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65249-4

No. 65249-4-I  
COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

---

Mary Cummings, James Dougherty, and Paul Sauvage,

Respondents,

v.

Budget Tank Removal & Environmental Services, LLC,

Appellant.

---

AMENDED OPENING BRIEF OF APPELLANT BUDGET TANK  
REMOVAL & ENVIRONMENTAL SERVICES, LLC

---

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## I. INTRODUCTION

An arbitrator misapplied Washington law in order to impose CPA and contract liability on appellant Budget Tank and Environmental Services, LLC (“Budget”). This Court should correct the injustice pursuant to Washington’s Uniform Arbitration Act, Title 7.04A (“UAA”). Even though the contract as described by the arbitrator plainly and specifically stated how Budget Tank would perform the work, the arbitrator created and imposed a different standard of care, found that Budget breached the new standard of care, and held the contract deceptive under the Consumer Protection Act, Title 19.86 (“CPA”). The arbitrator imposed CPA liability for breach of this implied professional standard of care—to which Budget never agreed—in contravention of clear Washington precedent that CPA liability is improper for breaches of professional duties. The arbitrator then awarded damages and interest that were not awardable under Washington law.

The trial court refused to review the entire written award, limiting its review to the last two pages. This was error based on the definition of “award” in the UAA and based on binding precedents. This Court should reverse confirmation of the award, because errors on the face of the award required vacation. The entire written award demonstrates multiple conflicts with established Washington law. This Court should rectify the resulting injustice to Budget and the very real prejudice represented by the judgment of one and a half million dollars.

This Court also should reverse for trial court error after confirmation of the award, when the trial court impermissibly added amounts to the judgment. Finally, this Court should reverse for trial court error prior to arbitration when the trial court consolidated the Dougherty and Sauvage arbitration with a separate party's arbitration against Budget. The consolidation was not authorized by the UAA. This error alone supports reversal and remand to arbitration.

The case arises from a contract for removal of petroleum-contaminated soil from property in Seattle. Budget removes underground storage tanks in the Seattle area. Budget also removes contaminated soil. In May 2009 Budget had two separate AAA arbitrations pending: one with James Dougherty and Paul Sauvage (collectively "Dougherty"), and another with customer Mary Cummings. These arose from separate, unrelated agreements to remove contaminated soil from their respective properties. Dougherty and Cummings moved the superior court to consolidate the arbitrations. Over Budget's objections, the superior court consolidated these arbitrations that did not arise from the same or related transactions. This consolidation did not comply with the UAA.

After an eight-day arbitration, the arbitrator issued to Dougherty a 42-page award detailing the parties' contract and the arbitrator's application of Washington law. CP 171-212 ("Final Award of Arbitrator"). Dougherty did not prevail on all claims, and Budget received an offset for the contractual amounts deemed owing, but Dougherty was awarded \$1,598,939.30 in damages and attorney fees. *Id.* Budget moved

for vacation of the award (and the Cummings' award) while Dougherty moved for confirmation. While resolving these cross-motions, the trial court incorrectly ruled that in examining "the face" of the arbitration award, she was limited to reviewing the final two pages of the written 42-page award which contained "the outcome." 3/16/10 RP pp. 24-25. The trial court failed to consider the entire written award denoted "Final Award of Arbitrator" including any legal reasoning. *Id.* This was error which this Court should correct on *de novo* review.

The trial court should have found error apparent on the face of the award. The award contravenes established Washington law in numerous respects. While the arbitrator quoted verbatim from the contract in the award, his rulings contradicted the contract language and Washington principles of construction. The arbitrator disregarded the plain disclosures and contract terms regarding *how* Budget would perform the work, namely through use of a machine known as a "PID" to detect soil contamination levels. The arbitrator created and imposed a new covenant on Budget to comply with industry standards of an environmental consultant when Budget solely contracted to remove contaminated soil through the specified methods. The arbitrator concluded that the way Budget proposed to and performed the work was below the standard of care of "a licensed environmental consultant." CP 194. Upon this conclusion, the arbitrator found the contract deceptive and imposed CPA liability in addition to breach of contract liability. The arbitrator's imposition of CPA and contract liability directly contradicted Washington law, which does not

permit rewriting of contracts and which holds that specific terms control over general terms. Significantly, the imposition of CPA liability is facially erroneous where the CPA does not permit liability for complaints directed to the competence and strategy of a professional.

In addition to the improper imposition of liability, error on the face also is demonstrated by (1) the award of lost profits based on an untested, new commercial leasing business in violation of Washington's new business rule and the requirement that lost profits be proven with reasonable certainty and be contemplated by the parties at contracting, (2) the award of prejudgment interest on the *unliquidated* delay damages, which violates longstanding law, and (3) the award of delay damages under the CPA, where there is no causal connection between the two-month delay and the alleged over-excavating,. This Court has the authority and duty under the UAA, upon *de novo* review, to vacate the award for these errors of law.

The trial court later exceeded its authority when it added pre-*award* interest to the arbitrator's award that the arbitrator had not awarded.

Cummings and Budget resolved their dispute. Cummings is no longer a party this appeal. The appeal only concerns the award to Dougherty.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in consolidating the unrelated arbitrations.

2. On cross-motions, the trial court erred in denying Budget's motions to vacate the award for error on the face, granting the cross-motion to confirm the award, and entering judgment upon the award.

3. The trial court abused its discretion in denying Budget's motion for reconsideration of the confirmation of the award and entry of judgment, because the trial court made an error of law reviewing only two pages of the award instead of the entire written award to decide the cross-motions.

4. The trial court erred in granting additional relief and amending the judgment to include \$15,763 in prejudgment interest from the time of award until entry of judgment because the damages were not liquidated sums entitled to bear prejudgment interest. The trial court also abused its discretion in failing to reconsider that relief.

5. The trial court erred in granting additional relief and amending the judgment to include \$23,301.83 in prejudgment interest from the time of the interim award until the final award that the arbitrator did not award, and abused its discretion in failing to reconsider that relief.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err when it consolidated the arbitrations despite that fact that two of the four requirements of RCW 7.04A.100 were not met when the arbitrations did not arise from the same transaction or series of related transactions, and there was no possibility of "conflicting decisions" in separate proceedings concerning separate contracts and parties? (Assignment of Error #1).

2. Did the trial court err when it limited its examination for error on the face of the award to the last two pages of the written 42-page award? Did the trial court abuse its discretion when it refused to reconsider the scope of review and review the entire written award? (Assignments of Error #2 and #3).

3. Did the trial court err resolving the cross-motions for confirmation or vacatur of the arbitration awards when it confirmed the award despite errors on the face of the awards? The errors include:

a) finding CPA violations based on Budget's use of the PID to detect soil contamination levels when the contract terms plainly called for this. The arbitrator recognized that the contracts described and disclosed that Budget would use the PID to detect soil contamination levels, but concluded that this method of detection fell below the standard of care of an environmental consultant, an irrelevant conclusion under Washington CPA law;

b) finding breach of contract based on Budget's use of the PID to detect soil contamination levels when the contract terms plainly called for this;

c) awarding \$671,863 for lost rents for anticipated but unrealized agreements to lease new, unbuilt commercial office space on the undeveloped properties where Budget removed soil. These awards contravened Washington's new business rule, the requirement that lost profits be shown with reasonable certainty and not be speculative, and the requirement that the parties contemplate the lost profits at the time of contracting (CP 205, 202);

d) awarding prejudgment interest of \$184,702.23 on the delay damages when the damages were unliquidated, as shown by the descriptions in the award, and therefore not entitled to bear interest under established Washington law (CP 205-06, 202); and

e) awarding delay damages under the CPA when the delay damages were not causally related to the CPA violations;

(Assignment of Error #2).

4. Did the trial court err by granting additional relief and amending the judgment to include \$15,763 in prejudgment interest on the delay damages from entry of the final award to entry of judgment, because

the sums awarded by the arbitrator were not liquidated and, therefore, should not have born interest under Washington law? (Assignment of Error #4).

5. Did the trial court err by granting additional relief and amending the judgment to include \$23,301.83 in prejudgment, *pre-award* interest for the period between the interim award and the final award, where this amount was not included by the arbitrator? (Assignment of Error #5).

#### **IV. STATEMENT OF THE CASE**

This is an appeal from an order consolidating unrelated arbitrations between Budget and different customers Dougherty and Cummings (CP 119-120), from the trial court's subsequent confirmation of the resulting award to Dougherty and refusal to vacate that award for errors on the face (CP 441-42), from entry of judgment against Budget on the confirmed award (CP 446-48), and from amendment of the judgment to include \$15,763 in interest from award to judgment and \$23,301.83 in pre-award interest that the arbitrator himself did not award (CP 563-564).

Budget, a limited liability company operated by two brothers, is an underground tank storage removal and soil remediation business which has operated in the Seattle area since 2003. CP 79.

**A. Budget's Soil Removal Contract with Dougherty and Eventual Dispute.<sup>1</sup>**

In February 2008, Budget contracted with Dougherty to provide remediation services at two contiguous properties in Seattle's Ballard neighborhood. CP 172. The parties entered a detailed, integrated contract from which the arbitrator quoted verbatim in his award. CP 180-84. Budget was to remove contaminated soil. CP 182.

The parties agreed that soil contaminated to a certain level would be removed, stating, "Budget will use and implement the Model Toxics Control Act- Method A standard cleanup level for all contaminants identified at the Project Cites." CP 182. This required removal of soil contaminated by petroleum hydrocarbons at or above 30 parts per million (ppm). *Id.* The parties also agreed on the method to determine the level of contamination in the soil, stating, "Budget will use the MiniRae 2000 photoionization detector ['PID'] for field screening purposes to determine what soil is contaminated at levels exceeding 30 ppm of total petroleum hydrocarbons." CP 182. In this same section, the parties agreed that soil samples only would be evaluated in a laboratory in two instances: first, when the PID indicated that contamination levels had dropped below the cleanup level, or second, if the customer requested sampling. *Id.* ("Budget will take performance soil samples when Budget's field screening instruments indicate to Budget that the petroleum hydrocarbons in the soil have dropped below the 30 ppm cleanup level or when Customer requests,

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<sup>1</sup> The facts for this section are taken exclusively from the award.

in writing and at Customer's expense, that Budget take additional performance soil samples."). *Id.* The contract also explained that uncontaminated soil "may incidentally be removed" during the cleanup process." CP 184.

The contract called for a soil removal rate of \$155 per ton. CP 183. The contract stated that "at least" 139 tons of TPH contaminated soil have been contaminated above the clean up level. CP 181. Budget cautioned in the contract that this was only an estimate because "Budget was not commissioned to conduct a complete and extensive subsurface contamination study." *Id.* The contract estimated a minimum cleanup cost of \$21,545 at the contract rate. CP 183. The contract provided that soil removed in excess of the estimate would be charged at the same contract rate of \$155 per ton. CP 183; see also CP 184 ("Customer agrees . . . to pay for all soils removed from the site when they are delivered to a hazardous waste facility for the per ton contract rate stated above.").

At the conclusion of the job, Budget had removed 3,525 tons of soil, for a total invoice of \$638,997.88. CP 184-85.

The contract contained no time is of the essence clause. CP 201. There were no provisions regarding Dougherty's plans for the properties or any timeline for completion. *See* CP 201-202. Again, the contract was integrated and required that future amendments be in writing. CP 183-84.

A dispute arose and Budget demanded arbitration. CP 172. Dougherty cross-claimed. *Id.*

**B. The Trial Court's Order to Consolidate Two Separate AAA Arbitrations of Separate Parties Concerning Their Separate Transactions with Budget.**

Budget sought arbitration with Dougherty in July 2008. Another customer, Cummings, sought arbitration in September 2008 of her dispute with Budget over an invoice from a different transaction. CP 135. After Dougherty's and Cummings' cases were established before the American Arbitration Association, CP 5, Dougherty and Cummings moved the superior court to consolidate the arbitrations pursuant to RCW 7.04A.100. CP 1-9. They argued that the four required elements of that statute were established. CP 6-9. Budget objected that all the required elements of the statute were not met, and that it would be prejudiced by the consolidation. CP 69-75.

Adopting the reasoning of Dougherty's reply brief that all four elements were met (CP 114-118 Reply Brief), the trial court consolidated the two arbitrations into a single arbitration scheduled for October 2009. CP 119-120. *See also* CP 135-36; 172-73.

**C. The Lengthy, Written Arbitration Award Against Budget.**

After a seven-day arbitration, the arbitrator issued final awards in the consolidated arbitration. CP 171-212 (Dougherty); CP 134-169 (Cummings). Dougherty's 42-page award is titled "Final Award of Arbitrator." CP 171. This title appears in the footer on every page of the awards. On page one, the arbitrator writes an introductory paragraph describing the following pages as his final award, writing,

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement dated February 22, 2008, between the above-referenced parties, having been duly sworn, having duly heard the proofs and allegations of the parties, having previously issued an INTERIM AWARD OF ARBITRATOR dated December 3, 2009, **do hereby find, conclude and issue this FINAL AWARD OF ARBITRATOR, as follows:**

CP 171 (emphasis added)).

After reiterating the contract provisions defining Budget's obligations to remove contaminated soil, CP 189-191, the arbitrator found in favor of the Dougherty on the CPA claim on the basis that "use of the those provisions by Budget with any of its soil excavation customers not technically trained or qualified to understand the substantial limitations of soil screening carried out by use of the PID constitutes an unfair and deceptive act and practice in trade and commerce" and has "the capacity to deceive a substantial portion of the public." CP 191. The arbitrator stated three reasons for this finding: (1) anyone "not technically proficient regarding the PID" would expect that only soils uncontaminated above the MTCA cleanup standard plus some incidental additional volumes would be removed, (2) exclusive use of the PID to determine contamination is deceptive and unfair "when used with any customer untrained or unaware that the PID is an unsatisfactory and unreliable tool for such purpose," and (3) the industry standard amongst "environmental consulting firms" is to use performance testing, not the PID, to determine if soils exceed the MTCA cleanup standard. CP 191-193.

The arbitrator then concluded, “The net effect of the evidence presented was a persuasive demonstration that, for customers not technically trained in the niceties of laboratory analysis and capabilities of the PID,” the contractual provisions “are deceptive and misleading.” CP 193. The arbitrator found that the contract “confronts the customer with a grave risk of overcharges for hauling away soils falling below the MTCA standard.” CP 194. The arbitrator then stated, “The evidence established that Budget made little or no use of performance sampling at the Dougherty/Sauvage site, and instead relied almost entirely on use of the PID . . . .” CP 194. The arbitrator found this to be a breach of the CPA, resulting in over-billing “outside the Agreement’s agreed scope of service due to unfair and deceptive acts and practices . . . .” CP 197.

The arbitrator rejected Dougherty’s claims of fraudulent inducement. CP 187-88. The arbitrator also found that Dougherty failed to prove that Budget intended to give erroneous estimates. CP 187 (Dougherty “failed to establish that the cleanup cost and tonnage removal estimates given by Budget were known and intended by Budget to be false or were not opinions genuinely held by Budget at the time these were given to [Dougherty].”). *See also* CP 198 (noting not only lack of evidence that Budget intended estimates to be erroneous, but that contract “clearly states that the Budget estimate may be wrong.”). The arbitrator rejected the contention that Budget violated the CPA by “engaging in a systemic pattern” of giving lowball estimates. CP 198-99.

The arbitrator found for Dougherty on the breach of contract claim. CP 200-203. The arbitrator reasoned that removal of soil occurred “outside the Agreement’s scope of work, properly construed, for which Budget was not contractually entitled to invoice Dougherty and Sauvage” due to reliance on the PID to screen the soil where soil was removed that exceeded the MTCA cleanup standard. CP 200. The arbitrator declared “such overbilling” “a material breach of the Agreement by Budget.” *Id.* The arbitrator also found Budget in breach for undue delay that “constituted a material breach of the parties’ Agreement.” CP 201-203. Although the contract contained no time is of the essence clause or performance schedule, CP 201-202, the arbitrator found that evidence “concerning the circumstances surrounding Budget’s performance of the Agreement” established this breach, including Dougherty’s post-contracting communication of an urgent desire to expedite completion and Budget’s “oral post-Agreement promises . . . that the project would be done in only one more day. . . .” CP 202.

