No. _____

In the Supreme Court of the United States

SCOTT A. SELDIN, INDIVIDUALLY AND AS TRUSTEE OF THE SELDIN 2002 IRREVOCABLE TRUST, DATED DECEMBER 31, 2002, ET AL.,

Petitioners,

V.

ESTATE OF STANLEY C. SILVERMAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Arbitration Act ("FAA") provides a mechanism for courts to enforce arbitration awards. The FAA also specifies grounds on which courts may vacate or modify those awards. The questions presented are:

1. Whether the FAA categorically forecloses courts from vacating an arbitration award on the ground that the award is contrary to public policy.

2. Whether the FAA's protection against an arbitrator's "evident partiality" (9 U.S.C. § 10(a)(2)) is triggered when there is a reasonable impression of partiality, or instead by a more heightened standard such as a showing of actual bias.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Scott A. Seldin, individually and as trustee of the Seldin 2002 Irrevocable Trust, dated December 13, 2002, was an appellant, cross-appellant, and cross-appellee in the Nebraska Supreme Court. Petitioners Millard R. Seldin, individually and as trustee of the Millard R. Seldin Revocable Trust, dated October 9, 1993 ("Millard R. Seldin Revocable Trust"); Seldin Real Estate, Inc., an Arizona corporation; Kent Circle Investments, LLC, an Arizona limited liability company; and Belmont Investments, LLC, an Arizona limited liability company, were appellants and cross-appellees in the Nebraska Supreme Court.*

Respondents Estate of Stanley C. Silverman; Theodore M. Seldin, individually and as trustee of the Theodore M. Seldin Revocable Trust, dated May 28, 2008; Howard Scott Silverman, as trustee of the Amended and Restated Stanley C. Silverman Revocable Trust, dated August 26, 2006; Silverman Holdings, LLC, a Nebraska limited liability company; SCS Family, LLC, a Nebraska limited liability company; TMS & SNS Family, LLC, a Nebraska limited liability company; Sarah N. Seldin and Irving

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* Millard Seldin passed away on January 24, 2020, while this case was pending before the Nebraska Supreme Court. As explained in the letter to the Clerk filed concurrently with this petition, petitioner Scott Seldin has been appointed as the personal representative of Millard's estate and is also the new trustee of the Millard R. Seldin Revocable Trust. Petitioners will move to substitute Scott Seldin in place of Millard Seldin if certiorari is granted. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 537 U.S. 1042 (2002) (granting respondents' motion to substitute a party in place of party who passed away before the grant of certiorari).

B. Epstein, as trustees of the Theodore M. Seldin and Sarah N. Seldin Children's Trust, dated January 1, 1995; Uri Ratner, as trustee of the Stanley C. Silverman and Norma R. Silverman Irrevocable Trust Agreement (2008), dated April 10, 2008; John W. Hancock, Irving B. Epstein, and Randall R. Lenhoff, as trustees of the Theodore M. Seldin and Sarah N. Seldin Irrevocable Trust Agreement (2008), dated May 12, 2008; and Seldin Company were appellees and cross-appellants in the Nebraska Supreme Court.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Seldin Real Estate, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

Seldin v. Estate of Silverman, No. S-19-310, Supreme Court of Nebraska, judgment entered March 6, 2020 (939 N.W.2d 768), rehearing denied August 4, 2020.

Seldin v. Seldin, No. S-19-311, Supreme Court of Nebraska, judgment entered March 6, 2020 (939 N.W.2d 768), rehearing denied August 4, 2020.

Seldin v. Estate of Silverman, No. A-19-310, Court of Appeals of Nebraska, petition to bypass court of appeals review sustained October 3, 2019.

Seldin v. Seldin, No. A-19-311, Court of Appeals of Nebraska, petition to bypass court of appeals review sustained October 3, 2019.

Seldin v. Seldin, No. CI 17-4272, District Court of Douglas County, Nebraska, judgment dated May 3, 2018, motion to alter or amend the judgment denied February 28, 2019.

Seldin v. Estate of Silverman, No. CI 17-6276, District Court of Douglas County, Nebraska, judgment entered May 3, 2018, motion to alter or amend the judgment denied February 28, 2019.

Seldin v. Seldin, No. CI 17-7509, District Court of Douglas County, Nebraska, judgment entered May 3, 2018.

Seldin v. Seldin, No. CI 16-8394, District Court of Douglas County, Nebraska, judgment entered May 3, 2018.

Seldin v. Seldin, No. CI 17-506, District Court of Douglas County, Nebraska, judgment entered May 3, 2018.

Seldin v. Seldin, No. CI 17-651, District Court of Douglas County, Nebraska, judgment entered May 3, 2018.

Seldin v. Seldin, No. CI 17-3637, District Court of Douglas County, Nebraska, judgment entered May 3, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully ask this Court for a writ of certiorari to review the judgment of the Nebraska Supreme Court in this case.

OPINIONS BELOW

The decision of the Nebraska Supreme Court (App. 1a-42a) is reported at 939 N.W.2d 768. The district court decisions confirming the arbitration award (App. 43a-79a) and denying petitioners' motion to alter the judgment (App. 80a-99a) are not published.

JURISDICTION

On March 6, 2020, the Nebraska Supreme Court affirmed the final judgment of the district court (App. 42a). On August 4, 2020, the Nebraska Supreme Court summarily denied petitioners' timely motion for rehearing (App. 100a). On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days from, *inter alia*, the order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in the appendix to this petition. App. 102a-04a.

INTRODUCTION

This case directly implicates two acknowledged conflicts of authority about the grounds on which courts may refuse to enforce arbitration awards under the Federal Arbitration Act ("FAA").

First, for nearly forty years, this Court has recognized that courts may refuse to enforce arbitration awards that contravene an "explicit," "well defined," and "dominant" public policy. *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983); *see also United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987); *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62 (2000). Nonetheless, some lower courts have read this Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, as eliminating, *sub silentio,* that longstanding public-policy exception, because *Hall Street* stated that the grounds for vacatur and modification of an award set forth in the FAA are "exclusive." 552 U.S. 576, 578 (2008). *Hall Street* has given rise to a 5–4 split among federal and state courts, with the majority holding that the common-law public-policy exception survives. In the case below, the Nebraska Supreme Court sided with the minority, holding that *Hall Street* categorically foreclosed it from even *considering* petitioners' argument that the arbitrator's award in this case runs afoul of Nebraska public policy. This Court should grant review to clarify the continuing vitality of this limited—but necessary—ground for vacatur of arbitration awards.

Second, the decision below further entrenched an even more longstanding divide regarding one of the

FAA's enumerated grounds for vacatur: the provision allowing courts to set aside an award when the arbitrator has shown "evident partiality." 9 U.S.C. § 10(a)(2). This Court emphasized the importance of that protection over fifty years ago, explaining that courts "should, if anything, be even *more* scrupulous to safeguard the impartiality of arbitrators than judges." *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 148-49 (1968) (emphasis added). Accordingly, *Commonwealth Coatings* interpreted the FAA to require vacatur where the arbitrator failed to disclose a personal interest "that might create an impression of possible bias"—a standard directly aligned with what is expected of judges. *Id.* at 148-49. But because of confusion over a concurring opinion in that case, federal and state courts have divided 7–4 on whether the *Commonwealth Coatings* majority's standard is the one they should follow. The Nebraska Supreme Court has adopted the more stringent standard, under which an award can be vacated only if an observer "*would have to conclude"* that the arbitrator was actually biased in favor of one party. App. 21a (emphasis added).

Both questions presented have generated widespread confusion in the lower courts and unnecessary litigation over the scope of judicial review under the FAA. And both questions have only increased in importance as arbitration has become more prevalent. As one federal court of appeals rightly observed, "[w]e have become an arbitration nation." *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors, LLC*, 913 F.3d 1162, 1169 (9th Cir. 2019). But arbitration's rise as a primary forum for dispute resolution makes it all the more crucial to

preserve the essential fail-safes of the system. This case presents an ideal opportunity for the Court to issue essential guidance for courts applying the FAA nationwide. The Court should grant certiorari.

STATEMENT OF THE CASE

A. Statutory Background

The Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), establishes a federal policy in favor of enforcing arbitration agreements involving interstate commerce. *See id* § 2. The FAA also provides a framework for judicial enforcement of resulting awards. Section 9 of the FAA enables parties to bring a court action for an order "confirming" the award. *Id.* § 9. Sections 10 and 11, in turn, provide enumerated grounds on which a court may decline to enforce an award in full or in part. *Id.* §§ 10-11.

In recent years, courts have wrestled with whether courts may look beyond the FAA's enumerated grounds when deciding whether an arbitration award should be enforced or set aside. In *Hall Street*, this Court held that parties cannot expand the scope of the FAA's judicial review by contractual agreement, explaining that Sections 10 and 11 "provide the FAA's exclusive grounds for vacatur and modification" of awards. 552 U.S. at 584. The Court did not decide, however, whether the FAA permits courts to apply additional *judicially* created, common-law bases for vacatur or modification. *See id.* at 585. Consequently, in the wake of *Hall Street*, an acknowledged circuit split has developed about the continued vitality of one such ground: the narrow common-law doctrine, recognized in three of this Court's prior cases, under which courts may refuse to

enforce an award that violates a well-defined public policy. *See infra* at 14-19.

Confusion has also arisen over FAA Section 10(a)(2), which authorizes courts to set aside an award "where there was evident partiality . . . in the arbitrator." In *Commonwealth Coatings*, Justice Black's six-Justice majority opinion interpreted the phrase "evident partiality" to impose a "simple requirement": that "arbitrators disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 148-49. The Court explained that this "reasonable impression of bias" standard aligned with what is expected of judges—because it "rest[s] on the premise that *any tribunal* permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Id.* at 150 (emphasis added); *see also id.* at 148.

Justice White, joined by Justice Marshall, wrote a concurrence stating that he was "glad to join" Justice Black's majority opinion. *Id.* at 150 (White, J., concurring). But despite the majority's clear language equating the neutrality of arbitrators and judges and adopting an "impression of bias" standard, Justice White noted that he did not read the majority opinion to "decide" that "arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." *Id.* And although Justice White agreed that "evident partiality" did not necessarily mean actual bias, *see id.* at 151 n.*, he never explained what showing short of the majority's "reasonable impression of partiality" standard he believed the FAA requires. This interplay between the *Commonwealth Coatings* majority and Justice White's concurrence has given rise to a split of

appellate authority over the proper standard for evaluating claims of an arbitrator's evident partiality under Section 10(a)(2). *See infra* at 26-31.

