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No. 71807-0-1

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

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

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

v.

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

APPELLANTS' BRIEF

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APPELLANTS' BRIEF
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I. INTRODUCTION

This is a de novo review of the trial court's order denying Appellants Unity Electric Construction, Inc. and Brian W. Hicks's (together, "Hicks") motion to vacate and confirming the arbitration award issued by Arbitrator Gerard Shellan (the "Award") in favor of Respondents Unity Electric Investors LLC, Unity Electric LP, John C. Graham, and Lisa Graham (together, "Graham"). The Award should be vacated as the product of undue means, arbitrator misconduct, manifest disregard of the law, and other defects inconsistent with a fair dispute resolution process. The defects in process were material and several, and included Graham's *secret, late, ex parte* submission of *false* evidence, and the decision-maker's consideration of such evidence and other *ex parte* statements, which Hicks was never allowed to rebut and discovered only after a decision had been issued against him.

The limited opportunity afforded under the law for judicial review of arbitrations is designed for cases just like this one – not to reconsider the merits of the underlying dispute but to require intervention in the unusual circumstance where the basic safeguards of fairness and due process have been violated. Here, where the arbitration involved secret, false evidence Hicks was never allowed to rebut, among other irregularities, the record readily reveals that Hicks was deprived of a fair proceeding. Under applicable law, the Award should be vacated.

This case arises from Hicks's 2009 sale of his electrical contracting company, Unity Electric (the "Company"), to Graham. More

specifically, it arises from Hicks's entitlement to an additional \$650,000+ payment from Graham based on the Company's performance through June 2010 (the "earn out" payment), which Graham initially and repeatedly agreed to pay before renegeing. The Award essentially held that Graham was not required to pay the earn out payment to Hicks. This appeal does not concern the *merits* of this dispute as to whether Hicks is entitled to the earn out payment. Rather, it concerns the seriously flawed *process* by which the earn out dispute was resolved.

Under both the Federal Arbitration Act ("FAA") and Washington's Uniform Arbitration Act ("WAA"), an arbitration award *must* be vacated where (1) the award was procured through undue means, (2) the arbitrator committed misconduct, or (3) the arbitrator manifestly disregarded the law. *See generally* RCW 7.04A.230; 9 U.S.C. § 10. All three independent bases for vacatur are present here.

First, the Award was procured through Graham's misconduct and undue means. Arbitrator Shellan delegated the authority to make a final decision regarding Hicks's entitlement to the earn out to a "Reviewing Accountant," and expressly treated the Reviewing Accountant as the arbitrator of this issue. During the Reviewing Accountant's review, Graham *secretly* submitted highly relevant documentary evidence to the Reviewing Accountant *ex parte* (the "Improper Submission"). The Improper Submission concerned the key issue before the Reviewing Accountant – the profitability of the Company's biggest project, Enloe hospital, as of June 30, 2010 (the relevant date for the earn out

calculation). Incredibly, the secret Improper Submission *falsely* indicated on its face that it contained Enloe project data as of June 30, 2010, when in fact it contained irrelevant cost data from the date it was printed in 2013, three years later. The Reviewing Accountant unwittingly treated this false data as if it were true and found it to be highly relevant to his decision that Hicks should not receive the earn out. Because the Improper Submission was submitted *secretly* and after the deadline for evidentiary submissions, in violation of the arbitrator's orders, Hicks knew nothing about this *false* data until after the Reviewing Accountant's unfavorable decision and never had any opportunity to respond. This is undue means sufficient to require vacatur of the Award.

Second, the Award was tainted by arbitrator misconduct. Despite the importance of the data the Improper Submission purported to show, the Reviewing Accountant compounded the problem and committed misconduct by failing to provide Hicks an opportunity to respond to it before ruling against him. If Hicks had been given that fair opportunity, Hicks could have cured the false impression Graham gave the Reviewing Accountant and confirmed the true facts about the Enloe project as of the relevant date (June 30, 2010). The Reviewing Accountant committed yet *further* misconduct by secretly interviewing a Graham witness and then relying heavily on his unsworn, ex parte statements (the "Improper Statements") as "key" to his decision, while again refusing to provide Hicks the ability to rebut them. This misconduct by the designated arbitrator of the earn-out issue is a second, independent basis for vacatur.

Third, the Award was further tainted by Arbitrator Shellan's legal errors and manifest disregard of the law. Arbitrator Shellan exceeded his powers by belatedly referring the matter to a Reviewing Accountant in the first place, contrary to the parties' Agreement. Then, after Hicks learned of the Improper Submission and Improper Statements and filed a motion with Arbitrator Shellan seeking to have the Reviewing Accountant's tainted decision set aside and a new accountant appointed, Arbitrator Shellan manifestly disregarded the governing law. Arbitrator Shellan recognized that Graham's late, secret submission was improper, and held that Hicks's motion would be governed by the law governing vacatur of an arbitration award procured through misconduct. However, in issuing his final Award, Arbitrator Shellan ignored the governing law (which he had himself previously articulated), wrongly stated that the governing law had "not been specially [sic] addressed by either party" (ignoring the briefing to him on the subject), and instead applied an incorrect standard for considering Hicks's motion, relying upon irrelevant cases concerning a separate, inapposite basis for vacatur that had never been raised by either party. These facts are classic manifest disregard of the law, and further grounds for vacatur.

As this summary reveals, the proceedings here were anything but typical. The normal, basic requirements of fundamental fairness and due process were supplanted by the decision-maker's reliance on ex parte communications and false evidence supplied in secret, to which Hicks was never allowed to respond. Under these extraordinary facts, the law

requires the extraordinary relief of vacatur. Hicks respectfully requests that the Court grant Hicks relief from the unfairly procured Award, remanding the case back to arbitration for fair proceedings on the merits of the earn out dispute.

II. ASSIGNMENT OF ERROR

Whether the trial court erred when it, without written opinion, denied Hicks's motion to vacate and confirmed the arbitration Award despite the Award having been procured and tainted by party misconduct and undue means, arbitrator misconduct, manifest disregard of the law, and other serious irregularities, which resulted in an arbitration inconsistent with basic notions of fundamental fairness and due process.

III. STATEMENT OF THE CASE

A. Background To The Underlying Dispute: Graham's Failure To Pay The Earn Out Payment Owing To Hicks

This arbitration arose from Graham's purchase of the Company – Hicks's successful electrical contracting business, Unity Electric – under a Purchase and Sale Agreement dated July 8, 2009 (“Agreement”). *See generally* CP 574-606.¹ Following negotiations, Graham agreed to pay Hicks a base purchase price plus certain additional (“earn out”) payments depending on the performance of the Company in the two years following

¹ Unless otherwise noted, all page numbers referenced herein are to the continuously paginated Clerk's Papers. For ease of reference, “Tr.” references are to specific pages and lines of the transcripts contained in the Clerk's Papers and cited herein.

the sale. CP 581-83. In simple terms, if the Company met certain financial targets, Hicks would receive additional purchase money.

At issue in the underlying arbitration was Graham's failure to pay Hicks the earn out payment owing for the Company's performance in the first year after the sale, i.e., the accounting period from July 1, 2009, through June 30, 2010. In the days following the end of this period, some preliminary financial reports indicated that the Company had not satisfied the requisite targets and thus that no payment would be due to Hicks. CP 625-26. However, once the Company's financial statements for the period were finalized by the Company's Chief Financial Officer, the statements showed that in fact the first earn out threshold had been met and a payment was owed to Hicks of approximately \$650,000. CP 613-14, 684-86. These financial statements were later reviewed and accepted by the Company's independent outside accountants. *Id.* Subsequently, the Company repeatedly acknowledged the payment obligation to Hicks and thereafter consistently recorded it on its reviewed financial statements. CP 608-11, 684-86. However, Graham failed to actually pay the amount to Hicks.

B. The Commencement Of Arbitration And The Improper Reference To A Reviewing Accountant

In 2012, seeking to collect on the payment that Graham had admitted was owed and recorded in the Company's books but had not paid, Hicks filed a Confession of Judgment signed by Graham, as was his right under the Agreement in the event of nonpayment. CP 923-27.