The arbitrator concluded that Dougherty owed Budget \$396,000 on the contract, netting a credit for Budget less amounts paid of \$296,000. CP 204-205. The arbitrator awarded Dougherty \$1,153,598.84 in delay damages and \$184,702.23 in pre-award interest on the delay damages without undertaking a prejudgment interest analysis. CP 206. Thus, the award to Dougherty was \$1,042,301. CP 207. On top of this, the arbitrator awarded \$529,970.06 in attorney fees and costs. CP 210.

The AAA rules to which the parties agreed provided for no appeal or reconsideration of any issue not clerical in nature. CP 172, note 1; AAA Commercial Arbitration Rule 46 (“The arbitrator is not empowered to redetermine the merits of any claim already decided.”).

**D. The Trial Court’s Confirmation of the Arbitration Award and Denial of Budget’s Motion to Vacate for Errors on the Face of the Award, While Refusing to Review the Entire Written Award.**

Both parties next sought judicial action pursuant to the UAA. Budget sought vacation of the award for errors on the face of the award. CP 213-228. Dougherty (and Cummings) sought confirmation and entry of judgments. CP 121-125.<sup>2</sup>

The trial court heard oral argument on the cross-motions on March 16, 2010. 3/16/10 RP (“RP”). The trial court expressed its belief that only the last two pages of the lengthy, written award were “the face of the awards” subject to review because they confined themselves to the “outcome” and did not state legal reasoning. RP p. 24, line 12 to p. 25, line 13; *see also* RP p. 3, line 24 to p. 22, line 25 (preceding argument and discussion). On that basis, the trial court did not consider Budget’s arguments regarding errors on the face of the award substantiated by other

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<sup>2</sup> Additional briefing on the cross-motions included: (1) the customers’ consolidated response in opposition to vacation and reply in support of confirmation, CP 323-335; (2) Budget Tank’s Response to Motions to Confirm, CP 320-322; (3) Budget Tank’s reply supporting vacation, CP 341-345; (4) Budget’s Supplemental Response to Motion to Confirm and Reply in Support of Motions to Vacate, CP 379-382; (5) the customers’ Reply to Budget’s Supplemental Response, CP 387-389. Supporting declarations included the Declaration of Gary Baker, CP 346-378.

portions of the written award. RP p. 25, lines 7-13 (“In looking at the outcome here, the issues that are raised in the motion to vacate go beyond [the outcome]. They ask this court to go beyond the face of it. I do not have authority to do that, so I’m finding that the motions – the grounds raised in the motion to vacate go beyond this court’s authority, and for that reason I’m denying the motion to vacate.”).

The trial court denied Budget’s motions and confirmed the award. CP 437-440. The trial court entered judgment on the award. CP 446-48.

**E. The Trial Court’s Amendment of the Judgment, Including Its Addition of Pre-Award Relief that the Arbitrator Did Not Include.**

After obtaining the initial judgment on March 17, 2010, Dougherty sought additional amounts and amendment of the judgment. CP 391-394 (Joint Motion for Awards of Attorney Fees and Costs on Motions to Confirm and to Vacate and Prejudgment Interest Since Entry of Arbitration Awards); CP 473-474 (Joint Motion to Amend). The trial court granted the relief and amended the judgments. CP 567-69 (Order Granting Joint Motion for Award of Attorney’s Fees, Costs, and Prejudgment Interest); CP 563-64 (Amended Judgment).

In pertinent part, the trial court awarded Dougherty \$15,763 in prejudgment interest from the final award to judgment. CP 569 at lines 5-7; CP 563 at lines 22-24. The trial court then went farther than the arbitrator when it agreed that Dougherty also was entitled an additional \$23,301.83 to Dougherty in prejudgment, *pre-award* interest representing interest from the arbitrator’s interim award to his final award. CP 569 at

lines 5-7; CP 563 at lines 22-24. The arbitrator had not awarded this sum. In support of his motion for this amount, Dougherty did not introduce the interim award. *See* CP 391-394 (Motion); CP 396-410 (Decl. of McDowall); CP 411-427 (Decl. of Scarpelli).

**V. ARGUMENT**

The arbitrator imposed a different contract on Budget than the one Budget entered. To impose liability under the CPA and for breach of contract, the arbitrator disregarded the plain provisions that Budget would use the PID to screen soil for contamination. Instead, the arbitrator held Budget to the standard of an environmental consultant, and premised liability on these standards. This contravened Washington law. Additionally, the award of lost profit damages and prejudgment interest violated Washington law. The Court should reverse confirmation of the awards, and remand for vacatur.

This Court reviews *de novo* the proper standard of judicial review of an arbitration award and whether a motion to confirm an arbitration award was correctly decided. *Woodley v. Safeco Ins. Co.*, 84 Wn. App. 653, 929 P.2d 1150 (1997) (review of a decision on a motion to confirm arbitration award should be *de novo*, because superior court has no discretion due to statutory constrictions). *See also First Options v. Kaplan*, 514 U.S. 938, 947-48 (1995) (no “special” standard governs review of a trial court’s decision to vacate or confirm an arbitration award; questions of law are decided *de novo*); *Parents Involved in Cmty. Schs. v. Seattle*

*Sch. Dist. No. 1*, 149 Wn.2d 660, 670, 72 P.3d 151 (2003) (questions of law are reviewed *de novo*).

Upon *de novo* review, this court should reverse, vacate the award for errors on the face and remand with direction to return the matter to AAA before a different arbitrator for further proceedings.

**A. The Trial Court Erred When It Consolidated the Arbitrations of Separate Parties Concerning Separate Transactions, Contrary to the Uniform Arbitration Act.**

The trial court exceeded its authority when it ordered consolidation of the two arbitrations pursuant to RCW 7.04A.100. Two of the necessary elements for consolidation were not satisfied. The trial court had no discretion to order consolidation. This Court should reverse the order of consolidation, vacate the judgment, and remand for a new, separate arbitration.

The trial court had no authority under the statute to intervene in these circumstances. RCW 7.04A.100(1) only permits a trial court to consolidate arbitrations if four elements are met, as follows:

§ 7.04A.100. Consolidation of separate arbitration proceedings

(1) Except as otherwise provided in subsection (3) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court **may order consolidation** of separate arbitration proceedings as to all or some of the claims **if**:

(a) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(b) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(c) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; **and**

(d) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

RCW 7.04A.100(1) (emphasis added). A trial court exercises discretion to consolidate arbitrations only if all the prongs are satisfied. Here, prongs (b) and (c) were not met as a matter of law.

This Court reviews legal issues *de novo*. *Parents Involved in Cmty Sch.*, *supra*. Statutory construction is a legal issue. *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 5, 802 P.2d 784 (1991). Courts must give effect to the plain meaning of a statute. *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002); *State v. Tiffany*, 44 Wash. 602, 87 P. 932 (1906). A literal, conjunctive reading of “and” would only be rejected in two circumstances not present here. First, if it led to absurd results (*see State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989)), which it does not. Second, in the “exceptional circumstances” that “cogent evidence” demonstrated a mistake by the Legislature. *See State v. Tiffany, supra*. Such evidence is lacking. The conjunctive construction is consistent with the intent and express language of the statute. It makes the most sense not only literally, but in the context of each prong. Each prong addresses different requirements that successively

build a case for consolidation. The prongs are not potential substitutes. Here, the legislators meant exactly what they said.

Further, the customers argued a conjunctive meaning and argued that all four prongs were met. *See* CP 6-9 (Motion to Consolidate) (arguing that all prongs are satisfied); CP 115, lines 2-4 (Reply) (same). The trial court specifically adopted this reasoning, giving the statute a conjunctive meaning. CP 119 (“The court adopts the reasoning by moving parties, especially as set forth in the reply brief.”). But the trial court erred when it considered all the prongs met.

First, Subsection (b) was not satisfied. The claims at issue did not arise “in substantial part,” or in *any* part, from the same transaction or series of related transactions. The Dougherty and Cummings transactions were unrelated. No “same transaction” existed. There was no “series of related transactions.”<sup>3</sup> Budget’s transaction with Dougherty had no like relationship to Budget’s transaction with Cummings. There was no connection. *Different* customers with *different* transactions were involved

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<sup>3</sup> In the absence of a statutory definition of a word, courts employ the plain and ordinary meaning of the word as found in a dictionary. *First Covenant Church v. City of Seattle*, 120 Wn.2d 203, 220, 840 P.2d 174 (1992). Merriam-Webster defines “**series**” as “**1** : a group of usually three or more things or events **standing or succeeding in order and having a like relationship to each other** : a spatial or temporal succession of persons or things : a group that has or admits an order of arrangement exhibiting progression.” *Webster’s Third New International Dictionary, Unabridged*. Merriam-Webster, 2002. <http://unabridged.merriam-webster.com> (June 2010) (emphasis added). Merriam-Webster defines “**related**” as “*transitive verb* **2** : to show or establish a logical or causal **connection** between <seeks to *relate* poverty and crime> <*relate* the flow of individual consciousness to large political and social contours -- Warren Beck> <utterly unable to *relate* these two events> *intransitive verb* . . . . **3** : to be in relationship : have reference.” *Id.* (bold emphasis added).

in *independent* disputes with the same defendant. The statute does not provide that mutuality of the defendant is a basis for consolidation. Identical legal theories, similarly, is not a basis for consolidation.

In their consolidation motion, the customers erroneously focused on the similar claims each wanted to pursue, and the like evidence they would present. *See* CP 1-9. They argued, “The proceedings arise from analogous facts and are governed by identical contracts.” CP 2, lines 3-4. They argued a “pattern” of practice on Budget’s part. CP 2, lines 15-16. But, the customers detailed the “Facts Regarding Budget’s Work for Mary Cummings,” CP 4-5, and the “Facts Regarding Budget’s Work for James Dougherty and Paul Sauvage,” CP 5-6, demonstrating the separateness of the transactions. The customers demonstrated no interrelatedness, nor did any exist. In their reply brief, the customers argue that “the point” is “the similarities between the cases as required under the Act.” CP 114. This argument is legally wrong under the UAA. Consolidation is not permitted merely because cases share similarities, because analogous facts are alleged, or where a pattern of practice is alleged. The Court should reject the customers’ argument on these points. Consolidation is only permitted, according to our Legislature, where the claims “arise in substantial part from the same transaction or series of related transactions.” That was not the case.

In addition to the fact that the customers and transactions were unrelated, there was no possibility of “conflicting decisions.” “Conflicting decisions” does not simply mean different outcomes of different cases

tried by different plaintiffs. It requires identical facts to be decided differently in two proceedings, or inconsistent outcomes regarding the same claim. Here, decisions from separate arbitrations involving different customers would not have been “conflicting.”

The trial court’s consolidation ruling was impermissible under the statute, and inconsistent with Washington’s judicial approach to the arbitral process. “Washington courts will take a fairly narrow approach when construing RCW 7.04 and intervening in the arbitration process.” *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 768, 934 P.2d 731 (1997) (construing the predecessor statute, RCW 7.04). In *Perez*, the trial court similarly became involved in pre-arbitration maneuvering. The *Perez* court examined whether a trial court may intervene “in the prearbitration process to disqualify an arbitrator-nominee to a tripartite panel where one party alleges that the nominee is partial. . . .” *Id.* at 765. The *Perez* court noted, “Washington courts are reluctant to intervene in the arbitration process . . . .” *Id.* at 768. The *Perez* court affirmed the trial court’s summary orders to proceed with arbitration without further trial court involvement. *Id.*

Here, the trial court disregarded the terms of the UAA, in contravention of the principles of the *Perez* decision. The trial court overstepped its authority to order consolidation of arbitrations where the required elements of RCW 7.04A.100(1) were not met. This Court should

reverse and remand the Dougherty dispute for a new arbitration before a new arbitrator.<sup>4</sup>

**B. The Trial Court Erred When It Incorrectly Reviewed the Face of the Award and Confirmed the Award Despite Errors on the Face.**

The trial court incorrectly decided Budget's challenges to the award when it confined its review to the last two pages. When this Court reviews the complete arbitration award, it should conclude that errors exist on the face. This Court should vacate the judgment and award and remand for return to arbitration before a new arbitrator.

1. The Trial Court Incorrectly Limited Its Review for Errors on the Face to the Last Two Pages of the Lengthy Written Award.

The trial court erred when it refused to review the entire written award, but instead limited its review to the last two pages. This Court should reverse. This Court should decide whether the award demonstrates error on the face.

RCW 7.04A.230(1)(d) provides that a court "shall" vacate an award if "the arbitrator exceeded the arbitrator's powers." Washington courts have long construed this language to require vacation for "errors on the face of the award." *Broom v. Morgan Stanley Dean Witter*, 169 Wn.2d 231, 236-240, 236 P.3d 182 (2010); *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995); *Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wn.

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<sup>4</sup> The UAA allows the court vacating an award under RCW 7.04A.230(1)(d), the grounds urged here, to remand for rehearing before a new arbitrator. RCW 7.04A.230(3).

App. 119, 123, 4 P.3d 844 (2000); *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990). The Supreme Court has stated that error on the face of an award requires vacatur:

[J]udicial review of an arbitration award is limited to the face of the award. *Boyd*, 127 Wn.2d at 263. In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified. *Id.*; see also *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990) (applying the above cited rule and reversing the trial court confirmation of an arbitration award, and remanding the matter for a new arbitration hearing, where an error of law appeared on the face of the award).

*Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998), citing *Lindon Commodities, Inc.*, *supra*.

The face of the award can include the arbitrator's reasoning. The Supreme Court in *Davidson* approved *Lindon Commodities, Inc.*, where the Court of Appeals reversed confirmation of an arbitration award where an error of law appeared on the face of the award. *Id.* In *Lindon*, the court excerpted the arbitrator's award that included the arbitrator's rationale for failing to find a modification of the contract, as follows,

My award is in favor of BAMBINO BEAN COMPANY, INC., in the sum of TWENTY-NINE THOUSAND ONE HUNDRED ELEVEN DOLLARS AND NINETY-ONE CENTS (\$29,111.91), plus interest at 12% per annum from and after November 19, 1988.

. . . [T]he evidence indicates that the parties entered into a binding contract which provided that shipment was to be made February/March, 1986 - buyer's call, and payment was due net 30 days receipt of invoice. The exhibits show that the invoice was received by Lindon Commodities on 4/1/86, and accordingly was

due and payable on 5/1/86. Said invoice was sent to Lindon Commodities at their request. All of the other matters that took place between the parties were subsequent to the time that the amount in question was due and payable and *I have found no evidence of any consideration for any modification of the contract after the payment due date. . . .* The award is for the contract price of \$85,800.00, plus interest at 12% per annum for one hundred and forty-one days from May 1, 1986, to September 19, 1986, in the sum of \$3,977.35, thus totaling [sic] \$89,777.35. A payment was made against that amount of \$66,300.00 on September 19, 1986. From that payment date to November 19, 1988, interest at 12% per annum (the legal rate in Washington State) is \$5,634.56, thus leaving an unpaid balance as of November 19, 1988, of \$29,111.91. I hereby award that amount to Bambino Bean Co., Inc., together with costs of arbitration as set forth below.

*Lindon*, 57 Wn. App. at 814-15 (emphasis original). Because Washington law *does* permit modification of a contract without consideration, the *Lindon* court found the italicized portion of the award embodied “error on the face.” *Id.* The *Lindon* court did not confine its review to only the first paragraph which stated the “award” in favor of Bambino Bean Company, Inc. It read the entire writing from the arbitrator detailing the award, including the arbitrator’s flawed legal reasoning.

