, 2023, Opinion issued by the Washington Court of Appeals, Division II (“COA”), affirming the Superior Court’s confirmation of an arbitration award and entry of judgment against Petitioners, which is contained in the Appendix.

III. ISSUES PRESENTED FOR REVIEW

A. Issue One

Petitioners satisfied the underlying arbitration award in full before the Superior Court confirmed the award, which

eliminated the live controversy and rendered the case moot. Nevertheless, over Petitioner's objection, the Superior Court confirmed the award and entered a money judgment against Petitioners rather than dismissing this *case with prejudice*. The Court of Appeals affirmed and created a divisional split of authority when it "declined to follow" *Kenneth W. Brooks Trust v. Pac. Media, LLC*, 11 Wn. App. 393, 44 P.3d 938 (2002). The first issue is whether this Court should accept review to resolve a divisional split in authority on the mootness doctrine and its application to entry of judgments after a private arbitration award has been satisfied in full.

B. Issue Two

RCW 7.04A.220 authorizes a Superior Court to confirm the "award," which is a term of art for purposes of arbitration that was defined in *Westmark* over 30 years ago. A Superior Court is not entitled to confirm the "reasons for the award," which gives the false impression that a court has independently endorsed an arbitrator's reasons for the award. Nevertheless, the Superior

Court entered an over-broad confirmation order, which conveys the false impression to the public a court or judicial officer has independently reviewed the arbitrators' reasons for the award and endorsed them. The Superior Court committed reversible error through its over-broad confirmation order that gives the misleading appearance that a court has given approval of an arbitrator's erroneous "reasons" for the award. The Court of Appeals erroneously affirmed. The second issue in this motion is whether the Court should accept review of the Court of Appeals decisions and to clarify the scope of an "award" that courts are to confirm under RCW 7.04A.220 consistent with the Court of Appeal's holding in *Westmark Properties v. McGuire*, 43 Wn. App. 400, 766 P.2d 1146 (1989). The Court should do so as a matter of public importance and public interest.

IV. STATEMENT OF THE CASE

On April 21, 2020, Plaintiff/Respondent AURC III, LLC, filed its First Amended Complaint, asserting claims against Defendants/Appellants Point Ruston Phase II, LLC ("PR

Phase II”) for breach of a Loan Agreement; against Point Ruston, LLC (“PR”) for breach of a Guaranty of the Loan Agreement; and against Century Condominiums, LLC (“Century”), the Shops at Point Ruston I, LLC (the “Shops”), PR Retail, LLC (“PR Retail”); PR Main Street Retail, LLC (“PR Main Street Retail”); “Point Ruston Building 11/9, LLC (“PR Building 11/9”); Point Ruston Theatre, LLC (“PR Theatre”); and Rainier Property Services, LLC (“RPS”), for breach of two separate “distribution and transfer” agreements, to avoid transfers under RCW 10.40, *et. seq.*, and for an “accounting.” (CP 1-19.) Collectively Appellants PR Phase II, PR, Century, the Shops, PR Retail, PR Main Street Retail, PR Building 11/9, PR Theatre are referred to as the Appellants or the Point Ruston Parties. On September 10, 2020, Appellants filed their First Amended Answer, Defenses, Counterclaims, and Third-Party Claims, which asserted the right to binding arbitration under the Loan Agreement. (CP 20-43.)

On September 25, 2020, the Superior Court ordered most of the parties to arbitration but ordered PR Phase II's third-party claims against ACI Capital Partners, Inc., to be severed by separate order. (CP 44-45.)

On July 22, 2021, American Arbitration Association Arbitrator George Finkle signed a document titled "Interim Award." (CP 48.) On July 22, 2021, Arbitrator Finkle signed a document titled "Final Award." (CP 48.)

For purposes of this appeal, it is important to distinguish between the title of the document that the arbitrator signed and arbitration terms of art. The document titled Interim Award contained both the reasons for the award and the "Award," and the term "Award" is a term of art on arbitration. The document the Arbitrator signed titled "Interim Award," consisted of a "Discussion" that ran from pages 2 through 22 (CP 177-198), and the actual "Interim Award," which is contained on pages 23 and 24. (CP 199-200.) Pages 2 through 22 are written reasons for the award but not the actual "Interim Award." (CP 199-200.)

The document the Arbitrator signed titled “Final Award,” incorporated the Interim Award found on pages 23 and 24 and then provided specific reasons for a fee award. (CP 53-54.) The “Final Award” is on pages 3 and 4. (CP 53-54.) The Arbitrator did not, at any point in the proceeding, issue findings of fact or conclusions of law, and doing so would exceed his authority under Section 8.16(b)(iv) of the Loan Agreement and the agreement of the parties at Arbitration. (*E.g.*, CP 137, 328-29.)

The Arbitrators “Final Award” is reproduced *in toto*:

Final Award.

Interest.

I award Claimant **\$10,969,015.00** in Current Interest and Default Interest through March 31, 2021, jointly and severally against Respondents Point Ruston Phase II, LLC; Point Ruston, LLC; Century Condominiums, LLC; The Shops at Point Ruston I, LLC; PR Retail, LLC; Point Ruston Theatre, LLC; PR Main Street Retail, LLC; and PR Building 11/9, LLC.

I rule only on Claimant’s request for Current Interest and Default Interest.

Attorney fees and costs.

Claimant is awarded a total of **\$434,287.75** in attorney fees and **\$96,686.82** in costs.

The administrative fees and expenses of the American Arbitration Association totaling **\$24,846.90** shall be borne by Respondents, and the compensation of the arbitrator totaling **\$49,400.00** shall be borne by the Respondents.

This Final Award is in full settlement of all claims and counterclaims submitted to this arbitration. All claims not expressly granted or expressly reserved herein are hereby denied.

(CP 499-500.)

On August 27, 2021, AURC filed a motion to confirm arbitration award. (CP 80.) AURC correctly noted that the “Arbitrator’s ruling is succinctly stated in the Final Award” and reproduced it in less than half a page. (CP 82.)

On September 7, 2021, Appellants filed a response to the motion to confirm that agreed that the Final Award resolved “all matters in dispute” and did not oppose confirmation of the award and entry of judgment. (CP 90-91.)

On September 8, 2021, AURC filed a reply brief that for the first time stated that the document titled “Interim Award” and

“Final Award” should be attached to a judgment as exhibits and that the “entry of judgment does not resolve all matters in this case.” (CP 99-103.)

On September 9, 2021, Appellants filed a sur-reply that objected to confirmation of anything but the “award,” *i.e.*, the “statement of relief in the award alone.” (CP 160-163.) Appellants also objected to entry of a “final judgment” that did not dispose of all claims against all parties. (CP 160-163.)

At the first hearing to confirm the award, the Superior Court indicated that it would not enter a judgment until all issues had been finally resolved and requested supplemental briefing.

On September 20, 2021, Appellants filed their Supplemental Brief and Proposed Order and Judgment. (CP 305-322.)

On September 27, 2021, Appellants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. (CP 341-343.) Appellants had paid the entire amount of the Award, in full, terminating the controversy before the award had been confirmed

and before judgment had been entered. (CP 342-43.) On October 5, 2021, AURC “verified” that the full amount of the award had already been paid. (CP 363.)

On October 8, 2021, the Superior Court denied the motion to dismiss (CP 510-11), confirmed the award by attaching the reasons to the confirmation order (CP 516-548), and entered judgment on the award (CP 512-15.)

On October 15, 2021, more than a week after the award had been paid in full, AURC filed a Full Satisfaction of Judgment. (CP 550.)

On March 7, 2023, the Court of Appeals affirmed. (Appx. 49.)

V. ARGUMENT

A. **The Court should accept review to resolve a divisional conflict of authority on the mootness doctrine and its application to the Washington Uniform Arbitration Act under RAP 13(b)(2).**

It is undisputed that Petitioners satisfied the award—in full—before the confirmation hearing and before judgment was

entered on the award. For the reasons stated by the Division III Court of Appeals *Brooks Trust A*, using a *de novo* standard of review, tendering payment of this amount ended the controversy. There was nothing left for the Superior Court to decide. The case should have been dismissed as moot because there was no case or controversy left to resolve and doing so would further the purposes of the Washington Uniform Arbitration Act. *See Brooks Trust A v. Pac. Media, LLC*, 111 Wn. App. 393, 400, 44 P.3d 938 (2002) (affirming dismissal *with prejudice* of the case before confirmation based on payment of the award in full, the lack of a controversy, and the policies of the arbitration act). Nevertheless, the Court of Appeals expressly “declined to follow” the holding of *Brooks Trust A* and determined that the Superior Court was required to enter a moot judgment confirming the award. (Appx. 44.) The Court should accept review because the decision of the Court of Appeals is in direct conflict with a published decision of the Division III Court of Appeals. RAP 13(b)(2).

B. The “reasons for the award” are not subject to confirmation and there are important policy reasons to clarify the scope of what a trial court is authorized to “confirm” when it confirms and award.

AURC convinced the Superior Court to confirm—or give the appearance of confirming—the “reasons for the award” instead of just the Award. The Superior Court’s duty under the Arbitration Act is to confirm the “Award” and respect the parties’ contract as to what constitutes the “Award.” But not confirm the extraneous reasons for the Award, which is outside of the Superior Court’s confirmation powers under the Arbitration Act, RCW Chapter 7.04A.

Here, on July 22, 2021, the Arbitrator issued a document titled “Interim Award,” that consisted of an unreviewable “Discussion” that ran from pages 2 through 22, that also contained a number of unsupported, extraneous, and at times defamatory observations. The “Interim Award” itself is on pages 23 and 24. Pages 2 through 22 at least facially meet the

requirements that the Arbitrator provide concise written “reasons” for the award and an “Award.”

On August 23, 2021, the Arbitrator issued a “Final Award,” that incorporated the Interim Award on page 23 and 24 and then provided specific reasons for a fee award. The “Final Award” is on pages 3 and 4 of the Final Award. What the Arbitrator did not do, however, was issue findings of fact or conclusions of law, and doing so would exceed his authority under Section 8.16(b)(iv) of the Loan Agreement and the agreement of the parties at Arbitration. *Compare Sarofim v. Trust Co. of the W.*, 440 F.3d 213, 215 n.1 (5th Cir. 2006) (a “reasoned award” is “something short of findings and conclusions but more than a simple result.”).

