No. _____

IN THE

Supreme Court of the United States

ROYAL MERCHANT HOLDINGS, LLC,
PETITIONER,

V.

THE FERRARO LAW FIRM, P.A., ET AL.

RESPONDENTS.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITION FOR WRIT OF CERTIORARI

EUGENE E. STEARNS, ESQ.
COUNSEL OF RECORD

STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33131
Telephone: 305-789-3200
estearns@stearnsweaver.com
Counsel for Petitioner
ROYAL MERCHANT HOLDINGS, LLC

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QUESTIONS PRESENTED

The question presented is:

1. Whether the decision below—that a claim in arbitration must be asserted in a pleading filed at the outset of the case and that the standard for procedural due process in arbitration is measured by cases decided under the judicial rules of procedure—is in express and direct conflict with the precedent of this Court that arbitrations under the Federal Arbitration Act are a true alternative to judicial proceedings.

PARTIES TO THE PROCEEDING

Petitioner is Royal Merchant Holdings, LLC

Respondents are The Ferraro Law Firm, PA and James L. Ferraro.

CORPORATE DISCLOSURE STATEMENT

Petitioner Royal Merchant Holdings, LLC has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following cases relate to this proceeding:

- *Royal Merchant Holdings, LLC v. The Ferraro Law Firm, P.A.*, No. SC2024-1369, Supreme Court of Florida. Judgment entered February 25, 2025.
- *The Ferraro Law Firm, P.A. v. Royal Merchant Holdings, LLC*, No. 3D2022-1851, the District of Court of Appeal of Florida, Third District. Judgment entered June 12, 2024.
- *The Ferraro Law Firm, P.A. v. Royal Merchant Holdings, LLC*, No. 2021-003987, the Circuit Court of Florida, Eleventh Judicial Circuit. Judgment entered on September 27, 2022.

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PETITION FOR WRIT OF CERTIORARI

The interests of the United States in a uniform, nationwide set of principles governing arbitration procedures is embodied in federal law. This Petition arises from a state court decision establishing pleading standards in arbitration that conflict with federal law and the many decisions of federal district and circuit courts holding that arbitration, as a method of alternative dispute resolution, was conceived and developed as a flexible, efficient, and cost-effective alternative to traditional litigation. Its foundational purpose is to provide parties with a streamlined mechanism to resolve disputes without the formalities and procedural rigidity characteristic of judicial proceedings. Imposing rigorous procedural rules within arbitration undermines this core objective and is antithetical to both the letter and spirit of arbitral practice.

Parties to an arbitration agreement elect this forum precisely because it permits a departure from the strict procedural and evidentiary rules that govern litigation in state or federal courts. To impose rigorous procedural requirements on arbitrations risks eroding the parties' contractual expectations and nullifying the very benefits arbitration is intended to confer.

The enforceability and legitimacy of arbitral awards are supported by the idea that arbitration is a simplified and expedited process that results in a final and binding resolution. Increasing procedural formalism can paradoxically open the door to greater

post-award challenges, as dissatisfied parties may be more inclined to seek vacatur on the grounds of due process violations or procedural irregularities. In this way, excessive proceduralism undermines finality and certainty, two hallmarks of effective arbitration.

While procedural fairness and basic due process remain essential in any adjudicatory process, defining the absence of due process as a failure to rigidly comply with state court pleading requirements defeats arbitration's essential purpose.

This Court has consistently held that judicial review of arbitration proceedings is exceedingly limited, and that courts must respect the parties' contractual expectations. Nevertheless, in the decision below, the Florida Third District Court of Appeal ("Third District") vacated an arbitration award governed by the Federal Arbitration Act ("FAA") on the sole ground that a particular claim, initially raised by the Respondent in its pleadings, had not been formally pled in Petitioner's initial pleading —even though the parties had never agreed to adhere to formal pleading requirements. In doing so, the Third District effectively imposed a procedural standard that is wholly inconsistent with this Court's well-established arbitration jurisprudence.

The decision invites other courts to depart from the principle of minimal judicial interference in arbitral awards. It undermines the fundamental nature of arbitration as an alternative to litigation—an avenue chosen specifically to avoid the procedural formality and rigidity of judicial proceedings.

This case presents the Court with a critical opportunity to resolve an important and unsettled question of federal law: whether courts may vacate arbitration awards subject to the FAA based on strict compliance with state court procedural requirements not contemplated by the parties' agreement. Given the widespread reliance on arbitration as a streamlined and efficient means of dispute resolution, this issue is of substantial national importance and warrants this Court's review.

OPINIONS BELOW

The arbitrator's findings of fact and conclusions of law are reproduced at App. 57a—130a. The arbitrator's findings of fact and conclusions of law are not reported. The trial court's orders that were subject to appellate review are reproduced at App. 9a—36a and App. 37a—56a, respectively. The order vacating the arbitration award is published on WestLaw as *The Ferraro Law Firm, P.A. v. Royal Merchant Holdings, LLC*, 2021 WL 12296261 (Fla. 11th Cir. Ct. Dec. 31, 2021). The order reconsidering the order vacating the arbitration award is published on WestLaw as *The Ferraro Law Firm, P.A. v. Royal Merchant Holdings*, LLC, 2022 WL 22860743 (Fla. 11th Cir. Ct. Sept. 14, 2022). The trial court's final judgment is published on Westlaw as *The Ferraro Law Firm, P.A v. Royal Merchant Holdings, LLC*, 2022 WL 22860742 (Fla. 11th Cir. Ct. Sept. 27, 2022).

The opinion of the Florida Third District Court of Appeals is reproduced at App. 3a—8a. The opinion is reported as *Ferraro Law Firm, P.A. v. Royal Merchant Holdings, LLC*, 394 So. 3d 672 (Fla. 3d

DCA 2024). The order denying rehearing and clarification of the opinion of the Florida Third District Court of Appeals is reproduced at App. 131a. The rehearing order is not reported or otherwise published. The Supreme Court of Florida's order denying discretionary review is reproduced at App. 1a—2a. The order is published on WestLaw as *Royal Merchant Holdings, LLC v. Ferraro Law Firm*, No. SC2024-1369, 2025 WL 606023, at *1 (Fla. Feb. 25, 2025).

JURISDICTION

The trial court's order affirming the arbitration award that was reviewed and reversed on appeal was issued on September 14, 2022, and its final judgment on September 27, 2022. The District Court of Appeals of Florida, Third District, issued its opinion on June 12, 2024, and its order denying rehearing on August 21, 2024. The Supreme Court of Florida issued its order denying discretionary review on February 25, 2025. Justice Clarence Thomas granted an application for an extension of time, setting the new deadline to file this Petition as June 25, 2025.

This Court has jurisdiction under 28 U.S.C. § 1257(a). *See Gonzalez v. Thaler*, 565 U.S. 134, 154 (2012) ("We can review . . . only judgments of a 'state court of last resort' or of a lower state court if the 'state court of last resort' has denied discretionary review.").

This matter involves a federal question pertaining to the FAA, which governed the arbitration at issue here. App. 13a—16a, 106a—

107a. Petitioner raised the federal question before the arbitrator (App. 178a—185a), the trial court (App. 149a—177a), the intermediate appellate court, (App. 137a—148a), and the Supreme Court of Florida (App. 132a—136a). Excerpts of the federal issue being raised by Petitioner are reproduced at App. 132a—185a.

STATUTORY PROVISIONS INVOLVED

This case involves 9 U.S.C. § 10 of the FAA (9 U.S.C. § 1, *et. seq.*):

> **§ 10. Same; vacation; grounds; rehearing**
>
> **(a)** In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
>
> > **(1)** where the award was procured by corruption, fraud, or undue means;
> >
> > **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;
> >
> > **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
>
> (c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

STATEMENT OF THE CASE

A. Legal and Factual Background

This case arises from the entry of an order confirming an arbitration award (the "Award") in favor of Petitioner Royal Merchant Holdings, LLC ("RMH"), and against its former attorneys, Respondent the Ferraro Law Firm, P.A. ("Ferraro"). App. 9a—36a. The Third District reversed the order confirming the arbitral award, concluding that the arbitration proceeding was fundamentally unfair and violated due process. App. 3a—8a. The purported

"misconduct" by the arbitrator consisted of failing to apply pleading rules that had never been agreed to by the parties. *Id.*

1. Ferraro's Representation of RMH

On July 23, 2014, RMH retained Ferraro to represent its interests in a dispute against Traeger Grills, LLC ("Traeger"). App. 70a. The underlying claim stemmed from RMH's role in brokering a credit card processing agreement between Traeger and a credit-card processor named CardConnect. App. 57a—58a. The law chosen by the parties to construe and enforce the CardConnect/Traeger agreement was that of Ohio. App. 69a. In addition, the agreement mandated venue for any litigation arising under the agreement to be brought in Ohio. App. 68a.

The retainer agreement between RMH and Ferraro included a provision that any dispute arising between the parties would be resolved in arbitration. App. 4a—5a, 10a. No formal arbitration administrator was designated, and no rules to govern arbitration proceedings were established in the retainer agreement. App. 5a, 10a; S.R. 145.[1]

Ferraro's representation proved deficient from the outset. App. 71a—72a. Shortly after beginning the representation, RMH received an executed assignment from CardConnect, transferring all of CardConnect's rights under the agreement with Traeger to RMH. App. 72a. This assignment would

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[1] In accordance with Supreme Court Rule 12.7, citations to the record and supplemental record below will be indicated as "R." and "S.R." respectively.

have enabled RMH to file suit against Traeger in its own name. *Id.* Ferraro, however, advised RMH to reject the assignment without performing any legal research or analysis. *Id.* Relying on that advice, RMH declined the assignment. App. 20a, 72a, 112a—113a. Had it been properly advised, RMH would have accepted the assignment. *Id.* Following RMH's rejection, CardConnect and Traeger settled their dispute, and CardConnect abandoned its claim under the agreement. App. 20a, 72a—73a.

Approximately six weeks later, James Ferraro, a member of the Ohio Bar, filed a complaint on RMH's behalf in Ohio state court against Traeger, falsely alleging that RMH was a party to the CardConnect–Traeger agreement. App. 73a—74a. Mr. Ferraro later conceded that he had realized RMH lacked standing to bring the claim without the assignment. App. 20a, 112a—113a; *see also* R. 551, 2983, 3596.

Traeger moved to dismiss, highlighting that RMH was not a party to the agreement. App. 75a. Regardless of the underlying legal theory, the complaint and subsequent filings failed to meet the standard of professional competence. App. 20a; 75a—76a. The Ohio court granted Traeger's motion to dismiss, finding that RMH had no contractual or third-party beneficiary rights to assert the claims. App. 76a.

Ferraro assured RMH that the dismissal was erroneous and that it would prevail on a motion for reconsideration. App. 20a—21a; 76a—77a. Over the next five months, Ferraro repeatedly represented

that it was preparing that motion. App. 20a—21a; 76a—78a. In fact, Ferraro never filed one. *Id.*

Although the court had dismissed RMH's contract claims, it allowed a separate trade secret claim to proceed. App. 78a. Ferraro, however, failed to meet court deadlines, ignored discovery obligations, and did not appear for scheduled hearings. App. 78a—79a. As a result of these repeated violations, the Ohio court ultimately dismissed the entire action with prejudice as a sanction. App. 79a.

Throughout this period, Ferraro consistently misrepresented to RMH that it was diligently pursuing the case and that a favorable outcome was imminent. App. 20a—21a; 76a—81a.

2. The Arbitration

On August 25, 2016, RMH initiated arbitration proceedings against Ferraro, seeking damages for legal malpractice based on the firm's mishandling of the Traeger litigation. App. 82a. The arbitration spanned nearly five years. App. 10a—11a.

In its response, Ferraro raised affirmative defenses, which, upon discovery, revealed additional instances of malpractice occurring prior to those alleged in the original demand. App. 22a—29a. Ultimately, Ferraro did not dispute the facts reflecting its incompetence, nor did it offer meaningful evidence to rebut RMH's claims. App. 83a. Instead, its principal defense was that RMH lacked standing to sue Traeger, contending that RMH's rejection of the assignment precluded any

recovery—and that RMH understood this when it rejected the assignment. App. 22a—23a; 85a—86a; 107a—108a.

At the inception of the evidentiary hearing, which took place over 22 days across an 18-month period, RMH notified the Arbitrator of Ferraro's malpractice relating to its failure to provide RMH with an informed decision regarding the assignment arising from the evidence uncovered during discovery in response to Ferraro's affirmative defenses. App. 24a—28a, 107a—109a. The Arbitrator permitted the introduction of this newly discovered evidence. App. 24a—28a, 35a.

On November 18, 2020, the Arbitrator issued her Findings of Fact and Conclusions of Law (the "FFCL"). App. 57a—130a. The Arbitrator rejected the argument that the signature of Traeger's chief financial officer on the CardConnect/Traeger agreement was forged; concluded that Traeger breached the agreement; and found that, had the case been competently presented, Traeger would have been liable for damages. App. 86a—93a, 103a—113a, 123a—124a. With respect to Ferraro's representation of RMH, the Arbitrator identified a host of instances where Ferraro's conduct failed to conform to the standard of care required by law. App. 83a—84a.

The Arbitrator determined that RMH had no claim in its own name against Traeger under Ohio law and, therefore, the incompetent presentation of that claim did not cause a loss. App. 29a, 93a—102a. The Arbitrator also found, however, that RMH would have had a direct claim against Traeger but for

Ferraro's negligent advice to reject the CardConnect assignment. App. 107a—113a.

The Arbitrator found that the uninformed advice to reject CardConnect's proffered assignment, based on an incompetent assurance that RMH could sue Traeger in its own name, was the singular cause of RMH's loss. App. 29a, 102a, 107a—113a, 123a—124a. All of the bad acts that followed—she found many—could not cause a loss that had already occurred. *Id.*

The Arbitrator found that Ferraro's advice that there was a direct claim that could be brought was not preceded by any analysis regarding "the impact of accepting the assignment" subject to its indemnity provision or "the consequences of being limited to the third-party beneficiary claim." App. 112a. Notwithstanding that no work had been done to support its advice, Ferraro's assurance that RMH had such a claim led RMH to reject the assignment and caused the loss. App. 112a—113a.

The Arbitrator concluded that the compensatory damages arising from Ferraro's breaches of duty totaled "$1,517,493.32, (exclusive of prejudgment interest and costs and/or any punitive damages that may be assessed)." App. 129a.

In rendering her decision, the Arbitrator addressed and rejected the procedural argument that the assignment issue could not be considered because it was not raised by RMH's amended claim. App. 103a—113a. She addressed, in detail, how Ferraro's Response to the arbitration demand raised the issue from a pleading perspective, leading to the discovery

that then resulted in the introduction of the evidence of this incompetent advice that caused the loss. App. 106a—110a.

The Arbitrator's rejection of Ferraro's due process argument was based on her consideration of the proceedings, the evidence, and her rulings on procedural issues during the lengthy proceedings. App. 103a—113a. The Arbitrator found, as a matter of fact, that Ferraro was "on notice of the claim" and neither the FAA nor the Florida Arbitration Act "contain pleading rules or demand that the parties proceed under pleading rules adopted by the Florida or Federal courts." App. 106a—108a. She held that "pleading requirements in arbitration proceedings are generally relaxed" with claims being "much more informal than a pleading;" "[t]here are virtually no rules of pleading in arbitration" and "technical pleading rules need not be followed." App. 106a. She rejected Ferraro's spin on her scheduling orders, and found, as a matter of law, that Ferraro was on "notice of the claim" and had sufficient opportunity to "take whatever steps" it "deemed necessary to address the issue." App. 108a—110a.

The Arbitrator observed that the assignment issue arose and "inhered in [Ferraro's] affirmative defenses," was within "the scope of discovery," and was "well known to the parties." App. 108a.

RMH defended against Ferraro's affirmative defense that Ohio law would not allow RMH to bring a direct claim, through evidence that RMH was only in that position because of incompetent advice to reject the assignment. App. 22a—25a, 107a—108a. Thus, the avoidance to the affirmative defense raised

the identical issue as the direct claim. App. 22a—25a, 34a—35a, 107a—109a.

Ferraro "neither requested a definitive ruling on the issue, nor a continuance to obtain expert testimony, engage in discovery, or undertake whatever action they deemed necessary to ameliorate any perceived prejudice stemming from the claim" during the "the five-week evidentiary portion of the Final Hearing [that] ran from December 3, 2018 to May 27, 2020, with months between final hearing sessions." App. 109a—110a.

As such, Ferraro "had sufficient notice to endeavor to take whatever steps, including requesting a continuance, they deemed necessary to address the issue . . . on substantive grounds during the Final Hearing." App. 110a. Instead, Ferraro decided to address the claim "on procedural grounds after the Final Hearing" at its own peril, despite being on "notice of the claim" and having "sufficient time to seek whatever relief it deemed necessary to remedy any prejudice it may have perceived stemming from that claim." *Id.*

After Arbitrator Perry issued her rulings on the assignment claim in November 2020, the parties then engaged in 8 months of extensive post-evidentiary hearing briefing and multiple oral arguments. App. 28a—29a, 34a. At no time during the extensive post-evidentiary hearing period, did Ferraro ever move for relief in respect of the Arbitrator's finding of malpractice relating to the assignment claim. App. 29a, 34a—35a.

3. The Trial Court Proceeding

Subsequent to the arbitration, Ferraro filed a motion in the trial court to vacate the Award, asserting that the malpractice claim for which it was held liable had not been included in the RMH's original demand. App. 6a. In response, RMH filed a motion to confirm the Award. App. 9a—10a.

Initially, on December 31, 2021, the trial court granted Ferraro's motion to vacate the Award, finding that it was fundamentally unfair. App. 54a—55a. On January 18, 2022, RMH filed a motion for reconsideration of the trial court's December 31 ruling. App. 154a.

On September 14, 2022, the trial court granted RMH's motion for reconsideration, denied Ferraro's motion to vacate, confirmed the arbitration award, and vacated the prior December 31 order. App. 35a—36a. Consistent with the Arbitrator's findings, the trial court found that Ferraro itself raised the issue in its answer and defenses; that the issue was fully subjected to discovery; that it had been provided notice of the claim before the final award was issued; that Ferraro presented evidence and argument on the issue; and that Ferraro refused continuances offered during the lengthy proceeding. App. 23a—29a, 31a—35a.

B. Intermediate Appellate Court Decision

The Third District reversed the trial court's order confirming the Award, holding that an arbitrator cannot consider a claim in arbitration that is not stated as an "affirmative claim" in a "pleading

with sufficient particularity," brought "at the outset" of the proceeding, as otherwise, the losing party will necessarily be denied "fundamental fairness." App. 3a—8a.

The Third District adopted that new procedural rule despite finding that "[t]hroughout the arbitration hearings, [Petitioner] Royal Merchant repeatedly raised the issue . . . arguing it both as an affirmative basis for malpractice and as an avoidance of [Respondent] Ferraro's affirmative defense . . . ." App. 5a.

The Third District's decision created a new bright-line pleading rule governing arbitrations, concluding that notice of a claim must be given in a formal pleading at the outset of a proceeding, irrespective of the myriad other means through which notice can be provided—as it was found to have been provided here. App. 6a—8a.

C. Florida Supreme Court Order

On February 25, 2025, the Florida Supreme Court declined to accept jurisdiction and denied discretionary review of the opinion of the Florida Third District Court of Appeal. App. 1a.

REASONS FOR GRANTING THE PETITION

A. This Court Has Made Clear That Arbitrations Are Streamlined Proceedings, Which Are Not Subject to Judicial Formalities.

1. The FAA Is the Supreme Law of the Land

"The Federal Arbitration Act is a law of the United States," and, as a result, "the judges of every State must follow it." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S 17, 21 (2012) (state courts "must abide by the FAA, which is 'the supreme law of the Land,' and by the opinions of this Court interpreting that law.") (quoting U.S. Const., Art. VI, cl. 2).

"[E]ven state rules that are generally applicable as a formal matter are not immune to preemption by the FAA," if such rules discriminate against arbitration. *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 650 (2022). Thus, "state law is preempted to the extent 'it stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 183 (2019) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)).

2. Arbitrations Are Favored

"The FAA was enacted in response to judicial hostility to arbitration." *Viking River Cruises, Inc.*, 596 U.S. at 649. It "declares a national policy favoring arbitration." *Nitro-Lift Techs., L.L.C.*, 568 U.S at 20 (citation omitted); *see Marmet Health Care*

Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012) (FAA "reflects emphatic federal policy in favor of arbitral dispute resolution.") (citation omitted). The FAA "not only 'declare[s] a national policy favoring arbitration,' but actually withdr[aws] the power of the states to require a judicial forum for the resolution of claims which contracting parties agreed to resolve by arbitration." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (citation omitted).

3. Arbitrations Are Treated as a True Alternative to the Legal Process

"Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011). "[A]n arbitration agreement 'is a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Viking River Cruises, Inc.*, 596 U.S. at 653 (citation omitted); *see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("The FAA's proarbitration policy does not operate without regard to wishes of contracting parties . . . . 'Just as [parties] may limit by contract issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.'") (citation omitted). Arbitrators "derive their 'powers from parties' agreement to forgo the legal process and submit their disputes to private dispute resolution.'" *Lamps Plus, Inc.*, 587 U.S. at 184 (citation omitted).

The "prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Preston v. Ferrer*, 552 U.S. 346,

357 (2008) (citation omitted). Indeed, the FAA "lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, and which issues are arbitrable, along with procedure and choice of substantive law." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *AT&T Mobility LLC*, 563 U.S. at 348 (citation omitted). To that end, "'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (citation and internal quotation marks omitted) (emphasis in original).

4. Vacatur of Arbitral Awards Is Highly Disfavored

Because arbitrations are largely favored under the FAA, "courts may vacate [an] arbitrator's decision 'only in very unusual circumstances.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). Grounds stated in FAA either for vacating, or for modifying or correcting, an arbitration award "address egregious departures from the parties' agreed-upon arbitration: 'corruption,' 'fraud,' 'evident partiality,' 'misconduct,' 'misbehavior,' 'exceed[ing] . . . powers,' 'evident material miscalculation,' 'evident material mistake,'

'award[s] upon a matter not submitted'." *Hall St. Assocs., L.L.C.*, 552 U.S. at 586. In order to obtain relief vacating an arbitration award, a party "must clear a high hurdle," and "[i]t is not enough for [the party] to show that the panel committed an error—or even a serious error." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010).

5. The Third DCA Decision Undermines the Principles Regarding Arbitration Laid by this Court

Plainly implicit but not directly stated in this Court's decisions is the absence of any formal pleading requirements in arbitration under the FAA. The imposition of such a requirement is fundamentally at odds with both the plain language of the FAA and the principles articulated in this Court's prior decisions and will create uncertainty in whether such a requirement is emerging in state courts.

It is particularly troubling that Respondent is a law firm that advised its client to choose "no-rules" arbitration to resolve any disputes that arose between them. The parties did not adopt any pleading rules—neither in their arbitration agreement nor during the course of the proceedings. App. 133a at n.2, 105a, 107a at n.20. Despite the absence of any such agreement, the Third District reversed the trial court's confirmation of the arbitral award, holding that Petitioner was obligated to assert the assignment issue first raised by Respondent as an affirmative claim. App. 8a. This ruling conflicts with the FAA's mandate to "honor the parties' expectations," *AT&T Mobility LLC*, 563 U.S.

at 351, including their expectations concerning "the procedure to be used in resolving the dispute," *Viking River Cruises, Inc.*, 596 U.S. at 653. The FAA itself does not articulate any pleading requirement. *See* 9 U.S.C. § 1 est seq.

By vacating an arbitral award based on the failure to adhere to pleading conventions that the parties did not adopt, the Third District's decision disregards this Court's clear precedent that vacatur under the FAA is appropriate only in cases of "egregious departures from the parties' agreed-upon arbitration." *Hall Street Assocs., L.L.C.*, 552 U.S. at 586. Moreover, the decision undermines the fundamental nature of arbitration as a forum chosen by the parties to "forgo the procedural rigor and appellate review of the courts," *AT&T Mobility*, 563 U.S. at 348, and encroaches on the arbitrator's presumptive authority to resolve procedural issues arising within the arbitration, *Howsam*, 537 U.S. at 84.

In short, the Third District's imposition of a judicial-style pleading requirement—where none was agreed to by the parties—not only contravenes the FAA, but also threatens to judicialize arbitration in a manner this Court has repeatedly cautioned against.

6. The Third DCA Decision Is in Direct Conflict with the Decisions of the Circuit Courts of Appeals

In direct conflict with the principles consistently articulated by this Court and uniformly followed by the federal Courts of Appeals, the Third District erroneously imposed formal pleading

requirements in an arbitration governed by the FAA. The federal appellate courts have made clear that the FAA does not mandate a system of formal pleadings akin to those required in judicial proceedings, nor does it impose the procedural strictures of the Federal Rules of Civil Procedure.

For example, in *Valentine Sugars, Inc. v. Donau Corp.*, the Fifth Circuit expressly rejected the notion of formal pleadings in arbitration, noting that "[f]ederal law . . . does not impose any requirements as to how specific a notice of arbitration must be" or "a code of pleading" and emphasizing that "[t]he parties agreed to arbitration, however, and must accept the loose procedural requirements along with the benefits which arbitration provides." 981 F.2d 210, 213 (5th Cir. 1993).

Similarly, the Seventh Circuit in *Generica Ltd. v. Pharmaceutical Basics, Inc.* reaffirmed that a "fundamentally fair hearing" in arbitration does not equate to adherence to the procedural standards of litigation. 125 F.3d 1123, 1130 (7th Cir. 1997). Other federal appellate decisions are in accord. *See OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 957 F.3d 487, 499 (5th Cir. 2020) ("The more fulsome procedures of the Federal Rules of Civil Procedure are not required."); *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007) (arbitrators "are not constrained by formal rules of procedure or evidence") (citation omitted).

Consistent with this precedent, courts and commentators have recognized that arbitration claims are generally presented in a far less formal manner than in litigation. As the D.C. Court of

Appeals observed in *Certain Underwriters at Lloyd's London v. Ashland, Inc.*, "there are virtually no rules of pleading in arbitration" and that "technical pleading rules need not be followed." 967 A.2d 166, 175 (D.C. 2009) (internal citations and quotations omitted). This view is well supported by leading arbitration authorities, who confirm that arbitrations are not governed by formal or technical pleading rules. *Id.*

Instead of enforcing rigid procedural requirements, the federal circuits have uniformly held that the minimum due process standard in arbitration under the FAA requires only that parties receive notice and an opportunity to be heard, which was clearly provided to Respondent. *See, e.g., CPR Mgmt., S.A. v. Devon Park Bioventures, L.P.*, 19 F.4th 236, 245 (3d Cir. 2021); *21st Fin. Servs., L.L.C. v. Manchester Fin. Bank*, 747 F.3d 331, 337 (5th Cir. 2014); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298-299 (5th Cir. 2004); *Louisiana D. Brown 1992 Irrevocable Tr. v. Peabody Coal Co.*, 205 F.3d 1340 (6th Cir. 2000); *Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994); *Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Continental Cas. Co.*, 37 F.3d 345, 352 (7th Cir. 1994); *Sunshine Mining Co. v. United Steelworkers of Am.*, 823 F.2d 1289, 1295 (9th Cir. 1987). These decisions reaffirm that arbitration proceedings need not, and should not, replicate the procedural formality of court litigation.

The Third District's decision directly contradicts this well-settled body of federal law by imposing a pleading requirement not contemplated

by the parties' agreement or by the FAA. By introducing a non-existent procedural threshold, the decision significantly alters the minimal notice standard recognized across the circuits, thereby undermining the foundational principles of arbitration.

This case presents an important and timely opportunity for the Court to clarify that the FAA does not impose formal pleading requirements in arbitration. In light of the widespread use of arbitration as a preferred method of dispute resolution, and the growing judicial tendency in some jurisdictions to import litigation-style formalism into arbitral proceedings, the need for uniformity and clarity on this issue is both pressing and nationally significant.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

EUGENE E. STEARNS, ESQ.
COUNSEL OF RECORD
STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33131
Telephone: 305-789-3200
estearns@stearnsweaver.com
COUNSEL FOR PETITIONER ROYAL MERCHANT HOLDINGS, LLC

APPENDIX

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APPENDIX A — ORDER OF THE SUPREME COURT OF FLORIDA, FILED FEBRUARY 25, 2025

SUPREME COURT OF FLORIDA

SC2024-1369
Lower Tribunal No(s).:
3D2022-1851; 132021CA003987000001

ROYAL MERCHANT HOLDINGS, LLC, etc.,

Petitioner(s),

v.

THE FERRARO LAW FIRM, P.A., etc., *et al.*,

Respondent(s).

Tuesday, February 25, 2025

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, LABARGA, COURIEL, GROSSHANS, and SASSO, JJ., concur.

Appendix A

Served:

3DCA CLERK
MIAMI-DADE CLERK
MARIA MACARENA ARHANCET FEHRETDINOV
MATHEW DANIEL GUTIERREZ
ERIC MICHAEL PALMER
JESSE MICHAEL PANUCCIO
ALEJANDRO DAVID RODRIGUEZ
LESLIE ROTHENBERG
EUGENE E STEARNS

APPENDIX B — OPINION OF THE COURT OF APPEAL FOR THE STATE OF FLORIDA, THIRD DISTRICT, FILED JUNE 12, 2024

THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 3D22-1851

Lower Tribunal No. 21-3987

THE FERRARO LAW FIRM, P.A., etc., *et al.*,

Appellants/Cross-Appellees,

vs.

ROYAL MERCHANT HOLDINGS, LLC, etc.,

Appellee/Cross-Appellant.

Filed June 12, 2024

An Appeal from the Circuit Court for Miami-Dade County, Alan Fine, Judge.

Before LINDSEY, MILLER and BOKOR, JJ.

BOKOR, J.

These cross-appeals challenge an order vacating an arbitration award in favor of Royal Merchant Holdings, LLC ("Royal Merchant"), as well as a successor judge's subsequent order granting reconsideration and confirming

that same award. Appellant, the Ferraro Law Firm ("Ferraro"), argues that the award was properly vacated and could not be reinstated because the arbitrator vitiated the fundamental fairness of the proceedings by relying solely on a ground for relief that was not pled as an affirmative claim. Royal Merchant cross-appeals to challenge the merits of the original order vacating the award. Under the specific circumstances present here, we find that the trial court properly vacated the award in the first instance, and the successor court abused its discretion by confirming it on reconsideration.

The arbitration action related to Ferraro's representation of Royal Merchant in an Ohio case founded on the breach of an agreement Royal Merchant had brokered between two nonparty companies. There, Royal Merchant claimed that it was entitled to recover as an intended third-party beneficiary to that agreement, but Ferraro asserted only that Royal Merchant was a party to the agreement instead of a beneficiary, which, in conjunction with Ferraro's violations of various discovery orders, led the Ohio court to dismiss the claims. During that litigation, Ferraro also advised Royal Merchant to reject an offer for an assignment of recovery rights from the nonbreaching signatory to the agreement, which would have clarified Royal Merchant's standing and allowed it to recover for the breach.

After dismissal of the Ohio case, Royal Merchant brought an arbitration complaint against Ferraro in

Miami[1] for legal malpractice, asserting various grounds for relief including Ferraro's failure to raise a third-party beneficiary claim and failure to comply with discovery rules. In response, Ferraro asserted as an affirmative defense that Royal Merchant was not harmed because it was not entitled to recover as a third-party beneficiary. As an avoidance of that defense, Royal Merchant responded that it could have instead recovered as an assignee had Ferraro not advised it to reject the assignment proposal on the purported basis that Royal Merchant already had a third-party beneficiary claim.

Throughout the arbitration hearings, Royal Merchant repeatedly raised the issue of Ferraro's failure to accept the assignment proposal, arguing it both as an affirmative basis for malpractice and as an avoidance of Ferraro's affirmative defense of lack of prejudice. Over Ferraro's objections, the arbitrator allowed Royal Merchant to present evidence and testimony about the assignment proposal but did not make a pre-judgment ruling as to whether the issue could be tried by consent as an affirmative ground for relief. Ultimately, the arbitrator ruled in favor of Royal Merchant, relying solely on Ferraro's advisement to reject the assignment proposal as the basis for malpractice and awarding Royal Merchant a total of $1,517,493.32. In doing so, the arbitrator also found that the assignment issue was tried by consent and that Ferraro was on notice it had "morphed" into an affirmative claim throughout the proceedings.