B. The Seldin Business Dispute And Arbitration

1. This case arises out of a business dispute. Over fifty years ago, petitioner Millard Seldin founded what became a highly successful real-estate business in the Omaha, Nebraska area. App. 3a. Millard's brother, respondent Theodore Seldin, and Millard's brother-in-law, Stanley Silverman, also joined the business years later. *Id.* Eventually, however, Millard relocated from Omaha to Scottsdale, Arizona. *Id.* And beginning in 2007, Millard and his son, petitioner Scott Seldin—referred to in the proceedings below, along with the other petitioners, as the "Arizona Seldins"—began to suspect that Theodore and Stanley were mismanaging their jointly owned properties and engaging in self-dealing. *Id.* Theodore and Stanley—described in the proceedings below, along with the other respondents, as the "Omaha Seldins"—countered with contentions of their own.

The two sides decided their business relationship had reached an irreconcilable end, and in February 2010, they entered into a formal separation agreement. App. 3a-4a. As part of that agreement, they agreed to settle their disputes through arbitration in accordance with the commercial rules

of the American Arbitration Association ("AAA") and Nebraska law. *Id.* at 4a; E1-A, 47, 49.[1]

The AAA-appointed arbitrator, attorney Eugene Commander, divided the parties' dueling causes of action and defenses into 10 "claims," and further bifurcated the proceedings on each claim, deciding liability first, and then damages. App. 4a-5a. Petitioners prevailed on several of their claims and were awarded millions of dollars. *Id.* at 46a. But respondents also prevailed in part, and when all was said and done, the arbitrator rendered a net award in favor of respondents. *Id.* at 46a-47a.

2. This petition concerns the arbitrator's treatment of respondents' most significant claim: their causes of action in connection with the "Sky Financial" asset. Sky Financial is an Arizona limited liability company through which the Seldins (via various entities) acquired fast-food restaurant franchises. App. 5a.

The crux of respondents' claim was that petitioner Millard invested their money to become part owners of Sky Financial without their full knowledge and consent. But respondents pursued two inconsistent theories of recovery. On the first theory, respondents sought to recover against Millard and the other petitioners under securities law for the wrongful investment itself—and sought *rescissionary* damages intended to put them back in the position they would have been in had they never made the investment at all. E2, 99-100; E2, 321-23. On the second theory, respondents sought to recover against Millard and

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[1] Citations to "E#, [page]" refer to exhibits to the bill of exceptions filed in Nebraska Supreme Court Nos. S-19-310, S-19-311.

petitioners as *owners* of Sky Financial—alleging that Millard absconded with a corporate opportunity by not asking them to participate in Sky Financial's management and earn certain fees and compensation. E2, 98-100.

In opposing the securities claims, petitioners raised a defense based on respondents' failure to "tender" their ownership interests in Sky Financial, as required by applicable law. App. 5a. In an untimely effort to obviate that defense, respondents came up with a bizarre solution: They offered to "assign" their Sky Financial interests *to the arbitrator*. At the September 2016 arbitration hearing in which they proposed this arrangement, respondents explained that the assignments would be "in the sense of an interpleader[]," and would enable the arbitrator to decide to whom the tender of the Sky Financial interests should be made. E2, 481:16-24; *see also* App. 5a-6a, 18a-19a.

Petitioners expressed unease about the procedure and declined to "commit" on the record about how it should be "recognized." E2, 482:4-8; *see also* App. 61a. Likewise, the arbitrator noted that he was "in unchartered waters here." E2, 481:13-14. Nevertheless, he ultimately stated:

> ARBITRATOR: Well, the only way I know how to deal with this right now is to consider this an act of interpleading these interests to me. I'm not an officer of the court, but I do have jurisdiction over the matter, so for the time being, at least, I'll accept them.

Id. at 483:11-16; App. 19a. The arbitrator then asked whether, "[w]ith that understanding in mind," his

acceptance of the assignments would be acceptable to both sides; counsel for petitioners answered yes. E2, at 483:16-19, App. 19a; *see also* App. 6a.

3. In October 2016, the arbitrator entered an interim award in respondents' favor on their Sky Financial claim. App. 6a. The arbitrator granted respondents $1,962,528 in damages on their lost-corporate-opportunity claims based on respondents' status as co-owners. *Id.* But the arbitrator also awarded respondents $3,135,681 in *rescissionary* damages for the securities violations—that is, awarding them damages as if they had never been owners of Sky Financial at all. *Id.* In April 2017, the arbitrator reaffirmed those damages awards in the Final Award, which—when offset by petitioners' recovery—resulted in a net award to respondents of $2,997,031, plus post-award interest. *Id.*

The Final Award also addressed respondents' assignments of the Sky Financial interests to the arbitrator during the arbitration hearing, noting that the arbitrator had "accepted" the assignments "as a form of temporary interpleader for the limited purposes stated in the record." E1-QQ, 462-63. But then—and notwithstanding his award of rescissionary damages—the arbitrator assigned the interests *back* to respondents. *Id.* at 463. And in re-conveying the interests, the arbitrator revealed for the first time his belief that he had obtained those interests in Sky Financial *in his personal capacity*:

> The Arbitrator, *individually and d/b/a Gene Commander, Inc., a Colorado corporation*, disclaims and releases any and all right, title and interest in any and all membership interests that were or could have been the subject of the Original Assignments. And to the extent deemed necessary, the Arbitrator hereby re-assigns any and all such interests back to the assignors.

Id. (emphasis added). At no point between the September 2016 hearing and the April 2017 Final Award did the arbitrator disclose to the parties his apparent discovery that he had taken ownership of the Sky Financial interests in his *personal* capacity—not merely in a role akin to an officer of the court. Nor did the arbitrator seek the parties' written consent to his proceeding over their dispute notwithstanding that personal interest, as would be required of a judge under Nebraska ethics law. *See* Neb. Rev. Stat. § 24-739.

C. Proceedings Below

1. Respondents filed an action in the District Court of Douglas County, Nebraska seeking confirmation of the Final Award under the FAA. App. 45a-46a. Petitioners opposed confirmation and asked the court to either modify or vacate the award. *Id.* at 46a.

As relevant here, petitioners argued that the Sky Financial portion of the award could not be enforced because it granted respondents a double recovery: Respondents received rescissionary damages as if they had never invested in Sky Financial at all, while

also receiving damages based on their status as Sky Financial owners. E50, 13-19. This double recovery was rendered a triple recovery, moreover, by the arbitrator's assignment of the Sky Financial interests *back* to respondents. This windfall, petitioners argued, violated a well-established Nebraska public policy—enshrined in the state constitution—permitting only compensatory damages for actual losses. *Id.*

Petitioners additionally argued that the Sky Financial portion of the award, or if necessary the entire award, should be vacated under FAA Section 10(a)(2) due to the arbitrator's evident partiality. They pointed out that respondents' assignments apparently left "*the Arbitrator himself* as the record owner of the [Sky Financial] shares," thus "creat[ing] an inherent conflict for him in any ruling to follow." *Id.* at 4-7; *see also id.* at 12, 24-25; E53-A, 12-15. Petitioners further argued that they had never provided written consent to the arbitrator continuing to preside over the case while harboring a *personal* interest in its subject matter, as required under Neb. Rev. Stat. § 24-739. E53-F, 1-2. And they argued that the arbitrator's personal interest cast an appearance of bias over the subsequent proceedings. E53-B, 6.

The district court rejected these arguments, ruling in favor of respondents and confirming the Final Award in full. App. 78a-79a; *see also id.* at 99a.

2. The Nebraska Supreme Court affirmed on direct review. App. 41a-42a. The Court acknowledged petitioners' argument that the Sky Financial award "violates Nebraska public policy by creating a massive windfall for [respondents]." *Id.* at 11a. But the Court held that the FAA categorically foreclosed its ability to set aside an award on that

basis: "[U]nder the FAA, a court is not authorized to vacate an arbitration award based on public policy grounds." *Id.* at 25a.

In reaching this conclusion, the Nebraska Supreme Court acknowledged its contrary prior holding in *State v. Henderson*, 762 N.W.2d 1 (Neb.), *cert. denied*, 557 U.S. 921 (2009). App. 22a-23a. In *Henderson*—which arose under the Nebraska Uniform Arbitration Act—the Nebraska Supreme Court had drawn on decisions by this Court recognizing the common-law authority to set aside arbitral awards that contravene public policy. 762 N.W.2d at 246-50 (citing *W.R. Grace*, 461 U.S. at 766; *Misco, Inc.*, 484 U.S. at 42; *Eastern Associated Coal*, 531 U.S. at 62). But the Nebraska Supreme Court nonetheless determined that it could not apply the same public-policy exception to petitioners' case in light of this Court's later decision in *Hall Street*—which the Nebraska Supreme Court understood to "abrogate[] public policy as grounds for vacating an arbitration award" in cases governed by the FAA. App. 25a. The Court therefore declined to "address the merits of [petitioners'] argument that the purported windfall in favor of [respondents] is contrary to public policy." *Id.*

The Nebraska Supreme Court also rejected petitioners' argument that the arbitrator's receipt of the Sky Financial interests gave rise to evident partiality under FAA Section 10(a)(2). App. 20a. The Court acknowledged petitioners' argument that the arbitrator's conduct violated Neb. Rev. Stat. § 24-739, which "provides . . . that a judge shall be disqualified in any case in which he or she is a party or interested except by mutual consent of the parties, which mutual consent is in writing and made part of the record."

App. 20a. The Court also acknowledged its prior "instruction" that "'judges and arbitrators are subject to the same ethical standards.'" *Id.* at 20a-21a (quoting *Barnett v. City of Scottsbluff*, 684 N.W.2d 553, 560 (Neb. 2004)).

Nonetheless, the Court refused to apply those standards under the FAA, explaining that it had previously "rejected a 'judicial ethics' standard when analyzing the FAA's requirement of 'evident partiality.'" App. 21a. Citing its precedent adhering to Justice White's *Commonwealth Coatings* concurrence, the Nebraska Supreme Court explained that evident partiality can only be found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration," *id.* (quoting *Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36, 43 (Neb. 1993)), and "is not made out by the mere appearance of bias," *id.* at 20a (citation omitted). Petitioners did not carry that "'heavy burden'" here, the Court explained, because there is "no evidence that the arbitrator engaged in . . . partiality by accepting the assignment of Sky Financial." *Id.* at 20a-21a (citation omitted).