Under the Court of Appeals’ holding in *Westmark Properties v. McGuire*, 43 Wn. App. 400, 766 P.2d 1146 (1989), expanding the scope of the actual award to include the “reasons” for the award is inconsistent with the nature of Arbitration and the statutory structure of RCW Chapter 7.04A. *See Westmark*, 53 Wn. App. at 402-03.

Our litigious society encourages parties to voluntarily submit disputes to arbitration. *See Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998); *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995). Arbitration seeks to avoid the formalities, delay, expense, and vexation of litigation in court. *See Davidson*, 135 Wn.2d at 118. Arbitration is attractive because it is a more expeditious and final alternative to litigation. *See Boyd*, 127 Wn.2d at 262. In this regard, arbitration can be casually structured. *See Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 161, 516 P.2d 1028 (1973) (arbitrators are not expected or required to always follow the strict and technical rules of law); *Thorgaard Plumbing & Heating Co. v. County of King*, 71 Wn.2d 126, 132, 426 P.2d 828 (1967) (arbitration depends for its existence and for its jurisdiction upon the parties having contracted to submit to it, and upon the arbitration statute); *Northern State Constr. Co. v. Banhero*, 63 Wn.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). Arbitration's desirable qualities would be heavily diluted, if not expunged, if a trial court reviewing an arbitration award were permitted to conduct a trial *de novo*. See *Boyd*, 127 Wn.2d at 263.

Thus, Courts do not review—or confirm—the Arbitrator's reasons supporting the award. They confirm the “Award,” which is a term of art in arbitration. See *Westmark*, 53 Wn. App. at 402-03.

In *Barnett v. Hicks*, the Court provided a detailed analysis of both the nature of private arbitration and the limited role courts have post-arbitration. See *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992). The Court held the following about arbitration:

- An arbitrator's powers are governed by an agreement to arbitrate;
- The arbitrator is not required to issue findings of fact and conclusions of law;

- A superior court may only confirm, vacate, modify, or correct an “award” based on limited and clearly defined statutory grounds;
- There is no traditional “full review” of an Arbitrator’s award because of the limited nature of the proceedings and the desire for a quick and final resolution to the dispute;
- An arbitration proceeding is a private affair without an open-courts presumption;
- An arbitration lacks trial formalities and is designed to settle controversies, and its very purpose is to avoid courts insofar as resolution of the dispute is concerned.

Here, Defendants were forced to arbitration on a quick fuse and forced to defend multiple transactions without the benefit of the Manager who made the decisions, because he died of cancer during the middle of this dispute. Most of the “reasons” for the award are *not* supported by substantial evidence; they are contrary to the great weight of the evidence; and the Arbitrator made multiple fundamental errors in the “evidence” he considered, including hearsay “evidence” that violated the dead-man’s statute. But due to the limited nature of an appeal of an Award, and the purpose of arbitration, an Arbitrator’s award *is*

not even required to be supported by substantial evidence and there is no real opportunity to appeal bad decisions. *See* RCW 7.04A.230 (defining the limited grounds a court must vacate a private arbitration award). Thus, while Defendants may be bound by the “Award,” they did not consent to have the Arbitrator issue unreviewable findings of fact and conclusions of law under the Dispute Resolution provision of the Loan Agreement, and the Arbitrator in this case did not do so. The Superior Court had no evidentiary basis to confirm the “reasons” for the award and had no statutory basis to do so either. The Superior Court’s power is limited to confirming the “Award,” which the Arbitrator clearly identified in less than two pages of the documents he issued titled Interim Award and Final Award.

The Court of Appeals apparently failed to grasp that the issue on appeal is the scope of what a superior court is allowed to “confirm,” and instead engaged in question begging and issued a decision that applies flawed, circular and non-sensical reasoning. The Court of Appeals rejected the appeal as to

whether the arbitrator's reasons for the award should be considered part of the "award" for purposes of confirmation by that, and instead treated it as a foregone conclusion that the "reasons for the award" are part of the "Award" for purposes of confirmation. The Court of Appeals wrote: "to the extent Point Ruston wanted to challenge the contents of the arbitration awards, it should have done so at arbitration, filed a motion for modification under RCW 7.04A.240, or filed a motion for vacation under RCW 7.04A.230. Any attempt by Point Ruston to contest the arbitration awards under RCW 7.04A.220 fails as that statute is not the avenue the legislature has prescribed for Point Ruston to challenge the content of the awards." Again, the whole point of the appeal was to decide whether the reasons are part of the award, not to attack them on appeal (as the reasons for the award are not subject to traditional review).

A court's job in "confirming" an award and then entering judgment on the award is simply to enforce the result. A court's job in confirming the award is not to review the reasons for the

decision; to act as a traditional appellate court; or to affirm or adopt the “correctness” of the fact supporting the decision. The whole point of *Westmark’s* holding is in the recognition that arbitration is more focused on voluntary, expedient dispute resolution to fact finding, and that the unreviewable nature of the reasons for the award make it necessary for courts to give the impression that they have reviewed and adopted the arbitrator’s reasoning for the award as a matter of statutory interpretation and as a matter of due process.

Thousands upon thousands of commercial contracts rely on arbitration clauses to resolve disputes quickly in recognition that resolving the dispute quickly and cheaply has more value to the parties to the contract than accurate fact finding. But parties to these contracts who bear the risk of a bad, non-reviewable judgment, should not also bear the risk of being saddled with the appearance that bad, unsupported, and defamatory reasons provided by an arbitrator have been independently adopted by a court of competent jurisdiction.

This Court should accept review of the Court of Appeal's decision under RAP 13(b)(4) because the issue involves an issue of substantial public interest that should be determined by the Supreme Court, which should determine that a court's statutory role in confirming an arbitration award is limited to an enforcement role and not that of fact finder or general appellate court.

V. CONCLUSION

Petitioners seek review of the March 7, 2023, Opinion issued by the Washington Court of Appeals, Division II ("COA"), affirming the Superior Court's confirmation of an arbitration award and entry of judgment against Petitioners, which is contained in the Appendix.

Respectfully submitted this 6th day of April 2023. I
certify that this document contains 3,139 words, in compliance
with RAP 18.17.

By: s/ Jack B. Krona Jr.

Jack B. Krona Jr.

WSBA No. 42484

Law Offices of Jack B. Krona Jr.

6509 46th Street NW

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Phone: (253) 341-9331

Email: j_krona@yahoo.com

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on the date below, I caused the foregoing to be filed via the Washington State Appellate Courts' E-Filing Portal, which provides email notification with link(s) to:

Russell A. Knight, WSBA # 40614 Megan Amici, Legal Assistant SMITH ALLING PS 1501 Dock Street Tacoma, Washington 98402 Tel: 253.627.1091 Fax: 253.627.0123 E-mail: rknight@smithalling.com E-mail: mamici@smithalling.com <i>Attorney for Respondent, AURC III, LLC</i>	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via E-mail <input checked="" type="checkbox"/> Via the Court's E-Service Device
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DATED this 6th day of April 2023, at Tacoma, Washington.

/s/ Sara M. Wallace
Sara M. Wallace, Legal Assistant

FILED
SUPREME COURT
STATE OF WASHINGTON
4/6/2023 2:09 PM
BY ERIN L. LENNON
CLERK

NO. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II: No. 56658-3-II

AURC III, LLC, an Oregon limited liability company,

Respondent,

v.

POINT RUSTON PHASE II, LLC, a Washington limited liability company, POINT RUSTON, LLC, a Washington limited liability company, CENTURY CONDOMINIUMS, LLC, a Washington limited liability company, THE SHOPS AT POINT RUSTON I, LLC, a Washington limited liability company, PR RETAIL, LLC, a Delaware limited liability company, PR BUILDING 11/9, LLC, a Washington limited liability company, POINT RUSTON THEATRE, LLC, a Washington limited liability company; PR MAIN STREET RETAIL, LLC, a Delaware limited liability company; and RAINIER PROPERTY SERVICES, LLC, a Washington limited liability company,

Appellants.

APPENDIX TO PETITION FOR REVIEW

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Attorney for Appellants/Petitioners POINT RUSTON PHASE II, LLC, a Washington limited liability company, POINT RUSTON, LLC, a Washington limited liability company, CENTURY CONDOMINIUMS, LLC, a Washington limited liability company, THE SHOPS AT POINT RUSTON I, LLC, a Washington limited liability company, PR RETAIL, LLC, a Delaware limited liability company, PR BUILDING 11/9, LLC, a Washington limited liability company, POINT RUSTON THEATRE, LLC, a Washington limited liability company; PR MAIN STREET RETAIL, LLC, a Delaware limited liability company; and RAINIER PROPERTY SERVICES, LLC, a Washington limited liability company.

Petitioners by and through their attorney of record, Jack B. Krona, Jr. hereby submit Petitioner's Appendix to Motion for Discretionary Review:

1. Exhibit 1 is a true and correct copy of the Judgment, filed October 8, 2021..... 1-4
2. Exhibit 2 is a true and correct copy of the Order Confirming Arbitration Award, filed October 8, 2021..... 5-37
3. Exhibit 3 is a true and correct copy of the Unpublished Opinion, filed March 7, 2023..... 38-49

Respectfully submitted this 6th day of April, 2023.

By: *s/ Jack B. Krona Jr.* _____
Jack B. Krona Jr.
WSBA No. 42484
Law Offices of Jack B. Krona Jr.
6509 46th Street NW
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Phone: (253) 341-9331
Email: j_krona@yahoo.com

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on the date below, I caused the foregoing to be filed via the Washington State Appellate Courts' E-Filing Portal, which provides email notification with link(s) to:

Russell A. Knight, WSBA # 40614 Megan Amici, Legal Assistant SMITH ALLING PS 1501 Dock Street Tacoma, Washington 98402 Tel: 253.627.1091 Fax: 253.627.0123 E-mail: rknight@smithalling.com E-mail: mamici@smithalling.com <i>Attorney for Respondent, AURC III, LLC</i>	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via E-mail <input checked="" type="checkbox"/> Via the Court's E-Service Device
--	---

DATED this 6th day of April 2023, at Tacoma, Washington.

