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No. 67306-8

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

REGAL ALUMINUM PRODUCTS, INC., a Washington corporation, and
REGAL ALUMINUM PRODUCTS, INC., a Canadian corporation,

Appellants,

v.

COSTCO WHOLESALE CORPORATION, a Washington corporation,

Respondent.

RESPONDENT'S APPELLATE BRIEF

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I. INTRODUCTION

Regal Aluminum Products, Inc., a Washington corporation, and Regal Aluminum Products, a Canadian corporation (hereinafter “Regal”) lost an arbitration hearing against Costco Wholesale Corporation in October 2010. The arbitrator, retired Judge Robert Alsdorf, found that Regal breached its contractual obligations to Costco when it sold Costco allegedly mislabeled aluminum telescoping ladders. Judge Alsdorf awarded Costco \$854,588.50 in damages, attorneys’ fees, and costs, and denied Regal’s counterclaims for over \$1,000,000.

Regal did not seek reconsideration or clarification from Judge Alsdorf following his ruling. Regal instead brought a motion to vacate arbitration award in King County Superior Court. Regal submitted voluminous evidence in support of its motion, including written testimony from its counsel and hundreds of pages of exhibits, in order to provide the trial court with an “alterative view of the evidence.” Costco moved to strike that extrinsic evidence because Washington law is clear that the court’s scope of review on a motion to vacate is “exceedingly limited,” and may not go beyond the face of the arbitral award. The trial court granted Costco’s motion to strike, denied Regal’s motion to vacate, confirmed the arbitration award, and entered judgment against Regal.

Regal now appeals to this Court for a complete reversal of the trial court and the Arbitrator. Regal's appeal is without merit. The Washington Supreme Court has repeatedly held that when reviewing arbitration awards courts are not permitted to conduct a trial de novo and may not review an arbitrator's decision on the merits. The "additional context and alternative view" evidence Regal used to support its arguments for vacation was properly rejected by the trial court. That evidence is not only disallowed under the law, it is also incomplete and was heavily disputed during the hearing.

Regal's arguments that Judge Alsdorf committed "grave legal errors" are likewise unsupportable: they are based on erroneous "facts" and ignore the express basis for the arbitrator's award – the parties' contract, not the UCC. Finally, the trial court's entry of judgment against Regal should also be affirmed. Regal voluntarily and explicitly asked the trial court to determine which entities were party to the underlying arbitration, and Costco joined. Washington law allows the parties to consent to the trial court's general jurisdiction to determine disputed issues within arbitration confirmation proceedings. Costco respectfully requests that Regal's appeal be wholly denied.

**II. CROSS-STATEMENT OF ISSUES PERTAINING TO
REGAL'S ASSIGNMENTS OF ERROR**

(1) Did the trial court abuse its discretion in granting Costco's motion to strike under CR 12(f) where:

(a) the Washington Supreme Court has repeatedly held that review of arbitral awards is "exceedingly limited" and reviewing courts may consider only the face of the award; and

(b) the trial court's order states that all materials that were "no[t] part of the Arbitration Award" are stricken? (*No.*)

(2) Did the trial court abuse its discretion in denying Regal's motion to vacate arbitration award pursuant to RCW 7.04A.230 where:

(a) the underlying factual premises relied upon by Regal go behind the face of the arbitration award and were heavily disputed; and

(b) the Arbitrator's final award specifically relies on the parties' contract, not the UCC, in granting relief for Costco? (*No.*)

(3) Did the trial court err in entering the Judgment and Order Confirming Arbitration Award against Regal Aluminum Products Inc., a Washington corporation, and Regal Aluminum Products, Inc, a Canadian corporation, where Regal and Costco voluntarily submitted the question to the trial court? (*No.*)

III. STATEMENT OF THE CASE

A. The Contract Dispute Between The Parties Centered On Costco's Purchase Of Aluminum Telescoping Ladders From Regal.

The underlying dispute in this case involves Costco's purchase of aluminum telescoping ladders from Regal in 2006 and 2007. (CP 424-442) (arbitrator's award).¹ Regal advertised and labeled the ladders as being ANSI compliant, but tests on the ladders Regal delivered to Costco (conducted by a third-party laboratory) called into question whether the ladders were properly labeled. (CP 427-28.) Costco sought assurances that the ladders were conforming, but Regal refused cooperation and refused to accept return of the ladders. (CP 428-30.) Costco thereafter "reasonably attempted to dispose of those ladders which it had received but reasonably believed may in fact have been mislabeled or otherwise non-conforming." (CP 430.) Costco mitigated its damages reasonably by "attempting to dispose of the unwanted product in multiple transactions at varying prices." (Id.)

¹ The Arbitrator issued two opinions: (1) Final Reasoned Award On All Substantive Issues, dated November 19, 2010 (CP 424-31); and (2) Final Award, dated January 6, 2011. (CP 433-42.) The Arbitrator's Final Award, which included an award of fees and costs, was reduced to judgment by the trial court. (See id.)

B. Retired Judge Robert Alsdorf Awarded Damages And Attorneys' Fees And Costs To Costco Following A Five-Day Arbitration Hearing.

Costco and Regal submitted their claims to Judge Robert Alsdorf (ret.) during a five-day arbitration hearing in October 2010. (CP 425.) “Both parties were represented by counsel at the Hearing and presented detailed legal argument as well as live testimony, deposition designations, and exhibits.” (Id.) At the conclusion of the hearing, both parties confirmed that all of the evidence the parties “sought to present on the substantive claims, counterclaims and defenses” had been received into evidence. (Id.) Judge Alsdorf weighed all the evidence and made critical determinations of credibility. (CP 434.)

