

No. 69769-2-1

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

Magna Force, Inc.,

Appellant,

v.

MagnaDrive Corporation,

Respondent

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Magna Force, Inc. (“Magna Force” or “MFI”) appeals judgment entered on an Arbitration Award in favor of Respondent MagnaDrive Corporation (“MagnaDrive”). The arbitration was presided over by a seasoned and respected former judge who considered hundreds of exhibits, the testimony of several witnesses, and substantial pre- and post-arbitration briefing. The Arbitrator found in favor of MagnaDrive on all claims, voided a patent assignment agreement (the “Assignment Agreement”)¹ between Magna Force and another party, Synergy Greentech Corporation (“Synergy”), dismissed with prejudice Magna Force’s counterclaim that the Assignment Agreement was valid, and awarded MagnaDrive its fees and costs.² The King County Superior Court denied MFI’s motion to vacate and confirmed the Arbitration Award, granted MagnaDrive its fees incurred in connection with confirming the Arbitration Award, and entered final judgment on the Arbitration Award on December 28, 2012.

MFI’s appeal is a transparent attempt to retry the case the Arbitrator decided against it. Public policy in Washington strongly favors

¹ To avoid confusion, this brief refers to the parties and the patent assignment agreement by the terms used in the arbitration award, CP 366-389 (the “Arbitration Award”).

² CP 377. Synergy was a party to the Arbitration. The Arbitrator dismissed with prejudice Synergy’s counterclaims that the Assignment Agreement was valid and for breach of contract. *Id.* Synergy did not move to vacate the Arbitration Award and has not appealed the final judgment.

the finality of Arbitration Awards, and Washington law prohibits the review MFI seeks. To prevail, MFI must show that the face of the Arbitration Award reveals an error of law. MFI cannot begin to meet this standard. This Court should reject MFI's arguments, affirm the trial court's judgment, and award MagnaDrive its attorneys' fees and expenses under RAP 18.1.³

II. SUMMARY OF ARGUMENT

MFI argues that the trial court erred because the Arbitrator exceeded his power in two ways. First, MFI argues that the Arbitrator lacked the power to declare the Assignment Agreement void, because, MFI claims, only part of it was within the scope of the contractual arbitration provision that conferred jurisdiction on the arbitrator (the "Arbitration Provision"). Second, MFI argues that the Arbitrator refused to consider MFI's counterclaim. MFI's arguments misconstrue the Arbitration Provision and Washington law, resort to evidence outside the face of the Arbitration Award, and ignore the Arbitration Award itself.

³ MFI's arguments are clearly without merit. Accordingly, simultaneously with this brief, MagnaDrive is filing a Motion on the Merits to Affirm the trial court's Final Judgment.

A. The Arbitrator Had The Power to Void the Assignment Agreement.

MFI's first argument fails for at least four reasons. First, it is contradicted by the broad language of the Arbitration Provision. The Arbitration Provision is set forth in a patent license agreement between MagnaDrive and MFI (the "License Agreement"). The Arbitrator interpreted the Arbitration Provision to be "a broad grant of authority for dispute resolution" that conferred jurisdiction on the Arbitrator to determine the validity of the Assignment Agreement, CP 381, and the Court may not substitute its own contract interpretation for the Arbitrator's.

Even if this Court were to re-interpret the Arbitration Provision, it would find the Arbitrator's interpretation to be correct. The Arbitration Provision requires arbitration of "*any dispute* between the Parties *relating to* the interpretation, construction, application or requirements" of the License Agreement. CP 99 (License Agreement, ¶12.1) (emphasis supplied). The License Agreement's requirements limited MFI's ability to assign the License Agreement and the rights, title, and interests it covered. CP 103-4 (License Agreement, ¶14.5); CP 367, 376 ¶3 (Arbitration Award). The Arbitrator interpreted the Assignment Agreement, and concluded that it assigned the License Agreement along with the patents

the License Agreement covered. CP 372, ¶ 4. MagnaDrive argued that the Assignment Agreement was void because it violated the License Agreement's restrictions on assignment. MFI claimed that the Assignment Agreement was valid. CP 377. The Arbitrator interpreted the License Agreement and the Assignment Agreement based on the evidence, briefing, and arguments presented, applied the requirements of the License Agreement to the Assignment Agreement, decided that the Assignment Agreement failed those requirements, and declared the Assignment Agreement void. CP 376 ¶¶3, 5. The dispute over the validity of the Assignment Agreement, as a whole, "related to" the Arbitrator's "interpretation and construction" of the License Agreement's "requirements" and their "application" to the Assignment Agreement, and so is squarely within the Arbitration Provision.

Second, MFI's argument contravenes Washington law, which requires that arbitration provisions be liberally construed. In Washington, a dispute is arbitrable "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Kamaya Co. v. Am. Prop. Consultants, 91 Wn. App. 703, 714, 959 P.2d 1140 (Div. 1 1998) (internal quotation marks and citation omitted). The Arbitration Provision is clearly susceptible to an

interpretation that it covers the dispute over the validity of the Assignment Agreement.

Third, MFI waived its objection to the scope of the arbitration and admitted the Arbitrator's power to decide the issue by "at all times . . . litigating the validity of the entire Assignment Agreement, not its separate parts." CP 380. "The actions of the parties in the presentation of this matter to the Arbitrator and the express provisions of Paragraph 14.5 [the License Agreement's restriction on assignment] make it clear that the validity of the Patent Assignment was squarely before the Arbitrator for decision." CP 381.

Fourth, the Order Compelling Arbitration, CP 128-132, provides a separate and independent basis for jurisdiction over the dispute regarding the validity of the Assignment Agreement. MFI has not appealed the Order Compelling Arbitration. Instead, MFI argues that although that order required arbitration of the dispute over the assignment of the License Agreement, it did not extend to the instrument that effected that assignment, which is the Assignment Agreement. This is a nonsensical interpretation of the Order Compelling Arbitration. That order found that "Petitioner and Respondents have a dispute regarding MFI's purported assignment to Synergy," concluded that the dispute was subject to the Arbitration Provision, and compelled arbitration. CP 129, ¶¶ 6, 19. It did

not parse the terms of the Assignment Agreement or identify that agreement by name, and it did not have to do so to apply to that instrument as a whole. Moreover, MFI ensured that the trial court could not identify the Assignment Agreement by name or discuss its terms even if it had wanted to do so – because MFI refused to disclose even the name of the Assignment Agreement, let alone provide MagnaDrive or the court with a copy of it, until months after the Order Compelling Arbitration had been entered. See, e.g., CP 335-336.

MFI implies that when MagnaDrive moved to compel arbitraiton, MFI took the position that the validity of the Assignment Agreement was outside the scope of the Arbitration Provision. On the contrary: MFI did not raise this argument until well after the Arbitrator ruled against it. When Arbitration was compelled, the parties all knew that the instrument assigning the License Agreement was at the heart of parties' dispute, and MFI said nothing about parts of that instrument being excluded from the scope of the parties' dispute. See CP 129 ¶¶ 2, 6. MagnaDrive was forced to move to compel arbitration not because MFI disagreed regarding the scope of arbitration, but because MFI refused to abide by the dispute resolution procedures set forth in the License Agreement. CP 131, ¶15. The order compelled arbitration of the dispute over the assignment of the

License Agreement. It clearly covered the instrument that effected that assignment.