/s/ Sara M. Wallace
Sara M. Wallace, Legal Assistant

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

AURC III, LLC, an Oregon Limited
Liability Company,

Plaintiff,

No. 20-2-05913-2

JUDGMENT

v.

POINT RUSTON PHASE II, LLC, a
Washington limited liability company;
POINT RUSTON, LLC, a Washington
limited liability company; CENTURY
CONDOMINIUMS, LLC, a Washington
limited liability company; THE SHOPS AT
POINT RUSTON I, LLC, a Washington
limited liability company; PR RETAIL,
LLC a Delaware limited liability company;
PR BUILDING 11/9, LLC, a Washington
limited liability company; POINT RUSTON
THEATRE, LLC, a Washington limited
liability company; PR MAIN STREET
RETAIL, LLC, a Delaware limited liability
company; and RAINIER PROPERTY
SERVICES, LLC, a Washington limited
liability company,

Defendants.

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JUDGMENT SUMMARY

- A. Judgment Creditor: AURC III, LLC, an Oregon Limited Liability Company
- B. Attorney for Judgment Creditor: Russell A. Knight, WSBA # 40614
- C. Joint and Several Judgment Debtors: Point Ruston Phase II, LLC, a Washington Limited Liability Company; Point Ruston, LLC, a Washington Limited Liability Company; Century Condominiums, LLC, a Washington Limited Liability Company; The Shops at Point Ruston I, LLC, a Washington Limited Liability Company; PR Retail, LLC, a Delaware Limited Liability Company; Point Ruston Theatre, LLC, a Washington Limited Liability Company; PR Main Street Retail, LLC, a Washington Limited Liability Company; and PR Building 11/9, LLC, a Washington Limited Liability Company
- D. Attorney for Judgment Debtor: Jack B. Krona, WSBA # 42484
- E. Principal Judgment Amount \$10,969,015.00
- F. Attorney's Fees \$ 434,287.75
- G. Costs \$ 96,686.82
- H. **Total Judgment \$11,499,489.57**
- I. Judgment shall bear interest at 7% per annum.

JUDGMENT AND ORDER

THIS MATTER was referred to arbitration in front of the American Arbitration Association by order of this Court dated September 25, 2020.

The American Arbitration Association issued Case Number 01-20-0015-5963 and appointed George Finkle as Arbitrator.

Plaintiff/ Claimant ARUC III, LLC, an Oregon Limited Liability Company was represented by Russell A. Knight.

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1 Defendants / Respondents Point Ruston Phase II, LLC; Point Ruston, LLC; Century
2 Condominiums, LLC; The Shops at Point Ruston I, LLC; PR Retail, LLC; Point Ruston
3 Theatre, LLC; PR Main Street Retail, LLC; and PR Building 11/9, LLC, were represented by
4 Jack B. Krona.

5 Arbitration was conducted between June 21, 2021 and June 25, 2021.

6 On July 22, 2021, Arbitrator George Finkle issued the Interim Award. On August 23,
7 2021, Arbitrator George Finkle issued the Final Award.

8 ACCORDINGLY, IT IS ORDERED ADJUDGED AND DECREED that AURC III,
9 LLC and Oregon limited liability company, is awarded judgment, jointly and severally,
10 against Point Ruston Phase II, LLC, a Washington limited liability company; Point Ruston,
11 LLC, a Washington limited liability company; Century Condominiums, LLC, a Washington
12 limited liability company; The Shops at Point Ruston I, LLC, a Washington limited liability
13 company; PR Retail, LLC, a Delaware limited liability company; Point Ruston Theatre, LLC,
14 a Washington limited liability company; PR Main Street Retail, LLC, a Washington limited
15 liability company; and PR Building 11/9, LLC, a Washington limited liability company in the
16 principal amount of \$10,969,015.00 plus attorney's fees of \$434,287.75 and costs of
17 \$96,686.82 for a total judgment of \$11,499,489.57. It is further

18 ORDERED ADJUDGED AND DECREED this judgment is the final determination
19 of the rights of the parties in this action under CR 54(a)(1).



20 DONE IN OPEN COURT this 8 day of October, 2021.
21 *Timothy L. Ashcraft*
22 _____
23 Honorable Timothy L. Ashcraft

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10/14/2021

1 Presented by:
SMITH ALLING, P.S.

2
3 By /s/ Russell A. Knight
4 Russell A. Knight, WSBA #10614
5 Attorneys for Defendants
6 Smith Alling, P.S.
7 1501 Dock Street
Tacoma, WA 98404
Email: *rknight@smithalling.com*

8 Approved as to form;
9 Notice of Presentment Waived:
10 LAW OFFICES OF JACK B. KRONA, JR.

11
12 By _____
13 Jack B. Krona, Jr., WSBA #42484
14 Law Offices of Jack B. Krona, Jr.
5020 Main Street, Suite H
Tacoma, WA 98407
Email: *j_krona@yahoo.com*



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10/14/2021



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

AURC III, LLC, an Oregon Limited
Liability Company,

Plaintiff,

v.

POINT RUSTON PHASE II, LLC, a
Washington limited liability company;
POINT RUSTON, LLC, a Washington
limited liability company; CENTURY
CONDOMINIUMS, LLC, a Washington
limited liability company; THE SHOPS AT
POINT RUSTON I, LLC, a Washington
limited liability company; PR RETAIL,
LLC a Delaware limited liability company;
PR BUILDING 11/9, LLC, a Washington
limited liability company; POINT RUSTON
THEATRE, LLC, a Washington limited
liability company; PR MAIN STREET
RETAIL, LLC, a Delaware limited liability
company; and RAINIER PROPERTY
SERVICES, LLC, a Washington limited
liability company,

Defendants.

No. 20-2-05913-2

ORDER CONFIRMING ARBITRATION
AWARD

(Clerk's Action Required)

THIS MATTER having come on regularly for hearing before this Court on the
Plaintiff's Motion to Confirm Arbitration Award, the Court having heard the argument of the
parties, and the Court having reviewed the records and files herein, including:

10/14/2021 8061 0226

1. AURC III, LLC's Motion to Confirm Arbitration Award;
2. Declaration of Russell Knight dated August 27, 2021;
3. The Arbitrator's July 22, 2021 Interim Award;
4. The Arbitrator's August 23, 2021 Final Award
5. Defendants' Response to AURC III, LLC's Motion to Confirm Arbitration Award;
6. Declarations of Jack Krona dated September 7, 2021;
7. Plaintiffs' Reply in Support of Motion for Presentation of Judgment;
8. Defendants' Sur-Reply to AURC III, LLC's Motion to Confirm Arbitration Award;
9. AURC III's Response to Court's Request for Briefing On Motion to Confirm Arbitration Award;
10. Declaration of Russell Knight dated September 20, 2021
11. Defendants' Opening Supplemental Brief Regarding AURC III, LLC's motion to Confirm Arbitration-Award and Cross-Motion to Confirm Award Using Defendants Proposed Order and Judgment;
12. Declaration of Jack Krona dated September 20, 2021;
13. AURC III, LLC's Reply in Support of Motion to Confirm Arbitration Award;
14. Defendant's Supplemental Brief Response Brief Regarding AURC III's Motion to Confirm Arbitration Award.

and the Court deeming itself fully advised, NOW, THEREFORE, it is hereby

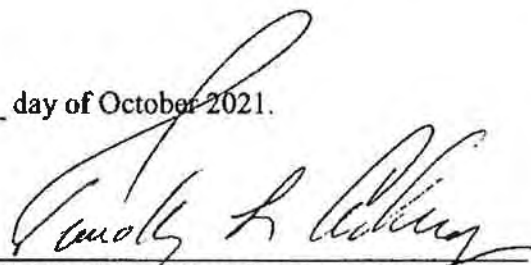
ORDERED, ADJUDGED AND DECREED that the Arbitrator's Interim Award dated July 22, 2021 attached hereto as **Exhibit 1** and Final Award dated August 23, 2021 attached hereto as **Exhibit 2** are confirmed. It is further

ORDERED, ADJUDGED AND DECREED this matter has been resolved and that the Court will issue a separate final judgment consistent with CR 54(a)(1). It is further

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1 ORDERED, ADJUDGED AND DECREED that the Preliminary Injunction entered
2 by this Court on September 25, 2020 is terminated. The Clerk of the Court is directed to return
3 the \$25,000.00 that AURC III, LLC deposited in the Registry of the Court as cash in lieu of a
4 bond payable to AURC III, LLC and mailed to its counsel: Russell Knight, Smith Alling, P.S.,
5 1501 Dock Street, Tacoma WA 98402.

6 DONE IN OPEN COURT this 8 day of October 2021.

7
8 
9 HONORABLE TIMOTHY ASHCRAFT

10 Presented By:
11 SMITH ALLING, P.S.

12
13 By: Russell A. Knight
14 Russell A. Knight | WSBA# 40614
15 Smith Alling, P.S.
16 1501 Dock Street
17 Tacoma, WA 98404
18 Email: rknight@smithalling.com



19 Approved as to form;
20 Notice of Presentment Waived:

21 LAW OFFICES OF JACK B. KRONA JR.

22 By: _____
23 Jack B. Krona Jr. | WSBA# 42484
Law Offices of Jack B. Krona Jr.
5020 Main Street, Suite H
Tacoma, WA 98407
Email: j_krona@yahoo.com

EXHIBIT 1

10/14/2021 8061 0220

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AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

AURC III, LLC,

Claimant,

v.

POINT RUSTON PHASE II, LLC; POINT
RUSTON, LLC; CENTURY
CONDOMINIUMS, LLC; PR BUILDING
1/9, LLC; THE SHOPS AT POINT RUSTON
I, LLC; PRRETAIL, LLC; POINT RUSTON
THEATER, LLC; PR MAINSTREET
RETAIL, LLC; and RANIER PROPERTY
SERVICES, LLC,

Respondents

No. 01-20-0015-5963

INTERIM AWARD

This arbitration is conducted pursuant to the Dispute Resolution clause, Section 8.16 of the Loan Agreement dated October 1, 2013 ("Loan Agreement") between Point Ruston Phase II, LLC, Borrower ("PR II"), and AURC III, LLC, Lender ("AURC").