REASONS FOR GRANTING THE WRIT

This petition presents two questions that have long vexed federal and state courts: (1) whether the public-policy exception to the enforceability of arbitration awards was abrogated, *sub silentio,* by this Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); and (2) the proper standard for "evident partiality" under FAA Section 10(a)(2). Both questions are the subject of longstanding, intractable, and acknowledged splits. And in both instances, the confusion directly results

from a prior decision of this Court. Only the Court can eliminate the uncertainty and clarify the proper standards for confirmation of arbitration awards going forward.

I. The Court Should Resolve The Split Over Whether The FAA Permits Courts To Vacate Arbitration Awards That Violate Public Policy

First, the Court should resolve the split over whether courts reviewing arbitration awards under the FAA are foreclosed from setting aside awards that are contrary to public policy.

A. Courts Are Irreconcilably Divided On This Issue

1. Judicial review of arbitration awards under the FAA is necessarily circumspect, and courts should overturn an award only in rare circumstances. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013). But in three previous decisions spanning nearly forty years, this Court recognized one such circumstance: When the award would violate an "explicit public policy," the court should not enforce it. *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983); *see also Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62 (2000) (referring to "the legal exception that makes unenforceable" an award "'that is contrary to public policy'" (citation omitted)); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (explaining that this public-policy exception derives from the common law). As a result, for many years, it was widely recognized that courts could vacate arbitral awards, including awards governed by

the FAA, if they resulted in "violations of public policy." *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001); *see also, e.g.*, *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007); *Brentwood Medical Assocs. v. United Mine Workers*, 396 F.3d 237, 241 (3d Cir. 2005).

That understanding has unraveled in the wake of this Court's 2008 decision in *Hall Street*. The *Hall Street* parties had entered into an agreement stating that a district court could vacate the arbitral award "where the arbitrator's conclusions of law are erroneous." 552 U.S. at 579. This Court found that the FAA forbids such a contractual expansion of judicial review. Explaining that Sections 10 and 11 "provide the FAA's exclusive grounds for vacatur and modification," *id.* at 584, the Court held that the parties could not supplement those provisions by agreement.

In the *Hall Street* opinion, the Court addressed its previous suggestion, in *Wilko v. Swan*, 346 U.S. 427, 436 (1953), that courts may vacate awards due to the arbitrator's "manifest disregard of the law." *See* 552 U.S. at 584-85. The *Hall Street* Court explained that *Wilko* did not establish a norm of "expandable judicial review." *Id.* But it declined to resolve whether the lower courts had been right to recognize "manifest disregard of law" as an additional vacatur ground—either as "a new ground for review," or as a "shorthand" for one of the enumerated grounds in Section 10. *Id.* at 585. Importantly, no party asked the Court to overrule its decisions in *Eastern Associated Coal* or *W.R. Grace* regarding the public-policy exception, and the Court did not state that it was doing so.

2. After *Hall Street*, there is now widespread confusion about whether courts are permitted to vacate or modify FAA-governed awards on *any* ground not expressly listed in Sections 10 and 11. In particular, courts are starkly divided over the remaining vitality of the common-law public-policy exception recognized in *W.R. Grace* and its progeny.

a. Five courts—the Second, Fourth, Seventh, and Ninth Circuits, as well as the Alaska Supreme Court—have all continued to apply the public-policy exception in post-*Hall Street* FAA decisions.

The Seventh Circuit has squarely rejected the argument that *Hall Street* had any effect on the public-policy doctrine. *See Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 734 F.3d 708, 716-17 & n.8 (7th Cir. 2013) (explaining that "the *Hall Street* Court did not overrule *Eastern Associated Coal* or *W.R. Grace*, both of which recognized a public policy exception").

The Second, Fourth, and Ninth Circuits have likewise rejected the argument that *Hall Street* eliminated judicially created grounds for vacatur. *See Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451-52 (2d Cir. 2011); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 481-83 (4th Cir. 2012); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1281, 1289-90 (9th Cir. 2009). Consistent with that position, those courts have continued to apply the public-policy exception in particular. *See Schwartz*, 665 F.3d at 451-52; *Matthews v. National Football League Mgmt. Council*, 688 F.3d 1107, 1111-12 (9th Cir. 2012); *DeMartini v. Johns*, 693 F. App'x 534, 537 (9th Cir. 2017); *Wells Fargo Advisers, LLC v. Watts*, 540 F. App'x 229, 231 (4th Cir. 2013), *cert. denied*, 574 U.S. 870 (2014).

The Alaska Supreme Court has also applied the public-policy exception in a post-*Hall Street* case, over one party's argument that the exception was a dead letter. *Dunham v. Lithia Motors Support Servs., Inc.*, No. S-15068, 2014 WL 1421780, at *6 (Alaska Apr. 9, 2014); *see also Dunham* Appellees Br. 9-13, 2013 WL 7206235.[2]

b. By contrast, the Eleventh Circuit and the highest courts of Alabama and Florida—as well as the Nebraska Supreme Court here—have held that *Hall Street* categorically forecloses the possibility of a public-policy challenge to an award governed by the

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[2] The Sixth Circuit has not addressed the continued vitality of the public-policy exception, but it has held that *Hall Street* did not eliminate the "manifest disregard of the law" ground for vacatur. *Coffee Beanery, Ltd. v. WW, LLC*, 300 F. App'x 415, 418-19 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009). It is unlikely that court would reach a different conclusion as to the public-policy exception. Similarly, the First Circuit has strongly suggested that the public-policy exception remains viable without fully resolving the issue. *See Bangor Gas Co. v. H.Q. Energy Servs. (U.S.) Inc.*, 695 F.3d 181, 188 (1st Cir. 2012) (assuming, post-*Hall Street*, that arbitration award directing a party to violate FERC rules and regulations would be "vulnerable" on public policy grounds). And although the Fifth, Eighth, and D.C. Circuits have not addressed the public-policy exception's continued vitality in the FAA context, all three have continued to apply that exception in reviewing arbitral awards under the Railway Labor Act ("RLA"), which—like the FAA—provides enumerated grounds for vacatur and does not list an express public-policy ground. *See Sullivan v. Endeavor Air, Inc.*, 856 F.3d 533, 537 (8th Cir. 2017); *National R.R. Passenger Corp. v. Fraternal Order of Police, Lodge 189 Labor Comm.*, 855 F.3d 335, 338 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 979 (2018); *Southwest Airlines Co. v. Local 555, Transp. Workers Union AFL-CIO*, 912 F.3d 838, 844 (5th Cir. 2019); 45 U.S.C. § 153, First(q).

FAA. Those courts reason that "the judicially-created grounds for vacatur we have recognized in our prior precedent . . . are no longer valid" after *Hall Street*, based on this Court's language about the "exclusivity" of the grounds set forth in FAA Sections 10 and 11. *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1314, 1323-24 (11th Cir. 2010); *see also Cavalier Mfg., Inc. v. Gant*, 143 So. 3d 762, 768-69 & n.5 (Ala. 2013); *Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc.*, 154 So. 3d 1115, 1128, 1132 (Fla. 2014), *cert. denied*, 135 S. Ct. 2052 (2015); App. 24a-25a. In effect, these courts have concluded that, in *Hall Street,* this Court overruled, *sub silentio,* its decisions recognizing the public-policy exception in *Eastern Associated Coal* and *W.R. Grace*, at least in the FAA context.[3]

c. The split on the question presented is acknowledged. As one district court has explained, "the Circuit Courts of Appeals have . . . disagreed on whether the public policy exception continues to serve as cognizable means for challenging an arbitration award." *Caputo v. Wells Fargo Advisors, LLC*, No. CV 19-17204 (FLW), 2020 WL 2786934, at *3 (D.N.J. May 29, 2020); *see also Immersion Corp. v. Sony Comput. Ent. Am. LLC*, 188 F. Supp. 3d 960, 968-69 (N.D. Cal. 2016). In addition, numerous courts have recognized the more general confusion over what *Hall Street*

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[3] The Third, Fifth, and Tenth Circuits have noted that the continued validity of the public-policy exception is an open question following *Hall Street*, but have declined to resolve it. *See CD & L Realty LLC v. Owens Ill., Inc.*, 535 F. App'x 201, 205 n.3 (3d Cir. 2013); *McKool Smith, PC v. Curtis Int'l, Ltd.*, 650 F. App'x 208, 212 (5th Cir. 2016) (per curiam); *Abbott v. Law Off. of Patrick J. Mulligan*, 440 F. App'x 612, 620, 624 & n.20 (10th Cir. 2011).

meant when it said that the grounds in Sections 10 and 11 are "exclusive." *See, e.g.*, *Wachovia*, 671 F.3d at 481 & n.7 ("*Hall Street* has been widely viewed as injecting uncertainty" and "[o]ur sister circuits have split into three camps about the meaning of the word 'exclusive' . . . ."); *Visiting Nurse*, 154 So. 3d at 1130 (referring to the "federal circuit court split regarding whether *Hall Street* prohibits all extra-statutory grounds for vacating an award, including judicially created grounds"). As Judge Willett has explained, the proper treatment of common-law vacatur doctrine in FAA cases has created "disarray" and a "quagmire." *Hoskins v. Hoskins*, 497 S.W.3d 490, 498-500 (Tex. 2016) (concurring).

B. The Nebraska Supreme Court's Decision Was Wrong

The Nebraska Supreme Court chose to join the wrong side of the split. Nothing in the FAA abrogates courts' longstanding authority to decline to enforce an arbitral award that violates well-defined public policy.

1. Three decisions of this Court—*W.R. Grace*, *Misco*, and *Eastern Associated Coal*—have squarely recognized a public-policy exception to the general prohibition on overturning arbitrator awards. Those decisions grounded the exception in a centuries-old common-law principle of contracts. *See* 5 *Williston on Contracts* § 12:1 (4th ed. 2020, Westlaw). Courts must treat an arbitration award as if it represented the parties' own agreement. *See Eastern Associated Coal*, 531 U.S. at 62. Thus, a court's "refusal to enforce" an award on public-policy grounds "is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to

enforce contracts that violate law or public policy." *Misco*, 484 U.S. at 42; *see also W.R. Grace*, 461 U.S. at 766.

