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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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OPTIMER INTERNATIONAL, INC.,

Claimant/Respondent,

v.

RP BELLEVUE, LLC,

Respondent/Appellant.

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**OPENING BRIEF OF APPELLANT RP BELLEVUE, LLC**

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## I. INTRODUCTION

The parties to this proceeding are Appellant RP Bellevue, LLC (“RP”), and Respondent Optimer International, Inc. (“Optimer”). RP is the owner of a mixed use commercial property located in the City of Bellevue Central Business District, the Bellevue Galleria. Optimer is a tenant and this appeal has its origins in a dispute over the respective obligations of the parties under the Lease. The underlying dispute was arbitrated pursuant to a mandatory arbitration provision in the Lease.

This appeal is taken from a denial of RP’s Motion to Modify or Vacate the Arbitrator’s Award and related Request for Reconsideration. The Superior Court did not actually consider any substantive issue raised by RP’s Motion. Rather, the Superior Court denied RP’s Motion because:

Under *Harvey v. University of Washington*, 118 Wn. App. 315, 76 P.3d 276 (2003), the parties may waive the right to appeal and that the provisions of 28.11 of the Lease that the arbitrator’s decision is “final, non-appealable and enforceable” constitute a voluntary and knowing waiver of judicial review under RCW 7.04A.010 et seq. and therefore there is no right to appeal.

CP 315-318 at 316. In other words, the parties contractually modified their rights so as to preclude review of an arbitrator’s decision under Washington’s Arbitration Statute, Chap. 7.04A RCW (the “Act”).

However, in *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992), the Washington Supreme Court specifically held that the parties to an arbitration agreement could not modify the rights under the Act: “In any event, the parties’ effort to define the nature and scope of review must fail. Litigants cannot stipulate to jurisdiction, nor can they

create their own boundaries of review.” *Id* at 161. *See, also, Godfrey v. Hartford Casualty Ins. Corp.*, 142 Wn.2d 885, 16 P.3d 617 (2001). Accordingly, the basis for the Trail Court’s decision is contrary to applicable law.

## II. ASSIGNMENT OF ERROR

RP respectfully submits that the Superior Court’s ruling and Order were in error for the following reasons:

1. Neither *Harvey* nor *Godfrey* (the authority relied on by the *Harvey* Court), address the issue of whether the parties had agreed to waive the limited right of review under the Act;
2. Even to the extent that the Superior Court had the authority to interpret the arbitration provision in the Lease, its interpretation that the parties waived a limited right of review under the Act is unreasonable;
3. The provisions of the Act are not waiveable as a matter of law; and
4. To conclude that language characterizing the award as non-appealable precludes the limited review under the Act is contrary to the well-established policy promoting arbitration.

## III. STATEMENT OF THE CASE

### A. Standard Governing Motion to Vacate Arbitration Award.

This Appeal is taken from denial of a Motion to Modify or Vacate under RCW 7.04A.230 which provides, in pertinent part:

- (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;...

In such a Motion, a reviewing Court may vacate an arbitration award only for grounds enumerated by statute, and generally the grounds for vacation must appear on the face of the award. Westmark Props., Inc. v. McGuire, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989). An arbitrator exceeds his powers where he commits an error of law on the face of the award. Boyd v. Davis, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). The fundamental issue raised by RP's Motion was whether the Arbitrator had exceeded his authority as disclosed on the face of the Arbitrator's various written rulings.

**B. Background Facts.**

RP is the owner of improved real property located in the City of Bellevue Central Business District known as the Bellevue Galleria (the "Galleria"). The Galleria was originally developed as a three floor vertical retail facility with a movie theater as the anchor tenant on the third floor.

Optimer was one of the Galleria's original tenants and operates a frame shop, an art gallery and a home furnishings business on the 2<sup>nd</sup> Floor of the Galleria (approximately 20,000 square feet), and a food kiosk on the Ground Floor of the Galleria (approximately 600 square feet). The Lease was entered into on September 25, 1997, between Optimer and an unrelated predecessor in interest to RP. (CP 34-121). RP is, in fact, the third owner of the Galleria since the effective date of the Lease.