Ex. 2. I am the duly appointed arbitrator.

On June 21-25, 2021, this arbitration came before me for Zoom evidentiary hearing. Claimant was represented by Russell A. Knight, Attorney at Law, of Smith

INTERIM AWARD
Page 1

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1 Ailing, P.S. Respondent was represented by Jack B. Krona Jr., Attorney at Law, of the
2 Law Offices of Jack B. Krona Jr.

3 I have considered the exhibits admitted into evidence, the testimony of the
4 witnesses, the arguments of counsel, and the parties' pre-hearing and post-hearing
5 memoranda. At the parties' request, this is a reasoned Interim Award.
6

7 *Discussion.*

8 *Background.*

9 As is summarized in the October 17, 2013, Business Plan submitted by AURC
10 to the U.S. Citizenship and Immigration Services, Exhibit 6:

11 Point Ruston is a 97-acre property situated in Tacoma and Ruston, Washington,
12 along nearly one mile of Puget Sound waterfront at the former ASARCO copper
13 smelter Superfund cleanup site.
14

15 Respondent Point Ruston, LLC ("PR") negotiated the purchase of the ASARCO
16 site, subject to final approval by the Federal Bankruptcy Court. The Project, Waterwalk
17 at Point Ruston, was to be capitalized with \$32,000,000 in Developer Equity;
18 \$66,000,000 in Immigrant Investor Program (EB-5) Capital; and \$71,000,000 in
19 secondary financing, for a total capitalization of \$169,000,000.
20

21 AURC was established to attract, aggregate, and invest EB-5 capital, through the
22 sale of membership Units at \$500,000 per Unit to suitably knowledgeable and
23 experienced foreign investors seeking to obtain United States residency.
24

Loan documents.

INTERIM AWARD
Page 2

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The Promissory Note, Ex. 1, provides for AURC to loan to PR II "up to" \$66 million for the Project. AURC raised from EB-5 investors and disbursed that full amount as the conditions in the Loan Agreement were satisfied.

As noted in the Business Plan, AURC recognized that PR II would require financing beyond its \$66 million in EB-5 funding. In the Loan Agreement, at Section 2.15, AURC acknowledged that the Business Plan "requires Borrower to secure such other financing from third party lenders as necessary to complete the Project; thus, in order to allow Borrower to provide the required security as such may be required and necessary to secure financing from such third party lenders, Lender shall cause the Deeds of Trust to be released or subordinated to such third party lenders on the Cinema Site and the Hotel Site either in whole or in part so long as such third party financing meets the terms of the Underwriting Guidelines. Lender may also agree to release or subordinate one or more other Deeds of Trust on other portions of the Property if necessary for the Borrower to obtain loans from third party lenders to finance the construction of other portions of the Project, provided that the terms of such loans are acceptable to Lender in its discretion."

2015 Agreement.

PR II ("Project Owner"), AURC, American United Development Group, LLC ("AU Ruston"), Cascadia Law Group, PLLC ("Cascadia") and Century Condominiums, LLC ("Project Owner Affiliate") (collectively "the Parties") entered into a Property

1 Transfer and Distribution Agreement, effective March 2015 (“2015 Agreement”)
2 concerning the “Theatre Property,” as described in Exhibit A. Ex. 8.

3 Consistent with the expectations set forth in the Business Plan and in the Loan
4 Agreement, AURC agreed to release a portion of the deed of trust securing its loan, in
5 exchange for consideration including Respondents’ agreements not to further transfer,
6 encumber or sell the Century Buildings without AURC’s prior written consent and to
7 first use cash flow and cash proceeds to pay AURC.
8

9 Under Section 9 of the 2015 Agreement, Project Owner Affiliate’s Covenant
10 Not to Further Encumber the Property, except as expressly permitted in the agreement,
11 Century Condominiums may not, “directly or indirectly, voluntarily alienate, encumber,
12 transfer, option, lease, assign, sell, transfer or convey its interest or any portion of such
13 interest in the Property or any portion thereof, or enter into any agreement to do so, so
14 long as this Agreement and the AURC Loan are in force, without the prior written
15 consent of AURC.”
16

17 The 2015 Agreement has not terminated: The conditions precedent to
18 termination defined in that agreement, including PR II granting AURC a new deed of
19 trust on the Century Buildings, have not been met.
20

21 *2017 Agreement.*

22 PR II, AURC, PR (“Guarantor”) and Century Condominiums (collectively “the
23 Parties”) entered into a Property Transfer and Financing Facilitation Agreement,
24 effective September 6, 2017 (“2017 Agreement”), Ex. 15.

1 The 2017 Agreement authorized the "Project Owner," PR II, to transfer Building
2 18 to The Shops at Point Ruston I, LLC ("The Shops"), a new entity wholly owned by
3 PR II. Again consistent with the expectations of the Business Plan and the Loan
4 Agreement, AURC agreed to release a portion of the deed of trust securing its loan in
5 exchange for consideration including Respondents' agreements not to further transfer,
6 encumber or sell Building 18 without AURC's prior written consent and to first use
7 cash flow and cash proceeds to pay AURC.
8

9 As was true in the 2015 Agreement, the 2017 Agreement included a Covenant
10 Not to Further Encumber the Property: Except to the extent permitted in the agreement,
11 Project Owner may not, "directly or indirectly, alienate, encumber, transfer, option,
12 lease, assign, sell, transfer or convey its interest or any portion of such interest in the
13 Retail Property [the Building 18 Property] or any portion thereof, or enter into any
14 agreement to do so, so long as this Agreement and the AURC Loan are in force, without
15 the prior written consent of AURC." AURC may not unreasonably withhold consent, as
16 long as Project Owner is in compliance with the AURC loan. The 2017 Agreement is
17 binding on the successors and assigns of the Parties. Section 10(g).
18

19 Even assuming the 2015 Agreement has terminated, the 2017 Agreement
20 restricts the transfer or encumbrance of the Century Buildings, as did the 2015
21 Agreement: "Century Condominiums shall not, directly or indirectly, alienate,
22 encumber, transfer, option, lease, assign, sell, transfer or convey its interest in the
23 Century Property, or any portion thereof, or enter in any agreement to do so, so long as
24

1 this Agreement and the AURC Loan are in force, without prior written consent of
2 AURC." Section 9.

3 Therefore, with few exceptions, none applicable here, both the 2015 Agreement
4 and 2017 Agreement required AURC's written consent prior to transfer or encumbrance
5 of the subject properties.

6 *Transactions in breach of 2015 Agreement and 2017 Agreement.*

7
8 By Quit Claim Deed recorded May 16, 2017, Century Condominiums, LLC,
9 Grantor, transferred to Point Ruston Theatre, LLC, Grantee, for no consideration, the
10 theatre property, Unit 3 of the Century Master Condominium, that was the subject of the
11 2015 Agreement. Ex. 102.

12 By Quit Claim Deed recorded March 12, 2018, Point Ruston Theatre, LLC,
13 conveyed the theater property to PR Retail, LLC, for no consideration. Ex. 104.

14
15 By Quit Claim Deed recorded April 28, 2020, PR Retail, LLC, conveyed the
16 theatre property to PR main Street Retail, LLC, for no consideration. Ex. 105.

17 All of these grantor and grantee entities are owned and controlled by Loren
18 Cohen and/or his marital community. None of the transfers was made with the prior
19 written consent of AURC or with notice to AURC.

20
21 By Deeds of Trust recorded November 30, 2016, in favor of JLW Point Ruston
22 Investments, LLC, Century Condominiums encumbered Units 2-8 of the Century
23 Master Condominium with a first position lien in the amount of \$20,400,000 and junior
24 liens in the additional amounts of \$2.4 million and \$4 million. Ex. 88, Ex. 89. Such

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encumbrances were entered into without the prior written consent of AURC and without notice to AURC.

By Deed of Trust recorded on June 19, 2017, Point Ruston Theatre, LLC, Grantor, encumbered the theatre property with a \$4 million obligation in favor of River Road Investments, LLC, Beneficiary. Ex. 103. By Deed of Trust recorded December 20, 2018, Grantors PR Retail, LLC, and Point Ruston, LLC, further encumbered the theatre property with an obligation in favor of Beneficiaries River Road Investments, LLC and the Nelson and Carver law firm.

By Deed of Trust recorded April 28, 2020, PR Main Street Retail, LLC, Grantor, encumbered the theatre property with a further \$10.4 million obligation in favor of TerraCotta Credit REIT, LLC, Grantee. Ex. 85, Ex. 106.

None of the above encumbrances was granted with the prior written consent of AURC or with notice to AURC.

AURC did not waive its right to require its written consent prior to sale or encumbrance, and all of the above transactions violated such right.

In the 2015 Agreement, PR II assigned to AURC its rights to the cash flow and cash proceeds from the Century Buildings as replacement collateral for the release of the AURC Deed of Trust, which was necessary to obtain a Bank of Ozark's loan. 2015 Agreement, sections I and J. The March 2015 Collateral Assignment and Security Agreement, which is an exhibit to the 2015 Agreement, granted to AURC a security interest in all of Project Owner's right, title and interest under the Distribution

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Agreement and permitted AURC, in the event of a default under the AURC Loan Agreement or by Project owner or Project owner Affiliate under the Distribution Agreement, to exercise all rights and remedies of a secured party, including the right to pursue any of Project Owner's claims against Project Owner Affiliate under the terms of the Distribution Agreement. Ex. 13, section G.

On May 16, 2019, with the AURC loan in arrears, Mr. Li, for AURC, wrote Mike Cohen, for PR II, demanding pursuant to the 2015 Agreement that Century Condominiums 1) deliver monthly income and cash flow statements for the theatre property to AURC; 2) deliver the net proceeds of all cash revenue collected from the operation of the theatre property to AURC until PR II has paid all amounts owed under the Loan Agreement and that agreement is no longer in breach; and 3) deliver a complete record of historic income and cash flow statement for the theatre property to AURC. Ex. 62. PR II did not comply with such demands.

By Quit Claim Deed recorded March 12, 2018, The Shops, Grantor, conveyed Building 18 to PR Retail, LLC, Grantee, for no consideration. Ex. 83.

By Quit Claim Deed recorded April 28, 2020, PR Retail, LLC, conveyed Building 18 to PR Main Street Retail, LLC, for no consideration. Ex. 88.