Although *W.R. Grace*, *Eastern Associated Coal Corp.*, and *Misco* all considered the public-policy exception in the context of labor arbitration, they announced a common-law rule that applies in other contexts as well. This is made crystal clear by the *W.R. Grace* Court's citation to *Hurd v. Hodge*, 334 U.S. 24 (1948)—a case about judicial enforcement of racially restrictive covenants—to establish the existence of the rule that the Court was "obliged" to follow. *See W.R. Grace*, 461 U.S. at 766; *see also Hurd*, 334 U.S. at 35 ("Where the enforcement of private agreements would be violative of [the public policy of the United States], it is the obligation of courts to refrain from such exertions of judicial power.").

This Court generally presumes Congress is aware of the area of law in which it legislates and does not intend to displace common-law rules. *See United States v. Texas*, 507 U.S. 529, 534 (1993) (invoking the "principle" that "'[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident'" (alteration in original) (citation omitted)). Here, there is no indication Congress intended to displace this common-law rule in enacting the FAA.

To the contrary, the public-policy exception fits naturally within Section 10(a)(4), which allows a court to vacate an award where "the arbitrator[] exceeded their powers." 9 U.S.C. § 10(a)(4); *cf. Wachovia*, 671 F.3d at 483 (noting that the "manifest disregard of law" exception can be understood as a "judicial gloss" on Section 10(a)(4)). The arbitrator's

"powers" derive from the parties' arbitration agreement. And because the parties themselves cannot agree to violate the law, the arbitrator exceeds his or her powers when the award compels a violation of public policy. *See Brown v. TGS Mgmt. Co.*, 271 Cal. Rptr. 3d 303, 312-13 (Ct. App. 2020) (reversing confirmation of an award that violated public policy under the California Arbitration Act's analogous provision allowing for vacatur when the "arbitrators exceeded their powers" (citation omitted)).

2. It is hardly surprising that Congress would preserve this narrow escape valve to avoid judicial enforcement of awards that violate well-defined public policy. The Nebraska Supreme Court's decision in *State v. Henderson* illustrates why. 762 N.W. 2d 1 (Neb.), *cert. denied*, 557 U.S. 921 (2009). In *Henderson*, the Court refused to confirm an award reinstating a known member of the Ku Klux Klan to his position as a police officer. *Id.* at 8-9, 17-18. The award at issue was governed by the Nebraska Uniform Arbitration Act, which (like the FAA) does not explicitly provide for vacatur on public-policy grounds; the Nebraska Supreme Court nonetheless applied the common-law exception based on the federal *W.R. Grace* trio of cases. *See id.* at 8-9. It would be unjust—and entirely illogical—for the state court to be compelled to enforce the same award if the officer's employment contract had instead arisen in interstate commerce and been subject to the FAA.

Indeed, if the Nebraska Supreme Court's understanding of the FAA were correct, the federal statute would have withdrawn state courts' traditional jurisdiction to remedy violations of state law in connection with interstate contracts. That cannot have been Congress's intent. *Cf. Rice v. Santa*

Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.'"); *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (courts should be "absolutely certain" that Congress intended to displace state authority over qualifications of state adjudicators).

Moreover, this Court has already defined the public-policy exception's narrow contours. As the Court held in *W.R. Grace*, an award may only be vacated if the policy is "explicit," "well defined and dominant," and "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)); *see also Misco*, 484 U.S. at 43-44; *Eastern Associated Coal*, 531 U.S. at 62. The exception is not a license for courts to freely overturn awards because they seem unfair or reached the wrong result, as this Court has already held in policing the exception's use. *See Eastern Associated Coal*, 531 U.S. at 63-67.

3. Despite all this, a number of courts—including the Nebraska Supreme Court below—have held that *Hall Street* "abrogated" this common-law exception. App. 25a. But they have misread that decision. This Court never stated that it was overruling its decisions recognizing the public-policy exception. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("[I]t is this Court's prerogative alone to overrule one of its precedents." (alteration in original) (citation omitted)). And the case did not present an opportunity to do so. The narrow question presented in *Hall Street* was whether the parties

could add an additional ground for judicial vacatur *by contractual agreement*. *See* 552 U.S. at 578. It was in that context that the Court explained that Section 10(a)'s enumerated "statutory grounds" were "exclusive." *Id.* The decision did not reject common-law bases for vacatur of arbitration awards. Nor did it decide the scope of Section 10(a)(4).

In fact, this Court has since made clear that *Hall Street* did not definitively resolve this issue. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court noted that the question whether "'manifest disregard' survives [the] decision in *Hall Street*"—either "as an independent ground" or "as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10"—remains open. 559 U.S. 662, 671 n.3 (2010). *Stolt-Nielsen* would not have said that if *Hall Street* necessarily abrogated all extra-statutory bases for vacatur, or if such bases could not possibly be understood as a gloss on Section 10(a)(4). The Nebraska Supreme Court's contrary reading of *Hall Street*—shared by at least three other appellate courts—is simply mistaken.

C. The Court Should Resolve The Split Of Authority On The Public Policy Exception In This Case

This Court's intervention is necessary now. Only this Court can definitively resolve the conflict over whether *Hall Street* in fact overruled this Court's prior decisions recognizing a public-policy exception. Nor will further percolation eliminate the entrenched divide on this issue. The courts that have entertained public-policy challenges following *Hall Street* were aware of the decision and its purported significance. Likewise, the courts on the other side interpret *Hall*

Street as tying their hands. *See, e.g.*, App. 24a-25a. Others have strenuously avoided deciding the issue, preferring to await "firm guidance from the Supreme Court." *Abbott v. Law Off. of Patrick J. Mulligan*, 440 F. App'x 612, 620, 624 n.20 (10th Cir. 2011).

Answering this recurring threshold question is crucial to preserving the benefits of arbitration as a cost-effective alternative to litigation. Parties agree to arbitration because it can provide "quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). But since *Hall Street*, parties have been forced to litigate whether the public-policy ground for vacatur survives. This is especially wasteful because courts often end up deciding the merits of the public-policy challenge anyway, finding that route more straightforward than wading into the post-*Hall Street* morass.[4]

This case presents an ideal vehicle to put the issue to rest. The question presented was dispositive to the Nebraska Supreme Court's analysis: The Court's sole basis for rejecting petitioners' public-policy argument was its determination that the FAA does not permit vacatur on such grounds *at all*. *See* App. 25a ("Because public policy is not a ground for vacating an arbitration award under the FAA, we need not address the merits of [petitioners'] argument that the

[4] For instance, the Third Circuit has three times avoided deciding whether public-policy review survives *Hall Street* for this reason. *See CD & L Realty*, 535 F. App'x at 205 n.3; *Rite Aid N.J., Inc. v. United Food Commercial Workers Union, Local 1360*, 449 F. App'x 126, 129 (3d Cir. 2011); *Andorra Servs. Inc. v. Venfleet, Ltd.*, 355 F. App'x 622, 628 n.6 (3d Cir. 2009).

purported windfall in favor of [respondents] is contrary to public policy.").

And although this Court would not need to reach the question (it would be an issue for the Nebraska Supreme Court on remand), the state public policy at issue here undoubtedly meets the "explicit," "well defined and dominant" test this Court adopted in *W.R. Grace*, 461 U.S. at 766. The Nebraska public policy against double recovery is longstanding, well-established, and enshrined in the Nebraska Constitution. *See, e.g.*, *Abel v. Conover*, 104 N.W.2d 684, 689-90 (Neb. 1960) ("[D]amages which double or treble the actual compensatory damages established, are in contravention . . . of the Nebraska Constitution" (citing Neb. Const. art. I, § 3 and *id.* art. VII, § 5)). Indeed, the Nebraska Supreme Court has described the rule that "the measure of recovery in all civil cases is compensation for the injury sustained" as "so well settled that we dispose of it merely by the citation of cases so holding." *Id.* at 688. And there can be no question that a state constitutional prohibition qualifies as "dominant." *See Hurd*, 334 U.S. at 34-35 (courts cannot enforce private agreements at odds with "public policy as manifested in the Constitution").

Finally, it would be advantageous to address the question presented when reviewing a state-court decision refusing to enforce a state public policy. The Nebraska Supreme Court firmly believed that the FAA categorically requires the enforcement of an award even if the award violated well-established and dominant state law. App. 25a. Because this Court's interpretation of the FAA will therefore carry significant federalism consequences, it makes sense

to resolve the question presented in a case—like this one—bringing those considerations to the fore.

II. The Court Should Also Resolve The Split Over The FAA's "Evident Partiality" Standard

Certiorari is also warranted to address a second issue: the Nebraska Supreme Court's mistaken standard for finding "evident partiality" under FAA Section 10(a)(2). The decision below implicates an equally deep and even more longstanding split of authority on this question of paramount importance to arbitrations nationwide.

A. Courts Have Divided Over Whether The FAA Requires Arbitrators To Satisfy The Same Ethical Standards As Judges

One of the enumerated grounds for vacatur under the FAA is "where there was evident partiality . . . in the arbitrators." 9 U.S.C. § 10(a)(2). But "[e]xactly what constitutes 'evident partiality' by an arbitrator is a troublesome question," and has been for a very long time. *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefits Fund*, 748 F.2d 79, 82 (2d Cir. 1984). The confusion stems from this Court's 1968 decision in *Commonwealth Coatings*, and in particular from courts' attempts to reconcile Justice White's concurring opinion with the majority's analysis.

a. Four courts—the Ninth and Eleventh Circuits, as well as the highest courts of Alabama and Texas—have employed standards that faithfully adhere to Justice Black's majority opinion. These courts have held that evident partiality must be found when the arbitrator fails to disclose a fact or circumstance that gives rise to a "reasonable

impression of partiality" (or "reasonable impression of bias"). *See Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994); *University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002); *Municipal Workers Comp. Fund, Inc. v. Morgan Keegan & Co.*, 190 So. 3d 895, 915-16 (Ala. 2015); *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 636 (Tex. 1997). In other words, if an arbitrator fails to disclose an interest that creates an impression of bias, those courts say the nondisclosure suffices to justify vacatur. *See, e.g.*, *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 525, 527 (Tex. 2014) (holding that "the standard for evident partiality in *Commonwealth Coatings* . . . requires vacating an award if an arbitrator fails to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality" and "evident partiality is established from the nondisclosure itself"); *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1135-36 (9th Cir. 2019), *cert. denied*, 207 L. Ed. 2d 1100 (2020).

b. By contrast, seven federal courts of appeals—and the Nebraska Supreme Court—have rejected the *Commonwealth Coatings* majority's analysis and instead adhered to a much heightened standard, supposedly derived from Justice White's concurrence. *See, e.g.*, *Morelite*, 748 F.2d at 83 & n.3 (explaining that Justice White's opinion reflects the Court's holding and "much of Justice Black's must be read as dicta"). The First, Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits require a party seeking vacatur of an award to show that "a reasonable person *would have to conclude* that an arbitrator *was* partial to one party to the arbitration." *Id.* at 84 (emphasis added); *see also JCI Commc'ns, Inc. v. Int'l Bhd. of Elec.*

Workers, Local 103, 324 F.3d 42, 51 (1st Cir. 2003); *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir.), *cert. denied*, 528 U.S. 877 (1999); *Cooper v. WestEnd Capital Mgmt., LLC*, 832 F.3d 534, 545 (5th Cir. 2016); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983). In practice, this "would have to conclude" standard effectively demands a showing of *actual* bias—though even Justice White did not purport to go that far. *See Commonwealth Coatings*, 393 U.S. at 151 n.* (White, J., concurring).