Simply put, the Galleria proved nonviable as an exclusively retail facility before it was acquired by RP. As the Arbitrator stated in his Interim Award, "the overwhelming evidence presented at the hearing is that Optimer's retail operation was doomed by the commercial realities at the

[Galleria]...” (Interim Reasoned Award: CP 13-22 at 18). RP’s business plan called for conversion of unoccupied space on the 2<sup>nd</sup> and 3<sup>rd</sup> Floors of the Galleria to office use, and reconfiguration of a portion of the Common Areas on the 2<sup>nd</sup> Floor to facilitate office use.

**C. The Issues in Arbitration.**

On April 30, 2008, Optimer made a Demand for Arbitration pursuant to an arbitration provision in its Lease. The description of the “Nature of the Dispute” states:

The Landlord has commenced construction to change the use from a shopping mall to commercial office space which violates the terms of the Claimant’s lease. The construction creates noise, dust, debris and other dangerous conditions. See, letters dated April 14 and 29, 2008. Claimant is requesting a preliminary injunction, final injunction, rent abatements, damages and other appropriate relief.

(AAA Commercial Arbitration Rules Demand for Arbitration: CP 24).

RP filed an Answering Statement and Counterclaim Request for declaratory relief: “Specifically, Respondent [RP] requests a declaration that Respondent [RP] is not limited under the Lease to using the leasehold for retail purposes.” (Answering Statement and Counterclaim Request: CP 123).

Under ¶ 6(i) of Prehearing Order No. 1 (CP 125-130 at 127), Optimer was ordered to make a more definite statement of its claims. Optimer’s First Amended Arbitration Demand and Reply to Counterclaim, dated May 30, 2008 (“Amended Demand”) states:

[T]he Claimant [Optimer] prays for an award which *inter alia* 1) determines that the Bellevue Galleria may not be reconfigured as a mixed retail and commercial use; 2) that if the mixed use is permitted that the Claimant [Optimer] be

compensated in an appropriate manner and/or allowed to sublet its Display and Storage Areas on the Second Floor of the Bellevue Galleria for a use more consistent with the mixed use 3) for dismissal of Respondent's [RP] counterclaim and 4) for such further and other relief as appropriate in the premises.

(CP 132-139 at 136). Optimer later submitted an expert opinion stating the amount of "appropriate compensation" is \$9 million based on the contention that the change of use had rendered Optimer's space untenable. (CP 141-145). The request for injunctive relief based on a determination that the leasehold was restricted to retail use or reconfigured was not withdrawn in Optimer's Amended Demand. However, the Amended Demand added an additional claim that RP had violated Lease provisions relating to parking. (CP 132-139 at 134, ¶ 10).

At that point, the principal issues between the parties were whether RP had the right under the Lease to: (1) convert tenant space to office use; and (2) reconfigure the Common Areas.

**D. The Arbitration Awards.**

RP moved for summary judgment on those two issues. RP's Motion was granted in Prehearing Order No. 5 which provides, in pertinent part:

Respondent's [RP] Motion for Summary Judgment is granted to the extent that it requests dismissal of Claimant's [Optimer] claims: 1) that the Landlord [RP] is precluded under the Lease from allowing uses other than retail uses in the [Galleria]; and 2) that the Landlord [RP] is precluded under the Lease from changing the configuration of the Common Areas and Facilities. All other issues are reserved for hearing, including, but not limited to claims that the manner of the Landlord's [RP] change in configuration of

the Common Areas and Facilities has violated Article XVIII or other provisions of the [L]ease.

(CP 147-150 at 147-148). RP's claim for declaratory relief was in effect granted and any claim for legal or equitable relief based on a change of use was gone. Any claim based on the contention that RP is precluded from modifying the Common Areas has also been resolved against Optimer. Before the matter ever went to hearing, Optimer had already lost on the seminal issues in the case.

