80573-8

No. 80573-8-I
(Consolidated with No. 80710-2-I)

IN THE COURT OF APPEALS – DIVISION I
STATE OF WASHINGTON

VICEROY GROUP, LLC and JEFFREY WYSONG,

Respondents,

v.

TOK, LLC and SAMUEL BURKE,

Appellants.

RESPONDENTS' BRIEF

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I. INTRODUCTION

This appeal arises from a multi-year dispute involving an option to purchase a 50 percent ownership interest in Washington cannabis licensee Appellant Tok, LLC. Appellant Samuel Burke sold the option. Respondent Viceroy Group, LLC, of which Respondent Jeffrey Wysong is the sole member, purchased the option. The dispute began when Burke challenged the validity and enforceability of the parties' agreements in an attempt to avoid the bargain he no longer wished to honor.

Pursuant to the parties' agreements, the dispute was arbitrated, resulting in several awards in favor of Viceroy and Wysong (collectively, "Viceroy"), most of which were confirmed long ago and are therefore no longer subject to challenge. Displeased with the result of those prior confirmed awards that, among other things, upheld the validity of the parties' agreements, Burke has consistently sought to collaterally attack and circumvent the awards in order to undermine or destroy Viceroy's 50 percent ownership of Tok and Wysong's rights as co-manager of Tok.

Although the history of the dispute may be complex given its longevity, the narrow issue on appeal is not. The only issue is whether Burke and Tok (collectively, "Burke") have established—in light of the exceedingly narrow scope of judicial review of arbitration awards—any statutory basis to vacate the Arbitrator's July 30, 2019 award. That award

found that Burke's actions—prosecuting a secret appeal of the decision of the Washington Liquor and Cannabis Board ("LCB") approving Tok's change of ownership to add Viceroy and approving Wysong as a true party of interest in Tok after accepting payment to close the sale—were improper under the parties' agreements and the Arbitrator's prior awards.

Burke's attempt to muddy the appellate waters by making allegations intended to malign Wysong and raising issues that have no bearing on the narrow issue on appeal should be rejected. In the end, those irrelevancies cannot remedy Burke's failure to establish any basis upon which to vacate the Arbitrator's July 30th award. As a result, Viceroy respectfully requests that the Court affirm the Superior Court's orders denying Burke's motions to vacate and for reconsideration and granting Viceroy's motion to confirm the July 30th arbitration award.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the Superior Court committed any reversible error in denying Burke's motion to vacate the arbitration award where Burke failed to carry his burden of establishing that the Arbitrator exceeded his power in issuing an award that: (a) was within the scope of the parties' arbitration agreement and the Arbitrator's retained authority to implement previously awarded relief; and (b) contained no facial error of law in its conclusion that Burke improperly accepted Viceroy's payment while

covertly attempting to destroy Viceroy's benefit of the parties' bargain.

2. Whether the Superior Court committed any reversible error in denying Burke's motion for reconsideration requesting that the Arbitrator's September 20, 2019 letter to the parties also be confirmed where Burke failed to argue, much less demonstrate, that the Superior Court abused its discretion by rendering a decision that was either manifestly unreasonable or based on untenable grounds.

III. COUNTERSTATEMENT OF THE CASE

Burke's purported statement of facts is replete with improper argument and irrelevant allegations. To better assist the Court, Viceroy provides the following counterstatement of facts focused on the narrow issue on appeal. But that focus should not be taken as an admission that any of the allegations made by Burke that are not specifically addressed herein have any merit. To the contrary, Burke's allegations have no merit.

A. Factual Background

1. Viceroy's Purchase of a 50 Percent Interest in Tok

Under the parties' agreements—the Sale of LLC Interest and Option Agreement ("Sale Agreement") and the Operating Agreement of Tok, LLC ("Tok Operating Agreement") (collectively, the "Agreements")—Viceroy had the option of purchasing a 50 percent interest in Tok, a Washington cannabis licensee. (CP 62.) The purchase

price was $600,000 to be paid to Burke—$10,000 paid in connection with execution of the Sale Agreement and $590,000 paid upon exercise of the option—plus $100,000 to be paid to Tok as capital improvement funds. (CP 589.) After the sale was complete, Tok would be co-owned (50/50) by Burke and Viceroy and co-managed by Burke and Wysong. (CP 589-90.) Burke later challenged the Agreements claiming they were illegal because they purportedly did not require that the LCB vet and approve Viceroy and Wysong before Viceroy became an owner of Tok.[1] (CP 589.)

The Arbitrator[2] rejected Burke's challenge, concluding that the Agreements were valid and enforceable as they incorporated the requirement that Viceroy and Wysong be vetted by the LCB. (CP 589, 604.) The arbitration awards issued in August and October 2017 also:

- concluded that Viceroy and Wysong, as a prospective member and manager, respectively, of Tok prior to LCB approval, on the one hand, and Burke (and Tok) on the other hand, were in effect partners and owed each other fiduciary duties consistent with the Tok Operating Agreement (CP 605);

[1] Under Washington's cannabis regulatory framework, cannabis licenses must be issued in the name of the "true parties of interest." "True parties of interest," and therefore those persons who must be vetted by the LCB include, for limited liability companies like Viceroy, all members and managers and their spouses. WAC 314-55-035. Here, that includes Wysong and his spouse.

[2] The parties' Agreements contain identical provisions providing that "all" disputes "concerning" the Agreements are subject to binding arbitration. (*See* CP 75-76, 84.)

- ordered the parties to "cooperate in good faith to complete and submit" the change in ownership form necessary to obtain LCB approval of Viceroy's purchase of a 50 percent interest in Tok and Wysong as a true party of interest (CP 94);
- ordered the parties to "provide reasonable cooperation to each other and the WSLCB" during the vetting (CP 94);
- ordered that if "the WSLCB approves the change of ownership of Tok, then within 10 days of the parties' receipt of the WSLCB's decision, [Viceroy] will pay Burke $590,000 and Tok $100,000, less any offset amount that Tok owes, if any" (and conversely, if the LCB does not approve the change, ordered that Viceroy shall not be required to make any payments to Burke) (CP 95); and
- retained jurisdiction "to the extent necessary to complete the adjudication of this dispute" with respect to implementing the relief in the August 2017 award (which relief was amended in the October 2017 award) (CP 606; *see also* CP 94-95).

These awards were confirmed in February 2018 and are no longer subject to challenge. (CP 581-82.)

2. The LCB's Approval and Burke's Secret Appeal

Burke submitted the change in ownership form in January 2018 (CP 146), and on November 27, 2018, the LCB approved the application

to add Viceroy and Wysong as true parties of interest in Tok (CP 240). On January 8, 2019, the LCB issued a Statement of Intent to Approve Change of Entity Structure Application in connection with its earlier approval. (CP 286-90.) Relying upon the LCB's approval of the change in ownership, Burke demanded payment of the $590,000 (plus interest) for Viceroy's 50 percent interest in Tok,[3] which Viceroy paid on January 17, 2019. (CP 487; *see also* CP 667.) Upon Burke's acceptance of Viceroy's payment, he acknowledged that Viceroy was a member of Tok and Wysong was co-manager of Tok with Burke. (*See, e.g.*, CP 33, 543.)

Unbeknownst to Viceroy, however, on December 12, 2018, Burke's counsel emailed the LCB indicating that Burke "would like to appeal the LCB's decision of November 27, 2018 to add Jeffrey Wysong as a true party of interest." (CP 97.) Burke followed that email up with the submission of a Request for Hearing form dated January 14, 2019, challenging the LCB's approval of Tok's change of ownership. (CP 487.)

Burke provided no notice of his appeal of the LCB's approval of Tok's change of ownership to Viceroy, Wysong or their counsel, or the Arbitrator. In fact, after Burke initiated the secret LCB appeal, there were additional proceedings in the arbitration, including a hearing on a dispute

[3] *See, e.g.*, Respondents' Appendix to Motion to Disqualify Counsel for Tok, LLC, filed Nov. 25, 2019, App 017-019, 021.

regarding profits, offset, and distributions relating to Tok. (*See* CP 99, 103-05, 667.) But at no time did Burke or his counsel inform the Arbitrator or Viceroy that Burke was prosecuting an appeal challenging the LCB's approval of Tok's change of ownership. (CP 99-100.)