Further watering down the FAA rule, many of those courts (including the Nebraska Supreme Court here) have specifically held that arbitrators are subject to *lower* disqualification standards than judges, also in direct contravention of the *Commonwealth Coatings* majority. *See, e.g.*, *Freeman*, 709 F.3d at 251-53 (holding that the "appearance of bias" standard, i.e., "the disqualification standard for federal judges," is inapposite); *Morelite*, 748 F.2d at 82-83 (acknowledging that Justice Black's opinion "appeared to impose upon arbitrators the same lofty ethical standards required of Article III judges," but rejecting that discussion as dicta); *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002), *cert. denied*, 538 U.S. 961 (2003) (explaining that "the 'appearance of partiality' ground of disqualification for judges does not apply to arbitrators"). As the Second Circuit has explained its position, "[u]nlike a judge, who can be disqualified 'in any proceeding in which his impartiality *might*

reasonably be questioned,'" an "arbitrator is disqualified only when a reasonable person . . . 'would *have* to conclude' that an arbitrator was partial to one side." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (citations omitted).

In addition—and also unlike the Ninth and Eleventh Circuits—courts on the long side of this split have held that an arbitrator's failure to disclose a potential conflict "has no independent legal significance and does not in itself constitute grounds for vacating an award" under Section 10(a)(2). *ANR Coal*, 173 F.3d at 499-500; *see also Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36, 42 (Neb. 1993).

c. Some circuits have adopted mixed or muddled standards. The Tenth Circuit has stressed that "[a]rbitrators are, of course, obligated to disclose possible bias," while simultaneously holding that "it is only clear evidence of impropriety which justifies" vacatur. *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir.), *cert. denied*, 459 U.S. 838 (1982). The D.C. Circuit has offered two competing standards in the same decision—referring to the arbitrator's "duty to disclose facts that 'might create an impression of possible bias,'" while noting that that a party "'must establish specific facts that indicate improper motives.'" *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996) (citations omitted). The Eighth Circuit has forthrightly acknowledged that its decisions are internally inconsistent: While its earlier opinions utilized the "'impression of possible bias'" standard, "over time [the circuit's] interpretation of evident partiality has migrated" toward a more stringent showing. *Ploetz v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 898 (8th Cir. 2018)

(citation omitted); *see also id.* (admitting that it is unclear "which of our constructions of [evident partiality]" is "circuit precedent").

d. It is thus clear that federal and state courts are employing conflicting and inconsistent standards for resolving evident-partiality challenges. This confusion about the proper benchmark undoubtedly leads to divergent results: The "reasonable impression of partiality" standard "is much broader" than the "*would have to conclude*" standard, "as circumstances can convey an *impression* of partiality without necessarily dictating a *conclusion* of partiality." *Burlington*, 960 S.W.2d at 633-34 (citation omitted).

This striking lack of uniformity has been widely noted. *See Ploetz*, 894 F.3d at 898; *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281 (5th Cir. 2007) (en banc); *Burlington*, 960 S.W.2d at 633-34. Indeed, scholars have long lamented the "longstanding, wide-ranging, and intractable judicial division over evident-partiality doctrine,"[5] noting that the courts' "struggle" over "whether to apply the majority or concurrence" in *Commonwealth Coatings* has "resulted in multiple interpretations,"[6] and that "the standards for what constitutes evident partiality are vague and oftentimes conflicting."[7]

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[5] Edward C. Dawson, *Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges*, 63 Am. U. L. Rev. 307, 324 (2013).

[6] Braydon Roberts, *An Evident Contradiction: How Some Evident Partiality Standard Do Not Facilitate Impartial Arbitration*, 43 J. Corp. L. 681, 683 (2018).

[7] Kathryn A. Windsor, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6

B. The Nebraska Supreme Court's Standard For Finding "Evident Partiality" Is Wrong

The Court should also grant review because the Nebraska Supreme Court's position is manifestly at odds with *Commonwealth Coatings*.

Justice Black's opinion for the majority explicitly adopts an "impression of possible bias" standard that holds arbitrators to the same standards as judges, including when it comes to disclosure of conflicts. 393 U.S. at 148-49. The only way courts on Nebraska's side of the split can justify their disregard of that language is to deem Justice White's narrower concurring opinion controlling. *See, e.g.*, *Freeman,* 709 F.3d at 251-52. The Nebraska Supreme Court has even downgraded the six-Justice majority to a "plurality opinion," stating that courts have no obligation to follow the majority's "holding" that an impression of bias suffices. *Dowd*, 495 N.W.2d at 42.

This misunderstands basic rules of judicial decisionmaking and vertical stare decisis. Justice White concurred in the Court's decision (*not* just in the judgment), explaining that he was "glad to join" the majority opinion. *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring). The "additional remarks" of a concurring opinion, *id.*, cannot, of course, rewrite the majority's reasoning. *See Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) ("The reasoning of this Court with respect to the disposition

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Seton Hall Cir. Rev. 191, 192 (2009); *see also* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 4.18, cmt. B (Proposed Final Draft 2019) (reporter's note) (noting that "federal courts have diverged significantly in defining 'evident partiality,'" due to a lack of "guidance" from this Court).

of this case is set forth in this opinion and none other.").

Even if the *Commonwealth Coatings* majority's approach were not binding, it is the right one. As the Court explained, "if anything," courts should "be even more scrupulous" when it comes to policing the impartiality of arbitrators than when considering whether judges are impartial. 393 U.S. at 148-49. This is because many of the other safeguards of the judicial system, including appellate review, are not present in the arbitration context. *See id.* A robust standard that polices apparent partiality thus "ensures that parties can view arbitration as a substitute for litigation." *University Commons-Urbana*, 304 F.3d at 1338.

Further, and as the *Commonwealth Coatings* majority also stressed, the "reasonable impression of partiality" standard achieves basic fairness without sacrificing arbitration's benefits. Requiring arbitrators to adhere to the "simple requirement" that they be free of conflicts that can give rise to the impression of bias—or else disclose such conflicts and obtain proper consent—is not onerous or unduly disruptive to arbitrations. *Commonwealth Coatings*, 393 U.S. at 149.

To the contrary, such rules are the norm in arbitration proceedings. The AAA Code of Ethics for Arbitrators in Commercial Disputes requires arbitrators to avoid "acquiring any financial or personal interest, which is likely to affect impartiality or *which might reasonably create the appearance of partiality*." AAA, *Code of Ethics for Arbitrators in Commercial Disputes*, Canon I.C (effective Mar. 1, 2004) (emphasis added). The AAA Code also requires

disclosure of any such conflicts on an ongoing basis. *Id.*, Canon II.B-C.[8]

Likewise, the Revised Uniform Arbitration Act ("RUAA") requires arbitrators to disclose "any known facts that a reasonable person would consider likely to affect [their] impartiality," including a financial interest in the outcome. RUAA § 12(a)-(b) (Nat'l Conf. Comm'rs on Unif. State L. 2000). And many States—including Nebraska—impose rules of judicial ethics on arbitrators under state law. *See* Neb. Rev. Stat. § 25-2604.01 (arbitrators are subject to disqualification on same grounds as judges); *Barnett*, 684 N.W.2d at 560; *accord* Cal. Civ. Proc. Code § 1281.9(a) (requiring arbitrators to disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt" as to their impartiality, including the "existence of any ground specified in [California law] for disqualification of a judge").[9] Needless to say, jurisdictions and arbitral bodies would not impose these standards if they were

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[8] AAA rules additionally require arbitrators to disclose "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including . . . any financial or personal interest in the result of the arbitration." AAA, *Commercial Arbitration Rules and Mediation Procedures*, R-17(a) (effective July 1, 2016).

[9] *See also Halliburton Co. v. Chubb Bermuda Insurance Ltd.* [2020], UKSC 48 ¶ 50, https://www.supremecourt.uk/cases/docs/uksc-2018-0100-judgment.pdf (explaining that English law requires removal of an arbitrator where "circumstances exist that give rise to justifiable doubts as to his impartiality" (citation omitted)); *id.* ¶ 132 (holding that an arbitrator must disclose circumstances that "*might reasonably* cause the objective observer" to "conclude there was a real possibility that the arbitrator was biased").

unrealistic or fundamentally unsuited to the nature of arbitration. *See Monster Energy*, 940 F.3d at 1137.

C. The Court's Intervention Is Needed On This Question As Well

The standard for evaluating evident partiality challenges under FAA Section 10(a)(2) is unquestionably important and recurring. Until this Court clarifies the proper standard, the unnecessary confusion will remain. *See Merit Ins.*, 714 F.2d at 681 (pointing out that "the only Supreme Court decision [on evident partiality] provides little guidance").

This case presents a clean opportunity to eliminate it. The Nebraska Supreme Court's refusal to apply the "reasonable impression of bias" standard squarely implicates the split. App. 21a; *see also Dowd*, 495 N.W.2d at 43. And the Court's position was determinative of the partiality challenge here. Petitioners argued that the arbitrator's receipt of the Sky Financial interests would have required disqualification under Nebraska judicial ethics law and thereby established the reasonable impression that the arbitrator was partial to respondents. Specifically, the arbitrator never disclosed his post-hearing determination—first revealed in the Final Award—that he believed he had acquired the assigned Sky Financial interests in his *personal* capacity, not just as an "officer of the court." *See supra* at 9-10. At no point did the arbitrator seek petitioners' written consent to his presiding over the remainder of the arbitration notwithstanding his belief that he held a personal interest in the subject matter of the dispute—as Nebraska judicial ethics law would require. Neb. Rev. Stat. § 24-739; *see also*

Neb. Rev. Stat. § 25-2604.01; *Barnett*, 684 N.W.2d at 560.