B. The Arbitrator Properly Considered and Dismissed MFI's Counterclaim.

MFI's argument that the Arbitrator failed to consider MFI's counterclaim is contradicted by the Arbitration Award, which makes abundantly clear that the Arbitrator considered MFI's counterclaim "to establish the validity of the Assignment Agreement" before dismissing it with prejudice. CP 377, 381. Because there is no basis for MFI's second argument on the face of the Arbitration Award, MFI (1) urges the Court improperly to apply a de novo standard of review, then (2) attempts to support its argument with the Arbitrator's post-arbitration order on MFI's motion to consider what MFI called "new evidence." CP 249-251 ("Order re: New Evidence"). Because the Order re: New Evidence is not part of the Arbitration Award, it cannot form the basis for reversal. But even if it could, it does not support MFI's argument. The Order re: New Evidence does not show that the Arbitrator refused to consider MFI's counterclaim, it shows the opposite. See infra §IV.C.3.

III. STATEMENT OF THE ISSUES

1. Did the Arbitrator have the authority to determine the validity of the Assignment Agreement?

2. Does the face of the Arbitration Award show that the Arbitrator considered and decided MFI's counterclaim?
3. Should this Court affirm the trial court's final judgment?
4. Should this Court deny MFI's request for relief?
5. Should this Court award MagnaDrive its fees incurred in connection with this appeal?

IV. STATEMENT OF THE CASE

A. The Arbitration Award

The parties' history and the contracts at issue are discussed in the Arbitration Award, CP 366-389, and summarized below.

1. The License Agreement

MFI and MagnaDrive entered into the License Agreement in 1999. Three provisions in the License Agreement are important with respect to MFI's appeal: paragraphs 12.1, 12.4, and 14.5. Paragraph 12.1 is a "broad grant of authority for dispute resolution" and covers the dispute over the validity of the Assignment Agreement. CP 381. Paragraph 12.4 provides that JAMS Rules apply to the arbitration, and JAMS Rule 24(c) provides that "the Arbitrator may grant any relief that is just and equitable." CP 375 ¶24. Paragraph 14.5 restricts MFI's ability to assign the License Agreement by establishing "three criteria for the advance consent to the assignment of the License Agreement by either party."

CP 367. One of those criteria is that the assignee's principal place of business must be located in the United States, Canada, or Europe. Id.

The restrictions of paragraph 14.5 of the License Agreement apply to MFI's patent rights as well as to the License Agreement. CP 381 ("In addition, Paragraph 14.5 covers the potential assignment of patent rights, standing alone."). The general introduction of paragraph 14.5 prohibits either party from assigning "any of its rights, title or interests under [the License Agreement] . . . without prior written consent." Id. The rights under the License Agreement include the patent rights that were the subject of the Assignment Agreement. In addition, paragraph 14.5 applies to "MFI's assignment of the License Agreement to a successor of MFI's ownership of the MFI Rights. MFI Rights includes the MFI Patent Rights." Id.

2. The Assignment Agreement

MFI and Synergy executed the Assignment Agreement on August 10, 2010. CP 368 ¶ 1. The Assignment agreement was an assignment of the License Agreement. CP 376 ¶1. The Assignment Agreement also transferred MFI Patents. CP 368, 380. A form to be used in connection with the assignment of MFI patents was an attachment to the Assignment Agreement and is referred to as the "Patent Assignment" in the Arbitration Award. CP 380. That form was "not a separate agreement – it is

inextricably part of and bound to the Assignment Agreement. It is referred to in the Assignment Agreement and is attached as Attachment B to the Assignment Agreement.”⁴ Id. The parties did not parse the terms of the Assignment Agreement, nor did they ask the Arbitrator to do so. “The documentary evidence, testimony and briefing by counsel did not address various portions of the Assignment Agreement, but rather considered the Assignment Agreement as a whole.” Id. “[A]t all times the parties were litigating the validity of the entire Assignment Agreement, not its separate parts.” Id. “The actions of the parties in the presentation of this matter to the Arbitrator . . . make it clear that the validity of the Patent Assignment was squarely before the Arbitrator.” CP 381.

3. The Dispute

MFI informed MagnaDrive of the “pending assignment of the patents and the License Agreement,” and advised MagnaDrive of the assignment after final payment was made. CP 368. Notice of entry into the Assignment Agreement was not given to MagnaDrive until September 10, 2010, after the Assignment Agreement was executed.⁵ CP 367

⁴ Evidence outside the face of the award submitted by MFI is consistent. For example, the Assignment Agreement contains an integration clause. CP 231. MFI and Synergy, by their own words, agree that the Assignment Agreement reflects one transaction.

⁵ A copy of the Assignment Agreement itself was not provided until after Arbitration had commenced. MFI Br. at 9; CP 335.

(Assignment Agreement dated as of August 10, 2010); CP 371 ¶34 (notice of the Assignment Agreement given September 10, 2010).

Synergy was the assignee under the Assignment Agreement and so became the assignee of, and new licensor under, the License Agreement. CP 367-69. Synergy is controlled by individuals working in China and by Chinese company CIMIC. CP 370-371. MFI kept the connection between Synergy and CIMIC “secret,” “to avoid trouble.” CP 371 ¶35.

MagnaDrive objected to the assignment on the grounds that it violated the requirements of paragraph 14.5, which required MagnaDrive’s advance consent to an assignment and provided that such consent had been given if certain criteria were satisfied, including that the assignee’s principal place of business must be in the United States, Canada, or Europe. See CP 367 (“Under a Patent Assignment Agreement . . . (the ‘Assignment Agreement’) Magna Force purported to assign its patents to Synergy . . . MagnaDrive has objected to the assignment and has placed all three of the advance consent criteria into issue in this arbitration.”). MFI argued that the Assignment Agreement was valid. CP 377 ¶7.

The Arbitrator concluded that Synergy’s principal place of business was “not in the United States, Canada or Europe.” CP 375 ¶25. The Arbitrator ruled that the Assignment Agreement therefore failed to

satisfy the advance consent criterion of paragraph 14.5 that required that the assignee's principal place of business be located in the United States, Canada or Europe. The Arbitrator declared the Assignment Agreement void, CP 376 ¶¶3-4, and awarded MagnaDrive \$849,273.36 in fees and costs, CP 389.

4. MFI's Counterclaim

MFI counterclaimed "seeking to establish the validity of the Assignment Agreement." CP 377 ¶7. Having found the Assignment Agreement to be invalid, the Arbitrator considered and dismissed MFI's counterclaim with prejudice. *Id.* ("The Assignment Agreement was declared void and Respondents' counterclaims are therefore dismissed with prejudice."); CP 381 ("In light of the determinations made in the [Arbitration Award], there is no basis on which the counterclaims may proceed.").

