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NO. 35531-1-II

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

MICHAEL MORRELL and NANCY MORRELL,
husband and wife,

Plaintiffs/Respondents,

vs.

WEDBUSH MORGAN SECURITIES, INC., a California Corporation,

Defendant/Appellant.

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

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal involves the legal question of whether the Pierce County Superior Court has jurisdiction to modify a clearly erroneous finding of the NASD arbitration panel and award the Morrells attorneys' fees according to the clear language of a customer account contract entered into between the Morrells and Wedbush calling for attorneys' fees to be awarded when either party prevails on any claim in excess of \$2,000. The Morrells were awarded \$101,817.14

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court correctly concluded that it had jurisdiction over the parties and the subject matter to modify the arbitration award because this case was initially brought in Pierce County Superior Court and that court never relinquished, nor was it divested of, jurisdiction in this matter, and because both Washington and California law empower the court to review arbitration outcomes.

2. The trial court correctly concluded that Section M of the Customer Account Application and Agreement ("Agreement") is mutual and applies to any party awarded in excess of \$2,000 on any claim because, under both Washington and California law, unilateral attorneys' fees clauses are to be interpreted as reciprocal.

3. The trial court correctly concluded that common law “prevailing party” analysis does not apply to the present dispute over attorneys’ fees because the contractual terms of the written Customer Agreement are clear and unambiguous.

4. The trial court correctly concluded that the arbitration panel’s refusal to modify the arbitration award and its application of the “prevailing party” analysis was clearly erroneous because the terms of the Agreement are clear and unambiguous.

5. The trial court correctly concluded that Respondents were entitled to attorneys’ fees under Section M of the Agreement because they were awarded more than \$2,000.

6. The trial court correctly concluded that Respondents were entitled to attorneys’ fees of \$44,720.00.

7. The trial court correctly entered judgment in the amount of \$44,720.00 against Appellant.

III. STATEMENT OF ISSUES

1. Whether the trial court properly enforced the terms of Section M of the Agreement between the parties upon the occurrence of the triggering event.

2. Whether the trial court properly reviewed the denial of attorneys’ fees to the Respondents when both Washington and California law empower the court to review arbitration outcomes.

3. Whether the trial court correctly concluded that Section M of the Agreement is mutual and operated to award the Morrells attorneys' fees when both Washington and California courts have ruled that unilateral clauses such as Section M of the Agreement are reciprocal.

4. Whether the trial court correctly concluded that the prevailing party analysis did not apply to the dispute over attorneys' fees when it is irrelevant whether either party is a "prevailing party" because the language of Section M of the Agreement does not require that a party "prevail."

5. Whether the trial court correctly concluded that it had the authority to modify the arbitration panel's award and grant attorneys' fees when both Washington and California have statutory authority for modification of the panel's award.

6. Whether the trial correctly modified the Award to include the requested attorneys' fees and entered judgment against Wedbush in the amount of \$44,720.00 when the terms of the Agreement are clear and unambiguous.

IV. STATEMENT OF THE CASE

In 1990, the Respondents, Michael and Nancy Morrell, announced their retirement; he from an active and successful orthopaedic surgery practice, and she from a thriving printing business. CP 57-61. The

Morrells announced their plans to purchase a sailboat and travel to ports throughout the world. *Id.* As part of their retirement plan, the Morrells liquidated their assets and gave sole control of their finances to Appellant, Wedbush Morgan Stanley. CP 57-61. Wedbush, through its broker, Stuart Simon, was given instructions to invest the Morrells' retirement savings in conservative, principle preserving investments. *Id.* The Morrells, also, instructed Wedbush not sell their IBM stock under any circumstances. *Id.*

Prior to leaving, the Morrells and Wedbush executed a Customer Account Application and Agreement memorializing the investment agreement between the two parties. CP 3-4. Subsection "M" of the agreement entitled, ATTORNEYS' FEES states:

The undersigned agrees to pay attorney's fees incurred by WMS **in any claim adjudicated against the undersigned, which is in the excess of two thousand dollars.** The undersigned consents to jurisdiction in California and venue in Los Angeles in any dispute between WMS and the undersigned." CP 4. (Emphasis added).

In 1995, during one of Dr. Morrell's return visits to Washington State, he learned that Wedbush had sold 1,200 shares of his IBM stock in violation of the investment directive. CP 70-72 and CP 323-24. Over the course of the following five years, Wedbush broker, Stuart Simon, made repeated promises to purchase back the IBM stock and make the Morrells whole. CP 59-61 and 70-72. This included reducing commissions on

subsequent stock transactions and buying back 400 of the IBM shares in 1999. *Id.* See also, Appendix A and proposed Clerk's Papers 335-339.

In June of 2000, the Morrells terminated their relationship with Wedbush after it became apparent that Wedbush was not going to make good on their promise to make them whole for the unauthorized sale of their IBM stock. CP 61, 70-72.

On September 19, 2001, the Morrells brought suit against Wedbush in the Pierce County Superior Court. CP 303 and 323-326. Approximately one year later, on September 6, 2002, the Pierce County Superior Court entered a Stipulation and Order staying all judicial proceedings and transferring the case to arbitration with the National Association of Securities Dealers, Inc. (NASD). CP 313 and, see also, Appendix A, Supplemental Clerk's Papers 332-334.

The Stipulation and Order addressed two issues: First, "this case should be transferred to arbitration consistent with the terms of the Customer Account Application and Agreement, dated January 15, 1990;" and second, "**all judicial proceedings in this matter should be stayed pending completion of arbitration.**" *Id.* (Emphasis added). By stipulation of the parties and Order of the Court, the Pierce County Superior Court specifically retained jurisdiction over the subject matter and the parties "pending completion of the arbitration." *Id.*

The parties arbitrated the dispute before a three-person panel of NASD appointed arbitrators in Seattle, Washington between February 27, 2006 and March 1, 2006. CP 303. On March 3, 2006, the NASD panel issued a ruling finding Wedbush liable for the unauthorized sale of the Morrells' IBM stock and awarded the Morrells \$70,600 in compensatory damages, and \$31,217.14 in interest for a total of \$101,817.14. *Id.*

On March 30, 2006, the Morrells filed Motion to Modify and Confirm the Arbitration award with the Pierce County Superior Court requesting an award of attorneys' fees in the amount of \$44,720.00 pursuant to the terms of the Customer Application and Account Agreement. CP 28. The motion was made based on the language in the Wedbush Customer Application and Account Agreement that requires an award of attorneys' fees when **any party prevails on any claim in excess of \$2,000.**¹

On May 4, 2006, the Pierce County Superior Court issued an Order reserving ruling on the attorneys' fees until the issue was presented to the NASD Panel for consideration. CP 104-05. In compliance with the Court's ruling, the Morrells filed a Motion for Reconsideration with the NASD requesting an award of attorneys' fees based on the contract language in the customer agreement. CP 133.