Viceroy did not learn of Burke's appeal of the LCB's approval until June 26, 2019—more than five months after Burke accepted Viceroy's payment of $590,000 plus interest and Viceroy became a member of Tok (and Wysong a co-manager)—when the Assistant Attorney General ("AAG") representing the LCB contacted Viceroy's counsel. (CP 100, 666-67.) The AAG reached out because she found Viceroy's non-participation in the appeal unusual. (CP 100, 666-67.)

3. Burke's *Ex Parte* Challenge to the LCB's Approval of Tok's Change of Ownership and the Arbitration Award

By the time Viceroy learned of Burke's challenge to the LCB's approval of Viceroy's 50 percent interest in Tok in late June 2019, Burke's secret appeal had progressed significantly. Extensive discovery had been conducted, motions for summary judgment were due (and later filed by both Burke and the LCB), and the evidentiary hearing was scheduled for September 2019. (CP 487-88, 500.)

Given the advanced state of Burke's LCB appeal and the significant risk that Viceroy's rights would be adjudicated in its absence, Viceroy promptly filed a motion to intervene, which Burke opposed. The

ALJ reserved decision on the motion, leaving Viceroy's ability to participate in the proceeding, protect its rights and defend against Burke's allegations of wrongdoing[4] in limbo. That limbo continues to this day.

In light of Burke's ongoing LCB appeal, on July 19, 2019, Viceroy filed a motion before the Arbitrator seeking relief in connection with Burke's secret challenge to the LCB's approval of Tok's change of ownership. (CP 483-97.) Viceroy requested, among other things, that the Arbitrator prohibit any further action by Tok in Burke's LCB appeal without the approval of Wysong, Tok's co-manager. (CP 495.)

On July 26, the Arbitrator issued an award providing interim relief, including prohibiting Burke from opposing Viceroy's intervention in the LCB appeal. (CP 53-55.) On July 30, the Arbitrator issued the award at issue in this appeal that required Burke to withdraw the appeal of the LCB's approval of Viceroy's 50 percent ownership interest in Tok and Wysong as a true party of interest in Tok. (CP 51-52.) On September 20, the Arbitrator sent a letter to the parties explaining his reasoning for—but explicitly not modifying—his July 30th award. (CP 22-24.)

[4] Burke again discusses the allegations of wrongdoing he made in his covert LCB appeal, claiming they are "established" violations. (Appellants' Brf. at 10-13, 34 n.14.) But those allegations have no bearing on the narrow issue on appeal and are simply intended to unjustly smear Wysong. Moreover, it is easy to claim (incorrectly) that the allegations are "established" where Burke has made every effort to prevent Wysong from mounting a defense to them by prosecuting the appeal in secret and opposing Viceroy's request to participate in a proceeding where its rights are being adjudicated in its absence.

B. Procedural History

1. Superior Court Procedural History

As relevant to this appeal, on September 26, 2019, Viceroy filed a motion to confirm the July 30, 2019 arbitration award. (CP 4-17.) That same day, Burke filed a motion to vacate that award and what he characterized (incorrectly) as the Arbitrator's September 20th "modification" of the award. (CP 29-43.)

In connection with Viceroy's opposition to Burke's motion to vacate, Viceroy filed a motion to strike the declaration of Mitzi Vaughn submitted with Burke's motion on the ground that it offered only improper legal opinions and conclusions and was not presented to the Arbitrator. (CP 686-95.) On October 16, the Superior Court granted Viceroy's motion to strike the declaration. (CP 696-97.) Burke did not appeal the Superior Court's order.[5] Therefore, that declaration should not be considered in this appeal either as a result of Burke's failure to appeal the order striking the declaration or for the reasons identified in Viceroy's motion to strike.

On October 4, 2019, after hearing argument, the Superior Court entered orders denying Burke's motion to vacate and granting Viceroy's motion to confirm the July 30th arbitration award. (CP 616-21.) That same

[5] Despite Burke's failure to appeal the Superior Court's order striking the Vaughn declaration, Burke included the declaration in his clerk's papers designation. (CP 44-47.)

day, Burke filed the Notice of Appeal of those orders.

On October 14, 2019, Burke filed a motion for reconsideration arguing that the Superior Court should have also confirmed what he inaccurately characterized as the Arbitrator's September 20th "modification" of the July 30th award. (CP 622-25.) On October 17, the Superior Court denied Burke's motion for reconsideration and on October 28, Burke filed a Notice of Appeal of that decision. (CP 629-30.)

2. Appellate Court Procedural History

On October 15, 2019, Burke asked this Court to stay enforcement of the orders confirming the arbitration award and denying the motion to vacate pending the outcome of this appeal. On November 25, Viceroy filed a motion in this Court seeking to disqualify counsel for Burke and Tok from representing Tok in this appeal in light of the inherent conflicts raised by counsel's representation of both Burke, individually, and Tok without the consent of both of Tok's managers (i.e., Burke and Wysong).

The Commissioner of this Court heard argument on the two motions on January 3, 2020. On January 17, the Commissioner issued a ruling (1) granting the motion to stay enforcement of the order confirming the arbitration award, and (2) referring the motion to disqualify counsel to this Court for consideration. The Commissioner also ordered that Appeal No. 80710-2-I be consolidated under Appeal No. 80573-8-I.

IV. SUMMARY OF ARGUMENT

Burke's appeal of the Superior Court's orders denying his motion to vacate the arbitration award regarding his covert LCB appeal and granting the motion to confirm that award suffers from a primary, overarching flaw. Specifically, Burke ignores the "exceedingly limited" judicial review of arbitration awards and asks the Court to delve into the merits of the dispute in order to substitute its decision for that of the Arbitrator. But such review of the merits is incompatible with the limited review only for errors of law appearing on the face of the award and Washington's robust policy favoring arbitration of disputes. Thus, Burke has failed to meet his burden of establishing either that the dispute was not subject to the parties' arbitration agreement or that there are any errors of law manifest on the face of the award. Consequently, the Superior Court orders granting Viceroy's motion to confirm the award and denying Burke's motions to vacate and for reconsideration should be affirmed.

V. ARGUMENT

A. Standards of Review

1. Orders Confirming an Arbitration Award and Denying a Motion to Vacate Are Subject to Limited Review

The appellate court's review of an order confirming or vacating an arbitration award is the same as that of the trial court. *Cummings v. Budget Tank Removal & Envtl. Servs., LLC*, 163 Wn. App. 379, 388, 260 P.3d

220 (2011); *see also Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992). Thus, "review is confined to the question whether any of the statutory grounds for vacation exist" and the "burden of showing that such grounds exist is on the party seeking to vacate the award." *Cummings*, 163 Wn. App. at 388. *See also Barnett*, 119 Wn.2d at 157 ("[I]n the case of an appeal from an arbitrator's award, an appellate court is strictly proscribed from the traditional full review."). In the context of a motion to confirm or vacate an arbitration award, "judicial review of [the] award . . . is exceedingly limited." *Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998). Judicial review of an arbitration award "does not include a review of the merits of the case" and "[o]rdinarily, the evidence before the arbitrator will not be considered by the court." *Id.*

2. Denial of Motions for Reconsideration Are Reviewed Only for an Abuse of Discretion

Decisions on motions for reconsideration are addressed to the sound discretion of the trial court and are therefore reviewed for an abuse of discretion. *West v. Dep't of Licensing*, 182 Wn. App. 500, 516, 331 P.3d 72 (2014). A trial court abuses its discretion only if its decision is "manifestly unreasonable or based on untenable grounds or reasons." *Id.*

> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; and it is based on

> untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Id. at 516-17.

B. Burke Has Not Satisfied His Weighty Burden of Establishing a Statutory Basis to Vacate the Arbitration Award

Under Washington's Uniform Arbitration Act, an arbitration award must be confirmed absent a demonstration by the party challenging the award that it should be vacated based on the limited grounds for vacatur in RCW 7.04A.230. *See also* RCW 7.04A.220; *Davidson*, 135 Wn.2d at 124 (stating, in a case involving prior arbitration act, that "the exclusive grounds for challenging an arbitration award are enumerated in" the act). As relevant to this appeal, Burke has relied on two statutory grounds for vacating an arbitration award, specifically, where (1) "[a]n arbitrator exceeded the arbitrator's powers," RCW 7.04A.230(1)(d), and (2) "[t]here was no agreement to arbitrate," RCW 7.04A.230(1)(e). (*See* Appellants' Brf. at 26.) Burke, however, has failed to satisfy his burden of establishing that either basis justifies vacating the Arbitrator's award. *See Cummings*, 163 Wn. App. at 388 (party seeking to vacate an award has the burden of demonstrating that grounds for vacatur exist).