All grantor and grantee entities are owned and controlled by Loren Cohen and/or his marital community. None of the transfers was made with the prior written consent of AURC or with notice to AURC.

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By Deed of Trust recorded August 10, 2017, The Shops, Grantor, encumbered Building 18 with a \$4.5 million obligation in favor of RiverRoad Investments, LLC, Grantee. Ex. 82.

By Deed of Trust recorded February 11, 2019, PR Retail, LLC, Grantor, encumbered Building 18 with a \$7 million obligation in favor of TerraCotta Credit REIT, LLC, Grantee. Ex. 84.

By First Amendment of Deed of Trust recorded April 28, 2020, PR Main Street Retail, LLC, Grantor, encumbered Building 18, in favor of TerraCotta Credit REIT, LLC, Grantee, to secure the \$7 million obligation and "new indebtedness" of \$10.04 million. Ex. 8.

None of the above encumbrances was granted with the prior written consent of AURC or with notice to AURC.

Similar to the assignment to AURC of theatre property cash flow and cash proceeds in the 2015 Agreement, PR II assigned to AURC such rights for Building 18. in the 2017 Agreement. Section 6, Exhibit G.

On May 16, 2019, with the AURC loan in arrears, AURC demanded, pursuant to the 2017 Agreement, that The Shops 1) deliver monthly income and cash flow statements for Building 18 to AURC; 2) deliver the net proceeds of all cash revenue collected from the operation of Building 18 to AURC until PR II has paid all amounts owed under the Loan Agreement and that agreement is no longer in breach; and 3)

1 deliver a complete record of historic income and cash flow statement for Building 18 to
2 AURC. Ex. 63. PR II did not comply with such demands.

3 After the above transfers of the theatre property and Building 18, PR II's sole
4 remaining real property was Building 11/9. On December 3, 2019, PR II, Grantor,
5 quitclaimed Building 11/9 to PR Building 11/9, Grantee, which is controlled by Loren
6 Cohen, without consideration. Ex. 81.

7
8 *Duty of good faith and fair dealing.*

9 There is in every contract an implied duty of good faith and fair dealing
10 obligating the parties to cooperate so each may obtain the full benefit of performance.
11 However, the duty of good faith requires only that the parties perform in good faith the
12 obligations imposed by specific terms of their agreement, and there cannot be a breach
13 of the duty of good faith when a party simply stands on its rights to require performance
14 of a contract according to its terms. *Badgett v. Security State Bank*, 116 Wn.2d 563,
15 569 (1991).
16

17 Here, where AURC simply stood on its contractual right to pre-approve transfers
18 and encumbrances, it was not in breach of its duty of good faith.

19 The Loan Agreement, at Schedule 5.2, Special Conditions to First Advance,
20 provided that prior to the first advance on Project Funds by AURC, due February 1,
21 2014, Borrower must furnish the following, all of which must be satisfactory to Lender:
22 (a) The original title insurance policy and Deeds of Trust; (b) Evidence of Borrower's
23 equity investment of cash and real property of not less than \$26.75 million from sources
24

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1 other than Project Funds; and (c) Borrower's delivery of the Letter of Credit, if required
2 for Lender to obtain a release of funds from the escrow account holding funds of
3 Lender's EB-5 Investors.

4 AURC had the contractual right to require PR II to comply with each of these
5 Special Conditions prior to the First Advance, even though such compliance pushed the
6 First Advance date past February 1, 2014. Further, the third-party EB-5 escrow
7 administrator required the equivalent of a letter of credit before AURC could obtain a
8 release of funds from the escrow account. AURC had no authority to waive this
9 requirement, even if it had wished to do so.

10 AURC could have subordinated or release its deed of trust on Building 11/9 to
11 facilitate a possible loan to the Project from Trez Capital, but under the Loan
12 Agreement, at Section 2.15, it was not required to do so. That section provided that
13 AURC "may" agree to release or subordinate deeds of trust if necessary for the
14 Borrower to obtain loans from third party lenders to finance the construction of portions
15 of the Project, "provided that the terms of such loans are acceptable to Lender in its
16 discretion."

17 But even assuming AURC would have been required to release or subordinate if
18 the proposed Trez loan terms were objectively reasonable, the evidence does not
19 support such a finding. Instead, AURC appears to have reasonably demanded adequate
20 substitute security as a condition of its approval of the Trez loan. Further, AURC's
21 reluctance to subordinate occurred in the context of a recent adverse award in the
22
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1 *Sterpanok* arbitration, contrary to PR II's assertion to AURC after *Sterpanok* filed its
2 arbitration demand that the claim lacked merit and that a counterclaim would likely
3 succeed.

4 *Interest due.*

5
6 In the Promissory Note, PR II, Borrower, promises to pay to the order of AURC,
7 Lender, the principal sum equal to the total amount of advances up to \$66,000,000
8 made by AURC to PR II under the Loan Agreement. The Promissory Note provides, at
9 Section 4, Interest Rate: "The unpaid principal balance of this Note shall bear interest at
10 the Applicable Interest Rate set forth in the Loan Agreement, provided that upon the
11 occurrence of an Event of Default, the Loan shall thereafter bear interest at the Default
12 Rate."

13
14 The Loan Agreement, Exhibit 2, provides in Schedule 1, Definitions:

15 "Applicable Interest Rate' means, during the term of the Loan and prior to
16 any extension of the Maturity Date or any default, a rate of six percent (6.0%) per
17 annum, consisting of the Current Interest of four percent (4.0%) per annum and the
18 Accrued Interest of two percent (2.0%) per annum."

19 'Current Interest' means, during the Term, that portion of the Applicable
20 Interest Rate that accrues on the outstanding principal balance of the Loan commencing
21 on the date of the first Advance to the Borrower, and that is payable on each Payment
22 Date commencing with the first day of the calendar quarter following the date of the
23 first Advance to the Borrower."
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'Default Rate' means a rate per annum equal to three percent (3%) per annum above the Applicable Interest Rate that would otherwise be payable by Borrower, to the extent not prohibited under applicable law."

An "Event of Default" triggering application of the Default Rate includes a "Payment Default" which arises when "Borrower fails to pay any obligation under this agreement within fifteen (15) days after the scheduled payment date of any scheduled payment for which no notice is required, or within fifteen (15) days after written notice of the due date of any non-scheduled payment." Loan Agreement, Section 6.1.

Therefore, if Borrower fails to pay Current Interest, the Default Rate applies, without notice. AURC did not waive its right to interest at the Default Rate, except as provided in the 2017 Agreement, at Paragraph 4, Conditional Waiver of Accrued Default Interest, which waived past Default Interest, but provided: "In the event the Project Owner fails to make payments of Current Interest as accrued on the AURC Loan following the Effective Date, then Project Owner Agrees that AURC shall have a right to charge Project Owner for the full amount of any Default Interest that may accrue in the future in accordance with the terms of the AURC Loan Agreement."

The Mediation Agreement dated October 25, 2019, Ex. 439, was negotiated in the context of the parties' consideration of permitting a Trez loan to close, providing, at Paragraph 9: "If loan (from Trez) close, no default interest due. Default interest provision remains post loan closing from events post-closing." However, the Trez loan

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did not close, and Default Interest was therefore not affected by the Mediation Agreement.

Applying the above definitions, and because AURC did not waive Default Interest other than as specified in the 2017 Agreement, as of March 31, 2021, total Current Interest due was \$5,677,854. Total Default Interest due was \$5,291,161. Ex. 117. (Default Interest at 3% is applicable from January 16 to October 3, 2018, totaling \$1,412,655, and from April 16, 2019 to March 31, 2021, totaling \$3,878,506.) Total Current Interest and Default Interest due as of March 31, 2021, was \$10,969,015.

Prior to the present arbitration, PR II made certain interest payments at the contractual rates and did not dispute that interest was due at such rates. The course of conduct of PR II, Michael Cohen, and Loren Cohen demonstrates their understanding that interest as requested by AURC is due. *See Eagle Insurance Co. v. Albright*, 3 Wn.App. 256, 266-67 (1970).

PR guaranty.

A guaranty is a promise to answer for the debt, default, or miscarriage of another person. Guaranties are contracts, subject to the general rules of contract formation, interpretation, and construction. Where a guarantor freely and voluntarily guarantees the payment of another, and a creditor relies to its detriment on this guaranty, the law generally requires the guaranty to be enforced. The guarantor is liable upon default of the principal without notice. *Frontier Bank v. Bingo Investments, LLC*, 191 Wn.App. 43, 53-54 (2015).

1 Here, in the Guaranty of Completion, Ex. 3, PR "irrevocably, absolutely and
2 unconditionally guarantees to Lender [AURC] and its successors and assigns the
3 payment and performance of the guaranteed Obligations as and when the same shall be
4 due and payable, whether by lapse of time, by acceleration of maturity or otherwise.

5 Guarantor hereby irrevocably and unconditionally covenants and agrees that it is liable
6 for the Guaranteed Obligations as a primary obligor." Section 1.1.
7

8 "Guaranteed Obligations" are "the obligations or liabilities of Borrower to
9 Lender under the Loan Agreement ... (b) to pay for all hard costs and for all
10 obligations, liabilities, costs and expenses incurred in connection with the Completion
11 of Construction, without limitation, any additional costs to achieve Completion of
12 Construction, and (c) to pay for soft costs incurred in connection with the operation,
13 construction, maintenance and management of the Project, including, without
14 limitation, debt service ... and any and all other operating expenses, when due during
15 the term of the Loan." Section 1.2.
16

17 "If all or any part of the Guaranteed Obligations shall not be punctually paid
18 when due,... Guarantor shall, immediately upon demand by Lender and without
19 presentment ... or any other notice whatsoever, pay in lawful money of the United
20 States of America, the amount due on the Guaranteed Obligations to Lender...."
21

22 Section 1.5.

23 The plain meaning of the Guaranty of Completion is that PR is jointly and
24 severally liable for the unpaid Current Interest and Default Interest obligations of PR II.

1 *Liability of Century Condominiums, LLC and The Shops at Point Ruston I, LLC.*

2 Century Condominiums is a party to the 2015 Agreement and the 2017
3 Agreement and is obligated to fulfill their requirements.