On November 19, 2010, Judge Alsdorf issued an eight-page Final Reasoned Award On All Substantive Issues. (CP 424-31.) He ruled in favor of Costco on its claims and denied Regal’s breach of contract counterclaims. (CP 431.) The award set a schedule for briefing attorneys’ fees and costs to Costco, as the substantially prevailing party. (Id.)

On January 6, 2011, Judge Alsdorf issued the Final Award, which summarized his ruling and granted Costco \$469,584.70 in substantive damages and \$316,813.50 in reasonable attorneys’ fees and costs. (CP 433-34, 441.) (finding and concluding that “[Costco] had and properly exercised its contractual and statutory rights when it conducted additional

product tests, that [Costco] had acted in good faith in demanding certain assurances from [Regal] and that *[Regal] had in response thereto not complied with its own contractual duties*”) (emphasis added). The Final Award also mandated a schedule for the payment of damages and attorneys’ fees to Costco. (Id.) Regal did not file a motion for clarification or reconsideration following Judge Alsdorf’s Final Reasoned Award On All Substantive Issues or his Final Award, as permitted under the Commercial Arbitration Rules of the American Arbitration Association. (CP 443-44, ¶ 3.)

C. Regal Filed A Motion To Vacate Judge Alsdorf’s Arbitration Award In King County Superior Court, Which Was Denied.

Regal’s Motion to Vacate Arbitration Award was the first time Regal sought clarification of or relief from Judge Alsdorf’s arbitration award. (See id.) In February 2011, Regal submitted a 30-page motion, accompanied by a 13-page declaration from its counsel, which attached at least 26 different documents totaling 245 pages. (CP 107-364.) Costco objected to the excessive length of the motion to vacate, and to the improper declaration and exhibits. Regal then asked the trial court to accept its over-length brief. (See CP 547-48.) The trial court denied Regal’s request. (Id.)

At the trial court's instruction, Regal submitted a 13-page "Revised Motion to Vacate Arbitration Award" on May 11, 2011. The parties fully briefed Regal's motion (CP 94-364, 373-384, 399-404, 443-464), as well as Costco's motion to strike the Declaration of Andrea Orth (CP 365-373, 385-399, 421-442.) Costco also submitted a Petition to Confirm Arbitration Award and Entry of Judgment, which Regal opposed. (CP 1-69, 465-498, 499-546.)

The trial court heard oral argument on all of these motions on May 20, 2011. (CP 407.) Following the hearing, the trial court granted Costco's Motion to Strike (CP 405-406), denied Regal's Motion to Vacate Arbitration Award (CP 407-408), confirmed Judge Alsdorf's arbitration awards and entered judgment against Regal. (CP 409-411.)

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion In Granting Costco's Motion To Strike Evidence That Regal Improperly Submitted With Its Motion To Vacate Arbitration Award.

Regal asked the trial court to vacate Judge Alsdorf's arbitration award under RCW 7.04A.230(d), claiming that Judge Alsdorf exceeded his arbitral power due to an "error of law apparent on the face of the award." (CP 99.) In support of the motion, however, Regal's counsel, Andrea Orth, submitted a 13-page declaration, attaching at least 26 different documents totaling 245 pages. (CP 107-364.) The Orth

declaration purports to contain a “summary of Regal’s proof,” intended to “provide the Court with *additional context* and *an alternative view of the evidence* than that which can be derived from the limited evidence discussed in the [arbitrator’s] Award.” (CP 108) (emphasis added).

Costco moved to strike the Declaration of Andrea Orth because, as Orth admits, the testimony and attached exhibits are not part of the “limited evidence discussed in the [arbitrator’s] Award.” (Id.) Washington law is clear that courts can review an alleged error on a motion to vacate “*only if it appears on the face of the award.*” E.g., Federated Services Ins. Co. v. Estate of Norberg, 101 Wn. App. 119, 124, 4 P.3d 844 (2000) (emphasis added). Thus, the only evidence properly before the trial court on Regal’s motion to vacate was the Arbitrator’s Final Award. E.g., id.; Westmark Properties Inc. v. McGuire, 53 Wn. App. 400, 403, 766 P.2d 1146 (1989). The trial court, therefore, did not abuse its discretion in granting Costco’s motion to strike pursuant to CR 12(f). See, e.g., Newman v. Veterinary Bd. of Governors, 156 Wn. App. 132, 150, 231 P.3d 840 (2010) (trial court’s ruling on a motion to strike is reviewed for abuse of discretion; declaration properly excluded).

1. Courts May Not Look Behind The Face Of The Arbitration Award To Extrinsic Evidence On A Motion To Vacate.

The Washington Supreme Court has repeatedly held that “the facial legal error standard is a very narrow ground for vacating an arbitral award.” Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 239, 236 P.3d 182 (2010); see also Davidson v. Hensen, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998) (holding judicial review of arbitration awards is “exceedingly limited”). Courts are not to “look to the merits of the case, and *they do not reexamine evidence.*” Broom, 169 Wn.2d at 239 (emphasis added). The Court has considered “arguments to the contrary,” and held that “the facial legal error standard does not permit courts to conduct a trial de novo when reviewing an arbitration award.” Broom, 169 Wn.2d at 239; see also Boyd v. Davis, 127 Wn.2d 256, 261, 897 P.2d 1239 (1995) (same).

