

No. 35531-1-II

DIVISION II, COURT OF APPEALS BY
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
CLERK

MICHAEL MORRELL and NANCY
MORRELL, husband and wife,

Plaintiffs/Respondents

v.

WEDBUSH MORGAN SECURITIES,
INC., a California corporation,

Defendant/Appellant

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. John A. McCarthy)

APPELLANT'S OPENING BRIEF

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I.

SUMMARY INTRODUCTION

This appeal presents a straightforward legal issue -- whether the trial court erred by granting attorneys' fees to the Morrells where there were no statutory grounds for such an award and the trial court impermissibly disturbed the arbitrators' decision that no fees should be awarded. The unequivocal answer must be "yes."

II.

ASSIGNMENTS OF ERROR

Defendant and Appellant Wedbush Morgan Securities, Inc. ("Wedbush" or "Appellant") makes the following assignments of error:

1. The trial court erred when it concluded that it had jurisdiction over the parties and the subject matter to modify the arbitration award. See Findings of Fact and Conclusions of Law, at 4 (CP 305), Conclusion of Law ("COL") No. 1.

2. The trial court erred when it concluded that Section M of the Customer Account Application and Agreement is mutual and applies to any party who is awarded in excess of \$2,000 on any claim. Id., COL No. 2.

3. The trial court erred when it concluded that the case law regarding "prevailing party" did not apply to the present dispute over attorneys' fees. Id., at 4-5 (CP 305-06), COL No. 3.

4. The trial court erred when it concluded that the arbitration panel's refusal to modify the arbitration award and its application of the "prevailing party" analysis were clearly erroneous. Id., (CP 306) COL No. 4.

5. The trial court erred when it concluded that it had the jurisdiction to modify the arbitration award and grant attorneys' fees to the Morrells. Id.

6. The trial court erred when it concluded that the Morrells were entitled to attorneys' fees under Section M of the Customer Account Application and Agreement simply because they were awarded in excess of \$2,000. Id., COL No. 7.

7. The trial court erred when it concluded that the Morrells were entitled to attorneys' fees in the amount of \$44,720.00. Id., at 6 (CP 307), COL No. 8.

8. The trial court erred when it entered judgment in the amount of \$44,720.00 in attorneys' fees against Wedbush. See Judgment, 1-2 (CP 308-09).

III.

STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Whether the trial court erred when it concluded that it had jurisdiction over the parties or the dispute over attorneys' fees when the

parties expressly agreed that California courts, venued in Los Angeles, have exclusive jurisdiction over "any dispute" between the parties. (Assignment of Error No. 1.)

2. Whether the trial court erred when it concluded that Section M of the Agreement is mutual and operated to award the Morrells' attorneys' fees, where the plain language of the Agreement limits such an award to Wedbush only. (Assignment of Error No. 2.)

3. Whether the trial court erred when it concluded that the prevailing party analysis did not apply to the dispute over attorneys' fees where both the governing California statute and Washington's similar statutory provision provide that attorneys' fees will only be awarded to the "prevailing party." (Assignments of Error Nos. 3-4.)

4. Whether the trial court erred when it concluded that it had the authority to modify the arbitration panel's award and grant attorneys' fees, where the trial court's authority to modify the award is strictly limited, the Morrells cited no statutory grounds for the "amendment" of the award, and no statutory grounds existed. (Assignments of Error Nos. 7-8.)

5. Whether the trial court erred by modifying the Award to include the requested attorneys' fees and entering judgment against Wedbush in the amount of \$44,720.00 in excess of the Award and after

the Morrells had accepted full and final payment for the arbitration award.
(Assignments of Error Nos. 7-8).

IV.

STATEMENT OF THE CASE

A. The Morrells and Wedbush Enter Into an Agreement That Detailed the Parties' Rights and Obligations, Including an Agreement That the Parties Would Submit Any Dispute to Final and Binding Arbitration; the Morrells Ignore the Arbitration Clause and File Suit Against Wedbush in the Superior Court.

Wedbush is a broker-dealer registered with the National Association of Securities Dealers, Inc. See Declaration of Gary L. Holmes ("Holmes Decl."), ¶ 2 (CP 49). In January 1990, plaintiffs Michael and Nancy Morrell (previously Nancy Eaton) (the "Morrells") executed a Wedbush Customer Account Application and Agreement (the "Agreement"). Holmes Decl., Ex. A (Customer Account Application and Agreement) (CP 54-55). The Agreement provides, in part:

L. Laws of the State of California: The provisions of this Agreement shall in all respects be construed according to, and the rights and liabilities of the parties hereto shall in all respects be governed by the laws of the State of California.

M. Attorneys' Fees: The undersigned agrees to pay attorney's fees incurred by WMS in any claim adjudicated against the undersigned [Morrells], which is in the excess of two thousand dollars. The [Morrells] consent[] to jurisdiction in California and venue in Los Angeles in any dispute between WMS and the [Morrells].

....

S. ARBITRATION: THE FOLLOWING GENERAL PROVISIONS APPLY TO ALL ARBITRATIONS UNDER THIS AGREEMENT:

(1) ARBITRATION IS FINAL AND BINDING ON THE PARTIES.

(2) THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL.

.....

(4) THE ARBITRATORS' AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED.

.....

THE UNDERSIGNED AGREES ... THAT ALL CONTROVERSIES WHICH MAY ARISE BETWEEN THE UNDERSIGNED AND WMS ... CONCERNING ANY TRANSACTION OR THE CONSTRUCTION, PERFORMANCE OR BREACH OF THIS OR ANY OTHER AGREEMENT ... SHALL BE DETERMINED BY ARBITRATION.

Id. (emphasis added).

In September 2001, the Morrells filed this action (the "Lawsuit") against Wedbush based upon allegations that its broker, Stuart Simon, sold stock from their portfolio in 1995 against their wishes. Holmes Decl., ¶ 4 (CP 49-50). Wedbush successfully moved the trial court to stay the Lawsuit and transfer the proceedings to arbitration as required by the Arbitration Clause in Paragraph S of the Agreement; specifically, that "all

controversies" between the parties are subject to final and binding arbitration. See Holmes Decl., ¶ 4 (CP 49-50).

B. The Morrells File an Arbitration Demand Alleging Eight Causes of Action Against Simon and Wedbush; an Arbitration Panel Dismisses All Claims Against Simon and Five Claims Against Wedbush.

On August 25, 2004, the Morrells filed a Demand for Arbitration before the National Association of Securities Dealers Dispute Resolution, Inc. ("NASDDR") asserting the following eight claims against Wedbush and Mr. Simon: (1) unsuitability; (2) negligence; (3) breach of fiduciary duty; (4) negligent, material misrepresentations and omissions; (5) violations of Chapter 21.20 RCW (the "Washington State Securities Act"); (6) violations of RCW 19.86.020 (the "Consumer Protection Act"); (7) breach of contract; and (8) failure to supervise. Holmes Decl., Ex. B, at 5-9 (Demand for Arbitration) (CP 61-65).

The Morrells requested \$355,911.39 in damages, consisting of \$92,312.39 in damages based upon unauthorized sale of IBM stock and \$263,599.00 based upon alleged unsuitability. See Holmes Decl., Ex. C, at 2 (Claimants' Statement of Damages Re: Unauthorized Sale of IBM Stock) (CP 69); Holmes Decl., Ex. D, at 2 (Letter from J. Christensen to G. Holmes) (CP 74-75). In addition, the Morrells requested unspecified special damages, rescission, punitive damages, prejudgment interest, and

attorneys' fees and costs. Holmes Decl., Ex. B at 9-10 (Demand for Arbitration) (CP 65-66).

Wedbush and Simon moved for dismissal of all claims. Holmes Decl., Ex. E, at 1 (Order on Motion to Dismiss) (CP 78). A panel of three NASDDR arbitrators considered the motion and, as a threshold matter, determined that pursuant to Paragraph L of the Agreement, California law applied to the parties' dispute. Id. at 2-3 (CP 79-80). Applying California law, the arbitrators dismissed all claims brought against Mr. Simon. Id. at 6 (CP 83). In addition, the panel dismissed the Morrells' negligence, misrepresentation, Washington State Securities Act, Consumer Protection Act, and failure to supervise claims against all respondents. Id.