C. The Arbitrator Had Authority to Issue the July 30th Award

1. The Propriety of Burke's Attempt to Deprive Viceroy of the Benefit of the Bargain is an Arbitrable Dispute

Burke's challenge to the Arbitrator's authority to decide the

dispute addressed in the July 30th award is logically and legally flawed.

As the Arbitrator stated in his September 20th letter to the parties (CP 57), under Rule 7(a) of the American Arbitration Association ("AAA") Commercial Arbitration Rules,[6] the "arbitrator shall have the power to rule on his . . . own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." (Appendix to Respondents' Brief ("Respondents' Appendix") at App002.) The Arbitrator exercised that power and determined that he retained authority to address contingencies that arose in the enforcement and implementation of the relief granted in his prior awards. (*See* CP 57-58.) That determination is consistent with the Arbitrator's prior awards in which he retained jurisdiction for purposes of implementing the granted relief and otherwise "complet[ing] the adjudication of this dispute." (CP 606; *see also* CP 94-95.) It is also consistent with the parties' arbitration agreement and the robust public policy in Washington favoring arbitration.[7]

Washington law embodies a strong presumption and public policy

[6] Under the parties' Agreements, those rules apply to the arbitration. (CP 75, 84.)
[7] It is also consistent with the Arbitrator's prior rejection of Burke's challenge to the scope of the issues subject to arbitration and the Arbitrator's prior retention of jurisdiction to address implementation of the granted relief. (CP 584 (denying Burke's "objection to the scope of the issues being adjudicated"), 603-04; *see also* CP 94-95 (amended award further addressing relief granted), 606 (retaining jurisdiction for purposes of implementing relief).)

in favor of arbitrating disputes. *See, e.g.*, *Davis v. Gen. Dynamics Land Sys.*, 152 Wn. App. 715, 718, 217 P.3d 1191 (2009); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002). *See also ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 741, 862 P.2d 602 (1993) (describing it as the "inexorable presumption in favor of arbitration") (internal quotation marks omitted). The presumption is so strong that the "court must be able to say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 739 (internal quotation marks omitted); *see also Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 407, 200 P.3d 254 (2009) (stating that "[c]ourts must indulge every presumption in favor of arbitration") (internal quotation marks omitted).

Burke's attempt to artificially narrow the scope of the parties' arbitration agreement to exclude the dispute addressed by the award at issue is inconsistent with this presumption in favor of arbitration and the language of the parties' arbitration agreement.

Both Agreements contain identical arbitration provisions stating:

> **All disputes concerning this Agreement** shall be settled by binding arbitration . . . in accordance with the commercial arbitration rules of the American Arbitration Association then in effect. . . . The arbitrator is authorized to grant injunctive relief and/or specific performance in

> addition to monetary relief. The arbitrator hereby is instructed to interpret and enforce this Agreement in strict accordance with its terms, and in accordance with Washington law.

(CP 75-76, 84 (emphasis added).) Far from being a "very specific arbitration clause" that "carefully circumscribed" the Arbitrator's powers (Appellants' Brf. at 27), this provision broadly subjects "all" disputes "concerning" the parties' Agreements to arbitration. Notably, Washington courts have held that an arbitration clause covering any dispute "relating to" (effectively a synonym for "concerning") a contract is broader than a clause covering, for example, only claims "arising out" of a contract. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 887, 224 P.3d 818 (2009), *aff'd*, 173 Wn.2d 451 (2012); *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 314-15, 890 P.2d 466 (1995). And Burke offers no support for his assertion that the language requiring the Arbitrator to interpret and enforce the Agreements "in strict accordance with [their] terms, and in accordance with Washington law" limits the broad directive that "all" disputes concerning the Agreements are subject to arbitration.[8]

Moreover, Burke undermines his own argument that the dispute

[8] In purporting to discuss the scope of the arbitration clause, Burke argues that the Arbitrator failed to "strictly apply" the terms of the Tok Operating Agreement in finding that Burke breached the implied duty of good faith and fair dealing and the fiduciary duties the Arbitrator had previously found he owed to Viceroy and Wysong. (Appellants' Brf. at 28.) But not only is that a question of contract interpretation for the Arbitrator and not the Court, *Cummings*, 163 Wn. App. at 389-90, that has nothing to do with the Arbitrator's authority to adjudicate the dispute under the parties' arbitration agreement.

addressed in the award does not "concern" the parties' agreement by time and again relying on the language of the Tok Operating Agreement, challenging the Arbitrator's interpretation of that contractual language, and inviting this Court to adopt interpretations of the agreement that differ from those of the Arbitrator. (*See* Appellants' Brf. at 2, 4, 9, 14, 28, 35, 37-42.) Burke cannot simultaneously rely on the language of the agreement to challenge the Arbitrator's decision on the merits of the dispute and also claim that the dispute does not "concern" the agreement.[9]

Thus, there is no credible argument that the dispute regarding Burke's seller's remorse actions in contravention of the parties' Agreement and the Arbitrator's prior awards regarding the Agreement is not covered by the agreement to arbitrate. *See Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 714, 959 P.2d 1140 (1998) (noting that although the parties' intentions as expressed in the agreement control, "those intentions are generously construed as to issues of arbitrability") (internal quotation marks omitted). The strong presumption in favor of arbitration only further cements the conclusion that the dispute was subject to arbitration. *See, e.g.*, *Mendez*, 111 Wn. App. at 456-57 (interpreting the parties' agreements "in a manner favorable to arbitration," concluding that

[9] Burke's current argument is also inconsistent with his prior argument that the arbitration provision covered "all" disputes concerning the Agreements and relying on the strong presumption in favor of arbitration. (*See* CP 638-39.)

the claims were subject to arbitration).

2. The Stipulation Did Not Divest the Arbitrator of Authority to Determine the Propriety of Burke's Later Covert Prosecution of the LCB Appeal

The parties' stipulation—entered into nearly three years ago in connection with the arbitration hearing on the merits—does not alter the conclusion that the Arbitrator had authority to resolve the dispute over the propriety of Burke's later covert actions in light of the parties' Agreements and the Arbitrator's prior awards regarding the Agreements.

Prior to the Arbitrator's August 2017 award (which was confirmed in February 2018), the parties entered into a Stipulation on Exhibits and LCB Issue ("Stipulation") on July 7, 2017. In that Stipulation, the parties agreed that certain exhibits would be admitted into evidence and also that:

> The Arbitrator need not rule on the issue of whether or not Mr. Wysong can be vetted and approved by the LCB. The parties have agreed that the LCB can make that determination on its own should Respondents prevail in the arbitration.

(CP 91.) Consistent with the Stipulation, in his August 2017 award, the Arbitrator did not decide whether, as a factual matter, the LCB should or must approve Wysong as a true party of interest. (CP 594.) In his October 2017 Amended Arbitration Award that addressed additional relief, the Arbitrator likewise did not rule on that question. (CP 94-95.)

But Burke takes this unremarkable proposition—that it is the LCB, not a private arbitrator, who has been granted the statutory authority to vet

true parties of interest in cannabis licensees—and asks the Court to give it a much broader interpretation than the language can bear. Specifically, Burke argues that anything even touching upon the "WSLCB process" (as he characterizes it) is outside the Arbitrator's authority to address. But the plain language of the Stipulation does not support such an interpretation. To the contrary, the Stipulation simply states that the Arbitrator need not decide for the LCB whether the LCB will or will not approve Wysong as a true party of interest. (*See* RP 61:19-21, 66:18-67:2.) Whatever subjective intent Burke may have harbored cannot trump the plain, unambiguous language of the Stipulation. *See Condon v. Condon*, 177 Wn.2d 150, 162, 298 P.3d 86 (2013) (the parties' intent is "based on the objective manifestations of the agreement, rather than any unexpressed subjective intent of the parties"); *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005) (courts "do not interpret what was intended to be written but what was written").