Despite these unequivocal holdings from the Washington Supreme Court, Regal claims that the case law “does not prohibit review of material undisputed facts, which were not ‘weighed’ or ‘decided’ by the arbitrator.” (Regal Brief 45.) The cases relied upon by Regal, Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 654 P.2d 712 (1982) and Federated Services Ins. Co. v. Estate of Norberg, 101 Wn. App. 119, 4 P.3d 844 (2000), do not change the law as it has been consistently outlined by Washington’s

Supreme Court and courts of appeal. (See id.) Neither case states, or otherwise stands for the principle, that courts are free to look behind the face of the arbitration award by considering “undisputed facts” allegedly relevant to legal issues in the arbitration.

The Washington Supreme Court has, in fact, explicitly rejected the characterization of Agnew advocated by Regal. See Boyd v. Davis, 127 Wn.2d 256, 261, 897 P.2d 1239 (1995).² As the Boyd Court explained, the trial court in Agnew considered an attorney’s fees contract provision ***only “in order to ascertain the law governing the disputed point.”*** Boyd, 127 Wn.2d at 260-61 (emphasis added). The Agnew court did ***not*** review “undisputed evidence” considered by the arbitration panel in order to second guess the panel’s decision, as Regal argues. (See Regal Brief 45-46.) The Agnew court specifically noted that the “question of whether or not attorneys’ fees should be awarded to the prevailing party was not an issue submitted to the tribunal for arbitration.” Agnew, 33 Wn. App. at 288.

The Washington Supreme Court’s decision in Boyd explains this distinction well. In Boyd, one party sought to reverse an arbitral award by

² Costco relied on Boyd v. Davis, 127 Wn.2d 256, 897 P.2d 1239 (1995) in its Motion to Strike (CP 367-369), Reply in Support of Motion to Strike (CP 395-396), and Opposition to Revised Motion to Vacate (CP 376-377). Regal failed to address this case on appeal or in any of its briefing to the trial court.

inviting the trial court to review the parties' underlying contracts and weigh their effect under Washington law. Boyd, 127 Wn.2d at 259. That party appears to have argued that, under Washington law, the parties' separate contracts should have been interpreted as a single, integrated agreement. Id. The trial court considered the five contract documents, applied the law, and found that the arbitration panel erred by failing to treat the separate contracts as a single agreement. Id.

The Washington Supreme Court *reversed* the trial court's decision, explaining that the trial court had impermissibly reviewed underlying evidence:

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. Accordingly, the court cannot search the four corners of the contract to discern the parties' intent, as the trial did court did in this case.

In the present case, the *face of the arbitral award alone* does not exhibit an erroneous rule of law or a mistaken application of law. Therefore, no support exists for Petitioner's position that the arbitrator exceeded his power within the meaning of RCW 7.04.160(4) when he rendered the award. Thus, that award cannot be disturbed.

Id. at 260 (emphasis added); see also Davidson, 85 Wn. App. at 192 (holding that the trial court was not permitted to look behind the award to

determine the legality of the parties' contract); Beroth v. Apollo College, Inc., 135 Wn. App. 551, 559, 145 P.3d 386 (2006) (noting that “the court considers only the face of the award”); Westmark Properties, Inc. v. McGuire, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989) (the moving party’s submission of all hearing exhibits, [and] a four-volume report of proceedings ...reflects a misconception of the nature of arbitration and the role of the court in the process”).

Like Agnew, the Federated Services decision (relied upon by Regal) was also explicitly made “without resort to the evidence that was before the arbitrators and *without second-guessing their application of the law to the facts.*” Federated Services, 101 Wn. App. at 125 (focusing its analysis, not on factual disputes, but on statutory interpretation of the Survival of Actions statute) (emphasis added).³ The Federated Services court explained that, under this facial legal error standard, “arbitrators can (unless otherwise directed) make their award more or less susceptible to judicial review, depending on the level of detail in the statement of the

³ In briefing to the trial court, Regal attempted to bootstrap its legal theory into Washington law based on one word in the Federated Services decision: “ordinarily.” (E.g., CP 386, citing Federated Services, 101 Wn. App. at 123.) Regal reads the Federated Services case to “imply[] that it may be appropriate” in some cases to consider evidence weighed by the arbitrator. (CP 386.) Costco found no cases that support Regal’s argument on this point, but dozens of Washington appellate decisions that contradict it.

award.” Id. (stating that if the arbitrator had awarded damages as a lump sum, rather than itemizing and listing lost inheritance damages, the award may not have been vacated).

Washington law is clear: Re-evaluating evidence or entertaining an “alternative view” of the evidence, as Regal invites this Court to do, is the equivalent of conducting a trial de novo. E.g., Broom, 169 Wn.2d at 239. Regal’s request that this Court review the underlying evidence should be rejected. The facial legal error, if any, must be recognizable from the “language of the award.” E.g., Federated Services, 101 Wn. App. at 124. The voluminous declaration and exhibits submitted by Regal were properly stricken.

2. Regal’s Attempt To Present Extrinsic Evidence Is Also Untenable Because, Among Other Problems, The Evidence Regal Relies Upon Is *Not* “Undisputed.”

Even if it were supported by law – its not – Regal’s argument that Washington courts may consider “material undisputed facts” is unworkable both in theory and practice. (Regal Brief 46.)