C. The Arbitrators Rule in Favor of Wedbush on All but One of the Morrells' Claims and Award the Morrells Only a Fraction of the Damages They Sought.

The NASDDR panel issued a March 3, 2006 written award (the "Award") after an arbitration hearing that commenced on February 20, 2006. Holmes Decl., ¶ 8 (CP 51); id., Ex. F, at 5-9 (CP 92-98). The panel awarded the Morrells only \$70,600 -- less than 20 percent of their total \$355,911.39 demand -- based upon the Morrells' breach of fiduciary duty claim. Id., Ex. F, at 6 (CP 93). With respect to the \$70,600 award, the panel applied offsets based upon (1) the Morrells' failure to mitigate their damages, and (2) the commission discounts granted to the Morrells by

Wedbush as partial compensation for the losses Wedbush sustained. Id. The arbitration panel awarded prejudgment interest on the compensatory damages award for a total award of \$101,817.14. Id. In total, the arbitrators denied seven of the Morrells' eight claims; dismissed Mr. Simon completely; denied punitive damages, costs, attorneys' fees, and "special damages"; and declined to award the vast majority of the compensatory damages sought by the Morrells. Id. at 6-7 (CP 93-94).

The NASDDR arbitration panel specifically declined to award attorneys' fees to either the Morrells or Wedbush, as follows:

With due regard for all of the claims and defenses that have been presented by the parties and resolved in this Award, the Panel has determined that each party will be responsible for its own attorneys' fees and costs.

Id. The arbitrators added: "Any and all relief not specifically addressed herein, including punitive damages, is denied." Id. at 7 (CP 94).

On March 29, 2006, Wedbush forwarded to the Morrells' counsel two checks in the total amount of \$101,817.14 "in full satisfaction of the award in this matter." Holmes Decl., Ex. G (CP 101-03).

D. The Morrells Move the Trial Court to Amend the Award to Add Attorneys' Fees; The Trial Court Reserves Ruling and Requires the Morrells to Submit the Issue to the Arbitration Panel.

On April 3, 2006, the Morrells filed a Motion to Modify and Confirm Arbitration Award requesting this Court reject the arbitrators' denial of attorneys' fees and award \$44,720. See Motion to Modify and

Confirm Arbitration Award at 1-2 (CP 28-29). (Citing only Washington law, the Morrells did not challenge the arbitrators' determination in the Award that California law governed the dispute between the parties.) Wedbush opposed the motion, and the trial court reserved ruling on the Morrells' motion until they presented their request to reconsider the attorneys' fees issue to the NASDDR arbitrators. See Order Re Plaintiffs' Motion to Modify and Confirm Arbitration Award (CP 104-05).

E. The Arbitration Panel Again Rejects the Morrells' Request for Attorneys' Fees.

The Morrells moved the same NASDDR arbitration panel that issued the Award to reconsider the original panel's denial of attorneys' fees. See Declaration of John R. Christensen ("Christensen Decl."), Ex. E (CP 133-40) (Claimants' May 25, 2006 Motion for Reconsideration Re: Attorney's [sic] Fees). The panel, citing NASD Arbitration Rule 1030(b), first confirmed that "all awards rendered pursuant to [the NASD] Code shall be deemed final and not subject to review or appeal." Id., Ex. F, at 1 (CP 167) (July 12, 2006 Ruling on Motion for Reconsideration Re: Attorneys' Fees) (attached hereto as Appendix A). The panel further noted that its previous award "specifically addressed the subject of attorneys' fees." Id. The NASDDR arbitrators again denied the Morrells' request for attorneys' fees stating, in part:

The Award in this matter was served on counsel for the parties on March 3, 2006. The Award specifically addressed the subject of attorneys' fees:

With due regard for all of the claims and defenses that have been presented by the parties and resolved in this Award, the Panel has determined that each party will be responsible for its own attorneys fees and costs. *Award pp. 6-7.*

This was the final Award of the arbitrators on the subject of attorneys' fees (and on all other issues in this arbitration) and this final Award shall remain unchanged.

.....

As stated in this Award, the determination that each party shall be responsible for its own attorneys' fees was made with due regard for the resolution in the Award of the multiple claims and defenses that were presented and finally resolved. The Panel concluded that given these results, neither party could be deemed the prevailing party for purposes of an award of attorneys' fees. . . . Suffice it to say that the Panel concluded that given the resolution of all claims and defenses in the manner addressed in the Award, neither party prevailed for purposes of awarding attorneys fees.

Holmes Decl., Ex. I (CP 238-39) (italics original; underscores supplied).

F. The Trial Court Grants the Morrells' Renewed Motion for Attorneys' Fees.

Approximately seven weeks after the NASDDR panel denied the Morrells' motion for reconsideration to award attorneys' fees, the Morrells filed a "Renewed Motion for Attorneys' Fees" on August 29, 2006. (CP 171). The Morrells did not ask the trial court to confirm the underlying award, nor did they cite any statutory grounds (under either California or Washington law) that would authorize the trial court to

vacate, modify or correct the award. Instead, the Morrells returned to the trial court to "seek an award of attorneys' fees pursuant to the attorneys' fee provision in the customer agreement contract between plaintiffs and defendant Wedbush." Id. at 3 (CP 173).

The trial court granted the motion and entered the Findings of Fact and Conclusions of Law submitted by the Morrells. See October 27, 2006 Findings of Fact and Conclusions of Law Re: Attorneys [sic] Fees (CP 302-07). The Findings of Fact are a recitation of the procedural history of the case. Id. at 2-4 (CP 303-05). The Conclusions of Law make no reference to statutory grounds for modifying the Award under either California or Washington law. Id. at 4-6 (CP 305-07). The trial court's amendment to the Award increased the total recovery to the Morrells by 44 percent. This timely appeal follows.

V.

JURISDICTION

As a threshold matter, the trial court lacked jurisdiction to hear the Morrells' motions for attorneys' fees and the case should be remanded to the trial court for an entry of dismissal. The Morrells agreed that any dispute over attorneys' fees arising out of the Agreement are subject to the jurisdiction of California courts, applying California law, and venued in Los Angeles, California. Agreement, ¶¶ L-M (CP 55). Washington courts

enforce forum selection clauses unless they are unreasonable or unjust. Voicelink Data Services, Inc. v. Datapulse, Inc., 86 Wn. App. 613, 618, 937 P.2d 1158 (1997). In the absence of evidence submitted by a party opposing enforcement of a contractual forum selection clause establishing fraud, undue influence, overwhelming bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive the aggrieved party of a meaningful day in court, the expressed intent of the parties should be upheld. Id. (citations omitted).

Although Wedbush raised this lack of jurisdiction in its opposition to both of the Morrells' motions for attorneys' fees, the Morrells never explained why this express provision did not preclude the trial court from entertaining their motion. The Morrells have failed to, and indeed cannot, demonstrate any basis upon which to avoid their covenant to submit any claim between themselves and Wedbush to the jurisdiction of a California court venued in Los Angeles. Thus, by agreement of the parties, the trial court lacked jurisdiction over this dispute. Yet the trial court entered Conclusion of Law No. 1, which erroneously states that it had subject matter jurisdiction over the Morrells' motion. The trial court erred and this Court should reverse and remand for further proceedings consistent with the parties' agreed upon forum selection clause.

VI.

GOVERNING LAW

California law applies to this dispute. Washington courts historically give effect to choice of law provisions. See, e.g., Parrott Mech., Inc. v. Rude, 118 Wn. App. 859, 78 P.3d 1026 (2003). Paragraph L of the Agreement expressly states: "The provisions of this Agreement shall in all respects be construed according to, and the rights and liabilities of the parties hereto shall in all respects be governed by the laws of the State of California." Agreement (CP 55) (emphasis added). Plaintiffs have not -- and cannot -- dispute that California law controls resolution of this issue.¹ However, because Wedbush would also prevail applying Washington law, Wedbush will analyze the present dispute under both states' laws.