B. Confirmation of the Arbitration Award and Final Judgment

The King County Superior Court denied MFI's motion to vacate the Arbitration Award and granted MagnaDrive's motion to confirm the award on August 6, 2012. CP 53-55. The court granted MagnaDrive's motion for fees in connection with the motion to confirm on September 13, 2012. CP 438-439. The court entered final judgment on the Arbitration Award on December 28, 2012. CP 166-170.

C. Evidence Outside the Arbitration Award

Matters outside of the Arbitration Award that are discussed incompletely or inaccurately by MFI are discussed below.

1. The License Agreement

The Arbitration Provision provides in relevant part as follows:

In the event of any dispute between the Parties relating to the interpretation, construction, application or requirements of this Agreement, the Parties will follow the procedures set forth in this Section 12

CP 99 (License Agreement, paragraph 12.1) (emphasis supplied). The procedures set forth in Section 12 require first negotiation, then mediation, and then arbitration of such disputes. CP 99-101.

Paragraph 12.4 of the License Agreement provides in relevant part:

If any dispute is not resolved after compliance with the procedures set forth in paragraph 12.1, 12.2 and 12.3, then either Party may submit the dispute to arbitration under the supervision and in accordance with the rules of JAMS.

CP 100 (License Agreement, paragraph 12.4) (emphasis supplied). “Rule 24(c) of the JAMS Comprehensive Arbitration Rules and Procedures provides that the Arbitrator may grant any relief that is just and equitable.” CP 375 (Arbitration Award); CP 421 (relevant excerpts of JAMS Rules).

Paragraph 14.5 of the License Agreement provides in relevant part:

Neither Party shall assign . . . this Agreement . . . without the prior written consent of the other Party, which consent shall not be unreasonably withheld. . . . MDC hereby consents to MFI's assignment of this Agreement . . . to a successor of MFI's

ownership of the MFI Rights . . . ; provided . . . that the successor principal place of business is located in the United States, Canada or Europe or another country approved by MDC, which approval shall not be unreasonably withheld.

CP 103-04 (License Agreement ¶14.5) (emphasis supplied). The MFI Rights are defined to include the MFI Patent Rights. CP 76.

2. The Order re: New Evidence

The record in the Arbitration closed on October 7, 2011. CP 367. The Arbitrator issued his Interim Award November 7, 2011. CP 407-417. On March 27, 2012, MFI requested clarification and that the Arbitrator consider new evidence with respect to MagnaDrive's connections to China. CP 249-251. In its Motion re: New Evidence, MFI claimed that after the Arbitration, it discovered additional evidence of MagnaDrive's connections to China that should cause the Arbitrator to reconsider his Interim Award. CP 249. The Arbitrator declined to do so, and explained, "the issue of the MagnaDrive connection to China was presented and considered during the course of the arbitration. While the extent of the connection may be more extensive than that presented at the hearing, *it was clearly part of the arbitration and has been decided adversely to Magna Force.*" CP 250 (emphasis supplied). The Arbitrator denied MFI's motion on March 30, 2012, by his Order Re: New Evidence. Id.

In an aside, the Arbitrator also discussed an argument that MFI had opted not to make in the Arbitration: that MagnaDrive had actually consented to this specific assignment. The Arbitrator referred to this as “individualized” consent to the assignment. The Arbitrator observed that MFI had previously conceded that MagnaDrive had *not* given individualized consent to the Assignment Agreement, and that MFI had instead relied on a blanket consent argument, that the Assignment Agreement was valid by operation of the License Agreement’s paragraph 14.5, which deemed MagnaDrive to have consented to an assignment that met certain criteria.⁶ CP 250. The Arbitrator stated:

Magna Force proceeded (and litigated) on the basis that the blanket consent applied since Synergy had a principal place of business in the United States. That argument was not accepted by the Arbitrator. [¶] The issues of individualized consent and the reasonableness of withholding consent were not presented in the arbitration and were not part of the dispute resolution procedures.

CP 251-52 (Order re: New Evidence at 2-3) (emphasis supplied). MFI misleadingly cites the last sentence of this as evidence that the Arbitrator

⁶ MFI had also argued in the alternative that even if it had not actually sought MagnaDrive’s consent to this specific assignment, MagnaDrive should have given it anyway. CP 266-268. MagnaDrive argued that having failed to seek MagnaDrive’s consent, MFI could not argue after the fact that that consent had been unreasonably withheld. CP 356-358. The Arbitrator agreed with MagnaDrive’s position. CP 366-382.

did not consider MFI's counterclaim. This is an outright mischaracterization of the Order re: New Evidence. The Order re: New Evidence shows not that the Arbitrator failed to consider MFI's arguments, but that he rejected them. Id.

3. The Order Compelling Arbitration

The parties' dispute arose in 2010, after MFI notified MagnaDrive of the Assignment Agreement (but refused to provide a copy of the Assignment Agreement). Shortly thereafter, Synergy threatened to terminate the License Agreement. CP 129. MagnaDrive told MFI and Synergy it disputed that there had been a valid assignment, and demanded arbitration. CP 129 (the parties in "dispute regarding MFI's purported assignment to Synergy."). MFI and Synergy "refused to comply with the condition precedent procedures set forth in the [License Agreement's] Dispute Resolution Provision." CP 131, ¶15. Because MFI and Synergy refused to arbitrate the parties' dispute, MagnaDrive moved to compel arbitration, and was successful. CP 128-132 (Order Compelling Arbitration). The parties then proceeded to arbitration.

The Order Compelling Arbitration describes the parties' dispute as "regarding MFI's purported assignment to Synergy." CP 129. The Order Compelling Arbitration does not refer to the title or terms of the Assignment Agreement, because at the time, MFI had refused to reveal

that information. See App. Br. at 9; CP 335 (MFI's admission it withheld the Assignment Agreement until months into the arbitration itself). Because MFI denied MagnaDrive and the court the information it needed to specifically identify the Assignment Agreement by anything other than an assignment of the License Agreement, that is how it is referred to in the Order. CP 129.

V. ARGUMENT

MFI participated fully in the arbitration and urged the Arbitrator to resolve the parties' dispute. Only after the Arbitrator ruled against MFI did MFI challenge the Arbitrator's authority to do so. And only after the Arbitrator rejected MFI's arguments and dismissed MFI's counterclaim did MFI argue that he must not have considered the counterclaim at all. MFI essentially argues that the Arbitrator had the authority to rule in MFI's favor or not at all.

MFI's appeal is another in its series of efforts to try to litigate this dispute anew, hoping for a different result. Because MFI seeks to relitigate this dispute, it asks this Court look to evidence outside the face of the Arbitration Award. Because it must resort to evidence outside the face of the Arbitration Award, MFI urges the Court to reject well-established Washington law and adopt a de novo standard of review.