As a preliminary matter, Regal has failed to articulate its theory regarding the admissibility of “material undisputed facts” in a clear, consistent manner. In one place, Regal argues that the standard of review for arbitration awards “does not prohibit courts from reviewing or relying upon undisputed evidence *not* cited in the award.” (Regal Brief 21)

(emphasis added). In other places, however, Regal argues that the extrinsic evidence it submits for consideration is permissible because it is “referenced or incorporated in the Award.” (Regal Brief 21; see also id. at 41 (claiming that the “various factual references” in Regal’s briefing and the supporting declaration and exhibits “were before Judge Alsdorf” and “were part of the arbitration award”)). But none of the extrinsic evidence offered by Regal was expressly incorporated by reference or otherwise cited in Judge Alsdorf’s award. (See Regal Brief 10-15, citing to the Orth declaration or exhibits thereto and then arguing an extrapolated connection between the outside “fact” and a generic statement in the arbitral award). Regal’s brief fails to articulate whether Regal believes that it can offer “undisputed” extrinsic evidence that was *not* considered by the arbitrator, or whether it can offer “undisputed” extrinsic evidence that *was* considered by the arbitrator. Either way, however, Regal’s argument is unsupported by Washington law. E.g., Boyd, 127 Wn.2d at 259.

Notwithstanding the inconsistent approach advocated by Regal, the allegedly “undisputed and legally dispositive facts” that Regal premises its arguments upon were heavily disputed during the arbitration. (Regal Brief 10.) The “facts” now offered by Regal were first submitted by Regal during the arbitration hearing, were adjudicated by the arbitrator, and *go directly to the merits of the case*. For purposes of brevity only, Costco

focuses here on two essential factual premises that Regal repeatedly relies upon in seeking to vacate Judge Alsdorf's arbitral award:

(1) Regal claims that "it cannot be disputed that Costco breached the parties' agreements by failing to timely pay for ladders received prior to demanding adequate assurances." (Regal Brief 14.) Regal's reasoning for why Costco was "undisputedly" in breach is, unsurprisingly, entirely one-sided. But, the existence of unpaid invoices does not mean that Costco breached the parties' agreements. (See id.) Judge Alsdorf heard five days of testimony and other evidence relevant to Regal's counterclaim that Costco was in breach of the parties' agreements. (CP 425.) Judge Alsdorf considered, among other evidence, a contract provision that entitled Costco to place Regal's accounts on hold. Judge Alsdorf heard and weighed all the evidence, including the lack of credibility of Regal's witnesses. (E.g., CP 433, 441.) He specifically held that Costco *did not* breach the agreements when he denied Regal's counterclaims. (CP 434 (holding that Regal "failed to prove either that [Costco] breached its contractual duties or violated any duty of good faith and fair dealing.")).

(2) Regal claims it "was undisputed that Costco made its first alleged demand for adequate assurances on March 20, 2007 (after Regal completed its performance on most if not all of the purchase orders)."

(Regal Brief 12-13.) This premise is error, both in detail and in whole. In detail, the March 20, 2007 date asserted by Regal is not “uncontroverted.” Costco’s pre-hearing arbitration brief, which Regal cites to, is not evidence. (See id.) During the week-long hearing, the Arbitrator heard evidence presented through the testimony of Costco and Regal witnesses, which established multiple requests for assurances dating from early 2007 and even before, during initial product testing.

Regardless of when the assurances were sought, Judge Alsdorf specifically rejected Regal’s claim that it had fully performed under the parties’ contract. He explained that Regal’s representations “as to the quality of its ladders were central to the parties’ own negotiations and, ultimately, were material to Regal’s *contractual obligations* as a vendor.” (CP 427) (emphasis added). Thus, when Regal failed to provide assurances to Costco about the ladders’ quality, Judge Alsdorf held that Regal failed to fully perform under the contract. (CP 434 (holding that Regal “had ... not complied with its own contractual duties”); see also CP 426-27 (quoting ¶ 20 of the parties’ agreement, stating Costco’s right to “*at any time*, reject (or revoke acceptance) ... of any Merchandise that are *non-conforming ... or that allegedly contain any defect* or inadequate warnings, *labeling*, instructions, or safety guards ...”) (emphasis added)). Judge Alsdorf’s findings, contained on the face of the award itself, directly

contradict Regal's assertion that it had (ever) fully performed its own duties under the contract.

Finally, the "material undisputed facts" offered by Regal are not only in dispute, they are incomplete. Regal is not permitted to unilaterally pick and choose extrinsic evidence, behind the face of the Arbitrator's award, to craft its "alternative view of the evidence" and to contend that the Arbitrator erred. Because Costco cannot feasibly address the inaccuracy of each "undisputed fact" offered by Regal in its brief or in the Revised Declaration of Andrea Orth, it was proper for the trial court to strike all evidence that was not part of Judge Alsdorf's award.⁴ Any other result would require Costco to completely re-litigate the merits of this case in order to debunk the "alternative view" of the evidence offered by Regal.

3. The Court's Order Properly Excludes All Materials That Were Not Part Of The Arbitrator's Award.

Regal claims that there "simply is no way to tell exactly what the trial court attempted to strike and therefore the ruling is manifestly

⁴ On page 44 of Regal's brief, it claims that only three facts are pertinent to resolving its claims that the arbitrator committed a facial legal error, citing to documents relating to the date of ladder shipments, a date in Costco's trial brief, and demonstrative exhibits Costco used during trial. On page 46, however, Regal inconsistently claims that the trial court was at least "permitted to review the parties' Import Vendor Agreement and its undisputed payment provisions, and enforce the same" But later Regal again inconsistently states that the Court should consider all of the evidence submitted in its brief and in the Declaration of Andrea Orth. (Regal Brief 47.)

unreasonable.” (Regal Brief 43.) Regal’s objection is without merit. The trial court’s order states that all materials that were “no[t] part of the Arbitration Award” are stricken. (CP 405.) As Washington case law has repeatedly explained, this means anything other than the “language of the award.” E.g., Federated Services, 101 Wn. App. at 124. Costco therefore respectfully requests that this Court affirm the trial court’s order granting Costco’s motion to strike.