VII.

STANDARD OF REVIEW

The California Supreme Court has repeatedly confirmed the fundamental principle that, in light of the strong public policy in favor of

¹In ruling on Simon's and Wedbush's Motions to Dismiss, the arbitrators made an express finding that California law applies to this matter. Order on Motions to Dismiss at 3 (CP 80). Plaintiffs never objected to this finding or moved the arbitration panel for reconsideration of this threshold finding. In light of the direct language in Paragraph L, any such challenge would have been futile.

private arbitration, judicial review of an arbitrator's award is quite limited. See, e.g., Bd. of Educ. v. Round Valley Teachers Ass'n, 13 Cal. 4th 269, 275, 52 Cal. Rptr. 2d 115 (Cal. 1996). In determining whether private arbitrators have exceeded their powers, the courts must accord substantial deference to the arbitrators' own assessments of their contractual authority. Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal. 4th 362, 373, 36 Cal. Rptr. 2d 581 (Cal. 1994). Accordingly, the Court of Appeals conducts a de novo review, independently of the trial court, of the question whether the arbitrators exceeded the authority granted them by the parties' agreement to arbitrate. Ajida Technologies, Inc. v. Roos Instruments, Inc., 87 Cal. App. 4th 534, 104 Cal. Rptr. 2d 686 (Cal. 2001). Finally, when undertaking review of an arbitrators' award, this court "must draw every reasonable inference to support the award." Id. (citing Pierotti v. Torian, 81 Cal. App. 4th 17, 24, 96 Cal. Rptr. 2d 553 (2000)).

VIII.

ARGUMENT

A. Judicial Review of an Arbitration Award Is "Severely Limited" to Vindicate the Parties' Intention That the Award Be Final and Binding.

Nearly 15 years ago, the California Supreme Court revisited its precedent concerning judicial review of arbitration awards and affirmed the fundamental rule that judicial review of arbitration awards must be

highly circumscribed to ensure arbitral finality and vindicate the intentions of the parties. Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 10, 10 Cal. Rptr. 2d 183 (Cal. 1992). Moncharsh observed that the legislature had "expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'" Id. at 9 (citations omitted). Consequently, reviewing courts will "indulge every intendment to give effect to such proceedings." Id. (citations and internal quotation marks omitted); accord, A.M. Classic Constr., Inc. v. Tri-Build Dev. Co., 70 Cal. App. 4th 1470, 1474, 83 Cal. Rptr. 2d 449 (Cal. Ct. App. 1999). Considering the expectation of finality of arbitration awards, the court explained that the "very essence" of the term arbitration denotes a binding award. Moncharsh, 3 Cal. 4th at 9; see also A.M. Classic Constr., 70 Cal. App. 4th at 1474 ("[I]t is essential that arbitration judgments be both binding and final"). Indeed, the Moncharsh Court wrote: "Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts." Moncharsh, 3 Cal. 4th at 9 (internal quotation marks omitted) (citing Blanton v. Womancare, Inc., 38 Cal. 3d 396, 402 n.5, 212 Cal. Rptr. 151 (Cal. 1985)).

It is this very expectation of finality that "strongly informs the parties' choice of an arbitral forum over a judicial one. The arbitrator's

decision should be the end, not the beginning of the dispute." Moncharsh, 3 Cal. 4th at 10. Washington courts also recognize that, by agreeing to private arbitration, the parties are affirmatively giving up their right to have the dispute resolved by the courts. See Westmark Properties, Inc. v. McGuire, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989) ("The very purpose of arbitration is to avoid the court. It is designed to settle controversies, not to serve as a prelude to litigation"). To this end, judicial intervention in the arbitration process must be minimized. Id. "[A]rbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive because the parties have agreed that it be so." Moncharsh, 3 Cal. 4th at 10 (emphasis the court's).

Here, parties expressly² agreed that the Award would be final and binding:

S. ARBITRATION: THE FOLLOWING GENERAL PROVISIONS APPLY TO ALL ARBITRATIONS UNDER THIS AGREEMENT:

(1) ARBITRATION IS FINAL AND BINDING ON THE PARTIES.

²Principles of finality are so fundamental to arbitration that the Moncharsh court found as a general rule, even absent such an express agreement regarding finality, that the parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final. Moncharsh, 3 Cal. 4th at 9.

(2) THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL.

Agreement (CP 55). To vindicate the parties' intentions here, the arbitration award is "subject to very narrow judicial review." A.M. Classic Constr., 70 Cal. App 4th at 1474-75 (citing Moncharsh, 3 Cal. 4th at 9). The trial court disregarded this fundamental principle when it granted the Morrells' motion for fees without statutory authority.

B. Judicial Review of Private, Binding Arbitration Awards Is Limited to the Statutory Grounds for Vacating, Correcting, or Modifying an Award.

The merits of a controversy that has been submitted to arbitration are not subject to judicial review. See, e.g., Harris v. Sandro, 96 Cal. App 4th 1310, 1313, 117 Cal. Rptr. 2d 910 (Cal. Ct. App. 2002). Thus, the reviewing court is prohibited from reviewing the "validity of the arbitrator's reasoning, the sufficiency of the evidence supporting the award, or any errors of fact or law that may be included in the award." Id. An award may be vacated or modified only based on one of the statutorily enumerated grounds. Id. (citing Marsch v. Williams, 23 Cal. App. 4th 238, 243-44, 28 Cal. Rptr. 2d 402 (Cal. Ct. App. 1994)).

1. California's Limited Statutory Grounds for Vacating or Correcting an Arbitration Award. California law permits the trial court to vacate an arbitration award when the court determines that:

(1) The award was procured by corruption, fraud or other undue means.

(2) There was corruption in any of the arbitrators.

(3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

(4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.

Cal. Code Civ. Proc. § 1286.2(a). The trial court can correct an award under California law in the very limited circumstances where:

(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

Cal. Code Civ. Proc. § 1286.6. These statutory provisions provide the "exclusive grounds" upon which an arbitration award can be vacated or corrected. See, e.g., A.M. Classic Constr., 70 Cal. App. 4th at 1475. "Except on these grounds, arbitration awards are immune from judicial review in proceedings to confirm or challenge the award." Id.

2. Washington Has Similarly Narrow Bases for Vacating or Modifying an Arbitration Award. Washington has nearly identical statutory grounds for vacating or modifying an arbitration award. The trial court may vacate the award only where:

(a) The award was procured by corruption, fraud, or other undue means;

(b) There was:

(i) Evident partiality by an arbitrator appointed as a neutral;

(ii) Corruption by an arbitrator; or

(iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(d) An arbitrator exceeded the arbitrator's powers;

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the

objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or

(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

RCW 7.04A.230(1). If the trial court finds that the arbitrator exceeded his power under subsection (d), the proper remedy is to remand the matter back to the arbitrator. RCW 7.04A.230(3). The trial court has the power to modify or correct an arbitrator's award only where:

(a) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(c) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

RCW 7.04A.240(1).³ Just like the California statutes, RCW 7.04A.230 and .240 are the only grounds upon which an arbitration award can be vacated or corrected. See, e.g., Dayton v. Farmers Ins. Group, 124 Wn.2d

³Consistent with the case law analyzed in Section D.2.a, infra, Washington's statute governing modification or correction of an arbitration award has replaced (and arguably equated) "exceeded authority" with making "an award on a claim not submitted to the arbitrator." Cf. Cal. Civ. Code 1286.6 with RCW 7.04A.240(1)(b).

277, 279-80, 876 P.2d 896 (1994) (trial court's authority limited to actions authorized in statute).

C. Plaintiffs Fail to Satisfy Their Burden of Proving That Even One of the Statutory Grounds for Vacation, Modification or Correction of the Arbitrators' Award Exists.

1. The Morrells Carry the Heavy Burden of Establishing the Limited Statutory Grounds for Vacating or Modifying an Arbitration Award. California requires that "[a] petition to correct or vacate an award, or a response requesting such relief, shall set forth the grounds on which the request for such relief is based." Cal. Code Civ. Proc. § 1285.8. The Morrells cite no statutory authority in support of their Renewed Motion, and the Motion should have been dismissed on that procedural flaw alone. Id.