Moreover, the Arbitrator's prior confirmed awards demonstrate the inaccuracy of Burke's subjective interpretation that the Stipulation covers any issue having anything whatsoever to do with the "WSLCB process". In the October 2017 Amended Arbitration Award, the Arbitrator ordered the parties (a) to "cooperate in good faith to complete and submit" the change in ownership form to the LCB to allow it to investigate and vet the

change and Wysong as a true party of interest, (b) to "provide reasonable cooperation to each other and the WSLCB during the WSLCB's vetting process, including providing any documents or information requested by the WSLCB," and (c) not to identify Tok's profits as the source of the purchase payment to Burke during the LCB's vetting process. (CP 94.) These items involve the "WSLCB process" but Burke did not argue that the Stipulation rendered the Arbitrator without authority to award that relief in his motion to vacate that award (which was confirmed and is no longer subject to challenge). (CP 645-65.)

In short, whatever Burke's subjective intent may have been when entering into the Stipulation, it is irrelevant. The plain, unambiguous language of the Stipulation in no way limits the Arbitrator's power to decide the propriety of *Burke's* actions with respect to his covert LCB appeal under the parties' Agreements and the Arbitrator's prior awards.[10]

3. The *Functus Officio* Doctrine Has No Applicability to the Arbitrator's July 30th Award

Burke's reliance on the *functus officio* doctrine to assert that the Arbitrator lacked authority to resolve the parties' dispute regarding Burke's covert actions regarding the LCB appeal is misplaced.

[10] Additionally, as discussed below (*see infra* at 45), the Arbitrator's July 30th award in no way ordered the LCB or the Office of Administrative Hearings ("OAH") to take any action or render any decision. Rather, the award focused solely on Burke's improper actions and required Burke to take actions to remedy the harm he caused.

Under the *functus officio* doctrine, an arbitrator generally is not permitted to redetermine an issue upon which he has already issued a final award. *See Int'l Bhd. of Teamsters, Local 631 v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409, 1411 (9th Cir. 1997); *see also* AAA Commercial Arbitration Rule 50 ("The arbitrator is not empowered to redetermine the merits of any claim already decided.").[11] The policy underlying the *functus officio* doctrine is an unwillingness to permit non-judicial officers from re-examining and redetermining the merits of a final decision on an issue. *See McClatchy Newspapers v. Cent. Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982).

But, as the above description of the doctrine illustrates, the doctrine comes into play only where (1) there has been a final award on an arbitrated issue, (2) the merits of which the arbitrator has revisited and redetermined. *See, e.g.*, *CUNA Mut. Ins. Soc'y v. Office & Prof'l Emps. Int'l Union, Local 39*, 443 F.3d 556, 565 (7th Cir. 2006) ("The *functus officio* doctrine holds that after a final decision by an arbitrator, the arbitrator becomes *functus officio* and lacks the power to reconsider or amend the decision.") (internal quotation marks omitted); *Int'l Bhd. of Teamsters*, 109 F.3d at 1411 (noting that under the *functus officio* doctrine,

[11] *See* Respondents' Appendix at App003.

"an arbitrator may not redetermine an arbitration award"); *Dep't of Transp., Ferries Div. v. Marine Emps.' Comm'n*, 167 Wn. App. 827, 831 n.3, 274 P.3d 1094 (2012) ("[O]nce an arbitrator has issued a final award, having fulfilled his . . . function, he . . . is without authority to . . . reexamine the final award.") (internal quotation marks omitted).

Here, the doctrine simply does not apply as the Arbitrator was not asked to (and did not) revisit or redetermine any issue previously decided in a final award, nor does Burke claim he did. In fact, the July 30th award could not address an issue previously decided as it addresses actions Burke took *after* prior awards were issued and before Viceroy (and the Arbitrator) learned of Burke's covert actions from a third party. As a result, the *functus officio* doctrine provides no basis to vacate the arbitration award at issue. *See Blanco v. Trump Ruffin Tower I, LLC*, No. 2:11-cv-00153-GMN-PAL, 2011 U.S. Dist. LEXIS 95724, *8-9, 13-14 (D. Nev. Aug. 25, 2011) (noting that the "threshold issue" with the *functus officio* doctrine is whether the issue had already been decided and if so, whether the arbitrator revisited that decided issue).

Even if the Court were to extend the *functus officio* doctrine as Burke suggests beyond its accepted scope, the doctrine is subject to a number of exceptions. For example, some of the most well-recognized exceptions include the arbitrator's authority (1) to correct a mistake in a

final award, (2) to clarify an ambiguity in the final award, or (3) to complete an arbitration if the award is not complete. *Int'l Bhd. of Teamsters*, 109 F.3d at 1411. Here, the award addressing Burke's covert actions following entry of the Arbitrator's prior awards falls within one or more of these exceptions to the doctrine.

The exception permitting an arbitrator to complete an arbitration "applies when an arbitration award fails to resolve an issue or specify the remedy in definite terms." *Id.* (internal quotation marks omitted). The exception permitting clarification of an ambiguity "applies when the award, although seemingly complete, leaves doubt whether the submission has been fully executed." *Id.* (internal quotation marks omitted).

The new issue implicated by Burke's covert prosecution of the LCB appeal after he accepted Viceroy's payment to complete the sale arose after the Arbitrator's prior awards and related to remedial measures. Where an award does not address such contingencies that arose after the award was issued, courts have held that an arbitrator may address that contingency under either the completion or ambiguity exceptions to the *functus officio* doctrine. *See id.* ("An award that fails to address a contingency that has arisen after the award was made is incomplete; alternatively, it is unclear; either way, it is within an exception to the doctrine.") (internal quotation marks omitted).

Although Burke attempts to narrowly hem in the Arbitrator's authority to address later arising contingencies by misapplying the *functus officio* doctrine, the Arbitrator explicitly found that his retained jurisdiction necessarily included the period in which prior awarded relief was implemented.[12] *See also Engis Corp. v. Engis, Ltd.*, 800 F. Supp. 627, 632 (N.D. Ill. 1992) (rejecting party's attempt to apply the *functus officio* doctrine to arbitrator's retention of jurisdiction to ensure compliance with an award). The Arbitrator's conclusion is also consistent with his prior confirmed awards in which he retained jurisdiction for purposes of implementing the relief in the August 2017 award (amended by the October 2017 award) "to the extent necessary to complete the adjudication of this dispute." (CP 606; *see also* CP 94-95.) Under AAA Commercial Arbitration Rule 7(a), applicable to the arbitration pursuant to the parties' Agreements, the Arbitrator had the power to rule on his own jurisdiction, including any objections to the arbitrability of an issue, a power he exercised here. (*See* CP 57-58, 75, 84; *see also* Respondents' Appendix at

[12] The Arbitrator explained:

> [W]hen deciding that Respondents' request for relief was within my retained jurisdiction to arbitrate, I recognized through my more [than] three years of familiarity with this case that because of the complex nature of the agreements being enforced and the implementation of relief as future contingencies were resolved, that my jurisdiction as arbitrator would necessarily continue during the future period in which such relief would be implemented.

(CP 57-58.)

App002.) And exercising jurisdiction over the implementation of remedies is consistent with the "abundance of case law" acknowledging "the propriety of an arbitrator retaining jurisdiction over the remedy portion of an award." *CUNA*, 443 F.3d at 565. The exercise of jurisdiction is particularly appropriate here given this long-running dispute and the Arbitrator's familiarity with the issues, facts and prior-awarded relief.

In short, the "doctrine applies only after the arbitrator's assigned duties have ended." *Heimlich v. Shivji*, 7 Cal. 5th 350, 363, 441 P.3d 857, 247 Cal. Rptr. 3d 603 (2019). Here, as a result of Burke's own actions, the Arbitrator's duties were not complete and the *functus officio* doctrine does not prevent the Arbitrator from resolving these later arising contingencies.[13] *See Engis*, 800 F. Supp. at 632 (in rejecting applicability of *functus officio* doctrine to issues regarding compliance with an award, noting that "[p]rohibiting retention of enforcement jurisdiction would needlessly undermine the arbitration process by requiring either perpetual judicial intervention or the selection of additional arbitrators to resolve future enforcement disputes").

[13] The AAA Commercial Arbitration Rules further support the Arbitrator's authority to issue the July 30th award. For example, Rule 47(a) gives the arbitrator authority to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." And Rule 47(b) acknowledges that the arbitrator may, in addition to rendering a final award, "make other decisions, including interim, interlocutory, or partial rulings, orders, and awards." (Respondents' Appendix at App003.)