B. The Trial Court Did Not Abuse Its Discretion In Denying Regal’s Motion To Vacate Arbitration Award.

Regal’s opening brief contains a tortured interpretation of Judge Alsdorf’s arbitration award intended to show that Judge Alsdorf made “grave legal errors”⁵ in ruling for Costco. (E.g., Regal Brief 16 (counting the number of times the Arbitrator used the word “assurances” as evidence of reference to the UCC), 17 (purporting to deconstruct a “compound and complex sentence” used by the Arbitrator), 18 (arguing that if that sentence is read “properly so that the rights are linked based on their order, it is clear” that the Arbitrator was not referring to the contract when he used the word “assurances”). Regal’s near “line-by-line almost word-by-word analysis” of the arbitrator’s decision, however, reflects a fundamental “misconception of the nature of arbitration and the role of the

⁵ Regal Brief 1.

court in the process.” Westmark Properties, Inc. v. McGuire, 53 Wn. App. at 402.

The alleged legal error must be easily found on the face of the award, not through a convoluted argument of the underlying evidence and the sentence structure found in the arbitral award. E.g., id. As the Federated Services court explained, the “error should be recognizable from the language of the award, as, for instance, where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages.” 101 Wn. App. at 124.

The “grave legal errors” alleged by Regal are not obvious from the face of Judge Alsdorf’s award, as evidenced by Regal’s confusing interpretation of voluminous extrinsic evidence and the “language and structure of the award.” (Regal Brief 15.) Even if this kind of inquiry was permitted under the law (its not), the underlying factual and legal claims made by Regal are erroneous. As explained in Section IV.A.2, above, the essential factual premises argued by Regal are both legally improper and factually disputed. Likewise, the essential legal premises advocated by Regal are mere assumptions, unsupported by the face of the award and unsupported by Washington law. The trial court’s denial of Regal’s motion to vacate should therefore be affirmed.

1. The Arbitrator Does Not Refer Or Rely Upon RCW 62A.2-609 Or RCW 62A.2-711 In His Award.

Regal contends that Judge Alsdorf “exclusively based” his allegedly erroneous decision on RCW 62A.2-609 and RCW 62A.2-711, in rendering an award in favor of Costco. (Regal Brief 15, 19-33.) Contrary to Regal’s assertions, Judge Alsdorf never refers to RCW 62A.2-609 or RCW 62A.2-711 in the award, and certainly did not cite those provisions as a basis for his decision in favor of Costco.

Instead of relying upon provisions of the UCC, the Arbitrator cited those portions of the parties’ contract that were pertinent to the dispute. (See, e.g., CP 426-27) (quoting the Import Vendor Agreement ¶ 11 (regarding quality of merchandise, product testing, and inspection) and ¶ 20 (regarding rejection of non-conforming merchandise, including Costco’s right to “at any time, reject (or revoke acceptance) ... any Merchandise that are non-conforming ... or that allegedly contain any defect or inadequate warnings, labeling, instructions, or safety guards...)). In the Final Award, the Arbitrator also specifically referenced the contract, not the UCC, in holding that Costco was entitled to relief:

[Costco] having thereby prevailed in proving that **Regal breached its contractual duties**, and [Regal] having failed to prove either that [Costco] had breached its contractual duties or violated any duty of good faith and fair dealing, I

awarded damages to [Costco], dismissed [Regal's] counterclaim, and directed that the parties thereafter brief all issues relating to the award of costs and fees to [Costco] as the prevailing party.

(Id. CP 434) (emphasis added). Regal failed to provide the Court with this portion of the Arbitrator's Award in its opening brief.

To entertain Regal's appeal, this Court would have to join Regal in ignoring the face of the arbitration award, and instead speculate about how Judge Alsdorf might or might not have considered or applied various provisions of the UCC. Engaging in such speculation is error under Washington law. E.g., Broom, 169 Wn.2d at 239.

2. Regal's Argument Ignores The Express Basis For The Arbitrator's Award: The Parties' Contract.

As explained above, the arbitration award makes clear that Judge Alsdorf relied on the parties' contract in ruling for Costco, not the UCC, as Regal alleges. (E.g., CP 434.) In reality, Judge Alsdorf mentions the UCC only generally, and only once in the entirety of his award – and it is not when summarizing the basis for his ruling. (CP 427.) Regal argues that the Arbitrator's generic references to “assurances” or “adequate assurances” should be translated by the Court into specific references to

the UCC.⁶ But, the terms of the parties' contract gave Costco the right to seek assurances that the goods were conforming, to re-test the product, and reject or revoke acceptance of the allegedly mislabeled product, *at any time*. (CP 426-27.)

The Arbitrator is entitled to rely on the parties' contract without reference to the UCC. Washington's UCC allows parties to freely contract for remedies and other terms – even if those terms are arguably at odds with the UCC's requirements. RCW 62A.1-102(3) (“The effect of provisions of this Title may be varied by agreement”) Put simply, even if RCW 62A.2-609 and RCW 62A.2-711 were at odds with the terms of the parties' agreement (they are not), it would be error under RCW 62A.1-102(3) to *not* enforce the specific terms of the parties' contract. *The parties' contract controls over the more general terms of the UCC.* *Id.* Thus, as Judge Alsdorf ruled, the terms of the parties' agreement govern this dispute.

⁶ Regal also suggests that the Court should refer to Costco's underlying arbitration pleadings, which (among other theories) refer to RCW 62A.2-609, to confirm that the Arbitrator relied upon the UCC in his decision. (E.g., Regal Brief 15, n.7.) This suggestion is an error of law – the Court's review on a motion to vacate is “exceedingly limited,” and may not go beyond the face of the arbitration award. Davidson v. Hensen, 135 Wn.2d at 119.