4 PR II is a party to the 2017 Agreement, which provides, at Section 10.g., that all
5 provisions of that agreement “shall inure to the benefit of and shall be binding upon the
6 successors and assigns of the Parties.” As successor to PR II, The Shops is bound to PR
7 II’s obligations under the 2017 Agreement.
8

9 Contract damages are ordinarily based on the injured party’s “expectation
10 interest” and are intended to give the injured party the benefit of its bargain. *Panorama*
11 *Village v. Golden Rule Roofing, Inc.*, 102 Wn.App. 422, 427 (2000). Under the 2015
12 Agreement and the 2017 Agreement, AURC had the expectation interest that, in
13 exchange for releasing its first position deed of trust on high-value real property, it
14 would be paid all Current Interest and Default Interest due. AURC is entitled to a joint
15 and several award against Century Condominiums and The Shops for Current Interest
16 and Default Interest.
17

18 *Joint and several liability of Point Ruston Theatre, LLC; PR Retail, LLC; PR*
19 *Building 11/9, LLC; and PR Main Street Retail, LLC.*

20 Under the Uniform Voidable Transactions Act, Chapter 19.40 RCW (“UVTA”)
21 (formerly the Uniform Fraudulent Transfer Act (“UFTA”)), “in general a fraudulent
22 transfer occurs where one entity transfers an asset to another entity, with the effect of
23 placing the asset out of the reach of a creditor, with either the intent to delay or hinder
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the creditor or with the effect of insolvency on the part of the transferring entity.”

Thompson v. Hanson, 167 Wash.2d 414, 219 P.3d 659, 662 (2009).

Under RCW 19.40.041, “(1) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor’s ability to pay as they became due. (2) In determining actual intent under subsection (1)(a) of this section, consideration may be given, among other factors, to whether: (a) The transfer or obligation was to an insider; (b) The debtor retained possession or control of the property transferred after the transfer; (c) The transfer or obligation was disclosed or concealed; (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (e) The transfer was of substantially all the debtor’s assets; (f) The debtor absconded; (g) The debtor removed or concealed assets; (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation

1 was incurred; (j) The transfer occurred shortly before or shortly after a substantial debt
 2 was incurred; and (k) The debtor transferred the essential assets of the business to a
 3 lienor that transferred the assets to an insider of the debtor. (3) A creditor making a
 4 claim for relief under subsection (1) of this section has the burden of proving the
 5 elements of the claim for relief by a preponderance of the evidence.”
 6

7 Not all of the “11 badges of fraud,” RCW 19.40.041(2)(a)-(k), need to be
 8 present to establish the requisite intent by a preponderance of the evidence under
 9 Section (1)(a). *Douglas v. Hill*, 148 Wn.App. 760, 767-68 (2009).

10 Considering the badges of fraud, I find that Respondents had actual intent to
 11 hinder, delay, or defraud AURC:

12 (a) *Transfer or obligation to insider.* Here, the transfers were from entities
 13 controlled by Mike Cohen or Loren Cohen to entities owned by Mike Cohen
 14 or Loren Cohen or their marital communities.

15 (b) *Debtor retained possession or control.* Here, Mike Cohen or Loren Cohen
 16 managed all transferring and receiving entities.

17 (c) *Transfer or obligation disclosed or concealed.* Here, although AURC was
 18 aware that PR II was seeking additional financing and appears to have
 19 frequently run “date down” title reports showing all current encumbrances,
 20 PR II effectively concealed the transfers until at least the dates they were
 21 recorded, at which time AURC may have had constructive notice, but had
 22 been deprived of the opportunity to grant or withhold prior written consent.
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- (d) *Suit or threat of suit.* Here, before the first unconsented transfer, PR II's interest payments to AURC were in arrears, and AURC had demanded that they be brought current. Ex. 116, Ex. 246. After the present arbitration was filed, Respondents made further unconsented transfers.
- (e) *Substantially all assets transferred.* Here, Respondents transferred or encumbered the real property that secured its obligations to AURC, leaving AURC without security for its \$66 million loan.
- (f) *The debtor absconded.* Here, although PR II did not physically abscond, the transfers and obligations resulted in it becoming essentially a shell entity, unable to satisfy its obligations to AURC except as it may receive funds from the entities to which the properties were transferred, an uncertain prospect that does not secure AURC.
- (g) *The debtor removed or concealed assets.* Here, after the transfers, PR II no longer held sufficient real property from which its obligations to AURC could be satisfied.
- (h) *Value of consideration received.* Here, Respondents received no consideration for the transfers, as is reflected in the recorded documents.
- (i) *Debtor insolvent or became insolvent.* All entities with contractual relationships with AURC were stripped of assets and now appear to be insolvent. The hope of revenues is no substitute for assets from which obligations could be satisfied.

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(j) *Transfer shortly before or after substantial debt incurred.* Here, the transfers followed AURC's funding of the \$66 million loan.

(k) *Debtor transferred the essential assets to a lienor that transferred the assets to an insider of the debtor.* Here, the debtor transferred all assets to an insider.

Under RCW 19.40.041(1)(b), "A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: ... Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Here, where the debtor received no consideration for the real property transfers, the debtor clearly did not receive "reasonably equivalent value in exchange." Further, after the transfers, (i) the debtor's remaining assets were unreasonably small; and (ii), the debtor reasonably should have believed it would incur debts beyond its ability to pay as they became due, since after the transfers, PR II was left with no assets from which to pay AURC.

In sum, all transfers at issue violated RCW 19.40.041.

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UVTA remedy; award against transferees.

AURC could not have elected to, and cannot, rescind the transactions:

Respondents entered into loans with third-party lenders, to which AURC did not consent. Such third-party lenders currently hold first-position secured promissory notes in amounts far greater than the Current Interest and Default Interest that AURC seeks in this arbitration.

Under RCW 19.40.081(2)(a), "Except as otherwise provided in this section, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less."

For each entity at issue, the value of assets transferred without AURC's authorization greatly exceeds the Current Interest and Default Interest AURC claims in this arbitration. Because the amount necessary to satisfy AURC claim is less than the value of the assets transferred, AURC is entitled to the amount of its claim.

AURC is entitled to joint and several liability for the Current Interest and Default Interest due against the Point Ruston Theatre, LLC, PR Retail, LLC, PR Building11/9, LLC and PR MainStreet Retail, LLC.

Non-monetary relief.

The arbitration clause of the Loan Agreement reserves to AURC certain rights, including the right "to obtain from a court provisional or ancillary remedies such as (but not limited to) injunctive relief, writ of possession, prejudgment attachment, or the

1 appointment of a receiver,” which AURC may exercise “before, during or after the
2 pendency of any arbitration.” Reservation of Rights, Section 8.16(c).

3 The sole issue before me is the amount of Current Interest and Default Interest,
4 if any, due to AURC. No evidence was presented as to other potential claims, including
5 but not limited to AURC’s potential claim for Accounting. AURC has not waived other
6 potential claims.
7

8 *Attorney fees and costs.*

9 The Promissory Note, at Paragraph 10, provides that Borrower agrees to pay to
10 Lender reasonable attorneys’ fees and expenses incurred by Lender in seeking to collect
11 the note or to enforce its rights and remedies under the Loan Documents.
12

13 The Loan Agreement, at Paragraph 4.20, provides that “Borrower shall pay all
14 costs and fees associated with the enforcement of Lender’s rights and remedies under
15 the Loan Documents,” and at Paragraph 8.16((b)(vii) provides “The arbitrator shall
16 have the power to award legal fees and costs pursuant to the terms of this Agreement.”

17 The 2015 Agreement, at Paragraph 11.15, provides that the prevailing party in
18 an action or proceeding instituted to enforce or interpret any provision of the agreement
19 is entitled “to recover its attorneys’ fees and costs from the losing party.”
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21 The 2017 Agreement, at Paragraph 10(o), provides that if any action or
22 proceeding is instituted to enforce or interpret any provision of the agreement, the
23 prevailing Party is entitled to recover its attorneys’ fees and costs from the other party.
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AURC is the prevailing party, and under the above attorney fees and costs provisions is entitled to recover its reasonable fees and costs (including AAA fees and arbitrator compensation).

Interim Award.

I award Claimant \$10,969,015 in Current Interest and Default Interest through March 31, 2021, jointly and severally against Respondents Point Ruston Phase II, LLC; Point Ruston, LLC; Century Condominiums, LLC, The Shops at Point Ruston I, LLC; PR Retail, LLC; Point Ruston Theatre, LLC; PR Main Street Retail, LLC; and PR Building 11/9, LLC.

I rule only on Claimant's request for Current Interest and Default Interest.

Attorney fees and costs briefing schedule.

Within one week of the date of this Interim Award, Claimant shall serve and file a Request for attorney fees and costs, supported by appropriate declarations.

Within two weeks of the date of this Interim Award, Respondent shall serve and file any Response to such Request.

Within three weeks of the date of this Interim Award, Claimant shall serve and file any Reply to such Response.

I expect to issue a Final Award without oral argument, incorporating my ruling on fees and costs, as soon as possible after such submissions are complete.

This Interim Award shall remain in full force and effect until such time as the Final Award is rendered.

1 *Document destruction.*

2 I expect to shred all exhibits and other documents 30 days after the date of the
3 Final Award.

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6 Dated: July 22, 2021

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8 _____
9 George A. Finkle, Arbitrator
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INTERIM AWARD
Page 24

EXHIBIT 2

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AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

AURC III, LLC,

Claimant,

No. 01-20-0015-5963

v.

FINAL AWARD

POINT RUSTON PHASE II, LLC; POINT
RUSTON, LLC; CENTURY
CONDOMINIUMS, LLC; PR BUILDING
11/9, LLC; THE SHOPS AT POINT
RUSTON I, LLC; PR RETAIL, LLC; POINT
RUSTON THEATRE, LLC; PR MAIN
STREET RETAIL, LLC; and RAINIER
PROPERTY SERVICES, LLC,

Respondents

I, the undersigned arbitrator, having been designated in accordance with the arbitration agreement entered into between the above-named parties (the Dispute Resolution clause, Section 8.16 of the Loan Agreement dated October 1, 2013 ("Loan Agreement")) between Point Ruston Phase II, LLC, Borrower ("PR II"), and AURC III, LLC, Lender ("AURC"), Ex. 2 herein), and having been duly sworn, and having duly heard the proofs and allegations of the parties, and having previously rendered an

FINAL AWARD
Page 1

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Interim Award dated July 22, 2021, incorporated by reference herein, hereby award as follows:

In the Interim Award, I set a briefing schedule for Claimant’s Request for attorney fees and costs, Respondent’s Response to such Request, and Claimant’s Reply to such Response. I have considered the parties’ submissions provided to me pursuant to that schedule.