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1. The parties' retainer agreement provided that disputes concerning the representation would be resolved by binding arbitration in Miami, Florida.

Ferraro subsequently moved for the circuit court to vacate the award, arguing that the arbitrator's reliance on the unpled assignment issue as a basis for relief was fundamentally unfair and amounted to a due process deprivation. After a hearing, the court entered an order vacating the arbitration award to the extent it relied on the assignment issue. Royal Merchant moved for reconsideration, and a successor judge granted the motion, vacated the prior order, and confirmed the arbitration award in its entirety, finding that the proceedings were not fundamentally unfair and that the original judge lacked any basis to vacate the award.[2] These appeals followed.[3]

An arbitration award shall be vacated where there has been "[m]isconduct by an arbitrator prejudicing the rights of the party to the arbitration proceeding." § 682.13(1)(b)3., Fla. Stat. "Although an arbitrator need not follow all the niceties observed in court proceedings, the arbitrator must grant the parties a fundamentally fair hearing." *Talel Corp. v. Shimonovitch*, 84 So. 3d 1192,

2. The original trial judge transferred to another division prior to hearing the reconsideration motion. Ferraro argues in part that the successor judge lacked jurisdiction to reconsider the order vacating the award because that order was final. A successor judge typically may not modify a final order of a predecessor judge absent a finding of fraud or mistake. However, while we note that the original order vacating the award lacks indicia of finality, ultimately, we decline to address the merits of this argument as we reverse on the merits.

3. We review a trial court's decision to confirm or vacate an arbitration award for abuse of discretion. *See Murton Roofing Corp. v. FF Fund Corp.*, 930 So. 2d 772, 773 (Fla. 3d DCA 2006).

1194 (Fla. 4th DCA 2012). Further, it is well-established that "[d]ue process protections prevent a trial court from deciding matters not noticed for hearing and not the subject of appropriate pleadings." *Mizrahi v. Mizrahi*, 867 So. 2d 1211, 1213 (Fla. 3d DCA 2004); *see also Cedars Med. Ctr., Inc. v. Ravelo*, 738 So. 2d 362, 367 (Fla. 3d DCA 1999) ("The pleading of a legal theory is indispensable to a finding of liability on the basis of that theory."); *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988) ("[L]itigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared.").

While we are cognizant of arbitrators' broad discretion to "conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding," § 682.06(1), Fla. Stat., we find that the trial court properly vacated the award in the first instance and abused its discretion by confirming it on reconsideration. "Generally, due process requires fair notice and a real opportunity to be heard and defend in an orderly procedure *before* judgment is rendered." *Viets v. Am. Recruiters Enters., Inc.*, 922 So. 2d 1090, 1095 (Fla. 4th DCA 2006). Here, Royal Merchant repeatedly represented throughout the proceedings that the issue of the assignment proposal was not being argued as an affirmative basis for malpractice, but merely as an avoidance of Ferraro's affirmative defense of lack of prejudice. When Ferraro objected and informed the arbitrator of the need to render a ruling on the issue, the arbitrator instead deferred the issue until the final order,

only to then conclude that the issue was tried by consent all along. Thus, from the face of the record, it appears that the arbitrator's consideration of the issue as an affirmative claim without prior notice prejudiced Ferraro's ability to prepare its defense. The lack of a substantive requirement that claims for relief be pled in an arbitration proceeding in a specific manner does not negate a party's right to fair and effective notice of the claims tried.

Thus, we vacate the order confirming the award, reinstate the prior order vacating the award, and remand for additional proceedings.

Reversed.

APPENDIX C — ORDER OF THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA, FILED SEPTEMBER 14, 2022

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2021-003987-CA-01
SECTION: CA44

THE FERRARO LAW FIRM, P.A., *et al.*,

Plaintiffs,

vs.

ROYAL MERCHANT HOLDINGS, LLC,

Defendant.

Filed September 14, 2022

ORDER GRANTING RESPONDENT ROYAL MERCHANT HOLDINGS, LLC'S MOTION FOR RECONSIDERATION

JUDGE: Alan Fine

THIS MATTER came before the Court for hearing on Friday, March 11, 2022 and September 8, 2022 ("Hearing") on Respondent Royal Merchant Holdings, LLC's ("RMH") motion for reconsideration of the Court's Order on Petition to Vacate Arbitration Award and

Motion to Confirm Arbitration Award, dated December 31, 2021, which confirmed, in part, and vacated, in part, the Award ("Motion" or "Reconsideration Motion"). Having considered said Motion, Petitioner The Ferraro Law Firm, P.A.'s ("Ferraro") response, RMH's reply, the authorities and record materials cited therein, and the oral arguments presented by the parties at the Hearing, and being otherwise dully advised in the premises, it is hereby **ORDERED AND ADJUDGED**, for the reasons explained more fully below, that RMH's Motion is **GRANTED**.

PROCEDURAL BACKGROUND

On July 23, 2014, RMH employed The Ferraro Law Firm to represent its interests in connection with a dispute involving its brokerage of a credit card processing agreement between CardConnect and Traeger Grills. The representation was unsuccessful, RMH's claim was lost, and RMH believed that the loss was caused by Ferraro's malpractice. The retainer agreement provided that any disputes between Ferraro and its client, RMH, would be resolved in binding arbitration.

On August 25, 2016, RMH brought an arbitration proceeding against Ferraro alleging that it failed to prevail in litigation against Traeger Grills because of Ferraro's malpractice. A. 1-134; 3572. A respected Miami attorney, Pamela I. Perry, served as Arbitrator.

After a two-year prehearing process and twenty-two (22) days of a final evidentiary hearing spaced out over eighteen (18) months, the Arbitrator issued her Findings of Fact and Conclusions of Law ("FFCL") in November

2020, finding in favor of RMH and awarding compensatory damages, punitive damages, prejudgment interest, and the recoverable costs. Ferraro successfully moved for reconsideration of the imposition of persol liabilty and punitive damges. In her August 11, 2021 Amended FFCL the Arbitrator eliminated punitive damages and recovery against James Ferraro, individually. In those post-FFCL proceedings, Ferraro did not (a) raise the issue of fundamental fairness based on a claim that an unpled issue was tried or (b) seek to offer new evidence with respect to the issue tried over its objection.

Ferraro brought this Petition to vacate the Award, claiming that it was denied a fundamentally fair hearing. It asserts that RMH did not prevail on the legal theory articulated in its Demand but, instead, prevailed on an unpled claim. The fundamental fairness claim had been raised by Ferraro in the arbitration and rejected in the FFCL coupled with a lengthy analysis of the facts. FFCL at 40-49.

In a 15-page order dated December 31, 2021, entitled "Final Order on Petition to Vacate Arbitration Award and Motion to Confirm Arbitration Award," this Court's predecessor vacated that part of the Award finding in favor of RMH, denied a new proceeding to correct any errors, and confirmed that part of the Award in favor of Ferraro ("December 31 Order").[1] A judgment pursuant

1. RMH insists that the "Final Order" was signed by the predecessor judge on January 3, 2022 after he was no longer assigned to Division 44 even though it was dated December 31, 2021. Even if true it is of no moment. As the judge who heard the argument, he was the appropriate judge to enter the ruling.

to Section 628.15(1), Florida Statutes, has not entered through today.

On January 1, 2022, this Court's predecessor transferred to another division of this Circuit. On January 3, 2022, Ferraro submitted the form of a final judgment consistent with the order dated December 31, which also sought an award of attorneys' fees.

At a hearing on January 7, 2022 on RMF's Motion to Strike and for Sanctions, before this Court, RMH advised of its intention to file a motion for reconsideration of the December 31 Order which it timely did on January 18, 2022.

On March 7, 2022, this Court issued its Order finding that the December 31 Order is a nonfinal order, allowing this Court, as a successor tribunal, to consider the motion. This Order was the subject of a Motion for Reconsideration that was argued on September 8, 2022 and denied on September 12, 2022.

On March 11, 2022, the parties appeared before this Court to argue RMH's Reconsideration Motion, following which, on March 18, 2022, the Court informed the parties that it would be granting RMH's Motion which would have the effect of denying Ferraro's petition and confirming the Arbitral Award in all respects.

Appendix C

PRINCIPLES GOVERNING REVIEW OF ARBITRATION AWARDS

There are few areas of the law as well-settled as the standards for judicial review of awards in arbitration, the forum chosen by Ferraro in its Retainer Agreement to resolve disputes with its client. "[U]nder the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances,'" as "limited judicial review . . . 'maintain[s] arbitration's essential virtue of resolving disputes straightaway.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (citation omitted). [6] As the United States Supreme Court has held, "[i]f parties could take 'fullbore legal and evidentiary appeals,' arbitration would become 'merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Oxford Health*, 569 U.S. at 568 (citation omitted).[2] "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

"[R]eview of an arbitration award is highly deferential and extremely limited." *United Steel, Paper & Forestry, Rubber, Mfg. v. Wise Alloys, LLC*, 807 F.3d 1258, 1271

2. The parties agree that the Federal Arbitration Act governs the arbitration. Ferraro Petition at 3; RMH Resp. to Petition at 1. CardConnect is a New Jersey corporation. A. 5247. Traeger was, at all relevant times, an Oregon corporation. A. 5247. The dispute resolution provision in the CardConnect/Traeger contract brokered by RMH provided Ohio as the venue. FFCL at 11-12. The Retainer Agreement between RMH and Ferraro adopted Ohio as the choice of law. FFCL at 23.

(11th Cir. 2015). The "FAA imposes a heavy presumption in favor of confirming arbitration awards; therefore, a court's confirmation of an arbitration award is usually routine or summary" as "arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011) (emphasis added); *see also AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007).

Florida State Courts have reached similar conclusions regarding the FAC. "Under Florida law, arbitration is a favored means of dispute resolution and courts indulge every reasonable presumption to uphold proceedings resulting in an award." *Miele*, 656 So. 2d at 473. "[L]imited review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative." *Id.*

"Arbitration awards are treated with a high degree of conclusiveness, and a court has extremely limited discretion to vacate an arbitration award." *Am. Fed'n of State, Cnty. v. MiamiDade Cnty. Pub. Sch.*, 95 So. 3d 388, 390 (Fla. 3d DCA 2012). "The narrow scope of our review is necessary to ensure that arbitration does not become merely an added preliminary step to judicial resolution" and constitutes "a true alternative." *Regalado v. Cabezas*, 959 So. 2d 282, 284 (Fla. 3d DCA 2007).

Arbitrations are "an alternative to the court system," *Miele v. Prudential-Bache Sec., Inc.*, 656 So. 2d 470,

473 (Fla. 1995), and they are intended to be informal "streamlined proceedings." *AT&T Mobility LLC*, 563 U.S. at 344. "Arbitrators 'enjoy wide latitude in conducting an arbitration hearing,' and they 'are not constrained by formal rules of procedure or evidence.'" *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007); *see Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Kinsey*, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995) ("Arbitrators are not constrained by formal rules of evidence or procedure. Rather, they enjoy wide latitude in the conduct of proceedings."). " The arbitrators' authority over proceedings is so expansive that parties may not infringe upon the arbitrators' control over procedure; parties may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations." *First Pres. Capital, Inc. v. Smith Barney, Harris Upham & Co., Inc.*, 939 F. Supp. 1559, 1565 (S.D. Fla. 1996). "Because arbitration proceedings are in no way constrained by formal rules of procedure or evidence, once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions which grow out of that dispute and bear on its final disposition should be left to the arbitrator." *Id*. at 1563-1565.

One of the few opportunities for judicial review of arbitration awards is provided in Section 682.13(b)(3), Florida Statutes, which requires the court to vacate an award where there was "[m]isconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding." Fla. Stat. § 682.13(b)(3). Section 10(a)(3) of the FAA similarly provides that vacatur is appropriate

where there is "any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). Section 682.06, Florida Statutes, provides that "a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to crossexamine witnesses appearing at the hearing." The law is equally well settled as to the meaning of these narrow exceptions.

In connection with petitions challenging awards based on Sections 682.13(b)(3) and 682.06 of the FAC and Section 10(a)(3) of the FAA, the only procedural requirement courts impose in arbitration is "notice and opportunity to be heard." *Talel Corp. v. Shimonovitch*, 84 So. 3d 1192, 1194 (Fla. 4th DCA 2012); *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1175-77 (9th Cir. 2010); *NYKCool A.B. v. Pac. Fruit, Inc.*, 507 F. App'x 83, 88 (2d Cir. 2013); *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1013 (10th Cir. 1994). That is the beginning and end of procedural formality. Therefore, a "fundamentally fair hearing" in an arbitration means that the parties are necessarily not provided "the same procedures they would find in the judicial arena." *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997); *see Productos Roche S.A.*, 2020 WL 1821385, at *3 ("[T]he right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure.").[3]

3. If this Court had the sweeping appellate review of an arbitration award as Ferraro suggests, it would be bound by the competent, substantial evidence standard. That is, the review would consist of assuming the correctness of the Arbitrator's factual findings and then determining whether there was

Notwithstanding that binding authority, Ferraro seeks vacation of the Award based on its assertion that the Arbitrator (1) adopted strict pleading rules that were violated and (2) improperly considered and decided an affirmative claim that Ferraro asserts it lacked notice of, causing it to be denied a hearing with fundamental fairness. RMH has argued that this Court should defer to the Arbitrator's findings of fact and conclusions of law not only to the contested facts tried during the arbitration but also to her findings and conclusions with regard to fundamental fairness. This Court disagrees with the latter proposition and believes that with regard to findings and conclusions on the issue of whether the Arbitrator provided a fundamentally fair proceeding, it is incumbent on this Court to examine the proceedings *de novo.* Nevertheless, as part of this Court's analysis it is helpful to review the Arbitrator's findings and conclusions on this issue.

FACTUAL BACKGROUND

The Underlying RMH Representation

The claim of legal malpractice arose from a matter in which the Ferraro law firm undertook to represent

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"competent substantial evidence" to support her conclusions; not whether there was evidence of a contrary conclusion. *See U.S. Bank, N.A. v. Stokes*, 289 So. 3d 523, 524 (Fla. 3d DCA 2019). The error here in adopting an otherwise unrecognized and expansive view of the Court's power of appellate review—coupled with ignoring the competent, substantial evidence standard in exercising it—led to an outcome that is clearly erroneous as a matter of fact and law.

RMH. RMH's claim arose from a credit card processing agreement between CardConnect, a New Jersey company, and Traeger Grills, LLC ("Traeger"), an Oregon company. The agreement was brokered by RMH, entitling it to a substantial fee. FFCL at 1. After months of successfully using CardConnect's services, Traeger abruptly terminated the service. *Id.* at 9. Traeger's termination gave rise to RMH's belief that the liquidated damages provision in the CardConnect/Traeger agreement, coupled with its disproportionate interest (RMH was entitled to 75%) of the termination fee in recovery based on its agreement with CardConnect, gave it a large claim for contract damages. *Id.* at 2, 7. When Traeger denied any responsibility to RMH for the claimed breach, asserting among other things that its Chief Financial Officer's signature on the agreement was a forgery, RMH retained Ferraro to pursue its claim "to judgment in a trial court in Florida, Ohio, or any other jurisdiction which Attorney believes would be in Client's best interests." *Id.* at 13.

At the outset of the representation, the fact that RMH was not a party to the CardConnect/Traeger agreement was identified as a concern. *Id.* at 12-14. To address that concern, RMH pushed CardConnect to bring a claim asserting Traeger's breach. *Id.* at 13-14. An assignment was sought as an alternative because CardConnect, which owned only 25% of any recovery, had minimal incentive to pursue the claim and had other reasons not to litigate. A. 3560-3561; Tr. at 701-702.

Retained to represent RMH in connection with the task to recover the contract damages, Ferraro attorneys

Eric Tinstman ("Tinstman") and Jeff Sloman ("Sloman") took over the effort to obtain an assignment from CardConnect of its claim that would eliminate any issue as to whether RMH could bring suit against Traeger in its own name. *Id.* at 12-13.

On July 16, 2014, CardConnect delivered to Ferraro a fully executed assignment of its claim against Traeger. *Id.* at 14. If RMH had accepted the assignment, all right, title, and interest in and to CardConnect's rights against Traeger would have been held by RMH. *Id.* The executed assignment provided that RMH would indemnify CardConnect from any fees and costs that might arise from the pursuit by RMH against Traeger under the assignment. *Id.*

Ferraro's associate Tinstman immediately advised RMH to reject the assignment because of the indemnification provision. *Id.* at 14-15.

In connection with his advice to reject the assignment, Tinstman, in writing, advised RMH that it could bring a third party beneficiary claim against Traeger in Ohio in its own name. *Id.* at 14. Before advising RMH to reject the tendered assignment, and before concluding that a valid claim existed, neither Tinstman nor Sloman conducted any analysis of Ohio law—the forum for a CardConnect/Traeger dispute to be litigated. Thus, the Arbitrator found that no reasonable effort was employed by Ferraro to determine if RMH could bring a claim in its own name without an assignment. *Id.* at 14, 48-49. Instead, the advice to reject the assignment on the basis that a direct claim

existed was an uninformed, off-the-cuff conclusion with consequences. *Id.*

Relying on the advice from Ferraro's attorneys, RMH rejected the assignment. *Id.* at 14-15, 48-49. Had RMH been properly advised by Tinstman and Sloman of the risks, it would have accepted the assignment on the terms presented by CardConnect. *Id.* at 49.

Traeger filed suit against CardConnect in Oregon seeking to declare the processing contract invalid. *Id.* at 15. CardConnect's assignment to RMH having been rejected, Traeger and CardConnect entered into a settlement terminating the processing agreement. *Id.*

Jim Ferraro, who was admitted to practice in Ohio, signed the complaint prepared by Tinstman, falsely alleging that RMH was a party to the CardConnect/Traeger agreement. FFCL at 16, 25, 61. Traeger moved to dismiss the complaint, noting that RMH was not a party to the contract and had no right to bring the suit. *Id.* at 17. On behalf of RMH, Ferraro filed a poorly reasoned opposition to the motion to dismiss prepared by Tinstman and signed by Jim Ferraro. FFCL at 17-18. "Faced with the Firm's deficient complaint and opposition," the trial court dismissed the contract claim, found that RMH was not a party to the agreement, and determined that the unpled third-party beneficiary claim, raised as an afterthought in response to Traeger's motion to dismiss, would not have prevailed either. *Id.* at 17-18.

Ferraro did not seek rehearing or leave to amend, notwithstanding its false assurances to RMH over months

that such a motion was in process and was certain to prevail. *Id.* at 18-19.

Because the Ohio court had allowed a separate claim for misappropriation of trade secrets to proceed, the case remained pending for months during which Traeger sought discovery that Ferraro failed to provide. *Id.* at 20-21. During those many months, Eric Tinstman engaged in a long series of unprofessional and dishonest acts, assuring RMH that a strong motion would be filed, concealing from RMH the true condition of the breach of contract claim, and providing RMH false hope of an eventually successful outcome. *Id.* at 18-21.

Ultimately, the Ohio case was dismissed with prejudice for discovery violations relating to the claim that was not dismissed. *Id.* When the final judgment circulated in Ferraro's office, Jim Ferraro directed that an investigation be undertaken. *Id.* at 21-22. That led to his discovery of Tinstman's unprofessional conduct, who was then terminated.[4] *Id.* Although Ferraro learned of the dismissal and Tinstman's misconduct before the time to file a notice of appeal had expired, no one in the Ferraro Law Firm advised RMH that the case was over until the time to appeal had run. *Id.* RMH did not learn of the final dismissal of its case until RMH's principal called Ferraro's office in March 2016 and discovered that Tinstman had been fired.[5] *Id.* at 22-23.

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4. Sloman left the Ferraro law firm before the Ohio court dismissed the complaint. FFCL at 17.

5. Jim Ferraro testified that "Mr. Tinstman was in a 'twilight zone' and 'off the rails' during this time period and that he, Mr. Ferraro, was unaware and 'not proud' of what happened." FFCL

Appendix C

The Arbitration Proceedings

RMH employed counsel to determine if a claim for malpractice existed. *Id.* at 23. Five months after the relationship between Ferraro and RMH ended, on August 25, 2016, RMH brought a single-count arbitration demand against Ferraro and its principal, Jim Ferraro, alleging "but for Ferraro's malpractice it would have prevailed in a lawsuit brought in Ohio against Traeger." *Id.* at 23, 63. Among other things, the demand articulated some of the bad acts committed by Tinstman in the course of the Ferraro representation. *Id.* at 25. The series of "regrettable" acts were not independent causes of action, as there was but a single count for damages. *Id.* at 24-25, 63. The litany of "regrettable" acts was offered to support a single claim for punitive damages. *See id.* at 59-60. The deficient advice to reject the assignment was not asserted as one of the "regrettable" acts.

In its pleadings, Ferraro affirmatively alleged that RMH could not prevail on a malpractice claim because it lacked standing to bring a claim in its own name against Traeger in Ohio. FFCL at 23, 44. In effect, Ferraro was arguing that it did not commit malpractice because the case it recommended bringing and brought was unwinnable. This was precisely the opposite of the legal advice Ferraro gave to RMH in connection with Ferraro's ill-fated advice to reject the assignment tendered by CardConnect. *Id.* at 14. Ferraro affirmatively alleged

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at 20. Yet, after Sloman left the firm, Mr. Ferraro "assured RMH that he was their lawyer" and "failed to properly supervise Mr. Tinstman." *Id.* at 26, 61.

that RMH knew it lacked a direct claim against Traeger because "RMH sought to cause CardConnect to assign its rights under the Agreement to RMH, a request that CardConnect declined a few months before the suit was filed." A. 341 (Ferraro's Amended Answer at pgs. 8-10, Third Affirmative Defense); FFCL at 44. Ignoring the legal advice it had given in connection with rejection of the assignment, Ferraro alleged that, "If RMH believed that it was a third-party beneficiary under the Agreement, such a request [for an assignment] would have been unnecessary." *Id.*

To support that defense, Ferraro pointed to "RMH's pre-suit conduct," which Ferraro claims "confirmed its recognition that it did not have any third-party beneficiary rights." *Id.* According to Ferraro, RMH knew it had no claim because "RMH sought to cause CardConnect to assign its rights under the agreement to RMH, *a request CardConnect declined* a few months before the suit was filed.'" *Id.*

Ferraro's affirmative assertions about Ohio law barring RMH's claim and RMH's failure to obtain an assignment led to the discovery that CardConnect had, in fact, presented an executed assignment to Ferraro that only required RMH's signature to become effective. FFCL at 14. Discovery before the final hearing began established that RMH did not execute the assignment because Tinstman and Sloman urged RMH to reject it, while erroneously assuring RMH that it was not needed. *See id.* at 14-15; 48-49.

Thus, through its affirmative defense, Ferraro made the failure to obtain a CardConnect assignment an issue in the filed arbitration. *Id*. at 23, 45.

From the outset of the evidentiary hearing—indeed, in opening statements—RMH asserted that Ferraro could not on the one hand argue that no claim under Ohio law existed, while it could have avoided the consequence of Ohio law by simply providing competent advice regarding a tendered assignment of the entire claim. *Id*. at 26, 45. RMH's argument was characterized by PHM as an avoidance to Ferraro's affirmative defense.

Beginning with RMH's opening statement, Ferraro objected to any consideration of the bad advice it gave with respect to turning down the CardConnect assignment, arguing that the issue was not by RMH as an affirmative claim, i.e. as one of the "regrettable" acts. Tr. 20:15-21. The Arbitrator allowed the argument over that objection and, for the duration of the evidentiary hearing, allowed evidence and argument as to what began to be referred to as the assignment issue, while reserving ruling on the objections.[6] FFCL at 45.

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6. Even had the federal Rules of Civil Procedure applied in the Arbitration, the assignment issue was made part of the case because Ferraro affirmatively asserted that Ohio law precluded a direct claim in RMH's own name thereby placing at issue the circumstances leading to rejection of the tendered CardConnect assignment. Rule 7 of the Federal Rules of Civil Procedure provides that the *"only"* pleadings allowed are a complaint, an answer to a complaint, an answer to a counterclaim, an answer to a cross claim, a third party complaint, an answer to a third party

When in opening statements the issue first arose, RMH argued that it did not have to affirmatively plead an avoidance to Ferraro's defense that Ohio law precluded the recovery it sought. That is, Ferraro had affirmatively pled Ohio law as a defense, and even formal pleading rules in federal court would not require a responsive pleading rebutting or avoiding Ferraro's affirmative defenses. In other words, Ferraro could not escape its liability arising from negligently advising RMH to reject an assignment on the basis that it was unnecessary since Ohio law allowed the claim in RMH's name (notwithstanding it not being a party to the agreement between CardConnect and Traeger or an intended third party beneficiary) and, then, when RMH accepted that advice, allow Ferraro to rely on its own malpractice in giving said advice as a defense to a claim of malpractice in the handling of the litigation. And, of course, the proceeding was an arbitration, where there are no rules of pleading or civil procedure and all that is required is notice and an opportunity to be heard.

Although it continued to object, throughout the course of the proceeding, Ferraro presented evidence and argument on the tendered assignment and in support of its contention that RMH's decision to reject the assignment was a risk it chose to take because it did not want to indemnify CardConnect.[7] FFCL at 48-49.

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complaint, and, "if the court orders, a reply to an answer." Missing from this list of allowed pleadings are responses to affirmative defenses. RMH consistently pointed that out in response to Ferraro's objections. FFCL at 43-44.

7. Because the parties and the Arbitrator could not compel third parties to produce pre-hearing discovery or provide pre-

Ferraro unsuccessfully argued that the rejection of the assignment was an informed decision. Id. Ferraro cross-examined witnesses on the assignment and informed consent issues, see Tr. 339-340, 842-843, 975-79, 987-990, 992-994; 1240-1249; 1253-54; 1260-70; 1510-16; 2314-15; 2367-68; 2591; 2597-98; 2602-09; 2616-19; 3251; 3350; 3411; 3461-62; 3466-69; 3473-76.[8]

During the testimony of RMH's expert, RMH argued for the first time that in addition to being an avoidance, it was also appropriately tried as an affirmative claim for relief, the difference being only the measure of damages. Tr. 2138-2160. From that point forward, RMH argued the assignment issue both as a defense against Ferraro's

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hearing testimony —*see* 9 U.S.C. § 7; *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019) (recognizing that the FAA implicitly withholds the power to compel documents from non-parties without summoning the nonparty to testify; therefore, pre-hearing depositions and discovery from non-parties is prohibited); *Kennedy v. Am. Express Travel Related Servs. Co., Inc.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009) (an arbitrator is not authorized to issue summonses for pre-hearing depositions and document discovery from non-parties; an arbitrator may do so at a hearing, but he or she may not order such production before the hearing)—the parties conducted discovery during the final hearing (which began on December 3, 2018), including a hearing on a motion to compel discovery on June 28, 2019, a hearing on a subpoena to Traeger for documents on October 11, 2019, and a hearing to compel production of Traeger discovery on January 22, 2020. Accordingly, the parties had new documents and new testimony provided during the course of the final hearing.

8. *See* also Tr. 411-412, 738-39, 800-801, 806-807, 809.

defense and as an affirmative claim for relief. As a defense against Ferraro's argument that Ohio law barred a direct claim, RMH's recovery would have been 75% of the total recovery. As an affirmative claim, RMH, would be seeking 100% of the recovery. Ferraro's objection to what it characterized as an unpled claim, failed to distinguish between the two.

Throughout the course of the proceeding the issue was tried, objections were made, and the Arbitrator reserved ruling on whether the assignment issue, which was part of the case as an avoidance to Ferraro's defenses, could be asserted as an affirmative claim for relief.[9] In the midst of the final hearing, Ferraro proposed to postpone a ruling on its objection until the presentation of the evidence concluded. Tr. at 2541-42.

Because of a series of unrelated but unfortunate events, the final hearing consumed twenty-two trial days conducted with many months in between over an eighteen-month period, with opening arguments on December 3, 2018 and closing arguments on September 24, 2020. FFCL at 46. In the course of the eighteen months, Ferraro did not seek a definitive ruling on its objection, a continuance, seek additional discovery, or assert any additional defenses that might arise because of what it characterized as an unpled claim. *Id*. at 45-46. When the Arbitrator asked Ferraro to address the assignment substantively in its post-hearing briefing, Ferraro never objected that it required additional discovery or other relief before filing its briefs.

9. *See*, e.g., Tr. at 1826; 2156-57; 2160-63.

See Tr. 4599-4600 (Ferraro's Counsel Mr. Hall: "I could have asked for a continuance and gotten other experts and what have you . . . we didn't want to go through all of that again. We wanted to have the trial."); 4444-4445, 4459-4460; A. 3285-3292.

The assignment issue was not the only issue tried. In her November 2020 Order, Arbitrator Perry rejected Ferraro's claim that the chief financial officer's signature on the CardConnect/Traeger agreement was a forgery and, thus, found a valid contract between CardConnect and Traeger that Traeger breached, causing damage to RMH. FFCL at 32-33, 63. While she concluded that there was no third-party beneficiary claim under Ohio law, she also found that Ferraro's advice to reject the proffered assignment from CardConnect was negligent and that, but for that negligent advice, RMH would have accepted the assignment and proceeded successfully against Traeger. *Id.* at 49. She specifically rejected Ferraro's argument that RMH's refusal to accept the assignment was an "informed" decision. *Id.*

The Arbitrator rejected Ferraro's unpled claim argument, treated the assignment claim as an affirmative claim, and explained in detail the factual basis for her conclusion that the issue of the incompetent advice to reject the assignment was properly presented, properly litigated, and properly decided. *Id.* at 40-48.

After the Arbitrator issued the FFCL, Ferraro and Jim Ferraro filed extensive briefs and motions, including offering new evidence the Arbitrator accepted, considered,

and relied upon in considering Ferraro's challenges to certain aspects of the Award, specifically the finding against Jim Ferraro personally and the initial award of punitive damages. A. 2828-2916, 3241–3314, 3315–3449, 3537–3549. The Arbitrator considered Ferraro's new post-FFCL arguments, she accepted new post-FFCL evidence, and rewrote her FFCL to exclude a previous finding of liability against Jim Ferraro, personally, and her initial award of punitive damages, concluding that the long string of bad acts that followed the rejection of the assignment, were not sufficiently connected to the loss caused by the negligence. Ex. A & B to Aug. 13, 2021 Notice of Filing Arbitrator's Orders. At no point during this post-FFCL phase did Ferraro ask to reopen discovery or otherwise attempt to rectify any perceived prejudice by requesting a reopening of evidentiary proceedings or making post-hearing submissions on the assignment issue.

Following the Arbitrator's post-FFCL order rulings, the Arbitrator's work was completed on August 11, 2021, with RMH being awarded contract damages and a liquidated amount of arbitration costs and prejudgment interest. FFCL at 63; Ex. B to Motion, Order on Costs and Interests.

CONCLUSION

The December 31 Order focuses on precedent concerning due process in trials instead of in arbitrations, and draws factual conclusions inconsistent with those found by this Court after an independent review as wells by the Arbitrator. To the extent that the findings in the

FFCL on the fundamental fairness issue are entitled to deference, the December 31 Order does not defer to those findings. Likewise, even if the Court were to apply a "substantial competent evidence" standard, the Court concludes that her findings were appropriately supported and, more importantly, after independent review, correct factually and legally.

The December 31 Order misappropriates the Arbitrator's discretion over procedure by concluding that scheduling orders established pleading requirements (where no such requirements were adopted), contrary to the FFCL and the competent, substantial evidence in the Record. The factual finding embodied in the December 31 Order is also not supported from a review of the Record. The Arbitrator specifically *rejected* the contention that her scheduling order adopted rules of procedure and established record support for that conclusion. *See* FFCL at 43-44. She found that only two rules were adopted, both at the request of the parties:

> The parties have agreed that Fed. R. Civ. P. 56(a) shall govern the standard for *summary judgment motions* and Fed. R. Civ. P. 26(b)(4)(B) and (C) shall govern the discovery of expert's *work product and communications with counsel*. **The parties will address what methodology the arbitration should use in determining what law to apply to other procedural issues as and if they arise.**

FFCL at 42-43 (emphasis added).