The Nebraska Supreme Court sidestepped those arguments based on an error of federal law. Relying on its own earlier decision "reject[ing the] 'judicial ethics' standard," the Court emphasized petitioners' need to show that an observer "*would have to conclude* that [the] arbitrator" was biased in favor of respondents. App. 21a (emphasis added). Based on the application of that stringent standard, the Court dismissed the arbitrator's violation of Nebraska ethics law as insufficient. *Id.* at 20a-21a.

Certiorari is warranted to resolve the conflict on this recurring issue and clarify that the "reasonable impression of bias" standard governs the analysis under Section 10(a)(2). The Court should remand for reconsideration of petitioners' challenge under the correct legal standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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SUPREME COURT OF NEBRASKA

Millard R. SELDIN, individually and as Trustee of the Millard R. Seldin Revocable Trust, dated October 9, 1993, et al., appellants and cross-appellees,
and
Scott A. Seldin, individually and as Trustee of the Seldin 2002 Irrevocable Trust, dated December 31, 2002, appellant, cross-appellant, and cross-appellee,
v.
ESTATE OF Stanley C. SILVERMAN et al., appellees, cross-appellants, and cross-appellees.

Theodore M. Seldin, individually and as Trustee of the Amended and Restated Theodore M. Seldin Revocable Trust, dated May 28, 2008, et al., appellees, cross-appellants, and cross-appellees,
v.
Millard R. Seldin, individually and as Trustee of the Millard R. Seldin Revocable Trust, dated October 9, 1993, et al., appellants and cross-appellees,
and
Scott A. Seldin, individually and as Trustee of the Seldin 2002 Irrevocable Trust, dated December 31, 2002, appellant, cross-appellant, and cross-appellee.

Nos. S-19-310, S-19-311.

Filed March 6, 2020

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

I. INTRODUCTION

This is an appeal from a judgment of the district court for Douglas County, confirming an arbitration award of $2,997,031 under the Federal Arbitration Act (FAA)[1] and awarding attorney fees as a sanction under Neb. Rev. Stat. § 25-824 (Reissue 2016).

II. BACKGROUND

These two cases arose out of an arbitration between family members designated as the "Omaha Seldins" and the "Arizona Seldins." The term "Omaha Seldins" refers to the following individuals, entities, and trusts: Theodore M. Seldin, individually and in his capacity as trustee of the Amended and Restated Theodore M. Seldin Revocable Trust, dated May 28, 2008; Howard Scott Silverman as trustee of the Amended and Restated Stanley C. Silverman Revocable Trust, dated August 26, 2006; Silverman Holdings, LLC, a Nebraska limited liability company; SCS Family, LLC, a Nebraska limited liability company; TMS & SNS Family, LLC, a Nebraska limited liability company; Sarah N. Seldin and Irving B. Epstein, as trustees of the Theodore M. Seldin and Sarah N. Seldin Children's Trust, dated January 1, 1995; Uri Ratner as trustee of the Stanley C. Silverman and Norma R. Silverman Irrevocable Trust Agreement (2008), dated April 10, 2008; John W.

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[1] 9 U.S.C. §§ 1 through 16 (2018).

Hancock, Irving B. Epstein, and Randall R. Lenhoff as trustees of the Theodore M. Seldin and Sarah N. Seldin Irrevocable Trust Agreement (2008), dated May 12, 2008. The term "Arizona Seldins" refers to the following individuals, entities, and trusts: Millard R. Seldin, individually and as trustee of the Millard R. Seldin Revocable Trust, dated October 9, 1993; Scott A. Seldin, individually and as trustee of the Seldin 2002 Irrevocable Trust, dated December 13, 2002; Seldin Real Estate, Inc., an Arizona corporation; Kent Circle Investments, LLC, an Arizona limited liability company; and Belmont Investments, LLC, an Arizona limited liability company.

For a period of more than 50 years, the parties held joint ownership interests as the Seldin Company in numerous entities located in the Omaha, Nebraska, area. The three principals of the Seldin Company were Millard; Millard's younger brother, Theodore; and Millard's brother-in-law, Stanley C. Silverman. The Seldin Company's principal place of business was Omaha. However, in 1987, Millard began relocating the business operations from Omaha to Scottsdale, Arizona. Theodore and Stanley co-owned the company, and they agreed to manage the jointly owned properties through management agreements.

In 2007, the Arizona Seldins (specifically Millard and Millard's son, Scott) began to question how Theodore and Stanley were managing the jointly owned properties. In 2010, the Arizona Seldins terminated the management agreements and the parties entered into an agreement to separate their joint interests in real estate assets through a bidding process. The "Separation Agreement" included a

provision whereby the parties agreed to resolve all "Ancillary Claims" exclusively through binding arbitration before arbitrator Stefan Tucker with the Venable, LLP, law firm in Washington, D.C. In case of Tucker's inability to serve as arbitrator, the agreement named a Venable partner as his successor. If both Tucker and the successor were unable to serve as arbitrator, the agreement provided that Venable's managing partner was responsible for identifying a substitute successor. The agreement also included provisions defining the scope of arbitration, as well as a provision that the "Commercial Division Rules" of the American Arbitration Association (AAA) would govern.

After the bidding process was completed, the parties began arbitration before Tucker in October 2011. While the arbitration was ongoing, the Arizona Seldins filed three lawsuits in the district court for Douglas County regarding their claims or, alternatively, seeking to remove Tucker as arbitrator. The district court dismissed the lawsuits and compelled the Arizona Seldins back to arbitration after finding the FAA governed the arbitration provision in the agreement. The Arizona Seldins then filed a demand with the AAA, seeking to disqualify Tucker as the arbitrator. The AAA denied the request; however, Tucker subsequently resigned and neither the successor arbitrator nor Venable was willing to participate in the arbitration. The parties agreed to select an arbitrator through the AAA, and Eugene R. Commander (hereinafter arbitrator) was appointed.

Arbitration resumed in October 2013. Due to the number of claims, each involving several independent causes of action and affirmative defenses, the

arbitrator proposed bifurcating each claim to address liability and damage claims in separate hearings when necessary. The parties agreed to the proposal, and a schedule of hearings was adopted.

After extensive discovery was conducted, 11 evidentiary hearings took place over a span of 14 months. Pursuant to the separation agreement, the hearings took place in Omaha. During the 53 days of hearings, 58 fact and expert witnesses testified and 1,985 exhibits were admitted into evidence. As permitted by the AAA's rules,[2] the arbitrator issued 12 separate interim awards at the end of hearings in which determinations of liability or damages had been made. The parties agreed that these interim awards were not considered final awards and that a final award would be issued after the arbitration had closed. The parties also agreed that the entities and individuals that made up each of the two parties were jointly and severally liable for any award issued by the arbitrator.

At some point during the arbitration proceedings, the Arizona Seldins asserted that the Omaha Seldins' lack of tender of one of its assets, Sky Financial Securities, LLC (Sky Financial), was a defense to damages under the Arizona Securities Act. Sky Financial is an Arizona limited liability company, created as part of a plan to acquire and operate a chain of pizza restaurants in numerous states. In response, the Omaha Seldins requested that the arbitrator take possession of Sky Financial as a form of interpleader so as to permit the award of the asset

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[2] American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R-37 at 24 (Oct. 1, 2013).

to the appropriate party after a determination was made. The Arizona Seldins did not object to the procedure, and when asked whether the assignment as a form of interpleader was acceptable to both sides, the Arizona Seldins stated, "Yes." The Omaha Seldins then tendered Sky Financial to the arbitrator by assignment.

In one of the interim awards, the arbitrator determined that the Arizona Seldins had breached their fiduciary duties and engaged in securities law violations relating to Sky Financial. After finding that none of the affirmative defenses raised by the Arizona Seldins were meritorious, the arbitrator awarded the Omaha Seldins $1,962,528 in damages for their lost corporate opportunities claims, as well as an additional $3,135,681 in recessionary damages for the securities violation claims.

On April 12, 2017, the arbitration was officially closed. On April 27, the arbitrator issued a final net award in favor of the Omaha Seldins and against the Arizona Seldins in the amount of $2,997,031, plus postaward simple interest. The final award incorporated each of the prior interim awards issued and found the Arizona Seldins jointly and severally liable for the entire amount.

On May 23, 2017, the Omaha Seldins filed a motion to confirm the final award in district court. Opposing confirmation, the Arizona Seldins filed a motion seeking to modify, correct, and/or vacate the award. The Arizona Seldins argued, summarized, that the arbitrator (1) engaged in misbehavior regarding assignment of the Sky Financial asset, and thus the Omaha Seldins lacked standing after the assignment; (2) failed to provide a reasoned award on three of the Arizona Seldins' key affirmative defenses;

(3) exceeded his power in awarding legal fees and expenses to the Omaha Seldins, because the separation agreement precluded the award of attorney fees; and (4) materially miscalculated the amount of prejudgment interest by applying the incorrect interest rate or, alternatively, exceeded his power in awarding damages that included the calculated amount of prejudgment interest.

Scott, one of the Arizona Seldins, sought further and separate relief. Scott argued that with regard to the Sky Financial claims, the arbitrator made an "evident material mistake in the description of 'Respondents' " and made an award on matters not submitted to him. Scott alternatively argued that the arbitrator exceeded his power or imperfectly executed it, by issuing an award of liability against Scott on those claims. In addition, Scott filed multiple applications seeking to vacate, confirm, and/or modify some of the interim awards in companion cases CI 16-7509, CI 16-8394, CI 17-506, CI 17-651, and CI 17-3637. The district court held that the interim awards were nonfinal arbitration orders and dismissed the applications.