The Morrells also fail to meet their substantive burden of proof. The burden of proving the statutory basis for modifying or correcting an arbitration award rests squarely with the party seeking to disturb the arbitration award. Betz v. Pankow, 16 Cal. App. 4th 919, 923, 20 Cal. Rptr. 2d 834 (1993); see also Pegasus Constr. Co. v. Turner Constr. Co., 84 Wn. App. 744, 748, 929 P.2d 1200 (1997) ("The burden of showing that [statutory] grounds exist is on the party seeking to vacate the award") (citing Groves v. Progressive Cas., 50 Wn. App. 133, 135, 747 P.2d 498 (1987)). If the moving party fails to satisfy this heavy burden, the reviewing court is prohibited from altering the arbitration award. Betz, 16

Cal. App. 4th at 930 (affirming denial of petition to vacate arbitration award where appellant failed to demonstrate statutory grounds permitted vacatur); accord, Nat'l Marble Co. v. Bricklayers & Allied Craftsmen, 184 Cal. App. 3d 1057, 1066, 229 Cal. Rptr. 653 (1986). The Morrells have utterly failed to meet this substantial burden and the trial court erred in modifying the arbitrators' award.

2. The Morrells Have Not Established Any of the Statutory Bases for the Trial Court's Grant of Attorneys' Fees. Tellingly, the Morrells *do not even cite to statutory grounds permitting the trial court's extraordinary grant of attorneys' fees let alone make arguments as to why any such grounds exist here.* See Renewed Motion for Attorneys' Fees (CP 171-77). Apparently frustrated over the arbitration panel's unwillingness to proclaim the Morrells the prevailing party after remand -- a prerequisite to recovering fees under both California and Washington law -- the Morrells simply abandon any attempt to satisfy their burden of establishing a statutory basis for the trial court's order.⁴ Failure to cite or argue the very limited

⁴The Morrells make a passing reference to RCW 7.04A.230 in their Motion to Modify and Confirm Arbitration Award. See Motion at 5-6 (CP 32-33). Remarkably, however, the Morrells seemingly reject the statutory requirement that the issue be remanded to the arbitration panel and ask the trial court to use its "leeway" and award attorney fees without remand. *Id.* at 6 (CP 33). Even a cursory review of the governing statutes and case law confirm that the trial court has no power to afford such extraordinary relief. This Court should not countenance the Morrells' (continued . . .)

grounds for disturbing the arbitration award is fatal to plaintiffs' Renewed Motion for Attorney Fees, and the trial court erred in granting the motion and entering judgment against Wedbush for the attorneys' fees. See Betz, 16 Cal. App. 4th at 923; see also Pegasus Constr., 84 Wn. App. at 749-50 (affirming denial of motion to vacate arbitration award where moving party failed to demonstrate violation of former RCW 7.04.160(3)).

The trial court's erroneous conclusions of law further illustrate the Morrells' failure to cite or establish the statutory grounds for awarding fees despite the panel twice rejecting the Morrells' request. The trial court does not cite any statutory grounds for its award of \$44,720.00 in attorneys' fees -- increasing the total award by approximately 44 percent. The trial court concluded that the panel's failure to apply the contractual attorney fee provision and choice to instead apply the prevailing party analysis was "clearly erroneous." COL No. 4 (CP 306). As discussed in the following section, this is not grounds for modifying the arbitration award. The trial court, at the Morrells' urging, misapprehended its very limited role in reviewing the arbitration panel's rejection of the Morrells' request for fees. Neither California nor Washington law grants the trial court authority to

(. . . continued)

attempt to circumvent the law establishing the very narrow and restricted role of the reviewing trial court.

revise an arbitration award, or much less to increase the amount of an arbitration award. The trial court's erroneous ruling should be reversed.

D. The Morrells *Cannot* Satisfy Their Burden of Proving Statutory Grounds for Vacating or Modifying the Arbitration Award: The Arbitration Panel Did Not Exceed Its Authority When It Twice Denied the Morrells' Request for Attorneys' Fees.

The only argument that the Morrells have made that even touches on the limited statutory grounds for disturbing the arbitration panel's award was in their original Motion to Modify and Confirm the Arbitration Award, wherein they claim that the arbitrators exceeded their authority.⁵ Although not raised in the Renewed Motion or referenced anywhere in the trial court's Findings of Fact and Conclusions of Law, Wedbush will presume without conceding that this theory is the basis for the Morrells' request for fees. The Morrells -- and ultimately the trial court -- misconstrued this standard. Moreover, the trial court's conclusions regarding the prevailing party requirement contradict the clear requirements of the very statutes the Morrells invoke to authorize the grant of attorneys' fees.

1. The Arbitration Panel Did Not Exceed Its Authority: The Morrells Submitted the Issue of Attorneys' Fees to the Panel for Resolution and the Resulting Award Is Not Subject to Judicial Review Even if Based on an Error of Law or Fact. In Moncharsh, the California

⁵Again, the Morrells failed to identify the specific statutory grounds for this argument.

Supreme Court declared that "[i]t is well settled that 'arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.'" 3 Cal. 4th at 28 (citing O'Malley v. Petroleum Maint. Co., 48 Cal. 2d 107, 111, 308 P.2d 9 (Cal. 1957)). Thus, the arbitrators do not exceed their authority within the meaning of § 1286.2 and § 1286.6 merely by rendering an erroneous decision on a legal or factual issue, "so long as the issue was within the scope of the controversy submitted to the arbitrators." Moshonov v. Walsh, 22 Cal. 4th 771, 776, 94 Cal. Rptr. 2d 597 (Cal. 2000); see also State Farm Mut. Ins. Co. v. Guleserian, 28 Cal. App. 3d 397, 402, 104 Cal. Rptr. 683 (Cal. Ct. App. 1972) ("An error of law committed by the arbitrator, no matter how gross, is not [a ground for setting aside an arbitration award.]"). The parties submitted the issue of attorneys' fees to the arbitrator⁶ and the Morrells now urge nothing more than an error of law. The California Supreme Court has already rejected this argument and, applying Moncharsh and its progeny, the trial court here had no authority to grant the Morrells' Renewed Motion for Attorneys' fees.

⁶The Morrells claimed in their Demand for Arbitration that they were entitled to attorneys' fees pursuant to RCW 21.20.430, Washington's Securities Act. They make no mention of Paragraph M. See Demand for Arbitration at 9 (CP 65).

a. Once a Party Submits an Issue to the Arbitrators, the Arbitrators' Decision Is Immune from Judicial Review. In Moore v. First Bank of San Luis Obispo, in circumstances virtually identical to the present case, the California Supreme Court affirmed the denial of a party's request for correction of an arbitration award to add attorneys' fees. 22 Cal. 4th 782, 94 Cal. Rptr. 2d 603 (Cal. 2000). In Moore, the parties entered into a loan agreement for a property development scheme, in which the plaintiffs used their own homes as collateral. Id. at 784. Plaintiffs filed suit against the bank after the bank sought to foreclose on the plaintiffs' homes. Id. at 785. The bank cross-complained. Both the complaint and the cross-complaint sought an award of attorneys' fees. Id.

The loan agreement had a provision whereby the parties agreed to arbitrate any disputes arising from the loan agreement according to the rules of the American Arbitration Association. Id. The loan agreement also contained a unilateral attorneys' fees provision by which the plaintiffs agreed to pay the bank's attorneys' fees. The trial court ordered arbitration of the issues. At the arbitration hearing, plaintiffs' counsel stated that plaintiffs were no longer pursuing a claim for damages except for attorneys' fees. Id. In a postarbitration brief, however, plaintiffs requested exemplary damages on their cause of action for fraud, and asked to be awarded attorneys' fees as the prevailing party. Id.