The “lodestar” method is the starting point for attorney fee determinations. The lodestar fee is determined by multiplying the hours reasonably expended in the litigation by each lawyer’s reasonable hourly rate of compensation. The lodestar is only the starting point and the fee thus calculated is not necessarily a “reasonable” fee.

Whether a fee is reasonable is an independent determination to be made by the awarding court (here, the arbitrator), and the burden of demonstrating that a fee is reasonable always remains on the fee applicant. Among the factors that the court may consider is the relationship between the amount in dispute and the fee requested.

Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597 (1983); *Berryman v. Metcalf*, 177 Wn.App. 644, 660 (2013); *Absher Construction Co. v. Kent School District*, 79 Wn.App. 841, 846-47 (1995). Work that is not directly tied to the trial (or arbitration) may be considered to be reasonably related to the litigation and compensable. *Baker v. Fireman’s Fund*, 5 Wn.App. 2d 604, 622-23 (2018).

Here, Smith Alling reasonably expended the hours at issue in this litigation, particularly given the \$10 million-plus amount in dispute, the complexity of the

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litigation, and the many hotly contested issues presented in extensive related court proceedings and this arbitration. Although no Perkins Coie attorney appeared in this arbitration, that firm provided reasonably necessary support related to central issues, including complex lien priorities.

All professional time was billed at reasonable hourly rates, consistent with the ability and experience of the timekeepers and prevailing rates in the relevant market.

Claimant is entitled to the award of \$340,096.25 in attorney fees from Smith Ailing and \$94,191.50 in attorney fees from Perkins Coie, for a total of \$434,287.75 in attorney fees.

All other costs sought by Claimant were reasonable and necessary, including forensic accounting and discovery preparation and review provided by the Stapleton Group and Claimant's advance of Respondents' share of AAA fees and arbitrator compensation. Claimant is entitled to the award of a total of \$96,686.82 in costs.

Final Award.

Interest.

I award Claimant **\$10,969,015.00** in Current Interest and Default Interest through March 31, 2021, jointly and severally against Respondents Point Ruston Phase II, LLC; Point Ruston, LLC; Century Condominiums, LLC, The Shops at Point Ruston I, LLC; PR Retail, LLC; Point Ruston Theatre, LLC; PR Main Street Retail, LLC; and PR Building 11/9, LLC.

I rule only on Claimant's request for Current Interest and Default Interest.

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Attorney fees and costs.

Claimant is awarded a total of \$434,287.75 in attorney fees and \$96,686.82 in costs.

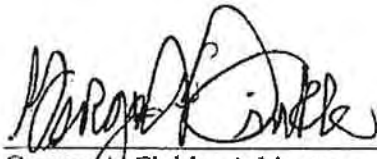
The administrative fees and expenses of the American Arbitration Association totaling \$24,846.90 shall be borne by Respondents, and the compensation of the arbitrator totaling \$49,400.00 shall be borne by Respondents.

This Final Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted or expressly reserved herein are hereby denied.

Document destruction.

I expect to shred all exhibits and other documents 30 days after the date of the Final Award.

Dated: August 23, 2021


George A. Finkle, Arbitrator

March 7, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

AURC III LLC, an Oregon Limited Liability
Company,

No. 56658-3-II

Respondent,

v.

POINT RUSTON PHASE II, LLC, a
Washington limited liability company; POINT
RUSTON, LLC, a Washington limited liability
company; CENTURY CONDOMINIUMS,
LLC, a Washington limited liability company;
THE SHOPS AT POINT RUSTON I, LLC, a
Washington limited liability company; PR
Retail, LLC, a Delaware limited liability
company; PR BUILDING 11/9, LLC, a
Washington limited liability company; POINT
RUSTON THEATRE, LLC, a Washington
limited liability company; PR MAIN STREET
RETAIL, LLC, a Delaware limited liability
company; and RAINIER PROPERTY
SERVICES, LLC, a Washington limited
liability company,

UNPUBLISHED OPINION

Appellants.

Lee, J. — Point Ruston Phase II, LLC; Point Ruston, LLC; Century Condominiums, LLC;
The Shops at Point Ruston I, LLC; PR Retail, LLC; PR Building 11/9, LLC; Point Ruston Theatre,
LLC; PR Main Street Retail, LLC; and Rainier Property Services, LLC (collectively Point

Ruston)¹ appeal the superior court's judgment and order confirming an arbitration award in favor of AURC III, LLC. Point Ruston argues that because Point Ruston had paid the amount of the arbitration award, the superior court should have dismissed the case with prejudice and erred by entering a judgment and order confirming the arbitrator's award.

We hold that the superior court did not err in entering a judgment and order confirming the arbitration award. We also award attorney fees and costs on appeal to AURC against Point Ruston Phase II, LLC.

FACTS

AURC filed a first amended complaint against Point Ruston at the superior court alleging, among other claims, that Point Ruston took a loan from AURC and then breached the loan agreement by not making timely interest payments. The superior court ordered the parties to arbitration pursuant to the terms of the loan agreement. The loan agreement included special rules for arbitration. One of these special rules required the arbitrator to provide "a concise written statement setting forth the reasons for the judgment and for the award, if any." Clerk's Papers (CP) at 137. The same special rule provided that "[t]he arbitration award, if any, may be submitted to any court having jurisdiction to be confirmed and enforced." CP at 137.

The arbitrator made an interim award of \$10,969,015.00 in current interest and default interest owed on the loan in favor of AURC. The interim award included facts about the loan

¹ This opinion refers to the appellants collectively as Point Ruston, but the arbitrator did not make an award against Rainier Property Services, LLC, and the superior court did not enter judgment against Rainier Property Services, LLC.

No. 56658-3-II

transactions and the parties involved in the dispute. The interim award stated that the arbitrator would issue a final award after making a decision on attorney fees and costs.

In the final award, the arbitrator awarded AURC \$10,969,015.00 in current interest and default interest and \$530,974.57 in attorney fees and costs. The final award also ordered Point Ruston to pay \$74,246.90 in arbitration fees and expenses. The final award incorporated the interim award by reference.

AURC moved for an order confirming the arbitration award in superior court. AURC also filed a motion for presentation of judgment. In its motion for an order confirming the arbitration award, AURC did not include the full text of the interim award or final award, but instead excerpted the totals from the final award.

Point Ruston filed a response brief, stating that the final award resolved all matters in dispute. Point Ruston did not oppose the confirmation of the final award or entry of judgment. Point Ruston only disputed the post-judgment interest rate.

AURC filed a reply brief, arguing, in relevant part, that the superior court should attach both the interim and final arbitration awards as exhibits to its judgment. AURC also argued that entry of judgment would not resolve all matters in the case because the interim award stated that the sole issue before the arbitrator was current interest and default interest, and the arbitration clause of the loan contract reserved certain rights that AURC may exercise outside of arbitration.

Point Ruston filed a sur-reply, arguing that the superior court should not attach the interim or final arbitration award to its judgment and order. Point Ruston also argued again that the arbitration award resolved all claims in the case.

On Friday, September 24, 2021, the superior court held a hearing on AURC's motion for presentation of judgment.² At the hearing, Point Ruston asked the superior court to not attach the interim or final arbitration award to the confirmation order. Point Ruston argued that it was not the superior court's role to approve the reasons for the arbitration award. Point Ruston asserted that attaching the interim or final award to the order would be prejudicial because Point Ruston disagreed with some of the findings in the interim award and the findings were unsupported.

At the conclusion of the hearing, the superior court stated that it intended to attach the interim and final arbitration awards to the order confirming the arbitration award. The superior court did not intend to attach the interim or final awards to the judgment. The superior court stated that it needed some time to prepare the order because it intended to add some language indicating that it is not the superior court's role to agree or disagree with the arbitrator's award.³ The superior court also stated that it would enter the order and judgment the following Monday.

On the following Monday, Point Ruston filed a motion to dismiss the case for mootness. In its motion, Point Ruston stated that it had requested wiring instructions from AURC and intended to immediately pay the full arbitration award to AURC upon receipt of those wiring instructions. Point Ruston argued that because it had "tendered the full amount of the award," the superior court should dismiss the case as moot. CP at 343. Point Ruston also moved for an order shortening time for a hearing on its motion to dismiss.

² The superior court first heard argument on presentation on September 10 but set the case over two weeks and requested additional briefing.

³ The superior court did not include any such language in its order confirming the arbitration award.

The superior court held a hearing on the motion to shorten time. At the hearing on the motion to shorten time, the parties made arguments relating to the underlying motion to dismiss. Point Ruston argued that the superior court should dismiss the case because the dispute had been settled and it had paid the funds. The superior court denied Point Ruston's motion to shorten time.

The parties submitted additional briefing on Point Ruston's motion to dismiss. In its briefing, AURC acknowledged that Point Ruston had paid the full amount of the arbitration award sometime after the superior court's oral ruling where the court stated its intent to attach the interim and final arbitration awards to the order confirming the arbitration award. The superior court denied Point Ruston's motion to dismiss.

The superior court entered an order confirming the arbitration award and attached the interim and final arbitration awards to the order. The court's order stated that the interim and final awards, attached as exhibits, were confirmed.

The superior court also entered judgment against Point Ruston. The judgment listed the amounts from the arbitration awards and stated that the judgment was "the final determination of the rights of the parties in this action." CP at 514. The superior court did not attach the interim or final awards to the judgment. AURC then filed a full satisfaction of judgment.

Point Ruston appeals.

ANALYSIS

A. MOTION TO DISMISS

Point Ruston argues that the superior court erred by entering judgment against Point Ruston instead of dismissing the case with prejudice because the case was moot upon Point Ruston paying the full amount of the arbitration award before judgment was entered. We disagree.