Moreover, Burke should be estopped from any claim that the Arbitrator no longer had authority to address his actions with respect to the LCB appeal in light of his (and his counsel's) remarkable lack of candor to his Tok co-owner and co-manager and the Arbitrator. Burke claims that the Arbitrator's jurisdiction terminated with the issuance of the offset award, which was dated June 24, 2019.[14] (Appellants' Brf. at 31-32; *see* CP 103-05.) That claim is convenient because, as a result of Burke's and his counsel's failure to provide any notice of the existence of his LCB appeal to Viceroy or its counsel or the Arbitrator, Viceroy did not learn of the appeal until June 26, 2019, when the AAG representing the LCB told Viceroy's counsel of the appeal. (CP 100.) Burke's and his counsel's lack of candor is even more egregious as there were filings and proceedings before the Arbitrator leading up to the June 24th offset award but still neither Burke nor his counsel made any mention of the LCB appeal to Viceroy or the Arbitrator. (*See* CP 99-100, 103-04.) Thus, Burke's duplicitous conduct should not be rewarded by adopting his request to arbitrarily cut off the Arbitrator's authority on June 24th when neither Viceroy nor the Arbitrator knew, or had reason to know, of Burke's covert

[14] Notably, even in the June 24th offset award the Arbitrator stated that Viceroy's petition for attorneys' fees and costs "shall be deferred until the case is fully resolved." (CP 105.) Thus, the award Burke relies upon to claim that the arbitration was concluded itself unambiguously states that the arbitration was not yet fully resolved.

actions attempting to destroy Viceroy's benefit of the parties' bargain and thwart the prior relief granted by the Arbitrator.

Finally, Burke's assertions that the Arbitrator "declared himself a *de facto* third manager of Tok" and bestowed upon himself unending authority "to consider any and all issues between the parties" (Appellants' Brf. at 32), are empty rhetoric. The Arbitrator's award dealt directly with an issue that was indisputably part of the parties' ongoing dispute, as described herein. Nothing in the award suggests that the Arbitrator bestowed upon himself authority to resolve any dispute between the parties in perpetuity and Burke tellingly points to no language in the award to support his assertions.

D. Burke Fails to Establish Any Error of Law Appearing on the Face of the Arbitration Award

1. The Arbitrator Did Not Modify the Award

Despite the lack of support for the allegation, Burke again argues that the Arbitrator improperly modified the July 30th award in his September 20th letter to the parties. But Burke's allegation is frivolous.

In no less than two places in his September 20th letter, the Arbitrator explicitly and unambiguously stated that the letter was "not intended to amend the relief previously granted." (CP 57, 59 (stating that the letter "does not modify any prior relief awarded"). Comparing the arbitration award and the September 20th letter readily establishes the

veracity of the Arbitrator's statements—the remedy granted in the award was not in any way changed, modified, expanded or reduced in the letter. Thus, there is no support for Burke's allegation that the September 20th letter to the parties constitutes a "modification" of the arbitration award.

2. Burke Has Not Established Any Error of Law in the Arbitrator's Conclusion That Burke Improperly Accepted Payment While Covertly Attempting to Vitiate Viceroy's Benefit of the Parties' Bargain

In determining whether an arbitrator exceeded his powers by making an error of law, the alleged error must appear on the face of the award. *Salewski v. Pilchuck Veterinary Hosp., Inc.*, 189 Wn. App. 898, 904, 359 P.3d 884 (2015). "The evidence before the arbitrator will not be considered." *Westmark Props., Inc. v. McGuire*, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989). Moreover, the facial legal error standard "does not extend to a potential legal error that depends on the consideration of the specific evidence offered or to an indirect sufficiency of the evidence challenge." *Salewski*, 189 Wn. App. at 904.

Burke alleges that the Arbitrator exceeded his powers by making various errors of law that purportedly appear on the face of the award. Burke, however, has failed to satisfy his burden of establishing any such errors. Moreover, even assuming *arguendo* that Burke had established one of the alleged such errors of law, that would be insufficient to vacate the arbitration award. Rather, Burke must establish each of the purported

errors of law he alleges or the award must be confirmed. *See, e.g.*, *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003) (appellate court can affirm on any ground supported by the record).

a. Subterfuges and Evasions Violate the Obligation of Good Faith in Performance

Burke essentially challenges the Arbitrator's interpretation of the Tok Operating Agreement, including the interpretation of that agreement embodied in the prior (confirmed) awards, by arguing that the agreement gave Burke unfettered, unilateral authority to initiate *and prosecute* the LCB appeal and to conceal the existence of the appeal from his Tok co-manager (Wysong) and Tok's co-owner (Viceroy). But in the exceedingly limited review of arbitration awards, the Court "do[es] not review an arbitrator's interpretation of a contract" nor does it "examine contract language relevant to the dispute." *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn. App. 2d 594, 610, 439 P.3d 662 (2019), *review denied*, 193 Wn.2d 1033 (2019); *see also Cummings*, 163 Wn. App. at 389-90. To the contrary, arbitrators are "the judges of both the law and the facts." *Mainline*, 8 Wn. App. 2d at 608. But even if the Court were to reach Burke's argument regarding the Arbitrator's interpretation of the parties' agreement and the Arbitrator's application of the implied duty of good faith and fair dealing to the facts, Burke has failed to satisfy his burden of demonstrating an error of law appearing on the face of the award.

Under Washington law, every contract includes an implied duty of good faith and fair dealing that "obligates the parties to cooperate with one another so that each may obtain the full benefit of performance." *Frank Coluccio Constr. Co. v. King Cty.*, 136 Wn. App. 751, 764, 150 P.3d 1147 (2007) ("*Coluccio*"). The implied duty does not have a "one-size-fits-all definition." *Microsoft Corp. v. Motorola, Inc.*, 963 F. Supp. 2d 1176, 1184 (W.D. Wash. 2013) (applying Washington law). Rather, its meaning varies with the particular context of the case.

Section 205 of the Restatement (Second) of Contracts, often cited with approval by Washington courts,[15] offers useful descriptions and examples of the varied meaning of the duty. As a general matter, "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party[.]" RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. a (1981) ("Restatement"). The Restatement goes on to describe what may constitute bad faith performance in a particular context:

> **Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified**. But the obligation goes further: bad faith may be overt or may consist of inaction, and **fair dealing may require more than honesty**. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions:

[15] *See, e.g.*, *Edmonson v. Popchoi*, 172 Wn.2d 272, 280, 256 P.3d 1223 (2011); *Coluccio*, 136 Wn. App. at 766.

> **evasion of the spirit of the bargain**, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and **interference with or failure to cooperate in the other party's performance**.

RESTATEMENT § 205, cmt. d (emphasis added). Additionally, while a subjective bad faith intent or dishonesty may support a breach of the implied duty of good faith and fair dealing, it is not necessary to establish such a breach. *See, e.g.*, *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001) (applying Washington law and noting that the fact that "a party can breach the [implied] duty . . . by acting dishonestly or unlawfully does not mean that dishonesty or an unlawful purpose is a necessary predicate to proving bad faith") (cited with approval in *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 113, 323 P.3d 1036 (2014)).

Here, Burke's actions readily meet various of these examples of bad faith. As the Arbitrator found, Burke's actions in accepting more than half a million dollars from Viceroy for its purchase of a 50 percent ownership interest in Tok while continuing a covert appeal attempting to destroy that interest, at best constitutes an evasion of the spirit of the parties' bargain or at worst, demonstrates intentional subterfuge and dishonesty. Even if the Court may have reached a different conclusion on the merits had it been the decision maker in this case, it may not supplant the Arbitrator's decision for its own absent an error of law appearing on the face of the award. Burke has demonstrated no such facial error.

Moreover, contrary to Burke's suggestion, although the implied duty of good faith and fair dealing is tied to the terms of the parties' agreement, a "breach of a specific provision of the contract is not a necessary prerequisite" to a claim for breach of the duty. *Rekhter*, 180 Wn.2d at 111-13 (internal quotation marks omitted). "Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract." *Id.* at 112 (internal quotation marks omitted).