The arbitrator ordered the bank to cancel all obligations under the contract, to obtain reconveyances of the deeds on plaintiffs' homes, and to execute releases from the liens and promissory notes. Id. The award further provided that "[n]o monetary sum is awarded to [plaintiffs] in this matter." Id. at 786 (alterations in original). Without any explanation, the arbitration award further provided that "[e]ach party shall pay its own attorney's fees." Id.

The bank petitioned for confirmation of the award and the plaintiffs moved for correction of the award pursuant to Cal. Code Civ. Proc. § 1286.6(b), claiming the arbitrators had exceeded their authority. Id. The superior court denied plaintiffs' motion to correct the award, finding the question of fees had been submitted to and decided by the arbitrators and was, therefore, unreviewable by the court under [the California Supreme Court's] decisions. Id. (internal citations omitted.)

The Court of Appeal affirmed, reasoning that although plaintiffs were, as a matter of law, the prevailing party for purposes of Civil Code § 1717, the arbitration panel's refusal to award fees, an error of law on an issue within the arbitrators' power to decide, could not be corrected under Moncharsh.

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Id. The California Supreme Court affirmed the Court of Appeal, explaining that, because the issue of recovery of attorneys' fees was submitted to the arbitration panel -- both sides requested fees -- the issue became "one of the 'contested issues of law and fact submitted to the arbitrator for decision' the arbitrators' decision was final and could not be judicially reviewed for error." Id. at 787 (internal citations omitted).

The plaintiffs argued that once the arbitrators determined who was to prevail on the contract-related claims, that the arbitrator then had no power to deny attorneys' fees to the prevailing party. Id. The court flatly rejected that argument, concluding:

Plaintiffs' argument fails for the same reason as in Moshonov: the entire controversy, including all questions as to the ingredients of the award, was in fact submitted to the arbitrators in this case. Plaintiffs submitted the question of fees to the arbitrators, first, by submitting the entire controversy created by the pleadings, including the prayer for fees contained in their complaint, and, second, by actually requesting an award of fees from the arbitrators themselves. Having submitted the fees issue to arbitration, plaintiffs cannot maintain the arbitrators exceeded their powers, within the meaning of [Cal. Code Civ. Proc.] section 1286.6, subdivision (b), by deciding it, even if they decided it incorrectly.

Id. (emphasis added). Indeed, the Moore court held that an arbitrator does not exceed his powers even if denying a party's request for attorneys' fees "would be reversible legal error if made by a court in civil litigation." Id.

at 784; accord, Pierotti, 81 Cal. App. 4th at 24; see also Delaney v. Dahl, 99 Cal. App 4th 647, 655-56, 121 Cal. Rptr. 2d 663 (Cal. Ct. App. 2002) (arbitrator does not exceed his authority even if he wrongly interprets the applicable written contract).

Here, just as in Moore, the contract contained a unilateral attorneys' fees provision, requiring the Morrells to invoke Cal. Code Civ. Proc. § 1717 to permit a grant of attorneys' fees. See Agreement, Paragraph M (CP 55) (providing fees only to Wedbush). The Morrells submitted the issue of attorneys' fees to the arbitrators both in their demand for arbitration and after remand from the trial court. See Demand for Arbitration at 9 (CP 65); Claimants' Motion for Reconsideration Re: Attorney's [sic] Fees (CP 133-40). The Morrells have argued that they are the prevailing party. See Renewed Motion for Attorneys' Fees at 6 (CP 176). The Morrells argue that, by failing to award attorneys' fees, the arbitrators exceeded their authority. See Motion to Modify and Confirm Arbitration Award at 1 (CP 28). On virtually identical facts, the Moore court emphatically rejected the arguments the Morrells successfully made to the trial court. There can be no reasonable dispute that Moore is dispositive of the Morrells' claims, and that the trial court accordingly erred when it granted their motion for attorneys' fees. See also Woodard v. So. Cal. Permanente Med. Group, 171 Cal. App. 3d 656, 662, 217 Cal.

Rptr. 514 (Cal. Ct. App. 1985) ("an erroneous ruling of law does not equate with excess of power"); Lindholm v. Galvin, 95 Cal. App. 3d 443, 451, 157 Cal. Rptr. 167 (Cal. Ct. App. 1979) ("[i]n California the applicable rule is that an arbitrator may make a binding award which a court is required to enforce, even though the award conflicts with substantive law").

b. Arbitrator Does Not Exceed His Authority When Denying Attorneys' Fees, Even if That Decision Directly Conflicts With an Otherwise Mandatory Contractual Attorneys' Fees Provision. The California Supreme Court has already resolved the issue of whether an arbitrator exceeds his authority by denying fees, even in light of a contractual provision seemingly mandating such an award. In Moshonov v. Walsh, supra, a companion case to Moore, the California Supreme Court affirmed the denial of a party's request for "correction" of an arbitration award to add attorneys' fees. 22 Cal. 4th at 777. The contract between the parties included the following provision: "Should arbitration or suit be brought to enforce the terms of this contract or any obligation herein, . . . the prevailing party shall be entitled to reasonable attorneys' fees." Id. at 774 (emphasis added). The arbitrator ruled for the defendants, and the award provided that plaintiffs would take nothing on their complaint and defendant would take nothing on their cross-

complaint. Id. The award provided for defendants' costs, but was silent on the issue of attorneys' fees. Id. The defendants filed a motion to confirm in the superior court, and requested -- from the trial court -- an order naming defendants as prevailing parties and awarding them attorneys' fees. Id. On remand, the arbitrator found that the defendants were the prevailing parties, but denied all of defendants' requests for attorneys' fees. Id. at 775. The defendants again moved the trial court for an award of attorneys' fees. Id. at 775. The trial court denied the motion. Id.

The Moshonov defendants argued that the arbitrator exceeded its authority in denying attorneys' fees because the arbitrator's refusal to award attorneys' fees was in "direct conflict with the express terms of the arbitrated contract." Id. at 777 (emphasis added). The court categorically rejected this argument, reasoning that the arbitrator's choice of relief does not exceed his powers when the relief expressly or impliedly bears a rational relationship to the underlying contract. Id. In affirming the trial court's denial of the motion, the California Supreme Court noted that an arbitrator may exceed his authority by granting relief expressly forbidden by the arbitration agreement. Id. In both Moshonov and the instant case, the arbitrators did not exceed their authority, because they did nothing that is expressly forbidden by the arbitration agreement.

Thus, the California Supreme Court has already rejected the very argument the Morrells cite as the basis for their motion -- that the arbitration award directly conflicts with the contractual attorneys' fees provision in Paragraph M of the Agreement. Relying on various contract principles, the Morrells miss the point. Because the Morrells submitted the issue of attorneys' fees to the NASDDR panel, the arbitrators alone had the power to make a determination on that issue. Even if, as the Morrells argue, that decision was erroneous, Moshonov squarely mandates that any erroneous decision is not subject to judicial review.

2. Even Applying Washington Law, the Trial Court Erred by Granting the Morrells' Motion for Attorneys' Fees: Any Such Grant Would Have Required the Trial Court to Go Beyond the Face of the Award.

a. Pursuant to RCW 7.04A.240, Trial Court Has No Authority to Modify an Award on an Issue the Parties Submitted to the Arbitration. As noted above, RCW 7.04A.240 does not involve the "arbitrators exceeded their powers" analysis. Instead, the statute only permits judicial interference with an arbitration award where "the arbitrator has made an award on a claim not submitted to the arbitrator." RCW 7.04A.240(1)(b). The Morrells twice submitted the issue of attorneys' fees to the NASDDR arbitration panel -- first in their demand for arbitration and

second in their specific request that the panel make an award of attorneys' fees. That the Morrells submitted this issue to the arbitration panel is evident on the face of the Award and the Ruling on Motion for Reconsideration Re: Attorneys' Fees. (CP 219) ("[The Morrells] requested . . . attorneys' fees"); (CP 167) (addressing the Morrells' Motion for Reconsideration Re: Attorney's [sic] Fees). Under RCW 7.04A.240(1)(b), the judicial inquiry stops here. The trial court had no authority under Washington law to modify the Award. The order must be reversed, and the judgment against Wedbush for attorneys' fees must be vacated.