Following summary judgment, the remaining claims left for hearing were: (1) was there a violation of the parking provisions of the Lease; and (2) whether the "manner" of changing the Common Areas violates other provisions of the Lease. Based on Optimer's Hearing Brief, the latter issue involves two sub-issues. The first concerns Article XVIII of the Lease which expressly allows modification of the Common Areas except where the modifications would "materially and adversely affect the interior or exterior visibility of or access to the Leased Premises..." (CP 152-166 at 155). Optimer's Amended Demand alleges interference with access and visibility. (CP 132-139 at ¶¶ 11-12). Second, ¶ 12 of Optimer's Amended Demand appears to allege that the "manner" in which construction of tenant improvements for the office use has proceeded has produced "noise, dust, debris, and danger..." (CP 132-139 at ¶ 12). In other words, the construction process has interfered with Optimer's quiet enjoyment.

**E. Optimer Fails to Meet Its Burden of Proof.**

In his Interim Award, the Arbitrator concluded that Optimer had met its burden of proof as to breach of the Lease on both interference with

access and parking. (CP 13-22 at ¶ 3). However, the Arbitrator also expressly found and concluded as follows:

Under Washington law, the landlord [RP] should be held liable for ascertainable damages shown to be a proximate result of the breach of the Lease terms as described in paragraph 3, above. However, *Optimer has failed to carry its burden of proof with respect to the damages* it has suffered as a proximate result of the breaches of the Lease by the landlord [RP]. Admittedly, demonstrating such damages with sufficient proof to remove such a determination from *the realm of speculation* is particularly difficult in this context since the testimony offered by both sides portrays how tenants of the [Galleria] .... have struggled to survive.

(CP 13-22 at 17) (Emphasis added). The Arbitrator went on to state: “[G]iven the failure by Optimer to offer competent proof and legally sufficient proof as the nature and amount of such damages, I am only in a position to award nominal damages, in the amount of \$100.00.” (CP 13-22 at 18). At ¶ 4 of the Interim Award, the Arbitrator denied Optimer’s request for injunctive relief. (CP 13-22 at 17).

In its Motion to Vacate, RP contended that this award of nominal damages was an error of law on the face of the award. Causation and damages are both an essential element of a claim for breach of contract. *See, e.g., Robinson v. Davis*, 158 Wash. 556 (1930): “Since the action was for damages suffered, mere proof that there was a breach of the contract, without more, did not warrant a verdict in favor of the respondent, *even for nominal damages.*” (Emphasis added). *Ketchum v. Anderson Bulb Gardens*, 142 Wash. 134, 252 P.2d 523 (1927); *Accord, Owners’ Ass’n v. Plateau 44 II LLC*, 139 Wn. App. 743 at 754, 162 P.3d 1153 (2007). In the

absence of proof of damages, the entire claim fails. The breach is not by itself enough to establish liability.

Damages must be supported by competent evidence in the record; however, evidence of damage is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 510, 728 P.2d 597 (1986), *review denied*, 107 Wn.2d 1022 (1987). The Interim Award repeatedly notes the failure of “Optimer to offer competent proof and legally sufficient proof as to the nature and amount of such damages...” (CP 13-22 at ¶ 5). Indeed, the Arbitrator characterized any effort to fix damages as “entering the realm of speculation.”

So, whether or not Optimer established a breach of the Lease, Optimer failed to meet its burden of proof on two critical elements of its claim. Optimer cannot, therefore, be characterized as the prevailing party on its breach of lease claims.

#### **F. The Lease Modification.**

This leaves the request for relief in Optimer’s Amended Demand: “that if the mixed use is permitted that the Claimant be...allowed to sublet its Display and Storage Areas on the Second Floor of the Bellevue Galleria for a use more consistent with the mixed use...” (CP 132-137 at 136). In other words, Optimer was seeking relief from restrictions which would limit the use by a subtenant or assignee from Optimer.

There are Lease restrictions in §11.01 of the Lease which would preclude a sublease by or assignment to an entity conducting a non-retail

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There are Lease restrictions in §11.01 of the Lease which would preclude a sublease by or assignment to an entity conducting a non-retail

business in the Galleria. However, RP conceded such a restriction would be inapplicable where RP had itself introduced non-retail uses into the Galleria, and this issue never went to hearing.