Thereafter, on July 30, 2012 (*two years* after the earn out had been achieved as of June 2010), Graham filed an arbitration demand with JAMS limited to whether Graham's "hand-delivery of a Dispute Notice to [Hicks's counsel] on Monday, July 9, 2012, [was] effective to extinguish any rights that [Hicks] may otherwise have had to file a Confession of Judgment." CP 559-61.²

Graham's arbitration demand did not touch on whether the earn out had been earned or the method for determining the earn out. *Id.* However, exceeding his powers under the demand and the Agreement's plain terms, Arbitrator Shellan held that a "Reviewing Accountant" would be appointed to render a final decision about whether the earn out had been achieved. CP 518-20, 703, 725. The Agreement had narrowly contemplated that a reviewing accountant would resolve earn out disputes that were properly submitted to the accountant, under the terms of the Agreement, *within 75 days of the earn out period* (June 30, 2010), which did not occur. CP 581-82.³ What actually occurred was that the amount was repeatedly acknowledged as owed but simply went unpaid. CP 608-

² The Agreement contained an arbitration clause calling for arbitration of disputes with JAMS. CP 603. Further details regarding the Confession of Judgment and the "dispute notice" are not relevant to the issues on appeal and thus will not be discussed further.

³ In summary, the plain terms of the Agreement, authored by Graham, provided that Graham was required to notify Hicks whether the earn out had been achieved "no later than 30 days after" June 30, 2010, with Hicks then delivering a Statement Acceptance Notice or Statement Dispute Notice "no later than 30 days after its actual receipt" of Graham's required notification, and for either party to submit any remaining dispute to a reviewing accountant "within 15 days after the date of actual delivery of the Statement Dispute Notice." CP 581-82. It is undisputed that Graham did not follow this process.

11, 684-86. Nonetheless, Arbitrator Shellan ordered that a Reviewing Accountant would be appointed to act as the arbitrator and final decision-maker of the earn out dispute. CP 518-20, 703, 725.

C. Graham's Initial Misconduct And The Inaccessibility To Hicks Of Relevant Historical Data

Once the accounting review process was initiated, over Hicks's objection, it was immediately tainted by Graham's efforts to gain an unfair advantage. The Agreement provided that where a reviewing accountant was to be engaged, the accountant would be from the CPA firm of Bader Martin. CP 578. However, Hicks learned that Graham had engaged in improper ex parte communications with Bader Martin about the earn out dispute. CP 516-17. This initial misconduct by Graham appropriately resulted in Bader Martin's disqualification from serving as the Reviewing Accountant, and the parties subsequently chose a replacement.⁴ *Id.*

Even after Graham's initial misconduct was addressed through the replacement of the first accountant, substantial problems remained with the commencement of a belated accounting review in late 2012 that was not called for under the Agreement. The pertinent accounting period had ended two and a half years earlier (as of June 30, 2010), while Hicks was

⁴ See CP 516-17 (Shellan stating that if Graham engaged in ex parte contact with accountant Mark Hanson of Bader Martin, as indicated, then Mr. Hanson should be disqualified because Hicks "had no opportunity to check all the financial data submitted to the Reviewing Accountant or to present additional data," depriving Hicks of "the opportunity to present [his] position"). As described herein, Arbitrator Shellan failed to follow this law of the case when it came to the second accountant, with which Graham *also* had improper ex parte contacts to which Hicks was never allowed to respond.

still employed by the Company and had access to relevant records and employee witnesses. CP 205-06. In the intervening years, however, the files containing the Company's original analyses supporting the earn out payment calculation had been lost or destroyed by Graham/the Company. CP 122, 209. In addition, due to limitations of the Company's software system, certain highly pertinent financial information from the relevant time period had been deleted and could not be recreated. CP 105-07, 117-18, 122. When Hicks asked for access to this information to support his claim, he was told that it was no longer available. CP 106, 118, 122.

D. Arbitrator Shellan's Orders Concerning The Accounting Review Process Call For Transparency

On January 31, 2013, Arbitrator Shellan held a hearing to set ground rules for the exchange of evidence between the parties and the presentation of evidence to the Reviewing Accountant. CP 64-76. These rules focused on transparency. As virtually all of the relevant information was in Graham's control, Arbitrator Shellan directed that "[t]here has to be a level playing field." CP 66. Arbitrator Shellan also noted that the JAMS rules required parties to exchange relevant information and affirmed that *anything* relevant to the subject matter at issue "should be provided to the other party." *Id.* He further specifically held that anything either party provided to the Reviewing Accountant had to "*be shared completely with the other side so that there are no secrets.*" CP 67 (emphasis added).

Arbitrator Shellan also ordered the parties to comply with strict deadlines. Specifically, he ordered that all submissions to the Reviewing

Accountant be made and exchanged with the other side by March 25, 2013. This deadline was set forth in the Arbitrator's Order that followed the hearing as well as the Scope of Work for the Reviewing Accountant, which was incorporated as part of that Order. CP 80, 83. That Scope of Work limited the Reviewing Accountant's review to evidence timely submitted by the deadline. It stated that the Reviewing Accountant "will analyze the various records and documents and/or other materials that each party (either jointly or individually) provides *on or before March 25, 2013.*" CP 83 (emphasis added). This limitation was also confirmed by Arbitrator Shellan at the hearing. CP 73 ("I would limit to the documents that are before him. In other words, like a court case you are limited to the documents that have been admitted into evidence and you can argue your case based on any arguments that is derived from the documents..."). Altogether, these orders formed the structure of a review process that was supposed to be both fair and transparent; it turned out to be neither.

E. The Accounting Review Process Begins And Hicks Is Assured That The Arbitrator's Orders Will Be Followed

Hicks complied with the March 25, 2013 deadline in submitting his materials. CP 89. Thereafter, the new Reviewing Accountant, Douglas McDaniel of the CPA firm Berntson Porter, began his review and under Arbitrator Shellan's orders met with both parties separately for *argument* about the timely submitted materials. CP 73, 83, 89.

In an April 3, 2013 telephone call between the Reviewing Accountant and Hicks to schedule Hicks's argument on April 4, the

Reviewing Accountant disclosed to Hicks the surprising revelation that Graham intended to provide an additional submission. CP 89. Hicks reiterated to the Reviewing Accountant that the deadline had passed and that no further submissions of evidence should be considered, consistent with the restrictions in his Scope of Work, which were confirmed in his engagement agreement and had been approved by Arbitrator Shellan. CP 83, 89-90, 130. The Reviewing Accountant assured Hicks that he would not accept or consider any further submission, and Hicks confirmed that understanding by email to the Reviewing Accountant. CP 89-90, 144.

Separately, Hicks's counsel wrote to Graham's counsel to object to any submission being made by Graham in violation of the ordered deadline. CP 146. After initially receiving no response, Hicks's counsel contacted JAMS and set an emergency hearing before Arbitrator Shellan to enforce the Arbitrator's orders. CP 148-49. Thereafter, on April 4 and 5, Graham's counsel wrote to Hicks's counsel and provided assurances that there would be no further submission from Graham to the Reviewing Accountant. CP 151-58. In reliance on such assurances, which Hicks's counsel confirmed with Graham's counsel and which Hicks separately confirmed with Graham's representative (Paul Raidna), Hicks cancelled the scheduled hearing. CP 148, 155, 160.

F. Graham Secretly Submits False Evidence After The Deadline

As it turns out, neither Graham nor the Reviewing Accountant abided by their assurances or the Arbitrator's orders. On April 12, well after the deadline and just a few days after telling Hicks that there would

be no further submissions, Graham secretly submitted new financial reports to the Reviewing Accountant concerning an issue highly material to the dispute (i.e., the Improper Submission). CP 524-25. This Improper Submission (which can be viewed at CP 97-102) was made ex parte and in secret, in breach of Arbitrator Shellan's orders and basic fairness. CP 524-25. Hicks had no knowledge of this secret submission or its contents until after the Reviewing Accountant had reviewed it and rendered a decision against Hicks. CP 90. These facts have been admitted by Graham. CP 524-25. Despite the orders in place and the communications just days earlier about further submissions, Graham's only excuse is the self-serving one that he simply "forgot" to send the secret evidence to Hicks. CP 525.

Graham's now-admitted secret submission and breach of the established procedure was made vastly worse by the fact that *the Improper Submission was also materially false and misleading*. It is now known that, before making a decision, the Reviewing Accountant privately called Graham's representative Paul Raidna to ask if Graham could provide a certain additional financial report about the Company's Enloe hospital project "as of June 30, 2010" – that is, as of the date that eligibility for the earn out would be determined. CP 372-74, 382, 398 (Tr. 29:1-11, 31:22-32:4, 49:13-17; 97:14-22); CP 90-91, 170, 524-25. The profitability of the Enloe project as of June 30, 2010 was highly relevant to the analysis because it was the Company's biggest job at the time and the principal subject of contention. CP 378-79 (Tr. 43:18-44:19); CP 90-91, 170.