No Arbitrator order required a party to plead an avoidance of an affirmative defense. FFCL at 42-43. Ferraro did not object to the evidence as supportive of an avoidance of its affirmative defenses and, long before the entry of the final award in August 2021, Ferraro acknowledged that RMH was also seeking affirmative relief on the assignment issue. Tr. At 2156; 2154; 1390-93; 2160-63; 2318; 2321; A.10. Yet, Ferraro—for two years—decided to stand on its objection without taking any other steps it deemed necessary to address the issue. Tr. 2541-42; 4459-60; 1826:13-22; 2156:23-2157:3; 2841; 2850. Thus, as indicated by the Arbitrator's findings and aptly supported by the Record, Ferraro cannot legitimately claim to have been surprised that the assignment issue became an affirmative claim nor was it lulled into thinking the evidence was only being offered as an avoidance.

Ferraro has been unable to present to this Court any basis for concluding that a trial over an avoidance to defenses that, during an arbitration, expanded to support an affirmative claim would result in fundamental unfairness. The cases addressing similar issues in arbitration proceedings have unanimously concluded otherwise. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 304 (5th Cir. 2004) (affirming district court for confirming arbitration award under the FAA where the party seeking vacatur had an opportunity but made no request for additional discovery and recognizing that it is not uncommon in arbitration "to ask for additional discovery or information after a hearing, to request additional sessions of a hearing to submit more evidence,

or to file posthearing submissions"); *Matter of Arbitration between Carina Int'l Shipping Corp. & Adam Mar. Corp.*, 961 F. Supp. 559, 567 (S.D.N.Y. 1997, Sotomayor, J.)(award confirmed; arbitration panel had considered what petitioner argued was a new claim after close of hearing because petitioner had failed to request additional discovery or reopening of hearing—by its "own tactical choice" [the petitioner] "waived the right to argue that the awarding panel committed misconduct under 9 U.S.C. § 10(a)(3) by not re-opening the evidentiary hearings" or asking the arbitrators to "permit it discovery").*Sungard Energy Sys. Inc. v. Gas Transmission Nw. Corp.*, 551 F. Supp. 2d 608, 616 (S.D. Tex. 2008) (confirming award under FAA and concluding: "[E]ven if GTN surprised SunGard at the arbitration hearing with evidence concerning GTN's cost of cover, SunGard has failed to establish that is was denied a fair hearing since the panel provided SunGard with ample opportunity to evaluate GTN's evidence and argue against it" where SunGard cross-examined GTN's witnesses concerning its costs of cover, both sides presented their evidence, the parties had more than thirty days to file extensive post-hearing briefs, both sides submitted briefs exceeding sixty pages, both parties marshaled the relevant evidence in support of their positions, and the parties then appeared before the arbitration panel again a month later for closing arguments) (emphasis added); *Capgemini U.S. LLC v. Sorensen*, 2005 WL 1560482, at *7 (S.D.N.Y. July 1, 2005) (confirming award under FAA where party seeking vacatur "had adequate notice that monetary damages were sought and an opportunity to be heard before the close of the hearing, it cannot now argue that its failure to

take advantage of those opportunities requires that this Court vacate the Award pursuant to § 10(a)(3);" had "made the tactical decision to limit its post-hearing submissions to the argument that [confirming party's] request for monetary damages was untimely and not supported by the evidence" and chose not to make alternative arguments; and "failed to take advantage of a potential opportunity to be heard when it failed to request that the hearing be re-opened") (emphasis added); *Dolan v. ARC Mech. Corp.*, No. 11 Civ. 09691(PAC), 2012 WL 4928908, at *3 (S.D.N.Y. Oct. 17, 2012) (confirming award under the FAA and concluding arbitration process was not fundamentally unfair where party received proper notice of hearing and that party was not prevented from presenting witnesses, cross-examined the opposing party's witnesses, and asked for and submitted post-hearing evidence); *Tokura Constr. Co., Ltd. v. Corporacion Raymond, S.A.*, 533 F. Supp. 1274, 1278 (S.D. Tex. 1982) (award confirmed; flatly rejecting the argument that the arbitrators improperly considered issue of liability for certain items that were not "formally submitted to the arbitrators in [claimant's] statement of claims" because "arbitration proceedings are not held to the same technical rules of pleading and evidence as lawsuits in federal courts" and, in any event, evidence on these contested issues was presented during the arbitration).

RMH volunteered a continuance if Ferraro believed it was prejudiced from the assignment issue; Ferraro declined the offer. Tr. 2157-58; *see also* Tr. at 4599-600 (HALL: "I could have asked for a continuance and gotten other experts and what have you, because then we would

have had to have a continuance . . . we didn't want to go through all of that again. We wanted to have the trial").

After the Arbitrator had determined liability on what Ferraro asserted was an unpled claim, Ferraro engaged in almost a year of post-final hearing motion practice, where it had an additional opportunity to correct any perceived prejudice by requesting a reopening of evidentiary proceedings, making post-hearing submissions, or seeking additional discovery. Moreover, Ferraro (1) introduced evidence and cross-examined witnesses on the issue,[10] and addressed the issue substantively, including in its post-hearing briefing, A. 3285-3292; and, (2) in fact, reopened the hearing and prevailed on having the Arbitrator reverse her findings on other issues. *See* A. 4996-5001 (Ferraro's motion to modify award citing evidence outside of the FFCL throughout); Ex. A to Filing # 132657631 [April 8, 2021 Order on Mot. to Modify at 10-16] (Arbitrator making new factual "find[ing]s" and reversing prior factual findings); Ex. B to Filing # 132657631 [Aug. 11, 2021 Order at 19-20] (Arbitrator citing testimony outside of the FFCL to support new factual findings).

The Court concludes that the underlying arbitration hearing conformed to the basic requirements of due process by providing notice and an opportunity to be heard. To be sure, the notice of an *affirmative* claim as opposed to an avoidance of Ferraro's defense did not arise until expert testimony was being presented, but the

10. *See* Tr. 339-340, 842-843, 975-79, 987-990, 992-994; 1240-1249; 1253-54; 1260-70; 1510-16; 2314-15; 2367-68; 2591; 2597-98; 2602-09; 2616-19; 3251; 3350; 3411; 3461-62; 3466-69; 3473-76.

substance of the malpractice was unaffected by redefining the defense as also being an independent claim. There can be no doubt that (1) Ferraro was on notice before the final award was issued that the assignment issue—presented initially as an avoidance of Ferraro's Ohio law defense—had morphed into an affirmative claim and (2) the Arbitrator had provisionally admitted all of the evidence the parties sought to introduce on the issue. While Ferraro did not try the affirmative claim by consent, it had no right to object to trial of the assignment malpractice as it had raised the issue in its pleadings and RMH had no right or duty to file an avoidance to Ferraro's asserted defenses or formally amend its arbitration demand. Ferraro did not seek to reopen discovery or seek a continuance. Finally, Ferraro's failure to raise the fundamental fairness issue after issuance of the FFCL, while successfully raising other issues, cannot be squared with an argument that it was denied procedural due process.

For the reasons stated in this Order, after having considered the motions, responses, replies, record, applicable law, argument of counsel, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED as follows:

1. Respondent's Motion for Reconsideration is **GRANTED**;

2. Ferraro's Petition to Vacate is **DENIED**;

3. RMH's Motion to Confirm is **GRANTED**;

4. The December 31, 2021 Order is **VACATED**; and

The Court will enter a final judgment confirming the Arbitration Award in its entirety in Respondent's favor and against Petitioner The Ferraro Law Firm, P.A. once the Court rules on the outstanding Motions for Sanctions.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 14th day of September, 2022.

/s/_____
Hon. Alan Fine
Circuit Court Judge

APPENDIX D — FINAL ORDER OF THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA, FILED DECEMBER 31, 2021

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2021-003987-CA-44

THE FERRARO LAW FIRM, P.A., *et al.*,

Plaintiffs,

vs.

ROYAL MERCHANT HOLDINGS, LLC,

Defendant.

Filed December 31, 2021

FINAL ORDER ON PETITION TO VACATE ARBITRATION AWARD AND MOTION TO CONFIRM ARBITRATION AWARD

Judge William Thomas

THIS CAUSE came before the Court for hearing on December 13, 2021, on the Petition to Vacate Arbitration Award ("the Petition to Vacate") filed by the petitioners, The Ferraro Law Firm, P.A. ("Ferraro Law") and James

L. Ferraro, and the cross Motion to Confirm Arbitration Award ("the Motion to Confirm") filed by the respondent, Royal Merchant Holdings, LLC ("RMH"). The Court, having reviewed the Petition to Vacate and the Motion to Confirm, the briefing and filings related thereto, and the authorities and record materials cited therein, and having carefully considered the oral arguments presented by the parties, makes the following findings:

Factual and Procedural History

On August 25, 2016, RMH commenced arbitration proceedings alleging that the Ferraro Parties committed malpractice for conduct committed during litigation proceedings in Ohio. By agreement of the parties, the arbitration proceedings were administered much like a trial court. The arbitrator issued scheduling orders that expressly imposed deadlines and requirements for "amend[ing] pleadings," serving, responding to, and producing fact and expert discovery, conducting depositions, exchanging witness and exhibit lists, and filing and responding to dispositive motions. A. 347-67. As to expert discovery, the scheduling orders dictated that "[e]very expert witness shall either (i) provide a report that complies with Fed. R. Civ. P. 26(a)(2)(B) or (ii) provide a disclosure that complies with Fed. R. Civ. P. (a)(2)(C) and give a deposition upon the request of the opposing party."

RMH's malpractice allegations, which were set forth in an initial complaint and then crystalized in an amended complaint, did not concern any conduct or decision-making during RMH's assignment negotiations with the

Card Processor. Indeed, the word "assignment" is not mentioned a single time in RMH's complaints. Rather, RMH's malpractice allegations focused exclusively on the following seven specific categories of actions and omissions that the Ferraro Parties supposedly committed during the Ohio Litigation.

(1) the Complaint filed by Ferraro Law against the Merchant in the Ohio Litigation was deficient because it failed to allege that RMH was a third-party beneficiary of the contract between the Card Processor and the Merchant;

(2) the demand letter that Ferraro Law sent to the Merchant after the Ohio Litigation was filed was deficient because it "incorrectly asserted that the Merchant 'signed a contract with [RMH] . . . for [RMH] to provide exclusive credit card payment processing services to [the Merchant]";

(3) the response to the Merchant's motion to dismiss that Ferraro Law filed in the Ohio Litigation was inept because it failed to offer a construction of the contract to show that RMH was a third-party beneficiary of the contract who could sue to enforce the liquidated damages provision;

(4) Ferraro Law was negligent because of the multiple missed deadlines and discovery

violations committed by Mr. Tinstman in the Ohio Litigation;

(5) Ferraro Law was negligent by disregarding court rules and orders in the Ohio Litigation, including:

(a) Mr. Tinstman's failure to disclose its witness list by the court-ordered deadline, then filing a witness list that supposedly violated local rules and failing to correct it;

(b) Mr. Tinstman's failure to attend a discovery conference;

(c) Mr. Tinstman's failure to file any opposition papers or respond to the Merchant's motion to compel; and

(d) Mr. Tinstman's failure to comply with the trial court's order compelling production of outstanding discovery;

(6) Ferraro Law was negligent by failing to oppose the Merchant's motion for sanctions seeking dismissal with prejudice of the Ohio Litigation; and

(7) Ferraro Law was negligent by failing to advise RMH of the dismissal with prejudice of the Ohio Litigation prior to the expiration of the appeal deadline.

RMH never moved to amend its complaint—either before, during, or after the arbitration trial—to add any further acts of malpractice. RMH alleged that, but for these alleged instances of malpractice, RMH would have prevailed in the Ohio Litigation against the Merchant because, according to RMH, it was a third-party beneficiary entitled to enforce the contract between the Card Processor and the Merchant.

The Ferraro Parties responded by asserting, in relevant part, that any alleged negligence committed by them while litigating RMH's claims in Ohio could not have caused RMH any damage, because RMH did not possess a valid claim against the Merchant to begin with. In support, the Ferraro Parties advanced three pertinent defenses:

(1) RMH was not, in fact, a third-party beneficiary, and thus had no right to enforce the contract at issue;

(2) even if RMH was a third-party beneficiary, the settlement and release reached between the Card Processor and the Merchant extinguished any possible claim RMH would have had ("the Release Affirmative Defense"); and

(3) in either event, the alleged signature of the Merchant's CFO on the liquidated damages document was a forgery, such that the Merchant owed no liquidated damages *to anyone.*

Appendix D

For roughly two years, RMH and the Ferraro Parties engaged in extensive pretrial motion practice and discovery—including exchanging twelve expert reports from eight expert witnesses and conducting six depositions of fact and expert witnesses—focused specifically on the seven categories of purported malpractice alleged in RMH's complaint. During this time, each side produced evidence in an attempt to prove its pleaded positions and to disprove the other side's pleaded positions. During discovery, none of RMH's witnesses opined that any actions taken by the Ferraro Parties during the course of the assignment negotiations constituted malpractice or a breach of the ferraro Parties' duty to RMH, or that RMH was entitled to anything other than 75% of the early termination fees based on RMH's supposed status as a third-party beneficiary. Moreover, RMH did not list the proposed assignment on its exhibit list or exchange it with the Ferraro Parties as one of its trial exhibits, which were requirements imposed by the arbitrator's discovery orders for exhibits to be used at trial.

The arbitration trial commenced. During the trial, RMH pursued a brand new, impleaded theory regarding wholly different conduct concerning the assignment negotiations that occurred prior to the Ohio Litigation. RMH repeatedly insisted that its focus on this unalleged conduct was not related to an affirmative claim; rather, according to RMH, it was related to an "avoidance" of one of the Ferraro Parties' affirmative defenses. RMH's new theory was that the Ferraro Parties were negligent for advising RMH to reject the assignment proposed by the Card Processor—which occurred months before

the Ohio Litigation even commenced. In support of this impleaded theory, RMH offered expert opinions that it did not disclose in its pre-trial expert disclosures, and documents that it did not disclose in its pre-trial exhibit list, in violation of the arbitrator's scheduling orders. At trial, however, Mr. Chappelear provided previously-undisclosed expert opinion regarding the Ferraro Parties' conduct as it related to the assignment, which occurred *before the Ohio Litigation*. Similarly, before trial, RMH disclosed the expert testimony of its Sales Agent, who opined that, as a third-party beneficiary (not an assignee), RMH was entitled to 75% of the early termination fees. At trial, however, RMH's Sales Agent presented previously-undisclosed expert testimony that RMH, as an assignee (not a third-party beneficiary), would have been entitled to 100% of the early termination fee. In addition, before trial, RMH did not disclose the proposed assignment, or emails about the proposed assignment, on its exhibit list, but nevertheless offered these documents into evidence at trial in its case-in-chief.

The Ferraro Parties repeatedly objected to RMH pursuing an unpleaded claim and its attempts to support this unpleaded claim with undisclosed evidence. T. 20, 212, 414, 706-07, T. 740-45, 2,142-2,157. In response to these objections, RMH assured the Ferraro Parties and the arbitrator that it was not using this evidence to pursue an unpleaded theory of malpractice liability, but merely to refute the Ferraro Parties' Release Affirmative Defense. T. 20, 212, 414, 706-07, T. 740-45, 2,142-2,157. In RMH's words: "I wasn't required to plead because there's no requirement to plead [an avoidance]. . . . [W]e are entitled

to respond to [Ferraro's defense]. . . . It is to avoid—it is literally the rule of civil procedure to avoid the subject of defense. . . . [T]hese are the facts that we're going to develop . . . in response to their defense." T. 21, 86-87, 91, 213, 215-16, 218. The arbitrator, in turn, confirmed her understanding of RMH's position regarding the assignment issue: "I understand what you're saying. . . . [Y]ou're saying it's a pure avoidance. . . ." T. 15-16, 218. Based on RMH's representations, the arbitrator allowed RMH to introduce the undisclosed evidence to "avoid" the Ferraro Parties' Release Affirmative Defense, subject to the Ferraro Parties' objections regarding RMH's pursuit of an impleaded claim, which was not resolved. T. 738-47.

On September 24, 2020, the parties presented closing arguments. Consistent with its post-trial brief, RMH requested affirmative relief on its impleaded assignment claim and on its various pleaded claims. T. 4483, 4484, 4511-12, 4517, 4521-22. When RMH argued the assignment issue, the arbitrator asked, "[w]e're really talking about the claim right now more than an avoidance, right?" T. 4513. RMH answered, "Yes." T. 4513. In response, the Ferraro Parties again objected to RMH pursuing an unpleaded claim, T. 4598-99, and to the arbitrator's consideration of the undisclosed evidence RMH offered in support of the unpleaded claim, T. 4,598-4,601.

On November 18, 2020, the arbitrator entered her findings of fact and conclusions of law. First, the arbitrator addressed, and rejected, RMH's theory that the Ferraro Parties were liable for malpractice committed during the Ohio Litigation, determining that RMH was not, in

fact, an intended third-party beneficiary of the contract between the Merchant and the Card Processor and, therefore, was not entitled to 75% of early termination fees as a third-party beneficiary. Second, the arbitrator ruled on the Ferraro Parties' "standing objection" to RMH's unpleaded claim—six months after the evidence closed and two months after closing arguments. Despite the fact that RMH never moved to amend its pleadings, and that the arbitrator waited until after the trial when she issued the Award to rule on the Ferraro Parties' objections, the arbitrator found that the Ferraro Parties were "on notice" that the unpleaded claim was at issue and, therefore, overruled the Ferraro Parties' objections, determining, in the present tense, "that RMH should be permitted to bring the assignment claim. . . ." A. 3,596. Third, the arbitrator ruled in favor of RMH on its unpleaded assignment claim, concluding that the Ferraro Parties committed malpractice by advising RMH not to accept the proposed assignment without fully disclosing the risks and benefits associated with that decision. Fourth, the arbitrator determined that the liability for compensatory damages associated with RMH's impleaded assignment theory should be borne not only by Ferraro Law but also by Mr. Ferraro individually, even though there was no evidence that he was involved with the conduct associated with RMH's assignment claim. And fifth, the arbitrator determined that RMH was entitled to punitive damages against Ferraro Law based on the conduct related to the Ohio Litigation, even though the arbitrator determined that this conduct did not harm RMH. Thereafter, the arbitrator reversed her fourth and fifth determinations. First, the arbitrator reversed her

determination that RMH was entitled to punitive damages against Ferraro Law. In doing so, the arbitrator found that: (1) "no principal or managing agent of the Firm knowingly authorized, participated in, or ratified actions that constitute actual malice"; and (2) the conduct that occurred during the assignment negotiations "was not inextricably intertwined" with the conduct that occurred during the Ohio Litigation. *See* Petitioners' 08/13/2021 Notice of Filing Arbitrator's Orders Resolving All Pending Arbitral Disputes Between Parties. Second, the arbitrator reversed her determination that Mr. Ferraro was personally liable for any malpractice. In doing so, the arbitrator clarified that the finding of negligence "focused solely on the limited period surrounding the assignment advice and did not subsume the period that included the Ohio misconduct." Finally, the arbitrator entered an order assessing, in favor of RMH, interest in the amount of $643,344.52 (as of May 31, 2021, plus an additional $221.30 per day until the entire judgment is collected) and costs in the amount of $229,555.26.

On February 16, 2021, the Ferraro Parties filed a Petition to Vacate the Arbitration Award, which initiated these proceedings. The Ferraro Parties contend that the arbitrator engaged in "misconduct" that prejudiced the rights of the Ferraro Parties in a manner that denied them a fundamentally fair arbitration hearing and, on this basis, seek to vacate the award under section 682.13(b)(3), Fla. Stat. (2021) and 9 U.S.C. § 10(a)(3) (2021). RMH, in turn, filed a Motion to Confirm the Arbitration Award, arguing that the award should be confirmed in its entirety because the Ferraro Parties were provided a fundamentally fair hearing.

Appendix D

Both the Federal Arbitration Act ("FAA") and the Federal Arbitration Code ("FAC") require confirmation of an award unless sufficient grounds exist to modify, amend or vacate the arbitration award. *Murton Roofing Corp v. FF Fund Corp*, 930 So. 2d 772 (Fla. 3d DCA 2006). The grounds for vacating an arbitration award are limited to those circumstances expressly listed in the statues. The ("FAA") provides that a court may make an order vacating the award upon the application of any party to the arbitration:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators or either of them;
>
> (3) where the arbitrators were guilty of misconduct and refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their power or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (a)(1)-(4). Similarly the FAC provides:

> (1) Upon motion of a party to an arbitration proceeding, the court shall vacate an arbitration award if:
>
> a. The award was procured by corruption, fraud, or other undue means;
>
> b. There was:
>
> 1. Evident partiality by an arbitrator appointed as a neutral arbitrator;
>
> 2. Corruption by an arbitrator; or
>
> 3. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.

§ 682.13 (l)(a)(b)(l)(2)(3), Fla. Stat.

As it pertains to this case, the FAC provides that a trial court "shall" vacate an arbitration award where there was "[m]isconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding," § 682.13(b)(3), and the FAA authorizes vacatur on essentially the same basis. In this context, "misconduct" does not mean professional wrongdoing. Rather, "[a]s used in this section, 'misconduct' means a decision 'which so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" *Efron*, 300 So. 3d at 736 (quoting *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968)). Under this

standard, the "fairness" of the hearing, i.e., procedural due process, is the polestar of the inquiry. *See Black v. City of Auburn, Ala.*, 857 F. Supp. 1540, 1547 (11th Cir. 1994) ("The underpinnings of procedural due process are notice and a fair hearing."). Accordingly, "[a]lthough an arbitrator need not follow all of the niceties observed in court proceedings, the arbitrator must grant the parties a fundamentally fair hearing." *Tatel Corp. v. Shimonovitch*, 84 So. 3d 1192, 1194 (Fla. 4th DCA 2012). Where an arbitrator deprives a party of a fundamentally fair hearing, the due process principles set forth in the FAA and FAC authorize the judiciary to vacate the award. *See Quaker Securities, Inc. v. Mid-Atlantic Securities, Inc.*, 1996 WL 524094, at *6 (E.D. Pa. Sept. 11, 1996) (vacating award where arbitration panel's issuance of the award "was the first notice to the named parties" that the panel had granted an intervenor's motion to intervene and intended to resolve the intervenor's claim, holding "[p]rinciples of due process required the [arbitration] [p]anel to provide [the parties] with notice that it had granted [an intervenor's] motion to intervene and that it intended to resolve [the intervenor's] claim. . . .").

The arbitrator authorized RMH to pursue affirmative relief on a claim that it did not plead before trial. "[T]he purpose of a pleading is to notify a defendant that he is being sued and what he is being sued for. Due process demands nothing less." *J.S.L. Const. Co.*, 994 So. 2d at 399 (internal citation omitted); *Walker v. Walker*, 254 So. 2d 832, 834 (Fla. 1st DCA 1971) ("The degree of certainty required in a pleading is that the pleader must set forth the facts in such a manner as to reasonably inform his

adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence."). For this reason, "litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared." *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988) (applying to legal malpractice case).

RMH insists that pleading requirements do not apply in arbitrations because arbitrations are not governed by any specific rules of civil procedure. This Court disagrees. Additionally, in *this* case, the arbitrator's scheduling orders imposed on the parties pleading requirements. These scheduling orders formed expectations by the parties that they would be bound at trial by the allegations in their pleadings. Indeed, pursuant to the scheduling order, RMH filed a detailed amended complaint within the deadline for the parties to amend their pleadings but did not make any allegations regarding the assignment theory upon which it ultimately prevailed.

"[G]ranting relief which was neither requested by appropriate pleadings, nor tried by consent, is a violation of due process." *Wachovia Mortg. Corp. v. Posti*, 166 So. 3d 944, 945-46 (Fla. 4th DCA 2015) (emphasis added); *Moore v. Trevino*, 612 So. 2d 604, 606-07 (Fla. 4th DCA 1992) (holding that "to permit" a trial court to grant relief that was not requested in the pleadings "would offend a party's right to notice and opportunity to prepare a proper defense"); *Fla. Atlantic Marine, Inc. v. Seminole Boatyard, Inc.*, 630 So. 2d 219, 221 (Fla. 4th DCA 1993)

("We reverse, in part, the final judgment because we find that the trial court ruled on the basis of issues that were neither addressed in the pleadings nor tried by consent."); *Fla. Digestive Health Specialists, LLP v. Colina*, 192 So. 3d 491, 494 (Fla. 2d DCA 2015) (holding that "[t]he trial court erred in granting" relief "for which [the plaintiff] did not plead"); *R.S. v. Dep't of Child & Fams.*, 872 So.2d 412, 413 (Fla. 4th DCA 2004) ("'[I]t is a denial of procedural due process rights of notice and a fair hearing' to terminate parental rights on a ground not pleaded.").

In the instant action, RMH did not allege, and its complaint gave "no hint" that RMH sought to recover for, malpractice committed by the Ferraro Parties during the course of the assignment negotiations, which took place before the Ohio Litigation. Rather, RMH's complaint alleges that the Ferraro Parties were negligent for actions they took during the Ohio Litigation—which commenced months after the assignment negotiations terminated. Accordingly, RMH's pleadings did not place the Ferraro Parties on notice of this claim. The arbitrator also allowed RMH to support its impleaded claim with critical documents and expert witness testimony that RMH did not disclose before trial as required by the arbitrator's discovery orders. RMH "fail[ed] to disclose the subject of witness testimony and documents that" it ultimately "introduced into evidence," over the Ferraro Parties' repeated objections, and "in violation of the arbitrator's discoveiy orders. By nevertheless allowing RMH to support its impleaded claim with this evidence/ Finally, the arbitrator failed to rule on the Ferraro Parties' repeated objections during the hearing and instead waited until

after it was completed to inform the Ferraro Parties that she would authorize RMH to pursue affirmative relief on its unpleaded claim, and to support that impleaded claim with undisclosed evidence. See *Quaker Securities, Inc. v. Mid-Atlantic Securities, Inc.*, 1996 WL 524094, at *6 (E.D. Pa. Sept. 11, 1996)(because "[t]he Arbitration Award was the first notice to the named parties that [the intervenor] was considered a party to the proceeding, the petitioners "were denied a fundamentally fair hearing." Principles of due process required the Panel to provide [the petitioners'] with notice that it had granted [the intervenor's] motion to intervene and that it intended to resolve [the intervenor's claim] that he was entitled to compensation such that an opportunity to respond was accorded [the petitioners].)

The first notice to the Ferraro Parties that the arbitrator would authorize RMH to pursue its impleaded claim, and use undisclosed evidence to support it, was when the arbitrator issued the Award. Thus, as in *Quaker Securities*, the arbitrator violated the "[p]rinciples of due process" which "required" her "to provide" the Ferraro Parties "with notice" *during* the hearing that she intended to authorize RMH to pursue its unpleaded claim and provide the Ferraro Parties with "an opportunity to respond" to that unpleaded theory as an affirmative claim. For these reasons, the Ferraro Parties "were denied a fundamentally fair hearing." RMH's complete failure to plead its assignment theory wholly deprived the Ferraro Parties of notice regarding the theory of liability RMH intended to prove at trial and a fair opportunity to prepare defenses to it before trial. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar*

Instrument Corp., 537 So. 2d 561, 563 (Fla. 1988) (holding "litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared").

In the Award, the arbitrator asserted that the Ferraro Parties did not request a continuance and attempt to cure the prejudice. However, the case facts and procedural history call for a different conclusion. Throughout RMH's presentation of its case-in-chief, RMH represented that it was not proceeding on a new impleaded claim, but was, instead, simply attempting to rebut the Ferraro Parties' affirmative defense. The arbitrator continuously deferred ruling on the Ferraro Parties' objections or otherwise indicated that the surprise evidence was being admitted solely to support RMH's "avoidance" of the Ferraro Parties' affirmative defense. Thus, the Ferraro Parties were made to believe that, at worst, the surprise evidence would be narrowly limited to support RMH's avoidance defense and were not on notice that the assignment claim was "at issue" in the case. Without such notice, it would have been premature for the Ferraro Parties to request a continuance to conduct additional costly discovery, re-depose RMH's witnesses, allow the Ferraro Parties' experts to form new opinions, and to potentially retain new experts, add new fact witnesses, amend the trial exhibits, and reopen the pleadings to assert additional defenses, like the statute of limitations defense referenced above. Because an affirmative claim allows a plaintiff to affirmatively recover against a defendant, a defendant must defend against an affirmative claim to avoid incurring a loss. On the other hand, an avoidance of an

affirmative defense does not, in and of itself, enable a plaintiff to recover against a defendant. Accordingly, a defendant need not defend against an avoidance in the same fashion it would defend against an affirmative claim. Thus, RMH's introduction of the surprise evidence, along with its representations that it was not going to use that evidence to support an affirmative claim, unfairly advantaged RMH and significantly hampered the Ferraro Parties' ability to defend against what was later revealed to be an impleaded, affirmative claim. The Ferraro Parties' objected but their objections were not overruled at any point during the arbitration trial and, therefore, the Ferraro Parties were not put on notice that they needed to seek affirmative relief to mitigate the prejudice or request a new trial if the prejudice could not be cured.

The Ferraro Parties objected to the unpleaded claim over a dozen times, beginning with RMH's opening statement, throughout RMH's entire case in chief, in the post-trial briefing, and in closing arguments. Indeed, the Arbitrator recognized that the Ferraro Parties had a standing objection on the issue. Each of the Ferraro Parties' objections served as a reminder to the arbitrator that she had not yet definitively ruled on these issues, and the Ferraro Parties emphasized that it was "important" for the arbitrator to do so.

Based upon the foregoing, it is

ORDERED AND ADJUDGED that the arbitrator actions "prejudice[ed] the rights" of the Ferraro Parties and deprived them of a fundamentally fair hearing. *See*

§ 682.13(b)(3), Fla. Stat.; *see also* 9 U.S.C. § 10. As to Ferraro Law, the Petition to Vacate is **GRANTED** to the extent it awards affirmative relief to RMH on the unpleaded assignment claim, including for compensatory damages, fees, and costs. The Petition to Vacate is **DENIED** as moot as to the arbitrator's initial findings that (1) Ferraro Law is liable to RMH for punitive damages and (2) Mr. Ferraro is personally liable to RMH for compensatory damages because, after the Petition to Vacate was filed, the arbitrator reversed these rulings. The Petition to Vacate is also **DENIED** as to the arbitrator's findings of fact and conclusions of law regarding the *pleaded* claims and defenses. Neither the Ferraro Parties nor RMH contend that they were denied a fundamentally fair hearing as to the *pleaded* claims. This Court hereby **GRANTS**, in part, RMH's Motion to Confirm to the extent it seeks confirmation of the arbitrator's findings of fact and conclusions of law other than those regarding the impleaded assignment claim. RMH's Motion to Confirm is otherwise **DENIED.**

RMH would have been precluded altogether from pursuing the unpleaded assignment claim using evidence that was not disclosed as required by the scheduling orders. Therefore, the proper remedy here is simply to vacate the offending portion of the award. *See J.S.L. Const. Co.*, 994 So. 2d at 400-01 (holding where impleaded claim is tried by ambush, remedy is reversal of award for entry of judgment for ambushed party). But for the arbitrator's misconduct,

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 12/31/2021.

/s/
William Thomas
Circuit Court Judge

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

APPENDIX E — FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ARBITRATION, FILED NOVEMBER 18, 2020

IN THE MATTER OF
THE ARBITRATION BETWEEN

ROYAL MERCHANT HOLDINGS, LLC,

Claimant,

and

JAMES L. FERRARO and
THE FERRARO LAW FIRM, P.A.,

Respondents.

Filed November 18, 2020

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FACTUAL BACKGROUND.