The appropriate standard here is not de novo, but whether the face of the Arbitration Award reveals a clear error of law. The Arbitration Award reveals no such error. Even if the Court were to consider evidence outside the face of the award, it would find no error. For the reasons discussed below, this Court should honor Washington's long-standing policy favoring the finality of arbitration awards and affirm the trial court's judgment.

A. This Appeal Is Subject to the Narrow “Face of the Award” Standard of Review Governing Final Arbitration Awards.

In Washington, judicial review of arbitration awards is strictly circumscribed. Davidson v. Hensen, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998) (judicial review of an arbitration award is “exceedingly limited”); Barnett v. Hicks, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992) (same); S & S Constr., Inc. v. ADC Props., LLC, 151 Wn. App. 247, 254, 211 P.3d 415 (2009) (same). A court may look only to the face of an arbitration award itself; it may not vacate an arbitration award if it has to delve into the merits of the claims to do so. Kenneth W. Brooks Trust v. Pac. Media LLC, 111 Wn. App. 393, 397, 44 P.3d 938 (2002) (court will confine its review “to the face of the award.”) (internal quotation marks and citation omitted); Beroth v. Apollo Coll., Inc., 135 Wn. App. 551, 559, 145 P.3d 386 (2006) (appellate scrutiny does not include review of an arbitrator's

decision on the merits); Davidson, 135 Wn.2d at 132 (court may not vacate arbitration award if appellant's grounds for relief would require the court to "delve improperly into the evidence" before the arbitrator); ML Park Place Corp. v. Hedreen, 71 Wn. App. 727, 742, 862 P.2d 602 (1993) (appeals court refusing "to exceed the limited scope of review permissible on a motion to vacate an award"). The "face of the award" standard is an extraordinarily limited form of review that requires incontrovertible error to be apparent within the four corners of the award—for example, where the Arbitrator awards punitive damages in a jurisdiction that does not allow them. Cummings v. Budget Tank Removal & Env'tl. Servcs. LLC, 163 Wn. App. 379, 388-89, 260 P.3d 220 (2011); Boyd v. Davis, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995) (clear error must be apparent from face of the award); N. State Constr. Co. v. Banchemo, 63 Wn.2d 245, 249-50, 386 P.2d 625 (1963) (same).

Courts may not consider the evidence, briefing, or arguments presented to the arbitrator if those are outside the four corners of the award. Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 239, 236 P.3d 182 (2010) ("Courts may not search the arbitral proceedings for *any* legal error; courts do not look to the merits of the case, and they do not reexamine evidence."); Expert Drywall, Inc. v. Ellis-Don Constr., Inc., 86 Wn. App. 884, 888, 939 P.2d 1258, 1260 (1997) ("The arbitrator's reasons

for the award are not part of the award itself, and [the court does] not consider the evidence before the arbitrator.”). Indeed, even the Arbitrator’s explanation of his reasons for the award may not be considered. Westmark Props., Inc. v. McGuire, 53 Wn. App. 400, 403, 766 P.2d 1146 (1989) (the arbitration award “consists of a statement of the outcome, much as a judgment states the outcome. A statement of reasons for the award is not part of the award.”); Expert Drywall, 86 Wn. App. at 888 (“The arbitrator’s reasons for the award are not part of the award itself, and [the court does] not consider the evidence before the arbitrator.”)

In addition, the Washington Supreme Court has made it clear that where an arbitrator interprets contract terms, a reviewing court must defer to the arbitrator’s interpretation; it is not permitted to revisit the evidence and argument and draw its own conclusions with respect to contract interpretation. Cummings, 163 Wn. App. at 390; Boyd, 127 Wn.2d at 261-62 (reversing trial court’s vacatur of arbitration award, holding that trial court effectively, and inappropriately, applied de novo standard of review by re-interpreting contracts already construed by the arbitrator, and stating, “Such an undertaking is tantamount to trying the case de novo. Essentially, the question before this court is therefore whether a trial court reviewing an arbitral award is permitted to conduct a trial de novo. We

have previously answered that question in the negative. We reaffirm that answer today.”). This is true even where the contract term at issue is the arbitration clause itself. Beroth, 135 Wn. App. at 557 (face of the award standard applies even as to interpretation of contract conferring jurisdiction to arbitrate at issue).

This narrow “face of the award” standard reflects an express policy that “strongly favors finality of arbitration awards.” S & S Constr., 151 Wn. App. at 254; Cummings, 163 Wn. App. at 389 (“Limiting judicial review to the face of the award is a shorthand description for the policy that courts should accord substantial finality to arbitrator decisions.”) (internal quotation marks and citation omitted). “[A party] cannot submit a dispute to arbitration only to see if it goes well for their position before invoking the courts’ jurisdiction.” Dahl v. Parquet & Colonial Hardwood Floor Co., 108 Wn. App. 403, 407, 30 P.3d 537 (2001) (quoting Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 897 (2001)).

It is the party challenging the award that bears the burden of proving that clear error is apparent on the face of the award. Boyd, 127 Wn.2d at 263; See Pegasus Constr. Corp. v. Turner Constr. Co., 84 Wn. App. 744, 747-48, 929 P.2d 1200 (1997). As the party seeking to vacate, MFI bears the burden of showing that statutory grounds to do so exist, based only upon the language on the face of the award itself and without

resorting to examining the merits of the underlying arbitration.

Cummings, 163 Wn. App. at 388. The facial legal error basis is very exacting and seldom leads to vacation of an arbitration award: “[O]ur courts have applied the facial legal error standard carefully, vacating an award based on such error only in four instances.” Broom, 169 Wn.2d at 239. MFI falls well short of showing that this case should become one of that select group.

B. The De Novo Standard Applies Only to Orders Compelling or Denying Arbitration, Not Where, as Here, an Arbitration Award Has Been Made.

To enable this Court to examine evidence and orders outside the Arbitration Award, MFI urges that the Court apply a de novo standard of review. MFI Br. at 16-17. But the de novo standard applies only to appeals of motions to compel or deny arbitration, not to appeals of orders to confirm or vacate arbitration awards. MFI’s own authority—when cited accurately—confirms this. Compare MFI Br. at 16 (citing Satomi Owners Ass’n v. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213 (2009) for proposition that “decision to confirm or vacate an arbitration award” is reviewed de novo) with Satomi, 167 Wn.2d at 797 (“This court engages in de novo review of a trial court’s decision granting a motion to compel or deny arbitration.”) (emphasis supplied). The de novo standard does not apply in an appeal after an arbitration award has issued. Beroth, 135 Wn.

App. at 557 (rejecting de novo standard in appeal challenging arbitrability of certain issues when issue presented in an appeal of denial of motion to vacate arbitration award); see also Kenneth W. Brooks Trust, 111 Wn. App. at 397 (a court cannot “impermissibly conduct a de novo review of the basis for an award”).