As further described below, Graham did not actually have the

historical data the Reviewing Accountant requested. CP 105-07, 117-19. However, Graham did not disclose to the Reviewing Accountant that the data did not exist. Instead, Graham secretly provided the Reviewing Accountant with the Improper Submission, which falsely *appeared* to contain the requested information, but in fact did not. CP 97-102, 105-07, 117-19, 524-25.

In considering the Improper Submission as part of his decision-making process, the Reviewing Accountant believed (wrongly) that it contained the June 30, 2010 Enloe project data he had requested. CP 377-79, 397-98 (Tr. 42:18-43:15, 44:8-19, 90:2-7, 97:10-13). There are several explanations as to why he came to that wrong belief. For one, Graham sent the Improper Submission in response to the Reviewing Accountant's specific request for a report as of June 30, 2010. CP 372-74, 382, 398 (Tr. 29:1-11, 31:22-32:15, 49:13-17; 97:14-22); CP 170, 524-25. For another, the Improper Submission on its face appeared to show a report "period end" date of June 30, 2010. CP 97-102. Graham even went so far as to highlight this "period end" date with a hand-drawn arrow, apparently to ensure that the Reviewing Accountant would come to believe (wrongly) that the data shown was as of June 30, 2010. CP 97.

In fact, however, as Graham has since had to concede, the key fields of data on the Improper Submission are *not* as of June 30, 2010, but are actually as of April 9, 2013, the date the document was printed. CP 104-07, 117-120, 525-26. Indeed, limitations of the Company's software system *preclude* the creation of a report with this data as of June

30, 2010. CP 104-07, 117-120, 525-26. The Company's data and software limitations were something about which Graham was well aware. CP 106-07, 119. As noted above, Hicks had previously requested the very same information to prepare for the review process and had been told it could not be provided. CP 105-07, 117-19. The limitations had also been *specifically* discussed in a notice sent by Hicks to Graham about missing information (CP 119, 122) as well as in a declaration that was filed in the arbitration before the January hearing with Arbitrator Shellan. CP 210. Graham has since "confirmed" that Hicks is right about the Company's software limitations and, thus, about the inaccuracy of the data on the Improper Submission. CP 525-26. Graham nonetheless claims now that he did not realize the data was false when he secretly submitted it. *Id.*

Importantly, by falsely portraying April 2013 data as having been from June 2010, the Improper Submission *dramatically misstates* the true facts about the Enloe project as of the relevant June 30, 2010 date in Graham's favor. Specifically, the Improper Submission (CP 97-102) *falsely* indicates that there were *millions of dollars of costs* incurred on the project as of June 30, 2010 that, in fact, had not been incurred as of that date and were not incurred until later years as the project expanded dramatically in scope and contract value. CP 105-07, 114. This would result in the calculation of the Company's profit, upon which earn out eligibility was derived, to be reduced inaccurately and dramatically. Notably, Graham specifically cited these false costs in handwritten notes that were added to the Improper Submission to sway the Reviewing

Accountant's opinion. CP 97, 99. Graham's handwritten notes highlighted the millions of dollars in false costs and then falsely stated that the project was "massively over budget" at the time of the earn out. *Id.* This secret, false handwritten statement to the Reviewing Accountant was based entirely on the false costs shown in the Improper Submission. *Id.*

G. The Improper Submission Was Material To The Earn Out Dispute, Yet The Reviewing Accountant Did Not Provide Hicks An Opportunity To Rebut Graham's Secret, False Evidence

The data purportedly shown on the Improper Submission was highly material to the disputed issue of whether Hicks was entitled to the earn out payment. The Improper Submission purported to show data regarding the Enloe project as of the relevant June 30, 2010 date. CP 97-102. The Enloe project was the Company's biggest project and its profitability as of June 30, 2010 was the principal point of contention between the parties. CP 378-79 (Tr. 43:18-44:19); CP 90-91, 170.

The Improper Submission's materiality is confirmed by the Reviewing Accountant's actions.⁵ The Reviewing Accountant specifically

⁵ As detailed in Section III.I *infra*, Arbitrator Shellan later ordered the Reviewing Accountant to be examined under oath (over Hicks's objection). Accordingly, some of the evidence pertaining to the Improper Submission and Improper Statements comes directly from the Reviewing Accountant. By citing to this material Hicks does not waive his objection to the improper procedure set up by Arbitrator Shellan to examine the delegated arbitrator. This process was contrary to settled law and would notably never have been countenanced in a court setting – a jury provided with false information would never be examined about whether they found the false information dispositive of their tainted decision or asked to speculate about decisions they might have reached otherwise. Further discussion of the significant flaws with this legally improper and wholly unnecessary process are further discussed *infra* at note 8 and Section IV.B.4.

requested a report relating to Enloe as of June 30, 2010 (in response to which Graham provided the Improper Submission). CP 372-74, 376, 382, 398 (Tr. 29:1-11, 31:22-32:15, 38:10-17, 49:13-17, 97:14-22); CP 524-25. This was the *only* document the Reviewing Accountant ever requested, emphasizing its significance to the decision-making process. CP 399 (Tr. 147:3-6). The Reviewing Accountant stated that Enloe was the “focus” of his analysis and the “emphasis” of Graham’s presentation to him, and that information about Enloe as of June 30, 2010 was “highly relevant.” CP 374, 378-379 (Tr. 32:5-15, 43:18-44:19); CP 90-91. The Reviewing Accountant further explained that Enloe was “a relevant part of [his] thought process” because it “was one of the largest projects that [the Company] was engaged in.” CP 378 (Tr. 43:18-25). Indeed, the Reviewing Accountant confirmed that, setting the Enloe project aside, the earn out may have been achieved; in other words, Enloe’s profitability was *dispositive* of his decision on Hicks’s right to the earn out. CP 381 (Tr. 47:5-10).

Moreover, the record is clear that the Reviewing Accountant in fact considered the Improper Submission in his decision-making, again confirming its materiality. The Reviewing Accountant stated that he read the Improper Submission, including Graham’s handwritten portions, before issuing his decision, and that it was “relevant to [his] decision” and “important.” CP 373, 375, 380, 400-01 (Tr. 31:9-21, 37:9-11, 45:7-9, 154:25-155:14). This testimony corroborated his prior statements, in which the Improper Submission was the *only* specific financial document

he referenced in explaining the reasons for his decision against Hicks. CP 165-68, 170. Importantly, the Reviewing Accountant confirmed that when considering the Improper Submission in reaching his decision, he believed (wrongly) that it reflected Enloe data as of June 30, 2010. CP 377-79, 397-98 (Tr. 42:18-44:19, 90:2-7, 97:10-13). Even as of the date of his later testimony, he continued to (wrongly) assume that the data Graham provided him was as of June 30, 2010. CP 401 (Tr. 155:6-8).

Despite the materiality of the data, both the Reviewing Accountant's request to Graham and Graham's response (the Improper Submission) were ex parte, without any notice to Hicks. CP 524-25. The Reviewing Accountant admitted that at no time prior to his decision did he notify Hicks of the Improper Submission or offer Hicks any opportunity to respond. CP 396 (Tr. 88:11-17); CP 491. Hicks did not learn about the Improper Submission until weeks *after* the Reviewing Accountant's decision, at which point Hicks requested and received a copy. CP 370-71, 395-96 (Tr. 23:16-24:13, 87:22-88:1); CP 90, 491, 1046.

H. The Reviewing Accountant Commits Additional Misconduct By Relying On Unsworn Ex Parte Statements From Graham

The Improper Submission was not the only significant deficiency in the fairness of the accounting review process. Hicks also learned, after the fact, that the Reviewing Accountant had secretly relied heavily on unsworn, ex parte statements made by Graham's employee Brandon Garrison (i.e., the Improper Statements), even though Hicks was never notified of the statements nor provided any opportunity to respond.

Shortly after his meeting with Graham, the Reviewing Accountant conducted a short, unsworn private telephone interview with Mr. Garrison. CP 383 (Tr. 59:3-24). According to the Reviewing Accountant, Mr. Garrison represented that he was at the Enloe project before June 30, 2010. CP 383-85 (Tr. 59:3-61:11). This representation was untrue, as later shown by Company records and sworn testimony. CP 107, 113-14, 120. But the Reviewing Accountant believed Mr. Garrison and considered it an “important aspect to [his] analysis.” CP 385 (Tr. 61:7-18).

The Reviewing Accountant testified that “one of the key parts of my analysis that helped me determine my final decision” was his interview of Mr. Garrison. CP 402-03 (Tr. 172:21-173:22).⁶ This was consistent with his prior statement, to a fellow CPA, that the interview was a primary factor in his decision and that ultimately it was Mr. Garrison’s statements that swayed him to rule against Hicks. CP 167.