This case was a hard and professionally fought legal malpractice action between Claimant, Royal Merchant Holdings, LLC ("RMH"), and Respondents, the Ferraro Law Firm, P.A. (the "Firm") and James Ferraro ("Mr. Ferraro") (collectively "Ferraro"). This dispute arose after RMH, an independent service organization ("ISO") in the credit card processing industry, retained the Firm to sue merchant Traeger Pellet Grills LLC ("Traeger") for breaching a contract it had executed with a credit card processor known as CardConnect ("CardConnect")[1].

1. CardConnect was also known as Financial Transaction Services LLC.

Appendix E

In the credit card processing industry, ISOs such as RMH are, in effect, brokers in the business of bringing merchants to credit card processors in exchange for substantial residuals from the fees the processor receives from the merchant. In this case, RMH brought Traeger to CardConnect in exchange for CardConnect's agreement to pay RMH 85% of the net income it received from Traeger. That 85%/15% split was memorialized in an Independent Contractor Agreement between RMH and CardConnect that also provided that CardConnect would pursue any payments owed by the merchant to CardConnect.

Claimant RMH was owned and operated by Nader Panahpour, a sophisticated businessman with years of experience in the ISO industry. The opportunity to bring the Traeger account to CardConnect arose through Mr. Panahpour's friend and colleague, Christopher O'Neill. Mr. O'Neill, a sophisticated businessman with experience at an asset management firm that was a "page one" shareholder of major credit card processors, is married to Princess Madeline of Sweden and enjoys significant business contacts in the United States and Europe. Mr. O'Neill conducted business through an entity known as Wilton Payments, and contracted with RMH to receive 50% of the fees RMH received from the Traeger account. It is the Arbitrator's understanding that that Wilton Payments, although not a claimant in this case, will receive 50% of any monies awarded to RMH in this case.

In 2013, Mr. O'Neill told Mr. Panahpour that he had a close relationship with Keith Barish, the father of his childhood friend. Mr. Barish is an incredibly successful entrepreneur and a driving force behind the Oscar

winning movie Sophie's Choice. Mr. O'Neill informed Mr. Panahpour that Mr. Barish had purchased Traeger Pellet Grills ("Traeger"), a company in the business of selling barbeque grills and the wooden pellets used in the grills, and that Traeger might be a potential client for RMH.

Mr. Panahpour and Mr. O'Neill agreed that Mr. O'Neill would approach Mr. Barish and ask him whether Traeger would consider moving its credit card processing business to RMH. Mr. Barish responded by telling Traeger CFO Paul Vindigni that Mr. O'Neill was a close friend who he had known for twenty years, and that he wanted Traeger's processing business transferred to RMH if it would result in a savings to the company. Mr. O'Neill subsequently sent a proposal to Mr. Vindigni and Traeger Controller Chuck Woods, and Messrs. Vindigni and Woods concluded that moving the company's processing business to RMH would be financially advantageous to Traeger.

RMH then contacted Laith Yaldoo, Vice President and Director of ISO Sales of CardConnect, and requested a credit card processing application that Mr. O'Neill could present to Traeger. CardConnect responded by sending RMH documents from a credit card platform known as the Omaha Platform to be transmitted to Traeger. The materials related to the Omaha Platform, like the materials related to the other platform in this case, (the North Platform), were comprised of two documents: an approximately five page "Merchant Application and Agreement," and a thirty plus page "Program Guide" that contained the terms and conditions of the Platform, along with a Confirmation Page to be signed by Traeger.

Appendix E

For reasons that are not entirely clear, on September 16, 2016, Mr. O'Neill emailed Traeger the Omaha Application form, along with the Omaha Program Guide Confirmation Page, without including the Omaha Program Guide itself. Among other things, the Omaha documents RMH sent to Traeger requested Mr. Barish's personal guarantee and Mr. Vindigni's social security number. In addition, the Omaha Program Guide confirmation signature page had the phrase "Early Termination Fee $0.00" immediately above the signature line.

On October 22, 2013, Messrs. O'Neill and Panahpour had a conference call to discuss the Omaha documents with Messrs. Wood and Vindigni and learned, *inter alia,* that Mr. Barish objected to providing a personal guarantee, and Mr. Vindigni objected to disclosing his social security number because he had been the victim of identity theft. Mr. Panahpour suggested that they go ahead and fill out the remainder of the Omaha Application without completing the objected-to sections and return it to RMH so that they could try and "push it through." According to Mr. Panahpour, during that call he also informed Traeger there was an alternative processing option that would involve a "more robust" processing platform that included a five-year exclusive dealing term as well as a liquidated damages provision. Mr. Vindigni[2] disputes Mr. Panahpour's recollection and testified that no one raised the subject of liquidated damages during the

2. Mr. Vindigni testified at the Final Hearing via videoconference on February 11, 2020 from Portland, Oregon with all counsel present. The Arbitrator presided over that session via video conference.

October 22nd call.[3] Notably, the initial (Omaha) platform that was the subject of the first application Traeger signed contained a five-year exclusivity provision, but did not include a liquidated damages provision.

Following the October 22nd call, Mr. Panahpour emailed Mr. Yaldoo at CardConnect and informed him that Traeger was "happy to engage in a five-year exclusive dealing term." In addition, Mr. Panahpour requested an "addendum" for "cancellation fees," writing that they could be "very large." Later that day, as instructed, Mr. Vindigni signed and emailed the Omaha Application to RMH without completing the objectionable sections.

The next day, on October 23, 2013, Mr. Panahpour again asked Mr. Yaldoo for an addendum "for RMH to get the cancellation fees," and a program guide that "includes a five year contract and standard liquidat[ed] damages." Mr. Panahpour also informed Mr. Yaldoo by email that the split of any liquidated damages received from Traeger would have to be 75%/25% in RMH's favor. Although CardConnect apparently typically split liquidated damages with ISOs (such as RMH) 50%/50%, Mr. Yaldoo agreed.

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3. The meaning of the term "liquidated damages" differed from "early termination fees" in the CardConnect/Traeger agreement. Liquidated damages referred to the liability that would be incurred as the result of a breach by a merchant prior to the expiration of the agreement, while an early termination fee referred to the fee charged for terminating a device used for processing sales. Those terms were at times used interchangeably in the communications between RMH and CardConnect.

That same day, Mr. Yaldoo sent RMH documents from a credit card processing platform known as the North Platform. Mr. Yaldoo instructed Mr. O'Neill to send Traeger the North Application for signature, and to ensure that Traeger signed the Confirmation Page of the North Program Guide. The North Platform, unlike the Omaha Platform, did not request a personal guarantee or social security information. Unlike the Omaha Platform, the North Platform contained the liquidated damages provision Mr. Panahpour had requested.

The next day, on October 24, 2013, following a brief call with Mr. Panahpour, Mr. O'Neill emailed a copy of the North Application to Messrs. Vindigni and Woods with the phrase "Processing Application" in the subject line. The email informed Traeger that CardConnect had "bypassed" the need for a social security number and personal guarantee by providing a "separate internal CardConnect platform," and that he had attached a fully completed new application, but that *"everything remain[ed] the same as the prior application."* (emphasis supplied). Despite CardConnect's instructions that RMH obtain Traeger's signature on the Confirmation Page of the North Program Guide, the email did not include the North Program Guide—the document that contained the liquidated damages provision[4].

4. In Ohio, a communication that arguably mischaracterizes a referenced contract does not excuse the recipient from complying with his contractual obligations, because persons able to read what they sign are responsible for the agreements they sign. *Fordyce v. Hattan,* 141 N.E. 3d 575, 581 (Ohio App. 2019)("A person of ordinary mind cannot say that he or she is misled into signing

Appendix E

Approximately four hours after RMH sent the North Application to Traeger, Mr. Woods, who was based in Oregon, signed, and returned it to RMH at 3:10 p.m. PST. In turn, RMH sent the signed North Application to Mr. Yaldoo, who is based in Michigan, at about 6:45 p.m. EST (3:45 PM PST). According to Mr. O'Neill, after he received the signed North Application from Traeger, he realized that he forgot to send the North Program Guide to Traeger for signature and asked CardConnect to do so "back office to back office." According to Mr. Yaldoo, he then asked his office manager, John Katoula, to take care of obtaining the signed Program Guide from Traeger. Mr. Yaldoo's testimony regarding what took place next was unclear, if not inconsistent, and he ultimately acknowledged that he does not know what, if anything, Mr. Katoula did in connection with obtaining the signed Confirmation Page. According to Mr. Yaldoo, at some point he knew that the application was in underwriting, which meant that the application had to be complete.

Although there is an October 24th email from Mr. Yaldoo to Mr. Katoula transmitting the package he obtained from Mr. Panahpour saying "please review and submit" at 6:56 p.m. EST, there are no emails confirming that Mr. Katoula transmitted the Program Guide to Traeger, or that Traeger signed and returned it. Instead,

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an agreement that is different from the agreement the person intended to sign, when that person could have ascertained what agreement he was entering into by merely reading it when he signed it. If a person can read and is not prevented from reading what he signs, then he alone is responsible for his omission to read what he signs.").

according to Co-Pilot, CardConnect's document storage platform, the signed North Platform Guide confirmation signature page (the "questioned document"), along with related North Platform documents, were uploaded on Co-Pilot the next morning, October 25, 2013, at about 9:44 a.m. EST. The uploaded North Confirmation Page purportedly contains Mr. Vindigni's signature, along with his title (CFO) and the date (October 24, 2013) written in Mr. Vindigni's hand. Minutes before the uploads, Mr. Katoula emailed Mr. Panahpour alerting him that Traeger's Amex number was four digits short, and Mr. Panahpour responded that he would take care of getting the full number.

On November 4, 2013, after a ten-day underwriting process, CardConnect approved Traeger for boarding on the North Platform, and in January 2014, Traeger started processing with CardConnect. Shortly thereafter, in February 2014, RMH and CardConnect entered into an Independent Contractor's Agreement memorializing their agreement that any liquidated damages fees received from Traeger would be split between RMH and CardConnect 75%/25% respectively.

When CardConnect began processing Traeger's credit card transactions in January of 2014, Mr. O'Neill, remained involved with Traeger and provided point of contact customer service, particularly at the outset. Among other things, Mr. O'Neill helped Traeger set up "authorize.net," which involved re-routing their gateway to CardConnect; assisted Traeger with setting up batch reporting, which allowed Traeger to see their transactions

in real-time; set up a new deposit account and third-party cloud-based POS system for Traeger's shopping center kiosks; advised Traeger on selecting and utilizing a pre-certified Payware gateway; helped Traeger with VeriFone merchant bank queries; helped remove debit blocks; assisted with chargebacks and bankcard deposits; and helped Traeger personnel to trouble shoot during the set-up and operational phases of Traeger's use of the North Platform. Although RMH, through Mr. O'Neill, provided Traeger with customer service related to credit card processing, Mr. Yaldoo testified that RMH did not engage in credit card processing *per se.*

Unbeknownst to RMH, during the time Traeger began processing with CardConnect, Mr. O'Neill's friend Mr. Barish was engaging in negotiations to sell his interest in Traeger for an enormous profit. As a result, in early 2014, the company appointed anew CEO by the name of Jeremy Andrus. Mr. Andrus had a prior relationship with PayPal and directed Traeger personnel to transfer Traeger's credit card processing from CardConnect to PayPal. Although Traeger completed that transfer, no one thought to tell RMH or CardConnect that they had, in effect, been terminated. Instead, Mr. O'Neill learned that Traeger had moved its processing to PayPal after he noticed that Traeger's processing volume had dropped and emailed Traeger on May 12, 2014 to ask about the reduction. Mr. Woods then realized that Traeger had neglected to inform RMH that its services were no longer needed, and on May 14, 2014, he responded by emailing RMH, thanking them for their services, and informing them that Traeger had decided to move its business to

PayPal. Although he was no longer the CEO at the time, Mr. Barish was the Chairman of Board and the majority owner at Traeger, but no one had told him about the processing switch to PayPal.

At the time of the May 14 email, there were over four years left on the Card Connect/Traeger five-year exclusive processing agreement. Mr. O'Neill was shocked that Traeger had dropped CardConnect and focused on persuading them to reverse course. At the Final Hearing, Mr. O'Neill testified that shortly after he received Mr. Wood's May 14 email, he called and reminded him of the liquidated damages that would be due if Traeger did not return its business to RMH and CardConnect. According to Mr. O'Neill, he and Mr. Woods discussed and calculated Traeger's potential liquidated damages, and Mr. Woods seemed unconcerned.

On May 16, 2014, Mr. Woods emailed RMH and said that the merchant processing application that he had ended at Part I: Confirmation Page, and that he needed a copy of the "full document." It is not clear whether the Confirmation Page to which Mr. Woods was referring was the Omaha Program Guide Confirmation Page, or the North Platform Program Guide Confirmation Page at issue in this case. On Monday, May 19, 2014, RMH went to Co-Pilot, CardConnect's document storage platform, and downloaded the signed North Platform Application and North Platform Guide Confirmation Page allegedly signed by Mr. Vindigni, along with Traeger's voided check and a copy of the North Program Guide and provided them to Traeger. In turn, Traeger emailed RMH writing

that "CardConnect's records of this transaction are inconsistent with [Traeger's] records and with [Traeger's] memory and understanding of the terms and execution of the agreement."

After concluding that Traeger would not be returning to CardConnect and considered the North Program Guide signature a forgery, RMH made repeated attempts to track down any October 24 emails that would have proven that CardConnect transmitted the North Program Guide to Traeger for signature that day, and that Traeger had signed the Guide and returned it to CardConnect. In so doing, RMH repeatedly reached out to CardConnect and urged Messrs. Yaldoo and Katoula to search their emails for these communications. CardConnect responded that it could not locate any such emails, and that the company's double deleted items were systematically deleted every ninety (90) days due to company security policies designed to protect merchants' sensitive information. Messrs. Panahpour and O'Neill also carefully, if not obsessively, searched their own emails to determine whether they had been copied on any such CardConnect/Traeger communications, but came up empty handed.

Ultimately, neither RMH nor CardConnect had any documentary evidence of the alleged October 24th email from CardConnect to Traeger transmitting the North Program Guide for signature, or the alleged email from Traeger to CardConnect returning the allegedly signed North Program Guide Confirmation Page. As noted above, according to Mr. Yaldoo, CardConnect did not have copies of these transmittal emails or attachments

as a result of CardConnect's 90-day document retention policy. In contrast, according to Traeger, Mr. Vindigni never signed the North Confirmation Page, and the transmittal emails and attachments thus simply never existed. RMH disputes Traeger's explanation, and notes that Traeger's production of documents from that time period does not include responsive documents still in RMH's possession—a deficit Traeger's counsel could not explain.[5]

On May 27, 2014, Traeger filed a lawsuit against CardConnect in Oregon alleging that Mr. Vindigni did not sign the Confirmation Page and that it had been forged. Traeger did not serve the complaint, and the filing in Oregon ran afoul of an Ohio venue provision in the Traeger/CardConnect agreement. On May 28, 2014, Traeger's attorneys sent a letter to CardConnect rescinding the signed October 22 and 24 agreements and alleging that the October 24 Confirmation Page had been forged. Traeger also employed a handwriting expert and directed Mr. Vindigni to obtain samples of his signature and handwriting. This was a very sensitive time for Mr. Vindigni, because he had been hired by Mr. Barish to help him to increase the value of the company during Mr. Barish's tenure, and Mr. Barish had promised him a separation bonus of one year's salary. That bonus, however, had not yet been reduced to writing, and Mr. Andrus, the new CEO, who was apparently at odds with Mr. Barish, had to sign off on the bonus.

5. Counsel for Traeger noted that Traeger moved from Portland Oregon to Salt Lake City shortly after the alleged October 24 transmission, and that some of the CardConnect related documents may have been lost as a result of that move.

During this time, RMH urged CardConnect to pursue Traeger's liquidated damages because its agreement with RMH provided that CardConnect "enforce[s] ETF's and the contracts [our] merchants sign." CardConnect, which stood to recover only 25% of any liquidated damages from Traeger given its 75%/25% agreement with RMH declined, explaining that it planned to go public and did not want to risk any potential negative publicity from suing a merchant pursuant to a liquidated damages clause. Mr. Panahpour also pressed CardConnect to assign its claim against Traeger to RMH, but Mr. Yaldoo failed to do so.

In the weeks following Traeger's decision to terminate CardConnect, Mr. Panahpour spoke with several lawyers, including his friend and fellow country club member Mr. Jeffrey Sloman, a respected former federal prosecutor, and at the time a lawyer at the Ferraro Firm. Mr. Panahpour told Mr. Sloman about RMH's potential claims, and among other things, provided him with the October 22 and October 24 applications; the North Program Guide containing the liquidated damages provision and allegedly signed Confirmation Page; Traeger's May 28 letter with its arguments that the signed North Program Guide was a forgery; and a factual summary of the relevant events. As it happened, the CardConnect/Traeger agreement had an Ohio choice of law provision, and Mr. Ferraro, a member of the Ohio Bar, could thus readily serve as RMH's counsel of record.

The Ferraro Firm accepted the case and assigned the primary responsibility of handling the case to Eric Tinstman, at the time an associate with limited

experience in commercial litigation. Mr. Sloman had just spent the previous 20 years at the U.S. Attorney's Office handling high profile criminal cases and his experience in commercial practice was limited.

At the outset of the representation, Mr. Tinstman endeavored to identify and analyze potential "roadblocks" in the case, but nonetheless informed RMH that the case was meritorious with "much higher damages than []3.2 M." Ferraro's initial agenda included reviewing the relevant contract, "so that we can properly assign rights to Card Connect," and noted that "we are waiting on CardConnect to sign the assignment letter."

On July 23, 2014, RMH and the Firm entered into a retainer agreement (the "Retainer Agreement") in which the Ferraro Firm undertook to "investigat[e] and analy[ze]" "potential claims" "based upon state or federal law" arising out of Traeger's breach of the merchant agreement where the potential "adverse parties" included Traeger, Mr. Vindigni, PayPal, and other "parties to be identified through discovery." The Firm agreed to prosecute RMH's claims "to judgment in a trial court in Florida, Ohio, or any other jurisdiction which Attorney believes would be in Client's best interests." The Firm also agreed that the "representation is meritorious," but "if the Firm concludes that [RMH does] not have claims that can be successfully pursued, or that meaningful recoveries cannot be obtained," Ferraro would have the right to "withdraw from representation [of RMH]." Ferraro likewise agreed to "keep itemized time records" and RMH "informed of developments" and "consult with

[RMH] regarding decisions that may affect their interest in the Representation." In addition, the Firm promised to undertake "detailed discovery requests, corporate out-of-state depositions and/or obtain[] handwriting experts."

Shortly after RMH retained Ferraro, the relationship between RMH and CardConnect became increasingly adverse, as CardConnect had failed to pursue Traeger for liquidated damages or assign its claim against Traeger to RMH. RMH cautioned CardConnect that it needed to "honor our agreement" or assign its claim to RMH. RMH also told CardConnect that it would enforce the Traeger/CardConnect Agreement on its own. When CardConnect stalled in providing an assignment, Mr. Panahpour insisted that it needed the assignment "ASAP" and told Mr. Yaldoo that he didn't know if he could ever bring another large merchant to CardConnect, as RMH "[had] been treated terribly."

During this time, Mr. Tinstman unsuccessfully attempted to propose and obtain an assignment from CardConnect, and Mr. Panahpour told Mr. Tinstman that he was "getting worried that CardConnect is not going to sign the assignment letter as is" so he "wanted to know if [RMH] could proceed if CardConnect doesn't sign." Mr. Tinstman responded by assuring RMH of the "good news" that "at the end of the day CardConnect can't stop us [RMH] from pursuing our claim as it has been expressly contemplated by the program guide and the earlier assignment of 75/25." He also specifically pointed RMH to Section 34.8 of the North Platform Program Guide entitled "Third-party Beneficiaries" in support of

his legal opinion that RMH could proceed to collect from Traeger without any assignment from CardConnect.

On July 16, 2014, after RMH and its counsel's numerous efforts to obtain an assignment, CardConnect tendered a fully executed assignment of 100% of its rights under the Traeger/CardConnect Agreement (the "Assignment") to RMH. As part of that Assignment, CardConnect agreed to "completely relinquish[ ] any and all of its rights, title and interest" to any amount of the early termination fee from Traeger, and in return asked RMH to indemnify it for losses incurred from RMH's "collection efforts" in RMH's future suit against Traeger. Without conducting any legal research or analysis, Mr. Tinstman advised RMH to reject the Assignment and told RMH an indemnification "horror story" based on anecdotal evidence.

In so doing, neither Mr. Tinstman nor anyone else at the Firm advised RMH that if it refused to accept the CardConnect Assignment, RMH would be exposed to the risk of a finding that it did not have a third-party beneficiary claim, and thus did not have a claim against Traeger. Likewise, no one advised RMH of the expense of trying to prove a third-party beneficiary claim, or the scope of the costs attendant to the indemnity provision. Instead, Mr. Tinstman advised RMH to reject the tendered Assignment without advising Mr. Panahpour of the risks and benefits of doing so.

On September 17, 2014, Traeger filed a second lawsuit against CardConnect, and this time served CardConnect with process. The lawsuit, based on Mr. Vindigni's position

that he did not sign the Confirmation Page, sought, *inter alia,* a declaratory judgment that: "the October 22 Agreement is invalid and unenforceable against Traeger;" the "October 24 Agreement and the Fraudulent Confirmation Page are invalid and unenforceable against Traeger;" and "Traeger does not have an obligation to pay CardConnect an early termination fee or any other amount."

The Firm advised RMH that it was best served by ignoring and doing nothing in response to the Oregon lawsuit, and RMH followed the Firm's advice. In November 2014, Traeger and CardConnect settled that case with a walk-away that purportedly released all claims that CardConnect or any of its agents, assigns, independent contractors and others may have had against Traeger. Mr. Tinstman assured RMH that the Traeger/CardConnect settlement was nothing to worry about, and that it was "our opinion" that it could not be binding on RMH.

On November 21, 2014, having advised RMH to reject CardConnect's executed agreement to assign its claim against Traeger, the Firm filed a claim on behalf of RMH in Ohio alleging that RMH was a party to the Traeger/CardConnect Agreement, despite the fact that the allegation was contradicted by the agreement itself. Mr. Ferraro signed the Ohio complaint on behalf of RMH and commenced RMH's suit against Traeger (the "Ohio Lawsuit"). The Complaint included three claims namely, breach of contract, fraudulent concealment, and misappropriation of trade secrets, and alleged that

RMH was able to "enforce the contract as a broker." The Complaint ignored potential third-party beneficiary arguments, including the potential argument that RMH provided services pursuant to Section 34.8 of the Agreement, and thus was a third-party beneficiary pursuant to the Agreement. According to Mr. Panahpour, the Firm assured him that Mr. Ferraro met with the team to review the complaint—an assertion that Mr. Ferraro disputed at the Final Hearing. The Firm also assured Mr. Panahpour that "Jim signed off." The complaint contained a "wet" signature by Mr. Ferraro.

On December 14, 2014, after filing the Ohio complaint, Mr. Tinsman sent a demand letter to Traeger seeking $4.2M, the amount he alleged was one hundred percent (100%) of the alleged collectible liquidated damages amount, on the theory that the letter needed to show that RMH "was serious" and that "the facts back us up." The letter included statements that Mr. O'Neill pointed out in advance when he reviewed the draft were untrue, such as "Traeger signed [the] contract with RMH—" an allegation belied by the Traeger/CardConnect Agreement itself.

On December 30, 2014, Traeger responded and told the Firm to "pound sand" and asserted various defenses, including that RMH was not a party to the Agreement, and that a "leading handwriting expert" had confirmed that Mr. Vindigni's signature was forged. In addition, Traeger told RMH that it had settled its claim with CardConnect, and that the settlement effectively released RMH's claims. In response to Traeger's reaction, the Firm assured RMH that they "anticipated, and have

a strong counter argument against every single one of [Traeger's] points made." Shortly thereafter, Mr. Sloman left the Firm and Mr. Ferraro called Mr. Panahpour and asked him to leave the case with Ferraro as RMH would be "his client."

In January of 2015, months after swearing in an affidavit that the signature and entries on the North Program Guide were not his, Mr. Vindigni received and executed a separation agreement with Traeger that included a confidential $325,000.00 payout in exchange for, *inter alia,* cooperating with Traeger in connection with the defense or prosecution of claims that related to his tenure at Traeger—claims that would have included actions related to the Traeger/CardConnect Agreement.

On July 23, 2015, Traeger moved to dismiss the Ohio lawsuit on the same basis that Mr. O'Neill and Traeger had presaged, namely that "[a]lthough Royal Merchant alleges that it entered into a contract with Traeger, Compl. at 1113, the plain terms of the [Traeger-CC] Agreement, Exhibit A to Royal Merchant's complaint, directly contradict that allegation." The trial court issued an Order that the motion would be decided on the papers. Upon seeing Traeger's motion, Mr. Tinstman, who testified that he had not seen a motion to dismiss before, stated that the "motion is weird" as the "forgery argument is barely referenced."

Rather than file an amended complaint alleging that RMH had third-party beneficiary status, the Firm filed a response that quoted the third-party beneficiary section of the Agreement but failed to assert facts or legal principles

that would arguably support a colorable third-party beneficiary claim. The Response also failed to mention the words "third-party beneficiary" in the argument or discuss facts, including services performed, that might have supported RMH's third-party beneficiary status.

Faced with the Firm's deficient complaint and opposition, the trial court granted Traeger's motion. The Court concluded that RMH could not be a third-party beneficiary under the Traeger/CardConnect Agreement by relying on language in the agreement that "the parties do not intend for any Persons to be third-party beneficiaries of this Agreement." In so doing the trial court failed to note that the quoted words were immediately preceded by the words "Except as expressly provided in this Agreement"—a provision that expressly created a class of "Persons" who could be "third-party beneficiaries," namely, those who provided "Services" as defined by the Traeger/CardConnect Agreement.

Mr. Tinstman informed Mr. Panahpour of the dismissal, and Mr. Panahpour then contacted Mr. Ferraro reminding him, "I hired you and your firm and I would appreciate your attention." Mr. Ferraro responded, "It has my attention. We are analyzing options right now." Messrs. Ferraro, Tinstman, and Panahpour then proceeded to meet on July 8, 2015. According to Mr. Panahpour, Mr. Ferraro stated, "judges make mistakes all the time," "we can turn this thing around" and "we've just got to get more information to the judge"—statements Mr. Ferraro categorically denied making at the Final Hearing.

Approximately three weeks later, when he had not seen a motion for rehearing or any other filing, Mr. Panahpour contacted Mr. Tinstman and asked about the promised motion. Mr. Tinstman assured Mr. Panahpour that "[t]he motion's going to be good. Will be filed this week and we will instantly begin peppering Court for a hearing date in August." Three months later, when he had still not seen the touted motion, Mr. Panahpour sent Mr. Tinstman an email asking, "[H]ow is our motion coming along?" Mr. Tinstman replied that the "[m]otion goes out next week," and "I'm confident the Court will have no choice but to accept some form of our relief sought," and promised to "explore all options, including an appeal to a higher court" if the court were to reject the motion. Two months later, still not having seen the motion papers, Mr. Panahpour sent another email:

> I am getting concerned that we haven't filled [*sic*] our motion and are arguing about "trade secrets." . . . This is a breach of contract case. Plane [*sic*] and simple. We have been discussing the motion for three [*sic*] months. We need it to be filled [*sic*] asap and the trial cannot be about "trade secrets." How will the breach of contract be tried if we don't file our motion?

Mr. Tinstman's response agreed that "the core of this case is [the] breach" of contract, rather than the remaining trade secrets claim, and attributed the delay in completing the motion to his having "put so much time into turning" the contracts claim around, and assured Mr. Panahpour that "[w]e will file the motion Monday." Nevertheless, the

Firm did not file the motion on "Monday," and indeed, the motion was never filed. Instead, the only version of such a "motion" in the Firm's files is a difficult to understand dictation by Mr. Tinstman, dated December 15, 2015, containing neither case law nor factual support. The motion was so difficult to decipher that that Mr. Ferraro testified (erroneously) at the Final Hearing that it must have corresponded to a different matter—a "Monroe matter." At the Final Hearing, Mr. Ferraro opined that Mr. Tinstman was in a "twilight zone" and "off the rails" during this time period and that he, Mr. Ferraro, was unaware and "not proud" of what happened.

After the entry of the Order dismissing Counts I and II, Traeger limited the scope of its discovery requests to the remaining count alleging trade secrets violations. Prior to that time, and unbeknownst to RMH, discovery had been stayed during the pendency of the Motion to Dismiss the core contract claims at the Firm's request. In June of 2015, Traeger filed its First Request for Production, and despite the eight-and-a-half-month stay of discovery Mr. Tinstman had procured, the Firm was late in responding to the Request that was due on July 29, 2015. In lieu of a timely response, the Firm advised Traeger's counsel that they would serve RMH's response by August 26, 2015. The Firm however, let that date pass, and when it finally responded on September 10, 2015, the Firm produced ten documents and objected to almost every Request as either not requiring a response or as being "outside the scope." The Firm then ignored Traeger's counsel's letter about serving better responses, and Traeger served its Second Request for Production and

First Set of Interrogatories on September 14, 2015, and its Second Set of Interrogatories on October 7, 2015. The Firm never responded to *any* of these discovery requests.

Consistent with the Court's August 31, 2015 order to contact the Court about discovery disputes before moving to compel, Traeger called the Court before moving to compel. The Court then set a telephonic discovery conference for November 4, 2015, but Mr. Tinstman was on paternity leave at the time, and neither Mr. Ferraro, nor anyone else at the Firm, attended the conference. As a result, the Court permitted Traeger to file its motion to compel without a conference.

Nearly one month passed between the date Traeger filed its motion to compel and the date the Court granted it. During that time, no one at the Firm filed any opposition papers or otherwise responded to the motion. The Court's December 11, 2015 order directed the Firm to produce documents responsive to twenty-four of Traeger's requests and to answer Traeger's First and Second Interrogatories "within ten days of this order." Although ten days passed, no one at the Firm responded to the Order.

On January 6, 2016, Traeger filed its Motion for Sanctions, seeking dismissal with prejudice for willful failure to obey a court order and other failures. No one at the Firm opposed the sanctions motion, and on February 1, 2016, the Court entered its order granting Traeger's motion, ***dismissing the case with prejudice*** as a sanction, and assessing costs against RMH.

Subsequently, Mr. Tinstman told the Firm partner David Jagolinzer that he had a problem in an Ohio case as Mr. Jagolinzer was leaving the office for the day and already in the elevator heading to his car. Mr. Jagolinzer told Mr. Tinstman to inform Mr. Ferraro. However, Mr. Tinstman did not inform Mr. Ferraro that the case had been dismissed. Instead, Mr. Ferraro and Mr. Jagolinzer did not become aware of the dismissal until February 26, 2016, when a legal assistant brought the Dismissal Order to the Firm's attention.

After learning about the dismissal, the Firm immediately commenced an investigation, put its malpractice carrier on notice, dispatched three of its attorneys to investigate the matter, and fired Mr. Tinstman after requiring him to debrief the Firm about what had transpired and prepare related memos. When Mr. Ferraro learned about the dismissal, the Firm still had time to appeal it. Rather than contact RMH about the dismissal, however, the Firm conducted its investigation, determined that "there was nothing to appeal" and let the appeal time run without even alerting RMH that the case had been dismissed—let alone that the Firm had decided to let the appeal time run and render the dismissal irrevocable.

On February 12, 2016, eleven days after the case had been dismissed with prejudice for Ferraro's violation of a court order, Mr. O'Neill sent Mr. Tinstman an email noting "the very positive news we received yesterday" and requesting "a proper update call for next week" at which he would ask "a few questions about the process

and next steps." Confused by the "good news" referenced in the email, Mr. Ferraro responded "Chris, are you free Wednesday?" In addition, believing the case was active and moving toward a June 2016 trial, Mr. Panahpour emailed Mr. Tinstman on March 2, 2016 asking "Can you lay out a time frame for now until June? I would rather have this settled before the trial date. If we can avoid delays that would be preferred."