¹ The language of the actual agreement is unilateral, but both California and Washington law require that the fees provision apply equally to both parties. See Section VIII (C) below.

On July 12, 2006, the NASD panel issued a ruling denying the Morrells' request for attorneys' fees, erroneously holding that neither party could be considered the "prevailing party" for purposes of awarding attorneys' fees. CP 167. In so ruling, the NASD panel did not cite or refer to the customer agreement or subsection "M" of the agreement that served as the basis for the Morrells' request for fees. Instead, the NASD panel ignored the clear language of the contract and mistakenly applied the common law prevailing party analysis. CP 167-170.

On or about August 28, 2006, the Morrells filed a renewed Motion for Attorneys' Fees with the Pierce County Superior Court arguing that the plain language of the customer agreement required an award of attorneys' fees because the Morrells prevailed on a claim in excess of \$2,000. CP 171. The Court agreed and issued Findings of Fact and Conclusion of Law awarding the Morrells attorneys' fees in the amount of \$44,720.00. CP 307-09.

V. JURISDICTION

Whether a court has jurisdiction is a question of law and is reviewed de novo. *Equity Group, Inc. v. Hidden*, 88 Wn.App. 148, 153, 943 P.2d 1167 (1997). The trial court correctly concluded that it had jurisdiction over the parties or the dispute over attorneys' fees because the original complaint in this matter was filed in Pierce County Superior

Court and that court never relinquished jurisdiction, but merely stayed the proceedings to allow arbitration to take place. CP 303.

On September 19, 2001, Respondents brought suit against Appellant Wedbush in Pierce County Superior Court alleging various causes of action including, but not limited to, the unauthorized sale of IBM stock and for the improper handling of their portfolio. The Pierce County Superior Court never relinquished, nor was it divested of, jurisdiction in this matter; it merely stayed the proceedings to allow arbitration to take place. CP 303. This stay was granted on Appellant's Motion to Compel Arbitration and to Stay Judicial Proceedings Pending Arbitration filed in Pierce County Superior Court on August 22, 2002. The proceedings were stayed by order of Hon. John A. McCarthy on September 6, 2002. Thus, Pierce County Superior Court never relinquished, nor was it divested of, jurisdiction in this matter.

Appellant cites Sections L and M of the Agreement for the proposition that jurisdiction and venue are properly in Los Angeles, California, but choice of forum clauses ordinarily cannot oust a state of jurisdiction to resolve a dispute properly presented to it, "but such an agreement will be given effect unless it is unfair or unreasonable." *Mangham v. Gold Seal Chinchillas, Inc.*, 69 Wn.2d 37, , 416 P.2d 680 (1966); *See also Exum v. Vantage Press*, 17 Wn.App. 477, 478, 563 P.2d 1314, (1977), Restatement (Second) Conflict of Laws, § 80, at 244 (1971).

The comment to § 80 provides further that “such a provision will be disregarded if ... the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action.” *Exum*, at 478.

Furthermore, venue can be proper in more than one location. Assuming that venue is proper in Los Angeles pursuant to the agreement, is also proper in Washington given the residency of the both parties as well as the location of the transactions giving rise to the dispute. CP 327. In their answer to the complaint, Wedbush admits it is licenced to do business and conducts business in Tacoma, Washington. *Id.* To now claim that venue is only proper in Los Angeles is ignoring all other properly venued locations. Additionally, Wedbush did not allege improper venue in its answer or elsewhere in the trial court pleadings. CP 327.

Washington courts generally enforce jurisdiction and venue contract provisions. However, where, as here, the forum selection provision is unduly burdensome or unreasonable, the forum selection clause need not be enforced. *Kysar v. Lambert*, 76 Wn. App. 470, 484, 887 P.2d 431 (1995).

In *Mangham v. Gold Seal Chinchillas, Inc.*, 69 Wn.2d 37, 46, 416 P.2d 680 (1966), one of Washington’s preeminent forum selection clause cases, the Washington Supreme Court found that the forum selection clause in a contract was unreasonable and unenforceable.

In *Mangham*, suit was brought in a Washington State Superior Court even though a forum selection clause placed jurisdiction and venue in Oregon. The court analyzed several factors and concluded that the forum selection clause was unenforceable. These factors included (1) where the contract was made; (2) where the contract was performed; (3) where the parties resided; (4) where the witnesses resided; (5) where the corporation's office was located; and (6) what law was to be applied. *Mangham*, at 46-47. Because all the parties were in Washington, all the witnesses were in Washington, the contracts were made in Washington, the contracts were performed in Washington, and Washington law applied, the court found that changing venue from Washington to Oregon would be "totally unreasonable." *Mangham*, at 47.

In this case, as in *Mangham*, the contract was entered into in Seattle, Washington; it was performed in Washington because that is where the stocks transactions were made, where Appellant promised to repay the Respondents in restitution for selling stocks Respondents had directed be held, and where Appellant breached its promise to pay that restitution to Respondents. Further, Respondents maintain their residence in Washington, and Appellant has a place of business in Washington. Moreover, all witnesses to the action and each party has counsel in Washington, and Appellant has a corporate office in Seattle, Washington.

Finally, this Court should give substantial weight to the fact that this case has been litigated in Washington state for over five years, and Appellant has fully participated. Thus, the forum selection clause in this case did not deprive Pierce County Superior Court of jurisdiction, and that court properly reviewed Respondents' Motion to Vacate and Confirm the Arbitrators' Award because it never relinquished, nor was it divested of, jurisdiction in this case.