3. Even If The Arbitrator Had Relied On The UCC – He Did Not – Regal’s UCC Analysis Is Flawed.

This Court need not evaluate the merits of Regal’s UCC analysis. As explained above, Regal’s arguments are fatally flawed for reaching behind the face of the arbitration award, including Regal’s erroneous assumption that the Arbitrator relied upon the UCC in ruling for Costco. Nevertheless, to be thorough, Costco addresses Regal’s analysis of RCW 62A.2-609 and RCW 62A.2-711.

First, Regal cites *no* Washington authority applying RCW 62A.2-609 or RCW 62A.2-711(3), instead relying entirely on out-of-state cases which were not binding on the trial court. (See Regal Brief 23-26.) *Second*, even these out-of-state cases cited by Regal do not support Regal’s arguments. The cases premise their holdings on facts inapposite to this case. See Magic Valley Foods, Inc. v. Sun Valley Potatoes, Inc., 134 Idaho 785, 10 P.3d 734 (2000); Sumner v. Fel-Air, Inc., 680 P.2d 1109 (Alaska 1984) (Regal Brief 23-26).

In Magic Valley Foods, the court found it improper for one party to seek assurances when the other party had already fully performed. Magic Valley Foods, Inc., 10 P.3d at 739. Here, *Judge Alsdorf specifically found the contrary to be true – that Regal never did complete its contractual performance.* (E.g., CP 427 (Regal’s representations

about ladder quality material to Regal’s contractual obligations); CP 434 (Regal failed to fully perform under contract by failing to provide assurances); CP 427, 430 (noting that Costco sought assurances regarding ladders not yet delivered)).

Similarly, the Sumner court’s decision is premised on the fact that the party seeking assurance was in breach at the time the assurances were sought. Sumner, 680 P.2d at 1116. Costco did not breach its contract with Regal. *Judge Alsdorf specifically rejected Regal’s breach of contract counterclaim.* (CP 431 (denying Regal’s counterclaims); CP 434 (holding that Regal “failed to prove either that [Costco] breached its contractual duties or violated any duty of good faith and fair dealing”)). Regal’s suggestion that breach can be determined from limited facts – which only Regal has provided – is erroneous. The Arbitrator heard a week of evidence regarding Regal’s breach of contract claims. It would be error to now re-examine the merits of this case, particularly with the one-sided “alternative view of the evidence” offered through the testimony of Regal’s legal counsel.⁷ E.g., Broom, 169 Wn.2d at 239.

Third, with respect to RCW 62A.2-711, the express terms of the contract between Costco and Regal gave Costco the specific right to re-

⁷ CP 108, ¶ 8.

test and reject or revoke acceptance of the ladders *at any time*, even if they were only *allegedly* mislabeled. (CP 426-27.)

Regal cites no Washington authority that supports its interpretation of the UCC. The out-of-state cases cited by Regal are not applicable to the facts of this case, as they have been found by Judge Alsdorf in the arbitration award. Regal not only ignores the parties' contract, it ignores the fundamental mandates of RCW 62A.1-106 that remedies be liberally administered to put an aggrieved party "in as good a position as if the other party had fully performed." The trial court's order denying Regal's motion to vacate Judge Alsdorf's arbitration award should be affirmed.

C. The Trial Court Properly Entered Judgment Against Regal Aluminum Products, Inc. In Canada And Washington.

1. Regal Voluntarily Presented Evidence And Sought Relief From The Trial Court On The Issue.

In March 2011, Costco sought confirmation of Judge Alsdorf's "Final Award" pursuant to RCW 7.04A.220. (CP 1-5.) Costco submitted a proposed Judgment and Order Confirming Arbitration Award with its opening brief, which named Regal Aluminum Products, Inc., a Washington entity and a Canadian entity, in the caption. (CP 418-420.)

Regal objected to the petition's and proposed judgment's caption, arguing that the "sole respondent in the underlying arbitration" was "Regal Aluminum Products, Inc., a Washington corporation." (CP 54.) Regal

asked the Court to “deny Costco’s attempt to confirm an arbitration award and obtain a judgment against the Canadian corporation bearing the name Regal Aluminum Products, Inc.” (Id.) Regal proceeded to present the trial court with documentary and testimonial evidence purporting to show that the respondent in the underlying arbitration was “Regal Aluminum Products, Inc., a Washington corporation.” (CP 6-53.) In response, Costco submitted rebuttal evidence demonstrating that judgment should be entered against Regal Aluminum Products, Inc, an entity in Washington and an entity in Canada. (CP 65-69, 499-546.)

Neither Regal nor Costco objected to the trial court’s review of this extrinsic evidence; instead, both parties consented to have the trial court consider and determine the identification of the underlying parties to the arbitration. See Sherry v. Financial Indemnity Co., 160 Wn.2d 611, 617-18, 160 P.3d 31 (2007) (clarifying Price v. Farmers Insurance Co., 133 Wn.2d 490, 946 P.2d 388 (1997) (relied upon by Regal)). Where parties voluntarily submit an issue to the trial court, notwithstanding the court’s limited statutory jurisdiction in reviewing and confirming arbitration awards, the trial court may properly review the evidence submitted by both parties and decide the issue. Id.