In purported support of his argument on the implied duty of good faith and fair dealing, Burke focuses on his rights under the Tok Operating Agreement at the time he was Tok's sole manager, which he argues included the unilateral right to initiate the LCB appeal. But even if the Court were to reach this issue of contract interpretation despite the limited review of arbitration awards,[16] it is telling that Burke ignores his actions *after* Viceroy became a 50 percent owner of Tok and *after* Wysong became a co-manager. Specifically, after demanding and accepting more than half a million dollars from Viceroy based on the LCB approval, Burke continued prosecuting the LCB appeal, failed to notify Viceroy of

[16] *See, e.g.*, *Mainline*, 8 Wn. App. 2d at 611 (stating that a "court may not review contract language not quoted in the arbitration award" and noting that "[a]nalyzing the contract language goes beyond facial error, possibly entails an intricate review of the merits of the case, and conflicts with the goal of avoiding extensive and expensive litigation").

the appeal or his actions in prosecuting it (including the continued retention of his attorney to prosecute the appeal) and thereby acted inconsistently with Viceroy's status as a 50 percent owner and Wysong's status as a co-manager. *See, e.g.*, *Scribner*, 249 F.3d at 909 (party could breach the duty of good faith and fair dealing "simply by disregarding [the other party's] justified expectations" under the parties' agreements); *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1101 (W.D. Wash. 2011) (under Washington law, the implied duty of good faith and fair dealing "prevents a contracting party from engaging in conduct that frustrates the other party's right to the benefits of the contract").

Additionally, Burke ignores the Arbitrator's prior confirmed award requiring the parties to (1) "cooperate in good faith" to complete and submit the change of ownership application to allow the LCB to investigate the proposed change of ownership and vet Wysong as a true party of interest, and (2) "provide reasonable cooperation to each other and the WSLCB during the WSLCB's vetting process." (CP 94.) Burke's actions in accepting more than half a million dollars from Viceroy for the 50 percent interest in Tok but then continuing to secretly prosecute his LCB appeal to vitiate that interest constitutes bad faith under any reasonable definition of the term. Thus, the Arbitrator acted well within his authority to determine that Burke's actions were inconsistent with his

prior awards and the implementation of the awarded relief. The Arbitrator's determination on the merits of the disputed issue is not subject to judicial review. *See Barnett*, 119 Wn.2d at 157 ("Review of an arbitrator's award does not include a review of the merits of the case.").

As a result, Burke's challenge to the Arbitrator's decision on the implied duty of good faith and fair dealing is without merit.

b. Burke's Argument Regarding the Term "Ultra Vires" is Without Merit

Burke challenges the Arbitrator's use of the Latin term "*ultra vires*", arguing that this language choice constitutes an error of law subject to judicial review. But Burke's argument is flawed in at least two respects.

First, Burke mischaracterizes the Arbitrator's use of the term, focusing on the formal *ultra vires* doctrine despite the absence of language in the award suggesting that the Arbitrator intended to rely on a specific doctrine. It is apparent from the award that the Arbitrator used the term *ultra vires* in a general sense rather than in a strict doctrinal application. "*Ultra vires*" simply describes acts that are "performed with no legal authority." *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010); *see also Haslund v. City of Seattle*, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976) ("An ultra vires act is one performed without any authority to act on the subject."). While the term can also refer to a specific doctrine, it is evident from the face of the award that the

Arbitrator used the term for its general meaning, e.g., to describe an action taken without authority. The face of the award simply states that Burke's actions with respect to the covert LCB appeal were taken without authority, e.g., *ultra vires*, based on the Arbitrator's interpretation of the parties' agreement and the prior awards. (*See* CP 51-52.)

There is no error of law in using the term "*ultra vires*" as a shorthand way of describing the Arbitrator's interpretation of the parties' agreement and the prior awards in the context of Burke's actions. *See, e.g.*, *N. State Constr. Co. v. Banchero*, 63 Wn.2d 245, 250, 386 P.2d 625 (1963) (identifying "ultra vires conduct by the arbitrators" as a ground upon which an arbitration award could be vacated or modified).

Second, even if the Arbitrator had applied the formal *ultra vires* doctrine in reaching his decision (which he did not),[17] Burke improperly asks the Court to review and interpret the Tok Operating Agreement in order to determine whether the Arbitrator correctly found Burke's actions to be *ultra vires* under that agreement. (*See* Appellants' Brf. at 37-39.) For example, Burke points the Court to specific sections of the Tok Operating

[17] In passing, Burke also asserts that the *ultra vires* doctrine only applies to the actions of an entity and cannot be applied to the "individual actions of a person," citing to a section of the Washington business corporation act in purported support of his assertion. (Appellants' Brf. at 37.) But the section of the act addressing *ultra vires* acts of corporations in no way establishes that the doctrine cannot apply to the "individual actions of a person" and case law supports a contrary conclusion. *See, e.g.*, *Bd. of Regents v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987).

Agreement and asks it to conclude that, based on those sections, Burke was authorized to take the actions that were the subject of the Arbitrator's award.[18] (*See* Appellants' Brf. at 37-38.) But in reviewing an arbitration award, the Court "may not examine contract language relevant to the dispute" or "review an arbitrator's interpretation of a contract." *Mainline*, 8 Wn. App. 2d at 610; *see also Cummings*, 163 Wn. App. at 389-90 (same). Thus, the Court should reject Burke's invitation to review either the parties' agreement or the Arbitrator's interpretation of that agreement, both of which require review of the evidence and the merits of the dispute. *See, e.g.*, *Salewski*, 189 Wn. App. at 904, 907.

c. The Award's Statement Regarding Fiduciary Duties is Consistent With the Prior Confirmed Award and Washington Law

In his August 2017 award—which was confirmed years ago and is no longer subject to challenge—the Arbitrator concluded that:

> As prospective LLC members, or managers Wysong and Viceroy are in effect partners of Burke and TOK and therefore owe each other fiduciary duties consistent with the terms of the LLC agreements once implemented.

(CP 605.) Yet Burke ignores this prior conclusion and instead asserts various evidentiary sufficiency challenges to the Arbitrator's July 30th

[18] Although the Court's review of the award does not extend to interpretation of the parties' agreement or the Arbitrator's interpretation of the agreement, Viceroy has repeatedly demonstrated that Burke's interpretation of the Tok Operating Agreement is erroneous. (*See, e.g.*, CP 466-68, 473-74.)

award and again invites the Court to interpret the Tok Operating Agreement and overrule the Arbitrator's interpretation. (Appellants' Brf. at 35-36.) But none of Burke's arguments demonstrate a statutory basis to vacate the Arbitrator's award, e.g., an error law on the face of the award.

The Arbitrator's factual determination that Burke's actions with respect to his covert LCB appeal breached fiduciary duties is consistent both with the Arbitrator's prior (confirmed) award and Washington law.

First, as described above, in his August 2017 award, the Arbitrator found that Burke/Tok and Viceroy/Wysong were in effect partners that owed fiduciary duties to one another. (CP 605.) That award was confirmed in February 2018 (CP 664-65), and Burke did not appeal that decision or the decision denying his motion to vacate that award (CP 577-80). As a result, Burke cannot challenge the Arbitrator's long-confirmed finding as to the existence of fiduciary duties Burke owes to Viceroy and Wysong. Given that fact, Burke cannot show, and has not shown, that there was any error of law appearing on the face of the award in the Arbitrator's factual finding that Burke had violated the previously found fiduciary duty to Viceroy and Wysong. (CP 51-52, 59.)

Second, Burke has not demonstrated that the Arbitrator's finding that Burke's covert actions regarding the LCB appeal constituted a breach of his fiduciary duties was erroneous under Washington law, much less

that any purported error appears on the face of the award. Burke attempts to cloak his argument as one involving an error of law by faulting the Arbitrator for not using specific language to describe the fiduciary duties at issue, e.g., not using the statutory language of a "duty of loyalty" or a "duty of care". (*See* Appellants' Brf. at 34-35.) But it is clear from Burke's own argument in his brief that he is in fact improperly asking the Court to review the merits of the Arbitrator's decision and supplant that decision with the Court's own assessment of the merits. For example, Burke raises an evidentiary sufficiency claim, arguing that "there was no evidence to support a finding that Burke violated these statutory duties of loyalty or care." (Appellants' Brf. at 35.) And yet again, Burke asks the Court to interpret the parties' agreement to find that his prosecution of the secret LCB appeal after accepting more than half a million dollars from Viceroy was "fully authorized by the [Tok] Operating Agreement." (Appellants' Brf. at 35.) But both of Burke's arguments would require the Court to far exceed the limited scope of review of arbitration awards by reviewing the evidence and the merits of the dispute. *See Mainline*, 8 Wn. App. 2d at 610 (under facial legal error review, courts "do not look to the merits of the case, and they do not reexamine evidence").