California law is to the same effect: the parties may not *deprive* courts of their jurisdiction over causes by private agreement. *See Smith, Valentino & Smith, Inc., v. Superior Court of Los Angeles County*, 17 Cal.3d 491, 495, 551 P.2d 1206 (Cal. 1976) (citing *Rest. 2d Conflict of Laws*, § 80, cmt. a). Thus, it is within the trial court's discretion whether or not to enforce a forum selection clause, and courts may decline to enforce such clauses if they are unreasonable. *Id.*, at 496.

Alternatively, the trial court had statutory jurisdiction: under RCW 7.04A.230(1)(d) the trial court has the power to review and vacate an award if an arbitrator exceeded his or her powers. RCW 7.04A.230(1)(d). In this case, as argued in section B below, the arbitration panel exceeded its powers by denying the Respondents attorneys' fees. Thus, the trial court correctly concluded that it had jurisdiction over the parties and the dispute over attorneys' fees.

VI. GOVERNING LAW

Although Section L of the Agreement provides that the provisions of the 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, this choice of law provision is in violation of fundamental state policy.

It is well established that “Washington courts will not implement a choice of law provision if it conflicts with a fundamental state policy or if the state has a materially greater interest than the other jurisdiction in the resolution of the issue.” *Ito Int’l Corp. v. Prescott Inc.*, 83 Wn. App. 282, 288-289, 921 P.2d 566 (1996); *Rutter v. BX of Tri-Cities Inc.*, 60 Wn. App. 743, 746, 806 P.2d 1266 (1991).

There can be no question but to find that Washington state has a materially greater interest in this case than California. To conduct a choice of law analysis, Washington courts use the most significant relationship test set out in Restatement (Second) of Conflict of Laws §145 (1971). *Rice v. Dow Chem Co.*, 124 Wn.2d 205, 213, 875 P.2d 205 (1994); *Haberman*, 109 Wn.2d at 159. The elements under this test include: (a) the place of injury; (b) the place where the conduct causing the injury occurred; (c) the residence of the parties; and (d) the place where the

relationship is centered. Restatement (Second) of Conflict of Laws §145 (1971); *Haberman*, 109 Wn.2d at 159.

In this case, there can be no question but to find that the most significant relationship is in Washington State. First, the injury occurred in Washington because that is where the stock was sold, where Appellant made the promise to repay Respondents, and where Appellant breached its promise to repay the Respondents. Second, the conduct causing the injury occurred in Washington because that is where the stock was sold, where Appellant made the promise to repay Respondents, and where the Appellant breached its promise to repay Respondents. Third, Respondents reside in Washington and Appellant has a place of business in Washington. Fourth, the relationship in this case centered in Washington because all trades, transactions, bills and office visits were made in Washington. Further, Washington state has an interest in regulating the conduct of parties involved in the sale of commodities.

For these reasons and others, this Court must find that Washington State has a materially greater interest in this case and apply Washington law.

Nevertheless, this brief will analyze the issues under both Washington and California laws.

VII. STANDARD OF REVIEW

Under Washington law, an appellate court reviews a trial court's award of attorney fees for an abuse of discretion. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 157 P.3d 431, 2007 Wn.App. LEXIS 865 (2007)(citing *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996)).

VIII. ARGUMENT

A. The Trial Court Did Not Review the Arbitration Award, But Merely Enforced a Contractual Obligation Upon Occurrence of the Triggering Event

Appellant argues at great length that the trial court wrongly reviewed the arbitration award in this matter because it lacked jurisdiction; that Respondents did not carry their burden of establishing that any statutory ground for vacation, modification, or correction of the arbitration award existed; that any award of attorneys' fees would have required the trial court to go beyond the face of the arbitration award; that the award of attorneys' fees was based on tort claims and expressly not on contract claims; that the trial court erroneously determined that the prevailing party analysis did not apply to Respondents' fee request; that the trial court had no authority to disturb the arbitrators' ruling that neither party was the "prevailing party" for purposes of attorneys' fees; that even if the trial court could review the prevailing party analysis, Respondents

would still not be entitled to attorneys' fees because they were not the prevailing party, and finally, that Respondents' claim for attorneys' fees is barred by the doctrine of accord and satisfaction.

These arguments appear to be an attempt to confuse this Court and divert its attention from the fact that this case is simply about enforcing a contractual obligation to award attorneys' fees upon the occurrence of an agreed upon triggering event. Under the Customer Account Agreement, the triggering event is when either party prevails on any claim in excess of \$2,000. CP 3-4. Section M of the agreements provides in pertinent part,

M. Attorney's Fees: The undersigned [Respondents] agrees to pay attorney's fees incurred by WMS [Appellant] in **any claim** adjudicated against the undersigned, which is in excess of two thousand dollars ..." (Emphasis added).

The Agreement is a legally binding contract entered into by Respondents and Appellant. CP 4. It defines the terms and conditions and rights and liabilities of the parties in this matter. The award of attorneys' fees is mandatory when, as here, the requirements of the contract are met. The contract mandates payment of attorneys' fees when two conditions are met:

1. When either party prevails on ANY claim; and
2. Where the amount awarded on ANY claim is in excess of two thousand dollars.

The contractual language is clear and unambiguous. When **either party** prevails on **any claim** and is awarded **in excess of two thousand**

dollars, that party is entitled to attorneys' fees. The award of fees is not discretionary and does not require an analysis of which party prevailed as Appellant repeatedly insists. These mistaken arguments add terms and conditions to the Agreement that are not present in the plain language of the contract.

When, as here, the terms of a contract are clear and unambiguous, the trial court is required to award attorneys' fees to the party identified in the contract. *Riss v. Angel*, 80 Wn.App. 553, 563-64, 912 P.2d 1028 (1996). Discretion does not allow the court to add terms or conditions. *Id.*

It is an abuse of discretion for a trial court to ignore the plain language of a contract awarding attorneys' fees to the party identified as the prevailing party under the contract. *Singleton v. Frost*, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987). Specifically, the Supreme Court held:

The denial of attorneys fees in circumstances where a contract provides for attorneys fees in favor of the prevailing party is not within the ambit of broad trial court discretion. *Id.*

The language of the Agreement is clear and unambiguous. Attorneys' fees are required as a matter of law whenever either party prevails on any claim and in the process is awarded more than \$2,000.

Because, as argued below in section C, this provision must be read reciprocally, when the arbitrators awarded more than \$2,000 to the

Respondents, Section M's contractual obligation to pay attorneys' fees was triggered, and the trial court properly awarded the attorneys' fees to Respondents. Therefore, this Court should affirm the trial court's award of attorneys' fees to Respondents.