This is consistent with *Moen v. State*, 13 Wn. App. 142, 533 P.2d 862 (1975), which expressed the rationale for the requirement that error appear “on the face” of the award as arising from the lack of any requirement that evidence presented to the arbitrator be preserved:

The legislature has also provided, as we have seen, that awards may be set aside for error in fact or law, but inasmuch as there is no provision in the statute requiring arbitrators to file or preserve the evidence received upon the hearing, it would seem to follow that the errors which will sustain an exception to an award on the ground indicated **must be discovered by an examination of the**

**award alone.** If it was the intention of the legislature to require the court, upon hearing exceptions taken to awards, to examine the evidence submitted to the arbitrators, or, in other words, to try the cause *de novo*, it is but reasonable to presume that they would have so declared. . . . **[T]he errors and mistakes contemplated by the statute must appear on the face of the award, or, at least, in some paper delivered with it.**

*Moen v. State, supra*, at 145 (quoting *School Dist. v. Sage*, 13 Wash. 352, 356-57, 43 P. 341 (1896)) (emphasis added). Here, Budget relies on the entire written award. It does not go behind the award and attempt to submit evidence that was submitted to the arbitrator. Budget exclusively relies on the award and the reasoning contained therein.

In *Lent's, Inc. v. Santa Fe Eng'rs, Inc.*, the court rejected the argument that a cover letter accompanying an award was part of the award. *Lent's, Inc., v. Santa Fe Eng'rs, Inc.*, 29 Wn. App. 257, 266, 628 P.2d 488 (1981). The award had been typed on a AAA form and mailed to the parties with the cover letter. The court limited the award to the document entitled "award of arbitration," which the Court reasoned "was substantively sufficient on its face to settle the dispute," "was a decision on the merits," "disposed of all the issues raised," and "was clear enough to indicate what each party was entitled to do." *Id.* The Court did not, therefore, consider the cover letter to be part of the award. Unlike the party in *Lent's*, Budget relies on the body of the award, not a cover letter.

In the case at hand, the trial court's review of only the last two pages of the 42-page award titled "Final Award of Arbitrator" was incorrect as a matter of law. The title of the document, which appears on

the first page and on every page in the footer, is self-explanatory and determinative. The award in its entirety contains the elements enumerated in *Lent's*, i.e., the decision on the merits that is substantively sufficient to settle the dispute, disposed of all issues raised, and was clear enough to indicate what each party had to do. The arbitrator described in his introductory paragraphs that the following pages constitute his "Final Award of Arbitrator." CP 134; CP 171. The Court should defer to the arbitrator's titling of the 42-page document. No cover letters or other communications are at issue, only the award itself. The trial court should have considered the entire award.

This Division has noted that an arbitrator can control the amenability of her award to judicial review by the brevity or length of the award. *Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wn. App. at 123. The Court noted, for example, that where an award "identifies a portion of the award as punitive damages," and the jurisdiction does not allow punitive damages, vacation will follow. *Id.*, citing *Kennewick Educ. Ass'n v. Kennewick School Dist.*, 35 Wn. App. 280, 282, 666 P.2d 928 (1983). Similarly, in *Norberg* where the arbitrator designated a specific amount for lost inheritance, and Washington law did not permit recovery for lost inheritance, vacation followed. *Id.* at 125, 128. In the case at hand, the arbitrator wrote a lengthy award. The trial court should have considered it in its entirety.

Review of the arbitrator's entire award also is supported by this Court's decision in *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 497, 32

P.3d 289 (2001). The *Tolson* court reversed for vacation of the award after reviewing the arbitrator's letter discussing the evidence and conclusions. *Id.* The court rejected the view that it should confine its review to the "actual dollar amounts awarded" and not "the letter as a whole" on the premise that this went beyond the face of the award. *Id.* at 498-99. After reviewing the entire letter, the Court found that the arbitrator's discussion in the letter demonstrated that the arbitrator may have incorrectly placed an evidentiary burden on the plaintiff, justifying vacation and remand. *Id.*

In addition, the UAA addresses an "award," stating that the arbitrator shall make "a record of an award" and give notice of the award "including a copy of the award" to each party. RCW 7.04A.190(1). Here, the arbitrator gave Dougherty a lengthy award titled throughout "Final Award of Arbitrator." The entire award is amenable to judicial review. The trial court's narrow approach was rejected by the *Tolson* court. It also contradicts RCW 7.04A.190(1). Where the lengthy award constitutes the record of award made by the arbitrator and copied to the parties, the trial court should have reviewed it in its entirety.

The trial court abused its discretion when it refused to reconsider its strict view of "the face of the award." *See* CP 449-457 (Motion for Reconsideration); CP 565 (Order Denying Motion for Reconsideration). *See also Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (trial court abuses its discretion when it takes erroneous view of the law). Budget moved for reconsideration bringing to the trial court's attention in more detail case law regarding the scope of review that

supports looking beyond the mere statement of the outcome to the legal rationale for the award. CP 449-457. No tenable basis supported denial of reconsideration where Washington law permits review of the complete award demonstrating the arbitrator's application of Washington law.

2. The Arbitrator's Finding of Liability Was Based on Misapplication of Washington Contract and CPA Law: The Arbitrator Rewrote the Contract.

The arbitrator violated Washington law by rewriting the contract to find Budget liable. The arbitrator erred on the face of his award when he concluded that Budget violated the CPA and breached the contracts when Budget complied with the exact terms of the contract. This was contrary to Washington law, which holds parties to the terms of their contracts. The arbitrator concluded that the method of completing the work upon which the parties agreed did not comply with industry standards for an environmental consultant. CP 193. This conclusion supported neither CPA liability nor breach of the contract. The decisions *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 167 P.3d 1162 (2007), and *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482 (2007), preclude CPA liability in these circumstances.

The arbitrator erroneously applied Washington law when he found CPA violations and found that Budget had "over-excavated" according to the contract. The arbitrator detailed on the face of his award that the parties agreed in writing that Budget would analyze the level of soil contamination with the PID device to determine what soil to remove. CP 190. The arbitrator excerpted this agreement, as follows:

Budget will use the MiniRae 2000 photoionization detector [“PID”] for field screening purposes to determine what soil is contaminated at levels exceeding 30 ppm of total petroleum hydrocarbons. Budget will take performance soil samples when Budget’s field screening instruments indicate to Budget that the petroleum hydrocarbons in the soil have dropped below the 30 ppm cleanup level or when Customer requests. . . .

*Id.*

The arbitrator went on to find that the PID was “an unreliable tool” to complete this work, stating,

[I]nsofar as the Agreement may be construed to allow Budget to use the PID exclusively to “determine what soil is contaminated,” without thorough companion program of performance soil sampling and follow-up laboratory testing, the above-referenced provisions are deceptive and unfair when used with any customer untrained or unaware that the PID is an unsatisfactory and unreliable tool for such purpose. The evidence established that the PID is a wand device that gives a relatively crude reading on whether vapors are present indicating petroleum contamination, and thus may be a suitable tool to use for assessing whether a site is entirely free of petroleum contamination, but that it is an unreliable tool to measure whether particular contamination levels are above or below the MTCA cleanup standard. The testimony of Respondents’ expert witnesses . . . persuasively established that the PID cannot measure accurately or reliably whether contaminated soil is contaminated above or below the MTCA standard.

CP 192. The arbitrator then concluded that use of the PID to evaluate soil for removal was below the industry standard “of a licensed environmental consultant,” CP 193, even though Budget was not hired in this capacity (or entitled to compensation for such expertise), the contract contained no term requiring Budget to perform to the standard of an environmental consultant, and the contract instead specified that the PID would be used

for screening. Nothing in Washington law allows the arbitrator to rewrite the contract in this fashion.

Because the arbitrator found the agreed-upon method for soil evaluation to be unreliable and below industry standard for environmental consultants, and concluded that a person untrained in remediation work would not know this, he found that Budget violated the CPA. This was an error of law for multiple reasons. “Either an erroneous rule of law or mistaken application thereof is a ground for vacation or modification under the statute.” *Expert Drywall v. Ellis-Don Constr.*, 86 Wn. App. 884, 939 P.2d 1258 (1977), *rev. denied*, 134 Wn.2d 1011 (1988). *See also Kennewick, supra*, at 282 (award will be vacated if it “on its face shows adoption of an erroneous rule, or mistake in applying the law”); *Boyd, supra* (same). The arbitrator’s mistaken application of Washington law requires vacation of the award.

In Washington, parties to a contract are held to its terms. *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973). Parties to contracts are bound to know and understand the terms of contracts they have voluntarily signed. *Id.* “[T]he whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.” Parties “have a duty” to read the contracts they sign. *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 385, 97 P.3d 11 (2004). “It is a well-known principle of contract interpretation that ‘specific terms and exact terms are given greater weight than general language.’” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d

773 (2004) (citing Restatement (Second) of Contracts § 203(c) (1981)).

The arbitrator's decision contradicts these rules.

The contract identified the PID as the device that would be used to determine the level of contamination in soil. The contract provided that only when the PID reading dropped below the 30 ppm cleanup level would Budget do corroborative laboratory testing. That the arbitrator found this method inadequate is irrelevant. The contract provides for exactly what was done at Plaintiff's property.

The contract, as recited in the awards, did not contain any term that Budget would perform according to any industry standards. But the arbitrator implied a new covenant, finding that the contract terms "*imply* that Budget will perform its services in a manner consistent with industry standards of a licensed environmental consultant." CP 194 (emphasis added). Persons charged with construing contracts under Washington law are not entitled to rewrite the contracts. *Equilon Enters. v. Great Am. Ins. Co.*, 132 Wn. App. 430, 437, 132 P.3d 758 (2006) ("The court can 'neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it.'") (quoting *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980)). *Seattle Prof'l Eng'g Emples. Ass'n-v. Boeing Co.*, 139 Wn.2d 824, 132 P.3d 758 (courts should not "foist upon the parties a contract they never made."). In contravention of Washington law, the arbitrator saddled Budget with a significant, material duty not stated in the contract as detailed by the arbitrator

himself. Moreover, that duty contradicted the specific provision describing how the soil would be screened for contamination.

Breach of a standard of care is not a CPA violation, even if there were a valid basis upon which to hold the defendant to that standard of care. This Court squarely decided the issue in *Nguyen v. Doak Homes, Inc., supra*. In *Doak Homes*, the plaintiff alleged that a builder failed to disclose material defects in her home. She relied on evidence “about Doak’s failure to comply with industry standards when installing various components of the home.” *Id.*, 140 Wn. App. at 734. The Court rejected such evidence as a basis for a CPA violation, stating, “The mere failure to comply with industry standards does not constitute a deceptive act or practice under the CPA.” *Id.* The Court also stated that “implicit in the definition of deceptive under the CPA is the understanding that the practice misleads or misrepresents something of material importance.” *Id.* Here, Budget plainly stated in the contract that the PID would be used to detect levels of contamination for soil removal. Under *Doak Homes*, it was error to impose CPA liability because the arbitrator felt use of the PID device did not meet industry standards of environmental consultants.

*Ramos v. Arnold, supra*, further requires this conclusion. *Ramos* stated the rule of law that, “Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act.” *Ramos v. Arnold*, 141 Wn. App. at 20, citing *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). Where a claim chiefly concerns the competence of a

professional, and not the entrepreneurial aspects of the business, it amounts to a negligence claim and is exempt from the CPA. *Id.*; *Short*, 103 Wn.2d at 61-62. Here, Washington law does not support CPA liability based on the arbitrator's dissatisfaction with the removal strategies identified in the contract.

Under the precedent of *Doak Homes* and *Ramos*, the arbitrator's decision that use of the PID was "unreliable" and not in compliance with industry standards should not have resulted in a finding of liability under the CPA.

Budget's contracts, as detailed in the awards, disclosed use of the PID to measure contamination levels. The arbitrator should have held Dougherty to those terms, and not implied new duties on Budget. Budget's contract therefore was not deceptive. The arbitrator's criticisms concern Budget's competence and strategies of performance and are not proper subjects for CPA liability. Imposition of CPA and breach of contract liability was error apparent on the face of the awards. This Court should reverse with instructions to vacate the award and remand to a new arbitrator.

3. The Arbitrator's Award of Lost Profits as Part of the Delay Damages Was Error Because These Amounts Violate Washington's New Business Rule and Were Not Contemplated at Contracting and Not Established with Reasonable Certainty.

The arbitrator contravened Washington law when he awarded lost profits of \$413,791 and \$258,072 in "lost rents" for new office space that Dougherty intended to build on the remediated property. Washington law

requires that lost profits be established with reasonable certainty, and are not available to new businesses with no established history of profit as was the case here. Washington law also requires that lost profits be contemplated by the parties at contracting, and these were not, according to the arbitrator's own findings. This Court should reverse and remand for vacation the award of these amounts.

Improper damage awards require vacation of arbitration awards. *Kennewick, supra; Federated Servs., supra*. Lost profits are recoverable when (1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of defendant's breach, and (3) they are proven with reasonable certainty. *Golf Landscaping v. Century Constr. Co., Div. of Orvco*, 39 Wn. App. 895, 903, 696 P.2d 590 (1984). The lost profit award here violates all of these requirements.

The arbitrator erred in awarding *any* lost profits for lost rents because Dougherty's new commercial real estate business was not sufficiently established to entitle him to lost profits. "[A] claim for lost profits is properly denied when the alleged loss cannot be proved adequately and remains speculative." *Golf Landscaping, supra*, at 903. *See also O'Brien v. Larson*, 11 Wn. App. 52, 54-55, 521 P.2d 228 (1974) ("[L]ost profits must be proved with reasonable certainty; damages which are remote and speculative cannot be recovered."), citing *National School Studios, Inc. v. Superior School Photo Serv., Inc.*, 40 Wn.2d 263, 276, 242 P.2d 756 (1952) (to establish lost profits requires business data). Where a plaintiff is conducting a new business with costs unknown, prospective

profits cannot be awarded. *O'Brien v. Larson*, *supra*, citing *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677 (1964), *mod.*, 396 P.2d 737 (1964). *See also Magna Weld Sales Co. v. Magna Alloys & Research Pty., Ltd.*, 545 F.2d 668, 670-72 (9<sup>th</sup> Cir. 1976) (under Washington law lost profit awards are forbidden “when the business is a new one with no established financial track record,” and that “anticipated ‘pie in the sky’ is not a financial loss, however disappointing it may be”).

The Supreme Court described Washington’s “new business rule” as precluding lost profit awards for new businesses, as follows:

The usual method of proving lost profits is from profit history. It is argued that where a plaintiff is conducting a new business with labor, manufacturing and marketing costs unknown, prospective profits cannot be awarded. This is the so-called new business rule and has long been the law of Washington.

*Larsen v. Walton Plywood Co.*, 65 Wn.2d at 16. The Court went on to state that while lost profits need not be proven with “mathematical nicety,” lost profits require “factual data” “to furnish a basis for computation of probable losses.” *Id.* at 17, 21. In *Larsen*, the rule of reasonable certainty was satisfied “only by a consideration of [the plaintiff’s] own profit experience.” *Id.* at 20. The arbitrator disregarded this rule.

Dougherty was not entitled to lost profits where he was undertaking a new commercial venture, which required him to construct and lease office space, for which he had no history of profit. The arbitrator also acknowledged that no executed leases existed, referring instead to “Lost Rents from **Anticipated** Banner Bank lease” and “Lost Rents

relating to Office Space **LOI's [Letters of Intent].**" An award for lost rental profits in these circumstances contravenes Washington law.

The arbitrator also plainly erred because he awarded damages that were not contemplated at the time the contract was made. The arbitrator stated in his decision that Dougherty communicated to Budget its "urgent desire to expedite completion of the project in order to accommodate their proposed anchor tenant (and prospective financing source), Banner Bank," and that Budget's principal "made several oral *post*-Agreement promises to Respondents" to expedite completion. CP 202 (emphasis added). The arbitrator erred when he premised damages on communications that occurred *after* contracting when Washington only permits such damages when the communications occur "at the time the contract was made."