On May 3, 2018, the district court issued an order sustaining the Omaha Seldins' motion to confirm the arbitration award and overruling the Arizona Seldins' motion to vacate the award. The district court also awarded the Omaha Seldins

> an amount equal to the attorneys' fees and costs [the Omaha Seldins] incurred in resisting [the Arizona Seldins'] application seeking vacation or modification of the Final Award and in seeking dismissal of the various applications (Case Nos. CI 16-7509; CI 16-8394; CI 17-506; CI 17-651; and CI 17-3637) . . . Scott . . . filed seeking to

> modify, vacate, or confirm the Arbitrator's Interim Awards [under Neb. Rev. Stat. "§ 25-834"].

The district court had mistakenly referred to the statute authorizing the sanction as Neb. Rev. Stat. § 25-834 (Reissue 1995), instead of § 25-824.

On July 30, 2018, the Omaha Seldins offered into evidence affidavits with attached fee statements from two law firms, demonstrating the amount of fees incurred on behalf of the Omaha Seldins in resisting the Arizona Seldins' motion to vacate and in seeking dismissal of Scott's interim award applications. The affidavits established that the law firm of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O. (McGill), had incurred $131,184.45 in fees and that the law firm of Bryan Cave Leighton Paisner LLP (Bryan Cave) had incurred $211,676.50 in fees, both on behalf of the Omaha Seldins. The exhibit containing the McGill firm's statement of fees had been redacted for privilege purposes. At a subsequent hearing, the Omaha Seldins offered an unredacted version of the McGill firm's fee statement, which the court received into evidence under seal.

On February 28, 2019, the district court issued its order denying the Arizona Seldins' and Scott's motions to alter or amend. In the same order, the district court awarded the Omaha Seldins attorney fees in the amount of $131,184.45.

On June 3, 2019, the Omaha Seldins filed a motion for order nunc pro tunc, requesting that the district court modify the amount of attorney fees to include Bryan Cave's fees of $211,676.50, for a total award of $342,860.95. After a hearing on the motion, in a written order dated August 26, 2019, the district court

denied the Omaha Seldins' motion for order nunc pro tunc. In its order, the district court stated that it had "clearly intended to award attorney fees to [the Omaha Seldins] in an amount, as stated in the Court's Order of February 28, 2019, equal to the attorney fees and costs incurred," but denied the motion after concluding that "[a]n Order Nunc Pro Tunc [could not] be used to enlarge the judgment or substantially amend[ ] the judgment even though said judgment was not the order intended."

On May 11, 2018, Scott filed a motion to alter or amend the district court's May 3 order. Scott argued that the award of attorney fees and costs was beyond the amount permitted as damages and that the arbitrator's award of attorney fees was improper. The motion further asserted that the order had referenced § 25-834 as authorizing the sanction against the Arizona Seldins, but that § 25-834 is unrelated to an award of attorney fees and had been repealed by the Legislature in 2002.

The Arizona Seldins also filed a motion to alter or amend the order. The motion incorporated Scott's arguments and additionally asserted that the district court failed to specifically address some of the Arizona Seldins' prior arguments, including whether the final award violated the automatic bankruptcy stay, whether the final award violated Nebraska's public policy and resulted in a massive windfall to the Omaha Seldins, and whether the arbitrator engaged in evident partiality.

On February 28, 2019, the district court issued a 13-page order detailing its findings and overruling both motions to alter or amend the May 3, 2018, order. The February 28, 2019, order included a nunc pro tunc modification, substituting § 25-824 for the

references to § 25-834 in the previous order. When discussing the sanction ordered against the Arizona Seldins, the district court noted that its May 3, 2018, order had "repeatedly identified the absence of rational factual or legal basis to support [the Arizona Seldins'] theories of modifying or vacating the Final Award." The district court articulated that "[w]hat should have been a fairly simple procedure, [the Arizona Seldins] literally turned into a re-litigation of the Arbitration itself."

The Arizona Seldins appeal the district court's order confirming the award and the district court's order of sanctions under § 25-824. Scott, individually, filed a cross-appeal asserting that the final award against him should be modified, corrected, or vacated by law and that the district court abused its discretion in imposing sanctions and overruling his motion to alter or amend. The Omaha Seldins also filed a cross-appeal, challenging the amount of attorney fees and costs ordered by the district court and the district court's denial of the Omaha Seldins' motion for order nunc pro tunc. The Arizona Seldins subsequently filed a motion to dismiss the Omaha Seldins' cross-appeal, claiming the Omaha Seldins' registration of the district court's judgment with an Arizona state court constituted an acceptance of the benefits of the judgment and, thus, precluded them from appealing the judgment.

We granted the parties' petition to bypass the Nebraska Court of Appeals, and the two cases, S-19-0310 and S-19-0311, have been consolidated for purposes of oral argument and disposition.

III. ASSIGNMENTS OF ERROR

The Arizona Seldins' assignments, renumbered and restated, are that the district court erred in (1) failing to vacate the Sky Financial award because the award was secured through misbehavior by the arbitrator; (2) failing to vacate the final award because the Sky Financial award violates Nebraska public policy by creating a massive windfall for the Omaha Seldins; (3) confirming the arbitrator's award of attorney fees because the award exceeded the scope of the separation agreement, which expressly prohibited an award of attorney fees; (4) awarding sanctions under § 25-824; and (5) excluding evidence of the Omaha Seldins' acting contrary to the separation agreement and the award by currently seeking additional damages in other litigation for the same Sky Financial investment.

Scott's assignments of error on cross-appeal, summarized, are that the district court erred in (1) failing to modify or correct an evident material mistake in the description of respondents in the final award relating to him; (2) failing to vacate the final award on the ground of arbitrator misbehavior; (3) failing to vacate the final award on the ground that the arbitrator exceeded his authority in regard to the claims bar date; and (4) imposing sanctions pursuant to § 25-824 and denying Scott's motion to alter or amend the district court's order regarding the sanctions.

The Omaha Seldins assign on cross-appeal that the district court erred in (1) denying their motion for order nunc pro tunc and (2) failing to award the Omaha Seldins their reasonable attorney fees and costs incurred. While not specifically assigned as

error, the Omaha Seldins also assert that the Arizona Seldins' public policy argument is time barred.

IV. STANDARD OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3]

In reviewing a decision to vacate, modify, or confirm an arbitration award under the FAA, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law.[4] However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.[5]

On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[6] When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.[7]

A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.[8]

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[3] *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[4] *Ronald J. Palagi, P.C. v. Prospect Funding Holdings*, 302 Neb. 769, 925 N.W.2d 344 (2019).

[5] *Id.*

[6] *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013).

[7] *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997).

[8] *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[9]

V. ANALYSIS

1. APPEAL IS GOVERNED BY FAA

Prior to addressing the arbitration issues raised by the parties on appeal, we must determine which law governs—the Uniform Arbitration Act (UAA)[10] or the FAA. Arbitration in Nebraska is governed by the FAA if it arises from a contract involving interstate commerce; otherwise, it is governed by the UAA.[11] The district court determined that the issues presented in this case were governed by the FAA. We agree. Arbitration that arises from a contract involving interstate commerce is governed by the FAA.[12] Because this case arose from a commercial dispute involving properties and companies located in multiple states, the arbitration agreement clearly involves interstate commerce and thus is governed by the FAA.

2. MOTION TO VACATE WAS TIMELY

Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the

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9 *Id.*

10 See Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2016 & Cum. Supp. 2018).

11 *Garlock v. 3DS Properties*, 303 Neb. 521, 930 N.W.2d 503 (2019).

12 *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 757 N.W.2d 205 (2008).

matter before it.[13] The Omaha Seldins claim the Arizona Seldins are precluded from seeking modification or vacatur of the final award on public policy grounds because this argument was not raised within 3 months of the final order being issued as required by § 12 of the FAA.

Section 12 of the FAA sets forth the specific service requirements for motions to vacate, modify, or correct an award and requires notice of an application seeking judicial vacatur to "be served upon the adverse party or his attorney within three months after the award is filed or delivered." This court has held that these notice requirements are jurisdictional and that failure to strictly comply deprives the district court of authority under the FAA to vacate the arbitration award.[14] And, where the district court lacks jurisdiction, this court lacks jurisdiction.[15]

The relevant portion of § 12 provides:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by

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[13] *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018).

[14] See *Karo v. Nau Country Ins. Co.*, 297 Neb. 798, 901 N.W.2d 689 (2017).

[15] *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999).

> the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Thus, the FAA's notice requirements are satisfied if the notice provided complies with Nebraska's statutory notice requirements. Neb. Rev. Stat. § 25-910 (Reissue 2016) requires that the notice be in writing and provides that it

> shall state (1) the names of the parties to the action or proceeding in which it is to be made, (2) the name of the court or the place where and the day on which it will be heard, (4) the nature and terms of the order or orders to be applied for, and (5) if affidavits are to be used on the hearing, the notice shall state that fact. It shall be served a reasonable time before the hearing.

The record reflects that the final arbitration award was issued on April 27, 2017. The Arizona Seldins moved to modify, correct, or vacate the award on July 25. On the same day, the Arizona Seldins provided the other parties with notice of the motion via U.S. mail and electronic mail. While the motion did not specifically assert the Arizona Seldins' public policy argument, the notice included each of the five requirements set forth in § 25-910 and was provided within 3 months of the final order being issued. The Arizona Seldins' notice complied with Nebraska's statutory notice requirements; thus, the notice requirements under § 12 of the FAA were satisfied. The public policy argument was timely raised, and therefore, this court has jurisdiction over the claim.

3. CLAIMS BY ARIZONA SELDINS AND SCOTT

(a) Arbitrator Misbehavior

In their first assignment of error, the Arizona Seldins claim the district court erred in failing to vacate the Sky Financial award because the award was secured through misbehavior by the arbitrator. On cross-appeal, Scott also asserts that the arbitrator's acceptance of Sky Financial constituted misconduct. Scott further asserts that the Arizona Seldins could not have accepted or consented to the interpleader because the transfer abrogated the Omaha Seldins' interest in Sky Financial and thus the interpleader never existed. Scott also claims that the interpleader procedure was not disclosed or explained and that he "should not be bound by a secret interpleader procedure of which he was never informed since he had no need for concern regarding any securities claim at the time the purported interpleader was first proposed for that purpose."[16]

Congress enacted the FAA to provide for "expedited judicial review to confirm, vacate, or modify arbitration awards."[17] The FAA favors arbitration agreements and applies in both state and federal courts.[18] It also preempts conflicting state laws and " 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration

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16 Brief for appellee Scott on cross-appeal at 24.

17 *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008).