On March 4, 2016, Mr. Panahpour emailed Mr. Tinstman and asked, "Did we have our hearing [on the motion to reconsider the dismissal of the contract claim]?" Mr. Tinstman did not respond to that email, and when Mr. Panahpour called Ferraro's offices on March 8 to discuss it, he was told that Mr. Tinstman was no longer working there. Immediately upon learning of Mr. Tinstman's departure, Mr. Panahpour reached out to Mr. Ferraro and agreed to meet at the Firm's offices on March 10.

During that meeting, Mr. Ferraro informed Mr. Panahpour that the case had been dismissed and Firm partner David Jagolinzer, who attended the meeting, told Mr. Panahpour that he was sorry. Mr. Panahpour pressed Mr. Ferraro for details about the case, but he responded that Mr. Lima, one of the attorneys who was investigating the matter, was working on the case and would fill him in. Mr. Panahpour was then escorted to Mr. Lima's office, who informed Mr. Panahpour that the case had been dismissed and that the time to appeal had expired. Shortly thereafter, Mr. Panahpour retained counsel to bring an action against the Ferraro Firm.

II. THE ARBITRATION.

On August 25, 2016, RMH commenced this arbitration against Ferraro, alleging that but for Ferraro's malpractice it would have prevailed in a lawsuit brought in Ohio against Traeger. Ferraro responded by claiming, *inter alia,* that Ferraro could not have prevailed in Ohio because RMH had no right to pursue claims in its own name, and thus the trial judge properly dismissed RMH's claim, and the settlement agreement between CardConnect and Traeger in the Oregon litigation barred RMH's claim. Ferraro also raised numerous affirmative defenses, including a defense that RMH failed to accept the executed assignment tendered by CardConnect.

Pursuant to the Firm's retainer agreement with RMH, the professional malpractice claims in this case are governed by Ohio law. In Ohio, "[t]o establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show that (1) the attorney owed a duty or obligation to the plaintiff; (2) there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law; and (3) *there is a causal connection between the conduct complained of and the resulting damage or loss." Envt'l Network Corp. v. Goodman Weiss Miller, L.L.P.,* 119 Ohio St. 3d 209, 211, 893 N.E.2d 173, 176 (Ohio 2008). (emphasis supplied).

Ohio courts apply the "trial-within-a-trial" doctrine in malpractice actions where, as here, "the theory of the malpractice case places the merits of the underlying

litigation directly at issue." *Id.* at 212-13. Accordingly, RMH must prove "by a preponderance of the evidence that but for [the attorney's] conduct, they would have obtained a more favorable outcome in the underlying matter." *Id.* at 213. Under that standard:

> All the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial.

Eastminster Presbytery v. Stark & Knoll, 2012-Ohio-900, ¶ 7 (Ohio 9th App. Dist.) (quoting Restatement (Third) of the Law Governing Lawyers 390, § 53, Cmt. B (2000)); *see also Envt'l Network,* 119 Ohio St. 3d at 213 ("the burden of proof for establishing a case within a case is the same burden the plaintiff would have had to satisfy if the underlying case had gone to trial").

Ferraro does not dispute that it owed a duty to RMH and did little to seriously contest that it breached its duty. Based on the evidence and testimony in this case, including the testimony of RMH standard of care expert Stephen Chappelear, the Arbitrator finds that the Firm and/or Mr. Ferraro failed to conform to the standard required by law when, among other things: (1) Ferraro filed—and Mr. Ferraro "wet" signed—a complaint alleging that RMH and Traeger had entered into an

agreement, when RMH was not a party to the agreement; (2) Ferraro failed to amend the complaint after Traeger pointed out that deficiency, and failed to bring the only even arguable claim against Traeger, namely, that RMH was a third-party Beneficiary under the CardConnect/Traeger Agreement; (3) Ferraro failed to file a competent opposition to the motion to dismiss, including raising a potential third-party beneficiary argument; (4) Ferraro failed to move for rehearing after the Court dismissed the contract claims after ruling that RMH could not be a third-party beneficiary, apparently without considering the provision that afforded third-party beneficiary status to those providing "Services" as defined by the Traeger/CardConnect agreement; (5) Ferraro failed to timely respond to numerous discovery requests and court orders and failed to follow court rules; (6) Ferraro failed to attend a telephonic hearing convened by the Court; (7) Ferraro failed to engage in timely discovery; (8) Ferraro failed to respond to Traeger's motion for sanctions—a lapse that prompted the court to dismiss the entire case with prejudice; (9) Ferraro let the appeal time on the dismissal run before even alerting RMH that its case had been dismissed as a result of the Firm's breach of duty; (10) the Firm made repeated manifestly false statements about work being done on the case, including efforts to reverse the dismissal of the contract counts; (11) Ferraro failed to keep RMH advised of what was taking place in the Ohio litigation; (12) Ferraro improperly advised RMH to reject the executed assignment tendered by CardConnect and failed to analyze the risks and benefits of doing so; and (13) Mr. Ferraro failed to properly supervise Mr. Tinstman.

Appendix E

Although there were several breaches of duty in this case, the core issue presented in this case is causation, that is, whether there is a causal connection between the Respondents' breaches and RMH's resulting damage or loss. *Envt'l Network Corp. v. Goodman Weiss Miller, L.L.P., supra,* 119 Ohio St. 3d at 211, 893 N.E.2d at 177. RMH raises several theories of legal malpractice, including that: (1) Ferraro breached their duty to RMH by failing to bring a third-party beneficiary claim; and (2) Ferraro breached their duty to RMH when they advised it not to accept the assignment of rights CardConnect tendered without assessing and discussing the risks and benefits of that advice.[6]

The Respondents have raised numerous factual and legal defenses in this case including that: (1) Mr. Vindigni never signed the North Program Guide, and accordingly, RMH could not have prevailed in the Ohio litigation on either a third-party beneficiary or any other contract based claim; (2) RMH was not a third-party beneficiary pursuant to the Traeger/CardConnect Agreement, because RMH did not provide "Services" within the meaning of the Agreement, and Traeger did not intend for RMH to be a third-party beneficiary of that Agreement; (3) CardConnect's settlement with Traeger in the Oregon litigation released any claims RMH may have had against

6. During the Final Hearing, RMH also argued that the Firm breached its duty by failing to advise RMH to intervene in the litigation in Oregon between Traeger and CardConnect because, according to RMH, it had a vested interest in defending the validity of the Traeger/CardConnect Agreement "and its rights and interests thereunder as a third-party beneficiary."

Traeger; (4) RMH was sufficiently informed when it declined to sign the executed assignment tendered by CardConnect; and (5) RMH cannot recover on a claim that the Firm negligently advised it to reject CardConnect's assignment because, *inter alia,* RMH failed to include that allegation in its Amended Claim.

A. The Signature Issue.

RMH's third-party beneficiary and assignment claims spring from the Traeger/CardConnect Agreement and thus raise a threshold factual issue, namely, whether Mr. Vindigni executed the Confirmation Page of the North Program Guide (the "questioned document"). The Respondents argue that Mr. Vindigni did not sign the questioned document and suggest that RMH forged his signature. In contrast, RMH argues that Mr. Vindigni did sign the questioned document but denied doing so for financial and professional reasons.

In Ohio, once a signatory has raised a defense that a signature has been forged, the burden rests on the claimant to prove the authenticity of the signature, because the allegation of forgery constitutes an assertion that "no contract ever existed"—an assertion that denies an element of the claim. *RC Olmstead Inc. v. GBS Corp.,* 2009 WL 4981226, *7 (Ct. App. Ohio December 18, 2019). The Arbitrator has considered several factors in connection with the issue of whether Mr. Vindigni signed the questioned document.

First, the parties presented experienced handwriting experts, each certified by the American Board of Forensic

Document Examiners (ABFDE) with decades in the field. Ferraro presented Charles Haywood, an examiner who formerly served at the Federal Bureau of Investigation. Mr. Haywood testified that as a result of comparisons with available specimens, he concluded that Mr. Vindigni's October 24, 2013 signature on the questioned document was forged, and that he could unqualifiedly eliminate Mr. Vindigni as a possible signatory of that document. Mr. Haywood also eliminated Mr. Vindigni as the writer of his title on the questioned document (CFO), and opined that Mr. Vindigni probably did not write the date entry on the document (October 24, 2013.)

In turn, RMH presented Thomas Vastrick, formerly a document examiner with the US Postal Inspection Service Southern Region Crime Laboratory. Mr. Vastrick also testified that he saw "significant" differences between Mr. Vindigni's signature on the questioned document and other handwriting specimens, but added that an unqualified elimination was inappropriate because, *inter alia,* the documents available for review were copies rather than originals, and the limited known specimens were provided by Mr. Vindigni. In so doing, Mr. Vastrick noted that Mr. Vindigni did not include sufficient specimens within a set period to offset potential selection bias—such as contemporaneous consecutively numbered checks—and that the specimen selection process can create inherent limitations as a result of selection bias. During the Final Hearing, Mr. Vindigni acknowledged that he was never asked to provide consecutively numbered checks or similar documents by Traeger or the professionals assisting him. Significantly, Mr. Vastrick also opined that it was highly

probable that Mr. Vindigni wrote his title and the date on the questioned document.

The Arbitrator recognizes the apparent significant differences between the specimens provided and the signature at issue. Nevertheless, the Arbitrator credits Mr. Vastrick's testimony regarding the limitations that can be created by selection bias, including an artificially restricted range of variation of Mr. Vindigni's signature that can result from his role in selecting the limited available specimens.[7]

The Arbitrator also credits Mr. Vastrick's persuasive testimony that it is highly probable that the date and title on the questioned document were written by Mr. Vindigni. Mr. Vindigni denied making those entries and testified that even if someone else completed an application for him, he normally added the title, date, and his signature himself. There is no evidence that Mr. Vindigni ever placed his title and date on a document without signing it, and having considered the evidence and testimony in this case, the Arbitrator finds it unlikely that he would place the date and his title on the questioned document, but not his signature. Additionally, having considered the evidence and testimony in these proceedings, the Arbitrator finds that an unqualified elimination of Mr. Vindigni as the signatory of the questioned document is not appropriate in this case.

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7. It bears noting that selection bias can be intentional or unintentional.

Appendix E

In addition to expert testimony, the Arbitrator has considered the potential concerns and motives of Mr. Vindigni and Mr. Panahpour. As to Mr. Vindigni, it bears noting that when he learned of RMH's demand for liquidated damages in May of 2014, he was awaiting a contract from Traeger for the one-year separation bonus that Mr. Barish had promised him. At the time the liquidated damages issue reared its head, Mr. Barish, although the Chairman of the Board and majority owner of the company, was no longer the CEO. Instead, Jeremy Andrus, the man who ordered Traeger's transition to PayPal was, and Mr. Andrus was apparently not allied with Mr. Barish. Accordingly, at the moment Mr. Vindigni needed his new boss to sign off on the bonus, he learned that Traeger faced an enormous liability based on a document he had allegedly signed, as a result of the transition to PayPal he had helped to facilitate. Mr. Vindigni never warned Mr. Andrus that the processor transition he ordered could have triggered a liquidated damages demand, and would have understood that had he taken responsibility for signing the questioned document, he would have been admitting to either failing to notice the liquidated damage provision when he signed the Program Guide, or forgetting about the provision until it was too late. Mr. Vindigni certainly would have understood that either scenario would have put him in a poor professional light with Mr. Andrus and jeopardized the substantial bonus he was awaiting.

Ultimately, months after Mr. Vindigni initially denied signing the questioned document and executed an affidavit to that effect, he signed a separation agreement

with Traeger that afforded him a $325,000 bonus. The agreement also required that he cooperate in connection with claims related to his tenure. Mr. Vindigni testified that he believed that his bonus was contingent on him not breaching the terms of the agreement, and the Arbitrator finds that when he testified in this Arbitration, Mr. Vindigni believed that his $325,000 bonus would have been at risk had he not continued to deny signing the questioned document.[8]

The Arbitrator recognizes that the fact that Mr. Vindigni had ample motive to deny signing the questioned document does not, *ipso facto,* establish that he signed it. The Arbitrator notes, however, that Mr. Vindigni testified that after learning that RMH alleged that he signed the North Program Guide, he denied the allegation but did not do an investigation and search through his emails to try and corroborate his position that he never received or transmitted the questioned document. The Arbitrator finds that it would have been natural for someone seeking to exculpate himself from an allegation that he signed a specific document to try and prove that he never received or transmitted it, and finds Mr. Vindigni's failure to attempt to prove his "innocence" *vis-a-vis* his alleged signature inconsistent with his position that he did not sign the questioned document.

As to Mr. Panahpour, the Arbitrator finds that RMH did not have a motive to forge the questioned document

8. The Arbitrator also notes that when presented with some of his prior signatures taken out of context, Mr. Vindigni incorrectly testified that they did not belong to him.

prior to or during the morning of October 25, 2013, the day it was uploaded on Co-Pilot, along with related North Platform documents, at approximately 9:45 am. At the time of the upload, RMH was waiting on CardConnect to obtain the signed Program Guide pursuant to Mr. O'Neill's request the afternoon before that they do so back office to back office. RMH had no reason to believe that CardConnect had been unsuccessful in obtaining the signed document from Traeger overnight and thus would have had no reason to forge the document on October 24th or 25th.[9]

The Arbitrator also notes that at the time he retained Mr. Sloman, Mr. Panahpour already knew of the forgery allegation. Mr. Panahpour was well aware that Mr. Sloman had served as a federal prosecutor for many years and would have had the experience to assess whether Mr. Panahpour actually forged the questioned document. As the Traeger account makes clear, Mr. Panahpour's business is in large part relationship based, and the Arbitrator finds it unlikely that Mr. Panahpour would have risked his standing with Mr. Sloman—a fellow country club member and friend—by inviting him into a case that would have revealed that he engaged in forgery and built his claim on a crime[10].

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9. There is no evidence that RMH had the ability to upload documents at that time, and no evidence that RMH could have somehow uploaded a document later and backdated the date of the upload.

10. The Arbitrator notes that Mr. Yaldoo testified that CardConnect does not begin underwriting unless all documents

Finally, the Arbitrator recognizes that no emails between CardConnect and Traeger transmitting the North Program Guide have been produced in this Arbitration. That deficit, however, was addressed during these proceedings. First, as to CardConnect, Mr. Yaldoo testified that the company had a ninety-day document destruction policy for double deleted items to protect sensitive information provided by merchants, and the Arbitrator credits that testimony. As to Traeger, the Arbitrator finds that the company's failure to produce an email receiving or transmitting the signed Program Guide does not dispositively demonstrate that the emails do not exist. As noted above, Traeger's production in this Arbitration does not include several responsive documents in RMH's possession—a deficit Traeger's lawyer candidly acknowledged that she could not explain[11].

In sum, having considered Mr. Vindigni's testimony, the evidence and testimony presented in this Arbitration, and the totality of the circumstances, the Arbitrator

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were complete. Credit card processors and issuing banks take on significant liability when a processor "boards a merchant," and the Arbitrator credits Mr. Yaldoo's testimony that CardConnect does not begin the underwriting process until a merchant completes its paperwork —a process that would have required a signature on the Program Guide Confirmation Page. According to Mr. Yaldoo, CardConnect finished Traeger's underwriting by *November 4, 2013,* which means that CardConnect would have had a signed Program Guide days before that process was completed.

11. The Arbitrator also finds that had Ferraro counselled RMH to accept the assignment and engaged in timely discovery as they should have, RMH would have been in a position to discover the transmittal emails from Traeger.

concludes that RMH has carried its burden of proving that Mr. Vindigni signed the North Program Guide Confirmation Page at issue in this case.

B. The Third-Party Beneficiary Issue.

The next issue the Arbitrator must address is whether the Firm's failure to bring a third-party beneficiary claim caused RMH damages. The Arbitrator finds that it did not.

In Ohio, "only an intended beneficiary can exert rights to a contract for which he is not a party." *Trinova Corp. v. Pilkington Bros. P.L.C,* 70 Ohio St. 3d 271, 277-78, 638 N.E.2d 572, 576 (1994). For a third-party to acquire intended beneficiary status, it must present evidence that the promisee intended to directly benefit the third-party. *Huff v. FirstEnergy Corp.,* 130 Ohio St.3d 196, 200, 957 N.E.2d 3, 7 (Ohio 2011)(pedestrian struck by falling tree branch not third-party beneficiary despite clause in public utility's contract requiring tree trimming that "adequately safeguard[s] all person and property from injury because purpose of contract was to ensure that electric company's lines were "kept free of interference from trees . . . ," and contract did not indicate that parties "intended to give the general public the benefit of a promise to perform.") The requirement that the purpose of the contract must be to directly benefit the purported third-party beneficiary applies even when the third-party is named in the agreement.[12]

12. *Sony Elecs. v. Grass Valley Group,* 2002 WL 440749 *13 (Ohio Ct. App. March 22, 2002) (plaintiff not an intended third-

In this case, there is no evidence that the parties intended to directly benefit RMH in the Traeger/CardConnect Application or the North Program Guide. RMH is not mentioned anywhere in the North Program Guide, and the North Program Application merely references Mr. Panahpour individually, first as a "Sales Rep," and later as the person verifying that Traeger's business premises had been inspected, but not in any manner that would afford RMH third-party beneficiary status. In addition, the purpose of the North Program Guide was to state the terms on which CardConnect would provide credit card processing services to Traeger, *see North Program Guide* at Confirmation Page (stating the Program Guide "describes the terms under which we will provide merchant processing Services to you"), and neither the North Application nor the North Program Guide contain any indication that either CardConnect or Traeger entered into the agreement with the purpose of "directly" benefitting RMH. *Huff v. FirstEnergy Corp.*, 130 Ohio St.3d at 200, 957 N.E.2d at 7.

Having reviewed the relevant evidence in this case, the Arbitrator concludes that RMH can enjoy third-party beneficiary status *vis-a-vis* the Traeger/CardConnect

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party beneficiary to a contract to build a production control room at football stadium, even though the contract specified that plaintiff's products must be used; noting that purpose of the contract "was to construct the production-control room" of the Stadium and, therefore, "was entered into to benefit the county and the public at large, not a supplier of some of the products that would be used in the construction.").

Agreement only if RMH falls within the ambit of Section 34.8 of the Agreement. Section 34.8 provides:

> **34.8 Third-party Beneficiaries.** Our respective Affiliates and any *Persons we use in providing* ***Services*** are third-party beneficiaries of this Agreement and each of them may enforce its provisions as it was a party hereto. Except as expressly provided in this Agreement, nothing in this Agreement is intended to confer upon any Person any rights or remedies, and the parties do not intend for any Person to be third-party beneficiaries of this Agreement. (emphasis supplied).

The Agreement defines "**Services**" as:

> The activities undertaken by Processor and/or Bank, as applicable, to authorize, process and settle all United States Dollar denominated Visa, Mastercard, Discovery Network and American Express transactions undertaken by Cardholders at Client's location(s) in the United States, and all other activities necessary for Processor to perform the functions required by this Agreement for all other Cards covered by this Agreement[13].

There are thus two categories of "Services" RMH could have assisted CardConnect and the Bank (Wells

13. The Agreement defines a **"Person"** as: "A third party individual or entity, other than the Client, Processor, or Bank."

Fargo) in providing that could have afforded it third-party beneficiary status: (1) activities undertaken by CardConnect or Wells Fargo to *authorize, process or settle* Visa, MasterCard, Discover Network and American Express transactions; and (2) all other activities necessary for CardConnect to perform the functions required by the agreement for all other cards covered by the Agreement.

As to the first category, Mr. Yaldoo's uncontroverted testimony was that RMH was not involved in authorizing, processing, or settling Visa, MasterCard, Discover Network or American Express transactions *per se.* Accordingly, although RMH provided customer service to Traeger that helped to facilitate its credit card payments, CardConnect did not use RMH to authorize, process or settle transactions for the card types enumerated above, and thus did not provide "Services" as defined in the first category of Section 34.8.

As to the second category, RMH indisputably did not handle transactions relating to "all other cards"—the only card types to which the second category applied. Accordingly, RMH cannot be afforded third-party beneficiary status pursuant to either category of services defined in Section 34.8.

The Arbitrator recognizes that RMH provided "customer service" to Traeger. The Arbitrator would note, however, that Section 34.8 appears to limit third-party beneficiary status to those providing customer service in connection with the cards with which RMH did not work, since it affords that status to Persons performing *"all*

other activities necessary for CardConnect to perform the functions required by the Agreement for *all other Cards*." In contrast, the Agreement provides third-party beneficiary status to Persons working with the enumerated cards (like RMH) only to those "authorizing, processing, or settling" transactions—something CardConnect did not do. The Arbitrator notes that the drafter's decision to afford third-party beneficiary status to those providing services ancillary to processing to those working with "all other cards," but not to those working with the enumerated cards, illuminates their intention not to afford third-party beneficiary status to those, like RMH, who provided customer service solely in connection with the enumerated cards. *See Lill v. Ohio State University,* 132 N.E. 2d 149, 156 (Ct. App. Ohio 2019) (("[w]here drafters showed they knew how to use specific language in one provision, it must be concluded that they intended to exclude that from a parallel provision where it is omitted."). Accordingly, the Arbitrator finds that RMH did not provide Services pursuant to the Agreement.

RMH also argues that it was a third-party beneficiary, because, according to Card Connect, "[i]n addition to providing 'Services,'" "it was a creditor beneficiary of the Traeger-CardConnect Agreement because it was entitled to 85% of the fees CardConnect collected from Traeger, and CardConnect owed RMH the duty to diligently pursue the monies that RMH would get paid for its work." According to RMH, Traeger's use of CardConnect as its exclusive processor for card transactions, and the fees it generated for CardConnect under the Traeger/

CardConnect Agreement, satisfied a separate legal obligation between CardConnect and RMH.

In Ohio, creditor beneficiaries are a category of third-party intended beneficiaries that benefit from the performance of a promise that satisfies a duty owed by the promisee to it.[14] Like other third-party beneficiaries, for a party to be a creditor beneficiary, "it must be shown that the contract was made and entered into with an intent to benefit" the putative beneficiary. *Sak Elec. Co. v. Cleveland Tr. Co.,* 1976 WL 190830, at *1 (Ohio Ct. App. Mar. 4, 1976). As noted above, the Agreement at issue evinces no such "intent to benefit" RMH.

In addition, Ohio has adopted the Restatement of the Law 2d, Contracts, Section 302 (1981).[15] According

14. *Visintine & Co. v. New York, C. & St. L. R. Co.,* 160 N.E. 2d 311, 313 (Ohio 1959) (contractor a creditor beneficiary of contracts between railroads and state where railroad's contract with state to perform certain work of grade crossing elimination and state also entered into a contract with contractor to do certain work for that project and performance of work of railroad was essential to contractor's performance); *Sak Elec. Co. v. Cleveland Tr. Co.,* 1976 WL 190830, at *1 (Ohio Ct. App. Mar. 4, 1976) (trial court erred in granting motion to dismiss where plaintiff alleged it was an intended third-party creditor beneficiary to a building loan agreement between defendant and its contractual counterparty, where counterparty's agent had a contract with plaintiff calling for plaintiff to perform certain work in connection with realty owned by the counterparty that was subject of the defendant's contract).

15. *See Hill v. Sonitrol of Southwestern Ohio, Inc.,* 36 Ohio St.3d 36, 40, 521 N.E.2d 780 (1988) (adopting Section 302; employee attacked by assailant in store not third-party beneficiary of

to comment 1(b) to Section 302, Section 302(1)(a) of the Restatement was amended to provide for creditor beneficiaries without adopting the term "creditor beneficiary." Comment 1(b) provides:

> The type of beneficiary covered by Subsection (1)(a) is often referred to as a 'creditor beneficiary.' In such cases the promisee is surety for the promisor, the promise is an asset of the promisee, and a direct action by beneficiary against promisor is normally appropriate to carry out the intention of promisor and promisee, even though no intention is manifested to give the beneficiary the benefit of the promised performance. Promise of a performance other than the payment of money may be governed by the same principle if the promisee's obligation is regarded as easily convertible into money, as in cases of obligations to deliver commodities or securities which are actively traded in organized markets. Less liquid obligations are left to Subsection (1)(b). (emphasis supplied)

Accordingly, creditor beneficiaries are directly referenced in Section 302(1)(a), and thus fall within the ambit of Section 302.

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contract between store and company that designed that store's security alarm system; holding that although victim derived an incidental benefit from the contract, she was not an intended third-party beneficiary, because "[t]he clear terms of the contract indicate that the contract was entered into for the protection of property, not people.").

Appendix E

> Section 302 of the Restatement of the Law 2d, Contracts, (1981) provides:
>
> (1) **Unless otherwise agreed** between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement of the Law 2d, Contracts, Section 302 (1981). (emphasis supplied).

Ohio courts interpreting Section 302 have held that pursuant to the "unless otherwise agreed" language bolded above, the limitations in the Agreement being construed govern the issue of those afforded third-party beneficiary status. In *Long v. Mount Carmel Health System,* 93 N.E. 3d 436 (Ohio 2017), the Court invoked that language and rejected a physician's argument that he was the third-party beneficiary of a services agreement between a hospital system and medical practice, where the

agreement provided that "[n]othing herein expressed or implied is intended or shall be construed to confer upon . . . other than the parties hereto . . . any rights or remedies . . . ." *Id* at 443. In so doing, the Court held that:

> By beginning with the clause **"unless otherwise agreed** between promisor and promisee," Section 302 of the Restatement recognizes the contracting parties' right to come to a different agreement regarding who qualifies as an intended third-party beneficiary. Contracting parties may further limit who may sue under their contract by expressly 'otherwise agree[ing]" to exclude all third parties from acquiring or invoking any rights under a contract.' *Pennsylvania State Emps. Credit Union v. Fifth Third Bank,* 398 F.Supp.2d 317, 324 (M.D.Pa.2005), *rev'd on other grounds, sub nom. Sovereign Bank v. BJ's Wholesale Club, Inc.,* 533 F.3d 162 (3d Cir. 2008). **'This limitation on third-party-beneficiary rights makes sense because contracting parties should be able to control who may sue on the contract." *Id* at 325. Thus, courts applying Section 302 honor contractual provisions that explicitly disclaim the creation of any third-party beneficiaries."** [citations omitted].

Long, 93 N.E.3d at 442-43. (emphasis supplied).

In this case, although the Traeger/CardConnect Agreement does not disclaim the creation of third-party beneficiaries *in toto,* it provides that:

> **34.8 Third-party Beneficiaries.** Our respective Affiliates and any Persons we use in providing Services are third-party beneficiaries of this Agreement and each of them may enforce its provisions as it was a party hereto. ***Except as expressly provided in this Agreement, nothing in this Agreement is intended to confer upon any Person any rights or remedies, and the parties do not intend for any Person to be third-party beneficiaries of this Agreement.*** (emphasis supplied)

Accordingly, for purposes of a non-affiliate like RMH, by providing that ***"[e]xcept as expressly provided in this Agreement, nothing in this Agreement is intended to confer upon any Person*** any rights or remedies, and the parties do not intend for any Person to be third-party beneficiaries of this Agreement,"[16] the Agreement disclaimed the creation of third-party beneficiaries, including creditor beneficiaries, with the exception of Persons who provided "Services"—something RMH did not do for the reasons described above.

In short, the Arbitrator finds that RMH did not enjoy third-party beneficiary status pursuant to the Agreement, and as such, Ferraro's failure to bring a third-party beneficiary claim in the Ohio litigation did not cause damage to RMH.

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16. An Affiliate is "[a] person that directly or indirectly (1) owns or controls a party to this Agreement; or (2) is under common ownership or control with a party to this Agreement." RMH does not take the position that it was an "Affiliate" for purposes of Section 34.8.

C. The Assignment Issue.

RMH argues that the Firm acted below the standard of care when they advised it to reject the executed assignment CardConnect tendered without analyzing the risks and benefits of doing so. The threshold issue that the Arbitrator must address is whether RMH can bring the assignment claim in this Arbitration.

Ferraro argues that RMH cannot bring the assignment claim because, although the Amended Claim enumerated a number of alleged breaches of duty, it did not include the assignment issue. Ferraro points out that pursuant to the Scheduling Order in this case, the Amended Claim was due by June 1, 2017, and indeed was filed that day. Ferraro likewise argues that "Florida procedural law" governs these proceedings, and points to a letter brief filed by RMH in support of a motion to compel documents withheld pursuant to a claim of work product in which RMH took that position.

In that brief, dated August 18, 2017, RMH argued that "[b]eing procedural, work product issues are determined under the law of the forum," and "[t]he arbitral forum's being in Miami is no accident." Ferraro argues that in light of its position in that letter brief, "RMH is precluded from now changing its position midstream." In so doing, Ferraro relies on two cases that turn on principles of judicial estoppel. *See, Federated Mutual Implement and Hardware Insco v. Griffin,* 237 So.2d 38 (Fla. 1st DCA 1970); *MCG Financial Services, LLC v. Technogroup, Inc.,* 149 So.3d 118 (Fla. 4th DCA 2014)).

The Arbitrator finds that RMH is not estopped from arguing that Florida procedural law does not govern this matter, because judicial estoppel does not apply where, as here, a party asserts a legal—rather than factual—position and the party did not succeed in doing so.[17] The Arbitrator would also note that the cases Ferraro relies upon apply the doctrine of judicial estoppel to *facts* alleged by a party, rather than as here, *a legal position,* and thus do not control this issue.[18]

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17. *Salazar-Abreu v. Walt Disney Parks and Resorts US, Inc.,* 277 So.3d 629, 631 (Fla. 5th DCA 2018) ("[j]udicial estoppel applies when a party in a current proceeding has successfully maintained an inconsistent position in a prior proceeding to the prejudice of the adverse party in the current proceeding." [citation omitted]. This requires not only a showing of inconsistent statements, but also. . . the successful maintenance of the inconsistent position and prejudice. Judicial estoppel does not apply when both parties are equally in possession of all the facts pertaining to the matter relied on as an estoppel; where the conduct relied on to create the estoppel was caused by the act of the party claiming the estoppel; or where the positions taken involve solely a question of law.") (citing *Blumberg v. USAA Cas. Ins. Co.,* 790 So.2d 1061, 1066 (Fla. 2001) (emphasis supplied.)); *Greer-Burger v. Temesi,* 116 Ohio 3rd 324, 330, 879 N.E. 2nd 174, 183 (Ohio 2007). ("the doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding;" "court's apply judicial estoppel in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.")

18. *See, Federated Mutual Implement and Hardware Insco v. Griffin,* 237 So.2d 38 (wife of deceased employee who obtained judgment against husband's co-employee in wrongful death action based on theory that husband was engaged in course of

Notably, following the hearing on the motion to compel at issue in the August 18, 2017 letter brief, the Arbitrator, at the request of the parties, entered an order dated December 6, 2017 that provided, *inter alia,* that:

> **"[t]he parties have agreed** that Fed.R.Civ.P. 56(a) shall govern the standard for summary judgment motions" and Fed.R.Civ.P. 26(b)(4)(B) and (C) shall govern the discovery of experts' work product and communications with counsel. The parties will address what methodology the arbitrator should use in determining what law to apply to other procedural issues as and if they arise." (emphasis supplied).

Accordingly, as the order reflects, RMH did not succeed in its legal position that Florida procedural law applied

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employment at time of death estopped in garnishment proceeding against employer's insurer from asserting that husband was not engaged in course of employment when collision occurred to avoid cross-employee exception in liability policy); *MCG Financial Services, LLC v. Technogroup, Inc.,* 149 So.3d 118, 120 (Fla. 4th DCA 2014) (equipment lessor who brought breach of contract and fraud action against corporation estopped from arguing, in opposition to contractual provision for fees, "completely inconsistent" position that lessees of equipment were not parties to contract, where lessor based its case on claim that lessees were bound by the contract; "litigants are not permitted to take inconsistent positions in judicial proceedings;" "[] a party cannot allege *one state of facts* for one purpose and in the same action or proceeding deny such allegations and set up a new and different state of facts inconsistent thereto for another purpose.") (emphasis supplied).

in this case, and the Arbitrator concludes that it is not estopped from arguing that it does not[19].