Finally, the arbitrator awarded the gross lost rents without any reduction for the expenses of a commercial landlord. The lump sum award of the speculative gross rents is unjustified under any theory of damages. They are not "damages" but a \$671,853 windfall.

This Court should reverse and remand for vacation of the award as to the lost profits.

4. The Arbitrator's Award of Post-Judgment Interest on the Delay Damages Was Error, Because the Delay Damages Were Unliquidated.

The arbitrator erred on the face of the award in awarding prejudgment interest on Dougherty's unliquidated damages. "[T]he liquidated-unliquidated analysis has long been the law in Washington" to determine if damages bear prejudgment interest. *Hansen v. Rothaus*, 107

Wn.2d 468, 474, 730 P.2d 662 (1986). “The rule in Washington is that interest prior to judgment is allowable (1) when an amount claimed is ‘liquidated’ or (2) when the amount of an ‘unliquidated’ claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.” *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968), “[A] ‘liquidated’ claim is one where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.” *Id.*, citing C. McCormick, *Damages* (Hornbook Series) § 54 (1935).

The Dougherty award evidences unliquidated amounts where the arbitrator listed the delay damages and prejudgment interest:

|  |   |
|--|---|
| Lost Rents from <b>Anticipated</b><br>Banner Bank lease  | \$413,791.00 [plus<br>prejudgment interest of<br>\$66,251.91] |
| Lost Rents relating to Office<br>Space <b>LOI’s [Letters of Intent]</b><br>[from “ <b>other entities that had<br/>previously indicated a willingness<br/>to participate in the project as<br/>tenants.</b> ”] <sup>5</sup> | \$258,072 [plus prejudgment<br>interest of \$41,319.80]       |

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<sup>5</sup> In the Award, the arbitrator stated that the delays “caused Dougherty/Sauvage to lose Banner Bank as an anchor tenant, eventually also lose Banner as a financing source, and also caused Dougherty/Sauvage to lose business with other entities that had previously indicated a willingness to participate in the project as tenants.” CP 202.

|  |   |
|--|---|
| Increased Construction Costs<br>[that Dougherty “will incur”] <sup>6</sup> | \$334,822.68 [plus<br>prejudgment interest of<br>\$53,608.32]       |
| Increased Financing Expense<br>and Loan Fees                               | <b>\$70,000.00</b> [plus<br>prejudgment interest of<br>\$11,207.67] |
| <b>Estimated</b> Backfill Costs  | <b>\$50,000.00</b> [plus<br>prejudgment interest of<br>\$8,005.48]  |

CP 205-06 (emphasis added); CP 201. These amounts are unliquidated. The Award states that there were no *actual* leases or agreements signed with any tenant. Instead, the arbitrator awarded delay damages for expectations that leases would be forthcoming. There was an “anticipated” lease with Banner Bank, and “letters of intent” from persons “who had expressed a willingness to participate in the project as tenants.” See notes 1 and 2. The terms of the unexecuted leases necessarily did not exist. The damages of \$413,791 for the “anticipated” Banner lease and \$258,072 based on “interest” expressed by other potential tenants are necessarily unliquidated because the terms were not yet written. The arbitrator erred in awarding prejudgment interest on these sums.

Similarly, the arbitrator plainly stated that the increased construction costs had not yet been incurred, but “will be incurred,” and that the backfill costs were “estimated.” These amounts are necessarily not liquidated sums, but are estimated sums not entitled to bear prejudgment interest. Where additional work or repairs are at issue, courts have found

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<sup>6</sup> The arbitrator stated that Dougherty “will incur increased construction costs as a result of the delays.” CP 201 (emphasis added).

the damage amounts liquidated where, unlike here, the additional work has been completed. *See Prier, supra; Hansen, supra.* In *Prier*, the plaintiff had to make repairs to an ice-rink that the defendant deficiently had constructed. The plaintiff asked for prejudgment interest from the date that his new contractor completed the repairs. *Id.* at 627. The court affirmed this prejudgment interest because it was a certain amount at the time the repairs were completed and invoiced. *Id.*

Similarly, in *Hansen v. Rothaus, supra*, a claimant sought to recover cost of repair of a vessel. The repairs had been performed and “paid for,” and the claimant introduced the bills for those repairs that had already been made. *Hansen v. Rothaus*, 107 Wn.2d at 470-78.<sup>7</sup> In these circumstances, the repair cost was liquidated and entitled to bear prejudgment interest. *See also Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 687, 686, 15 P.3d 115 (2000) (“[C]alculating the amount due required no discretion--it equaled the invoices for the cleanup work performed”; no discretion was required because Weyerhaeuser “factually established its costs through the presentation of invoices” and interest would run from “[t]he date those invoices were paid.”); *North Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 235,

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<sup>7</sup> The *Hansen* court noted that the records demonstrated the repairs made to both vessels, and concluded, “In both of these claims evidence was available which furnished data making possible the computation of the cost of repairs with exactness and without reliance upon opinion or discretion. . . . Thus, prejudgment interest is awardable on the total amount of the repairs paid for by the owner of the *Vestfjord*, and on the amount the owner of the *Sea Comber* paid out of pocket for repairs.” *Id.* at 475, citing *Prier*.

628 P.2d 482, *rev. denied*, 96 Wn.2d 1002 (1981) (“Once North Pacific paid the substitute contractor, its damages could be ascertained with certainty under the *Prier* standard. Prejudgment interest from that date [of payment to the substitute contractor] was therefore proper.”). *Cf. Maryhill Museum of Fine Arts v. Emil’s Concrete Constr. Co.*, 50 Wn. App. 895, 903, 751 P.2d 866 (1988) (where court used its discretion to determine what a reasonable cost of repairs “would be,” damages not liquidated).<sup>8</sup>

The arbitrator plainly was not following Washington law in awarding prejudgment interest. The award should be vacated and returned to arbitration to correct the error of awarding prejudgment interest on the unliquidated delay damages in contravention of Washington law.<sup>9</sup>

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<sup>8</sup> This case law is consistent with the policy behind awarding prejudgment interest that a plaintiff be compensated for the use value of the money representing the damages. *See State v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 790, 161 P.3d 372 (2007) (“If damages are liquidated, interest accrues from the time they were incurred.”), citing *Hansen*, 107 Wn.2d at 473 (“plaintiff should be compensated for the ‘use value’ of the money representing his damages *for the period of time from his loss to the date of judgment*” (emphasis added)). Here, where Dougherty had not completed the repair work or paid a substitute contractor, Dougherty was not denied the use value of the money damages. Also, a defendant should not be required to pay prejudgment interest in cases, like this one, where he is unable to ascertain the amount owed. *See Hansen*, 107 Wn.2d at 473.

<sup>9</sup> The prejudice of the arbitrator’s error was compounded in the final, amended judgment of the trial court, which awarded an additional \$15,763 to Dougherty as prejudgment interest on the delay damages. CP 569, line 6 (order); CP 563 at lines 23-24 (amended judgment). Unliquidated damages should not bear interest, and damages are not “liquidated” simply by being reduced to an arbitral award. *State v. Fluor Daniel, Inc.*, *supra*. The trial court denied reconsideration on the issue, CP 645-646, even though there is no tenable basis to award prejudgment interest on unliquidated amounts. If this Court finds that the arbitrator’s award of prejudgment interest on these unliquidated amounts was error justifying vacatur, this would necessarily result in vacation of the judgment which includes the trial court’s award of \$15,763 in additional interest incurred from award to judgment.

5. The Arbitrator's Conclusion that the Delay Damages Were Causally Related to the CPA Violations Is Obvious Error.

This Court also should conclude that the arbitrator erred when he imposed liability for delay under the CPA and awarded delay damages to Dougherty under the CPA. The delay was not causally related to the CPA violations as a matter of law.

The arbitrator found that Budget's performance was unreasonably delayed. CP 201. The contract was entered in February 2008. CP 172. Budget worked on the site "over the course of approximately seven days of work performed between March 14 to May 30, 2008." CP 201. The contract set no schedule for performance. It did not contain a time is of the essence clause. The arbitrator reasoned that he could read into the contract a reasonable time for performance. CP 201, note 10. Because of post-contracting conversations where Dougherty expressed "an urgent desire to expedite completion of the project," the arbitrator concluded that completion of the project in May 2008 was unreasonably untimely. He awarded \$1,153,598.10 plus interest in delay damages, for a total award of \$1,338,301.07. CP 206.

On the face of the award there is no causal connection between the delay damages and the CPA liability. Under the CPA, a private plaintiff must establish five elements: (1) an unfair or deceptive act or practice (2) occurring in trade or practice, (3) affecting the public interest, (4) and injuring the plaintiff's business or property, and (5) a causal link between the unfair or deceptive acts and the injury suffered by plaintiff. *Hangman*

*Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986); RCW 19.86.020. To establish causation under the CPA, a plaintiff must show that “but for” the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 81, 84, 170 P.3d 10 (2007) (despite liberal interpretation of the CPA, a “but for” proximate cause analysis is essential to a CPA claim). *Id.* at 81. These “but for” causation standards were not met.

The alleged over-excavation (resulting from what, in the arbitrator’s view, was the impermissible use of the PID to determine contamination levels) simply could not have caused the two-month delay. The arbitrator unmistakably found that the job was completed in **seven days of work**. CP 201. It is impossible to say that “but for” the alleged over-excavation, there would have been no two-month delay. An accurate assessment of delay attributable to over-excavation would have focused on some portion of the seven-day job. For example, if Budget could have finished the job in four days of work but instead took seven days because Budget over-excavated, there would have been three days of delay attributable to over-excavation. There is no relationship between the arbitrator’s conclusion that Budget deceptively removed more dirt than the contract called for, and the two-month span of time it took for Budget to complete the job. If Budget over-excavated according to the contract, this over-excavation was not a “but for” cause of the supposed **two-month** delay. The awards should be reversed and remanded to arbitration for

correction to reflect that the delay damages were not properly awardable under the CPA.<sup>10</sup>

**C. The Trial Court Erred When It Added to the Judgment Prejudgment Interest That Predated, and Was Not Included in, the Award.**

The trial court erroneously permitted amendment of the judgment to include additional amounts of interest not awarded by the arbitrator. At Dougherty's request, the trial court reached back in time to a period prior to issuance of the award, and added \$23,301.83 in prejudgment interest from the arbitrator's interim award to the final award. The trial court had no authority to award this amount. Doing so was error.

Pursuant to RCW 7.04A.220, a court may confirm an arbitral award. The customers moved pursuant to this provision. CP 121 (seeking confirmation and judgment "pursuant to RCW 7.04A.220."). RCW 7.04A.250 permits entry of judgment upon a confirmed arbitration award. These statutes give the trial court no authority to add to the award. "The court does not have collateral authority to go behind the face of an award and determine whether additional amounts are appropriate." *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

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<sup>10</sup> The Court has no authority under the UAA to confirm only certain portions of the awards. Thus, where errors on the face appear, vacation and remand is necessary. Moreover, if the finding of CPA liability is incorrect on the face of the award, the arbitrator on remand would reconsider the prevailing party issue and fee award to Dougherty. In addition, because Dougherty is now suing Budget Tank's owners personally for the same CPA claims, reversal on the CPA claim alone is significant for *res judicata* purposes.

Dougherty sought to amend its judgment to add prejudgment interest earned *prior to the award*. CP 393-94; CP 473-475. Dougherty cited only *Prier* and *Hansen* for the proposition that liquidated sums warrant prejudgment interest. CP 393. Dougherty argued that interest was due “from the date of the Interim Award” “because the Interim Award was a liquidated sum.” CP 393, lines 15-16. The trial court added this unauthorized amount to the judgments. The trial court refused to reconsider. CP 645. *See also* CP 572-579 (Motion for Reconsideration) at 577-578. No tenable basis supports adding prejudgment interest where the arbitrator did not award such amounts and such amounts are not in the confirmed arbitral award underlying the judgment.

The award itself states, on one of the final pages that the trial court intended to consider, that the monetary award of \$1,042.301 is “inclusive of pre-award interest.” CP 211. The trial court’s award of an additional \$23,301.83 of “pre-award interest” contradicts the award and was unauthorized by the statute. This Court should vacate the amended judgment in the amount of \$23,301.83 for prejudgment, pre-award interest impermissibly tacked on by the trial court.

#### **VI. REQUEST FOR FEES & COSTS ON APPEAL**

Pursuant to RAP 18.1, Budget requests an award of attorney fees and costs should it prevail in this appeal. As noted in the Award, the parties’ contract contains attorney fee and cost provisions. CP 208. “A contractual attorney fee provision provides authority for granting fees on

appeal.” *Mike’s Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 71, 975 P.2d 532 (1999) (contractor prevailing on appeal of confirmation of award entitled to fees pursuant to contract and RAP 18.1); *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). If Budget is the prevailing party in this appeal, it should be awarded its attorney fees and costs.

RCW 4.84.330 also supports the award. RCW 4.84.330 provides that when a contract contains an attorney fee provision, the prevailing party in “**any** action on a contract” shall be awarded its attorney fees and costs. “An action is on a contract if the action arose out of the contract and if the contract is central to the dispute.” *Seattle-First Nat’l Bank v. Wash. Ins. Guar. Ass’n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). Since the parties’ contracts are central to the dispute, this appeal is “an action on the contract.” Appellate fees are justified under RCW 4.84.330.

## **VII. CONCLUSION**

This Court should reverse the judgment on multiple grounds and remand for a new arbitration. Under the UAA, this Court has the authority and mandate to return an arbitration award to arbitration where the award on its face is inconsistent with Washington law. This is such a case.

First, the trial court had no authority to issue the consolidation order combining separate arbitrations where all four elements required by the UAA were not met. As a matter of law, the evidence did not establish that the transactions were related or that the possibility of conflicting

decisions existed, each of which was required in order to consolidate. The trial court had no discretion, therefore, to consolidate the arbitrations. This Court should reverse the consolidation order and remand for a new arbitration.

Because the arbitrator failed to follow the law with regard to his findings of liability, this Court should reverse confirmation of the award, and remand for vacation and return to arbitration. The liability findings of the arbitrator were facially erroneous because they contravened established law regarding CPA liability and contract construction. The arbitrator disregarded the plain disclosures and terms of the parties' contract as set forth in the awards. The arbitrator rewrote the contract to find a deceptive act and hold Budget liable for failing to meet the industry standards of an environmental consultant in screening soil for contamination, openly "implying" that term over the express terms in the contract. The contract specified how soil would be screened for contamination. Budget followed the contract. Washington law holds parties to contract terms. The written award demonstrates that a deceptive act in trade or commerce was not established. Moreover, a party cannot be held liable under the CPA for failing to satisfy a professional duty of care. The arbitrator's dislike of the PID as the tool to measure contamination levels should not have triggered either CPA or breach of contract liability.

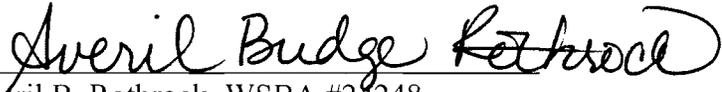
The arbitrator additionally made errors of law apparent in its damage awards. The lost profit awards contravened Washington law

because they were not contemplated and were speculative. All of the delay damages were unliquidated, disqualifying them for the prejudgment interest that the arbitrator awarded.

This Court should find that the errors apparent on the face of the award justify vacation, as did the courts in the cases *Broom*, *Federated Servs.*, *Kennewick*, *Lindon Commodities*, and *Tolson*.

Finally, the Court should reverse the judgment as amended by the trial court to include \$23,301,83 in prejudgment, *pre-award* interest. The trial court had no authority to award this amount.

Respectfully submitted this 10<sup>th</sup> day of December, 2010.