B. Judicial Review of an Arbitration Award is Statutorily Authorized Under Either Washington or California Law

Under both Washington and California law, judicial review of arbitrations are authorized by statute. It is ironic and unreasonable that Appellant so strenuously argues *some* of the contractual provisions, such as Sections S (finality), L (California law), and even the latter part of Section M (dealing with jurisdiction and venue), while at the same time resisting enforcement of the attorneys' fees provision of Section M. Appellant provides no authority for such cherry-picking, nor can it.

Similarly, Appellant's arguments that Respondents have not established any of the statutory bases for the trial court's grant of attorneys' fees, that the trial court did not cite any statutory grounds for its grant, and that the trial court cannot go behind the face of the award to determine whether additional amounts are appropriate, are simply misleading and misplaced. As argued in section A above, the trial court's grant of fees was simply enforcing the terms of the contract that the

NASD panel twice ignored. The trial court's review and grant of attorneys' fees was proper under both Washington and California statutes.

1. The Trial Court Had Statutory Authority to Grant Respondents' Motion for Attorneys' Fees

In Washington as in California, arbitration proceedings are governed by statute. RCW 7.04A; Cal. Code Civ. Proc. § 1280, *et seq.* Both states' statutes grant the courts authority to review the arbitration award. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 876 P.2d 896 (1994); *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 9, 10 Cal. Rptr.2d 183 (Cal. 1992). The superior court may either confirm, vacate, modify, or correct an arbitration award for the specific reasons set forth in RCW 7.04A.150-170. *Dayton*, at 279; *A.M. Classic Constr., Inc. v. Tri-Build Dev. Co.*, 70 Cal.App.4th 1470, 83 Cal. Rptr.2d 449 (Cal. Ct.App. 1999).

a. Judicial Review Is Appropriate Under Washington Law

Judicial review of an arbitration award is limited to the face of the award. *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). Unless the award, upon its face, shows the adoption of an erroneous rule or mistake in applying the law, the award shall not be vacated. *Harris v. Grange Ins. Ass'n.*, 73 Wn.App. 195, 198, 868 P.2d 201 (1994).

RCW 7.04A.230 provides for vacation of an award by the court under certain limited circumstances:

“(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

(d) An arbitrator exceeded the arbitrator’s powers...”

RCW 7.04A.230(1)(d).

Denial of attorneys’ fees in an arbitrator’s award is an error on the face of the award. *See Agnew v. Lacey Co-Ply*, 33 Wn.App. 283, 654 P.2d 712 (1982), *rev. denied*, 99 Wn.2d 1006 (1983). Here, the arbitrators denied attorneys’ fees to Respondents on the face of the award. CP 10-11. Thus, the arbitrators exceeded their powers when they refused to award attorneys’ fees to Respondents despite an award to Respondents of over \$2,000, which triggered the attorney’s fees provision in Section M of the Customer Account Agreement. CP 4. Because under both Washington and California laws such clauses must be applied reciprocally, and because Respondents were awarded more than two thousand dollars on their claims against Appellant, the arbitrators exceeded their powers when they denied attorneys’ fees to Respondents. Thus, contrary to Appellant’s argument, the award, upon its face, showed the adoption of an erroneous rule or mistake in applying the law, and judicial review was not only appropriate but, also, was necessary to rectify the error.

The Appellant also argues that pursuant to RCW 7.04A.240, the trial court has no authority to modify an award on an issue the parties submitted to the arbitration. Appellant’s Opening Brief, d, 2, a, p. 32-33.

While it is true that Respondents did ask for attorneys' fees both in their complaint and twice before the arbitrators, this does not prevent Respondents from seeking vacation of the award under RCW 7.04A.230 or under other statutes authorizing modification of the award. Appellants have cited no authority supporting their claim that, simply because Respondents requested attorneys' fees during the arbitration and before, a Court sitting in review cannot correct a clearly erroneous decision or one that was outside the arbitrator's authority, as occurred in this case. This argument is irrelevant, and this Court should affirm.

Appellant's arguments that the trial court has no power to increase arbitration awards based on *Dayton, supra*; that it has no statutory authority to "amend" an arbitration award, based on *Bongirno v. Moss*, 93 Wn.App. 654, 969 P.2d 1118 (1999); that it exceeded its authority by granting attorneys' fees, based on *Westmark Properties v. McGuire*, 53 Wn.App. 400, 755 P.2d 1146 (1989); and that it could not look past the face of an arbitration award to grant attorneys' fees where the award did not include such fees, based on *Phillips Building Co. v. An*, 81 Wn.App. 696, 915 P.2d 1146 (1996), are not supported by authority because all of these cases are readily distinguishable.

The issue in *Dayton* was whether an insured was entitled to attorneys' fees incurred in a UIM arbitration proceeding to determine damages. The trial court had awarded attorneys' fees pursuant to two

other cases. One, *Kenworthy v. Pennsylvania Gen. Ins. Co.*, 113 Wn.2d 309, 779 P.2d 257 (1989) invalidated an insurer's policy requiring an insured to pay part of the fees and costs in a UIM arbitration as violative of a UIM statute. Washington's Supreme Court ruled, without further explanation, that the trial court in *Dayton* had erred in awarding attorneys' fees pursuant to that case because an award under *Kenworthy* did not meet the criteria for correction or modification of an award as set forth in the former RCW 7.04.170 and, therefore, the trial court had exceeded its authority.

In the other insurance case upon which the *Dayton* court based its decision, *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), the insured had to sue its insurance company because the company refused to defend or pay the justified action or claim of an insured. In that case, the court found that the insured was entitled to attorneys' fees when s/he was compelled to assume the burden of legal action in order to obtain the benefit of the insurance contract for which s/he paid. *Olympic Steamship*, at 54.

The *Dayton* court found that *Olympic Steamship* did not apply in the case before it and that providing *Olympic Steamship* attorneys' fees in a UIM arbitration to determine damages would give the insured more than he or she contracted for because, "when a tortfeasor carries insurance, the claimant insured bears his or her own attorney fees in the arbitration

proceedings.” Therefore, it found that the superior court exceeded its authority in awarding attorneys’ fees. *Dayton*, at 281.