Despite the importance of Mr. Garrison’s unsworn ex parte statements, the Reviewing Accountant admitted that prior to his decision Hicks was not aware of the questions he asked of Mr. Garrison or the answers provided. CP 386-87 (Tr. 64:25-65:6). He also confirmed that

⁶ In addition to the telephone interview with Mr. Garrison, which the Reviewing Accountant considered to be of great importance to his analysis, the Reviewing Accountant also had a very short telephone call with former Company Vice President of Operations Bob Berg. CP 388 (Tr. 67:16-19). The Reviewing Accountant described the interviews as a “big deciding factor” in his decision. CP 404. Unlike Mr. Garrison, who only provided unsworn statements via secret interview, Mr. Berg had submitted a sworn declaration prior to the submission deadline, in accordance with arbitrator orders, and thus the substance of his views was well known to the parties. CP 114.

there was nothing in the written materials provided to Hicks that even identified Mr. Garrison as a witness, let alone indicated what, if anything, he might say. CP 389 (Tr. 68:18-24). Remarkably, the Reviewing Accountant admitted that he knew Hicks would have wanted the opportunity to respond to the Improper Statements, but he did not consider Hicks's desire to respond because he "didn't believe it was [his] role or responsibility." CP 390-91 (Tr. 70:14-71:1). Moreover, the Reviewing Accountant acknowledged that, after Hicks learned that Mr. Garrison had been physically present at Graham's April 11 presentation, but before the decision was rendered, Hicks asked for a chance to explain Mr. Garrison's role with the Company and the Enloe project. CP 393-94 (Tr. 85:17-86:5). The Reviewing Accountant refused to provide that fair opportunity, while nonetheless relying on Mr. Garrison's ex parte statements to issue his decision on the earn out against Hicks. *Id.*

I. Arbitrator Shellan Improperly Orders The Reviewing Accountant To Testify

On April 19, 2013, the Reviewing Accountant issued a letter ruling stating in one line his opinion that Hicks was not entitled to the earn out payment. CP 1046. Weeks later, Hicks learned of the Improper Submission and some of the other improprieties described herein. CP 90. Diligently attempting to protect his rights, Hicks promptly filed a motion with Arbitrator Shellan to set aside the Reviewing Accountant's unfairly procured decision and to have a new accountant appointed. CP 44-61.

In response, Arbitrator Shellan rightly confirmed that Graham had

breached the established process. Arbitrator Shellan specifically held that the Improper Submission was (1) made by Graham after the ordered deadline, (2) without copying Hicks, and (3) in breach of his orders.⁷ He also held that Hicks's motion would be treated as a motion to vacate an arbitration award. CP 254 (Tr. 6:15-7:14). This was consistent with Arbitrator Shellan's designation of the Reviewing Accountant as the "arbitrator" and "final decision maker" of the earn out dispute. CP 725; *see also* CP 519, 703. Notably, in response to Hicks's request for clarification regarding the standard that would be applied, Arbitrator Shellan confirmed that the Reviewing Accountant would be treated like an arbitrator, that he understood the Reviewing Accountant's decision was being challenged on the basis of misconduct and undue means, and that the law governing the vacatur of arbitration awards for fraud or undue means, specifically RCW 7.04A.230, would be the governing law. CP 253-55, 270-71 (Tr. 5:18-7:7, 22:12-23:5).

Arbitrator Shellan ordered an evidentiary hearing, purportedly to resolve whether the standards necessary to vacate an arbitration award based on misconduct or undue means had been satisfied. CP 509. As part of that hearing, Arbitrator Shellan took the unprecedented step of ordering the Reviewing Accountant – who, in Arbitrator Shellan's own words, was

⁷ *See* CP 258 (Tr. 10:14-22) (Shellan: "[T]he submission was untimely and a breach of the prior deadline I had set It came in late, and also there was an admission on the part of [Graham] that he had inadvertently omitted to send a copy of whatever he gave to Mr. McDaniel[] to" Hicks); CP 510 (Shellan: "it was late"); CP 741 (Shellan: Graham's conduct was "neglect" and a "breach").

the final “arbitrator” of the earn out dispute (CP 725) – to appear before him and be examined under oath. CP 509. Hicks objected to the legally improper and unnecessary procedure of forcing the decision-maker to testify, but it proceeded over his objection.⁸ CP 244-47. On August 23, 2013, the Reviewing Accountant was subjected to examination under oath. *See generally* CP 369-404. The Reviewing Accountant was improperly asked by Graham and Arbitrator Shellan to speculate about whether the Improper Submission and other improprieties altered his decision (questions that have no bearing on the relevant legal standard, as discussed in Section IV.B.4 *infra*). *See generally* CP 975-1027.

J. Arbitrator Shellan Further Manifestly Disregards The Law

Thereafter, Arbitrator Shellan issued an interim award, and later, a final Award which incorporated the interim award in full. CP 723-36, 739-42. In the Award, Arbitrator Shellan recognized Hicks’s contention that the Award was the product of misconduct. CP 726. However, when

⁸ The law is clear that arbitrators are not to be examined about their decisions. *See, e.g., Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 67 (2d Cir. 2003) (“[C]ases are legion in which courts have refused to permit parties to depose arbitrators – or other judicial or quasi-judicial decision-makers – regarding the thought processes underlying their decisions.”) *overruled on other grounds by Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008); *O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 748 (11th Cir. 1988) (“Courts have repeatedly condemned efforts to depose members of an arbitration panel to impeach or clarify their awards.”) (quotations omitted). There are good reasons for this rule. *See, e.g., Rubens v. Mason*, 387 F.3d 183, 191 (2d Cir. 2004) (holding that it was error to admit arbitrator testimony because “[a]dmitting the testimony of the decision-maker below not only places a heavy burden on the party opposing the testimony because of that decision-maker’s virtually unimpeachable credibility, but it becomes practically impossible for a party to challenge the mental impressions of a decision-maker, as his thought process is known to him alone”) (quotations omitted).

discussing the governing law, Arbitrator Shellan strangely asserted that the applicable law “has not been specially [sic] addressed by either party.” CP 733. This statement was made even though Hicks had *repeatedly* addressed the law that Arbitrator Shellan himself had previously held was applicable. CP 254-55 (Tr. 6:15-7:14). Hicks addressed the governing law in his pre-hearing motion regarding the legal standard to be applied as well as in his pre-hearing and post-hearing briefs. *See, e.g.*, CP 244-47, 289-95, 355-66. Arbitrator Shellan went on in the Award to cite irrelevant cases discussing an arbitrator exceeding his or her powers, a distinct statutory ground for vacatur never raised by Hicks in his challenge to the Reviewing Accountant’s decision and never before discussed.⁹ CP 733-35. Arbitrator Shellan had previously acknowledged that Hicks’s challenge was based on misconduct and undue means, and had previously acknowledged the applicable law and standard relating to that challenge, yet disregarded and did not reference any such law in the Award. *Id.*

K. The Trial Court Erroneously Denies Hicks’s Motion To Vacate

Following issuance of the Award, Hicks timely filed a Motion to Vacate the Award in the King County Superior Court. CP 1-27. Hicks argued, as he does here, that under the governing legal standards, the

⁹ The FAA and WAA permit vacatur of arbitration awards where they were the product of “corruption, fraud, or undue means” or where the arbitrator engaged in “misconduct” and, *separately*, where the arbitrator exceeded the scope of his powers. *Compare* RCW 7.04A.230(1)(a) & (b) (“undue means” and “[m]isconduct by an arbitrator”) *with* RCW 7.04A.230(1)(d) (“arbitrator exceeded the arbitrator’s powers”); *compare* 9 U.S.C. § 10(a)(1) & (3) (“undue means” and “arbitrators were guilty of misconduct”) *with* 9 U.S.C. § 10(a)(4) (“the arbitrators exceeded their powers”).

Award must be vacated because it was the product of a manifestly flawed and unfair process tainted by Graham's misconduct and undue means, the Reviewing Accountant's misconduct, and Arbitrator Shellan's legal errors and manifest disregard of the law. *Id.* Without explanation, the trial court entered an order denying the motion and confirming the Award. CP 1079-80. This appeal timely follows. CP 1081-83.