Regal now argues, for the first time on appeal, that the trial court “exceeded its very limited authority and jurisdiction by entering judgment

against two Regal entities.” (Regal Brief 35.)⁸ But Regal cannot have it both ways. Regal previously invoked the trial court’s jurisdiction, seeking a ruling that only “Regal Washington” was subject to judgment. Having lost that issue, Regal now argues on appeal that the trial court did not have the authority to grant the relief Regal previously sought, but was denied. When Regal affirmatively, and voluntarily, submitted to the Court the determination of which entities were part of the underlying arbitration, Regal waived any argument that the court should not consider the issue in a confirmation proceeding. Sherry, 160 Wn.2d at 617-18.

2. The Trial Court Did Not Err In Finding That Regal Aluminum Products, Inc. In Washington *And* Canada Were Part Of The Underlying Arbitration.

a. Regal’s Own Pleadings Show That Regal Aluminum Products, Inc., A Canadian Corporation, Appeared And Participated In The Arbitration.

Costco entered into a contract with “Regal Aluminum Products, Inc.” in February 2006. (CP 490.) Costco filed a Demand for Arbitration (“Demand”) against that entity for breach of contract. (CP 465 ¶ 2) Costco’s Demand listed “Regal Aluminum Products, Inc.” as the Respondent, with an address in Delta, British Columbia. (CP 502.)

⁸ In direct contrast to the rest of its brief, Regal claims, for the sole purpose of vacating the judgment, that the trial court erred by considering evidence outside the face of the award. (Id. at 36.)

Costco listed Regal's outside counsel, "C. Roy Henning, Q.C." in Edmonton, Alberta, as Regal's representative. (Id., see also 499, ¶¶ 2-3.)

After filing its Demand with the American Arbitration Association, Costco's counsel served a copy on Mr. Henning in Canada. (CP 500 ¶ 4, 540.) Costco also served Regal's registered agent in Washington with a copy of the Demand. (CP 7 ¶ 4.) Costco's Demand alleged, on information and belief, that Regal was a "Washington corporation headquartered in British Columbia, Canada." (CP 500 ¶ 2, 502.)

In its Answering Statement and Counterclaim, Regal Aluminum Products, Inc. stated:

COMES NOW, respondent and counterclaimant Regal Aluminum Products, Inc. ("Regal") and alleges and states as follows:

...
2. Regal is a corporation incorporated under the laws of the Province of Alberta, Canada which is registered to carry on business in the Province of British Columbia, Canada headquartered in British Columbia, Canada.

(CP 500 ¶ 5, 542-548) (emphasis added). This responsive paragraph fell under the heading of "Parties." (Id.) Respondent identified itself as "Regal Aluminum Products, Inc. ('Regal')," and then defined Respondent "Regal" as an Alberta corporation headquartered in British Columbia. (Id.) At no point in its Answering Statement, or in any pleading thereafter,

did Respondent identify itself as a Washington corporation or assert that it was not party to the contract with Costco. In fact, contrary to the allegations Regal now makes, Respondent admitted that *it*, not some other entity, signed the contracts with Costco. (CP 500 ¶ 5, 544.)

Respondent, which identified *itself* as a Canadian corporation, also *admitted* that the American Arbitration Association had “jurisdiction over this arbitration by virtue of contractual provisions between the parties, including the Import Vendor Agreement.”⁹ (CP 500 ¶5, 542.) Regal further admitted that it had contracted with Costco when it availed *itself* of jurisdiction by asserting counterclaims, alleging that:

Costco had breached its contract with Regal for the purchase of the subject ladders and this breach has damaged Regal in an amount to be proven at hearing but believed to exceed \$1,049,328.

(CP 500 ¶ 5, 544) (emphasis added). Regal sought an award of attorneys’ fees and costs based on the parties’ agreement. (CP 545.)

⁹ In its Answering Statement, Regal failed to raise any defense based on improper service, improper party, or failure to join a necessary party. Regal also did not state that the Regal Aluminum Products, Inc. listed by the Washington Secretary of State as doing business in Washington is not part of the same Regal Aluminum Products, Inc. incorporated under the laws of Alberta Canada that answered, admitted jurisdiction, and asserted counterclaims. (See CP 500 ¶ 5, 542.) The owner of both entities, Norm Liefke, candidly testified as his deposition that the entities were “the same” and he “[didn’t] know” which entity signed the contract with Costco. (CP 51.)

Thomas N. Bucknell, of Bucknell Stehlik Sato & Stubner, LLP, signed the Answering Statement as “Attorneys for Regal Aluminum Products, Inc.” (CP 545.) *No mention was made in Regal’s Answering Statement of “Regal Aluminum Products, Inc., a Washington corporation,”* which Bucknell Stehlik now claims is the “only” party it represented throughout the entire arbitration. (CP 56.) In fact, Bucknell Stehlik had never before signed its pleadings or otherwise referred to its client as “Regal Aluminum Products, Inc., a Washington corporation.” (CP 500 ¶ 6; compare CP 6, March 21, 2011 Orth Decl. Supporting Opposition to Petition to Confirm Award (“I am one of the attorneys that represented the Respondent, Regal Aluminum Products, Inc., a Washington corporation, in the underlying arbitration”), with CP 107, May 11, 2011 Orth Decl. Supporting Motion to Vacate February 8, 2011 Orth Decl. in Support of Motion to Vacate Arbitration Award (“I am one of the attorneys that represented Regal Aluminum Products, Inc. in the above-referenced arbitration.”)).

b. Washington Law Supports Entry Of Judgment Against Both Regal Entities.