Clearly, such a holding is inapposite in this case, and the *Dayton* court went on to clarify that under the American rule followed in Washington, a court has no power to award attorneys’ fees as a cost of litigation in the absence of a contract ... providing for fee recovery. *Id.*, at 280. Here, there is a contract providing for fee recovery. Thus, *Dayton* is distinguishable. Further, this case does not involve attorneys’ fees in the UIM context; it involves a contractual obligation to pay attorneys’ fees upon the occurrence of a triggering event. Thus, the trial court did not increase the award, but merely enforced the contract between the parties. Therefore, *Dayton* is inapplicable and this Court should affirm.

Bongirno is even less on point than *Dayton*. The underlying action in *Bongirno* was an action on a contract to sell property that went to mandatory arbitration under Washington’s MAR statutes. Since these statutes are significantly different than RCW 7.04A, *Bongirno* is readily distinguishable and provides no binding authority for Appellant. The relevant mandatory arbitration rules that applied in *Bongirno* specifically authorized the arbitrator to award attorneys’ fees. *Bongirno*, at 662. Thus, when the arbitrator declined to award attorneys’ fees, the plaintiff’s remedy in superior court was either to claim a “manifest procedural error,” or seek a trial de novo. *Id.*, at 661. The facts and law of *Bongirno*

are readily distinguishable from this case: the statutes are different, the action is different, and the remedies are different. The trial court in this case did not “amend” the arbitration order, but enforced the parties’ contract. Therefore, *Bongirno* does not support Appellant, and this Court should affirm.

Westmark Properties does not support Appellant, either. In *Westmark Properties*, the appellant claimed, among other things, that the trial court erred when it added prejudgment interest to an award. The court said that the trial court had no basis for determining whether the amount awarded met the test for prejudgment interest; that this was part of the merits of the controversy and, therefore, forbidden territory for a court. *Westmark Properties*, at 404. *Westmark Properties* is easily distinguishable since the merits of the controversy in this case involved breaches of contract and fiduciary duty by the Appellant and its agent. The attorneys’ fees properly awarded by the trial court are a *consequence* of an award over \$2,000 that the arbitrator made on the merits. Thus, the trial court did not exceed its authority, and *Westmark Properties* does not support Appellant’s position. This Court should affirm.

Phillips Building Co. is, similarly, unhelpful to Appellant. In that case, there were numerous claims and counterclaims, and some issues had gone unchallenged. *See, Phillips Building Co.*, at 703. It was to these issues, and not the award of contractually required attorneys’ fees, the

court referred when it said, “in order to resolve these issues, the parties seek to look behind the arbitration award to the merits of the case. Judicial review ... does not include the merits of the award.” *Id.*, at 703-04.

Here, there is no such issue. The trial court did not look behind the face of the award. *See Agnew, supra*, at section B, 1, a. The Agreement requires that attorneys’ fees be paid to any party awarded more than \$2,000. The Morrells were awarded more than \$2,000. Therefore, the trial court properly awarded attorneys’ fees under the Agreement, and this Court should affirm.

Appellant attacks Respondents’ reliance on *Agnew* claiming that “the reasoning in *Agnew* is limited to the uncommon and distinguishable circumstance where a party prevails on all claims.” Appellant’s Opening Brief, D, 2, c, p. 37. Neither *Agnew* nor *Phillips Building Co.*, which Appellant also cites for this proposition, actually contain such a limitation, although it is factually correct that the Appellant in *Agnew* did prevail on all its claims.

Agnew and *Phillips Building Co.* make clear, however, that arbitrators exceed their authority where they fail to award attorneys’ fees to the prevailing party under the terms of the arbitration agreement.

In *Agnew*, the court was to determine whether the arbitrators had discretion to award attorneys’ fees even where the arbitration agreement

gave attorneys' fees to the prevailing party. *Agnew*, at 284. The court ultimately found that, because the arbitration panel derives its power from the agreement between the parties, if the arbitration agreement expressly provides for attorneys' fees to the prevailing party, the arbitration panel necessarily exceeds its authority where it fails to award the fees to that party. *Agnew* at 287-288. The court, then, remanded the case to arbitration to determine the amount of attorneys' fees to be provided to the prevailing party. *Agnew* at 291.

In this case, the parties agreed in Section M of the Agreement that attorneys' fees would be paid to any party "in any claim" that is "in excess of two thousand dollars" CP 4. Although Section M, unlike the provision in *Agnew*, does not contain "prevailing party" language, under Washington law "prevailing party" means the party in whose favor final judgment is rendered. RCW 4.84.330. Final judgment was rendered in favor of Respondents—they were awarded a total of \$101,817.14; Appellant was awarded nothing. Thus, Respondents "prevailed" in terms of the statute. Therefore, this Court should affirm.

Appellant goes on to claim that Respondents cannot be characterized as the prevailing party on the face of the award because Appellant "prevailed outright on seven of eight claims brought by plaintiffs." Appellant's Opening Brief, D, 2, c, p.37. It is unclear what Appellant could mean by this assertion since only three claims were

arbitrated on the merits, while all other claims were dismissed on procedural grounds. CP 9-10, 80-95. Further, this claim is irrelevant because the Agreement does not require that a party “prevail” on a specified number of claims or even a majority of the claims in order to be awarded attorneys’ fees. This appears to be yet another attempt by Appellant to confuse and mislead this Court in order to divert its attention from the real issue, which is the contractual obligation to pay attorneys’ fees upon occurrence of the triggering event. This Court should affirm the trial court in all respects.

2. Judicial Review Was Appropriate Under California Law

California’s Code of Civil Procedure provides for correction of an arbitrator’s award under various circumstances. Under Cal. Code Civ. Proc. § 1286.6(b) and (c), an arbitrator’s award may be corrected in the following situations:

“(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(b),(c).

In this case, the **merits** of the controversy adjudicated by the arbitrators involved claims of breach of contract and breaches of fiduciary duty based on Appellant’s agent selling IBM shares contrary to the direct

in this case. The attorneys' fees provision of the contract is triggered by the award to any party of \$2,000 or more and is independent of any award by the arbitrators. That the arbitrators failed to award it is an error that the trial court corrected by its Order. Thus, it was by determining that Respondents would not be awarded attorneys' fees that the arbitrators exceeded their powers without affecting the merits of the decision upon the controversy submitted under Cal. Code Civ. Proc. § 1286.6(b).