IV. ARGUMENT

A. Overview Of Applicable Legal Standards Supporting Vacatur

On appeal, trial court decisions regarding whether to vacate an arbitration award are subject to de novo review. *See, e.g., Seattle Packaging Corp. v. Barnard*, 94 Wn. App. 481, 486-88, 972 P.2d 577 (1999) (applying *de novo* review); *Fidelity Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1311 (9th Cir. 2004) (same). Accordingly, the question before this Court is identical to the question that was before the trial court – i.e., whether any of the statutory standards that require the vacatur of an arbitration award have been satisfied. *See, e.g., Kenneth W. Brooks Trust v. Pacific Media, LLC*, 111 Wn. App. 393, 397, 44 P.3d 938 (2002) (explaining that the Court of Appeals “can vacate, modify, or correct the award in accordance with” statutory grounds for vacatur).

The law is clear that judicial review of arbitration proceedings is limited. The courts do not simply second-guess arbitration awards on the *merits* of the underlying dispute; rather, review is principally designed to ensure that the arbitration *process* was consistent with basic principles of fundamental fairness and due process. *See, e.g., Seattle Packaging*, 94

Wn. App. at 487 (“The court’s role in reviewing an arbitration award is to ensure that the hearing process comports with the broad contours of procedural fairness.”). Indeed, it is “[p]recisely because arbitration awards are subject to such judicial deference” that “it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded.” *Goldfinger v. Lisker*, 68 N.Y.2d 225, 232, 500 N.E.2d 857, 508 N.Y.S.2d 159 (N.Y. 1986).¹⁰

Consistent with these principles, Hicks is not seeking a new ruling on the merits of the underlying dispute as to whether he is entitled to the earn out payment. Rather, Hicks is simply seeking to vindicate his right to a fair, transparent, and reasonable process for resolving that dispute, which the record readily demonstrates he has not been afforded to date. Judicial intervention under such circumstances is both necessary and appropriate. *See id.* at 232-33 (explaining that the “general reluctance to disturb arbitration awards must yield” where necessary to “safeguard[] the integrity of the arbitration process”).

¹⁰ *See also, e.g., In re Wal-Mart Wage & Hours Employment Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) (confirming the importance of motions to vacate to “preserve due process” and forbidding parties from waiving their rights to vacate arbitration awards because to do so would “frustrate Congress’s attempt to ensure a minimum level of due process for parties to an arbitration”); *Hoefl*, 343 F.3d at 64 (acknowledging that courts are “not rubber stamps” in reviewing arbitration proceedings and explaining that “Congress impressed limited, but critical, safeguards on” the process of arbitration review, which “respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct”); *cf. Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 349 U.S. 145, 149, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) (stating that courts “should, if anything, be more scrupulous to safeguard the impartiality of arbitrators than judges”).

Under the principles of statutory review set forth in the FAA and WAA and well-established case law, the Award here is required to be vacated because (1) Graham engaged in misconduct and undue means; (2) the Reviewing Accountant, acting as the final arbitrator of the earn out payment dispute, engaged in misconduct; (3) Arbitrator Shellan manifestly disregarded the law when determining whether to set aside the Reviewing Accountant's decision; and (4) Arbitrator Shellan exceeded the scope of his powers when he ordered that the Reviewing Accountant belatedly adjudicate the earn-out issue. Each of these grounds is independently sufficient for vacatur and is discussed further below.¹¹

B. Graham's Misconduct And Undue Means Requires Vacatur

Arbitration awards "shall" be vacated when "procured by corruption, fraud, or other *undue means*." RCW 7.04A.230(1)(a) (emphasis added); *see also* 9 U.S.C. § 10(a)(1). To show "undue means," Hicks is *not* required to show that Graham *intended* to mislead (although the evidence supports that conclusion, *see* Section IV.B.1.b *infra*). Rather, intentional "fraud" and "corruption" are specifically distinguished from

¹¹ Under Sections 10.5 and 10.11 of the parties' Agreement, any arbitration "shall be conducted pursuant to the United States Arbitration Act, 9 U.S.C., § 1 *et seq.*" but all disputes are to be governed by Washington law. CP 602-03. 9 U.S.C. § 10 and RCW 7.04A.230 contain nearly identical standards for vacating arbitration awards, and are also very similar to Fed. R. Civ. P. 60, which governs the vacation of judgments. Accordingly, cases interpreting both the state and federal statutes and Fed. R. Civ. P. 60 are applicable and persuasive here. *See Seattle Packaging*, 94 Wn. App. at 493 (relying on FAA cases to interpret the WAA); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 n.8 (11th Cir. 1988) (explaining that the Rule 60 standard and FAA standard for vacating an award based on undue means are "nearly identical").

the broader and less rigid concept of “undue means,” which is a separate basis for vacatur.

Although “undue means” has not been clearly defined in Washington, by its plain language the concept is rightfully understood to refer to misconduct *not* rising to the level of corruption or fraud but that nonetheless improperly affects the fairness of the proceeding. *See* Dictionary.com Unabridged, Random House Inc. (2014) (defining “undue” as “inappropriate; unjustifiable; improper”); *Seattle Packaging*, 94 Wn. App. at 487 (noting that where there are “allegations of *misconduct*,” the movant’s burden is to make “a prima facie showing of such *misconduct*”) (emphasis added). Many out of state authorities strongly support this common sense interpretation. *See, e.g., Nasca v. State Farm Mut. Auto. Ins. Co.*, 12 P.3d 346, 350 (Col. App. 2000) (citing dictionary definition of “undue” as “inappropriate, unjustifiable, improper” and stating that the “ordinary meaning of these terms suggests some type of impropriety in the arbitration process”); *Henley v. Econ. Fire & Cas. Co.*, 153 Ill. App. 3d 66, 73, 505 N.E.2d 1091, 106 Ill. Dec. 300 (1987) (stating that “undue means” is “some aspect of the arbitrator’s decision or decision-making process which was obtained in some manner which was unfair and beyond the normal process contemplated by the arbitration act”) (quotations omitted); *see also Wojdak v. Greater Phila. Cablevision, Inc.*, 550 Pa. 474, 489-90, 707 A.2d 214 (1998) (adopting

same definition).¹²

Interpreting the “undue means” provision, courts have required a showing of the following three elements: (1) misconduct “materially related to an issue of consequence in the arbitration proceeding” occurred; (2) the misconduct could not have been discovered by due diligence prior to the close of the arbitration on the merits (here, prior to the Reviewing Accountant’s decision); and (3) the misconduct “operated to prevent the party from fully and fairly presenting his or her case or defense.” *Seattle Packaging*, 94 Wn. App. at 483; *see also Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) (explaining that to vacate an award for undue means or fraud under the FAA, the moving party must show misconduct “materially related to an issue in the arbitration,” which was not discoverable by due diligence prior to the award, and which deprived the party of a full and fair hearing). As discussed below, the third element no longer appears to be required under Washington law. In any event, all three elements are satisfied. Graham secretly engaged in misconduct material to the issues in dispute, which deprived Hicks (who followed the rules) of a fair proceeding. The Award should be vacated.

1. The First Element For Vacatur (Relevant Misconduct)

¹² *See also, e.g., Commonwealth Coatings*, 349 U.S. at 148 (applying the “broad statutory language” concerning “undue means” to set aside award for arbitrator’s failure to disclose prior relationship with party); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403-04 (9th Cir. 1992) (noting that “undue means” has not been defined, citing dictionary definitions, and indicating that it includes conduct that is not “part and parcel of the business of litigation” that carries a “connotation of wrongfulness or immorality”).

Is Satisfied

a. The undisputed facts show misconduct materially related to an issue of consequence.

The Improper Submission was misconduct material to an issue of consequence in the dispute, and thus the first element is satisfied.

First, there can be no debate that “improper” or “inappropriate” conduct occurred. As detailed above, the Improper Submission was submitted by Graham late, ex parte, in secret, and in breach of existing orders regarding the review process. These facts are undisputed. While the late submission of secret evidence would alone constitute undue means, here the facts are far worse because the Improper Submission was also materially *false and misleading*. There is no factual dispute about this either. The Reviewing Accountant requested Enloe project data as of June 30, 2010 and (wrongly) believed that is what Graham provided to him. The Improper Submission certainly appeared on its face to contain the requested data, since it showed a date of June 30, 2010. In fact, however, the data was *not* as of June 30, 2010. As Graham has now conceded, the key fields of data in the Improper Submission are *not* as of June 30, 2010 but instead reflect project costs from the date the report was printed in April 2013, *three years later*. See *supra* Section III.F (detailing these facts). Graham’s secret submission of false evidence is clear misconduct.