Point Ruston's argument involves issues of statutory interpretation and mootness, both of which are reviewed de novo. *Gronquist v. Dep't of Corr.*, 196 Wn.2d 564, 569, 475 P.3d 497 (2020); *Jametsky v. Olsen*, 179 Wn.2d 756, 761-62, 317 P.3d 1003 (2014).

When performing statutory interpretation, we give effect to a statute's plain meaning as an expression of legislative intent whenever possible. *Jametsky*, 179 Wn.2d at 762. In determining a statute's plain meaning, we consider the context of the entire act as well as any related statutes. *Id.* We do not consider outside sources if a statute is unambiguous. *Id.* A statute is unambiguous if it is only subject to one reasonable interpretation. *Id.* "Interpretation of an unambiguous statute must focus on the plain statutory language, not what seems most reasonable or 'makes sense' from a policy perspective." *Protect the Peninsula's Future v. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 959, 972, 344 P.3d 705 (2015).

After arbitration, the party who receives an award "may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected . . . or is vacated." RCW 7.04A.220. When the word "shall" is used in a statute, it "is presumptively imperative and creates a mandatory duty unless a contrary legislative intent is shown." *Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011).

Here, following arbitration, AURC moved for an order confirming the arbitration award. None of the exceptions in the statute (modification, correction, or vacation) apply in this case. *See* RCW 7.04A.220. And there is no indication that the legislature intended for the "shall" in RCW 7.04A.220 to create anything other than a mandatory duty. Therefore, AURC's motion for an order confirming the award triggered the superior court's mandatory duty to issue an order confirming the arbitration award. *See* RCW 7.04A.220; *Goldmark*, 172 Wn.2d at 575.

Point Ruston argues that *Kenneth W. Brooks Trust v. Pac. Media LLC*, 111 Wn. App. 393,44 P.3d 938 (2002), mandated dismissal of the case instead of entry of an order confirming the award because it had paid the amount of the arbitration award to AURC before the superior court entered its written order confirming the arbitration award and judgment. In *Brooks Trust*, an arbitrator made an award to a party, and the party moved to confirm the arbitration award. 111 Wn. App. at 395. A few days after the party moved to confirm the award but before the superior court had heard or ruled on the motion, the other party paid the full amount of the arbitration award. *Id.* at 395, 399. The superior court denied the motion to confirm the award and instead dismissed the case with prejudice. *Id.* at 395-96. The recipient of the award appealed, arguing that the superior court erred by dismissing the case instead of confirming the award. *Id.* at 398. Division Three of this court held that the superior court did not err, and “a trial court may deny a motion to confirm an arbitration award and dismiss the underlying claim with prejudice when satisfaction of the award has rendered the controversy moot.” *Id.* at 400.

We decline to follow *Brooks Trust*. See *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018) (holding that Court of Appeals divisions are not bound by decisions of other divisions). *Brooks Trust* prioritized policy considerations over the plain language of the statute. 111 Wn. App. at 399-400. In holding that the superior court did not err by dismissing the case, Division Three emphasized judicial economy and the policy goals of using arbitration to avoid the formalities, delay, expense, and vexation of litigation. *Id.* We decline to follow *Brooks Trust* because policy considerations cannot overcome the plain language of a statute. See *Protect the Peninsula’s Future*, 185 Wn. App. at 972. “Interpretation of an unambiguous statute must focus on the plain statutory language, not what seems most reasonable or ‘makes sense’ from a

policy perspective. When the legislature has expressed its intent in the plain language of a statute, we cannot substitute our judgment for the legislature's judgment." *Id.*⁴

On the issue of mootness, "[a] case becomes moot when a court can no longer provide effective relief." *Gronquist*, 196 Wn.2d at 569. Here, AURC requested relief from the superior court in the form of an order confirming the arbitration award. As discussed above, a party that moves for an order confirming an arbitration award is entitled by statute to that confirmation order. *See* RCW 7.04A.220. The superior court below made an oral ruling confirming the arbitration award but had not yet entered the written order. Before the superior court could enter its written order on the Monday following its Friday oral ruling, Point Ruston initiated payment of the amount of the arbitration award over the weekend. However, payment of the arbitration award did not deprive AURC of relief in the form of a written confirmation order, to which AURC is statutorily entitled. Thus, effective relief could still be provided.⁵ This issue was not moot.

Because the plain language of RCW 7.04A.220 required the superior court to confirm the arbitration award once AURC moved for confirmation, and because the case was not moot, the

⁴ Even if the policy considerations in *Brooks Trust* are applied to this case, those same policy considerations support affirming the superior court's confirmation of the arbitration award. Here, AURC brought the motion to confirm the arbitration award, and both parties provided briefing and oral argument on the motion. In its briefing, Point Ruston did not oppose confirmation of the award. Following oral argument, the superior court clearly expressed its intention to confirm the award and attach the interim and final arbitration awards to its order. Only after this clear expression of intent did Point Ruston attempt to pay the award and bring a motion to dismiss. By the time Point Ruston started the payment process, the parties and the superior court had already participated in most of the formalities, delays, expenses, and vexation of litigation.

⁵ We note that this case involves *confirmation* of an arbitration award, not *enforcement* of that award. We do not address the issue of mootness in cases involving enforcement of arbitration awards after a party has paid the amount of that award.

superior court did not err by confirming the arbitration award and entering judgment against Point Ruston instead of dismissing the case with prejudice.⁶

B. ATTACHING INTERIM AND FINAL ARBITRATION AWARDS

Point Ruston takes issue with the superior court's decision to attach the arbitrator's interim and final arbitration awards to the court's order confirming the arbitration award because the interim and final arbitration awards included the arbitrator's reasoning and argues that the superior court erred by attaching the arbitrator's interim and final arbitration awards to the confirmation order. We disagree.

Attaching the arbitrator's interim and final awards merely identified the awards the superior court was confirming, nothing more or less. To the extent Point Ruston wanted to challenge the content of the arbitration awards, it should have done so at arbitration, filed a motion for modification under RCW 7.04A.240, or filed a motion for vacation under RCW 7.04A.230. Any attempt by Point Ruston to contest the arbitration awards under RCW 7.04A.220 fails as that statute is not the avenue the legislature has prescribed for Point Ruston to challenge the content of the awards.

Point Ruston contends that the superior court erred by confirming the reasons for the arbitration awards by attaching the awards to the confirmation order, arguing that, under *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 766 P.2d 1146 (1989), courts cannot confirm an arbitrator's reasons supporting an award. In *Westmark*, the parties agreed to go to arbitration after

⁶ Point Ruston makes several arguments regarding res judicata and collateral estoppel in a hypothetical future case. Because we do not render advisory opinions, we do not address Point Ruston's arguments regarding res judicata and collateral estoppel. See *Gunn v. Riely*, 185 Wn. App. 517, 532, 344 P.3d 1225, review denied, 183 Wn.2d 1004 (2015).

the case was filed, but before trial. 53 Wn. App. at 401. One of the parties sought to vacate the arbitration award, which included “random observations about the case in general and about some of the evidence,” but the superior court denied the motion to vacate and entered an order and judgment confirming the award. *Id.* at 401, 403. On appeal, the appellant challenged the arbitrator’s random observations as findings of fact. *Id.* at 403. The appellate court declined to review the observations as factual findings, stating “[a]n award consists of a statement of the outcome, much as a judgment states the outcome. A statement of reasons for the award is not part of the award.” *Id.* at 403. Contrary to Point Ruston’s argument, *Westmark* does not preclude a superior court from attaching an arbitration award that includes an arbitrator’s reasoning to an order confirming the arbitration award.⁷

The superior court did not err by attaching the arbitrator’s interim and final arbitration awards to the court’s order confirming the arbitration award.

C. ATTORNEY FEES AND COSTS ON APPEAL

Point Ruston and AURC both request attorney fees and costs on appeal. We deny Point Ruston’s request and grant AURC’s request.

RAP 18.1(a) allows for an award attorney fees “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review.” Attorney fees may be awarded when authorized by a contract provision, statute, or recognized ground in equity. *King County v.*

⁷ We note that here, the parties had an underlying loan agreement that included special rules for arbitration. One of those special rules required the arbitrator to provide “a concise written statement setting forth the reasons for the judgment and for the award, if any.” CP at 137. Thus, the underlying agreement between the parties required the arbitrator to include written reasons for the arbitration award.

No. 56658-3-II

Vinci Constr. Grands Projects/Parsons RCI/Frontier-Kemper, JV, 188 Wn.2d 618, 625, 398 P.3d 1093 (2017). The loan agreement between AURC and Point Ruston Phase II, LLC states, “Borrower shall pay all costs and fees associated with the enforcement of Lender’s rights and remedies under the Loan Documents.” CP at 127. AURC is the “Lender” for purposes of the loan agreement.

RAP 18.1(b) requires that a party devote a section of its opening brief to the request for attorney fees or expenses on appeal. Here, Point Ruston only requests attorney fees and costs in its reply brief, not its opening brief. Therefore, we deny Point Ruston’s request for attorney fees and costs on appeal.

AURC requests attorney fees and costs on appeal pursuant to the loan agreement. As discussed above, this appeal concerns AURC’s rights and remedies under the loan agreement; specifically, AURC’s right to have the superior court to confirm an arbitration award. Therefore, this appeal is associated with the enforcement of AURC’s rights and remedies under the loan agreement, and the loan agreement allows AURC to collect attorney fees and costs from this appeal.⁸ However, the loan agreement only lists Point Ruston Phase II, LLC, as the “Borrower.” Therefore, we grant AURC’s attorney fees and costs on appeal, but solely against Point Ruston Phase II, LLC.

⁸ AURC also argues that the arbitrator found that other agreements between the parties also entitled the prevailing party to attorney fees and costs. Because the record on appeal does not contain these other agreements, we do not address whether the other agreements allow an award for attorney fees or costs.

CONCLUSION

We affirm the superior court's order confirming the arbitration award. We also grant AURC's attorney fees and costs on appeal against Point Ruston Phase II, LLC.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Lee, J.

We concur:



Cruiser, A.C.J.



Price, J.

LAW OFFICES OF JACK B. KRONA JR.

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Filing Petition for Review

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