The procedural issues in these proceedings arise in an arbitration rather than a state or federal court, and the Arbitrator finds that those issues are governed by the Federal Arbitration Act ("FAA") and the Revised Florida Arbitration Code ("FAC"). Neither the FAA nor the FAC contain pleading rules or demand that the parties proceed under pleading rules adopted by the Florida or Federal courts. *See generally, AT&T Mobility, LLC v. Concepcion,* 563 U.S. 333, 344 (2011) (recognizing that arbitrations under FAA are "informal, streamlined proceedings."); *Rosensweig v. Morgan Stanley & Co., Inc.,* 494 F.3d 1328 (11th Cir. 2007) ("[a]rbitrators enjoy wide latitude in conducting an arbitration hearing and they are not constrained by formal rules of procedure or evidence"). Instead, pleading requirements in arbitration proceedings are generally relaxed" with claims being "much more informal than a pleading;" "[t]here are virtually no rules of pleading in arbitration" and "technical pleading rules need not be followed." *Certain Underwriters at Lloyd's London v. Ashland, Inc.,* 967 A.2d 166, 175 (D.C. 2009); *see also, Tokura Constr. Co., Ltd v. Corporacion Raymond,*

19. Although the Arbitrator need not address the question since RMH did not succeed in its position regarding Florida procedural law governing these proceedings, it bears noting that courts differ on the factors to be considered when applying the equitable doctrine of collateral estoppel, and it is not clear that a party who succeeds in taking a legal position in a proceeding will necessarily be estopped from taking a contrary position later in the same proceeding. *See generally, SalazarAbreu v. Walt Disney Parks and Resorts US, Inc.,* 277 So.3d at 632.

S.A., 533 F. Supp. 1274, 1278 (S.D. Tex. 1982) (affirming arbitration award and rejecting argument that arbitrators improperly considered issue of liability for certain items that were not "formally submitted to the arbitrators in [claimant's] statement of claims" because "arbitration proceedings are not held to the same technical rules of pleading and evidence as lawsuits in federal courts" and, in any event, evidence on these issues was presented during arbitration); *Kintzele v. J.B. & Sons, Inc.*, 658 So. 2d 130, 132-33 (Fla. 1st DCA 1995) (acknowledging that "Florida Arbitration Code specifies no pleading requirements for initiating arbitration" and, therefore, "judicially created pleading requirements" are inapplicable).[20]

RMH notes that the assignment issue initially arose in Ferraro's affirmative defenses, which include allegations that RMH's pre-suit conduct confirmed its "recognition" that it did not have any third-party beneficiary rights, because "RMH sought to cause CardConnect to assign its rights under the agreement to RMH, a request CardConnect declined a few months before the suit was filed."[21] RMH argues that neither the FAA nor the FAC

20. RMH correctly points out that when it attempted to reference formal rules of procedure in connection with Mr. Vindigni appearing by video conference, counsel for Ferraro objected and pointed out that "[RMH] ignores that *[Federal Rules of Civil Procedure] 43(a) is applicable only in court proceedings and that we are in private arbitration." See,* email dated February 6, 2018 attached to Claimant's Response in Opposition to Respondent's Post-Hearing Brief as Exhibit A. (emphasis supplied).

21. Ferraro also included an affirmative defense that raised the issue of the finality of the Traeger/CardConnect settlement in

would have required RMH to file an avoidance to these affirmative defenses, including avoidances alleging that RMH declined the assignment because the Firm improperly advised it to do so without assessing the risks and benefits of that advice.

The Arbitrator concurs that the assignment issue inhered in the affirmative defenses, and that the scope of discovery would have included the circumstances surrounding RMH's "decision" to reject the assignment—circumstances that appear to be well known to the parties. The Arbitrator recognizes, however, that as Ferraro points out, although the Amended Claim filed on June 1, 2017 lists several breaches of duty, the Firm's advice regarding the assignment is not enumerated in that filing.

The Arbitrator finds that the threshold issue to be determined with respect to RMH's ability to bring the assignment issue as an affirmative claim in this case is whether Ferraro was on notice of the claim. For the reasons described below, the Arbitrator concludes that they were. In addition to arising in the affirmative defenses, the issue of whether RMH made an informed decision when it declined the assignment arose at the inception of the Final Hearing in December 2018, including during the questioning of RMH standard of care expert Stephen

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Oregon—a settlement that would not have taken place had RMH accepted CardConnect's executed assignment. In this arbitration, RMH also argued that Ferraro breached its duty by advising it to stay out of Oregon because, *inter alia,* it allowed Traeger to take the position that its settlement with CardConnect released RMH's claims.

Chappelear. Subsequently, RMH questioned witnesses regarding the assignment and related damage issues, and in turn, counsel for Ferraro objected to RMH's efforts to raise the issue as an affirmative claim on pleading, scheduling order, and related grounds. *See e.g.* Tr. 10:2149-2163. Ultimately, the Arbitrator reserved ruling on the issue, and the Firm maintained its standing objection. Although the issue loomed in these proceedings, the Respondents neither requested a definitive ruling on the issue, nor a continuance to obtain expert testimony, engage in discovery, or undertake whatever action they deemed necessary to ameliorate any perceived prejudice stemming from the claim.

As the record in this case makes clear, this Arbitration has been far more than a five-week Final Hearing preceded by a few pretrial hearings. Instead, the Final Hearing alone has been an eighteen-month saga, including twenty-two days of Final Hearing sessions, (including ten days on Zoom), starting in early December 2018, and ending in late May 2020. During that time, in addition to having to attend to other professional commitments, the Arbitration participants have suffered unforeseen—indeed tragic—circumstances. Prior to the Final Hearing, RMH's esteemed lead counsel David Pollack suffered a catastrophic medical event that forced him to leave the practice of law. Later, after the Final Hearing began, Respondents' iconic counsel Andrew Hall became ill and passed away, Claimant's lead counsel Eugene Stearns' wife of over fifty years became critically ill and had to be hospitalized in another state, and the world-wide COVID pandemic changed the world.

As a result of this unusual confluence of events, the five-week evidentiary portion of the Final Hearing ran from December 3, 2018 to May 27, 2020, with months between final hearing sessions. The Arbitrator concludes that given the time since the assignment issue emerged as a potential affirmative claim, Ferraro had sufficient notice to endeavor to take whatever steps, including requesting a continuance, they deemed necessary to address the issue. Indeed, given the months between Final Hearing sessions, the Respondents likely had the time to seek expert testimony or move for additional discovery without materially affecting the scheduling in this case. Ferraro chose not to exercise any of these options, and elected not to seek a definitive ruling. Instead, rather than endeavor to address the assignment issue on substantive grounds during the Final Hearing, Ferraro, (perhaps understandably), chose to attempt to bar it on procedural grounds after the Final Hearing.

Accordingly, based on the evidence and testimony in this case, and the reasons stated above, the Arbitrator concludes that RMH should be permitted to bring the assignment claim because Ferraro had notice of the claim and sufficient time to seek whatever relief it deemed necessary to remedy any prejudice it may have perceived stemming from that claim.[22] *Cf. Batista v.*

22. All parties to the Arbitration frequently referenced the legal malpractice action *of Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So.2d 561 (Fla. 1988) in connection with the assignment issue, perhaps at least in part because Eugene Stearns and the late Andrew Hall participated in that matter. In *Arky,* a former client sued a law

Walter & Bernstein, 378 So. 2d 1321, 1323 (Fla. 3d DCA 1980) (failing to move for a continuance due to surprise from change in opponent's theory precludes a claim of prejudice); *see also U.S. v. Diaz-Villafane,* 874 F.2d 43, 47 (1st Cir. 1989) (finding that assertion that party was "unfairly surprised is severely undermined, if not entirely undone, by his neglect to ask the district court for a continuance to meet the claimed exigency"); *Marino v.*

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firm for legal malpractice and determined twelve days before trial that the former client would be raising a claim based on the firm's failure to present a specific defense in the underlying case—a claim the firm argued was not pled with sufficient particularity. The firm objected, but the trial court ruled that the claim had been sufficiently pled and denied the firm's motion to continue the trial so that they could prepare to defend the claim. On appeal, the Third District determined that the claim had not been sufficiently plead, and that the trial court erred in denying the firm's motion for a continuance. The Court of Appeal remanded the case for a new trial, and in so doing denied the law firm's request that the trial court be ordered to direct a verdict in their favor and certified the directed verdict question. The Supreme Court disapproved the Third District's decision not to order the trial court to direct a verdict in the firm's favor. In so doing, the Supreme Court rejected the former client's argument that it had a right to "rely" on the trial judge's decision to deny the law firm's motion for continuance, writing that the former client was "on notice" that the firm considered the former client's evidence beyond the scope of the governing complaint. *Id.* at 563. Although *Arky* highlighted the primacy of the former client's notice that the firm considered the evidence beyond the scope of the governing complaint when it successfully objected to the firm's request for a continuance, the decision is of limited applicability as it arises in the context of Florida procedural law that does not govern the issue of whether RMH can bring the assignment claim in this case.

Otis Eng' g Corp., 838 F.2d 1404, 1411-12 (10th Cir. 1988) (assuming there was surprise and prejudice as to new testimony presented at trial, party's failure to "move for a continuance or take other steps 'to cure the alleged prejudice'" constituted a "waiver of surprise").

Having decided the threshold question that RMH could bring a claim against the Firm with respect to its failure to advise them in connection with the assignment, the Arbitrator must decide whether the Firm breached its duty with respect to its advice and, if so, whether that breach damaged RMH. The Arbitrator concludes that the Firm breached its duty with respect to advising RMH to reject the assignment, and in so doing, damaged RMH.

In effect, the Firm told RMH to reject the assignment as a result of the indemnity provision that included costs and fees that would arise from RMH's litigation with Traeger. The Firm did so based on anecdotal evidence, including an indemnity "horror story" from another case, but failed to analyze the impact of accepting the assignment, or the consequences of being limited to the third-party beneficiary claim in this case. In fact, the Firm assured RMH had it had a third-party beneficiary claim—an assurance that in effect informed RMH that there was no real risk in rejecting the assignment. Further, the Firm did not advise RMH with respect to strengths and weaknesses of the third-party beneficiary claim *vis-a-vis* the putative assigned claim, or assess the costs it would incur in connection with bringing each of those claims.

Simply put, the Firm failed to analyze the risks and benefits of rejecting the assignment, and thus failed to

advise RMH that without the assignment, it might not have a claim against Traeger, but with the assignment, it had a path to victory. As Mr. Ferraro acknowledged at the Final Hearing, had RMH brought the CardConnect claim in the Ohio litigation, it would have been a "different ball game." Mr. Ferraro was correct, and RMH's decision to follow the Firm's off the cuff advice and reject the assignment was anything but informed.

During the Final Hearing in this case, Mr. Panahpour testified that had he been properly informed of the risks and benefits of the executed assignment he would have accepted it. Mr. Panahpour is an astute businessman and the Arbitrator credits that testimony. Accordingly, the Arbitrator concludes that the Ferraro firm acted below the standard of care and breached its duty when it advised RMH to reject the assignment of CardConnect's claim against Traeger without doing any meaningful legal or factual analysis, and in so doing damaged RMH.

D. The Liquidated Damages Issue.

The next question the Arbitrator must address is whether RMH would be entitled to liquidated damages had it accepted CardConnect's assignment. Pursuant to the CardConnect/Traeger agreement, the issue would have been governed by the following provision:

> [I]f (a) Client breaches this Agreement by improperly terminating it prior to the expiration of the applicable term of the Agreement, or (b) this Agreement is terminated prior to

> the expiration of the applicable term of the Agreement due to an Event of Default, then ***Servicers will suffer a substantial injury*** that is difficult or impossible to accurately estimate. Accordingly, the parties have agreed that the amount described below ***is a reasonable pre-estimate of Servicers' probable loss.*** (emphasis supplied).

The provision further states that in the event of an early termination:

> Traeger would be liable to us for liquidated damages in an amount equal to the average monthly revenue payable to us as a result of this Agreement for the three calendar months in which such revenue was the highest during the preceding 12 calendar or such shorter period if this Agreement has not been in effect for 12 months, multiplied by the by the number of months remaining during the then current term of the Agreement.

The terms "Servicers" and "us," as used in the North Program Guide, are defined as follows:

> Servicers—Bank and Processor collectively. The words "we," "us" and "our" refer to Servicers unless otherwise indicated in the Program Guide.

In this case, the Processor is CardConnect and the Bank is Wells Fargo.

Appendix E

The Ohio Supreme Court developed a tripartite test to determine the enforceability of liquidated damages provisions:

> Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be: (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof.

Boone, 50 N.E. 3d at 509 (quoting *Samson Sales, Inc. v. Honeywell, Inc.*, 465 N.E. 2d 392, 394 (Ohio 1984)).

As to the first prong of the *Samson Sales* test, the uncertainty of amount caused by a breach, it is important to note that the proper inquiry is whether damages are uncertain as to the amount and difficulty to prove at the time of contracting. *E.g.*, *Fleming v. Kent State Univ.*, 17 N.E. 3d 620, 628 (Ohio Ct. App. 2014) ("[T]he proper focus is on whether the damages the parties could anticipate [plaintiff] would incur if [defendant] breached the contract were uncertain in amount and difficult of proof *at the time the parties entered the contract*.").

The Arbitrator finds that the Agreement satisfies that prong. As RMH expert Adam Atlas testified, "over the course of a merchant relationship with a processor, there could be many changes in the activity" and "the performance of the parties" under a merchant agreement. For instance, there could be increases or decreases in a merchant's volumes, "additional merchant accounts added," or additional services provided to the merchant such as "ACA processing [or] gift card processing." Because of the difficulty in measuring these variables in any calculation of damages arising from a merchant's early termination, parties to merchant agreements can use liquidated provisions like the one here to side-step the difficult actuarial task of calculating losses on account of early termination. Here, although Mr. Barish predicted an increase in sales, Traeger's business fluctuations were not precisely predictable for purposes of calculating losses caused by an early termination. As such, the Traeger/CardConnect agreement provided that "the liquidated damages are fair and reasonable because it is difficult or impossible to estimate our damages resulting from any breach or improper termination," and contained the liquidated damages formula. Based on the above, the Arbitrator finds that the liquidated damages provision satisfies the first prong of the *Samson Sales* test.

The second prong of the *Samson Sales* test requires that the liquidated damages must not be so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties. *Samson Sales,* 465 N.E. 2d at 394. Like the first prong, the question whether a

liquidated damages provision is conscionable "must be viewed by the court from the standpoint of the parties at the time of contract, and not *ex post facto* when the litigation is up for trial." *Boone,* 50 N.E. 3d at 514. "In upholding liquidated damages provisions, Ohio courts recognize that "estimation by exacting standards cannot be achieved by every scenario." *Kent State Univ. v. Ford,* 26 N.E. 3d 868, 876 (Ohio Ct. App. 2015). Further, "[w]hen a liquidated damages clause is included, it is not required that actual damages be proven." *Ford,* 26 N.E. 3d at 876.

By providing that the parties would calculate the average monthly revenue for the three highest calendar months, the liquidated damages provision in this case takes into account Traeger's past sales performance to approximate what CardConnect and Wells Fargo would have collected in fees through Traeger's full, 60-month performance under the contract. Such a calculation based on historical performance at the time of breach bears a reasonable relationship to actual damages and the liquidated damages provision thus satisfies the second prong of the *Samson Sales* test.

Finally, the liquidated damages provision satisfies the third prong of the *Samson Sales* test, namely, that the court consider "whether the contract is consistent with the fact that the parties intended that the damages follow the breach." *Kent State,* 26 N.E. 3d at 876. The Arbitrator finds that the liquidated damages provision intended to remedy Traeger's premature termination of the Agreement by providing that it would apply if the Agreement was "terminated or breached by Merchant,"

and thus concludes that the liquidated damages provision meets the criteria of all three prongs of the *Samson Sales* test.

The remaining issue with respect to the liquidated damages provision is the meaning of the term "average monthly revenue payable to us" in that provision. The primary dispute with respect to this provision is whether RMH, as the assignee of CardConnect, could have been awarded interchange fees as part of its liquidated damages had it accepted the tendered assignment and brought an action against Traeger. The interchange fees in this case are significant and appear to substantially exceed the amount CardConnect was earning pursuant to the Agreement.

Interchange fees are fees earned by the issuing bank (in this case Wells Fargo) for the provision of credit lending and credit card or debit card provision to its cardholders. It is undisputed that CardConnect and RMH would have never received any portion of any interchange fees paid by Traeger to CardConnect, because they are a pass-through expense that went from CardConnect to Wells Fargo. As Mr. Panahpour explained to the Ferraro Firm at the outset of their representation in this case:

> "we (RMH and CardConnect) made about 30k per month in fees. RMH gets 80% and CC gets 20%. Chris and I split the RMH fees. **The remainder of the fees are Interchange and have nothing to do with us.** Visa, Mastercard and the card issuers split these fees. These

> are the basic costs of doing credit card transactions."

(emphasis supplied).

Notably, Traeger was aware of the breakdown of the fees owed pursuant to the Traeger/CardConnect Agreement. Each statement that CardConnect provided to Traeger set forth fees paid by Traeger for interchange fees, service charges and fees, and CardConnect s statements defined these fees as follows:

> **Interchange Charges—**These are the variable fees **charged by Card Organizations** for processing transactions. Factors that affect Interchange Charges include card type, information contained in the transaction, and how/when the transaction was processed.
>
> **Service Charges—**Also known as Discount Rate; the amount charged to authorize, process and settle card transactions.
>
> **Fees—**The range of transaction-based and/or fixed amounts charged for specific card processing services.
> (emphasis supplied).

Traeger's monthly statements thus stated that interchange fees are charged by the "Card Organizations," and Traeger understood the fees it was paying for processing when it opened its monthly statements. In addition, the applications

signed by Traeger made clear that interchange fees are pass-through expenses. Accordingly, Traeger knew from the outset that it was paying interchange fees for the benefit of the Card Organizations and issuing bank, Wells Fargo—not CardConnect.

Although the parties agree that neither CardConnect nor RMH would have been entitled to any portion of the interchange fees, RMH includes them in its liquidated damages calculation. RMH argues that pursuant to the "plain language" of the Agreement, the fees constituted "revenue" for purposes of the liquidated damages provision—a term that is not among the dozens of defined terms in the Agreement. RMH argues, *inter alia,* that revenue is a gross rather than a net concept and cites Black's Law Dictionary (11th Ed. 2019), which defines revenue as, among other things, "[i]ncome from any and all sources, gross income or gross receipts." RMH also argues that in the processing industry, revenue is commonly understood as "the amount the merchant would have to pay under its agreement in totality," and notes that the CardConnect/RMH agreement defines "net income" as revenue minus (among other costs) interchange fees.

At the Final Hearing, Ferraro presented Philip Schechter, CPA, ABV, CVA. Mr. Schechter noted that although Mr. O'Neill, RMH's witness regarding this issue, supported RMH's position by utilizing a footnote in CardConnect's consolidated financial statements that indicates that CardConnect treats card processing revenues on a gross basis, equal to the full amount of the discount charged to the merchant, including interchange

fees paid to card issuing banks, CardConnect's Financial statements include interchange fees as a cost of services, and the interchange revenues and interchange fees thus offset one another and do not result in income to CardConnect.[23] Mr. Schechter also noted that Global Payments Inc., a company that provides credit card processing, stated in financial statements included in its Form 10k that "revenue for services provided directly to merchants is *net of interchange fees.*" (emphasis supplied). Mr. Schechter likewise noted that processor First Data Corp's Form 10k provides that in the case of contracts the company owns and manages, "revenue is comprised of fees charged to the client, *net of interchange fees* and assessments charged by the credit card associations." (emphasis supplied).

The Arbitrator concludes that interchange fees should not be included in RMH's liquidated damages calculation. First, the Arbitrator finds that the term "revenue" is not universally understood within the processing community to include interchange fees passed through from the processor to the issuing bank, and the meaning of the term "revenue" in the Agreement is anything but plain. As noted above, revenue is not among the many defined terms in the Agreement, and there is no evidence that Traeger would have deemed the interchange fees it knew were being passed through from CardConnect to Wells Fargo and the Card Organizations to be "revenue" as to CardConnect.

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23. Mr. Schechter also noted that interchange fees do not affect RMH's revenue share.

Second, including interchange fees would be inconsistent with the liquidated damages provision at issue. As noted above, the liquidated damages provision provides that in the event of a breach, Traeger would "be liable to *us* [CardConnect *and* Wells Fargo] in an amount equal to the highest average monthly revenue payable to *us*" for three calendar months a formula that included interchange fees that CardConnect passed through to Wells Fargo. The Agreement likewise provided that because the injury incurred as a result of default was different or impossible to estimate, the liquidated damages provision provided *"a reasonable pre-estimate of Servicers'* [Card Connect *and* Wells Fargo's] *probable loss*" and that, upon a breach, Traeger would be liable to "us [CardConnect and Wells Fargo]." In other words, the Agreement made clear that the purpose of the liquidated damages formula was to provide a reasonable pre-estimate of CardConnect *and* Wells Fargo's probable loss—not merely CardConnect's.

Including interchange fees that would have been passed through to Wells Fargo pre-breach in RMH's liquidated damages would thus make neither legal nor common sense. There is no evidence that RMH planned to pass on those fees to Wells Fargo had it prevailed in Ohio. Accordingly, including those fees in RMH's recovery as CardConnect's assignee would contravene the purpose, language, and structure of the liquidated damages provision, namely to pre-estimate CardConnect *and* Wells Fargo's loss in the event of a breach. In addition, including those fees in RMH's recovery would constitute an unintended, unreasonable, and disproportionate

windfall.[24] Accordingly, for all of the reasons described above, the Arbitrator declines to include the interchange fees in RMH's liquidated damages in this case.

During the final hearing, Mr. Schechter testified that the proper liquidated damage calculation, excluding interchange fees, totaled $1,517,493.32. The Arbitrator credits that calculation. Accordingly, the Arbitrator concludes that (1) the liquidated damages provision in the Traeger/CardConnect agreement is enforceable pursuant to Ohio law; (2) RMH, as CardConnect's assignee, would not be entitled to recover interchange fees as part of its liquidated damages in an action against Traeger; and (3) the liquidated damages that would have been awarded in an action against Traeger by RMH as CardConnect's assignee would be $1,517,493.32.

E. Damages.

1. The Firm.

a. Compensatory Damages. For the reasons described above, the Arbitrator finds that the Firm breached its duty, acted below the standard and care and damaged the RMH by advising them to reject the assignment without assessing the risks and benefits of

24. The Arbitrator rejects RMH's argument that the interchange fees should be included as liquidated damages to RMH to account for the increase in Traeger's business because, as described above, the purpose of the liquidated damages provision was to provide liquidated damages to CardConnect *and* Wells Fargo.

doing so. The Arbitrator concludes that the compensatory damages arising from this breach of duty totals $1,517,493.32, (exclusive of prejudgment interest and costs and/or any punitive damages that may be assessed).

b. Punitive Damages. The Arbitrator finds that punitive damages in an amount to be determined at a later date should be assessed against the Firm in this case. In Ohio, punitive damages can be assessed in a negligence or breach of fiduciary duty action where there has been a showing of actual malice by clear and convincing evidence. *Burns v. Prudential Servs., Inc.,* 857 N.E. 2d 621, 646-47 (Ohio Ct. App. 2006) (citing Ohio Rev. Code § 2315.21(D)(4)). Actual malice exists where the defendant had a conscious disregard for the rights of others that has a great probability of causing substantial harm. *Whitt Sturtevant, LLP v. NC Plaza, LLC,* 43 N.E. 3d 19, 41 (Ohio Ct. App. 2015). It may be "inferred from conduct and surrounding circumstances." *Wagner v. Galipo,* 1984 WL 5292, at *9 (Ohio Ct. App. Oct. 25, 1984). Where an attorney misrepresents that work has been done, such conduct categorically constitutes actual malice warranting punitive damages. *See Williams v. Hyatt Legal Servs.,* 1990 WL 28113, at *2 (Ohio Ct. App. Mar. 14, 1990) (upholding an award of punitive damages against a firm that "knew that [its attorney] had . . . done no work" on a bankruptcy petition to save a client's home, but "took no action to rectify the situation at any time," and the attorney "misrepresented to [the client] that work would be performed, and later, that work had been performed," and the client lost his home as a result).

Appendix E

An attorney's gross negligence in handling a client's case may also support an inference of a conscious disregard of his client's legal rights and an awareness that a failure to pursue a client's legal claims has a great probability of causing substantial harm to their rights. *See Patel v. Zervas,* 2013 WL 6504695, at *3 (S.D. Ohio Dec. 10, 2013) (holding for purposes of determining the amount in controversy on motion to dismiss case invoking diversity jurisdiction, that allegations were sufficient to raise a claim of actual malice where complaint alleged that law firm failed to prosecute plaintiff's claim for more than a year, did not respond to motions to dismiss, failed to appear at hearings and conferences, and as a result, the plaintiff's complaint was dismissed without prejudice and law firm failed to take additional action, including moving to set aside judgment).

Here, the Firm's conduct demonstrates that Firm acted with actual malice as a matter of law. Among other things, the Firm incompetently represented RMH in the Ohio Lawsuit, paid little attention to the merits of the case against Traeger,(including the value of the assignment *vis-a-vis* the third-party beneficiary claim), paid little attention to court rules, discovery deadlines, hearing dates, or court orders, offered advice and drafted pleadings (including the Complaint) with minimal factual or legal analysis, and made false statements to RMH—both affirmatively and by omission.

Just by way of example, the Firm said that they would request oral argument on Traeger's motion to dismiss but didn't; said they would be filing a motion to overturn

the Ohio Court's dismissal order on the contract claim but didn't; and told RMH about the "good news" that its case was ongoing and advancing to trial, keeping hidden from RMH that its case was dismissed with prejudice as a sanction for the Firm's failure to comply with court orders and their discovery obligations.

In fact, the only time that the Firm competently and consistently focused on RMH's case was after the Ohio court dismissed it as a sanction and Mr. Ferraro found out. At that point, having delegated most of the matter to an unsupervised lawyer with little commercial experience, the Firm kicked into gear and focused on protecting itself without communicating with RMH for days. During that time, the Firm was well aware that the appeal period was going to run on the dismissal of RMH's breach of contract claim, yet the Firm let it run without even informing their client.

Simply put, this was not a case in which the Firm misread a map and made a wrong turn. Instead, the conduct in this case was more akin to a someone driving with his eyes closed, all the while assuring his passenger that he was carefully watching the road. The Arbitrator thus finds by clear and convincing evidence that the Firm acted with actual malice, engaged in conduct that had a great probability of causing substantial harm, and damaged RMH in so doing, and finds that punitive damages, in an amount to be determined at a later date should be assessed against the Firm in this case.

2. Mr. Ferraro.

a. Compensatory Damages. The Arbitrator finds that Mr. Ferraro breached his duty, acted below the standard of care, and damaged RMH by failing to supervise Mr. Tinstman, an associate with little commercial experience, and by failing to pay any meaningful attention to this case until it exploded. Mr. Ferraro assured RMH that he was their lawyer, but appears to have paid only nominal and intermittent attention to the case, and when asked, rubber stamped Mr. Tinstman's work. In so doing, Mr. Ferraro put his "wet" signature on a complaint that alleged that RMH was a party to the Traeger/CardConnect agreement—a misstatement that someone with even the most cursory knowledge of the Agreement would have corrected rather than bless.

The Arbitrator finds that had Mr. Ferraro been properly supervising Mr. Tinstman and focused on the case, he would have been informed of CardConnect's tendered, executed assignment, been in a position to consider the risks, benefits and expenses associated with the assignment *vis-a-vis* the third-party beneficiary claim, and counseled RMH to accept it. Mr. Ferraro testified at the Final Hearing that had RMH obtained the assignment, "it would have been a whole new ball game." The Arbitrator concurs and concludes that the compensatory damages arising from Mr. Ferraro's failure to properly supervise Mr. Tin stman and focus on RMH's case are the same damages that arose from the Firm's failure to properly advise RMH of the risks and

benefits of the assignment, that is, $1,517,493.32, (exclusive of prejudgment interest and costs and/or any punitive damages that may be assessed).

b. Punitive Damages. Although the Arbitrator finds that Mr. Ferraro should be assessed compensatory damages for the reasons described above, the Arbitrator does not find by clear and convincing evidence that he should be assessed punitive damages. Mr. Ferraro was not aware of the multiple lapses that resulted in the dismissal, (although he should have been), and was not aware of the falsehoods his associate was passing onto RMH. Likewise, he did not know that his associate was conducting himself, in Mr. Ferraro's words, "in the Twilight Zone," and had no reason to anticipate what he called "off the rails" conduct Although the Arbitrator concurs with RMH's observation that Mr. Ferraro truly focused on RMH's case only after it became necessary to protect the Firm, the Arbitrator does not find that his conduct rises to the level of actual malice that had a great probability of causing substantial harm, and declines to impose punitive damages against him.

F. Costs and Prejudgment Interest.

The Arbitrator assesses costs against the Firm and Mr. Ferraro to be determined at a later date.

The Arbitrator also assesses prejudgment interest against the Firm and Mr. Ferraro to be determined at a later date. The Arbitrator has been informed that the parties concur that assessing prejudgment interest is undisputed in this case.

G. Punitive Damage Procedure; Request for Zoom Hearing.

The Arbitrator requests that the parties alert the Arbitrator to their availability to attend a one-hour (maximum) hearing concerning the procedure for discovery and other issues related to punitive damages. If possible, the Arbitrator suggests a Zoom hearing on Monday, December 1, 2020, or Tuesday December 2, 2020 after 4 PM. If those dates are unavailable, please email the Arbitrator and we will find an alternative date.

CONCLUSION

1. The Arbitrator finds by a preponderance of the evidence that the Firm breached their duty to RMH and failed to conform to the standards required by law, and in so doing, damaged RMH.

2. The Arbitrator finds by a preponderance of the evidence that Mr. Ferraro breached his duty to RMH and failed to conform to the standards required by law, and in so doing, damaged RMH.

3. The Arbitrator finds that compensatory damages in this case (exclusive of prejudgment interest, costs and any punitive damages that may be assessed) total $1,517,493.32.

4. The Arbitrator finds by clear and convincing evidence that the Firm acted with actual malice and engaged in conduct with a great probability of causing

substantial harm, and in so doing damaged RMH, and finds that punitive damages, in an amount to be determined at a later date, should be assessed against the Firm in this case.

5. The Arbitrator finds that punitive damages should not be awarded against Mr. Ferraro.

6. The Arbitrator assesses prejudgment interest against The Firm and Mr. Ferraro to be determined at a later date. (The Arbitrator understands that the parties concur on the propriety of prejudgment interest in this matter; if that is not the case, please alert the Arbitrator immediately).

7. The Arbitrator assesses costs against The Firm and Mr. Ferraro to be determined at a later date.

8. The Arbitrator requests a hearing regarding the procedures to be used in determining punitive damages on Monday, December 1, 2020 or Tuesday, December 2, 2020 after 4 PM. If those dates are unavailable, please alert the Arbitrator and we will find an alternative date.

Dated this 18th day of November, 2020.

Respectfully submitted,

/s/_____
Pamela I. Perry

APPENDIX F — ORDER OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, FILED AUGUST 21, 2024

IN THE DISTRICT COURT OF

APPEAL

OF FLORIDA

THIRD DISTRICT

3D2022-1851
Trial Court Case No. 21-3987

THE FERRARO LAW FIRM, P.A., etc., *et al.*,

Appellant(s)/Cross-Appellee(s),

v.

ROYAL MERCHANT HOLDINGS, LLC, etc.,

Appellee(s)/Cross-Appellant(s).

Filed August 21,2024

Upon consideration, Appellee's Motion for Rehearing, and Clarification is hereby denied.

LINDSEY, MILLER and BOKOR, JJ., concur.

Appellee's Motion for Rehearing En Banc is, likewise, denied.

APPENDIX G — EXCERPTS FROM THE PETITION FOR DISCRETIONARY REVIEW TO THE SUPREME COURT OF FLORIDA, FILED DECEMBER 30, 2024

IN THE SUPREME COURT OF FLORIDA

S.C. CASE NO.: SC2024-1369
DCA CASE NO.: 3D22-1851
L.T. CASE NO.: 21-3987

ROYAL MERCHANT HOLDINGS, LLC,

Petitioner,

v.