Second, this misconduct is without question “materially related to an issue of consequence” in the case. *Seattle Packaging*, 94 Wn. App. at 483. The Improper Submission concerned the profitability of the

Company's biggest project (Enloe) as of the relevant date (June 30, 2010), which was the central issue in the dispute as to whether the earn out was owed. CP 378-79 (Tr. 43:18-44:19). On that central issue, the Improper Submission falsely indicated that millions of dollars in additional costs had been incurred as of June 30, 2010 (falsely reducing profits accordingly). Likewise, it falsely stated in Graham's handwritten notes that the Enloe project was "massively over budget" as of June 30, 2010 (when, in fact, the cited costs were incurred in later years after the earn out period). CP 105-07, 114. The Improper Submission concerned a central issue in dispute and is thus plainly "material."

The record is replete with other facts further confirming the materiality of the Improper Submission. These include, for example, that: (1) the data was specifically requested by the Reviewing Accountant; (2) it was the *only* additional document he requested and the *only* specific financial document he identified when initially describing the reasons for his decision; (3) the Reviewing Accountant read the Improper Submission and repeatedly described it as "relevant" to his decision; and (4) the Reviewing Accountant considered the status of the Enloe project as of June 30, 2010 to be "highly relevant," "important," and the "focus" of his analysis. *See supra* Section III.G (detailing these facts).

In *Seattle Packaging*, this Court held that misconduct relating to the inputs of an expert's valuation analysis concerned "an issue of consequence at the arbitration." 94 Wn. App. at 492. Likewise, here Graham provided and the Reviewing Accountant reviewed secret evidence

submitted by Graham directly pertaining to the profitability of Enloe at the time, an issue of consequence in dispute at the arbitration. *Cf. Hazel-Atlas Glass v. Hartford-Empire Co.*, 322 U.S. 238, 247, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) (indicating that the materiality of improper evidence is proved by the fact that it was submitted for the ostensible purpose of persuading the decision maker). This element is satisfied.

b. Although no further showing is necessary, the facts support an inference that Graham's misconduct was not inadvertent.

Before Arbitrator Shellan and the trial court, Graham did not even attempt to refute any of the pertinent details regarding the Improper Submission. He did not argue that it was timely, that it was not submitted in secret, that it was really accurate, or that Hicks had an opportunity to respond to it before the ruling against him. Graham has admitted the basic facts. CP 524-25. Instead, Graham argued that "undue means" should be interpreted as the equivalent of intentional fraud and that there was insufficient evidence of his fraudulent intent. As discussed above, the law does not support equating "undue means" with intentional fraud; instead, it distinguishes the concepts and defines "undue means" more broadly to include other improprieties affecting the fairness of the proceeding. The specific contours of the standard, however, do not necessarily need to be addressed here because Graham's misconduct satisfies any reasonable definition of "undue means." Graham secretly provided the decision-maker with false evidence in violation of arbitrator orders. Graham

concedes these facts, but claims that he did not realize the evidence (which would be interpreted as highly favorable to him) was false and “forgot” to comply with the arbitrator’s orders. These self-serving excuses are not credible and are no basis for denying vacatur.

Indeed, although it is unnecessary for Hicks to prove intentional misconduct, the evidence in the record overwhelmingly supports the conclusion that Graham’s actions were not inadvertent.¹³ Several points are worth emphasis. First, Graham began the process by tainting the first reviewing accountant through improper ex parte contact. CP 516-17. Second, Graham had been *repeatedly* informed that data as of June 30, 2010 had been deleted and could not be recreated due to software limitations. CP 106-07, 117-119, 122, 210. Graham thus knew that the data provided to the Reviewing Accountant was false, or was at least highly reckless in that regard. Third, Graham was well aware of the submission deadline and the requirement of “no secrets.” These points were not just part of arbitrator orders (CP 67, 80, 83) but were also the subject of communications in early April, in which Hicks raised concerns about late submissions and was assured by Graham that there would not be any. CP 146, 151-53, 155-58, 160-63. Just days later, Graham secretly made the Improper Submission, after writing on it notes and calculations

¹³ There is good reason for the rule that a party seeking vacatur under circumstances like these is not required to prove fraudulent intent. It would be unfair to impose that heavy burden on the innocent party who has suffered from the misconduct at issue. *Cf.* Section IV.B.4 *infra* (further discussing the showing required for establishing vacatur here).

that were demonstrably false. CP 373 (Tr. 31:9-12); CP 97-102, 524-25. Graham's contention that his misconduct is too minor to be considered "undue means" and should be excused is baseless. Under any reasonable standard, Graham's conduct justifies vacatur.

2. The Second Element For Vacatur (Lack Of Knowledge Of Misconduct) Is Satisfied

The second element of vacatur for undue means (Hicks's lack of knowledge of the misconduct before the ruling) is also satisfied. Graham does not dispute that he provided the information to the Reviewing Accountant and not to Hicks, nor is there any dispute that Hicks was completely unaware of the misconduct until well after the Reviewing Accountant had rendered his decision. Hicks had no knowledge of and no opportunity to challenge the secret evidence before the ruling against him.

3. If There Remains A Third Element For Vacatur (Fair Opportunity), It Is Satisfied

In *Seattle Packaging*, this Court, relying on a prior version of the Washington arbitration statute (RCW 7.04.160), required a party seeking vacatur for fraud or undue means to prove that the misconduct inhibited the party from fully and fairly presenting his or her case or defense. 94 Wn. App. at 483. This element no longer appears to be required. In the prior version of the statute, an award could be vacated for fraud or undue means only upon a showing of "substantial prejudice," but that prejudice provision was *removed* by the Washington legislature in 2006; the current version expressly requires a showing of prejudice for certain grounds for

vacatur, but *not* for undue means.¹⁴ Thus, under the plain language of the current statute, no showing of prejudice is required. Accordingly, Hicks need not show prejudice to obtain vacatur for undue means.

Even if the third element is still required, it is satisfied. This element merely requires that the misconduct inhibited Hicks from “fully and fairly” presenting his case to the Reviewing Accountant. Case law indicates that a party is deprived of a full and fair hearing where his or her “right to submit evidence to the arbitrators was in any way curtailed.” *N. State Constr. Co. v. Banchemo*, 63 Wn.2d 245, 250, 386 P.2d 625 (1963). Here, Graham secretly submitted false evidence. Hicks had *no* ability to respond to the secret, false evidence before the decision was made against him, and certainly did not receive a “full and fair” opportunity for rebuttal. To the extent there is still a required third element, it is satisfied here.

4. No Further Showing Is Required For Vacatur

All three elements are satisfied here and the Award thus must be vacated. *See* RCW 7.04A.230(1)(a); 9 U.S.C. § 10(a)(1). Significantly, Hicks does *not* need to prove that the Reviewing Accountant’s decision would have been different absent the misconduct or that the Improper Submission was a deciding factor in the Reviewing Accountant’s decision. As this Court has expressly stated, “*the moving party does not need to*

¹⁴ Compare RCW 7.04.160 (superceded) (vacatur not required for corruption, fraud or undue means “unless the . . . substantial rights of the parties were prejudiced thereby”) with RCW 7.04A.230(1)(a) (no such requirement). Compare RCW 7.04A.230(1)(b)(iii), (c), & (f) (requiring prejudice) with RCW 7.04A.230(1)(a) (no such requirement).

show that the result of the proceeding would have been different if the [misconduct] had not occurred.” Seattle Packaging, 94 Wn. App. at 487. This rule is consistent with the basic principle that vacatur is “aimed at judgments which were unfairly obtained, not at those which are factually incorrect.” Id. at 493 (quotations omitted).

Accordingly, Arbitrator Shellan’s order requiring the Reviewing Accountant to testify about what he might have done, in hypothetical scenarios in which aspects of the misconduct had not occurred, was not just legally improper (*see supra* note 7) and entirely speculative, but also utterly irrelevant. Even when the “substantial prejudice” requirement existed under Washington law (which the statute no longer requires), an aggrieved party still was *not* required to prove that the outcome would have been different but for the misconduct. *Id.* at 487. Cases interpreting the similar provisions of the FAA and Rule 60 are in accord. *See, e.g., Bonar, 835 F.2d at 1383-85* (holding that vacatur “does not require the movant to establish that the result of the proceedings would have been different had the [misconduct] not occurred”).