Instead, the Arbitrator arbitrarily crafted an unprecedented and unsupported relief out of an entirely different provision of the Lease. The Assignment/Subletting provision of the Lease (§ 15.01) provides, in pertinent part:

Tenant shall furnish to Landlord all information available to Tenant and requested by Landlord as to the responsibility, reputation, financial standing and business and experience of the proposed assignee or subtenant. Landlord's consent to the proposed assignment or sublease shall not be unreasonably withheld so long as the proposed assignment or sublease complies with provisions of this Section 15.01 and the information provided by Tenant is reasonably satisfactory to Landlord.

(CP 60 at §15.01(a)).

Incredibly, the Arbitrator completely abrogated all of RP's contractual rights under this provision by granting Optimer the following relief:

Optimer is entitled to assign or sublet its leasehold premises in whole or in part to any assignee or sublessee whose proposed use is not in violation of law and which is not prohibited by existing leases to other tenants. Without limiting the foregoing, the landlord shall not disapprove or decline to consent to any proposed assignee or sublessee based upon landlord's judgment as to: 1) responsibility, reputation, financial standing and/or business and experience of the proposed assignee or sublessee; 2) net worth, financial condition and/or experience of proposed assignee or sublessee (other than if Optimer requests a true assignment which would operate to release Optimer from

further obligations under the Lease), or 3) proposed use of the premises by the proposed assignee or sublessee...

(CP 13-22 at 19). In short, the Arbitrator virtually deleted § 15.01 from the Lease, granting relief that went far beyond that requested by Optimer relating to an entirely different provision in the Lease. In its Motion to Vacate, RP contended that this award was an error of law on the face of the award for the following reasons.

The parties to a commercial lease are at liberty to specify the terms and conditions governing assignment or subletting. The scope of the obligation of the landlord with respect to consent is defined entirely by the terms of the lease. See, Coulos v. Desimone, 34 Wn.2d 87 (1949); and Johnson v. Yousoofian, 84 Wn. App. 755 (1996). In the absence of a “reasonable” consent provision, a landlord may, for example, arbitrarily refuse an assignment or sublease. But §15.01 does contain a reasonable standard.

Under Ernst Home Center v. Sato, 80 Wn. App. 473 (1996), the standard governing a reasonable consent provision is objective. Good faith is not by itself sufficient. The decision to withhold consent must be objectively reasonable. Where the parties have failed to define the criteria governing a reasonableness determination in the lease, Ernst Home Center identifies a number of factors which may be legitimately considered in a decision as to whether consent may be reasonably withheld: “The concerns which a landlord can reasonably consider include the financial strength and responsibility of the proposed assignee, the legality of the assignee’s intended use, and the nature of the occupancy.” *Id.* at 486.

So, if the Lease here had not defined any criteria governing “reasonable consent,” RP would still have been entitled to “reasonably consider the financial strength and responsibility of the proposed assignee, the legality of the assignee’s intended use, and the nature of the occupancy” as a matter of law. The agreed criteria in the Lease simply include those criteria specifically recognized as “reasonable” considerations in relation to a requested consent to assignment in *Ernst Home Center*. By rewriting the Lease, the Arbitrator has denied RP the benefit of protections available to any landlord in this state under a reasonable consent provision. Since the Arbitrator is not the State legislature, the Arbitrator clearly exceeded his authority under Washington law.

As rewritten by the Arbitrator, § 15.01(a) of the Lease is no longer a reasonable consent provision. The Arbitrator certainly has the authority of to conclude that RP has waived any right to enforce the retail use limitation in § 15.01(e) of the Lease. However, there is no legal, equitable or factual basis which would allow the Arbitrator to either rewrite § 15.01(a) of the Lease to eliminate the enumerated factors agreed to by Optimer, or redefine Washington law defining the legitimate considerations governing a request for reasonable consent.

**G. The Prevailing Party Issue.**

Both parties requested an award of fees. The Arbitrator characterized Optimer as the prevailing party. (CP 13-22 at ¶ 8). In the Final Award, Optimer was awarded \$41,500 in fees and costs. (CP 178-183 at 180-181). No offset was given to RP even though RP had clearly prevailed on most of the issues in the case. In its Motion to Vacate, RP

contended that this award was an error of law on the face of the award for the following reasons.