Beroth is instructive. In that case, appellants challenged the denial of a motion to vacate, asked the appellate court to interpret the arbitration provision conferring jurisdiction, and argued in favor of a de novo standard of review. The court disagreed, holding that in the context of a motion to vacate an arbitration award, the scope of review was limited to the face of the arbitrator’s award. Only if the arbitrator’s award showed clear error was reversal justified. The court explained: “While an arbitration agreement may control what issues are to be arbitrated, *once the issues are submitted to arbitration*, the proceeding itself is governed by statute. Under Washington’s former arbitration statute, chapter 7.04 RCW, ‘there is no such thing as a trial de novo.’” Beroth, 135 Wn. App. at 557-58 (internal citations omitted) (emphasis supplied). Like Washington’s former arbitration statute, Washington’s current arbitration statute, Chapter 7.04A RCW, does not permit trial de novo here.

As in Beroth, MFI’s appeal challenges the denial of a motion to vacate an arbitration award. MFI Br. at 4. The narrow “face of the

award” standard therefore applies to the issues raised by MFI’s appeal. See, e.g., Kenneth W. Brooks Trust, 111 Wn. App. at 397 (“Absent an error of law on the face of the arbitrator’s award, the reviewing court will not vacate or modify an award. And the appellate court’s review of an arbitrator’s award is confined to the same scope as the trial court’s review.”) (citation omitted).

C. The Trial Court Did Not Err in Confirming and Entering Judgment on the Arbitration Award.

To try to justify the extraordinary remedy of vacating the Arbitration Award, MFI argues that the Arbitrator exceeded his power by invalidating the Assignment Agreement and by “refusing to consider” MFI’s counterclaim. MFI Br. at 17, 25. The narrow “face of the award” standard applies to both. Beroth, 135 Wn. App. at 559 (“face of award” standard applied to appeal of arbitrator’s decision as to whether issues before him were arbitrable); Hedreen, 71 Wn. App. at 738-41 (applying “face of the award” standard to arbitrator’s decision regarding treatment of appellant’s counterclaim).

In support of its first argument, MFI contends that the Arbitration Provision extends to the Assignment Agreement only insofar as the Assignment Agreement purports to assign the License Agreement, and not

beyond.⁷ As discussed below, there are multiple independent reasons to reject this argument. Because the Arbitration Award reveals no error of law, the Court's inquiry ends there. Even if the Court were to interpret the Arbitration Provision, it would find that it covers the parties' dispute. Washington courts presume disputes to be arbitrable, and the Arbitration Provision in particular should be construed broadly. And even if the Arbitration Provision did not confer jurisdiction, which it does, the issue of the validity of the Assignment Agreement was arbitrated, and MFI waived its objection to the scope of the arbitration by participating fully. Finally, the Order Compelling Arbitration conferred jurisdiction over the validity of the Assignment Agreement.

MFI's second argument ignores the Arbitration Award and relies wholly on the Order re: New Evidence, which is outside the Arbitration Award and not before the Court. The argument should be rejected on that basis alone, and for the additional and independent reason that the Order Re: New Evidence simply does not show that the Arbitrator failed to consider MFI's counterclaim.

⁷ MFI does not identify the provisions in the Assignment Agreement it contends the Arbitrator had jurisdiction to invalidate, and MFI has never done so. In Arbitration, MFI did not even argue that the Arbitrator should consider the Assignment Agreement piecemeal, much less identify the provisions that MFI now contends were within his power to invalidate. CP 380; see also CP 254-268 (MFI Arbitration Brief).

1. The Arbitration Award establishes that deciding the validity of the Assignment Agreement was within the Arbitrator's power.

The face of the Arbitration Award plainly reflects that the validity of the Assignment Agreement was within the Arbitrator's authority to decide, based on the Arbitrator's interpretation of the Arbitration Provision and the "clear" fact that the parties submitted the dispute over the Assignment Agreement to him. CP 381 ("Paragraph 12.1 is a broad grant of authority for dispute resolution. The actions of the parties in the presentation of this matter to the Arbitrator and the express provisions of Paragraph 14.5 make it clear that the validity of the Assignment [Agreement] was squarely before the Arbitrator for decision."); CP 376 ("The validity of the Assignment Agreement, as a whole, was before the Arbitrator and the Arbitrator declared the Assignment Agreement void in its entirety.").

There is no facial error of law as to this aspect of the Arbitrator's decision: an Arbitrator obviously has power to decide both the issues the parties place before him and whether those issues are within the scope of the governing arbitration clause. Westmark, 53 Wn. App. at 404 ("The arbitrator was empowered to decide the issues submitted; he decided nothing more. . . . Judicial scrutiny stops here."); W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco, 47 Wn. App. 681, 683-84, 736

P.2d 1100 (1987) (confirming an arbitration award over appellant's objection that the issues in the arbitration were not within the scope of the arbitrator's authority under the parties' arbitration clause).

No further inquiry by this Court is required, or permitted, under the strict "face of the award" standard. MFI's first assignment of error can be rejected on these grounds alone. Beroth, 135 Wn. App. at 559 ("It bears repeating that on judicial review of the arbitrator's decision, this court cannot consider the merits of the [appellant's] arguments. Because these issues were submitted by the parties, and the arbitrator decided nothing more than these issues, his decision is not subject to reversal") (citation omitted).

2. The presumption in favor of arbitrability under Washington law confirms that the Assignment Agreement was within the Arbitrator's authority.

To the extent this Court deems it necessary to evaluate the scope of the Arbitration Provision, that analysis only confirms that the Arbitrator was correct. Under Washington law there is a strong presumption that issues are arbitrable. Likewise, Washington courts routinely hold that an arbitration clause with language like that at issue here—which subjects "any dispute . . . relating to" the License Agreement to arbitration—is a "broad" provision that call for courts to presume arbitrability. Moreover, the Arbitrator had enormous discretion to decide whether the validity of

the Assignment Agreement was within the scope of the Arbitration Provision and the Arbitrator was required to presume arbitrability absent some positive assurance to the contrary. In interpreting the scope of an arbitration provision, Washington law deems issues arbitrable absent unmistakable contract language that excludes those issues from the arbitrator's authority: "[A] contractual dispute is arbitrable unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Kamaya Co. v. Am. Prop. Consultants, 91 Wn. App. 703, 714, 959 P.2d 1140 (1998) (internal quotation marks and citations omitted); Local Union 77, Int'l Bhd. of Elec. Workers v. PUD I, 40 Wn. App. 61, 65, 696 P.2d 1264 (1985) (absent an express provision excluding a claim "only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail") (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

Indeed, if there is any doubt as to whether the issue is arbitrable—although here there is no doubt—Washington law presumes arbitrability. Kamaya, 91 Wn. App. at 714 (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .”) (quoting Moses. H. Cone. V. Mercury Constr. Hosp., 460 U.S. 1, 24-25 (1983)); see also Hedreen, 71 Wn. App. at 741 (noting the “inexorable presumption

in favor of arbitration” and affirming an arbitrator’s award that deemed certain issues arbitrable over appellant’s objection) (internal quotation marks and citation omitted).