THE FERRARO LAW FIRM, P.A., *et al.*,

Respondents,

Dated: September 30, 2024

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FLORIDA THIRD DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

* * *

After losing the arbitration, Respondent brought an action in Circuit Court to vacate the Award, arguing that the malpractice claim for which it was found liable was not

raised in Petitioner's initial demand. Petitioner responded with a motion to confirm the Award, which the Circuit Court granted, entering final judgment in Petitioner's favor. The Circuit Court observed:

> There are few areas of the law as well-settled as the standards for judicial review of awards in arbitration, *the forum chosen by Ferraro in its Retainer Agreement* to resolve disputes with its client.[1]

Because this arbitration was governed by the Federal Arbitration Act ("FAA") and Florida's Revised Arbitration Code ("FRAC") and not rules established by one of the private arbitration services, much less the Florida Rules of Civil Procedure,[2] the Circuit Court summarized the law, in both federal and state courts:

> Arbitrations are "an alternative to the court system," *Miele v. Prudential-Bache Sec., Inc.*, 656 So. 2d 470, 473 (Fla. 1995), and they are intended to be informal "streamlined proceedings." *AT&T Mobility LLC*, 563 U.S.

1. R. 15919. For context, Petitioner cites to the record below ("R. ___"), as the appendix accompanied with this brief only contains a conformed copy of the Third District's decision in accordance with Rule 9.120(d).

2. The Respondent law firm, in its Retainer Agreement, did not offer its client arbitration administered by the American Arbitration Association or JAMS. Instead, the Agreement compelled arbitration in a forum where no procedural rules existed.

at 344. "Arbitrators 'enjoy wide latitude in conducting an arbitration hearing,' and they 'are not constrained by formal rules of procedure or evidence.'" *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007); *see* ***Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Kinsey*****, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995) ("Arbitrators are not constrained by formal rules of evidence or procedure. Rather, they enjoy wide latitude in the conduct of proceedings.").** "The arbitrators' authority over proceedings is so expansive that *parties may not infringe upon the arbitrators' control over procedure; parties may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations.*" *First Pres. Capital, Inc. v. Smith Barney, Harris Upham & Co.*, Inc., 939 F. Supp. 1559, 1565 (S.D. Fla. 1996). "Because arbitration proceedings are *in no way constrained by formal rules of procedure* or evidence, once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, *procedural questions which grow out of that dispute and bear on its final disposition should be left to the arbitrator.*" *Id.* at 1563-1565.

. . . .

> In connection with petitions challenging awards based on Sections 682.13(b)(3) and 682.06 of the FAC and Section 10(a)(3) of the FAA, ***the only procedural requirement courts impose in arbitration is "notice and opportunity to be heard." Talel Corp. v. Shimonovitch*, 84 So. 3d 1192, 1194 (Fla. 4th DCA 2012)**; *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1175-77 (9th Cir. 2010); *NYKCool A.B. v. Pac. Fruit, Inc.*, 507 F. App'x 83, 88 (2d Cir. 2013); *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1013 (10th Cir. 1994). That is the beginning and end of procedural formality. Therefore, a "fundamentally fair hearing" in an arbitration means that the parties are necessarily not provided "the same procedures they would find in the judicial arena." *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997); *see Productos Roche S.A.*, 2020 WL 1821385, at *3 ("[T]he right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure.").[3]

Consistent with the Arbitrator's findings, the Circuit Court found that Respondent itself raised the issue in its answer and defenses; that the issue was fully subjected to discovery; that it had been provided notice of the claim that arose from the discovery "[f]rom the outset of the evidentiary hearing"; that Respondent

3. R. 15920 (emphasis added).

"presented evidence and argument" on the issue; and that Respondent refused continuances offered during the lengthy proceeding.[4] Indeed, Respondent suggested that the Arbitrator wait until all of the

* * *

4. R. 15925-15931; "[A]n appellate court cannot use its review powers as a mechanism for reevaluating conflicting evidence and exerting covert control over the factual findings." *State v. Coney*, 845 So. 2d 120, 133 (Fla. 2003).

APPENDIX H — EXCERPTS FROM APPELLEE'S MOTION IN THE THIRD DISTRICT COURT OF APPEAL, STATE OF FLORIDA, FILED JUNE 27, 2024

IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 3D22-1851
L.T. Case No. 2021-003987-CA-01

THE FERRARO LAW FIRM, P.A., *et al.*,

Appellants,

v.

ROYAL MERCHANT HOLDINGS, LLC,

Appellee.

Filed June 27, 2024

APPELLEE'S MOTION FOR REHEARING, CLARIFICATION AND REHEARING EN BANC

* * *

apply [but] . . . chose to forego them, perhaps in the hopes of a more expedient resolution to its claims.").[19]

19. *See also Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328 (11th Cir. 2007) ("Arbitrators enjoy wide latitude in conducting an arbitration hearing and they are not constrained by formal rules of procedure"); *First Pres. Capital, Inc. v. Smith*

Notably, civil rules of procedure, and their attendant pleading obligations, were specifically rejected by the Federal Arbitration Act and the Florida Arbitration Code, which merely requires actual notice—i.e., "the person has knowledge"—or constructive notice—i.e., "taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice" (Fla. Stat. § 682.012(1))—of "the nature of the controversy and the remedy sought" (Fla. Stat. § 682.032(1)). *See also Kintzele*, 658 So. 2d at 132; *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Kinsey*, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995) ("Arbitrators are not constrained by formal rules of evidence or procedure. Rather, they enjoy wide latitude in the conduct of proceedings."); *21st Fin. Servs., L.L.C. v.*

Barney, Harris Upham & Co., Inc., 939 F. Supp. 1559, 1565 (S.D. Fla. 1996) ("The arbitrators' authority over proceedings is so expansive that parties may not infringe upon the arbitrators' control over procedure; parties may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations . . . Because arbitration proceedings are in no way constrained by formal rules of procedure or evidence, once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions which grow out of that dispute and bear on its final disposition should be left to the arbitrator."); *Productos Roche S.A.*, 2020 WL 1821385, at *3 (S.D. Fla. Apr. 10, 2010) ("[T]he right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure."); *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997) (A "fundamentally fair hearing" in an arbitration means that the parties are necessarily not provided "the same procedures they would find in the judicial arena").

Manchester Fin. Bank, 747 F.3d 331, 337 (5th Cir. 2014)) (holding due process "notice and an opportunity to be heard . . . required the absence of actual or constructive notice"); *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 729 (5th Cir. 1987); *Grp. 32 Dev. & Eng'g, Inc. v. GC Barnes Grp., LLC*, 2015 WL 144082, at *6 (N.D. Tex. Jan. 9, 2015) ("due process requirements are satisfied, and an arbitration award will not be vacated, if the affected parties are given either actual or constructive notice"); *Productos Roche S.A.*, 2020 WL 1821385, at *3 ("[T]he right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure.").[20]

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20. *See also AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (recognizing that arbitrations under FAA are "informal, streamlined proceedings."); *Certain Underwriters at Lloyd's London v. Ashland, Inc.*, 967 A.2d 166, 175 (D.C. 2009) ("pleading requirements in arbitration proceedings are generally relaxed" with claims being "much more informal than a pleading;" and "technical pleading rules need not be followed"); *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 (5th Cir. 1993) ("The parties agreed to arbitration, however, and must accept the loose procedural requirements along with the benefits which arbitration provides. An arbitrator, in his discretion, may choose not to address an issue without giving the opposing party better notice and an opportunity to respond. Federal law, however, does not impose any requirements as to how specific a notice of arbitration must be. In the absence of a congressional mandate, we will not develop a code of pleading here."); *Tokura Constr. Co., Ltd. v. Corporacion Raymond, S.A.*, 533 F. Supp. 1274, 1278 (S.D. Tex. 1982) ("arbitration proceedings are not held to the same technical rules of pleading and evidence as lawsuits in federal courts").

Appendix H

The trial court found that Ferraro had both notice and an opportunity to respond to the assignment malpractice issue that Ferraro, itself, raised in its answer and affirmative defenses. R. 15931. From that moment forward, the issue was front and center in the proceeding, as Ferraro's pleading led to the discovery establishing its malpractice with regard to rejection of the proffered assignment, and then was raised continually throughout the hearings.

Notwithstanding this *actual notice* to Ferraro, the Opinion concludes that a fundamentally fair hearing was not provided because the matter was "not the subject of *appropriate pleadings*." *Id.* at 5; id. at 2 (upholding "Appellant, [Ferraro's] argu[ment] that

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APPENDIX I — EXCERPTS FROM APPELLEE'S CROSS-REPLY BRIEF IN THE THIRD DISTRICT COURT OF APPEAL, STATE OF FLORIDA, FILED JANUARY 8, 2024

THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 3D22-1851
L.T. Case No. 2021-003987-CA-01

THE FERRARO LAW FIRM, P.A., *et al.*,

Appellants,

v.

ROYAL MERCHANT HOLDINGS, LLC,

Appellee.

Filed January 8, 2024

APPELLEE'S CROSS-REPLY BRIEF

* * *

In rejecting Ferraro's argument that formal rules of procedure required that notice be given in a written demand, the Arbitrator applied well-established principles that a litigant in arbitration is entitled to notice of a claim and an opportunity to respond, but the manner in which that notice would be provided is undefined by formal rules:

> The procedural issues in these proceedings arise in an arbitration rather than a state or federal court, and the Arbitrator finds that those issues are governed by the Federal Arbitration Act ("FAA") and the Revised Florida Arbitration Code ("FAC"). Neither the FAA nor the FAC contain pleading rules or demand that the parties proceed under pleading rules adopted by the Florida or Federal courts. Instead, pleading requirements in arbitration proceedings are generally relaxed" with claims being "much more informal than a pleading;" "[t]here are virtually no rules of pleading in arbitration" and "technical pleading rules need not be followed."

R. 7762-7763 (citations omitted).

In the Award, the Arbitrator identified the limited rules that had been adopted, none of which would require that notice of a claim be provided in a particular manner. R. 7761-7767.

In addition, even if pleading rules had been adopted, because Ferraro raised the issue in its pleading, and because an avoidance to

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APPENDIX J — EXCERPTS FROM APPELLEE'S ANSWER BRIEF AND CROSS-INITIAL BRIEF IN THE THIRD DISTRICT COURT OF APPEAL STATE OF FLORIDA, FILED AUGUST 31, 2023

THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 3D22-1851
L.T. Case No. 2021-003987-CA-01

THE FERRARO LAW FIRM, P.A., *et al.*,

Appellants,

v.

ROYAL MERCHANT HOLDINGS, LLC,

Appellee.

Filed August 31, 2023

APPELLEE'S ANSWER BRIEF AND CROSS-INITIAL BRIEF

* * *

964, 965 (Fla. 3d DCA 2012) (determination of an issue of law is reviewed de novo).[9]

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9. Both parties agree that the FAA and FAC govern here. I.B. at 27 n.8. When the FAC and FAA conflict, the FAA controls. *E.g., Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc.*,

Appendix J

The final judgment confirming the arbitration award is to be reviewed on appeal for "an abuse of extremely limited discretion." *Nucci v. Storm Football Partners*, 82 So. 3d 180, 183 (Fla. 2d DCA 2012) (quoting *Murton Roofing Corp. v. FF Fund Corp.*, 930 So. 2d 772, 773 (Fla. 3d DCA 2006)).

Ferraro's Initial Brief relies on *Boyhan v. Maguire*, 693 So. 2d 659 (Fla. 4th DCA 1997). I.B. at 27. *Boyhan* addressed a claim of arbitrator bias, and it should be considered with the entirety of its discussion of the subject:

> Review of arbitration proceedings is extremely limited. An award may not be set aside by the court except upon the grounds set forth in section 682.13, namely specified, extrinsic acts of misconduct or procedural errors. *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327 (Fla. 1989). A reviewing court may not comb the record of the arbitration hearing for

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154 So. 3d 1115, 1124 (Fla. 2014); *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 463-64 (Fla. 2011); *UBS Fin. Servs. Inc. v. Walzer*, 2019 WL 7283220, at *2 (S.D. Fla. Dec. 27, 2019). Federal cases interpreting the FAA, therefore, are highly instructive as they are either consistent with, or control the decision if they conflict with, the FAC.

II. A Party Participating in Arbitration Is Entitled to a Fundamentally Fair Hearing—Ferraro Was Provided with One

A. Ferraro Erroneously Contends That an Arbitration Process without Formal Rules of Civil Procedure Deprives a Party of Due Process

In its Initial Brief, Ferraro argues that Arbitrator Perry violated "fundamental due-process principles" by failing to comply with judicial rules of pleading, procedure, and evidence. I.B. at 42. This argument is directly contrary to the unanimous decisions of the state and federal courts addressing the issue.

Arbitrations are "an alternative to the court system," *Miele v. Prudential-Bache Sec., Inc.*, 656 So. 2d 470, 473 (Fla. 1995), and they are intended to be informal "streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). A "fundamentally fair hearing" in an arbitration, therefore, means that the parties are necessarily not provided "the same procedures they would find in the judicial arena." *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997). Indeed, due process rights in arbitrations do not include the same procedural rights as in court. *Kintzele v. J.B. & Sons, Inc.*, 658 So. 2d 130, 133 (Fla. 1st DCA 1995) ("Arbitrators are not constrained by formal rules of . . . procedure") (quoting *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Kinsey*, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995)); *Productos Roche S.A. v. Iutum Servs. Corp.*, 2020 WL 1821385, at *3 (S.D. Fla. Apr. 10, 2020) ("[T]he

right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure."); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 957 F.3d 487, 499 (5th Cir. 2020) ("The more fulsome procedures of the Federal Rules of Civil Procedure are not required" in arbitration).

"An arbitrator enjoys wide latitude in conducting an arbitration hearing." *Generica Ltd.*, 125 F.3d at 1130. "The arbitrators' authority over proceedings is so expansive that parties may not infringe upon the arbitrators' control over procedure; parties may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations." *First Pres. Capital, Inc. v. Smith Barney, Harris Upham & Co., Inc.*, 939 F. Supp. 1559, 1565 (S.D. Fla. 1996). "Because arbitration proceedings are in no way constrained by formal rules of procedure or evidence, once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions which grow out of that dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 1565 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).

With respect to pleadings, neither the FAA nor the FAC contain pleading rules or demand that parties proceed under pleading rules adopted by Florida or federal courts. "[P]leading requirements in arbitration proceedings are generally relaxed" with claims being "much more informal than a pleading"; "[t]here are virtually no rules of pleading in arbitration" and "technical pleading rules need not be followed." *Certain*

Underwriters at Lloyd's London v. Ashland, Inc., 967 A.2d 166, 175 (D.C. 2009); *see Tokura Constr. Co., Ltd. v. Corporacion Raymond, S.A.*, 533 F. Supp. 1274, 1278 (S.D. Tex. 1982) ("arbitration proceedings are not held to the same technical rules of pleading and evidence as lawsuits in federal courts"). Notably, the "Florida Arbitration Code specifies no pleading requirements for initiating arbitration" and, therefore, "judicially created pleading requirements" are inapplicable. *Kintzele*, 658 So. 2d at 132-33.[13] Similarly, federal law does not have a code of pleading for arbitration. *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 (5th Cir. 1993) ("The parties agreed to arbitration, however, and must accept the loose procedural requirements along with the benefits which arbitration provides. An arbitrator, in his discretion, may choose not to address an issue without giving the opposing party better notice and an opportunity to respond. Federal law, however, does not impose any requirements as to how specific a notice of arbitration must be. In the absence of a congressional mandate, we will not develop a code of pleading here.").

A fundamentally fair hearing in arbitration merely requires "notice and an opportunity to be heard." *Talel*

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13. *Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass'n, Inc.*, 117 So. 3d 1226, 1230 (Fla. 3d DCA 2013), which Ferraro cites, recognizes that the procedural safeguards for arbitration are "codified in substantial part in the Florida Arbitration Code." The FAC does not recognize any specific pleading requirements. Rather, it guarantees each party a right to "notice of each hearing session . . . right to counsel, the opportunity to present evidence, and the right to crossexamine witnesses." All of which was given to Ferraro.

Corp. v. Shimonovitch, 84 So. 3d 1192, 1194 (Fla. 4th DCA 2012). All of which Ferraro received in the arbitration.

B. Arbitrator Perry Did Not Impose Any Procedural or Pleading Rules on the Parties

Ferraro argues that a scheduling order with respect to the time to file a complaint and answer effectively adopted all formal rules of

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APPENDIX K — EXCERPTS FROM THE RESPONDENT ROYAL MERCHANT HOLDINGS, LLC'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT FOR THE MIAMI-DADE COUNTY, FLORIDA, FILED MARCH 4, 2022

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

COMPLEX BUSINESS LITIGATION DIV.
CASE NO.: 2021-003987-CA-01

THE FERRARO LAW FIRM, P.A.,
A FLORIDA CORPORATION, AND
JAMES L. FERRARO, AN INDIVIDUAL,

Petitioners/Counter-Respondents,

v.

ROYAL MERCHANT HOLDINGS, LLC,
A FLORIDA LIMITED LIABILITY COMPANY,

Respondent/Counter-Petitioners.

RESPONDENT ROYAL MERCHANT HOLDINGS, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION AND TO VACATE DECEMBER 31 ORDER OR, IN THE ALTERNATIVE, MOTION FOR REHEARING

* * *

II. Ferraro Wholly Mischaracterizes the Scope of Judicial Review of Arbitration Awards

The law governing review of arbitration awards is voluminous, clear and unanimous. It is discussed in RMH's motion and briefly summarized here.

There are no rules of pleading or other judicial rules in arbitration, *see* Motion at 16-18, and the Court cannot overrule factual findings, *see id.*at 10-12. Ferraro concedes the fundamental principle "that a trial court may not review factual findings made by an arbitrator" but fabricates a sweeping exception to the rule "when the factual findings relate to the FAC's and the FAA's statutory grounds for vacating an arbitration award." Resp. at 13. Ferraro does not cite to a judicial decision supporting that attempt to alter well-established principles because no such exception exists. Moreover, even under Ferraro's attempt to create new law to overcome existing law, this Court would never be able to contradict the factual findings the Arbitrator made interpreting *her own* scheduling orders, procedures, and pleading requirements she, herself, imposed in the arbitration. Recon. Mot. at 14-15. These facts have been found by the one person entitled to find them (findings which are amply supported by the record), and the Court lacks the power to sift through the cold record and disagree.

Every case relied on by Ferraro to support their "general exception" involved a party seeking vacatur on the basis that the arbitrator was biased or impartial—a basis that was never asserted here. Resp. at 13-14; *see*,

e.g., *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1258 (7th Cir. 1992) ("**[W]hen a claim of partiality as to an arbitration award is made**, the court is under an obligation to *scan the record* to see if it demonstrates evident partiality on the part of the arbitrators."); *Saxis S.S. Co. v. Mulifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967) ("It is true that **when a claim of partiality is made**, the court is under an obligation to scan the record to see if it demonstrates '**evident partiality**' on the part of the arbitrators.")). Indeed, unlike the other limited bases for vacatur, "the **'evident partiality' question** necessarily entails a fact intensive inquiry [as t]his is **one area of the law** which is highly dependent on the unique factual settings of each particular case." *Univ. Commons-Urbana, Ltd. v. Univ. Constructors Inc.*, 304 F.3d 1331 (11th Cir. 2002). Scanning the record to see if an arbitrator's partiality led to factual conclusions based on bias or undue influence makes sense as the essence of the inquiry is whether factual disputes were resolved by a fact finder unburdened with improper bias or influence. By contrast, factual *findings* by an unbiased and qualified arbitrator, as here, made about the scope of discovery, the rules and procedures established in her own orders, and determining whether a party had been fully informed throughout the proceedings of the assignment affirmative claim cannot be disturbed. Otherwise, every arbitration award would be subject to the bizarre and never before used kind of *de novo* appellate review on steroids sought here. Ferraro not only sought appellate review of factual conclusions against it, it persuaded the Court to ignore even a normal standard of review—abuse of discretion—urging the Court to make factual findings based on its

biased view of the record, specifically considered and rejected by the Arbitrator who heard and weighed the evidence. The procedure here, if allowed, is not only without precedent, it would defeat the very purpose of arbitration.

In determining "whether or not the arbitration proceedings were fundamentally unfair," "[c]ourts ***may not*** vacate an arbitration award based on . . . mistakes in fact-finding." *Castleman v. AFC Enters., Inc.*, 995 F. Supp. 649, 652 (N.D. Tex. 1997). More fundamentally, courts cannot usurp "the arbitrator's control over procedure," *First Pres. Capital, Inc. v. Smith Barney, Hariss Upham & Co., Inc.*, 939 F. Supp. 1559, 1565 (S.D. Fla. 1996), which is "left to the sound discretion of the arbitrator and **should not be second-guessed by the courts**." *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 545 (2d Cir. 2016). Procedural and evidentiary determinations by the arbitrator are "***not*** the type of action for which judicial review is appropriate." *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Kinsey*, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995).

III. The Due Process Required for an Arbitration Does Not Involve the Procedural Structures Required in a Judicial Proceeding

Throughout its Response (and in the Order), Ferraro erroneously conflates the procedural structures of *court* proceedings with the minimum procedural requirements in arbitrations. Resp. at 17-21. Yet, Ferraro does not, and cannot dispute that rules of pleading and procedures do

not apply in arbitration, and parties are not provided the same procedural rights as in court. *See Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) ("Arbitrators 'enjoy wide latitude in conducting an arbitration hearing,' and they '**are not constrained by formal rules of procedure or evidence**.'"); *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997) (a "fundamentally fair hearing" in an arbitration means that the parties are necessarily **not provided "the same procedures they would find in the judicial arena**"); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 957 F.3d 487, 499 (5th Cir. 2020) ("The more fulsome procedures of the Federal Rules of Civil Procedure are not required" in arbitration).

In ***all*** of the decisions the Order (and Ferraro) cites, where a court found a lack of due process, the court did so under the constraints of rules of judicial procedure that do *not* exist in arbitration. *J.S.L. Const. Co. v. Levy*, 994 So.2d 394, 399-400 (Fla. 3d DCA 1971) (addressing violation of "discovery rules" and Florida Statute Sec. 558.004 that requires a strict "60 days' notice" for a construction defect claim); *Walker v. Walker*, 254 So. 2d 832, 834 (Fla. 1st DCA 1971) (applying "25 Fla. Jur. 'Pleadings ss 23 and 24" discussing Fla. R. Civ. P. 23 and 24 on "forms of pleadings"); *Arky v. Bowmar*, 537 So.2d 561, 562-63 (Fla. 1988) (finding evidence was "beyond the scope of the pleadings" and applying procedural rules requiring that allegation must

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APPENDIX L — EXCERPTS FROM MOTION FOR RECONSIDERATION AND FOR REHEARING IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA, FILED JANUARY 18, 2022

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

COMPLEX BUSINESS LITIGATION DIV.
CASE NO.: 2021-003987-CA-01

THE FERRARO LAW FIRM, P.A.,
A FLORIDA CORPORATION, AND
JAMES L. FERRARO, AN INDIVIDUAL,

Petitioners/Counter-Respondents,

v.

ROYAL MERCHANT HOLDINGS, LLC,
A FLORIDA LIMITED LIABILITY COMPANY,

Respondent/Counter-Petitioners.

Filed January 18, 2022

RESPONDENT ROYAL MERCHANT HOLDINGS, LLC'S MOTION FOR RECONSIDERATION AND TO VACATE DECEMBER 31 ORDER OR, IN THE ALTERNATIVE, MOTION FOR REHEARING

* * *

II. The Order Directly Conflicts with Established Law by Erroneously Applying a Uniformly Rejected Standard of Review of the Arbitrator's Findings

There are few areas of the law as deeply and uniformly established as the standard for reviewing attacks on arbitration awards. Adopting Ferraro's proposed legal conclusion that the Court can disregard the Arbitrator's findings and engage in cold record fact-finding violates the Federal Arbitration Act ("FAA"), Florida's Revised Arbitration Code ("FAC"), and a virtual tsunami of cases uniformly rejecting that contention. There is no case approving such a process.

a. This Court is bound by the Arbitrator's Findings.

Under the FAA and FAC, this Court does not act as an appellate body that undertakes de novo review of the Arbitrator's decision or clear error review of the Arbitrator's factual findings. *See Cunningham v. Pfizer Inc.*, 294 F. Supp. 2d 1329, 1331 (M.D. Fla. 2003) (recognizing that under the FAA, "[a] court reviewing an arbitration decision does not review the issues submitted to arbitrators de novo. Instead, courts review awards pursuant to standards in the FAA and case law in order to determine whether to vacate."). Courts are prohibited from reviewing an arbitrator's factual findings, must grant extreme deference to an arbitrator's legal conclusions, and can only disturb an arbitration's internal procedures where the arbitrator entirely disregards the bare minimum of due process, "notice and an opportunity to be heard." *Talel Corp. v. Shimonovitch*, 84 So. 3d 1192, 1194 (Fla. 4th DCA 2012); *Capital Factors, Inc. v. Alba*

Rent-A-Car, Inc., 965 So. 2d 1178, 1183 (Fla. 4th DCA 2007); *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007).

"The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). "[C]ourts may vacate an arbitrator's decision 'only in very unusual circumstances,'" as "limited judicial review . . . 'maintain[s] arbitration's essential virtue of resolving disputes straightaway.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013). As the United States Supreme Court has held, "[i]f parties could take 'full-bore legal and evidentiary appeals,' arbitration would become 'merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Id.* at 568.

"[R]eview of an arbitration award is highly deferential and extremely limited." *United Steel, Paper & Forestry, Rubber, Mfg. v. Wise Alloys, LLC*, 807 F.3d 1258, 1271 (11th Cir. 2015). The "FAA imposes a heavy presumption in favor of confirming arbitration awards; therefore, a court's confirmation of an arbitration award is usually routine or summary" as "arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011).

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* * *

the awarding panel committed misconduct under 9 U.S.C. § 10(a)(3) by not re-opening the evidentiary hearings" or asking the arbitrators to "permit it discovery").

The same narrow review exists under the FAC. "Under Florida law, arbitration is a favored means of dispute resolution and courts indulge every reasonable presumption to uphold proceedings resulting in an award." *Miele v. Prudential-Bache Sec., Inc.*, 656 So. 2d 470, 473 (Fla. 1995). "[L]imited review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative." *Id.* at 473. "Arbitration awards are treated with a high degree of conclusiveness, and a court has extremely limited discretion to vacate an arbitration award." *Am. Fed'n of State, Cnty. v. Miami-Dade Cnty. Pub. Sch.*, 95 So. 3d 388, 390 (Fla. 3d DCA 2012). "The narrow scope of our review is necessary to ensure that arbitration does not become merely an added preliminary step to judicial resolution" and constitutes "a true alternative." *Regalado v. Cabezas*, 959 So. 2d 282, 284 (Fla. 3d DCA 2007).

Courts may not review factual findings by an arbitrator—***at all***. *Capital Factors,* 965 So. 2d at 1183 (the FAA "presumes that arbitration awards will be confirmed" and the review of arbitral awards is limited to determining "whether the arbitrator did the jobs they were told to do—not whether they did well, or correctly, or reasonably, but simply whether they did it"); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1322-23 (11th Cir. 2010) (rejecting a trial court's ability to review an arbitrator's factual findings as outside the constraints of the FAA even where the parties agreed the trial court could do so).

b. The Order erroneously adopts new findings.

Throughout its fifteen pages, the Order urged on the Court by Ferraro not only sets aside detailed factual findings made by the fact finder, but does so in a manner that would be outrageously improper for an appellate court considering review of a lower court's fact finding on the "abuse of discretion" standard.[5] When a fact finder's conclusions are reviewed by a higher court, the process is to determine if there is substantial competent evidence to support the lower court's conclusion, while excluding consideration of contrary evidence. Ferraro proposed the opposite and urged the Court to simply adopt its factual assertions as judicial findings if their references to the record had any support for them, *without any deference* to the fact finder's contrary findings.

The Arbitrator's Findings concluded that "the assignment issue inhered in the affirmative defenses," that Ferraro raised "a defense that RMH failed to accept the executed assignment tendered by CardConnect," and that Ferraro was on notice of the assignment, in part, because of

* * *

DCA 1995)). Nor does the "Florida Arbitration Code specif[y] [] pleading requirements for initiating

5. A chart with excerpts and citations of impermissible fact-findings by the Court in conflict with the Arbitrator's findings is attached as Exhibit A hereto.

arbitration," making "judicially created pleading requirements" inapplicable. *Kintzele*, 658 So. 2d at 132-33. The Order completely sidesteps this binding precedent.

The Arbitrator (who would know) found that the parties agreed that judicial rules did not apply in arbitration. Indeed, the record clearly reflects that agreement. She also found that she did not adopt such rules in a scheduling order. *See* FFCL at 43-44. Thus, in interpreting the scheduling orders to find pleading requirements, the Order not only makes inappropriate factual findings, it misappropriates the Arbitrator's discretion over procedure in the arbitration. *See Productos Roche*, 2020 WL 1821385, at *3 ("Because arbitration proceedings are in no way constrained by formal rules of procedure or evidence, once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, **procedural questions which grow out of that dispute and bear on its final disposition should be left to the arbitrator**."); *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 545 (2d Cir. 2016) ("**It is well settled that procedural questions that arise during arbitration, such as which witnesses to hear and which evidence to receive or exclude, are left to the sound discretion of the arbitrator and should not be second-guessed by the courts**. Arbitrators do not need to comply with strict evidentiary rules, and they possess substantial discretion to admit or exclude evidence."). The Order also impermissibly overlooks the plethora of arbitration decisions confirmed under the FAA and FAC, deferring

to the arbitrator's procedural and evidentiary decisions. *Tallahassee Mem'l*, 655 So. 2d at 1198 (confirming award, despite assertion of arbitrators' purported "unauthorized consideration of new evidence," since it "is clear that the matter complained of by appellants is not the type of action for which judicial review is appropriate").[7]

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7. *See Standard Sec. Life Ins. Co. of N.Y. v. FCE Benefit Adm'rs, Inc.*, 967 F.3d 667 (7th Cir. 2020) (award confirmed; arbitration panel did not violate due process rights by awarding insurers damages for "embezzlement" in their proceeding against administrator, even though insurers never pled claim for embezzlement, where, in relevant part, administrator had notice of and attempted to defend against that assertion); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1129 n.10 (3d Cir. 1972) (award confirmed; recognizing that "one of the primary virtues of [] arbitration is its procedural informality" and thus arbitrator could grant relief not specifically pled in an arbitration demand); *Gottlieb v. Janney Montgomery Scott LLC*, 2007 WL 9701991, at *3 (S.D. Fla. Apr. 23, 2007) (award confirmed; deferring to arbitrators' evidentiary rulings on permitting the introduction of late evidence and improper rebuttal evidence); *Vyas v. Doctor's Assocs., Inc.*, 2018 WL 1440179, at *8 (D. Conn. Mar. 21, 2018) (award confirmed; in light of arbitrators wide latitude to manage evidence presented in the proceedings before them, it was far from clear that it would have been inappropriate for an arbitrator to allow undisclosed witnesses to testify); *Ostrom v. Worldventures Mktg., LLC*, 160 F. Supp. 3d 942, 949-50 (M.D. La. 2016) (award confirmed; arbitrator's decision to allow an undisclosed witness to testify did not deprive party of a fair hearing where the arbitrator held oral arguments on the issue and carefully considered the position of both parties before making his decision); *Halim v. Great Gatsby's Auction Gallery, Inc.*, 2007 WL 541935, at *1, 4 (N.D. Ill. Feb. 15, 2007) (award confirmed; rejecting argument that award should be vacated because the arbitrator allowed party's expert to testify as an undisclosed expert for counter-party because

In this arbitration, the Arbitrator already ruled—in accordance with her exclusive control over procedural questions—that (1) RMH was under no obligation to specifically plead every fact that supported RMH's legal malpractice claim; and (2) Ferraro had sufficient notice of the issue and had ample time to be heard on the issue. The Court committed clear legal error when it purported to determine those procedural questions otherwise.