Appellant cites *Moshonov v. Walsh*, 22 Cal.4th 771, 94 Cal. Rptr.2d 597 (Cal. 2000) for the proposition that an arbitrator does not exceed his authority when denying attorneys' fees even if that decision directly conflicts with an otherwise mandatory contractual attorneys' fees provision. First, Respondents reiterate that the trial court's award of attorneys' fees was merely enforcing the contract between the parties rather than reviewing the arbitrator's award. But even if the trial court was reviewing the arbitrator's award, *Moshonov* does not support Appellant's argument and is, otherwise, distinguishable.

Moshonov involved a multiparty dispute arising out of a real estate purchase. The attorneys' fees provision at issue in *Moshonov* was very different from the one here. The *Moshonov* attorneys' fees provision provided that "should arbitration or suit be brought to enforce the terms of this contract or any obligation herein, including any action by Broker(s) to recover commissions, the prevailing party shall be entitled to reasonable

attorneys' fees." *Moshonov*, at 774. The arbitrator ruled for the defendants but twice denied attorneys' fees, reasoning that the underlying contract did not provide for attorneys' fees on the tort actions pled against the defendants. *Id.*, at 775. California's Supreme Court said that the provision "specifically limits fee recovery to proceedings 'brought to enforce the terms of this contract or any obligation herein,'" and that "accordingly, it is not broad enough to encompass non-contractual claims." *Id.* Section M of the Agreement is not so limited. Thus, although both this case and *Moshonov* involve tort claims, the contractual clause at issue in *Moshonov* is so different as to render that case inapplicable here. Therefore, this Court should affirm.

Appellant argues at length that Respondents cite no statutory authority in support of their Renewed Motion below, and that, therefore, the motion should have been dismissed on that basis. Appellant's Opening Brief, C, 1, p. 21. As authority for this argument, Appellant cites Cal. Code Civ. Proc. § 1285.8, but that section requires only 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." Again, Appellant's argument is disingenuous; statutory authority is not required under Cal. Code Civ. Proc. § 1285.8, and Respondents' Renewed Motion clearly states a ground for relief: that Section M of the Agreement

constitutes grounds for vacation and/or modification of the arbitrators' award. CP 173-77.

Continuing in the same vein, Appellant argues that Respondents have not established and cannot establish any of the statutory bases for the trial court's grant of attorneys' fees. First, such arguments are irrelevant, since the ground for awarding of attorneys' fees to Respondents resides in Section M of the contract between the parties. Second, even if relevant, those grounds have been proven as argued above.

Further, Appellant argues that under *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 832 P.2d 899 (Cal. 1992), arbitrators do not exceed their authority within the meaning of Cal. Code Civ. Proc. § 1286.2 and 1286.6 merely by rendering an erroneous decision on a legal or factual issue. *Moncharsh* is factually distinguishable because it involved, generally, a dispute over the allocation of attorneys' fees under an employment contract following termination of employment. It did not involve a contractual provision providing for an award of attorneys' fees upon the occurrence of a triggering event, as is the case here. *Moncharsh* disagreed with the arbitrator's interpretation of the fee splitting provision and sought judicial review under Cal. Code Civ. Proc. § 1286.2 and 1286.6. The court found that *Moncharsh* did not meet the requirements of either statute. *Moncharsh*, at 28.

The court said that it is within the powers of the arbitrator to resolve the entire “merits” of the “controversy submitted” by the parties. *Moncharsh*, at 28. Here, although Appellant appears to argue that Respondents’ submission of enforcement of the attorneys’ fees provision agreement to the arbitrators brings it within the “merits” of the “controversy submitted,” it is not. It is simply an *obligation* triggered by the arbitrators’ decision on the merits. Furthermore, since “an arbitrator exceeds his powers when he acts in a manner not authorized by the contract or the law,” it is clear that the arbitrators in this case exceeded their powers when they refused to award contractually required attorneys’ fees upon the occurrence of the triggering event. *See O’Flaherty v. Belgum*, 115 Cal.App.4th 1044, 1091, 9 Cal. Rptr. 3d 286 (2004). Therefore, the trial court properly granted attorneys’ fees to Respondents, and this Court should affirm.

Appellant also argues that under *Moore v. First Bank of San Luis Obispo*, 22 Cal.4th 782, 996 P.2d 706 (Cal. 2000), once a party submits an issue to the arbitrators, the arbitrators’ decision is immune from judicial review. Appellant’s Opening Brief, D, 1, a, p. 26. Appellant claims that in virtually identical circumstances, the California Supreme Court affirmed the denial of a party’s request for correction of an arbitration award to add attorneys’ fees. *Id.*

In fact, the circumstances of that case were different: it involved an action on a contract, not tort claims; the attorneys' fees provision did not specify a triggering event for the payment of attorneys' fees as does the Agreement in this case; the arbitrators did not designate the appellants as the prevailing parties; and the court is equivocal in holding that the arbitrators' decision could not be disturbed, saying, "because the grounds for relief are not set forth on the record, the possibility remains that the arbitrators based the award to a significant degree on noncontractual theories and thus saw no party that had unequivocally 'prevailed *on the contract*' as required by § 1717." (emphasis in original) *Moore*, at 788. Most tellingly, the court concluded that it "had yet to decide whether, in view of the principle that '[t]he powers of an arbitrator derive from, and are limited by, the agreement to arbitrate' (*Advanced Micro Devices, Inc. v. Intel Corp.* 9 Cal. 4th 362, 375, 885 P.2d 994), an arbitrator's refusal to award fees expressly mandated by the underlying contract may be judicially corrected under section 1286.6." *Id.*, at 789. Thus, the *Moore* court explicitly recognizes that the question is still open. The underlying contract in this matter expressly mandated payment of attorneys' fees to the Respondents. This Court should affirm.

C. The Trial Court Correctly Concluded that Section M of the Agreement is Reciprocal and Operated to Award Respondents Attorneys' Fees

1. Section M is Reciprocal Under Washington Law

Under the terms of the Agreement between the parties, which contains the arbitration agreement, a party awarded two thousand dollars or more is entitled to attorneys' fees.

Although this agreement states that only Appellant is entitled to attorneys' fees, under both Washington and California law, such agreements are to be applied reciprocally.