Finally, the Arbitration Provision is exceedingly broad, reaching “*any dispute between the Parties relating to the interpretation, construction, application or requirements of [the License] Agreement.*” CP 99 (emphasis supplied). Washington courts have repeatedly held that arbitration clauses like the Arbitration Provision, which covers “any dispute...relating to” the contract, must be interpreted broadly and in favor of arbitrability of claims. See In re Marriage of Pascale, 173 Wn. App. 836, 847, 295 P.3d 805 (2013) (holding that arbitration provision covering “any dispute[]” relating to the parties’ contract is a “broad arbitration provision” and reversing trial court decision deeming issue non-arbitrable as an improper examination of the merits); Townsend v. Quadrant Corp., 153 Wn. App. 870, 875, 224 P.3d 818 (2009) (holding that arbitration clause covering “any dispute or claim . . . arising out of or relating to” the contract was a “broad mandatory provision” requiring arbitration of parties’ claims); McClure v. Tremaine, 77 Wn. App. 312, 314-15, 890 P.2d 466 (1995) (“An arbitration clause which encompasses any controversy ‘relating to’ to a contract is broader than language covering only claims ‘arising out’ of a contract.”) (affirming final arbitration award

that permitted arbitration of claims by non-parties to the underlying contract); Boyd v. Davis, 75 Wn. App. 23, 27, 876 P.2d 478 (1994) (explaining that an arbitration clause covering “any claim or controversy arising out of or relating to [the] Agreement” is a “broad and inclusive” term subjecting contested claims to arbitration) (internal quotation marks and citation omitted).

Given the presumption in Washington that requires interpretation of arbitration clauses to favor coverage and the uniform case law holding that arbitration clauses with language indistinguishable from the Arbitration Provision are deemed “broad,” it is overwhelmingly clear that the Arbitrator was empowered to consider and decide the validity of the Assignment Agreement. The central issue in the Arbitration was whether the Assignment Agreement met the requirements of paragraph 14.5 of the License Agreement. CP 377; CP 381. The validity of the Assignment Agreement was therefore plainly a “dispute . . . relating to the interpretation, construction, application or requirements of [the License] Agreement.” CP 99. No further inquiry is needed for this Court to affirm. Davis, 75 Wn. App. at 27; Kamaya, 91 Wn. App. at 714.

This Court’s analysis in ML Park Place Corp. v. Hedreen, 71 Wn. App. 727, is instructive. In Hedreen, the appellant argued that the arbitrator had improperly ruled on the respondent’s counterclaim,

contending that “the arbitrator[] had no contractual authority” over that counterclaim because it was outside the scope of the parties’ arbitration clause. Id. at 729. The trial court denied the appellant’s motion to vacate, and this Court affirmed. This Court noted the “broad and inclusive” language in the underlying arbitration clause, and the strong presumptions in favor of arbitrability under Washington law. Id. at 739. This Court rejected appellant’s request to consider matters beyond the final award itself and the language of the arbitration clause, explaining:

Thus, we conclude that the trial court appropriately heeded the admonition of this court in Botting that an arbitration award shall not be vacated if the appellant’s argument cannot be decided without delving into the substantive merits of the claims. As did the trial court, we refuse to exceed the limited scope of review permissible on a motion to vacate an award, and we conclude that [appellant] has failed to overcome the inexorable presumption in favor of arbitration.

Id. at 741 (internal quotation marks and citations omitted).

The same result is required here. MFI concedes that the Arbitration Provision determines whether the validity of the Assignment Agreement was properly arbitrated. MFI Br. at 17-18. But MFI ignores the Washington law that dictates how the Arbitration Provision must be interpreted. MFI’s contention that the Arbitrator had no power to address

the validity of the Assignment Agreement is contrary to Washington law. Townsend, 153 Wn. App. at 875; Davis, 75 Wn. App. at 27; Hedreen, 71 Wn. App. at 730; Local Union 77, 40 Wn. App. at 65.

3. MFI waived any objection to arbitrating the validity of the Assignment Agreement, and admitted the Arbitrator had the power to decide the issue, by placing the validity of the Assignment Agreement before the Arbitrator.

MFI's challenge to the voiding of the Assignment Agreement fails for the separate and independent reason that MFI placed that issue before the Arbitrator by arbitrating the Assignment Agreement's validity. Having done so, it waived its ability to object belatedly that the Arbitrator exceeded his power. Botting, 47 Wn. App. at 685-86 (a party's "failure to raise the issue of arbitrability by a motion to stay arbitration, coupled with its submission of the arbitrability of the issue to the arbitrator, could be construed as a waiver of its rights to pursue the issue in the courts"). In addition, MFI's own counterclaim asked the Arbitrator to decide the validity of the Assignment Agreement. MFI Br. at 26; CP 377. This confirms that throughout the Arbitration, MFI agreed the Arbitrator was empowered to decide that issue.

The parties (including MFI) placed the validity of the Assignment Agreement squarely before the Arbitrator to decide:

The documentary evidence, testimony and briefing by counsel did not address various portions of the Assignment Agreement, but rather *considered the Assignment Agreement as a whole*. . . . In this case, the grant of authority to the Arbitrator to determine the validity of the Assignment Agreement included all parts of that Agreement.

CP 380 (emphasis supplied); see also CP 381 (“Paragraph 12.1 is a broad grant of authority for dispute resolution. *The actions of the parties in the presentation of this matter to the Arbitrator* and the express provisions of Paragraph 14.5 *make it clear that the validity of the Patent Assignment was squarely before the Arbitrator* for decision.”) (emphasis supplied). Where, as here, it is clear that an issue was before the Arbitrator, judicial scrutiny stops there. Westmark, 53 Wn. App. at 404 (judicial scrutiny stops on determination that an issue was before the arbitrator to decide).

By waiting to challenge the Arbitrator’s power to determine the validity of the Assignment Agreement until *after* that issue had been decided against it, MFI waived this baseless challenge. See MFI Br. at 13 (MFI challenged the scope of the Arbitrator’s authority for the first time in post-arbitration briefing); Botting, 47 Wn. App. at 685-86.⁸

⁸ As this Court later explained in Hedreen, the waiver rationale in Botting does not apply where a party registers a timely objection to the arbitrability of an issue in the arbitration itself, but nonetheless goes on to arbitrate the merits of that issue. Hedreen, 71 Wn. App. at 737. In Hedreen, for example, the party challenging the arbitrator’s authority sought a preliminary determination in the arbitration as to arbitrability of the contested issue. Id. at 731-32. Here, by contrast, MFI took an improper wait and see approach to arbitrability

4. The Order Compelling Arbitration empowered the Arbitrator to decide the validity of the Assignment Agreement.

MFI also asserts that the Order Compelling Arbitration covered the assignment of the License Agreement, but not the instrument effecting that assignment. MFI Br. at 23-24. This argument is based on an unreasonable interpretation and a misleading characterization of the Order Compelling Arbitration. That Order was necessitated by MFI's refusal to follow the License Agreement's dispute resolution procedures, which require mediation and arbitration before any attempt to terminate the License Agreement. CP 129-31. Because Synergy threatened to terminate the License Agreement and MFI and Synergy both refused MagnaDrive's demand that the parties abide by the License Agreement's dispute resolution procedures, MagnaDrive obtained an Order mandating compliance with the Arbitration Provision and enjoining termination of the License Agreement. *Id.* The Order plainly reflects this. CP 129-32 ¶¶ 4-5, 9, 13-16, 21-22.