b. Like California, Washington Courts Place Strict Limitations on a Reviewing Court's Ability to Disturb an Arbitration Award. In Washington, when a court does review an arbitration award, the reviewing court "does not have collateral authority to go behind the face of an award and determine whether additional amounts are appropriate." Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). The error must be recognizable from the face of the award, for example where the award awards punitive damages in a jurisdiction that does not allow punitive damages. Federated Servs. Ins. Co. v. Norberg, 101 Wn. App. 119, 124, 4 P.3d 844 (2000); cf. Davidson v. Hensen, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998) (affirming confirmation of arbitration award where challenging party could not "point

to an error that appears on the face of the arbitrator's award"). "Limiting judicial review to the face of the award is a shorthand description for the policy that courts should accord substantial finality to arbitrator decisions." Federated Servs. Ins., 101 Wn. App. at 123. A court cannot consider the merits of an arbitrated controversy to add additional amounts to an arbitration award -- this is "forbidden territory." Westmark Properties, 53 Wn. App. at 404.

c. Washington Courts Have Consistently Held That the Trial Court Has No Power to Increase Arbitration Awards. In Dayton, the Washington Supreme Court reversed the trial court's order granting attorneys' fees. 124 Wn.2d at 280. The arbitrator ruled in favor of the injured plaintiff, awarding him \$19,000, but did not award attorneys' fees. Id. at 279. When plaintiff moved for confirmation of the arbitration award, he also requested that the trial court grant him attorneys' fees pursuant to Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991). Dayton at 278. The trial court confirmed the arbitration award and granted plaintiff \$9,167.76 in attorneys' fees. Our Supreme Court reversed the trial court, affirming the fundamental principle that trial courts reviewing arbitration awards are strictly bound by statute. Id. at 279. The Dayton court held:

The arbitration panel did not include attorney fees in its award. The Superior Court's award of attorney fees at the subsequent

hearing to confirm the award did not meet the criteria for correction or modification of an award as set forth in RCW 7.04.170. The court exceeded its authority in awarding the attorney fees.

Id. at 280. Cf. Bongirno v. Moss, 93 Wn. App. 654, 969 P.2d 1118 (1999) (applying mandatory arbitration statute, trial court has no statutory authority to "amend" an arbitration order by granting attorneys' fees in addition to arbitrator's award).

Similarly in Westmark Properties, this Court found that the trial court exceeded its authority in granting prejudgment interest where the arbitration award was silent on the issue. The Westmark Properties court observed that the arbitrator was empowered to decide the issues submitted, and that "judicial scrutiny stops [t]here." 53 Wn. App. at 404. This Court went on to hold that:

the trial court erred in adding prejudgment interest to the award. Inasmuch as the court was foreclosed from going behind the face of award, it had no basis for determining whether the amount awarded met the test for prejudgment interest; this was part of the merits of the controversy, forbidden territory for a court.

Id. at 404.

In Phillips Building Co. v. An, 81 Wn. App. 696, 915 P.2d 1146 (1996), this Court again concluded that the trial court could not look past the face of an arbitration award to grant attorneys' fees where the arbitration award did not include such fees. In Phillips, this Court considered whether it had authority to vacate an arbitrator's denial of

attorneys' fees where a contract between the parties to that action entitled the prevailing party to attorneys' fees, but the arbitrator awarded plaintiffs only a portion of what they demanded. Id. at 698-700. Denying the plaintiff's motion to vacate the arbitration award so that attorneys' fees could be awarded, this Court stated:

In order to resolve these issues, the parties seek to look behind the arbitration award to the merits of the case. Judicial review of an arbitration award, however, does not include the merits of the award; review is limited to the face of the award.

....

We cannot determine from the face of the award whether the [plaintiffs] or [defendants] prevailed. . . . We are not allowed to go behind the face of the award to determine the merits of that decision.

....

We, therefore, hold that because the prevailing party cannot be determined from the face of the arbitration award, the court may not modify the award.

Phillips, 81 Wn. App. at 703-04 (citations omitted); see also Puget Sound Bridge & Dredging Co. v. Frye, 142 Wn. 166, 252 P. 546 (1927) (method or procedure employed by arbitrator to ascertain numbers is solely within arbitrator's province unless it appears on face of award that method adopted necessarily results in error of fact).

The Morrells mistakenly rely upon Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 654 P.2d 712 (1982), rev. denied, 99 Wn.2d 1006 (1983),

(see the Morrells' Motion to Modify at 6:22-7:8) (CP 33-34), a case that contradicts the Morrells' position because, as the Phillips court recognized, the reasoning in Agnew is limited to the uncommon and distinguishable circumstance where a party prevails on all claims. See Phillips, 81 Wn. App. at 704. In Agnew, an arbitration panel denied all of plaintiff's claims and awarded nothing to plaintiffs. The Agnew defendants prevailed on all claims, and that outcome could be determined from the face of the arbitration award. Therefore, in Agnew, defendants were entitled to attorneys' fees as wholly prevailing parties under a contract between the parties. Agnew, 33 Wn. App. at 286, 290.

Here, Wedbush prevailed outright on seven of eight claims brought by plaintiffs. On the remaining claim, the Morrells -- like the plaintiff in Phillips -- only partially prevailed, and thus cannot be characterized as prevailing party on the face of the Award. The Morrells recovered less than 20 percent of the compensatory damages they sought, and they were denied all punitive damages, "special damages," and other monetary and nonmonetary relief they sought. The arbitration panel did not exceed its authority in not awarding attorneys' fees to a party that, on the face of the Award, did not prevail on the claims it brought. The trial court erred by revising the Award with no statutory basis and contrary to California and Washington case law.

Further, a searching review of the face of the arbitration award in this case reveals that there is no mention of Paragraph M or any attorneys' fees provision. The award simply states: "With due regard for all of the claims and defenses that have been presented by the parties and resolved in this award, the Panel has determined that each party will be responsible for its own attorneys [sic] fees and costs." See Award at 6-7 (CP 93-94). There is no error apparent on the face of the award. The trial court necessarily would have had to look past the face of the award to grant the fees, an action this Court and our Supreme Court have repeatedly expressly forbidden. The trial court's grant of attorneys' fees pursuant to Paragraph M of the Agreement is error and should be reversed.

E. The Morrells Are Not Entitled to Attorneys' Fees Under Cal. Code Civ. Proc. § 1717: The Award Was Based on the Morrells' Tort Claims and Expressly **Not** on the Contract Claims.

California Civil Code § 1717 applies only when an award is based upon a claim sounding in contract. See Moore, 22 Cal. 4th at 788 (affirming arbitrator's finding that no attorneys' fees were recoverable under § 1717 because no party had unequivocally "prevail[ed] on the contract" (emphasis in original)).

California Civil Code § 1717 states, in relevant part:

(a) In any action on a contract . . . the party prevailing on the contract . . . shall be entitled to reasonable attorneys' fees.

The party must prevail on the contract, rather than prevail in the lawsuit, to obtain attorneys' fees under § 1717. Myers Bldg. Indus. v. Interface Tech., Inc., 13 Cal. App. 4th 949, 975 (Cal. Ct. App. 1993) The arbitration panel unambiguously based its March 2003 Award in this matter on Plaintiffs' breach of fiduciary duty theory, a theory sounding in tort, not in contract. See Award at 6 (CP 93). Consequently, the Morrells are not "the party prevailing on the contract," under California Civil Code § 1717, and are therefore not entitled to attorneys' fees. The trial court erred in granting the Morrells' motion for fees.

F. The Trial Court Erred When It Determined That the Prevailing Party Analysis Did Not Apply to the Morrells' Fee Request: The Statute Expressly Requires That the Morrells Must Be the Prevailing Parties to Be Entitled to Attorneys' Fees.

California Civil Code § 1717, the only vehicle by which the Morrells would be entitled to attorneys' fees, expressly provides that a party can only recover its attorneys' fees when it is the prevailing party.