Under Washington law, courts have permitted the award of attorneys' fees where, as here, a contract between the parties authorized such fees. *See, e.g. Granite Equip. Co. v. Hutton*, 84 Wn.2d 320, 525 P.2d 223 (1974); *Beaulaurier v. Washington St. Hops Producers, Inc.*, 8 Wn.2d 79, 11 P.2d 559 (1941); *Maryland Cas. Co. v. City of Tacoma*, 199 Wn. 72, 990 P.2d 226 (1939); *Olson v. Scholes*, 17 Wn.App. 383, 563 P.2d 1275 (1977); *Artz v. O'Bannon*, 14 Wn.App. 421, 562 P.2d 674 (1977).

RCW 4.84.330 was enacted to remedy unilateral attorneys' fee provisions such as these. This statute awards attorneys' fees to any party who prevails in an action if one or more of the parties would be entitled to attorney's fees under the agreement. RCW 4.84.330 states in relevant part:

and case law also allow the Respondents to recover attorneys' fees under this contract provision. Cal. Civ. Code § 1717 states:

(a) In any action on a contract, where the contract specially provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Cal. Civ. Code §1717 is a broad law applying to all contractual agreements containing provisions for attorneys' fees. *Weber v. Langholz*, 39 Cal.App.4th 1578, 1586, 46 Cal.Rptr.2d 677 (1995). In construing § 1717, numerous California Courts have found that all parties to a contract are entitled to recover under an attorneys' fees provision even where a party is not specifically named in the provision. In *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* 33 Cal. App. 3d 116, 120, 108 Cal. Rptr. 782 (2nd Dist. 1973), the court stated that "[t]he sole purpose of section 1717 is to transform a unilateral contract right to attorney's fees into a reciprocal provision giving the right to recover fees to whichever party prevails in the contract action." (internal quotations omitted); *See also San Dieguito Partnership v. San San Dieguito River Valley Regional etc. Authority*, 61 Cal. App. 4th 910, 72 Cal. Rptr.2d 91 (1998); *Korech v. Hornwood*, 58 Cal. App. 4th 1412, 68 Cal. Rptr 2d 637 (1997); *Reveles v Toyota By the Bay*, 57 Cal. App. 4th 1139, 67 Cal. Rptr.

543 (1997); *Nasser v. Superior Court*, 156 Cal. App. 3d 52, 202 Cal. Rptr. 552 (1984); *San Luis Obispo bay Properties, Inc. v. Pacific Gas & Elec. Co.*, 28 Cal.App.3d 556, 104 Cal. Rptr. 733 (1972).

Thus, it is clear that contract clauses like Section M of the Agreement in this case are reciprocal. Therefore, the trial court correctly awarded attorneys' fees to Respondents and this Court should affirm.

D. The Trial Court Correctly Concluded That the Case Law Applying "Prevailing Party" Analysis Is Not Applicable to the Present Dispute and That Its Application Was Clearly Erroneous Because the Contractual Language Is Clear and Unambiguous

The issue is not, as Appellant claims, who is the "prevailing party" or who on the whole prevailed on the majority of claims at trial. Rather, the singular issue is whether the Respondents were awarded in excess of \$2,000 on ANY CLAIM, and are, therefore, entitled to attorneys' fees under the contract. The answer to this simple and single question is "yes."

As argued above, The Customer Account Agreement is a legally binding contract entered into by Respondents, Michael and Nancy Morrell and Appellant, Wedbush Morgan Securities. This Agreement defines the terms and conditions of the investment relationship between Respondents and Appellant, as well as the rights and liabilities of the parties, including the award of attorneys' fees. Section "M" of the contract, entitled "ATTORNEY'S FEES" states:

ATTORNEY'S FEES: The undersigned agrees to pay attorney's fees incurred by WMS in any claim adjudicated against the undersigned which is in the excess of two thousand dollars.

The award of attorneys' fees in the present case is mandatory when the requirements of the contract are met, as they are here. The contract mandates attorneys' fees when two conditions are met:

1. When either party prevails on ANY claim; and,
2. Where the amount awarded on ANY claim is in excess of two thousand dollars. CP 4.

The contractual language in the Agreement is clear and unambiguous. When either party prevails on any claim and is awarded in excess of \$2,000, that party is entitled to attorneys' fees. The award of fees is not discretionary and does not require an analysis of which party prevailed on the majority of the claims as the NASD panel and Appellant mistakenly argue. These mistaken arguments add terms and conditions to the Customer Agreement that are not present in the plain language of the contract.

When the terms of a contract are clear and unambiguous as they are here, the trial court is required to award attorneys' fees to the party identified in the contract. *Riss v. Angel*, 80 Wn.App. 553, 912 P.2d 1028 (1996). Discretion does not permit the court to add terms or conditions. *Id.*

It is an abuse of discretion for a trial court to ignore the plain language of a contract awarding attorneys' fees to the party identified as the prevailing party under the terms of the contract. *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987). Specifically, the Supreme Court held:

The denial of attorneys fees in circumstances where a contract provides for attorneys fees in favor of the prevailing party is not within the ambit of broad trial court discretion. *Id.*

The language in the Customer Agreement is clear and unambiguous. Attorneys' fees are required as a matter of law whenever either party "prevails" as defined by the statute on any claim and in the process is awarded more than \$2,000. Therefore, the common law "prevailing party" analysis is irrelevant and this Court should affirm.

E. Respondents Are Entitled to Attorneys' Fees Under Section M of the Agreement Regardless of Whether Their Claims Were Based on Contract or Tort

Appellant argues that under California Civil Code Section 1717 and RCW 4.84.330 only claims arising under the contract are subject to the attorneys' fee provision of the Customer Agreement. Again, Appellant is adding language to the terms of the Agreement that are not present in the plain language of the contract.

The Agreement very clearly states that attorneys' fees are award in ANY CLAIM adjudicated in excess of \$2,000. The wording of the

Agreement, drafted by Appellant, does not restrict the award of attorneys' fees to any specific type of claim. Instead it mandates that fees be awarded in ANY CLAIM in excess of \$2,000 and such award is available to any party to the contract.

Furthermore, the Customer Agreement by its very terms governs the entire relationship between defendant and the plaintiffs. For example, Section "N" states that "the provisions of this agreement shall be continuous and cover individually and collectively all accounts the undersigned may open or reopen with WMS . . ." CP 4.