MFI implies that when the Order Compelling Arbitration was entered, there was some disagreement among the parties as to whether the

of the Assignment Agreement. It only objected *after* that issue was decided against it, never raising an objection of any sort to the scope of the Arbitrator's authority up to that point. MFI Br. at 13. Even under the generous interpretation of waiver advanced in Hedreen, this is insufficient. 71 Wn. App. at 737 (discussing with approval case law holding that a party avoids waiver only by making a "timely objection to arbitrability").

Assignment Agreement was within the scope of what should be arbitrated. MFI Br. at 9. On the contrary: it was clear and undisputed that the scope of the arbitration ordered was to include whatever it was that purportedly assigned the License Agreement. The court described the parties' dispute as "regarding MFI's purported assignment to Synergy," CP 129, and concluded that the dispute was "subject to the [License Agreement's] Arbitration Provision." MFI's purported assignment to Synergy was the Assignment Agreement.

MFI now tries to claim that the Order only narrowly conferred jurisdiction to the Arbitrator, because it referred to the Assignment Agreement as a purported assignment or as an assignment of the License Agreement. MFI Br. at 9. But the absence of references to the Assignment Agreement by its title, or to its specific terms, is due to the fact that at the time, as MFI admits, MFI refused to provide any information about the Assignment Agreement—even its title—until after the Order Compelling Arbitration was entered. See CP 335-36. MFI cannot now complain that the Order's identification of the Assignment Agreement as "purported Assignment" was too imprecise.

5. MFI's authority does not support its argument that the Arbitrator exceeded his power by invalidating the Assignment Agreement.

MFI's Brief avoids all discussion of the presumptions under Washington law regarding the arbitrability of issues and the interpretation of arbitration clauses. MFI Br. at 20-22. In its place, MFI recycles the same losing arguments it raised in the King County Superior Court, arguing that because the Assignment Agreement is a separate contract entered into by MFI and Synergy, its validity was somehow *per se* non-arbitrable. MFI Br. at 20-21. This argument is flawed for two reasons. First, MFI concedes that the Arbitrator had the power to invalidate an assignment of the License Agreement. MFI Br. at 20. The Assignment Agreement is the document reflecting the assignment of the License Agreement. See CP 367-368, 372. Because MFI concedes that the Arbitrator had the power to invalidate at least portions of the Assignment Agreement, MFI concedes that the Arbitration Provision extends to a separate contract. Case law suggesting that one contract's arbitration provision may not cover another contract therefore is inapplicable.

Second, the authority MFI cites in support of its argument does not remotely establish that "the arbitration clause of one agreement does not extend to disputes arising under a separate contract." MFI Br. at 20. Two of the three cases MFI cites stand for the unextraordinary proposition that

if parties terminate a contract, then the arbitration clause in that contract can no longer be invoked. See Davis v. Gen. Dynamics Land Sys., 152 Wn. App. 715, 719, 217 P.3d 1191 (2009) (arbitration clause in employment contract does not apply when employment under that contract has been terminated and contract therefore no longer operative); Weiss v. Lonquist, 153 Wn. App. 502, 512, 224 P.3d 787 (2009) (same). Here, there is no dispute that the License Agreement is and remains operative and MFI readily admits that the Arbitration Provision in paragraph 12.1 remains in force as well. See, e.g., MFI Br. at 7, 9-10, 23-26, 29 (discussing applicability of paragraph 12.1).

MFI's reliance on Nelson v. Westport Shipyard is equally misplaced: that case does nothing to help MFI establish that the Arbitrator was powerless to invalidate the Assignment Agreement. MFI Br. at 21 (citing Nelson, 140 Wn. App. 102, 118, 163 P.3d 807 (2007)). In Nelson, a former employee and shareholder of a closely-held corporation sued the corporation, asserting shareholder-based and employee-based claims and contesting the enforceability of a shareholder agreement between himself and the corporation. The corporation moved to compel arbitration based on a narrow arbitration clause in the shareholder agreement. The trial court declined to compel arbitration, and was affirmed. MFI urges that this case stands for the proposition that an arbitration provision in one

contract cannot extend to another, but Nelson reflects no such holding – it merely interprets the narrow arbitration provision at issue, and concluded that under the facts before the court, it did not apply to the plaintiff’s claims. Moreover, unlike the appellants in Nelson, MFI concedes that the Arbitration Provision in paragraph 12.1 is valid and enforceable, and admits that it covers at least some aspects of the validity of the Assignment Agreement. MFI Br. at 17-18. Nelson does not support an argument that MFI can now nonetheless enlist this Court to go beyond the face of the Arbitration Award and review the Arbitrator’s merits determinations about the extent of the Assignment Agreement’s invalidity. Cummings, 163 Wn. App. at 388 (no merits review permitted).

Moreover, courts in Washington and elsewhere recognize that broad arbitration clauses can extend to both the validity of separate collateral contracts, as well as to persons or entities who are not parties to the contract with the arbitration clause. Ace Capital v. Central United Life Ins., 307 F.3d 24, 34-35 (2d Cir. 2002) (Sotomayor, J.) (holding that an arbitration provision that covers “any dispute . . . with reference to the interpretation of this Agreement” a “broad” provision and expressly rejecting argument that an arbitration agreement “cannot encompass a dispute relating to . . . a separate, collateral document” that does not contain an arbitration provision); McClure, 77 Wn. App. at 317

("[Appellant's] claim is sufficiently related to the Agreement to fall within the scope of the broad language of the arbitration clause.").

6. There is no error of law on the face of the Arbitration Award as to the Arbitrator's dismissal with prejudice of MFI's counterclaim.

MFI's second argument supporting its assignments of error contends that the Arbitrator refused to "consider MFI's counterclaim and instead dismiss[ed] it with prejudice." MFI Br. at 25. This ignores the language of the Arbitration Award, which shows that the Arbitrator did consider MFI's counterclaim—he just dismissed it because MagnaDrive had prevailed. CP 377 ("Respondents asserted counterclaims in this Arbitration seeking to establish the validity of the Assignment Agreement . . . the Assignment Agreement was declared void and Respondents' counterclaims are therefore dismissed with prejudice."); CP 381 ("In light of the determination made in the Award, there is no basis on which the counterclaims may proceed."). Given that MagnaDrive prevailed in the Arbitration as to the invalidity of the Assignment Agreement, the Arbitrator's dismissal of MFI's counterclaim was entirely proper. See, e.g., Kelly v. Powell, 55 Wn. App. 143, 151-52, 776 P.2d 996 (1989) (affirming dismissal with prejudice of appellant's counterclaim based on respondent having prevailed on its own claims).