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Matthew Turetsky, WSBA #23611  
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*Attorneys for Appellant Budget Tank and  
Environmental Services, LLC*

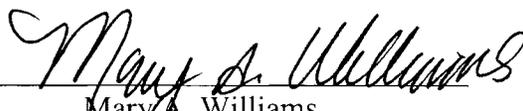
## CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of December, 2010, I caused to be served the foregoing AMENDED OPENING BRIEF OF APPELLANT BUDGET TANK REMOVAL & ENVIRONMENTAL SERVICES, LLC via *First Class Mail/U.S. Postal Service* on the following parties at the following addresses:

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Jason W. Anderson  
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*Attorneys for Respondents James Dougherty & Paul Sauvage*

  
Mary A. Williams



AMERICAN ARBITRATION ASSOCIATION  
COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the )  
Arbitration Between: ) Case Manager:  
 ) Jill A. Siegrist  
BUDGET TANK REMOVAL & )  
ENVIRONMENTAL SERVICES, LLC, )  
 )  
Claimant and )  
Respondent by Counterclaim, )  
 )  
and )  
 )  
JIM DOUGHERTY and PAUL )  
SAUVAGE, )  
 )  
Respondents and )  
Counterclaimants. )  
 )  
75 192 Y 00269 08 JISI )  
 )

FINAL AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement dated February 22, 2008, between the above-referenced parties, having been duly sworn, having duly heard the proofs and allegations of the parties, having previously issued an INTERIM AWARD OF ARBITRATOR dated December 3, 2009, do hereby find, conclude and issue this FINAL AWARD OF ARBITRATOR, as follows:

This arbitration involves claims, counterclaims and disputes between Claimant and respondent by counterclaim BUDGET TANK REMOVAL & ENVIRONMENTAL SERVICES, LLC. ("Budget" and/or  
FINAL AWARD OF ARBITRATOR - 1

"Claimant") and Respondents and counterclaimants JIM DOUGHERTY and PAUL SAUVAGE ("Dougherty and Sauvage" and/or "Respondents").

On or about February 22, 2008, Dougherty and Budget entered into an agreement ("Agreement") providing that Budget would provide certain remediation services respecting petroleum-contaminated soils located at 2654 N.W. Market Street, Seattle, Washington. Among other things, the Agreement provided, at its page 4, that "[a]ll claims disputes and other matters in question arising out of or related to this Agreement or the breach of this Agreement shall be decided by arbitration in accordance with the commercial arbitration procedures . . . of the American Arbitration Association then in effect."<sup>1</sup>

Disputes within the scope of the above-quoted arbitration agreement subsequently arose between the parties.

Claimant submitted its Demand for Arbitration to the American Arbitration Association ("AAA") on or about July 18, 2008. Respondents submitted their Answering Statement and Counterclaim on or about August 19, 2008.

On or about May 8, 2009, the Hon. Paris K. Kallas, Chief Civil Judge of the King County Superior Court, entered an Order pursuant to RCW 7.04A.100 ("Consolidation Order") consolidating

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<sup>1</sup> The ellipsis omits a reference in the arbitration agreement to the "Fast Track Resolution" procedures of the AAA. As discussed below, the parties later stipulated to application of the AAA's Commercial Arbitration Rules and the AAA's Optional Procedures for Large, Complex Commercial Disputes.

FINAL AWARD OF ARBITRATOR - 2

the present arbitration with a separate AAA arbitration, Mary Cummings v. Budget Tank Removal & Environmental Services, LLC, AAA No. 75 192 Y 00344 08, for hearing and decision before me in a consolidated arbitration proceeding.<sup>2</sup>

#### THE ARBITRATION HEARING

The undersigned arbitrator was appointed and sworn to hear this dispute in accordance with the requirements of the parties' arbitration agreement, the Commercial Arbitration Rules of the AAA and the Court's Consolidation Order.

Subsequent to the Consolidation Order, the Arbitrator entered a Pre-Hearing Order re Consolidation of Arbitrations and Amended and Consolidated Pre-Hearing Orders Nos. 1-6 establishing procedures for the arbitration, resolving certain discovery and procedural disputes, and denying all pre-hearing motions for summary dismissal made by the parties. Among other things, Amended and Consolidated Pre-Hearing Order No. 1 confirmed a stipulation by the parties that this arbitration would proceed in accordance with the AAA's Commercial Arbitration Rules ("Rules") and the AAA's Optional Procedures for Large, Complex Commercial Disputes ("LCCP"). Amended and

<sup>2</sup> Following the Consolidation Order, the AAA administered the arbitrations as one consolidated administrative proceeding under its Case No. 75 192 Y 00344 08. At closing argument, counsel for Budget, Dougherty & Sauvage, and Cummings all agreed and joined in a request that I issue separate awards in each of the two cases. Accordingly, I am issuing the present Final Award of Arbitrator under the original Budget v. Dougherty and Sauvage caption, under the original Case No. 75 192 Y 00269 08, and herein reference Budget as the Claimant and respondent by counterclaim, and Dougherty and Sauvage as Respondents and counterclaimants.

Consolidated Pre-Hearing Order No. 1 also set a pre-hearing schedule and the dates for the Arbitration Hearing, all of which were agreed upon by the parties. That Order also confirmed an agreement of the parties that:

After the arbitration hearing is completed the record will not be closed. Rather, I will issue an Interim Award resolving all issues in dispute except those relating to claims for attorneys' fees and costs. After issuance of the Interim Award a schedule will be set for additional written submissions from the parties on the fees and costs issues. After these have been received the record will be closed. The fees and costs issues will be resolved based on these written submissions, without an additional hearing and without oral argument. Following the closing of the record, a Final Award will be issued in due course.

Pursuant to notice, the Arbitration Hearing in this matter was held in Seattle, Washington, on October 1-2, 5-9, and 21-22, 2009. Claimant was represented at the hearing by its counsel, Mr. Gary D. Baker. Respondents were represented by their counsel, Mr. Nicholas P. Scarpelli, Jr. and Mr. John R. McDowell, Carney, Badley, Spellman, P.S. Ms. Jill A. Siegrist is the AAA's Case Manager responsible for this case.

At the Arbitration Hearing, the parties presented opening statements, submitted voluminous documentary exhibits and called numerous witnesses to give testimony both in person and by deposition, and presented closing arguments.

FINAL AWARD OF ARBITRATOR - 4

At the conclusion of the Arbitration Hearing, as directed in R-35 of the Rules, I inquired of counsel whether they had any further proofs to offer or witnesses to be heard on the substantive issues in dispute in the case (i.e., all issues except the reserved issues concerning claims for fees and costs). Counsel for each party replied to this inquiry in the negative. Accordingly, I find that all evidence pertinent and material to the substantive issues in dispute in this controversy that the parties wished to offer was received into evidence and heard at the Arbitration Hearing, and that the parties so stipulated at the conclusion of the hearing.

With my permission, certain post-hearing briefs were submitted by the parties following the hearing. As discussed above, the parties previously agreed to reserve submissions on the issues related to claims for attorneys' fees and expenses until after issuance of an Interim Award.

An Interim Award of Arbitrator, dealing with the substantive claims and defenses at issue in this arbitration, was issued by the by this Tribunal on December 3, 2009. In addition, the Interim Award of Arbitrator directed the parties to provide certain additional written submissions if any party sought an award of attorneys' fees and costs in its favor, set a schedule for submissions concerning any such applications, and also provided that all issues concerning allocation of the

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expenses of the arbitration related to AAA charges and arbitrator compensation would be reserved to the Final Award. The parties timely filed submissions in accordance with the schedule set in the Interim Award. Following receipt of these submissions, the record was declared closed as of January 15, 2010 (see Rules, R-35 and R-41). The issues raised by the parties in these written submissions, and all reserved issues related to applications for fees and costs and allocation of the expenses of the arbitration, are addressed below in this Final Award of Arbitrator.

Having heard the witnesses; having reviewed the exhibits, proofs, written submissions and legal authorities offered by the parties; having heard the arguments of counsel; and otherwise having considered all of the evidence and other submissions offered, my Final Award of Arbitrator in this matter is as follows:

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**Arbitrability.** Although only Respondent Dougherty signed the Agreement, I find that Dougherty signed the Agreement on behalf of both of the property owners - Dougherty and Sauvage - and that both Dougherty and Sauvage are therefore bound by, and entitled to invoke, the Agreement's arbitration provision. In addition, Claimant voluntarily submitted this dispute to arbitration by filing its Demand and claims against both

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Dougherty and Sauvage. Sauvage then agreed to that submission to arbitration of the claims against him by appearing and participating in this arbitration, answering the claims, and asserting counterclaims in this proceeding on his own behalf. Budget's Response to those counterclaims in this proceeding did not assert any objection to the arbitrability of Sauvage's counterclaims. Finally, neither side asserted a timely objection to the jurisdiction of the arbitrator over or to the arbitrability of the claims against Sauvage or to Sauvage's counterclaims. (Rules, R-7(c)).

Accordingly, and with one exception, I find and conclude that all of the claims, counterclaims, defenses and requests for relief asserted herein are encompassed by the terms of the parties' arbitration agreement, and the Consolidation Order, or were otherwise voluntarily submitted to arbitration, and are arbitrable in this proceeding. (Rules, R-7). This arbitration has been duly commenced and conducted pursuant to the requirements of the parties' arbitration agreement, and of the Rules.

The only exception to this general finding of arbitrability is as follows: Respondents' Pre-Hearing Brief, at 22, states as follows:

The Arbitrator has authority to hold the principals of Budget personally liable under the CPA to make it

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impossible for them to avoid liability by hiding behind the corporation or draining its assets. The CPA provides for civil liability any "person" who violates its provisions. See RCW 19.86.010(1), .090; *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 317-18, 553 P.2d 423 (1976) (holding owners and managers of car dealership personally liable under the CPA). Accord, *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979). It is appropriate to pierce the corporate veil in this context, where Budget's owners are clearly the masterminds and perpetrators of the scheme of unfair and deceptive practices and fraud.

Based on these propositions, Respondents seek an award finding "that to the extent Budget committed acts of fraud, fraudulently induced the parties to enter into contracts and made false representations, these acts were done by Matthew Veeder on behalf of Budget." (Reps. Closing Argument, Legal Authorities and Requested Relief, at 46-47.) Mr. Veeder is a co-owner of Budget, a Washington limited liability company.

Respondents failed to establish, however, that claims for relief against Matthew Veeder personally are arbitrable in this proceeding. Throughout its pendency this arbitration has been maintained as a dispute between the captioned parties, which do not include Mr. Veeder personally. The Rules, R-6, provide that "[a]fter the arbitrator is appointed . . . no new or different claim may be submitted except with the arbitrator's consent."

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Amended and Consolidated Pre-Hearing Order No. 1 provided, in its paragraph 2, that "[a]ny requests for leave to file additional or amended pleadings shall be submitted on or before June 15, 2009." No motion to add Mr. Veeder personally as a party was ever made or granted. For these reasons, no claims for relief against Mr. Matthew Veeder personally are arbitrable in this proceeding. Accordingly, insofar as Respondents' counterclaims, as presented at the Arbitration Hearing, may be construed to have included such claims, those claims are hereby denied. This denial is not an adjudication on the merits of any such claims, but rather is a determination that any such claims were not arbitrable here.

Pleadings. The parties' pre-hearing briefs provide a comprehensive explanation of their arguments on each of the issues and the legal principles upon which they rely. In brief, Budget alleges claims against Dougherty and Sauvage for amounts it contends are due under the Agreement. As presented at the Arbitration Hearing, Budget seeks an award of \$670,293.42, inclusive of pre-Award interest, plus an award of fees and expenses. (Budget Damage Calculation, at 1.)

Dougherty and Sauvage deny all of Budget's claims, and seek denial of all of Budget's requests for relief. Respondents also allege counterclaims for breach of contract, violation of Washington's Consumer Protection Act ("CPA"), RCW 19.86, and

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fraudulent inducement. As presented at the Arbitration Hearing, Respondents seek return of \$100,000 in payments they made under the Agreement, plus pre-award interest on that sum, and also seek an award of counterclaim damages in the amount of \$1,338,301.07, inclusive of pre-Award interest, against Budget, plus an award of their fees and expenses.

Budget denies all of the allegations of wrongdoing alleged by Respondents in their counterclaims.

Analysis. I have examined the factual record and have considered all of the testimony, documentary evidence, arguments and legal authorities offered relating to the principal issues in dispute.<sup>3</sup> The following discussion includes a statement of those facts I find to be true and necessary to this Final Award of Arbitrator. To the extent that this recitation differs from any party's position, that is the result of my determinations as to credibility, determinations of relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

The Parties' Agreement. In addition to the arbitration agreement quoted above, the parties' Agreement contains the following salient provisions:

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<sup>3</sup> The discussion that follows addresses the principal issues in dispute that have some plausible basis for supporting a claim for relief. The following discussion does not discuss other issues or claims which, by their omission, I find not to be actionable and do not require discussion here.

• Budget's Qualifications. Budget is described as "a licensed, bonded and insured environmental construction and consulting firm, specializing in environmental issues surrounding soil and ground water contamination caused by leaking underground storage tanks (USTs) . . ."

(Agreement, at 1.)

• Project Site. The Agreement defines the Project Site as "1) any location on the physical address of 2654 N.W. Market Street, Seattle, Washington; and 2) any location that is adjacent to or connected with the physical address of 2654 N.W. Market Street, Seattle, Washington (including . . . neighboring properties and/or their rights of way)."

(Id.)

• Estimate of Contaminated Soils. The Agreement states: "Budget estimates that at least 71 cubic yards of soil or approximately 139 tons of soil have been contaminated with total petroleum hydrocarbons (TPH) gasoline above the Model Toxics Control Act's Method A standard [30 parts per million ("ppm") with Benzene present; "the MTCA cleanup standard"]. . . Because Budget was not commissioned to conduct a complete and extensive subsurface contamination study, the estimated amount of contamination is only an estimate which could understate or overstate the actual amount of subsurface contamination." (Id.)

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- Cleanup Services. The Agreement obligates Budget to stockpile "clean overburden soils . . . on-site via dump trucks. The on-site trackhoe will then excavate contaminated soil and place it in a dump truck. The contaminated soil will be taken to a certified waste facility for disposal. Budget will conduct soil testing to determine the concentrations of actionable total petroleum hydrocarbons (TPH) for all contaminated soil removed from the Project Site. Budget will backfill the excavation with clean backfill material . . . Budget will use and implement the Model Toxics Control Act - Method A standard cleanup level for all contaminants identified at the Project Site. Budget will analyze the contaminants utilizing the NWTPH-Gx and BTEX by 8021B laboratory analyses. Budget will use the MiniRae 2000 photoionization detector ["PID"] for field screening purposes to determine what soil is contaminated at levels exceeding 30 ppm of total petroleum hydrocarbons. Budget will take performance soil samples when Budget's field screening instruments indicate to Budget that the petroleum hydrocarbons in the soil have dropped below the 30 ppm cleanup level or when Customer requests, in writing and at Customer's expense, that Budget take additional performance soil samples."

(Id., at 2.)

- Remedial Action Final Report. In addition to the cleanup services, the Agreement also requires Budget to prepare, at the completion of the cleanup, and, after Budget has been paid, deliver to the Customer a Phase III Site Assessment and Report following the standards of Washington's Department of Ecology ("DOE") and Model Toxics Control Act. (Id.)
- Estimated Cost. The Agreement states: "The estimated cleanup costs for the Project Site is in the amount of approximately \$21,545 plus Washington State sales tax. The \$21,545 cleanup cost is determined by multiplying the 139 tons of TPH contaminated soil that is expected to be removed from the Project Site by the contract rate of \$155 per ton. . . In the event that more than 139 tons of PCS [petroleum contaminated soils] should require removal from the Project Site, then Budget will charge \$155 per ton for the actual tonnage amount that is removed from the Project Site." (Id.)
- Payment. The Agreement requires the Customer "to pay Budget when Budget invoices customer for the remediation work." (Id., at 3.)
- Entire Agreement. The Agreement contains an integration clause providing that the written Agreement constitutes the parties' entire agreement and further provides that the

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Agreement may not be amended except by an amendment executed in writing by both parties. (Id.)