Indeed, courts have repeatedly held that evaluating how much weight was put on improper evidence is not only not required, it is wholly *inappropriate*. Requiring an innocent party (Hicks) to show the extent to which another’s misconduct impacted the decision would be too onerous a burden and would distract from the focus of the inquiry, which is *fairness*. *See, e.g., Hazel-Atlas, 322 U.S. at 247* (holding that party submitting improper evidence is “in no position” to “dispute its effectiveness”

because “it is wholly impossible” to “appraise [its] influence”); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9th Cir. 1995) (holding that one who offers misinformation “is in no position to dispute” its “effectiveness” in “helping to obtain a favorable [outcome]”); *Fraige v. Am.-Nat’l Watermattress Corp.*, 996 F.2d 295, 299 (Fed. Cir. 1993) (holding that court should not try to determine extent to which decision-maker relied on false evidence, as the proffering party is “in no position to dispute” its effectiveness); *Viskase Corp. v. Am. Nat’l Can Co.*, 979 F. Supp. 697, 700, 704 (N.D. Ill. 1997) (holding that where relevant false testimony is presented, the court should not attempt to weigh its effect).

Thus, all that must be shown to require vacatur here is misconduct material to an issue of consequence that, at most, in some way curtailed Hicks’s full and fair participation. Applying that standard here, Graham’s secret submission of false evidence, about which Hicks had no knowledge or ability to respond before a decision was rendered, plainly curtailed Hicks’s right to full and fair participation. The Award should be vacated.

C. The Reviewing Accountant’s Misconduct Requires Vacatur

A second and independent basis for vacatur here is the misconduct of the Reviewing Accountant, who was designated as the final arbitrator of the earn out dispute. RCW 7.04A.230(1)(b)(iii) requires vacatur where there has been “[m]isconduct by an arbitrator prejudicing the rights of a party.” Likewise, the FAA requires vacatur “where the arbitrators were guilty of misconduct . . . or of any misbehavior by which the rights of any party have been prejudiced.” 9 U.S.C. § 10(a)(3). Here, the Reviewing

Accountant improperly accepted and relied upon ex parte evidence relevant to a material issue in dispute, including the Improper Submission and Improper Statements, without providing Hicks any chance for rebuttal. Under settled law, this is misconduct requiring vacatur.

Courts have repeatedly held that where, as here, an arbitrator accepts ex parte evidence relevant to a material issue without providing a chance for rebuttal, prejudicial misconduct has occurred requiring vacatur. *See, e.g., Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991) (“Ex parte evidence to an arbitration panel that disadvantages any of the parties in their rights to submit and rebut evidence violates the parties’ rights and is grounds for vacation of an arbitration award.”); *Totem Marine Tug & Barge v. N. Am. Towing, Inc.*, 607 F.2d 649, 652-53 (5th Cir. 1979) (vacating award where panel requested and received ex parte evidence and then rendered decision without allowing other party to contest new evidence); *Hahn v. A.G. Becker Paribas, Inc.*, 164 Ill. App. 3d 660, 667-72, 518 N.E.2d 218, 115 Ill. Dec. 693 (1987) (vacating award where panel solicited and received material evidence ex parte, without allowing other party to challenge it, as such conduct is both “undue means” and “misconduct”).¹⁵

¹⁵ *See also, e.g., Chevron Transp. Corp. v. Astro Vencedor*, 300 F. Supp. 179, 181 (S.D.N.Y. 1969) (arbitrator’s prejudicial “failure to discharge th[e] simpl[e] duty” of “ensur[ing] that relevant documentary evidence in the hands of one party is fully and timely made available to the other” would require vacatur); *Wojdak*, 550 Pa. at 488-93 (vacating award due to arbitrator’s ex parte contact with third parties); *Goldfinger*, 68 N.Y.2d at 231-33 (vacating award where party had no opportunity to respond to ex parte communication); *Ministerelli Constr. Co. v. Sullivan Bros. Excavating, Inc.*, 89 Mich. App. 111, 113-15, 279 N.W.2d 593 (1979) (vacating award due to arbitrators’ ex parte

This settled law is directly applicable here. As outlined above, the Improper Submission and Improper Statements both concerned a material issue in dispute – the status of the Enloe project as of the earn out date, which the Reviewing Accountant viewed as “highly relevant.” CP 374, 378-79 (Tr. 32:5-15, 43:18-44:7). Further, the Improper Submission and Improper Statements were submitted ex parte, after the ordered deadline for evidentiary submissions, and were considered by the Reviewing Accountant without Hicks having been informed of the secret and false evidence or allowed any opportunity to respond. These facts were admitted by the Reviewing Accountant and are undisputed.

Indeed, despite the orders requiring fairness and transparency, the Reviewing Accountant – who was being treated as the “arbitrator” and “final decision maker” of the earn out payment dispute (CP 725) – did not regard it as his “responsibility” to ensure that the proceeding was fair, or that information provided to him was provided to both parties. CP 390-91 (Tr. 70:14-71:1). He understood Hicks would want an opportunity to respond to the ex parte evidence he received, yet he refused to provide that fair opportunity before ruling against Hicks in a dispute worth well over \$650,000. *Id.* The Reviewing Accountant’s complete and admitted abdication of his responsibility to ensure basic fairness and provide Hicks

contacts with witnesses); *cf. Tempo Shain Corp v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (vacating award where party was deprived of fundamental fairness by not being provided opportunity to submit rebuttal testimony).

with an opportunity to respond to “highly relevant,” “important,” and “key” ex parte evidence warrants vacatur under well-established law.

D. Arbitrator Shellan’s Manifest Disregard Of The Law Requires Vacatur

A third independent basis for vacatur here is Arbitrator Shellan’s manifest disregard of the law. Under both federal and Washington law, an award must be vacated where the arbitrator manifestly disregards the law. To vacate an award on this basis, the moving party generally must show “that (1) the arbitrator[] knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator[] was well defined, explicitly, and clearly applicable to the case.” *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998); *see also Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990) (vacating award where “on its face” it showed “an erroneous rule or mistake in applying the law”).¹⁶

For example, courts have vacated awards where “the arbitrators were correctly advised of the applicable legal principles” but “ignored the law or the evidence or both,” *Halligan*, 148 F.3d at 204; where the award indicated that consideration was required to modify a contract when there

¹⁶ Both Washington and the Ninth Circuit recognize manifest disregard of the law as grounds for vacating an arbitration award and view it as an outgrowth of the “exceeds powers” basis for vacatur. *See, e.g., Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277 (9th Cir. 2009) (“[I]n this circuit, an arbitrator’s manifest disregard of the law remains a valid ground for vacatur of an award.”); *Lindon*, 57 Wn. App. at 816 (finding error of law and vacating because the arbitrator exceeded the arbitrator’s powers).

was no such requirement under Washington law, *Lindon*, 57 Wn. App. at 816; where the arbitrator awarded lost probable future inheritance in a wrongful death survival action despite a prohibition on such damages, *Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 127-28, 4 P.3d 844 (2000); and where the award was internally inconsistent and indicated that the claimant suffered memory loss, but refused, for no apparent reason, to award damages for memory loss, *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 499, 32 P.2d 289 (2001).

Here, a review of the Award demonstrates a similar manifest disregard of law. The Award ignores and omits the standard governing motions to vacate based on undue means or arbitrator misconduct, which Arbitrator Shellan had previously identified as being the applicable law. In response to Hicks's initial motion seeking appointment of a new accountant, Arbitrator Shellan ruled that the Reviewing Accountant would be treated as an arbitrator and, therefore, that the standards governing a motion to vacate an arbitration award would govern. CP 254-55 (Tr. 6:15-7:14). Arbitrator Shellan also recognized that Hicks was attempting to vacate the decision based on undue means and misconduct. CP 253-55 (Tr. 5:18-7:7, 22:12-23:5). After initial briefing on the applicable law, Arbitrator Shellan concluded that RCW 7.04A.230, which dealt with attempts to vacate an award based on undue means, would govern. *Id.* Hicks extensively briefed the legal standards. CP 244-47, 289-95, 355-66.

Subsequently, however, in the Award, Arbitrator Shellan (1) ignored the law he had previously recognized as the governing standard,

(2) wrongly asserted that the parties had not discussed the governing law, and (3) for the first time, and without any basis, relied on cases governing attempts to vacate an award where the arbitrator *exceeds his powers*, which was not an issue that had ever been raised regarding the Reviewing Accountant. CP 733-35. Arbitrator Shellan's disregard of the very law that had been cited to him, and which he had acknowledged as applicable, is hornbook manifest disregard of the law and requires vacatur.¹⁷

E. Arbitrator Shellan Also Exceeded His Powers By Referring The Earn Out Dispute To The Reviewing Accountant

A final additional ground for vacatur is Arbitrator Shellan's referral of the earn out payment dispute to a Reviewing Accountant in the first instance, which exceeded the scope of his powers. Graham's narrow arbitration demand concerning his "dispute notice" did not seek a determination of whether an earn out had been achieved in 2010. CP 560-61. Arbitrator Shellan's decision to nonetheless refer a decision on that topic to an accountant under the circumstances went beyond the scope of the matters submitted to him.