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that was an evidentiary ruling entitled to deference); *Tokura Constr. Co., Ltd. v. Corporacion Raymond, S.A.*, 533 F. Supp. 1274, 1278 (S.D. Tex. 1982) (award confirmed; flatly rejecting the argument that the arbitrators improperly considered issue of liability for certain items that were not "formally submitted to the arbitrators in [claimant's] statement of claims" because "arbitration proceedings are not held to the same technical rules of pleading and evidence as lawsuits in federal courts" and, in any event, evidence on these contested issues was presented during the arbitration); *Certain Underwriters at Lloyd's London v. Ashland, Inc.*, 967 A.2d 166, 175 (D.C. 2009) ("[P]leading requirements in arbitration proceedings are generally relaxed" with claims being "much more informal than a pleading"; "[t]here are virtually no rules of pleading in arbitration" and "technical pleading rules need not be followed.").

APPENDIX M — EXCERPTS FROM ROYAL MERCHANT HOLDINGS, LLC'S RESPONSE IN OPPOSITION TO FERRARO PETITION TO VACATE AWARD IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT FOR MIAMI-DADE COUNTY, FLORIDA, FILED SEPTEMBER 16, 2021

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

COMPLEX BUSINESS LITIGATION DIV.
CASE NO.: 2021-003987-CA-01

THE FERRARO LAW FIRM, P.A.,
A FLORIDA CORPORATION, AND
JAMES L. FERRARO, AN INDIVIDUAL,

Petitioners/Counter-Respondents,

v.

ROYAL MERCHANT HOLDINGS, LLC,
A FLORIDA LIMITED LIABILITY COMPANY,

Respondent/Counter-Petitioner.

RESPONDENT/COUNTER-PETITIONER ROYAL MERCHANT HOLDINGS, LLC'S RESPONSE IN OPPOSITION TO PETITIONERS/ COUNTER-RESPONDENTS THE FERRARO LAW FIRM, P.A.'S PETITION TO VACATE AWARD

* * *

confirming awards, the party moving to vacate must sustain a very "heavy burden." *Interactive Brokers LLC v. Saroop*, 969 F.3d 438, 443 (4th Cir. 2020).[7]

b. A Fundamentally Fair Hearing Merely Requires Notice, an Opportunity to Be Heard, and an Impartial Decision

Ferraro seeks to vacate the Award based upon alleged misconduct. Pet. at 31 (citing 9 U.S.C. § 10(a)(3) and Fla. Stat. § 682.13(1)(b)(3)). However, arbitral misconduct in support of vacatur must be so severe that it amounts to a denial of a fundamentally fair arbitration proceeding. *E.g.*, *Talel Corp. v. Shimonovitch*, 84 So. 3d 1192, 1194 (Fla.

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7. *Wiand v. Schneiderman*, 778 F.3d 917, 925 (11th Cir. 2015) (explaining "the heavy burden of demonstrating that vacatur is appropriate"); *Youngs v. Am. Nutrition, Inc.*, 537 F.3d 1135, 1142 (10th Cir. 2008) (recognizing that arbitration awards are "[g]iven the presumption of validity" and the party seeking to vacate an award bears a "heavy burden of proof"); *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007) ("In order for a reviewing court to vacate an arbitration award, the moving party must sustain the heavy burden of showing one of the grounds specified in the Federal Arbitration Act or one of certain limited common law grounds."); *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) ("A party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high."); *RDC Golf of Fla. I, Inc. v. Apostolicas*, 925 So. 2d 1082, 1094 n.4 (Fla. 5th DCA 2006) ("The burden of proof with regard to claims of . . . arbitrator misconduct or misbehavior prejudicing the rights of a party rests with the party raising such allegations" and "[t]hat burden is substantial. . . .").

4th DCA 2012); *Rainier DSC 1, L.L.C. v. Rainier Capital Mgmt., L.P.*, 828 F.3d 362, 364-66 (5th Cir. 2016) (applying FAA standard and finding arbitrator "did not deprive the [petitioners] of a fair hearing" where they "failed to identify any evidence that they would have been able to elicit from further examination" from two witnesses to whom the arbitrator refused to issue subpoenas); *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007) (applying FAA standard to uphold award where arbitrators refused request to introduce testimony); *El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co.*, 247 F.3d 843, 847 (8th Cir. 2001) (applying FAA standard to uphold award where arbitrator denied petitioners' motion for continuance without giving "specific reasons for the denial"); *Sobol v. Kidder, Peabody & Co., Inc.*, 49 F. Supp. 2d 208, 223 (S.D.N.Y. 1999) (applying FAA standard and finding no arbitral misconduct where arbitrator imposed a "limited scope of pre-hearing discovery").

Here, Ferraro was provided a fundamentally fair opportunity to know what the case was about and present and oppose evidence and argument on the merits of the claim; yet, it is still unable to show how any other result was possible as its malpractice is virtually indisputable. Indeed, as a matter of law, Ferraro is entitled to far less than what it received in arbitration, because a fundamentally fair hearing in a private arbitration (such as the one Ferraro demanded[8]) does *not* mandate the

8. RMH initially requested to try the matter in court, but Ferraro demanded that the matter be arbitrated pursuant to the parties' Retainer Agreement, whereby Ferraro knowingly

full due process protections of a judicial proceeding. *See Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) ("[I]t is axiomatic that constitutional due process protections *do not* extend to *private* conduct abridging individual rights.") (citing *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)). Rather, a fundamentally fair hearing in arbitration merely requires that it "meets the minimal requirements of fairness—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator." *Sunshine Mining Co. v. United Steelworkers of Am., AFL-CIO, CLC*, 823 F. 2d 1289, 1295 (9th Cir. 1987).[9] All of which, of course, Ferraro received.

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dispensed with all of the procedural and evidentiary protections that it now, ironically, complains it wants. A. 3688.

9. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298-99 (5th Cir. 2004) (same); *Slaney v. The Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001) (same); *Louisiana D. Brown 1992 Irrevocable Tr. v. Peabody Coal Co.*, 205 F.3d 1340 (6th Cir. 2000) ("Fundamental fairness requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators."); *Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1013 (10th Cir. 1994) ("[A] fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that the decisionmakers are not infected with bias."); *Talel*, 84 So. 3d at 1194 (recognizing that a fundamentally fair hearing for an arbitration requires "notice and an opportunity to be heard") (quoting *Cassara v. Wofford*, 55 So. 2d 102, 106 (Fla. 1951)).

c. Civil Rules of Procedure or Rules of Evidence Do Not Apply in Arbitrations

Ferraro's hyper-technical pleading argument would not work in federal or state court. It certainly does not work in an arbitration proceeding. Arbitrations are "an alternative to the court system," *Miele*, 656 So. 2d at 473, and they are intended to be informal "streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Therefore, a "fundamentally fair hearing" in an arbitration means that the parties are necessarily *not* provided "the same procedures they would find in the judicial arena." *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997); *Productos Roche S.A. v. Iutum Servs. Corp.*, 2020 WL 1821385, at *3 (S.D. Fla. Apr. 10, 2020) ("[T]he right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure.").[10]

"An arbitrator enjoys wide latitude in conducting an arbitration hearing." *Generica Ltd.*, 125 F.3d at 1130. "The arbitrators' authority over proceedings is so expansive

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10. *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 313 (7th Cir. 1981) ("Arbitrations are not governed by the rules of evidence"); *Karaha*, 364 F.3d at 299; *Rosensweig*, 494 F.3d at 1333; *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 957 F.3d 487, 499 (5th Cir. 2020) (recognizing that "the more fulsome procedures of the Federal Rules of Civil Procedure" are not required to satisfy procedural due process in an arbitration proceeding); *Kintzele*, 658 So. 2d at 133 ("Arbitrators are not constrained by formal rules of . . . procedure") (quoting *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Kinsey*, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995)).

that parties may not infringe upon the arbitrators' control over procedure; parties may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations." *First Pres. Capital, Inc. v. Smith Barney, Harris Upham & Co., Inc.*, 939 F. Supp. 1559, 1565 (S.D. Fla. 1996). Thus, courts must defer to procedural issues ruled upon by an arbitrator. *First Pres. Capital*, 939 F. Supp. at 1563 ("Deference given to arbitrators' decisions accompanies not only a review of the final order itself, but also arbitrators' decisions to control the order, procedure and presentation of evidence."). "Because arbitration proceedings are in no way constrained by formal rules of procedure or evidence, once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions which grow out of that dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 1565 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).

With respect to pleadings, neither the FAA nor the FAC contain pleading rules or demand that parties proceed under pleading rules adopted by Florida or federal courts. "[P]leading requirements in arbitration proceedings are generally relaxed" with claims being "much more informal than a pleading"; "[t]here are virtually no rules of pleading in arbitration" and "technical pleading rules need not be followed." *Certain Underwriters at Lloyd's London v. Ashland, Inc.*, 967 A.2d 166, 175 (D.C. 2009); *see Tokura Constr. Co., Ltd. v. Corporacion Raymond, S.A.*, 533 F. Supp. 1274, 1278 (S.D. Tex. 1982) ("arbitration proceedings are not held to the same technical rules of pleading and evidence as

lawsuits in federal courts"); *Kintzele*, 658 So. 2d at 132-33 (acknowledging that "Florida Arbitration Code specifies no pleading requirements for initiating arbitration" and, therefore, "judicially created pleading requirements" are inapplicable); *see also Standard Sec. Life Ins. Co. of N.Y. v. FCE Benefit Adm'rs, Inc.*, 967 F.3d 667 (7th Cir. 2020) (holding that arbitration panel did not violate health insurance policies' administrator's due process rights by awarding insurers damages for "embezzlement" in their proceeding against administrator, even though insurers never pled claim for embezzlement, where panel's award was for excessive and unearned administrative fee that administrator had retained, and administrator had notice of and attempted to defend against that assertion); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1129 n.10 (3d Cir. 1972) (recognizing that "one of the primary virtues of [] arbitration is its procedural informality" and thus arbitrator could grant relief not specifically pled in an arbitration demand).

* * *

i. Arbitrator Perry did not impose any pleading rules on the parties.

Any notion that RMH should have moved to amend its pleading is nonsensical because no pleading rule in the arbitration required as much, and RMH otherwise did not need to plead its claim in any particular manner. On the contrary, the parties expressly agreed at the outset of this Arbitration to not apply the federal or state procedural

rules wholesale.[12] As explained, *supra*, neither the FAA nor the FAC contain pleading requirements.[13]

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12. Instead, the Arbitrator's October 18, 2017 Order (which embodied the parties' agreement) states that only Federal Rules of Civil Procedure 26 and 56 would apply—and only in the two limited areas of summary judgment motions and expert witness discovery. Rather, other formal procedural rules would only apply where a party first raised the issue in advance with the Arbitrator and sought a determination from the Arbitrator—which Ferraro never bothered to do here in respect of the parties' pleading obligations. A. 357-359 ("The parties have agreed that Fed. R. Civ. P. 56(a) shall govern the standard for summary judgment motions and Fed. R. Civ. P. 26(b)(4)(B) and (C) shall govern the discovery of experts' work product and communications with counsel. The parties will address what methodology the arbitrator should use in determining what law to apply to other procedural issues as and if they arise."). In fact, when RMH attempted to reference formal rules of procedure on other issues, Ferraro's counsel objected and informed the Arbitrator that "[RMH] ignores that [Federal Rule of Civil Procedure] Rule 43(a) is applicable only in court proceedings and that we are in a private arbitration." A. 3507.

13. Even if it did (it did not), RMH did not need to plead its legal malpractice claim against Ferraro with any particularity. Under Ohio law (the governing substantive law in the arbitration), unlike a claim for fraud, a plaintiff may generally plead claims for legal malpractice. *See DiPaolo v. DeVictor*, 555 N.E. 2d 969, 975-76 (Ohio Ct. App. 1988) (acknowledging that complaint was "one in malpractice, but not fraud" since fraud requires greater "particularity" to allege); *Bates v. Meranda*, 2016 WL 4728074, at *3-4 (Ohio Ct. App. Sept. 2, 2016) (noting that plaintiff failed to properly plead his fraud claim, unlike his legal malpractice claim, because it "fail[ed] to meet the requirements of Civ. R. 9(B) as plaintiff has not pleaded the circumstances constituting fraud with particularity in the complaint").

The decision in *Tokura* is instructive here. There, a general contractor and subcontractor were involved in an arbitration governed by the FAA regarding a dispute over claimed payments due to the subcontractor and the general contractor's claims of a subcontractor's defective performance. *Tokura*, 533 F. Supp. at 1275. After hearing evidence over three sessions, the arbitrators rendered an award in favor of the subcontractor. *Id.* at 1275-76. The subcontractor subsequently moved to confirm the award, and the general contractor lodged several objections, including that two items covered in the arbitration award were not formally submitted to the arbitrators and therefore the subcontractor was not entitled to recover those amounts. *Id.* In material part, the district court confirmed the arbitration award, flatly rejecting the argument that the arbitrators improperly considered issue of liability for certain items that were not "formally submitted to the arbitrators in [claimant's] statement of claims" because "arbitration proceedings are not held to the same technical rules of pleading and evidence as lawsuits in federal courts" and, in any event, evidence on these contested issues was presented during the arbitration. *Id.* at 1278.

Like the general contractor in *Tokura*, Ferraro had notice and an opportunity to be heard—and, in fact, was heard—on the very assignment issue it claims were "unpled."

ii. Ferraro, itself, raised the assignment issue in the initial case pleadings

Ferraro was on notice of its own misconduct, including its failure to competently advise RMH on the CardConnect assignment, as it raised the issue itself. As correctly recognized by Arbitrator Perry, the assignment issue initially arose in Ferraro's own affirmative defenses, "which include allegations that RMH's pre-suit conduct confirmed its 'recognition' that it did not have any third-party beneficiary rights, because 'RMH sought to cause CardConnect to assign its rights under the agreement to RMH, a request CardConnect declined a few months before the suit was filed.'" A.3593. To be sure, because "the assignment issue inhered in the affirmative defenses," the "circumstances surrounding RMH's 'decision' to reject the assignment" was within the "scope of discovery" and thus were "circumstances that appear to be well known to the parties." A. 3594. Since Ferraro first raised the assignment in its own pleadings in February 2017, Ferraro had more than sufficient notice and opportunity to heard on it. A. 135-147; 332-346. Moreover, Ferraro again raised the assignment in its pre-hearing brief

* * *

in December 2018, Ferraro mentioned the assignment in its opening statements, Tr. 211, cross- examined witness at length on the assignment and informed consent issues, *see* Tr. 339-340, 842-842, 975-79, 987-990, 992-994, and did not object to questions regarding informed consent and the assignment at the time of questioning of several

witnesses, including RMH's malpractice expert, Stephen Chappelear, *see* Tr. 411-412, 738-39, 800-801, 806-807, 809. Thus, even if there was a basis to object (there was not), Ferraro's untimely objections regarding purported issues relating to the assignment constitute a waiver.

Third, as the record reveals, Arbitrator Perry asked Ferraro to address the assignment substantively and Ferraro never objected that it required additional discovery or other relief before it addressed the issue in its post-hearing briefing. Tr. 4444-4445, 4459-4460; A. 3285-3292. In the face of all the assignment evidence being admitted into evidence, Ferraro decided inaction was the best course of action and waived any right to assert misconduct. *See Karaha*, 364 F.3d at 298 (affirming district court for confirming arbitration award where the party seeking vacatur had an opportunity but made no request for additional discovery and recognizing that it is not uncommon in arbitration "to ask for additional discovery or information *after* a hearing, to request *additional* sessions of a hearing to submit more evidence, or to file *posthearing* submissions"); *Matter of Arbitration between Carina Int'l Shipping Corp. & Adam Mar. Corp.*, 961 F. Supp. 559, 567 (S.D.N.Y. 1997) (refusing to vacate award under FAA for hearing in which arbitration panel had considered what petitioner argued was new claim after close of hearing because petitioner had failed to request additional discovery or reopening of hearing—by its "own tactical choice" [the party seeking vacatur] "waived the right to argue that the awarding panel committed misconduct under 9 U.S.C. § 10(a)(3) by not re-opening the evidentiary hearings" or asking the arbitrators to

"permit it discovery"); *Sungard Energy Sys. Inc. v. Gas Transmission Nw. Corp.*, 551 F. Supp. 2d 608, 616 (S.D. Tex. 2008) ("[E]ven if GTN surprised SunGuard at the arbitration hearing with evidence concerning GTN's cost of cover, SunGard has failed to establish that is was denied a fair hearing since the panel provided SunGard with ample opportunity to evaluate GTN's evidence and argue against it" where SunGard cross-examined GTN's witnesses concerning its costs of cover, both sides presented their evidence, the parties had more than thirty days to file extensive post-hearing briefs, both sides submitted briefs exceeding sixty pages, both parties marshaled the relevant evidence in support of their positions, and the parties then appeared before the arbitration panel again a month later for closing arguments); *Capgemini U.S. LLC v. Sorensen*, 2005 WL 1560482, at *7 (S.D.N.Y. July 1, 2005) (holding that vacatur based on arbitral misconduct was not warranted because party seeking vacatur "had adequate notice that monetary damages were sought and an opportunity be heard ***before the close of the hearing***, it cannot now argue that its failure to take advantage of those opportunities requires that this Court vacate the Award pursuant to § 10(a)(3);" had "made the ***tactical decision*** to limit its post-hearing submissions to the argument that [confirming party's] request for monetary damages was untimely and not supported by the evidence" and chose not to make alternative arguments; and "***failed to take advantage of a potential opportunity to be heard when it failed to request that the hearing be re-opened***"); *see also* Argument, II(b), *infra* (collecting cases).

As Arbitrator Perry concluded, Ferraro had "sufficient time to seek whatever relief it deemed necessary to remedy any prejudice it may have perceived stemming from that claim." A. 3596.[19] Ferraro's failure to seek time and leave precludes them from claiming prejudice now.

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19. *Batista v. Walter & Bernstein, P.A.*, 378 So. 2d 1321, 1323 (Fla. 3d DCA 1980) (failing to move for a continuance due to surprise from change in opponent's theory precludes a claim of prejudice); *U.S. v. Diaz-Villafane*, 874 F.2d 43, 47 (1st Cir. 1989) (finding that assertion that party was "unfairly surprised is severely undermined, if not entirely undone, by his neglect to ask the district court for a continuance to meet the claimed exigency"); *Marino v. Otis Eng'g Corp.*, 839 F.2d 1404, 1411-12 (10th Cir. 1988) (assuming there was surprise and prejudice as to new testimony presented at trial, party's failure to "move for a continuance or take other steps to cure the alleged prejudice" constituted a "waiver of surprise"); *see also White v. Ring Power Corp.*, 261 So. 3d 689, 700 (Fla. 3d DCA 2018) (finding no prejudice where party did not "request a continuance of the trial to cure any prejudice he now claims to have suffered" as a result of new opinions offered by expert witness); *London v. Dubrovin*, 165 So. 3d 30, 32 (Fla. 3d DCA 2015) ("The appropriate cure for a violation that results in surprise during the trial is a continuance, and a failure to request one precludes a later claim of prejudice."). Ferraro fails to materially distinguish these cases since none of them involved a trial period that lasted for almost two years. Even though Florida procedural and substantive law did not apply in the arbitration, Arbitrator Perry relied on these cases by analogy since Ferraro did not nothing to rectify any purported prejudice. It merely sat on its hands.

b. Ferraro also had almost a year of extensive post-final hearing motion practice where it failed to seek any relief

While Ferraro claims that it was "procedurally barred from seeking any recourse" (Pet. at 37), arbitrators routinely consider post-final hearing evidentiary submissions. *See Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Ry. Co.*, 312 F.3d 943, 947 (8th Cir. 2002) (party had no basis to argue that a "surprise post-hearing ruling deprived [the party] of an opportunity to present other evidence" since that party could have urged the arbitrators "to receive and consider other evidence"); *Dolan v. ARC Mech. Corp.*, No. 11 Civ. 09691(PAC), 2012 WL 4928908, at *3 (S.D.N.Y. Oct. 17, 2012) (arbitration process was not fundamentally unfair where party received proper notice of hearing and that party was not prevented from presenting witnesses, cross-examined the opposing party's witnesses, and asked for and submitted post-hearing evidence); *Ashraf v. Republic New York Sec., Corp.*, 14 F. Supp. 2d 461, 466–67 (S.D.N.Y. 1998) (confirming award and finding use of post-hearing submissions did not constitute fundamental unfairness).[20] "[A]rbitrators do not act as junior varsity trial courts," *Cat Charter, LLC*, 646 F.3d at 842, and there was no such procedural bar.

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20. *See also Sunshine Mining Co*, 823 F. 2d at 1295 (fundamentally fair arbitration where "both parties had an adequate opportunity to present evidence and argue the question at the hearing and in the post-hearing briefs").

Here, Ferraro engaged in almost a year of post-final hearing motion practice, where it had an additional opportunity, but failed, to rectify any purported prejudice on the issue after Arbitrator Perry issued her rulings in the 2020 Order.

c. Ferraro's distinction that it believed the assignment issue was an avoidance and not an affirmative claim is meritless

Ferraro repeatedly argues that it was prejudiced by the consideration of the assignment issue because it was under the impression that evidence relating to the assignment issue was "for the limited purpose of establishing an avoidance to the Ferraro Parties' affirmative defense." Pet. at 40. Ferraro's assertions are unavailing for several reasons.

First, it is predicated on the faulty assumption that technical pleading and evidence rules and case law concerning judicial proceedings governed the arbitration—they do not. *See* Argument, I(c), *supra*. *Second*, RMH or Arbitrator Perry made no ruling that assignment evidence would be limited to only supporting an avoidance as opposed to an affirmative claim. RMH repeatedly asserted that it was entitled to damages based on Ferraro's malpractice with respect to the assignment. *See* Tr. 1386-88; 2143-53, 2832-2833, 4448. Notably, in its complaint, RMH asked for the full amount of damages—$4 million—which could *only* be sought if it proved that Ferraro had committed malpractice in respect of the assignment (so that RMH would have a

right to 100% of the liquidated damages rather than the 75% RMH had without such assignment). A. 11. Ferraro even acknowledged at the final hearing that RMH was seeking affirmative relief on the assignment issue. Tr. at 2154, 2321. And, Arbitrator Perry never intimated or ruled that the assignment evidence would *only* be considered for purposes of an avoidance. *See* Tr. 1386-1388. In fact, Arbitrator Perry had overruled Ferraro's objection on the informed consent issue:

* * * *

APPENDIX N — EXCERPTS FROM CLAIMANT'S RESPONSE IN OPPOSITION TO RESPONDENTS' POST-HEARING BRIEF, FILED AUGUST 28, 2020

In the Matter of the Arbitration Between

ROYAL MERCHANT HOLDINGS, LLC,

Claimant,

and

JAMES L. FERRARO AND
THE FERRARO LAW FIRM, P.A.

Respondents.

Filed August 28, 2020

CLAIMANT'S RESPONSE IN OPPOSITION TO RESPONDENTS' POST-HEARING BRIEF

Claimant Royal Merchant Holdings, LLC ("RMH") hereby submits its Response in Opposition to Respondents James L. Ferraro's and The Ferraro Law Firm, P.A.'s Post-Hearing Brief ("Brief" or "Resp. Br.").[1]

* * *

1. Capitalized terms and abbreviations not defined herein have the meanings ascribed to them in RMH's Post-Final Hearing Brief. RMH's Post-Final Hearing Brief is cited as "RMH Br."

b. Ferraro's Negligent Advice in Connection with the Proffered CC Assignment and Oregon Litigation, Failure to Timely Intervene in the Oregon Lawsuit, Failure to Timely Conduct Discovery on Traeger, and Failure to Issue an Arbitration Demand on CC Were Properly Tried in Arbitration

i. Only the Federal Arbitration Act and Florida Arbitration Code govern the parties' pleading requirements.

The Federal Arbitration Act ("FAA") and Revised Florida Arbitration Code ("FAC") govern these proceedings—not Florida procedural law, as Ferraro asserts, or any other procedural law.[102]

The order entered in this arbitration regarding the form of pleadings did not dictate that any formal rules on pleading were to be part of this proceeding. On the contrary, the parties expressly agreed at the outset of this Arbitration to *not* apply the federal or state procedural rules wholesale. Instead, the Arbitrator's October 18, 2017 Order (which embodied the parties' agreement) states that the Federal Rules of Civil Procedure would apply to two limited areas (summary judgment motions and expert

102. In any arbitration involving interstate commerce, both the FAC and the FAA are in effect; but when they conflict, the FAA controls. *E.g.*, *Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc.*, 154 So. 3d 1115, 1124 (Fla. 2014); *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 463-64 (Fla. 2011); *UBS Fin. Servs., Inc. v. Walzer*, 2019 WL 7283220, at *2 (S.D. Fla. Dec. 27, 2019).

witness discovery) and that other formal procedural rules would *only* apply where a party first raised the issue in advance with the Arbitrator and sought a determination from the Arbitrator—which Ferraro never bothered to do here in respect of the parties' pleading obligations.[103] In fact, when RMH attempted to reference formal rules of procedure on other issues, Ferraro's counsel objected and informed the Arbitrator that "[RMH] ignores that [Federal Rule of Civil Procedure] Rule 43(a) is applicable only in court proceedings and that we are in a private arbitration."[104]

Neither the FAA nor the FAC contain pleading rules or demand that parties proceed under pleading rules adopted by Florida or federal courts.[105] Indeed, that would run contrary to the informality of arbitration proceedings. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (recognizing that arbitrations under the FAA are

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103. Order on October 18, 2017 Telephone Status Conference at ¶ 3 ("The parties have agreed that Fed. R. Civ. P. 56(a) shall govern the standard for summary judgment motions and Fed. R. Civ. P. 26(b)(4)(B) and (C) shall govern the discovery of experts' work product and communications with counsel. The parties will address what methodology the arbitrator should use in determining what law to apply to other procedural issues as and if they arise."), a copy of which RMH appends hereto as **Exhibit A**.

104. *See* Email from Feb. 6, 2018 A. Hall to P. Perry Re: Authority for Out of State Arbitration Testimony Via Video Conference, a copy of which RMH appends hereto as **Exhibit B**.

105. The FAC merely dictates that in order to initiate an arbitration claim a party "must describe the nature of the controversy and the remedy sought." Fla. Stat. § 682.031(1).

"informal, streamlined proceedings"). Formal rules of procedure are inapplicable to arbitrations.[106]

Even so, RMH plead its malpractice claim in compliance with the general pleading requirements of Ohio law.[107]

ii. RMH did not need to plead an avoidance to Ferraro's affirmative defenses.

Even if the Federal Rules of Civil Procedure applied (given that those were the only set of procedural rules ever referenced by the parties, albeit only for limited purposes), RMH did not need to plead an avoidance.

Ferraro injected the issues they contend are unpled into this arbitration by affirmatively alleging that (1) RMH's non-participation in the Oregon litigation left RMH's case DOA because "Traeger and CardConnect settled [in Oregon] and terminated the Agreement because RMH had not materially changed its position . . . [or] brought suit on the agreement prior to its termination;" and (2) RMH is not a third party beneficiary, as RMH sought but failed to "cause CardConnect to assign its rights under the Agreement to RMH."[108] While under Florida Rules of Civil Procedure

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106. RMH Br. at 117-118.

107. RMH Br. at 118-120.

108. Ferraro's Amended Answer at Third Aff. Defense, pg. 10-11.

APPENDIX O — EXCERPTS FROM CLAIMANT'S POST-FINAL HEARING BRIEF, FILED JULY 24, 2020

In the Matter of the Arbitration Between

ROYAL MERCHANT HOLDINGS, LLC,

Claimant,

and

JAMES L. FERRARO AND
THE FERRARO LAW FIRM, P.A.,

Respondents.

File July 24, 2020

CLAIMANT'S POST-FINAL HEARING BRIEF

Claimant Royal Merchant Holdings, LLC ("RMH") hereby submits its Post-Final Hearing Brief for the twenty-day final hearing held on December 3-6, 2018; January 20-27, 2020; February 11, 2020; and May 11-15, 19-21, 27, 2020 between RMH versus James L. Ferraro and The Ferraro Law Firm, P.A.

* * *

Ct. App. 2013) ("[T]he clean hands doctrine is a defense against claims in equity . . . [and] does not apply where a party is not attempting to invoke the equitable powers of the court."). Second, the record evidence demonstrated that RMH acted in good faith, providing all the information

Ferraro requested and following their instructions to its detriment. *See* Statement of Facts at § III and Argument at §§ IV-V, *supra*. Indeed, the record evidence showed that Ferraro—not RMH—acted reprehensibly in representing RMH. *See* Argument at § VIII, *supra*.

X. THE ARBITRATOR SHOULD CONSIDER FERRARO'S FAILURE TO ADEQUATELY ADVISE RMH REGARDING THE CC ASSIGNMENT, FAILURE TO TIMELY INTERVENE IN THE OREGON LAWSUIT, FAILURE TO CONDUCT TIMELY DISCOVERY ON TRAEGER, AND FAILURE TO FILE AN ARBITRATION DEMAND ON CC

Ferraro argues that the Arbitrator should not consider *all* of the evidence of Ferraro's gross incompetence in representing RMH because some of the underlying facts were not specifically pled in the Arbitration Complaint or in a reply to Ferraro's Affirmative Defenses. Ferraro ignores the informality of arbitration proceedings (that they themselves demanded that the parties undergo in their Retainer Agreement), as well as the parameters of the pertinent rules of civil procedure in Ohio and federal court.

a. RMH Was Not Obligated to Plead Its Claim in Any Particular Manner in this Arbitration Proceeding

This arbitration proceeds under the Federal Arbitration Act and Florida's Revised Arbitration Code.

None of these statutes contain pleading requirements and procedures. In addition, the Retainer Agreement's arbitration provision that Ferraro themselves drafted, does not delineate the procedural rules for an arbitration proceeding, which by its very nature is an expedited proceeding that does not contain all of the formalities and procedural limitations of court proceedings. *See Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328 (11th Cir. 2007) ("[a]rbitrators enjoy wide latitude in conducting an arbitration hearing and they are not constrained by formal rules of procedure or evidence"). Indeed, "pleading requirements in arbitration proceedings are generally relaxed" with claims being "much more informal than a pleading"; "[t]here are virtually no rules of pleading in arbitration" and "technical pleading rules need not be followed." *Certain Underwriters at Lloyd's London v. Ashland, Inc.*, 967 A.2d 166, 175 (D.C. 2009); *see Tokura Constr. Co., Ltd. v. Corporacion Raymond, S.A.*, 533 F. Supp. 1274, 1278 (S.D. Tex. 1982) (affirming arbitration award and rejecting argument that arbitrators improperly considered issue of liability for certain items that were not "formally submitted to the arbitrators in [claimant's] statement of claims" because "arbitration proceedings are not held to the same technical rules of pleading and evidence as lawsuits in federal courts" and, in any event, evidence on these issues was presented during arbitration); *Kintzele v. J.B. & Sons, Inc.*, 658 So. 2d 130, 132-33 (Fla. 1st DCA 1995) (acknowledging that "Florida Arbitration Code specifies no pleading requirements for initiating arbitration" and, therefore, "judicially created pleading requirements" are inapplicable). Given the informality of arbitration, it is not surprising that the AAA

Commercial Arbitration Rules ("AAA R.") simply require an arbitration demand contain "a statement setting forth the nature of the claim including the relief sought and the amount involved," the names, addresses, and contact information of the parties and their representatives, and the locale if not included in the arbitration agreement. AAA R. 4(e)(i). In this arbitration proceeding, RMH was under no obligation to specifically plead every fact that supported RMH's legal malpractice claim and avoided Ferraro's affirmative defenses.

b. RMH, as a Malpractice Plaintiff, Can Generally Plead Its Claim against Ferraro under Ohio Law

RMH did not need to plead its legal malpractice claim against Ferraro with any particularity. Ohio Rule of Civil Procedure 9(B) identifies the types of claims a plaintiff must plead with particularity. It reads: "In all averments of fraud or mistake, the circumstances

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