1. The Plain Language of Paragraph M Declares that Only Wedbush Is Entitled to Attorneys' Fees. Paragraph M provides that the Morrells must pay Wedbush's attorneys' fees in any action where Wedbush recovers more than \$2,000. By its plain terms, this is a unilateral fee provision, and the Morrells are not entitled to recover fees under Paragraph M. Consequently, the Morrells must look to the

provisions of Cal. Civil Code § 1717, which clearly requires that they must be the "prevailing party" to be entitled to their attorneys' fees.

2. Applying Cal. Civil Code § 1717, California Courts Have Imposed a Prevailing Party Requirement on Unilateral Attorneys' Fees Provisions That Lack the Prevailing Party Language. Once a party invokes the benefits of Cal. Civil Code § 1717, which authorizes an award of fees the party would not otherwise be contractually entitled to, the party must satisfy the statute's eligibility requirements. See, e.g., Scott Co. of Cal. v. Blount, Inc., 20 Cal. 4th 1103, 1109, 86 Cal. Rptr. 2d 614 (Cal. 1999). Scott addressed the interplay between unilateral attorneys' fees provisions and section 1717:

On its face, the attorney fees provision is unilateral, giving only defendant and not plaintiff a right to attorney fees. Section 1717, however, renders the provision mutual, giving either plaintiff or defendant, if a prevailing party, a right to attorney fees on any claims based on the contract

Id. (emphasis added). Contractual provisions conflicting with § 1717's prevailing party requirements are void. Wong v. Thrifty Corp., 97 Cal. App. 4th 261, 264, 118 Cal. Rptr. 2d 286 (Cal. App. 2002). The Wong court reasoned that Wong was entitled to attorneys' fees because he satisfied all conditions of section 1717, including being the prevailing party. The court expressly held: "Language in the attorney fee provision that conflicts with the prevailing party definition is void." Id. at 265

(emphasis added); see also Fairchild v. Park, 90 Cal. App. 4th 919, 923-24, 109 Cal. Rptr. 2d 442 (2001) ("While the lease does not state that the tenants could recover attorney's fees [only] if they were the prevailing parties," Civil Code section 1717 makes a unilateral attorneys' fee provision in favor of the landlord reciprocal and grant fees only to the prevailing party); Frank M. Booth, Inc. v. Reynolds Metal Co., 754 F. Supp. 1441, 1448 (E.D. Cal. 1991) (finding that two parties' forms, which each contained unilateral attorneys' fees provisions not using the term "prevailing party," were reconciled because Section 1717 "converts such provisions into clauses permitting the prevailing party to recover attorney's fees for any dispute on the contract"). The law on this matter is well settled: The Morrells must be the prevailing party to be entitled to attorneys' fees. Their argument -- and the trial court's conclusion -- to the contrary is flat wrong.

G. The Trial Court Would Have No Authority to Disturb the Arbitrators' Ruling That Neither Party Was the "Prevailing Party": The Arbitrators' Finding Precludes the Grant of Attorneys' Fees.

After the Morrells were unsuccessful in their attempt to have the trial court unilaterally grant their requested attorneys' fees, they were forced to return to the NASDDR panel to ask for reconsideration.⁷ See

⁷The trial court reserved ruling on the Motion to Modify and Confirm Arbitration Award, and noted that it would consider a second
(continued . . .)

Order Re: Plaintiffs' Motion to Modify and Confirm Arbitration Award at 1-2 (CP 104-05). In their motion before the arbitration panel, the Morrells specifically requested fees because they "prevailed" on a claim in excess of \$2,000 and were entitled to fees under the contract. See Ex. E to Christensen Decl. (Claimants' Motion for Reconsideration Re: Attorneys' [sic] Fees) at 4 (CP 136). The NASDDR panel denied the motion and was unequivocal in its reasoning: "The panel concluded that given the[] results [of the arbitration], neither party could be deemed the prevailing party for purposes of an award of attorneys' fees." See Ex. F to Christensen Decl. (Ruling on Motion for Reconsideration Re: Attorneys' Fees) (CP 168). The arbitrators' determination of no prevailing party is immune from judicial review. See, e.g., Moore, 22 Cal. 4th at 788 (arbitrators' determination that no party had unequivocally prevailed, even if legally erroneous, is not reviewable under Cal. Code Civ. Proc. § 1286.2 or § 1286.6); Pierotti, 81 Cal. App. 4th at 24, 24 n.3 (challenge to arbitrator's designation of prevailing party is nothing more than an attack on the arbitrator's reasoning and not subject to judicial review); see also Phillips, 81 Wn. App. at 704 (court cannot go behind face of the award to

(. . . continued)

motion if appropriate under Chapter 7.04A RCW. See Order Re: Plaintiffs' Motion to Modify and Confirm Arbitration Award at 1-2 (CP 104-05).

determine who is the prevailing party). The trial court could not disturb the arbitrators' finding of no prevailing party, and the court's order awarding fees must be reversed.

H. Even if the Trial Court Could Review the Prevailing Party Analysis -- Which It Cannot -- the Morrells Would Still Not Be Entitled to Their Attorneys' Fees, as They Were Not the Prevailing Party.

When deciding whether there is a prevailing party on a contract, the court is to compare the relief awarded on the contract claim with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources Scott, 20 Cal. 4th at 1109. The court can then determine whether or not, on balance, neither party prevailed sufficiently to justify an award of attorneys' fees. Id. Washington law is similar: If both parties prevail on major issues, there is no prevailing party, and neither party is entitled to an attorneys' fee award. American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990).

Here, Wedbush prevailed outright on seven of the Morrells' eight claims.⁸ On the remaining claim,⁹ the Morrells only partially prevailed, and thus cannot be characterized as prevailing party. Overall, the Morrells recovered less than 20 percent of the compensatory damages they sought, and they were denied all punitive damages, "special damages," and other monetary and nonmonetary relief they sought. Wedbush plainly prevailed on seven of eight "major issues" and no fee-shifting is appropriate on the eighth claim, upon which the Morrells only partially prevailed. Consequently, the Morrells are not the "prevailing parties" and are not entitled to statutory attorneys' fees.

I. The Morrells' Claim for Attorneys' Fees Is Barred by the Doctrine of Accord and Satisfaction: The Morrells Accepted Full and Final Payment in Satisfaction of the Award.

The Morrells are also barred under the doctrine of accord and satisfaction from challenging the sufficiency and amount of the Award,

⁸Washington courts consider the totality of claims brought by the parties in determining whether there is a prevailing party for purposes of awarding attorneys' fees. See Marine Enters., Inc. v. Security Pacific Trading Corp., 50 Wn. App. 768, 772, 750 P.2d 1290, rev. denied, 111 Wn.2d 1013 (1988) (when both parties are afforded some measure of relief and there is no singularly prevailing party, neither party may be entitled to attorney fees).

⁹Again, the Morrells did not prevail on their contract claim. This is fatal to their claim for attorneys' fees under section 1717. That they prevailed on a common law tort claim is irrelevant. See Cal. Civ. Code § 1717(a).

because they have received and accepted payment "in full satisfaction" of the Award.

Accord and satisfaction requires three elements: (1) that there was a bona fide dispute between the parties, (2) that the debtor made it clear that acceptance of what he tendered was subject to the condition that it was to be in full satisfaction of the creditor's claim, and (3) that the creditor understood when accepting what was tendered that the debtor intended such remittance to constitute payment in full of the particular claim in issue. See, e.g., BII Finance Co. Ltd. v. U-States Forwarding Servs. Co., 95 Cal. App. 4th 111, 126, 115 Cal. Rptr. 2d 312 (2002).¹⁰

The doctrine of accord and satisfaction applies in this case and precludes the Morrells' request for an increase in the amount awarded them. Here, there was (1) a bona fide dispute between the parties; (2) Wedbush tendered the amount of the Award in full via a letter stating that the payment was "in full satisfaction of the award in this matter" (CP 231); and (3) the Morrells accepted Wedbush's tender and have exercised dominion over Wedbush's payment since it was made on

¹⁰The elements are similar under Washington law. See, e.g., Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc., 64 Wn. App. 661, 685-86, 828 P.2d 565 (1992) (elements are (1) that a debtor tenders payment to a creditor on a disputed claim; (2) that the debtor communicates that the payment is intended as full satisfaction of the claim; and (3) that the creditor accepts the payment).