- Removals of Uncontaminated Soil. The Agreement states that "uncontaminated soil may incidentally be removed during the process of removing contaminated soil during the remediation process" and that "Customer agrees . . . to pay for all soils removed from the site when they are delivered to a hazardous waste facility for the per ton contract rate stated above." (Id., at 4.)
- Disclaimer of Legal Services. One of Budget's principals, Matthew Veeder, is a lawyer. The Agreement provides that Mr. Veeder is not providing any legal services to Customer, that Customer is not relying on any legal opinions expressed by Mr. Veeder and that any future retention of Mr. Veeder by customer to provide legal services must be done in a separate written legal representation agreement. (Id.)

Budget's performance of the Agreement. Budget performed the cleanup at the Dougherty-Sauvage site over the course of approximately seven days of work performed between March 14 and May 30, 2008. Despite its estimate of \$21,545 to clean up an estimated 139 tons of soil contaminated above the MTCA cleanup standard, Budget ultimately invoiced Dougherty and Sauvage a total of \$638,997.88 for removal of 3,525 tons of

soil. The amount actually invoiced to Dougherty/Sauvage thus exceeded Budget's original estimate of cleanup costs by a multiple of approximately thirty. Dougherty and Sauvage paid Budget \$100,000 of this amount but not the balance.

The evidence presented at the Arbitration Hearing established that property owners Dougherty and Sauvage had no prior technical or scientific training familiarizing them with the capabilities, or limitations, of the PID.

Other Budget Customers Had Similar Experiences. Based on the evidence presented, Dougherty's and Sauvage's experience with Budget was similar to experiences that other customers, not parties to the present arbitration, also had with Budget. The evidence presented, including Exhibits 1, 1-A and 4-40, demonstrated a general pattern, similar to that experienced by Dougherty and Sauvage, in which more than twenty other Budget customers experienced final invoices grossly exceeding Budget's original estimated invoice amounts, and total soil tonnage remediations far in excess of Budget's original estimates. For example, Budget's cleanup cost estimate to Mary Cummings, the Claimant in the other arbitration consolidated for hearing with the present case under the Consolidation Order, was \$43,344, but its actual invoices on that job totaled \$364,523.90 - a multiple of approximately eight. As noted above, Budget's form of

contract with all of these customers contained language, quoted above, warning that the estimate might be wrong and obligating the customer to pay for all actual removals of contaminated soils at the contract rate.

Claims and Counterclaims. As discussed in greater detail above, Claimant Budget seeks payment of the contract price, plus interest, fees and costs. Respondents Dougherty and Sauvage deny all such claims, and assert counterclaims alleging fraudulent inducement, breaches of the CPA, and breaches of contract by Budget.

The Fraudulent Inducement Counterclaim. A contract is voidable if consent is induced by fraud. *Pedersen v. Bibloff*, 64 Wn. App. 710, 722, 828 P.2d 1113 (1992). Under Washington law, the elements of fraud are:

- (1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) his right to rely upon it, and (9) his consequent damage.

*Id.*, at 723 n.10. Reliance upon an opinion is actionable as a misrepresentation of an "existing fact" where the maker

"represents as his opinion that which is not his opinion."

*Streeter v. Vaughan*, 39 Wn.2d 225, 233, 235 P.2d 193 (1951).

Dougherty and Sauvage bear the burden of proving each of the

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above elements of their fraudulent inducement counterclaim by clear, cogent and convincing evidence. *Guarino v. Interactive Objects, Inc.*, 122 Wn.App. 95, 126, 86 P.3d 1175, 1191 (2004) (citing cases).

Based on the evidence presented, Respondents failed to do so. Their fraudulent inducement counterclaim was not established for one main reason. Although this was a close question, Respondents failed to establish that the cleanup cost and tonnage removal estimates given by Budget were known and intended by Budget to be false or were not opinions genuinely held by Budget at the time these were given to Respondents. The evidence presented did not prove by clear, cogent and convincing evidence that Budget knew and intended that the particular estimates it gave to Respondents Dougherty and Sauvage were false or other than genuinely-held estimates at the time they were made.<sup>4</sup> For this reason, Respondents' fraudulent inducement

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<sup>4</sup> Although the fraudulent inducement counterclaim is denied for the reason discussed above in text, the counterclaim also raised difficult issues as to the entitlement of Respondents Dougherty and Sauvage to rely reasonably on Budget's estimates. Although the evidence established that Dougherty and Sauvage had no reason to anticipate that Budget's tonnage removal estimate (139 tons) would be as erroneous as it eventually turned out to be (3,525 tons actually removed), the evidence did demonstrate that Respondents had other information, at the time of receiving Budget's lower estimates, credibly indicating that the total amount of contaminated soil requiring removal from the project site could well be somewhere between 139 and 2,000 tons. Thus, although Dougherty and Sauvage might have relied reasonably on Budget's estimates not to be as egregiously wrong as they turned out to be, it was not clear that Respondents' reliance on the estimates was entirely reasonable given the other facts that they had in hand. The parties' briefing did not shed much light on how Washington's courts would apply the reliance requirement, or the requirement of proof of it by clear, cogent and convincing evidence, in such circumstances. In view of my denial of the fraudulent inducement counterclaim for other reasons, as discussed above in text, I do not reach or decide this interesting issue.

claim is denied and is hereby dismissed with prejudice in its entirety.

The Consumer Protection Act Counterclaim. The purpose of Washington's Consumer Protection Act is "to protect the public and foster fair and honest competition." RCW 19.86.920. The CPA declares unlawful any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" and provides a private cause of action, which allows citizens to act as private attorneys general on behalf of the public. RCW 19.86.020, .090 (emphasis added). The CPA is to be "liberally construed that its beneficial purposes may be served." *Id.* A CPA claim has five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986).

"Whether a particular act or practice is 'unfair or deceptive' is a question of law." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009). An act or practice is unfair or deceptive if it has "the capacity to deceive a substantial portion of the public." *Hangman Ridge*, 105 Wn.2d at 785 (emphasis in original). "A plaintiff need not show that the act in question was intended to deceive[.]"<sup>5</sup> *Id.* (emphasis in original).

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<sup>5</sup> In this regard, the elements of a CPA claim are quite different from those of a fraudulent inducement claim, as discussed earlier above in text.

Although Respondents alleged that Budget engaged in a variety of unfair or deceptive acts or practices violative of the CPA, their strongest showing in this regard related to Budget's contractual undertakings to its customers and its actual practices relating to "over-excavation" of soil not contaminated above the MTCA cleanup standard.

As discussed above, the Agreement provided that:

- Budget is described as "a licensed, bonded and insured environmental construction and consulting firm, specializing in environmental issues surrounding soil and ground water contamination caused by leaking underground storage tanks (USTs). . . ." (Agreement, at 1; emphasis added.)
- Budget's "Scope of Services" was to remove soil "contaminated with total petroleum hydrocarbons (TPH) gasoline above" the MTCA cleanup standard. (Agreement, at 1; emphasis added.) "The on-site trackhoe will . . . excavate contaminated soil and place it in a dump truck. The contaminated soil will be taken to a certified waste facility for disposal." (Agreement, at 2; emphasis added.)
- "Budget will conduct soil testing to determine the concentrations of actionable total petroleum hydrocarbons

(TPH) for all contaminated soil removed from the Project Site." (Agreement, at 2; emphasis added.)

- "Budget will direct clean overburden soils to be stock piled on-site. . . ." (Agreement, at 2; emphasis added.)
- ". . . [U]ncontaminated soil may incidentally be removed during the process of removing contaminated soil . . . ." (Agreement, at 4; emphasis added.)
- "Budget will use the MiniRae 2000 photoionization detector ["PID"] for field screening purposes to determine what soil is contaminated at levels exceeding 30 ppm of total petroleum hydrocarbons. Budget will take performance soil samples when Budget's field screening instruments indicate to Budget that the petroleum hydrocarbons in the soil have dropped below the 30 ppm cleanup level or when Customer requests, in writing and at Customer's expense, that Budget take additional performance soil samples." (Agreement, at 2.)
- Notwithstanding the provision quoted immediately above, the Agreement contains other provisions that are internally inconsistent and confusing as to whether soil performance sampling using laboratory analyses will or will not be used to guide removal determinations during Budget's work. See, e.g., Agreement, at 2 ("Budget will conduct soil testing to determine the concentrations of actionable total petroleum hydrocarbons (TPH) for all contaminated soil removed from the Project Site" and "Budget will use and implement the Model Toxics Control

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Act - Method A standard cleanup level for all contaminants identified at the Project Site. Budget will analyze the contaminants utilizing the NWTPH-Gx and BTEX by 8021B laboratory analyses.")

Contractual Provisions Unfair and Deceptive. The evidence presented at the Arbitration Hearing established that Budget used contract provisions similar or virtually identical to the above-referenced provisions with numerous of its customers, including Dougherty and Sauvage and Mrs. Cummings. I find that use of those provisions by Budget with any of its soil excavation customers not technically trained or qualified to understand the substantial limitations of soil screening carried out by use of the PID constitutes an unfair and deceptive act and practice in trade and commerce. I also find that Budget's use of such provisions in its standard form of contracting document has the capacity to deceive a substantial portion of the public because it can affect numerous customers, see *Potter v. Wilbur-Ellis Co.*, 62 Wn. App. 318, 327-28, 814 P.2d 670 (1991).

I make these findings for the following reasons. First, the above-referenced provisions, properly construed, obligate the customer only to pay for removals of soils "contaminated" above the MTCA cleanup standard and small amounts of other soils "incidentally . . . removed." Except for such incidental removals, the Agreement obligates Budget to stockpile the "clean" soil - i.e., soils that are either not contaminated at all or soils that are somewhat contaminated but not contaminated

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above the level specified in the MTCA cleanup standard - at the site. These provisions would create a reasonable expectation in the mind of any customer not technically proficient regarding the PID that the Agreement only requires payment for removals of soil contaminated above the MTCA cleanup standard, plus some incidental additional volumes.

Second, insofar as the Agreement may be construed to allow Budget to use the PID exclusively to "determine what soil is contaminated," without a thorough companion program of performance soil sampling and follow-up laboratory testing, the above-referenced provisions are deceptive and unfair when used with any customer untrained or unaware that the PID is an unsatisfactory and unreliable tool for such purpose. The evidence established that the PID is a wand device that gives a relatively crude reading on whether vapors are present indicating petroleum contamination, and thus may be a suitable tool to use for assessing whether a site is entirely free of petroleum contamination, but that it is an unreliable tool to measure whether particular contamination levels are above or below the MTCA cleanup standard. The testimony of Respondents' expert witnesses William V. Goodhue, LHC, and Clifford T. Schmitt, L.G., L.H.G., persuasively established that the PID device cannot measure accurately or reliably whether contaminated soil is contaminated above or below the MTCA standard. This testimony was corroborated by that of several other witnesses, including an expert Claimant initially designated but did not call at the hearing whose views were

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submitted by Respondents via his deposition testimony (Deposition Testimony of George Webster), and by the totality of the evidence presented.

Third, the Agreement leads the customer to expect that Budget is and will be conducting itself as a "a licensed, bonded and insured environmental construction and consulting firm, specializing in environmental issues surrounding soil and ground water contamination caused by leaking underground storage tanks (USTs). . . ." (Agreement, at 1; emphasis added.) The testimony of expert witnesses Goodhue and Schmitt established, however, that, because of the unreliability of the PID, the industry standard amongst such environmental consulting firms is to base determinations on whether particular soils exceed the MTCA cleanup standard on soil samples sent to a laboratory for analysis - a process they referred to as "performance testing," rather than on PID readings exclusively.

The net effect of the evidence presented was a persuasive demonstration that, for customers not technically trained in the niceties of laboratory analyses and capabilities of the PID,<sup>6</sup> the above-referenced contractual provisions are deceptive and misleading. Read together, these provisions convey to a reasonable customer untrained in the technical capabilities of the PID that, except for "incidental" exceptions, only

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<sup>6</sup> As expert witness Schmitt put it, the typical property owner does not understand that a PID does not reliably measure concentrations of contamination in soils. For this reason, Budget's contracting documents and practices concerning use of the PID are deceptive and misleading to a customer lacking such an understanding because they do not adequately disclose the existence and magnitude of the risk that basing removal decisions on PID readings could result in over-excavation and over-billing.

"contaminated" soils will be removed, imply that Budget will perform its services in a manner consistent with industry standards of a licensed environmental consultant, and contain confusing and inconsistent provisions as to whether performance soil sampling will be used or not. At the same time, these provisions do not adequately disclose either that Budget construed the Agreement as an authorization to rely almost exclusively on use of the PID to guide its removal decisions or that basing the decisions as to which soils to remove exclusively on a program of field screening using the PID alone, without companion performance testing, confronts the customer with a grave risk of overcharges for hauling away soils falling below the MTCA standard.<sup>7</sup>

Budget's Performance of these Provisions at the Dougherty-Sauvage Site. The evidence established that Budget made little or no use of performance sampling at the Dougherty/Sauvage site, and instead relied almost entirely on use of the PID to determine whether particular soils should be trucked to the disposal facility, and construed the Agreement as authorizing it to do so. Accordingly, for the reasons explained in the

<sup>7</sup> Budget argued against this conclusion by noting that Washington DOE guidelines authorize field screening techniques that include use of the PID. As witness Goodhue persuasively noted, however, the DOE guidance documents do not address issues of cost control or consumer protection. Although DOE may regard the PID as a useful tool to determine whether a site is entirely devoid of any petroleum contamination, nothing in the DOE guidance effectively contradicted the evidence presented at the hearing establishing that (i) the PID is not a reliable tool for measuring whether particular concentrations of petroleum contamination exceed or fall below the MTCA cleanup standard, and that (ii) basing removal determinations exclusively on PID readings rather than on performance soil sampling done by a laboratory exposes customers to an undisclosed and substantial risk of being overbilled for removals of soils not contaminated to the MTCA level.

testimony of expert witness Goodhue, and corroborated in important respects by that of expert witness Schmitt, the evidence presented by Budget failed to establish that all of the soils removed by Budget from the Dougherty/Sauvage site and invoiced at the contract rate actually exceeded the MTCA cleanup standard. Rather, the record presented established that a substantial portion of the soils removed from the site by Budget and invoiced at the contract rate were "clean" soils not contaminated above the MTCA standard. (Testimony of Goodhue and Schmitt; testimony of John Veeder.)<sup>8</sup> Specifically, the evidence presented at the Arbitration Hearing established that at least 1,000 tons of the soil removed from the Dougherty/Sauvage site and invoiced at the contract rate - a quantity far beyond an "incidental" amount of clean soils - were not contaminated above the MTCA cleanup standard specified in the Agreement. Dougherty and Sauvage were improperly invoiced for these deliveries at the same price charged for disposal of the soils contaminated above the MTCA standard. Based on this finding, Budget's invoices for

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<sup>8</sup> Budget argued against this conclusion by contending that it had entered into an oral agreement with Dougherty/Sauvage to remove all soils with any level of contamination, whether or not above the MTCA cleanup standard, in order to facilitate Respondents' future business plans for the property. This argument was not established for two reasons. First, the evidence presented did not substantiate this claim. Insofar as the testimony of the witnesses conflicted on this point, I accepted Mr. Dougherty's denials that any such agreement was ever made. Second, as Budget noted frequently with regard to other issues, the Agreement contains both an integration clause and a provision requiring amendments to be in writing and signed by both parties. As discussed above, the Agreement's scope of work, properly construed, is clearly limited to removals of soils contaminated above the MTCA cleanup standard plus a small quantity of incidental removals of other soils. Even if the parties had reached an oral agreement to amend these provisions, by the Agreement's terms, any such oral amendment or understanding would be unenforceable unless set forth in a written amendment meeting the Agreement's requirements.

removals of a total of 3,525 tons of soil overbilled Dougherty and Sauvage by at least 28%.