For purposes of argument only, the same result occurs whether this court applies the language in section "M" of the Agreement or California Civil Code Section 1717 or RCW 4.84.330. Both statutes and the Agreement mandate the award of attorneys' fees. The statutes identify the prevailing party as the party in whose favor final judgement is rendered; although the judgment need not include the entire amount sought by the party. *Burman v. State*, 50 Wn. App. 433, 749 P.2d 708, *review denied*, 110 Wn.2d 1029 (1988); *Michell v. Olick*, 49 Cal. App. 4th 1194, 1198-1199, 57 Cal. Rptr. 2d 227 (1996); *Moss Construction Co. v. Wulffsohn*, 116 Cal. App. 2d 203, 205, 253 P.2d 483 (1953).

Under Washington law, attorneys' fees are awarded for claims other than breach of contract where, as here, the contract is central to the existence of claims. *Western Stud Welding Inc. v. Omark Inds., Inc.*, 43

Wn.App. 293, 299, 716 P.2d 959 (1986). For the purposes of awarding attorneys' fees permitted by a contractual provision, an action is based on the contract even though the alleged alternative legal claims are based on torts and statutes if the action arose out of the contract and the contract is central to the dispute. *Id.*

Furthermore, according to California Code of Civil Procedure § 1021, once it is established that attorneys' fees may be granted, the attorneys' fees provision itself determines the precise grounds for such an award. § 1021 states:

§ 1021. Compensation of attorneys; Costs to parties.

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

Thus, "California law permits recovery of attorney's fees by agreement, for tort as well as contract actions." *Redwood Theaters Inc. v. Davidson* (In re Davidson) (2003) 289 BR 716, 2003 Bankr LEXIS 157, 2003 CDOS 2165, 40 BCD 271, 49 CBC2d 866, CCH Bankr L Rptr P 78826(citing *3250 Wilshire Boulevard Bldg. v. W.R. Grace & Co.*, 990 F.2d 487, 489 (9th Cir. 1993)). The court must look to the language of the agreement to determine if attorney's fees are warranted in a tort action. *See 3250 Wilshire Boulevard Bldg.*, 990 F.2d 489.

Moreover, in this case, the contractual relationship created the fiduciary duty that Appellant was found to have breached. A relationship between a principal, here Respondents, and an agent for such principal is an example of a fiduciary relationship. *Van Noy v. State Farm Mut. Automobile Ins. Co.*, 142 Wn.2d 784, 798, 16 P.3d 574 (2001). California law is to the same effect. *See Oakland Raiders v. Nat'l Football League*, 131 Cal.App.4th 621, 632, 32 Cal. Rptr.3d 266 (2005). Thus, it is misleading and disingenuous to argue that Respondents are not entitled to attorneys' fees under either RCW 4.84.330 or Cal. Code Civ. Proc. § 1717 because the award was based on tort claims and not on contract claims. Therefore, this Court should affirm.

F. The Doctrine of Trial Court Accord and Satisfaction Does Not Bar Respondents' Claim For Attorneys' Fees

Consistent with its other arguments, Appellant here argues that Respondents are barred from challenging the sufficiency and amount of the award by the doctrine of accord and satisfaction because they have received and accepted payment "in full satisfaction" of the award. Once again, Appellant misses the point: the attorneys' fees sought are not part of the award, but as a **consequence** of it. Appellant became obliged to pay Respondents attorneys' fees once the arbitrators awarded the Morrells

in excess of \$2,000 on any claim. Thus, the doctrine of accord and satisfaction is irrelevant, and this Court should affirm.

IX. REQUEST FOR ATTORNEYS' FEES PURSUANT TO RAP 18.1

Pursuant to RAP 18.1, and supported by the underlying Customer Account Agreement, Respondents are requesting costs, expenses and attorneys' fees on appeal. Attorneys' fees are authorized on appeal pursuant to the Customer Account Agreement. CP 3-4. See also, *Simonson v. Fendell*, 34 Wn.App. 324, 329-30, 662 P.2d 54 (1983), reversed on other grounds, 101 Wn.2d 88, 675 P.2d 1218 (1984). Attorneys' fees are recoverable when there is a contractual, statutory, or recognized equitable basis for the award. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 796-98, 557 P.2d 342 (1976).

X. CONCLUSION

For the reasons set forth above Respondents respectfully request this Court affirm the Trial Court in all respect and award Respondents request for attorneys on appeal.

DATED this 27th day of June, 2007.

MESSINA BULZOMI CHRISTENSEN

By 

JOHN L. MESSINA

4440

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Attorneys for Plaintiffs

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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.

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

AFFIDAVIT OF FILING BRIEF OF RESPONDENT

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STATE OF WASHINGTON)

: ss.

County of Pierce)

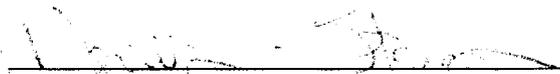
Vickie LoFranco, being first duly sworn, on oath deposes and says:

On June 28, 2007, I filed, via Legal Messengers, the original Brief of Respondent with the Clerk of the Division II of the Court of Appeals in the State of Washington, at Seattle.



VICKIE LOFRANCO

SIGNED AND SWORN to before me on the 28th day of June, 2007, by Vickie LoFranco.



Notary Public in and for the State of Washington,
residing at Tacoma.
My appointment expires 10-16-10



STATE OF WASHINGTON
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OT 12:23 PM 11:05
STATE OF WASHINGTON
BY _____
DEPUTY

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.

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

AFFIDAVIT OF SERVICE OF BRIEF OF RESPONDENT

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STATE OF WASHINGTON)

County of Pierce) : ss.

Vickie LoFranco, being first duly sworn, on oath deposes and says:

That on June 28, 2007, I delivered, via Legal Messengers, a copy of Brief of Respondents for service upon:

Christian Oldman, Esq.
Lane Powell Spears & Lubersky
1420 5th Ave #4100
Seattle, WA 98101

Vickie LoFranco
VICKIE LOFRANCO

SIGNED AND SWORN to before me on the 28th day of June, 2007, by Vickie LoFranco.

Heather Stamper
Notary Public in and for the State of Washington,
residing at Tacoma.
My appointment expires 10 16 10