Finding no support on the face of the Arbitration Award, MFI relies entirely on the Arbitrator's Order re: New Evidence, which is not incorporated in the Arbitration Award and so cannot be considered. MFI Br. at 27 (citing Order re: New Evidence at CP 251); Broom, 169 Wn.2d at 239 (reexamination of arbitration evidence not allowed); Westmark, 53 Wn. App. at 403 (review limited to the award itself). Even if it could be, the Order does not support MFI's contention that the Arbitrator "refused to consider [MFI's] counterclaim." MFI Br. at 26. Instead, the Order shows that the Arbitrator considered MFI's arguments and found them unavailing:

Magna Force is seeking to effectively reopen the arbitration to allow the Arbitrator to consider both new evidence and a new claim, i.e., that it was not reasonable to withhold consent to the transfer to a Chinese entity in light of MagnaDrive's significant Chinese contacts. [¶] There are several bases for denying the request of Magna Force. . . . *the issue of MagnaDrive's connection to China was presented and considered during the course of the arbitration. . . . it was clearly part of the arbitration and has been decided adversely to Magna Force.* [¶] . . . Magna Force is now arguing that withholding consent to the transfer to a Chinese entity was unreasonable. It should be remembered that no consent was ever requested by Magna Force. Rather, *Magna Force proceeded (and litigated) on the basis that the blanket consent applied since Synergy had a*

principal place of business in the United States. That argument was not accepted by the Arbitrator. [¶] The issues of individualized consent and the reasonableness of withholding consent were not presented in the arbitration and were not part of the dispute resolution procedures.

CP 251-52 (Order re: New Evidence at 2-3) (emphasis supplied). MFI's disagreement with the Arbitrator's reasoning for this order (which is not part of the Arbitration Award) provides absolutely no legal basis for vacating the dismissal in the Arbitration Award itself. Cummings, 163 Wn. App. at 388 (appellant bears the burden of proving legal error to vacate award and cannot carry that burden by resorting to examination of merits of arbitrator's decision). Finally, even if the Arbitrator's Order Re: New Evidence were part of this appeal, which it is not, it could not provide the basis for vacatur. Davidson v. Hensen, 135 Wn.2d at 124 ("we have made clear the exclusive grounds for challenging an arbitration award are enumerated in RCW 7.04.160 and 7.04.170. New evidence is not an enumerated ground for overturning the arbitration award.")

D. MFI Is Not Entitled to Have the Matter Re-Arbitrated By A New Arbitrator.

MFI asks the Court to remand for "rehearing before a new arbitrator." MFI Br. at 29. MFI's request for rehearing rests entirely on its attempt to vacate the Arbitration Award. Id. Because there is no basis to

vacate the Award, MFI's request for a rehearing is moot and should be denied.

Even if there were grounds to vacate the Arbitration Award under RCW 7.04A.230(d), rehearing before a new arbitrator would be improper. RCW 7.04A.230(3) states that "if the award is vacated on a ground stated in subsection . . . [RCW 7.04A.230](d) . . . of this section, the court may order a rehearing *before the arbitrator who made the award.*" (Emphasis supplied.) Thus, the presumption is that any rehearing would take place before Judge Lukens, not a new arbitrator.

Equally specious is MFI's claim that the Arbitrator made a "serious" error that justifies rehearing before a new arbitrator. The Arbitrator did not exceed his powers or make any error at all. But even under MFI's view there was nothing more than a legal error made as to the scope of the arbitration and the resulting treatment of MFI's counterclaim. MFI Br. at 17-27. This is not "serious" error warranting the wasteful exercise of presenting the same evidence to an entirely new arbitrator. Compare Harris v. Grange Ins. Ass'n, 73 Wn. App. 195, 200, 868 P.2d 201 (1994) (decision by two members of arbitration panel to issue award without assent of third member did not warrant rehearing before new panel), with Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 290, 654 P.2d 712 (1982) (holding that arbitrators' refusal to follow two separate court orders

mandating entry of attorneys' fees was "obvious misconduct" requiring new panel and noting, by contrast, "honest mistakes [of law] on the part of the arbitrator" do not warrant rehearing with new arbitrator) (internal quotation marks and citation omitted).

E. MagnaDrive Is Entitled to an Award of Its Attorneys' Fees.

As MFI acknowledges, paragraph 14.6 of the License Agreement mandates entry of an award of attorneys' fees and costs to the prevailing party in any action to enforce the Agreement. CP 222. The Arbitrator and the trial court both awarded MagnaDrive its fees in accordance with this provision. CP 389 (fee award in Arbitration); CP 438-39 (trial court fee award). Similarly, RCW 7.04A.250(2) and (3) provide that "costs" and "attorneys' fees and other reasonable expenses" are recoverable by a party in post-arbitration judicial proceedings. King County Superior Court properly awarded MagnaDrive its fees pursuant to the License Agreement and these code provisions. See CP 54; CP 167. This Court should affirm that award. McGinnity v. AutoNation, Inc., 149 Wn. App. 277, 285-86, 202 P.3d 1009 (2009) (affirming award of attorneys' fees to party successfully opposing motion to vacate arbitration award). This Court likewise should reject MFI's own demand for fees, which depends on MFI's ill-founded request to reverse the trial court. Id.

Paragraph 14.6 of the License Agreement, RCW 7.04A.250(2) and (3), and RAP 18.1 also require an award of MagnaDrive's attorneys' fees and expenses on appeal. See McGinnity, 149 Wn. App. at 286 (awarding fees on appeal in post-arbitration proceedings). An award to MagnaDrive of its fees on appeal if it prevails is mandatory under paragraph 14.6 of the License Agreement. CP 222 (the prevailing party "*shall be entitled to recover . . . from the other Party all reasonable attorneys' fees incurred by the prevailing party in connection with such action (including, but not limited to, any appeal thereof)*") (emphasis added). That fees award is amply justified. MagnaDrive has been forced to litigate in post-arbitration proceedings for over a year, delaying enforcement of its Judgment against MFI. This Court should therefore award MagnaDrive all reasonable fees and expenses, in an amount to be determined by the Commissioner pursuant to RAP 18.1(d) and (f).

VI. CONCLUSION

MFI agreed to arbitrate the dispute over the validity of the Assignment Agreement when it agreed to the Arbitration Provision in the first place, then again when it did not appeal the Order Compelling Arbitration, and again when it arbitrated the issue of the Assignment Agreement's validity without objection. Only after the Arbitrator ruled against it did MFI begin to claim that that decision was outside the

Arbitrator's power. The Arbitrator properly considered and decided the claims and counterclaims raised, and ruled against MFI. MFI now asks this Court to review the merits of the case and then to order that a new arbitrator do so as well.

MFI's appeal violates Washington's public policy strongly favoring the finality of arbitration and would deny arbitrating parties the benefits that arbitration is supposed to afford. This Court should affirm the trial court's judgment, deny the relief MFI requests, and grant MagnaDrive its fees incurred in connection with this appeal.

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