Thus, Burke fails to demonstrate that there was any error of law apparent on the face of the award relating to the Arbitrator's conclusions

on Burke's breach of prior-established fiduciary duties. Additionally, even assuming *arguendo* that Burke had satisfied his burden of showing an error of law with respect to the fiduciary duty, the July 30th award can be upheld on the independent ground of Burke's breach of the implied duty of good faith and fair dealing, as discussed above. (*See supra* at 29-34.)

As part of his flawed discussion of the breach of fiduciary duty issue, Burke claims he did not owe Viceroy "any duty of candor" with respect to informing Viceroy (50 percent owner of Tok) or Wysong (co-manager of Tok) of Burke's prosecution of the LCB appeal. (Appellants' Brf. at 36 n.15; *see also* RP 56:4-9 (exchange with trial court where Burke's counsel opined that Burke had no obligation to inform his co-owner and co-manager of the LCB appeal).) The Arbitrator concluded otherwise, either as part of the implied duty of good faith and fair dealing requiring "the parties to cooperate with one another so that each may obtain the full benefit of performance," *Coluccio*, 136 Wn. App. at 764, or as part of the fiduciary duties the Arbitrator previously found Burke owed to Viceroy and Wysong (CP 605). Given the facts of this long-running dispute and Burke's continued attempts to thwart or circumvent the arbitration awards enforcing the parties' Agreements (and therefore Viceroy's 50 percent interest in Tok), these conclusions were well within the Arbitrator's authority as the "judge[] of both the law and the facts."

Mainline, 8 Wn. App. 2d at 608.

d. Burke's Alleged Inconsistencies in the July 30th Award and the September 20th Letter are Illusory

Burke alleges that the July 30th award and the Arbitrator's September 20th letter to the parties are "internally inconsistent" in four ways: (1) the Arbitrator's decision that he had authority to decide the propriety of Burke's actions with respect to the covert LCB appeal purportedly contradicted his prior award and the Stipulation; (2) the Arbitrator's purported statement that Burke had failed to transfer a 50 percent interest in Tok to Viceroy allegedly contradicted the Arbitrator's other statements; (3) the purported ruling that Burke failed to transfer the 50 percent interest in Tok allegedly contradicted the Arbitrator's rulings on the fiduciary duties and Burke's *ultra vires* actions; and (4) by stating in his September 20th letter to the parties that the letter did not modify any relief granted in the July 30th award at issue but then purportedly modifying that award in the letter. (Appellants' Brf. at 43-45.) Each of these allegations are wholly lacking in merit.

First, as discussed above (*see supra* at 18-20), the Stipulation did not divest the Arbitrator of power to determine the propriety of Burke's actions with respect to the covert LCB appeal in light of the parties' Agreements and the Arbitrator's prior awards. Neither the Stipulation nor the Arbitrator's prior awards stated that the Arbitrator lacked authority to

address an issue that could be said to relate in any way whatsoever to the "WSLCB process". To the contrary, both the Stipulation and the prior awards consistently acknowledged the unremarkable proposition that the Arbitrator need not decide whether the LCB should or should not approve Wysong as a true party of interest in Tok. (*See* CP 91, 594.)[19] Nothing in the award at issue finding Burke's seller's remorse actions with respect to the secret LCB appeal improper is inconsistent with that acknowledgement. Thus, Burke's first alleged inconsistency is illusory.

Burke's second and third alleged inconsistencies are based upon a mischaracterization of the Arbitrator's award and his September 20th letter to the parties. Burke alleges that the Arbitrator found both that Burke had breached the parties' agreement by failing to transfer the 50 percent ownership interest in Tok to Viceroy but also found that he breached duties that would arise only if that interest was transferred and Viceroy was a co-owner (and Wysong a co-manager of Tok). (*See* Appellants' Brf. at 44-45.) But Burke misstates the Arbitrator's conclusion.

In his award, the Arbitrator found that because Burke accepted the benefit of the parties' bargain—payment by Viceroy of more than half a million dollars—Burke was obligated to accept Viceroy's 50 percent

[19] Burke's assertion that the Arbitrator previously found that the "WSLCB process was completely outside of the arbitration" (Appellants' Brf. at 43), finds no support in the language of the Stipulation or the Arbitrator's prior awards. (*See supra* at 18-20.)

ownership of Tok and Wysong as co-manager of Tok. (CP 51-52; *see also* CP 58.) But although Burke accepted the payment, he failed to accept the rights and control that Viceroy and Wysong had (and have) as, respectively, co-owner and co-manager of Tok, by failing to notify them of his prosecution of the LCB appeal and necessarily preventing them from having any say in the prosecution of the appeal. (CP 51 ("Burke sought to accept only the benefits of his agreement with Respondent without the burdens of accepting Viceroy [as] a 50% co-owner."); CP 58 (stating that upon accepting the payment from Viceroy, Burke was "obligated to convey 50% interest ***and control*** of TOK to Viceroy") (emphasis added).) Thus, it is not inconsistent to find that the transfer technically occurred but Burke breached the implied duty of good faith and fair dealing by preventing Viceroy and Wysong from exercising their control rights and duties with respect to Tok.[20]

Finally, as discussed above, the Arbitrator did not modify the July 30th award in his September 20th letter to the parties. (*See supra* at 27-28.) As a result, his statements that the letter in no way modified the award

[20] Viceroy's motion to disqualify counsel for Burke from also representing Tok in this appeal (which motion has been referred to the Court for decision), illustrates one context in which Burke has refused to accept Viceroy's and Wysong's control and management rights as, respectively, co-owner and co-manager of Tok. (*See* Respondents' Motion to Disqualify Counsel for Tok, LLC at 11-14; Respondents' Reply in Support of Motion to Disqualify Counsel for Tok, LLC at 3-4, 8-10.)

necessarily cannot be inconsistent.

e. Burke Has Failed to Demonstrate an Error of Law Appearing on the Face of the Award With Respect to the Relief Granted

Burke argues that the relief granted in the Arbitrator's award was improper, citing to a single, irrelevant, case and then yet again inviting the Court to review the Arbitrator's interpretation of the Tok Operating Agreement and effectively overrule that interpretation. (Appellants' Brf. at 41-42.) But neither argument demonstrates an error of law appearing on the face of the arbitration award.

First, Burke's suggestion that expectation damages are the sole remedy the Arbitrator could award for breach of contract is simply incorrect. For example, specific performance is a well-recognized remedy available under Washington law. *See Pardee v. Jolly*, 163 Wn.2d 558, 568-69, 182 P.3d 967 (2008). Indeed, specific performance is likely the most appropriate remedy in cases such as this where a party breaches the implied duty of good faith and fair dealing by trying to undermine a bargain he later regrets agreeing to. *See Cavell v. Hughes*, 29 Wn. App. 536, 539-41, 629 P.2d 927 (1981) (remanding for entry of judgment for specific performance where defendant did not proceed in good faith, trying to get "out of the agreement because he felt he had made a bad bargain"). Nothing in the sole case Burke cites supports his suggestion that

expectation damages is the only available remedy in such circumstances.

Second, the appropriate remedy was a decision for the Arbitrator. Under the Uniform Arbitration Act, "an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding." RCW 7.04A.210(3). *See also Endicott Educ. Ass'n v. Endicott Sch. Dist. No. 308*, 43 Wn. App. 392, 394-95, 717 P.2d 763 (1986) (stating that "[i]nherent in the authority to adjudicate the breach [of contract] is the power to remedy it" and "arbitrators generally have authority to fashion any remedy necessary to the resolution of the dispute"). The "fact **that such a remedy could not or would not be granted by the court is not a ground** for refusing to confirm an award . . . or **for vacating an award**[.]" RCW 7.04A.210(3) (emphasis added). AAA Commercial Arbitration Rule 47(a) also gives the arbitrator authority to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." (Respondents' Appendix at App003; *see also* CP 75, 84.)

Third, Burke's arguments regarding the actions that the Tok Operating Agreement purportedly does or does not authorize raise questions of interpretation of the parties' agreement that are for the Arbitrator, not the Court. *See, e.g.*, *Mainline*, 8 Wn. App. 2d at 610;

Cummings, 163 Wn. App. at 389-90.