First, Costco is entitled to a judgment against Regal Aluminum Products, Inc., the company “incorporated under the laws of the Province of Alberta, Canada,” as defined in the Answering Statement. This entity

appeared in the arbitration, admitted jurisdiction (thereby waiving service, if any issues had existed – but they did not),¹⁰ admitted signing contracts with Costco, and asserted counterclaims based upon its contracts with Costco. (See CP 542-46, 425 (noting that “[a]ll of the claims, counterclaims, and defenses were voluntarily submitted by the parties to this Arbitrator without challenge to the arbitrability thereof”).

Second, Costco is entitled to a judgment against Regal Aluminum Products, Inc., a Washington corporation, because that entity was properly served with the Demand for Arbitration but Regal made an unreserved admission of jurisdiction in its Answering Statement. (*Id.*) Regal did not assert any defense of improper service, improper party, or failure to join an indispensable party. (*Id.*) Regal did not distinguish the Regal Aluminum Products, Inc. entities, only now styled as “Regal Canada” and “Regal Washington,” for purposes of liability to Costco, when asserting over \$1 million in counterclaims, or in any other manner. As a

¹⁰ Regal argues that, under the Washington Arbitration Act, Costco was obligated to provide “notice to Regal Canada via ‘service as authorized for the initiation of a civil action’ or ‘by mail certified or registered, return receipt requested and obtained.’” (Regal Brief 39, citing to testimony of Andrea Orth, although she now claims that she did not represent “Regal Canada” at that time.) Costco was not required to follow the notice procedures set out in RCW 7.04A.090(1) because the parties agreed to be bound instead by the “Commercial Arbitration Rules of the American Arbitration Association.” (CP 495-96 ¶ 20.) Costco satisfied those requirements.

consequence of Regal's *unreserved* admission of liability, *both* Regal Aluminum Products, Inc. entities are jointly and severally liable.

Regal's argument that "Regal Washington" was the Respondent in the underlying arbitration also raises serious questions about Regal's conduct in the underlying arbitration. If Regal's argument was to be believed, then "Regal Washington" misrepresented itself as "a corporation under the laws of the Province of Alberta," defended breach of contract claims on contracts it did not sign, and brought breach of contract counterclaims, including more than \$1 million in claimed damages, on contracts it did not have with Costco.¹¹ (Regal Brief 38-41.) In addition to contradicting the arbitration pleadings, this argument simply does not make sense, and should be rejected. Costco is entitled to judgment against Regal Aluminum Products, Inc., in both Canada and Washington. The trial court's judgment should be affirmed.

D. The Remedy For Facial Error Is Remand To The Arbitrator, But No Error Occurred Here.

Regal's appeal is without merit and should be denied for all the reasons outlined above. Even assuming, *arguendo*, that Regal was entitled

¹¹ Regal now *implies* in its opening brief that the Canadian corporation's claims were assigned to the Washington corporation. (Regal Brief 40.) But Regal submitted no evidence of an assignment when it asked the trial court to rule that Regal Aluminum Products, Inc., a Washington corporation, was the "real Regal" participating in the underlying arbitration.

to relief, the remedy is not for the trial court to simply “reverse” the arbitrator. (Regal Brief 50.) Where the reviewing court suspects an error of law has been made, the remedy is for the trial court to first seek clarification from the arbitrator. Tolson v. Allstate Ins. Co., 108 Wn. App. 495, 499, 32 P.3d 289 (2001). Based on the arbitrator’s response, the award may be affirmed or remanded for further proceedings to the same arbitrator. Id.; see also Agnew, 33 Wn. App. at 290.

The matter should be referred back to the same arbitrator, unless “the grounds for vacating the award are more serious, such as obvious misconduct to the prejudice of a party.” Id.; see also Lindon Commodities, Inc. v. Bambino Bean Co., Inc., 57 Wn. App. 813, 816, 790 P.2d 228 (1990) (denying request for rehearing before a new arbitrator). Those standards have certainly not been met in this case. If the award is vacated – it should not be – the matter should be remanded back to Ret. Judge Robert Alsdorf.

V. CONCLUSION

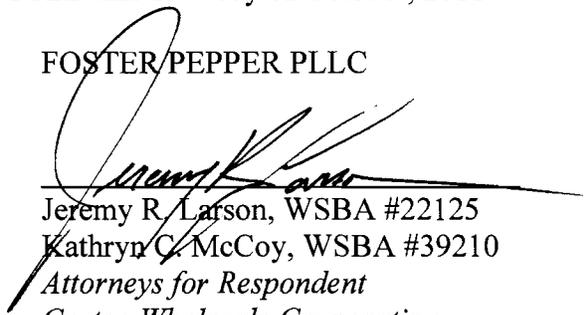
Regal’s requested relief makes clear that Regal is not seeking to remedy a legal error – which it could have done by submitting a motion for clarification or reconsideration to Judge Alsdorf. Regal is instead simply forum shopping, hoping to get a second bite at the apple before a

new decision-maker. Regal is not entitled to have the merits of its case re-tried either before this Court, the trial, court or a new arbitrator.

Costco Wholesale Corporation respectfully requests this Court affirm the trial court's ruling excluding the Declaration of Andrea Orth, confirming Judge Alsdorf's arbitration award in favor of Costco, and entering judgment against Regal Aluminum Products, Inc. Costco further requests an award of its fees incurred in responding to this appeal.

RESPECTFULLY SUBMITTED this 19th day of October, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 19, 2011, I caused to be served true and accurate copies of:

1. Respondent's Appellate Brief; and
2. this Certificate of Service.

upon the following individuals *via* legal messenger:

Mr. Thomas Bucknell, WSBA #1587
Ms. Andrea D. Orth, WSBA #24355
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED on October 19, 2011, at Seattle, Washington.



Lisa Cachopo

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