Optimer first asserted that the Lease precluded leasing to non-retail tenants or modifications to the Common Areas. Optimer lost on both issues on summary judgment where RP's request for declaratory relief is effectively granted. Optimer then claimed that the "manner" in which the use and Common Areas had been changed caused Optimer \$9 million in damages. The Arbitrator found that Optimer failed to meet its burden of proof on any damages, but then awarded Optimer nominal damages of \$100.00. The Arbitrator granted relief never sought by Optimer materially modifying express provisions of the Lease. Then, despite the fact that Optimer had lost on the majority of the issues in the case, as is clear from the face of the Award, the Arbitrator awarded Optimer \$41,500 in fees and costs.

The rule in Washington is that, in cases involving multiple claims, if both parties prevail on major issues, fees should be awarded to both parties on a proportionate basis. *See, e.g., Marassi v. Lau*, 71 Wn. App 912 (1993). The Arbitrator's conclusion that Optimer was the sole prevailing party and solely entitled to fees and costs is inconsistent on its face with the conclusions of the Arbitrator regarding the various claims asserted by both parties. In fact, with the possible exception of the lease modification issue, Optimer prevailed on none of its claims and RP prevailed on all of its claims. At a minimum, the fees, costs and AAA expenses incurred by RP should have been offset against any award made to Optimer. The failure of

the Arbitrator to award fees and costs to RP on the claims on which it prevailed is an error of law appearing on the face of the Award.

**H. The Superior Court Decision.**

The Superior Court addressed none of the issues discussed above in denying RP's Motion to Vacate. Rather, the Superior Court denied RP's Motion because:

Under *Harvey v. University of Washington*, 118 Wn. App. 315, 76 P.3d 276 (2003), the parties may waive the right to appeal and that the provisions of 28.11 of the Lease that the arbitrator's decision is "final, non-appealable and enforceable" constitute a voluntary and knowing waiver of judicial review under RCW 7.04A.010 et seq. and therefore there is no right to appeal.

(CP 315-318 at 316). In other words, the parties contractually modified their rights so as to preclude review of an Arbitrator's decision under the Act.

**IV. APPLICABLE AUTHORITY AND DISCUSSION**

**A. The *Harvey* Case Does Not Stand for the Proposition that Parties to an Arbitration Agreement Entered into Prior to the Dispute Can Agree to Waive the Right of Review Under the Act.**

The Superior Court's ruling was that by entering into an arbitration agreement specifying that any arbitration award would be "final and non-appealable," RP waived its right to the limited review available in Superior Court under the provisions of the Act. In other words, this Court interpreted the term "non-appealable" to mean the limited review available in Superior Court under the provisions of the Act and that the parties could exempt themselves from the provisions of the Act by agreement.

However, neither Harvey nor Godfrey addressed the issue of whether any right under the Act had been waived. In Harvey, the Superior Court had already considered, and denied, a Motion to Vacate under Washington's version of the Uniform Arbitration Act then in force. 118 Wn. App at 317. The Harvey Court framed the issue before it as follows: "UW asserts that we should not review the superior court ruling because Harvey knowingly and voluntarily waived his *right to judicial review* in the parties' *private trial agreement*." *Id.* at 318. (Emphasis added).

The Harvey decision was based on two specific factors, neither of which applies to the case at bar:

First, the parties in this case clearly waived their right to appeal. Both parties signed the private trial agreement, and both acknowledged they consulted their attorneys and knowingly waived their right to appeal.

\* \* \* \* \*

Second, Washington law permits parties to waive rights conferred by law as long as the waiver is knowing and voluntary. There is nothing in Washington law prohibiting a party from waiving the right to appeal an arbitration award.

*Id.* at 319.

Unlike Harvey, the waiver of the right to appeal in this case was not part of a "private trial agreement" signed by the parties after consultation with their attorneys after the dispute had arisen. Harvey voluntarily dismissed a pending lawsuit and knowingly entered into a private trial agreement waiving his right to appeal.

In the case of RP, the arbitration clause is part of a 47-page lease between Optimer and RP's predecessor landlord in 1997 which was assigned to RP after it purchased the Galleria ten years later. RP certainly did not negotiate the Lease or any of the provisions in it, nor did RP ever knowingly or voluntarily waive any of its rights. RP had no choice – it was required under the Lease to arbitrate all disputes with Optimer. This does not meet Washington's *litmus* test that a waiver of rights conferred by law be both knowing and voluntary.