¹⁷ Arbitrator Shellan further erred by failing to abide by his own orders regarding the review process (including his initial order that undisclosed ex parte contact required disqualification, and his subsequent orders setting forth the procedures for the parties' exchange and submission of evidence to the Reviewing Accountant). While Hicks dutifully complied with all of the rules set by Arbitrator Shellan, Graham did not and obtained an unfair advantage as a result, yet Arbitrator Shellan failed to enforce or apply his own prior rulings. This is yet further basis for vacatur. *See, e.g., Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, 811 (Tex. App. 2008) (recognizing that "other procedural irregularities" in an arbitration proceeding such as "an arbitrator's running afoul of his or her own rules in conducting the arbitration" are a basis for vacatur).

Moreover, the parties' Agreement only permitted a reviewing accountant to resolve earn out disputes under limited circumstances, where the dispute was properly submitted under the terms of the Agreement within 75 days of June 30, 2010. In other words, any disputes were to be resolved by an accountant within the strict time limits delineated by the Agreement. In no way did the Agreement contemplate a reviewing accountant trying to resolve a purported dispute more than 2.5 years after the fact, long after Graham had lost or destroyed the original files supporting the earn out calculation and with the key financial data unable to be recreated. Yet, that is precisely what Arbitrator Shellan ordered.

Washington and federal law are once again in accord that where an arbitrator decides issues not squarely presented by the parties' arbitration agreement or grants relief not provided for by the agreement or by law, the arbitrator exceeds his powers. *See* RCW 7.04A.230(1)(d) (award shall be vacated where "arbitrator exceeded the arbitrator's powers"); 9 U.S.C. § 10(a)(4) (award shall be vacated "where the arbitrators exceeded their powers"). Interpreting these provisions, courts have concluded that arbitrators have exceeded their powers where they have awarded damages not requested in the arbitration, *Totem Marine*, 607 F.2d at 651; awarded relief where the parties' agreement did not specifically provide for such relief, *Swift Indus., Inc. v. Botany Indus., Inc.* 466 F.2d 1125, 1134 (3d Cir. 1972); arbitrated a dispute where the time periods for submitting a grievance and proceeding to arbitration had not been satisfied, *El Mundo Broad. Corp. v. United Steelworkers of Am.*, 116 F.3d 7, 8, 10 (1st Cir.

1997); or decided issues of law not delegated to them under the parties' agreement, *Peerless Ins. Co. v. Nault*, 701 A.2d 320, 323 (R.I. 1997).

Arbitrator Shellan's order directing that a Reviewing Accountant would belatedly determine whether an earn out was achieved is directly analogous to these cases. He ignored both the limitations of the arbitration demand before him and the strict timing and procedural provisions of the parties' Agreement. In essence, he ordered relief that was not available under and was contrary to the clear terms of the Agreement, and thereby altered the parties' contract. Doing so was not within his rightful powers as an arbitrator under the Agreement and therefore exceeded his powers by law. For this additional reason as well, the Award should be vacated.

F. The Unique Procedural Posture Arising From The Reviewing Accountant's Role As Final Arbitrator Does Not Absolve The Misconduct And Undue Means That Plagued The Arbitration

Before the trial court, Graham argued that the courts are prohibited from vacating the Award, despite its procedural unfairness, because Hicks initially raised the issues to Arbitrator Shellan as soon as he became aware of them (as required). To support this argument, Graham cited to cases where allegations of misconduct were presented to the trier of fact, during the weighing of the evidence, to make a credibility and evidentiary decision regarding the alleged misconduct. Decisions regarding the weight of evidence are typically left undisturbed on motions to vacate.

But Graham misses the point of this case law and misconstrues the procedural posture of this case. The arbitrator of the earn out dispute was

the Reviewing Accountant; he was given final authority, as the trier of fact, to determine whether an earn out payment was owed. Hicks was never able to present this trier of fact with evidence of undue means or misconduct before his decision. While Hicks was able to make arguments about misconduct to Arbitrator Shellan after the fact, Arbitrator Shellan was not the trier of fact on the underlying dispute, having expressly abdicated that role to the Reviewing Accountant. Put differently, Graham is attempting to prevent judicial review of the Award solely based on the unique procedural posture of this case (to which Hicks objected), wherein the trier of fact was not, in fact, the “Arbitrator,” but was instead the Reviewing Accountant, who had been deputized as the “arbitrator” on the underlying merits. This argument is unsupported by law and unavailing.

In fact, in *Seattle Packaging*, this Court held that where the evidence of undue means was raised to the trier of fact after a decision on the merits, and where the trier of fact refused to reopen the evidentiary proceeding to reevaluate the facts in light of the misconduct, then the trier of fact “did not ‘hear’ the new evidence during the arbitration hearing when, presumably, credibility determinations were being formed.” 94 Wn.App. at 489. This is analogous to the situation here. Hicks learned of the misconduct only *after* the Reviewing Accountant had weighed the evidence and reached a decision on the merits. Hicks raised his concerns with Arbitrator Shellan, but he was not the decision-maker of the earn out dispute and he refused to order a new process/hearing. Thus, to this day, Hicks has not had the benefit of presenting a neutral trier of fact on the

earn out issue with evidence to undermine the validity, credibility, and weight of the Improper Submission and Improper Statements on the earn out determination.¹⁸ Accordingly, the motion to vacate was properly before the trial court, and is now properly before this Court. Graham's attempt to avoid judicial review of the misconduct and procedural unfairness that permeated this proceeding is without merit.

V. CONCLUSION

Arbitration is intended to be an efficient but reasonable, fair, and transparent process for dispute resolution, which the provisions of the FAA and WAA are designed to ensure. This arbitration lacked all of those hallmarks. Instead, it lasted eighteen months and was enormously expensive, and involved a series of serious improprieties: the secret, late, ex parte submission of false evidence to the decision-maker, in breach of arbitrator orders; the decision-maker's secret consideration of that false data and related material misrepresentations, which he unwittingly accepted and believed to be true; the decision-maker's heavy reliance on secret, unsworn ex parte witness statements; and an innocent party (Hicks)

¹⁸ While the Reviewing Accountant was confronted with some of Hicks's arguments *after* his decision, such as during his examination before Arbitrator Shellan, by that point he was necessarily in a defensive position, responding to questions implicating the accuracy, fairness, and propriety of his work and process. This defensive posture is just one of the reasons the law prohibits examining the decision-maker. In any event, the Reviewing Accountant never reworked his analysis to exclude the improper ex parte evidence, or to take into account any evidence Hicks could have presented had he been given a rebuttal opportunity before a decision had been made. Even as of the hearing, the Reviewing Accountant still (wrongly) presumed that the Improper Submission, which Graham has since admitted was false, was accurate. CP 401 (Tr. 155:6-8).

being precluded from any opportunity to rebut the secret evidence submitted against him before suffering an adverse ruling.

This highly unusual set of facts fits squarely into the statutory framework requiring unfairly or improperly procured arbitration awards to be set aside. It is not, and cannot be, the law that courts must approve and confirm decisions involving the consideration of secret, false evidence to which the innocent, losing party was never allowed to respond. Judicial review of arbitrations is narrow but not nugatory, and circumstances like these are precisely why we have that review – not to reconsider the underlying “merits” anew but to ensure that the decision-making process “comports with the broad contours of procedural fairness.” *Seattle Packaging*, 94 Wn. App. at 487. Here, the broad contours of procedural fairness – the basic, core principles of due process and fundamental fairness – were violated, and the Award should be vacated as a result.

For all the reasons set forth herein, Hicks respectfully requests that the Court (1) reverse the trial court’s order denying the motion to vacate and confirming the Award; (2) remand to the trial court with instructions to remand the matter to a new arbitrator for a determination as to whether the deadlines for disputing the earn out had passed and, only if not, order the financial statements of the Company to be reviewed by a new reviewing accountant on a fair and transparent basis; and (3) vacate all awards of fees and costs to Graham and, pursuant to Section 10.9 of the Agreement (CP 603), order that Hicks be awarded his reasonable costs and attorney’s fees associated with this appeal as well as all such fees incurred

in connection with the preceding trial court proceedings.

Respectfully submitted this 31st day of July 2014.



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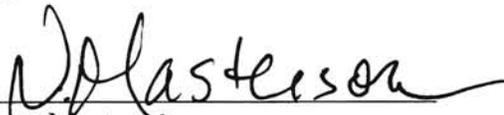
CERTIFICATE OF SERVICE

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

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Dated this 31st day of July, 2014.



Nancy Masterson