The evidence further established, however, that Budget's overbillings may have been substantially greater than 28%. Although conflicting, the evidence strongly suggested that a considerable additional volume of clean soils, over and above the 1,000 tons discussed above, may well have been improperly removed and invoiced at contract rates by Budget. The evidence presented made precise quantification of this additional quantity difficult. Ultimately, under the terms of the parties' Agreement, Budget bears the burden of demonstrating that the soils removed and invoiced were only for soils within the Agreement's scope of work. On balance, the evidence presented failed to do so with regard to at least an additional 450 of the tons removed and invoiced by Budget at the Dougherty/Sauvage site.

On balance, these findings establish that Budget overbilled Dougherty/Sauvage for at least 1,000 tons of clean soils established by the evidence to have been improperly removed and invoiced, and that Budget also failed to substantiate its billings for an additional 450 tons of removals of soils that very likely were also clean. Taken together, these findings indicate that Budget overbilled Dougherty/Sauvage by at least 28% and perhaps by as much as 41%.

Ultimately, the evidence established that this combination of above-referenced deceptive and misleading contractual provisions, coupled with Budget's extensive reliance on the PID

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to designate the soils to be trucked away for disposal at the Agreement's contract rates, constituted unfair and deceptive business acts and practices that proximately caused Dougherty and Sauvage to be overcharged for removals of soils not meeting the MTCA standard and proximately causing them injuries in their business and property.

In summary, for the reasons discussed above, I find and conclude that Respondents have proven each of the five elements required under *Hangman Ridge Training Stables, Inc., supra*, in support of their counterclaim that Budget committed actionable violations of Washington's Consumer Protection Act. Accordingly, I find in favor of Respondents on their CPA counterclaim for over-billing on account of over-excavation of soils falling outside the Agreement's agreed scope of services due to unfair and deceptive acts and practices related to Budget's contractual provisions and course of performance discussed above.

Respondents alleged several other types of CPA violations by Budget that were not established by the evidence presented, and that do not warrant extensive comment here. These included CPA counterclaims related to alleged provision of legal advice by Matthew Veeder, alleged use of delayed performance as a systematic deceptive business practice (although see the discussion below re the interrelationship between Respondents' CPA violations and damages and their contract-based delay damages), the alleged systematic giving of erroneous oral assurances as to the anticipated scope or length of work, and an

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alleged systematic failure to use even the PID to guide removal decisions when the owners or other observers were not present. Based on the evidence presented concerning the Dougherty/Sauvage site, and although, as discussed below, I do find that Budget committed material breaches of its Agreement with Dougherty/Sauvage due to unreasonable delays in performing that particular Agreement, Respondents failed to establish any of these alleged additional violations of the CPA.

One other CPA theory advanced by Respondents presented a closer question. Respondents alleged that Budget violated the CPA by engaging in a systematic pattern of giving deceptive "lowball" estimates of the likely extent and expense of removals required. As discussed above, the evidence did indicate such a pattern in Budget's dealings with many customers, including Mrs. Cummings. On the other hand, as discussed above in my denial of the fraudulent inducement claim, and although this is not an element of a CPA claim, the Respondents did not prove by clear, cogent and convincing evidence that Budget intended the estimates it gave to Dougherty/Sauvage to be erroneous. In addition, as Budget notes, the Agreement clearly states that the Budget estimate may be wrong, and that the customer's obligation is to pay for the actual tonnage of contaminated soils removed, plus an "incidental" amount of other soils, at the contract rate. Moreover, although a pattern of deceptive "lowball" bidding might well be actionable by a competitor or by a property owner choosing between accepting the bid or not remediating at all, it is not clear that Dougherty/Sauvage fit

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into either of those categories; assuming that the removals are all for soils contaminated above the MTCA level, it is not clear that the alleged systematic low-bidding violation could proximately cause harm to the business or property of a property owner, such as Dougherty/Sauvage, required by their proposed financing source and proposed anchor tenant to remediate their property to the MTCA standard in order to achieve a desired larger business plan, even if such remediation would result in a higher price than that originally estimated. On the other hand, the degree of error built into Budget's estimates may well have been affected by the over-excavation issue discussed above; the evidence presented, however, afforded no sound basis for identifying additional degrees of injury or causation due to possible additional deceptive practices related to "lowball" bidding. Finally, in view of my conclusions reached above concerning Budget's violations of the CPA due to its contractual provisions and business practices concerning use of the PID and resulting over-excavation of "clean" soils, and my conclusions below concerning the breach-of-contract issues and the appropriate relief to be awarded in this arbitration, I do not believe that the relief awarded herein would be materially different even if I reached and found in favor of Respondents' CPA counterclaim based on alleged "lowball" estimates. For all of these reasons, although the counterclaim raised serious and provocative liability issues, I do not grant any additional relief attributable to that separate CPA counterclaim.

FINAL AWARD OF ARBITRATOR - 29

The Breach-of-Contract Counterclaim. Respondents

principally allege that Budget committed two main breaches of the Agreement, as follows:

- "Over-excavating" by removing more than incidental amounts of uncontaminated soil and charging for removal of such soil at the \$155-per-ton contract rate.
- Incurring unreasonable delays in performing the project.<sup>9</sup>

Turning to the first of these, I have found above that Budget violated the CPA by substantially overbilling Dougherty and Sauvage for removals of soil that Budget failed to establish exceeded the MTCA cleanup standard; that, in fact, at least 1,000 tons of those soils did not exceed that standard and that Budget failed to demonstrate that another 450 tons of the soils removed exceeded that standard. The removals of those soils constituted work outside the Agreement's scope of work, properly construed, for which Budget was not contractually entitled to invoice Dougherty and Sauvage. For the same reasons discussed above, I find that such overbilling constituted a material breach of the Agreement by Budget. Accordingly, I find in favor

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<sup>9</sup> Insofar as Dougherty and Sauvage advanced other breach-of-contract arguments, I find that these were not established by the evidence presented. They are hereby denied and do not require further discussion.

of Respondents on their breach-of-contract counterclaim for over-excavation and overbilling.

Respondents also counterclaim that Budget committed additional breaches of the Agreement by unduly delaying its performance of the contract. As discussed above, Budget performed the cleanup at the Dougherty-Sauvage site over the course of approximately seven days of work performed between March 14 and May 30, 2008. Respondents contend that "Budget's delays and improper cleanup of the site resulted in the loss of the anchor tenant for their development, Banner Bank. In addition, they lost the financing for the project, also with Banner Bank, and will incur increased construction costs as a result of the delays. Dougherty and Sauvage incurred nearly \$1.5 million in damages. . . ." as a result of the allegedly improper delays. (Respondents' Pre-Hearing Br., at 3.) The Agreement does not contain a "time is of the essence" provision.

Based on the evidence presented, I find in favor of Respondents on this counterclaim. The absence of a "time is of the essence clause" is not fatal to the claim. Absent such a clause, Washington law presumes a reasonable time period for performance of a commercial contract.<sup>10</sup> The evidence presented

<sup>10</sup> See *Lano v. Osberg Constr. Co.*, 67 Wn.2d 659, 663, 409 P.2d 466 (1966) (affirming trial court's finding that subcontractor was in default where it failed to make reasonable progress); *Cartozian & Sons, Inc. v. Ostruske-Murphy, Inc.*, 64 Wn.2d 1, 5, 390 P.2d 548 (1964) (in the absence of a "time is of the essence" clause, whether a delay in performance is a material breach depends upon the surrounding circumstances); *Pepper & Tanner, Inc. v.*

concerning the circumstances surrounding Budget's performance of the Agreement at the Dougherty/Sauvage site established that (i) Dougherty/Sauvage had an urgent desire to expedite completion of the project in order to accommodate their proposed anchor tenant (and prospective financing source), Banner Bank; (ii) Dougherty communicated these circumstances to Budget; (iii) Matthew Veeder made several oral post-Agreement promises to Respondents representing variously that the project would be done in only one more day and/or that there was "only a little bit more to do;"<sup>11</sup> (iv) contrary to those assurances, Budget unreasonably and inexplicably delayed both its performance of the cleanup work and its delivery of a satisfactory environmental report as required by the Agreement; (v) these delays caused Dougherty/Sauvage to lose Banner Bank as an anchor tenant, eventually also lose Banner as a financing source, and also caused Dougherty/Sauvage to lose business with other entities that had previously indicated willingness to participate in the project as tenants; (vi) the various excuses offered by Budget at the Arbitration Hearing for its delays were neither credible nor persuasive; and (vii) in consequence of Budget's delays and deficiencies in performing the work, Dougherty/Sauvage were

---

*Kedo, Inc.*, 13 Wn. App. 433, 435, 535 P.2d 857 (1975) (What constitutes a reasonable time "is to be determined by the nature of the contract, the positions of the parties, their intent, and the circumstances surrounding performance); *Singer v. Etherington*, 57 Wn. App. 542, 789 P.2d 108 (1990).

<sup>11</sup> Insofar as the testimony of Mr. Dougherty conflicted with that of the Budget witnesses on points (ii) and (iii) above, I preferred and accepted Mr. Dougherty's testimony on these issues.

wrongfully required to incur additional expenses to obtain adequate environmental reports and to correct certain deficient work at the project site.<sup>12</sup>

Based on these facts, I find that Budget's unexcused delays in performing its duties under the Agreement were unreasonable in the circumstances, unexcused, and constituted a material breach of the parties' Agreement. I further find that these unreasonable delays proximately caused Respondents to suffer damages as discussed and in the amounts set forth below. Accordingly, I find in favor of Respondents on their delay-based breach-of-contract counterclaim.

Relief. The Rules, R-43, provide in pertinent part, as follows:

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties...

(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate. . . .

<sup>12</sup> Based on my findings above concerning Budget's CPA violations and breaches of the Agreement concerning overbilling for improper removals of soils not contaminated above the MTCA cleanup standard, I also find that the lien filed on the Dougherty/Sauvage project by Budget in the summer of 2008 was improper and unlawful insofar as it liened the property for amounts not genuinely owed. The breaches of contract and resulting damages found herein on Respondents' delay counterclaim, however, are based on Budget's unreasonable delays in performing its duties under the Agreement, rather than on the improper lien filing.

As discussed above, Dougherty and Sauvage paid \$100,000 against the \$638,997.88 in invoices submitted by Budget. As discussed in the factual findings made above concerning Budget's CPA violations and over-excavation breaches of contract, Budget failed to establish that 1,450 tons of the soils removed and invoiced were soils within the Agreement's scope of work. Budget is not entitled to invoice or collect from Dougherty and Sauvage for any of those removals. Comparison of this figure to the 3,525 total tonnage of soils removed suggests that approximately 2,075 tons of the soils removed by Budget were contaminated above the MTCA cleanup standard, and thus appropriately invoiced. Application of the contract rate to this estimate of the tonnage appropriately invoiced to Dougherty and Sauvage yields a proper invoice amount of approximately \$377,008.74. The Agreement also allowed Budget to charge the contract rate for "uncontaminated soil. . . incidentally. . . removed during the process of removing contaminated soil. . . ." After taking this provision into account, and exercising the discretion granted to me under the Rules, R-43, I find that none of Budget's invoices to Dougherty and Sauvage in excess of \$396,000 were established as valid billings, and that collection of those amounts are barred by Budget's CPA violations and breaches of contract. I further find, however, that Budget should be allowed a credit in the amount of \$396,000, on account

FINAL AWARD OF ARBITRATOR - 34

of the work it did on appropriate removals of soils contaminated above the MTCA cleanup standard, against the damages awarded below in favor of Respondents.<sup>13</sup> As discussed above, \$100,000 of this amount was paid previously by Dougherty and Sauvage, leaving a net credit against Respondents' damages of \$296,000.

The evidence submitted established that Dougherty and Sauvage suffered the following items of damage in consequence of Budget's delay-related breaches of the Agreement:

|   |              |
|---|--------------|
| Lost Rents from Anticipated Banner Bank lease | \$413,791.00 |
| Interest (12% from July 1, 2008 to present)   | \$66,251.91  |
| Lost Rents relating to Office Space LOI'S     | \$258,072.00 |
| Interest (July 1, 2008 to present)            | \$41,319.80  |
| Increased Construction Costs                  | \$334,822.68 |
| Interest (July 1, 2008 to present)            | \$53,608.32  |
| Increased Financing Expense and Loan Fees     | \$70,000.00  |
| Interest (July 1, 2008 to present)            | \$11,207.67  |

<sup>13</sup> There was some discussion at closing argument as to whether Budget might be entitled to a recovery in quantum meruit if its claims for the contract price were denied. Amended and Consolidated Pre-Hearing Order No. 1, at its paragraph 13, required that "[c]ounsel for the parties shall each submit brief portions of proposed awards to me prior to closing argument showing all specific relief requested." The submission from Budget did not contain any request for a quantum meruit recovery. Nor did Budget's Demand for Arbitration. Assuming *arguendo*, however, that Budget did have a well-pleaded claim for a quantum meruit recovery as to those removals meeting the MTCA cleanup standard, I find that the evidence presented would not support a quantum meruit award greater than the \$296,000 net credit allowed to Budget in the analysis referenced above in text.

|  |                       |
|--|-----------------------|
| Extra Work to shore up side of the hole at project site                            | \$21,155.60           |
| Interest (July 1, 2008 to present)   | \$3,387.21            |
| Additional Performance Sampling Remediation Expenses with Environmental Associates | \$5,757.56            |
| Interest (July 1, 2008 to present)   | \$921.84              |
| Estimated Backfill Costs   | \$50,000.00           |
| Interest (July 1, 2009 to present)   | \$8,005.48            |
| <b>TOTAL DAMAGES</b>   | <b>\$1,153,598.84</b> |
| <b>PRE-AWARD INTEREST (AS ITEMIZED ABOVE)</b>                                      | <b>\$184,702.23</b>   |
| <b>TOTAL DELAY-RELATED DAMAGES AND PRE-AWARD INTEREST</b>                          | <b>\$1,338,301.07</b> |

Based on the totality of the evidence presented, I further find that a substantial portion of the delays that resulted in the above-listed damages were attributable to work done on and hauls made of soils outside the Agreement's scope of work. The evidence established that Budget's performance of its duties under the Agreement would and should have been completed in a far more timely fashion if its work had been confined only to removing the soils within the Agreement's scope of work rather than to also removing and hauling an additional 1,000-1,450 tons of other soils as well. Accordingly, I find that the above-listed delay damages were proximately caused not only by Budget's delay-related breaches of the Agreement, but also by

FINAL AWARD OF ARBITRATOR - 36

Budget's CPA violations and over-excavation-related breaches of the Agreement, as found above. Respondents therefore suffered a total of \$1,338,301.07 in damages, inclusive of pre-award interest, proximately caused by Budget's CPA violations and breaches of the Agreement.

As discussed above, however, Budget is entitled to a credit of \$396,000 against such damages, on account of its work done removing and disposing of soils above the MTCA cleanup level and thus within the Agreement's scope of work. \$100,000 of this amount, however, has already been paid to Budget by Dougherty/Sauvage; the amount of the credit should be reduced accordingly. Deduction of the \$100,000 paid previously by Respondents leaves Budget with a net additional credit of \$296,000 against Respondents' total damages.

After adjusting for this net credit, Respondents are hereby awarded total damages of \$1,042,301 against Budget by reason of Budget's CPA violations and material breaches of the Agreement.

Budget's Claims. In view of the findings and conclusions reached above, Budget's claims for payment of the contract price or other recovery are barred by its violations of the CPA and by Budget's anterior material breaches of the Agreement. In addition, Budget bears the burden of showing that any recovery it might seek, on either a contract price or an alternative

FINAL AWARD OF ARBITRATOR - 37

quantum meruit theory of recovery, is based on work done performing removals of soils contaminated above the MTCA cleanup standard and thus within the Agreement's scope of work. For the reasons discussed above, and except for the evidence presented related to the \$296,000 net credit granted above, the evidence presented failed to afford any reasonable basis for concluding that the remainder of Budget's other invoices, truckloads or costs were attributable to removals of soil within the Agreement's scope of work. Accordingly, Budget failed to prove that it is entitled to any recovery for the work done at the Dougherty/Sauvage site except the \$296,000 net credit granted above against Respondents' damages.