More important, what was under consideration in Harvey was not whether the parties had a limited right to review under the Act, but, rather, whether the Court of Appeals could entertain an appeal of the "superior court ruling" denying the Motion to Vacate. The parties had already sought and obtained review under the Act. Harvey simply does not stand for the proposition that a binding arbitration agreement characterizing the award as non-appealable precludes consideration of a Motion to Vacate by the Superior Court under the Act.

In Godfrey, the issue was whether the parties could agree to partially non-binding arbitration – preserving the right to trial *de novo* of any issues after a "binding" arbitration. Again, as in Harvey, but not the case here, there was already a pending Superior Court action when the parties entered into the arbitration agreement which provided that either party could demand "a trial within 60 days of the arbitrator's decision" on the issue of damages.

The Godfrey Court described arbitration as “exclusively statutory,” “the rights of the parties are governed and controlled by statutory provisions.” 142 Wn. 2d at 893. The Godfrey Court held:

While the parties are free to decide by contract whether to arbitrate, and which issues are submitted to arbitration, once an issue is submitted to arbitration, however, Washington’s Act applies.

142 Wn.2d at 894. As the Court later noted: “we have clearly indicated any efforts to alter the fundamental provisions of the Act by agreement are inoperative.” 142 Wn.2d at 896. The holding was that the parties could not contractually modify any provision of the Act.

In Barnett, the Court was specifically addressing the issue of whether the parties to an arbitration subject to the Act could modify rights of review by agreement. The Barnett Court held that the parties could not: “In any event, the parties’ effort to define the nature and scope of review must fail. Litigants cannot stipulate to jurisdiction, nor can they create their own boundaries of review.” *Id* at 161.

That is precisely the conclusion that RP is asking this Court to come to here. Presented with the present facts, the Washington Supreme Court would certainly hold that any attempt to modify the rights of the parties under the Act by agreement would have been unenforceable. However, by adopting an interpretation of the Lease that the parties waived the right to limited review under the Act, this Court has done exactly what the Washington Supreme Court has said repeatedly cannot be done: the creation by agreement of the parties of some modified “common law” arbitration not governed by the Act.

**B. To the Extent that the Superior Court Even Had the Authority to Interpret the Arbitration Provision in the Lease, the Interpretation is Unreasonable.**

In concluding that the arbitration provision included a contractual waiver of the right of review under the Act, the Superior Court construed the Lease. The scope of the rights of the parties under the contract is exclusively the province of the arbitrator and confers exclusive jurisdiction over “any dispute” arising from the Lease. The Superior Court did not have the authority to either construe or interpret the Lease. As the *Godfrey* Court noted: “review in the trial court is limited to vacation of the award or correction or modification of the award.” 142 Wn.2d at 895. If Optimer had requested a ruling by the Arbitrator on this issue, the Superior Court’s consideration of the issue would have been limited to whether the decision of the Arbitrator involved error on the face of the Award.

But, Optimer did not request relief relating to the scope of the rights of review. Rather, it invoked its rights under the Act to seek confirmation of the Award. If the term “appeal” as used in the Lease refers to proceedings under the Act, a request for confirmation is no different than a request to an appellate court that a judgment be affirmed. In this regard, Optimer can’t have it both ways. Either the parties waived review under the Act or they did not.

Nevertheless, the express basis for decision in *Harvey* was a contractual waiver: “There is nothing in Washington law prohibiting a party from waiving the right to appeal an arbitration award.” 118 Wn. App. at 320. Neither *Harvey* nor *Godfrey* arose from an arbitration agreement entered into before a dispute between the parties arose. In each case, the

agreement was negotiated after litigation had been initiated and, at the time of negotiation, each party had an existing right to seek review before the Court of Appeals.

Unlike *Harvey*, in this case there was no mature, inherent right of review to the Court of Appeals arising from an existing dispute at the time the Lease was entered into. The claim that the “right of appeal” had been waived in *Harvey* was made *after* the Superior Court had already heard a Motion to Vacate under the Act. To interpret the term “right of appeal” as the term is used in *Harvey* to extend to the statutory right of review under the Act has absolutely no basis in law or fact.