March 29, 2006.¹¹ The Morrells are barred, therefore, from reasserting claims related to the Award under the doctrine of accord and satisfaction.

IX.

CONCLUSION

The trial court erroneously granted the Morrells' Renewed Motion for Attorneys' Fees. Appellants respectfully request that this Court reverse the trial court's ruling and remand the matter for confirmation of the arbitration award that has already been paid in full.

RESPECTFULLY SUBMITTED this 6th day of April, 2007.

LANE POWELL PC

By Brian Meenaghan
Christian N. Oldham
WSBA No. 14481
Brian J. Meenaghan
WSBA No. 28264
Laura T. Morse
WSBA No. 34532
Attorneys for Appellant
Wedbush Morgan Securities, Inc.

¹¹The Morrells cannot reasonably suggest they did not understand the payment was intended to be full and final payment to finally resolve all issues between the parties. Had they objected to the "full and final payment" language, they could have contacted Wedbush's counsel and explained that they believed attorneys' fees were still at issue. Instead, the Morrells accepted tender and then filed their motion for attorneys' fees. This behavior should not be rewarded.

APPENDIX A

NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Michael and Nancy Morrell,
Claimants,

vs.

Wedbush Morgan Securities, Inc., and Stuart K.
Simon,
Respondents.

Case Number: 04-06067

**Ruling on Motion for
Reconsideration Re: Attorneys'
Fees**

Claimants' Counsel has filed a Motion for Reconsideration Re: Attorneys' Fees. Respondent's Counsel has proved its written response. Counsel for Claimants and Respondent have agreed this motion can be resolved without oral argument.

The Panel, consisting of William J. Bender, Public Arbitrator and Panel Chair, Lawrence E. Little, Public Arbitrator and Kevin I. Patrick, Industry Arbitrator having reviewed the Motion for Reconsideration and Response and having conferred on the Motion, hereby rule on the Motion for Reconsideration, as follows:

The Motion for Reconsideration Re: Attorneys' Fees is denied. NASD Arbitration Rule 1030 (b) provides that, "...all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal." Furthermore, arbitration hearings may only be reopened before the Award is rendered. Arbitration Rule 10329. *Reopening of Hearings.*

No request was made to reopen the hearing before the Award was entered.

The Award in this matter was served on counsel for the parties on March 3, 2006. The Award specifically addressed the subject of attorneys' fees:

With due regard for all of the claims and defenses that have been presented by the parties and resolved in this Award, the Panel has determined that each party will be responsible for its own attorneys fees and costs.

Award pp. 6-7

This was the final Award of the arbitrators on the subject of attorneys' fees (and on all other issues in this arbitration) and this final Award shall remain unchanged.

Respondent's submission demonstrates that the total amount owing to satisfy the Award was paid on March 29, 2006.

According to Claimants' submission, on April 3, 2006, after the Award had been fully paid and satisfied, Claimants filed a motion in a pending Pierce County Washington

Superior Court case seeking an award of Attorneys Fees for the one claim on which Claimants partially prevailed in the matters that had been arbitrated. Claimants' counsel has represented in this motion that,

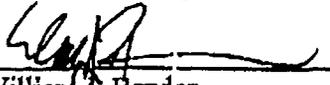
(F)ollowing the hearing [on the motion] the Court ruled that the issue of attorneys fees under the Customer Account must first be addressed by the panel before the court will rule on the motion.

Claimants' Motion, p. 2.

Without modify ng or changing the Award in any respect, the Panel makes the following observations in denying this Motion for Reconsideration.

As stated in the Award, the determination that each party shall be responsible for its own attorneys' fees was made with due regard for the resolution in the Award of the multiple claims and defenses that were presented and finally resolved. The Panel concluded that given these results, neither party could be deemed the prevailing party for purposes of an award of attorneys' fees.

The procedural history and recitation of claims and defenses is fully set out in the Award and will not be repeated here. Suffice it to say that the Panel concluded that given the resolution of all claims and defenses in the manner addressed in the Award, neither party prevailed for purposes of awarding attorneys fees.



William J. Bender
Panel Chair and Public Arbitrator

Dated: 7-12-06

Lawrence E. Little, Public Arbitrator

Dated: _____

Kevin I. Patrick, Industry Arbitrator

Dated: _____

Superior Court case seeking an award of Attorneys Fees for the one claim on which Claimants partially prevailed in the matters that had been arbitrated. Claimants' counsel has represented in this motion that,

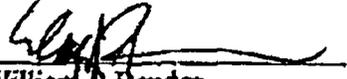
(F)ollowing the hearing [on the motion] the Court ruled that the issue of attorneys fees under the Customer Account must first be addressed by the panel before the court will rule on the motion.

Claimants' Motion, p. 2.

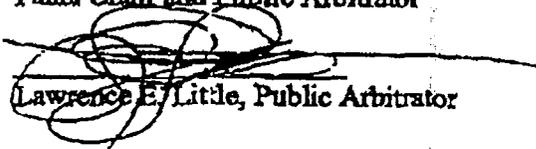
Without modifying or changing the Award in any respect, the Panel makes the following observations in denying this Motion for Reconsideration.

As stated in the Award, the determination that each party shall be responsible for its own attorneys' fees was made with due regard for the resolution in the Award of the multiple claims and defenses that were presented and finally resolved. The Panel concluded that given these results, neither party could be deemed the prevailing party for purposes of an award of attorneys' fees.

The procedural history and recitation of claims and defenses is fully set out in the Award and will not be repeated here. Suffice it to say that the Panel concluded that given the resolution of all claims and defenses in the manner addressed in the Award, neither party prevailed for purposes of awarding attorneys fees.


William J. Bender
Panel Chair and Public Arbitrator

Dated: 7-12-06


Lawrence E. Little, Public Arbitrator

Dated: 7/12/06

Kevin I. Patrick, Industry Arbitrator

Dated: _____

Superior Court case seeking an award of Attorneys Fees for the one claim on which Claimants partially prevailed in the matters that had been arbitrated. Claimants' counsel has represented in this motion that,

(F)ollowing the hearing [on the motion] the Court ruled that the issue of attorneys fees under the Customer Account must first be addressed by the panel before the court will rule on the motion.

Claimants' Motion, p. 2.

Without modifying or changing the Award in any respect, the Panel makes the following observations in denying this Motion for Reconsideration.

As stated in the Award, the determination that each party shall be responsible for its own attorneys' fees was made with due regard for the resolution in the Award of the multiple claims and defenses that were presented and finally resolved. The Panel concluded that given these results, neither party could be deemed the prevailing party for purposes of an award of attorneys' fees.

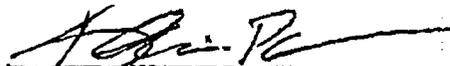
The procedural history and recitation of claims and defenses is fully set out in the Award and will not be repeated here. Suffice it to say that the Panel concluded that given the resolution of all claims and defenses in the manner addressed in the Award, neither party prevailed for purposes of awarding attorneys fees.

William J. Bende:
Panel Chair and Public Arbitrator

Dated: _____

Lawrence E. Little, Public Arbitrator

Dated: _____


Kevin T. Patrick, Industry Arbitrator

Dated: 7/12/06

No. 35531-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MICHAEL MORRELL and NANCY
MORRELL, husband and wife,

Plaintiffs/Respondents

v.

WEDBUSH MORGAN SECURITIES,
INC., a California corporation,

Defendant/Appellant

07 APR -9 PM 1:43
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. John A. McCarthy)

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2007, I caused to be served
a copy of the following document:

1. Appellant's Opening Brief;
2. Certificate of Service,

On the following:

Mr. David C. Ponzoha
Clerk of the Court
Washington State Court of Appeals - Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

via hand delivery

Mr. John R. Christensen
Messina Bulzomi Christensen
5316 Orchard Street W
Tacoma, WA 98467-3633

via hand delivery

RESPECTFULLY SUBMITTED this 9th day of April, 2007.



Helen Van Buren