Finally, Burke's allegation that the Arbitrator exceeded his power by exercising authority over an independent tribunal—the OAH in which Burke's covert LCB appeal is pending—is without merit. Nowhere does the Arbitrator direct the OAH (or the LCB) to take any action or make any decision. (*See* RP 6:23-7:2 (trial court indicating that it was leaning toward finding that the Arbitrator "clearly was addressing the parties' conduct under the agreements rather than trying to tell [the LCB] what to do or interfere with that process"); RP 63:18-22 (trial court noting that the arbitration award "doesn't tell the LCB what to do").) The Arbitrator's award was directed solely at Burke—the party engaging in the wrongful conduct and over whom the Arbitrator indisputably had authority under the parties' arbitration agreement. Thus, Burke's accusation that the Arbitrator interfered with an independent tribunal is spurious.

E. Burke's Collateral Attack on Prior Confirmed Arbitration Awards Should Not be Countenanced

Burke feigns umbrage at the purported "abuse of the arbitration system" and "overreach by an arbitrator" of unprecedented magnitude. (Appellants' Brf. at 48.) But these circumstances are entirely of Burke's own making as he continues his attempts to undermine a bargain he wishes he'd never made and arbitration awards in Viceroy's favor that hold him to that bargain. Burke chose to accept more than half a million

dollars from Viceroy for a 50 percent interest in Tok but remained silent about his ongoing prosecution of an appeal that could effectively deprive Viceroy of that interest without an opportunity to protect it.

Thus, it is Burke who is attempting a collateral attack. Having lost in the arbitration and therefore being bound to a deal he now regrets entering into and being unable to challenge the prior confirmed awards against him, Burke opted to collaterally attack those awards by secretly appealing the LCB's approval of Tok's change of ownership. And by choosing to conceal the appeal from Viceroy (50 percent owner of Tok) and Wysong (co-manager of Tok), Burke hoped to deprive Wysong of any opportunity to challenge the false allegations of wrongdoing Burke made in the appeal. Burke continued his efforts to divest Viceroy of its interest in Tok by opposing Viceroy's motion to intervene in the LCB appeal.

Viceroy and Wysong have taken reasonable steps to protect Viceroy's interest in Tok (for which Burke accepted more than half a million dollars) and defend against the allegations made by Burke. Despite having sought to intervene in that appeal to protect those interests, the OAH's failure to decide that request has left Viceroy in limbo, facing the possibility that its rights will be adjudicated in its absence. In light of that untenable situation and the parties' ongoing arbitration on related issues, Viceroy logically and reasonably sought relief from the Arbitrator.

Moreover, it is Burke who is attempting to undermine the arbitration process and Washington's strong presumption in favor of arbitrating disputes. "The very purpose of arbitration is to avoid the courts. It is designed to settle controversies, not to serve as a prelude to litigation." *Westmark*, 53 Wn. App. at 402. Burke has only multiplied the proceedings and collaterally attacked the Arbitrator's awards in favor of Viceroy by prosecuting his LCB appeal and keeping his actions secret from Viceroy and the Arbitrator. Therefore, to the extent public policy plays a role, it favors upholding the finality of arbitration awards by affirming the Superior Court order confirming the award.

F. Burke's Counsel's Conflict of Interest Prevents His Representation of Co-Owned and Co-Managed Tok

Viceroy's motion to disqualify Burke's counsel from also representing Tok in this appeal has been fully briefed and referred to the Court for decision. Thus, the parties' positions are fully set forth in their briefing on the motion. Nonetheless, in his brief, Burke claims that "[a]dditional evidence . . . has come to light" since the briefing. (Appellants' Brf. at 49.) But Burke's claim of "additional" evidence is irrelevant to the issue at the core of Viceroy's motion to disqualify.

Regardless of whether a letter was sent in a law firm envelope or an email was cc'd to Viceroy's counsel, that so-called evidence cannot obscure the fact that Burke's counsel is operating under an irreconcilable

conflict of interest. Specifically, Burke's counsel purports to represent Tok in this appeal but is following only the direction of one of Tok's owners and managers (Burke, who counsel also represents individually) to the exclusion and disregard of Tok's other 50 percent owner (Viceroy) and co-manager (Wysong). Viceroy has not consented to the representation of Tok by Burke's counsel nor has it consented to any waiver of the conflict of interest inherent in counsel's dual representation.[21] Notably, Burke's continued retention of his counsel to represent Tok and his and his counsel's refusal to provide any information regarding that representation to Tok's co-owner and co-manager is further evidence of Burke's refusal to accept Viceroy's rights and interest in Tok despite Burke's acceptance of more than half a million dollars for that interest.

In short, Burke's purported "new evidence" in no way cures the conflict of interest Burke's counsel is operating under in his dual representation of Burke and Tok in this appeal. Viceroy therefore respectfully requests that the Court grant its request to disqualify Burke's

[21] Although there has been some suggestion of a "what's good for the goose is good for the gander" argument with respect to Respondents' counsel representing both Viceroy and Wysong, any such argument is misplaced. Unlike counsel for Burke and Tok, there is no conflict arising between counsel's representation of both Viceroy and Wysong. It is not simply the mere fact that Appellants' counsel represents both Tok and Burke, individually; rather, it is the fact that it is far from clear whether counsel is placing the interests of Tok ahead of the personal interests of Burke where Tok's co-owner and co-manager are denied information about counsel's representation of Tok and are entirely excluded from counsel's decision making purportedly on behalf of Tok.

counsel from representing Tok in this appeal.

G. Viceroy Should Be Awarded Attorneys' Fees on Appeal

Under the parties' Sale Agreement, the party prevailing in any claim "to interpret or enforce any of the terms of this Agreement" is entitled to recover its reasonable attorneys' fees and costs. (CP 84.) The Uniform Arbitration Act also provides for an award of fees and costs to the party prevailing in a contested judicial proceeding confirming an arbitration award. *See* RCW 7.04A.250(3).

Where a contract provides for an award of attorneys' fees and costs to the prevailing party, such an award is mandatory. RCW 4.84.330; *Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987) ("There is no authority to support an interpretation of RCW 4.84.330 other than as mandating an award of reasonable attorney's fees to the prevailing party where a contract so provides."). The Superior Court's order confirming the July 30th award followed this mandate and awarded Viceroy its attorneys' fees and costs. (CP 619-20.) Similarly, because the order confirming the arbitration award should be affirmed, Viceroy is entitled to its attorneys' fees and costs on appeal as the prevailing party. *See Nw. Cascade, Inc. v. Unique Constr., Inc.*, 187 Wn. App. 685, 705, 351 P.3d 172 (2015) ("A contract provision that authorizes attorney fees below authorizes attorney fees on appeal."). Therefore, under RAP 18.1, Viceroy respectfully

requests that it be awarded its attorneys' fees and costs on appeal.

VI. CONCLUSION

In this appeal, Burke bore the weighty burden of establishing that one of the limited statutory grounds for vacating an arbitration award exists under the "exceedingly limited" judicial review of arbitration awards. But Burke falls woefully short of satisfying that burden. Consequently, because Burke has failed to establish either (1) that the dispute was not subject to the parties' arbitration agreement or (2) that there is any error of law appearing on the face of the award, the Superior Court orders granting Viceroy's motion to confirm the award and denying Burke's motions to vacate and for reconsideration should be affirmed.

Respectfully submitted this 17th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Respondents' Brief and Appendix to Respondents' Brief with the Clerk of the Court for the Court of Appeals for the State of Washington by using the appellate electronic filing system on the date set forth below, which caused service of the foregoing document to the parties identified below via eService. I also caused a copy of the foregoing document to be sent via first class U.S. Mail postage prepaid to the parties at the address below.

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(Consolidated with No. 80710-2-I)

IN THE COURT OF APPEALS – DIVISION I
STATE OF WASHINGTON

VICEROY GROUP, LLC and JEFFREY WYSONG,

Respondents,

v.

TOK, LLC and SAMUEL BURKE,

Appellants.

APPENDIX TO RESPONDENTS' BRIEF

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Rules Amended and Effective October 1, 2013
Fee Schedule Amended and Effective July 1, 2016

(b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

(c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

(d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-47. Scope of Award

(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, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

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

R-48. Award Upon Settlement—Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other

parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and

FOCAL PLLC

March 17, 2020 - 4:51 PM

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