**C. The Provisions of the Act Are Not Waiveable By the Parties to an Agreement Subject to the Act.**

The limited right of review under the Act is simply non-waiveable under controlling authority. As the *Godfrey* Court noted:

The parties to an arbitration contract are not free to craft a “common law” arbitration alternative to the Act. We have clearly indicated any efforts to alter the fundamental provisions of the Act by agreement are inoperative.

142 Wn.2d at 896. In *Barnet*, the Court was specifically addressing the issue of whether the parties to an arbitration subject to the Act could modify rights of review by agreement. The *Barnett* Court held that the parties could not: “In any event, the parties’ effort to define the nature and scope of review must fail. Litigants cannot stipulate to jurisdiction, nor can they create their own boundaries of review.” *Id* at 161.

So, the characterization of an arbitration award under the Act as “non-appealable” cannot, as a matter of law, refer to rights under the Act

without contradicting multiple holdings of the Washington Supreme Court that the parties cannot contractually modify the rights under the Act.

**D. To Conclude that Binding Arbitration Agreements Characterizing the Award As “Non-Appealable” Preclude the Limited Review Under the Act is Contrary to the Well-Established Policy Promoting Arbitration.**

The fact of the matter is that the bar recognizes that awards made under pre-dispute arbitration agreements are non-appealable to begin with, in the sense that the awards are not subject to review before the Court of Appeals under the same standards as Trial Court decisions. Nobody who drafts these kinds of agreements would recognize the phrase “non-appealable” as anything other than reflecting that review under the agreement is limited to review under the Act. Parties contract to arbitrate disputes in reliance on the limited review under the Act, and it is in fact the reason that parties request “reasoned” arbitration awards as in the case here.

What the Superior Court has done here is to rewrite thousands of existing arbitration agreements, contrary to the understanding and intent of the parties. Corollary to that, the Superior Court has contravened clear holdings of the Washington Supreme Court that parties cannot contractually modify the rights under the Act. In effect, the Court has acted as the Legislature just for these parties because, as the Washington Supreme Court has stated, arbitration is “exclusively statutory,” “the rights of the parties are governed and controlled by statutory provisions.” *Godfrey*, 142 Wn.2d at 893.

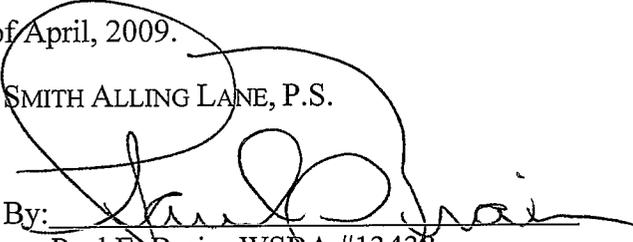
## V. CONCLUSION

The Superior Court's decision was based on the legal conclusion that the parties to a pre-dispute binding arbitration agreement could contractually waive or modify the rights of the parties under the Act. However, the Washington Supreme Court has repeatedly and consistently held that such a right does not exist. Accordingly, the basic legal premise relied on the by the Superior Court was simply wrong.

Accordingly, RP respectfully submits that this Court should reverse the decision and Order of the Superior Court and remand this matter with instruction to the Superior Court to address the substantive issues raised by RP's Motion to Vacate. In addition, RP would request an award of its fees and costs on appeal.

DATED this 9<sup>th</sup> day of April, 2009.

SMITH ALLING LANE, P.S.

By: 

Paul E. Brain, WSBA #13438

Attorneys for RP Bellevue, LLC

**CERTIFICATE OF SERVICE**

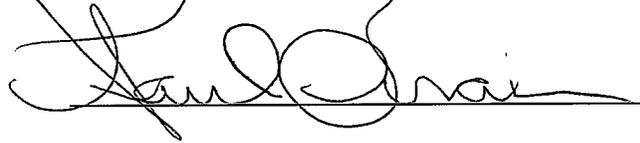
I hereby certify that I have this 9<sup>th</sup> day of April, 2009, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

***Attorneys for Optimer International, Inc.:***

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9<sup>th</sup> day of April, 2009, at Tacoma, Washington.



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