For these reasons, all of the claims asserted by Budget in this arbitration are denied and are hereby dismissed with prejudice in their entirety.

Applications for an Award of Fees and Costs. The parties' Agreement provides, at its paragraph 10, that "[t]he prevailing party in the dispute, as determined by the arbitrators, shall be entitled to its reasonable costs and attorney fees." In addition, Washington's CPA provides that "any person who is injured in his or her business or property by a violation of RCW 19.86.020 . . . may bring a civil action . . . to recover the actual damages sustained by him or her . . . together with the costs of suit, including a reasonable attorney's fee." RCW

FINAL AWARD OF ARBITRATOR - 38

19.86.090. See also, RCW 7.04A.210. The Rules, R-43, further provide as follows:

(d) The award of the arbitrator(s) may include:

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

Following issuance of the Interim Award of Arbitrator, Budget sought an award of fees and costs in its favor. This application is denied because I find, based on this Final Award's resolution of the disputed issues discussed above, that Budget is not "[t]he prevailing party in the dispute," as required by the above-quoted fee-shifting provision in paragraph 10 of the parties' Agreement.<sup>14</sup>

<sup>14</sup> As discussed above, Budget sought an award of \$670,293.42 on its claims in this arbitration, and further sought a complete denial of Dougherty and Sauvage's counterclaims. All of Budget's claims in this arbitration have been denied, and it was not awarded any monetary relief on those claims. Dougherty and Sauvage prevailed on both their breach of contract and CPA counterclaims, and were awarded over \$1 million on those counterclaims. Based on these results, I find that Dougherty and Sauvage substantially prevailed in this matter, and are "[t]he prevailing party in the dispute" within the meaning of paragraph 10 of the Agreement. The fact that Dougherty and Sauvage did not prevail on every factual issue raised or recover 100% of the damages they sought does not prevent a finding that, on balance, they are the "[t]he prevailing party in the dispute." See, e.g., *CHD, Inc. v. Boyles*, 138 Wn.App. 131, 140 (2007); *Am. Federal Sav. & L. Ass'n, v. McCaffrey*, 107 Wn.2d 181, 194-95 (1986). Moreover, the type of issue-by-issue segregation sought by Budget is neither realistically feasible nor appropriate in cases, such as this one, where overlapping claims all derive from a common set of operative facts. See *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572 (1987); *Ethridge v. Hwang*, 105 Wn.App. 447, 461 (2001); *Sign-O-Lite Signs, Inc. v. De Laurenti Florists, Inc.*, 64 Wn.App. 553, 566 (1992).

FINAL AWARD OF ARBITRATOR - 39

Dougherty and Sauvage also sought an award of fees and costs in their favor. As discussed above, I find that they are the "[t]he prevailing party in the dispute" and grant their application for such an award. I further find that Dougherty & Sauvage are entitled to such an award of fees and costs in the reasonable amount of \$529,970.06.<sup>15</sup> Based on the record presented, I find that Dougherty and Sauvage's case was efficiently staffed and presented by able and experienced counsel, that the rates charged were reasonable for this locality, that the amount awarded here for fees and costs bears a reasonable proportion to the amounts in controversy (defending claims for approximately \$670,000 and prosecuting counterclaims for approximately \$1.4 million), is appropriate to the number, complexity and significance (including the remedial purposes of the CPA) of the issues raised, and that this award of fees and costs is reasonable and appropriate given all of the facts and circumstances of this arbitration.

Award.

I hereby award and order the following relief:

---

<sup>15</sup> This figure does not include Dougherty and Sauvage's application for reimbursement of amounts paid to the AAA. This issue is addressed separately below. Dougherty and Sauvage's application for an award of \$10,000 as treble damages under the CPA is denied; such amount is not part of the fees-and-costs issues reserved by the Interim Award and was neither sought nor granted as part of Dougherty and Sauvage's previous presentations on the subject of damages. I have carefully considered Budget's other criticisms of the amount of fees and costs sought by Dougherty and Sauvage, but find these to be without merit.

1. All of the claims asserted by Budget in this arbitration are denied and are hereby dismissed with prejudice in their entirety.

2. Respondents Dougherty and Sauvage are hereby awarded \$1,042,301, inclusive of pre-award interest, on their breach of contract and CPA counterclaims. Claimant Budget shall pay this amount to Respondents Dougherty and Sauvage.

3. Respondents Dougherty and Sauvage are hereby awarded \$529,970.06 as their reasonable attorneys' fees and costs incurred in this arbitration. Claimant Budget shall pay this amount to Respondents Dougherty and Sauvage.

4. Pursuant to my authority under paragraph 10 of the parties' Agreement, RCW 19.86.090, and the Rules, R-43(c), I hereby determine that the fees, expenses and arbitrator compensation paid by the parties herein pursuant to the Rules, R-49, R-50 and R-51, shall be borne by Budget. Accordingly, Budget shall reimburse Respondents Dougherty and Sauvage the sum of \$26,658.39, representing that portion of said AAA fees and expenses and arbitrator compensation previously incurred by Respondents Dougherty and Sauvage.

FINAL AWARD OF ARBITRATOR - 41

5. The total amount awarded to Respondents Dougherty and Sauvage is thus \$1,598,939.30. Claimant Budget shall pay this total amount to Respondents Dougherty and Sauvage.

6. Except as specifically ordered above, all of the other claims, counterclaims and requests for relief asserted herein by the parties are denied and are hereby dismissed with prejudice.

I hereby certify that this Final Award of Arbitrator was made in Seattle, Washington USA.

\* \* \* \* \*

DATED this 8th day of February, 2010.



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Thomas J. Brewer  
Arbitrator



**FILED**

KING COUNTY

MAR 17 2010

SUPERIOR COURT  
BY **WALTER HANSELL**  
DEPUTY

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SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF KING

MARY CUMMINGS, JAMES  
DOUGHERTY, and PAUL SAUVAGE,

Moving Parties,

v.

BUDGET TANK REMOVAL &  
ENVIRONMENTAL SERVICES, LLC,

Respondent.

No. 09-2-17537-3 SEA

JUDGMENT SUMMARY/  
JUDGMENT

(Re: American Arbitration Association  
matter of *Budget Tank Removal &  
Environmental Services, LLC v. Jim  
Dougherty & Paul Sauvage*, No. 75-192-Y-  
00269-08-JISL)

JUDGMENT SUMMARY

*Budget Tank Removal & Environmental Services, LLC  
v. Jim Dougherty and Paul Sauvage*

- |                                 |   |   |
|---------------------------------|---|---|
| 1.                              | Judgment Creditor:  | Jim Dougherty and Paul Sauvage                    |
| 2.                              | Judgment Debtor:  | Budget Tank Removal & Environmental Services, LLC |
| 3.                              | Principal Judgment Amount:<br>(Final Arbitration Award,<br>Including Attorney Fees and Costs) | \$1,598,939.30                                    |
| <b>TOTAL PRINCIPAL JUDGMENT</b> |   | <b>\$1,598,939.30</b>                             |

JUDGMENT  
(Re Dougherty/Sauvage) -- J

CARNEY  
BADLEY

SPELLMAN  
ORIGINAL

LAW OFFICES  
A PROFESSIONAL SERVICE CORPORATION  
101 FIFTH AVENUE, 4250  
SEATTLE, WA 98104-2010  
FAX (206) 467-8715  
TEL. (206) 672-8000

CONSOLIDATED 02 1b113703 3/16/10

1 6. Principal Judgment of \$1,598,939.30 shall bear interest at the rate of twelve  
2 percent (12%) per annum from the date of the Judgment is entered until paid in full.

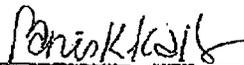
3 7. Attorneys for Judgment Creditor: John R. McDowall  
4 Nicholas P. Scarpelli, Jr.  
5 Carney Badley Spellman, P.S.  
6 701 5<sup>th</sup> Avenue, Ste. 3600  
7 Seattle, WA 98104  
8 (206)622-8020

9 **JUDGMENT**

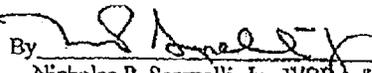
10 THIS MATTER having come on regularly to be heard in open court upon the Motion  
11 of the Moving Parties for an Order Confirming Arbitration Awards, and it appearing from the  
12 files and records of this Court that venue is properly laid in King County, Washington, and  
13 the Court having granted the Moving Parties' Motion, now therefore,

14 IT IS ORDERED, ADJUDGED AND DECREED that Judgment is granted against  
15 Respondent Budget Tank Removal & Environmental Services, LLC, in favor of Jim  
16 Dougherty and Paul Sauvage for the total amount of \$1,598,939.30, plus interest at the rate of  
17 twelve percent (12%) per annum until paid in full.

18 DONE IN OPEN COURT THIS 17 day of March, 2010.

19   
20 \_\_\_\_\_  
21 Judge/Court Commissioner  
22 Paris K. Kallas

23 Presented by:  
24 CARNEY BADLEY SPELLMAN, P.S.

25 By   
26 Nicholas P. Scarpelli, Jr., WSBA #5810  
27 Attorneys for Cummings, Dougherty and Sauvage

JUDGMENT  
(Re Dougherty/Sauvage) -- 2.

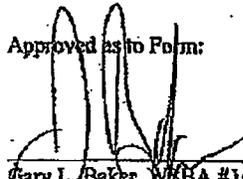
CARNEY  
BADLEY  
SPELLMAN

LAW OFFICES  
A PROFESSIONAL SERVICE CORPORATION  
701 FIFTH AVENUE, #3600  
SEATTLE, WA 98104-7010  
FAX (206) 467-8215  
TEL (206) 622-8020

CONSOLIDATED 02 16113703 3/16/10

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Approved as to Form:

  
\_\_\_\_\_  
Gary L. Baker, WBA #16206  
Attorney for Budget Tank Removal  
& Environmental Services, LLC

JUDGMENT  
(Re Dougherty/Sauvage) - 3

**CARNEY  
BADLEY  
SPELLMAN**

LAW OFFICES  
A PROFESSIONAL SERVICE CORPORATION  
701 FIFTH AVENUE, #3600  
SEATTLE, WA 98104-7010  
FAX (206) 457-8215  
TEL (206) 452-8020

CONSOLIDATED 02 16113703 3/16/10



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**FILED**

MAR 29 2010

SUPERIOR COURT  
BY JENNIFER ANN BELL  
DEPUTY

SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF KING

MARY CUMMINGS, JAMES  
DOUGHERTY, and PAUL SAUVAGE,

Moving Parties,

v.

BUDGET TANK REMOVAL &  
ENVIRONMENTAL SERVICES, LLC,

Respondent.

No. 09-2-17537-3 SEA

AMENDED JUDGMENT

(Re: American Arbitration Association  
matter of *Budget Tank Removal &  
Environmental Services, LLC v. Jim  
Dougherty & Paul Sauvage*, No. 75-192-Y-  
00269-08-JISJ)

Clerk's Action Required

ORIGINAL

JUDGMENT SUMMARY

*Budget Tank Removal & Environmental Services, LLC  
v. Jim Dougherty and Paul Sauvage*

|  |   |
|--|---|
| 1. Judgment Creditor:  | Jim Dougherty and Paul Sauvage                    |
| 2. Judgment Debtor:  | Budget Tank Removal & Environmental Services, LLC |
| 3. PRINCIPAL JUDGMENT  | \$1,598,939.30                                    |
| 4. Interest Incurred on Interim Award at 12%<br>from 12/3/09 - 2/8/10            | 23,301.83   |
| 5. Interest on Final Award Incurred at 12%<br>from 2/9/10 - 3/26/10 <sup>1</sup> | 15,763.00   |
| 6. Fees and Costs Incurred from 2/9/10 - 3/16/10                                 | <u>12,479.10</u>                                  |

<sup>1</sup> Interest calculated on damages awarded in the sum of \$1,042,031.

AMENDED JUDGMENT  
(Re Dougherty/Sauvage) - 1

CARNEY  
BADLEY  
SPELLMAN

LAW OFFICES  
A PROFESSIONAL SERVICE CORPORATION  
701 FIFTH AVENUE, #3608  
SEATTLE, WA 98104-7010  
FAX (206) 467-3215  
TEL (206) 622-3020

7. AMENDED JUDGMENT

\$1,650,483.23

8. Attorneys for Judgment Creditor:

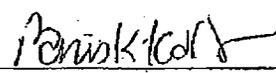
John McKay  
Thomas M. Brennan  
McKay Chadwell, PLLC  
600 University St Ste 1601  
Seattle, WA 98101-4124  
(206) 233-2800

JUDGMENT

THIS MATTER having come on regularly to be heard in open court upon the Motion of the Moving Parties for an Order Confirming Arbitration Awards and the subsequent Motion for Amended Judgment, and it appearing from the files and records of this Court that venue is properly laid in King County, Washington, and the Court having granted the Moving Parties' Motion, now therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment is granted against Respondent Budget Tank Removal & Environmental Services, LLC, in favor of Jim Dougherty and Paul Sauvage for the total amount of \$1,650,483.23, plus interest at the rate of twelve percent (12%) per annum until paid in full.

DONE IN OPEN COURT THIS 26 day of March, 2010.

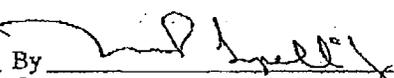
  
HONORABLE PARIS KALLAS

Presented by:

CARNEY BADLEY SPELLMAN, P.S.

McKAY CHADWELL, PLLC

By   
Nicholas P. Scarpelli, Jr., WSBA No. 5810  
Jason W. Anderson, WSBA No. 30512  
Attorneys for Mary Cummings (and former counsel for Dougherty & Sauvage)

By   
for John McKay, WSBA No. 12935  
Thomas M. Brennan, WSBA No. 30662  
Attorneys for Dougherty & Sauvage

*telephone approval nps from J. McKay*

AMENDED JUDGMENT  
(Re Dougherty/Sauvage) - 2

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Consolidation of separate arbitration proceedings.

(1) Except as otherwise provided in subsection (3) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(a) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(b) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(c) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(d) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(2) The court may order consolidation of separate arbitration proceedings as to certain claims and allow other claims to be resolved in separate arbitration proceedings.

(3) The court may not order consolidation of the claims of a party to an agreement to arbitrate that prohibits consolidation.

[2005 c 433 § 10.]

RCW 7.04A.190  
Award.

(1) An arbitrator shall make a record of an award. The record must be authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(2) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

[2005 c 433 § 19.]

RCW 7.04A.220  
Confirmation of award.

After a party to the arbitration proceeding receives notice of an award, the party may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected under RCW 7.04A.200 or 7.04A.240 or is vacated under RCW 7.04A.230.

[2005 c 433 § 22.]

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

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

(b) There was:

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

(ii) Corruption by an arbitrator; or

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

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

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

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or

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

(2) A motion under this section must be filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, unless the motion is predicated upon the ground that the award was procured by corruption, fraud, or other undue means, in which case it must be filed within ninety days after such a ground is known or by the exercise of reasonable care should have been known by the movant.

(3) In vacating an award on a ground other than that set forth in subsection (1)(e) of this section, the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (1)(c), (d), or (f) of this section, the court may order a rehearing before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in RCW 7.04A.190(2) for an award.

(4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

RCW 7.04A.250

Judgment on award — Attorneys' fees and litigation expenses.

(1) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity with the order. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(2) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(3) On application of a prevailing party to a contested judicial proceeding under RCW 7.04A.220, 7.04A.230, or 7.04A.240, the court may add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made.

[2005 c 433 § 25.]