18 *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008).

agreements.' "[19] When arbitration has already occurred and a party seeks to vacate, modify, or confirm an award, "' "an extraordinary level of deference" [is given] to the underlying award itself.' "[20] The U.S. Supreme Court has instructed that under the FAA, a court may vacate an arbitrator's decision "'only in very unusual circumstances.' "[21]

The FAA sets forth four grounds under which a court may vacate an arbitration award, and in the absence of one of these grounds, the award must be confirmed.[22] These grounds are as follows:

> (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
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> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a

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[19] *Id.*, 552 U.S. at 353, 128 S.Ct. 978 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)).

[20] *SBC Advanced v. Communications Workers of America*, 794 F.3d 1020, 1027 (8th Cir. 2015).

[21] *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013).

[22] *Hall Street Associates, L. L. C., supra* note 17.

> mutual, final, and definite award upon the subject matter submitted was not made.[23]

Both the Arizona Seldins and Scott claim the arbitrator engage in misbehavior by accepting ownership of Sky Financial. We reject this claim because the Arizona Seldins expressly agreed to the transfer of Sky Financial during the arbitration proceedings, and there is no evidence that the arbitrator engaged in misconduct by accepting the transfer.

The Omaha Seldins attempted to "tender" Sky Financial as a form of interpleader after the Arizona Seldins asserted that a lack of tender is a defense under the Arizona Securities Act in regard to damages. The Omaha Seldins transferred ownership of Sky Financial to the arbitrator " 'for purposes of effectuating the relief to be awarded.' " The relief contemplated was the award of the asset to the appropriate party after a determination had been made.

At the time the assignment was made, the following colloquy occurred:

> ARBITRATOR: Well, I'm in uncharted waters here. I guess my first question is why would the assignment come to me?
>
> [Counsel for the Omaha Seldins]: It's largely in the sense of an interpleader. Is this to be—I mean, it emphasizes the point which is the impossibility, to whom do we tender, do we tender to Millard, do we tender to Sky Financial, to whomever it is that it is deemed you think, to the extent it isn't impossible and

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[23] 9 U.S.C. § 10(a).

> excused by impossibility, you're welcome to determine to whomever it should be tendered.
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> ....
>
> ARBITRATOR: Well, the only way I know how to deal with this right now is to consider this an act of interpleading these interests to me. I'm not an officer of the court, but I do have jurisdiction over this matter, so for the time being, at least, I'll accept them. With that understanding in mind. Is that acceptable to both sides?
>
> [Counsel for the Arizona Seldins]: Yes.

"A party seeking to vacate an award for misconduct under § 10(a)(3) must show that he [or she] was 'deprived of a fair hearing.' "[24] When a party " 'who contests the merits of an arbitration award in court fails to first present the challenges on the merits to the arbitrators themselves, review is compressed still further, to nil.' "[25] Here, the district court noted that the Arizona Seldins appeared to have consented to the arbitrator's acceptance of the assignment as a form of interpleader. We agree. Not only did the Arizona Seldins not object to the assignment at the time it was made, but they agreed that the transfer as an act of interpleading was acceptable after the purpose of the procedure was explained. By consenting to the assignment, the Arizona Seldins waived the argument that the arbitrator's acceptance

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[24] *Brown v. Brown-Thill*, 762 F.3d 814, 820 (8th Cir. 2014) (quoting *Grahams Service Inc. v. Teamsters Local 975*, 700 F.2d 420 (8th Cir. 1982)).

[25] *Medicine Shoppe Intern. v. Turner Investments*, 614 F.3d 485, 489 (8th Cir. 2010) (quoting *Intern. Broth. v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004)).

of the transfer constituted misconduct. And, the record clearly refutes Scott's claim that the intended interpleader was not disclosed or explained.

Furthermore, while the Arizona Seldins' attempt to invoke the grounds set forth in § 10(a)(3) of the FAA by using the term "misconduct," their argument focuses only on the arbitrator's possible partiality as the purported owner of Sky Financial. Under § 10(a)(2), a court may vacate an award for the arbitrator's "evident partiality." However, this is a " 'heavy burden' "[26] because the standard " 'is not made out by the mere appearance of bias.' "[27] "Evident partiality exists where the non-disclosure at issue *'objectively* demonstrate[s] such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.' "[28]

The Arizona Seldins assert that the arbitrator's taking actual possession of Sky Financial without first securing mutual consent of the parties in writing and making it part of the record disqualified him as an interested party under Neb. Rev. Stat. § 24-739 (Reissue 2016). Section 24-739 provides, in relevant part, that a judge shall be disqualified in any case in which he or she is a party or interested except by mutual consent of the parties, which mutual consent is in writing and made part of the record.

The Arizona Seldins contend that § 24-739 applies to arbitrators as well as judges per this court's

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[26] *Williams v. National Football League*, 582 F.3d 863, 885 (8th Cir. 2009) (quoting *Choice Hotels Intern. v. SM Property Management*, 519 F.3d 200 (4th Cir. 2008)).

[27] *Id.*

[28] *Id.* (quoting *Dow Corning Corp. v. Safety National Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003)).

instruction that " 'judges and arbitrators are subject to the same ethical standards.' "[29] However, this court has expressly rejected a "judicial ethics" standard when analyzing the FAA's requirement of "evident partiality." In *Dowd v. First Omaha Sec. Corp.*,[30] we held that " ' "evident partiality" within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.' "

Here, the record contains no evidence that the arbitrator engaged in misconduct or partiality by accepting the assignment of Sky Financial. Rule R-37(a) of the AAA rules, which was incorporated into the parties' separation agreement, provides that "[t]he arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods." Moreover, the Arizona Seldins' argument that the arbitrator's acceptance of Sky Financial constituted misconduct is confuted by their express acceptance of the procedure. This argument is without merit.

(b) Public Policy

In their second assignment of error, the Arizona Seldins assert that the district court erred in failing to vacate the final award because the Sky Financial award violates Nebraska public policy by creating a

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[29] See brief for appellants at 24 (quoting *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004)).

[30] *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 358, 495 N.W.2d 36, 43 (1993) (quoting *Morelite Const. v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79 (2d Cir. 1984)).

massive windfall for the Omaha Seldins. The Arizona Seldins argue that the Omaha Seldins profited substantially from Sky Financial and that the award of damages results in a double recovery and windfall for the Omaha Seldins in violation of public policy. The Arizona Seldins further assert that a court may refuse to enforce an arbitration award on the ground that it is contrary to public policy. In making this assertion, the Arizona Seldins rely on this court's prior holding in *State v. Henderson*.[31]

In *Henderson*, a Nebraska State Patrol officer had been terminated based on his membership in a Ku Klux Klan-affiliated organization. An arbitrator determined that the State Patrol had violated the officer's constitutional rights because his affiliation with the organization was not " 'just cause' " for termination.[32] The arbitrator issued an award ordering the officer to be reinstated.[33] The district court vacated the award after concluding that the officer's reinstatement violated Nebraska public policy, and this court affirmed the judgment.[34]

Unlike the present case, *Henderson* was governed by Nebraska's UAA.[35] However, this court found none of the UAA's statutory bases for vacating an award applied.[36] Noting that the applicable provisions in the UAA and the FAA were similar, the majority, in a 4-to-2 decision, relied on three U.S.

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31 *State v. Henderson*, 277 Neb. 240, 762 N.W.2d 1 (2009).

32 *Id.* at 242, 762 N.W.2d at 3.

33 *Id.*

34 *Id.*

35 See §§ 25-2601 to 25-2622.

36 *Henderson, supra* note 31.

Supreme Court cases applying the FAA when holding that an arbitration award could be vacated on public policy grounds.[37]

The majority in *Henderson* held that a court may refuse to enforce an arbitration award that is contrary to a public policy when the policy is explicit, well defined, and dominant. The majority concluded that Nebraska has "an explicit, well-defined, and dominant public policy" that "the laws of Nebraska should be enforced without racial or religious discrimination" and that the arbitrator's decision reinstating the officer violated this public policy because the policy "incorporates, and depends upon, the public's reasonable perception that the laws are being enforced without discrimination."[38] The dissent argued that the U.S. Supreme Court's narrow public policy exception did not bar judicial enforcement of the award and that the majority was doing precisely what the Supreme Court had prohibited in *Paperworkers v. Misco, Inc.*[39]: engaging in factfinding, which is the arbitrator's function, not the appellate court's.[40]

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[37] *Id.*

[38] *Id.* at 263, 762 N.W.2d at 16-17.

[39] See *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).

[40] *Henderson, supra* note 31 (Stephan J., dissenting). See, also, *Misco, Inc., supra* note 39, 484 U.S. at 44, 45, 108 S.Ct. 364 (criticizing federal Court of Appeals' conclusion that machine operator had ever been or would be under influence of marijuana while he was on job from fact that marijuana was located in his car as "an exercise in factfinding" that "exceeds the authority of a court asked to overturn an arbitration award").

Prior to 2008, a circuit split existed on whether courts could apply nonstatutory standards when reviewing arbitration awards under the FAA. Many courts had been relying on language in the 1953 case of *Wilko v. Swan*,[41] which indicated courts could vacate an award made in "manifest disregard" of the law. In *Hall Street Associates, L. L. C. v. Mattel, Inc.*,[42] the U.S. Supreme Court resolved the split and held that under the FAA, courts lack authority to vacate or modify arbitration awards on any grounds other than those specified in §§ 10 and 11 of the FAA.[43] The Court was explicit that

> [o]n application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies.[44]

Pointedly, the Eighth Circuit Court of Appeals has explained that prior to 2008, "a court could vacate arbitration awards on grounds other than those listed in the FAA."[45] However, "*Hall Street*, resolving a

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41 *Wilko v. Swan*, 346 U.S. 427, 436, 74 S. Ct. 182, 98 L. Ed 168 (1953).

42 *Hall Street Associates, L. L. C., supra* note 17.

43 See John M. Gradwohl, *Arbitration: Interface of the Federal Arbitration Act and Nebraska State Law*, 43 Creighton L. Rev. 97 (2009).

44 *Hall Street Associates, L. L. C., supra* note 17, 552 U.S. at 587, 128 S.Ct. 1396 (quoting 9 U.S.C. § 9).

45 *Medicine Shoppe Intern.*, *supra* note 25, 614 F.3d at 489.

circuit split, held that 'the text [of the FAA] compels a reading of the §§ 10 and 11 categories as exclusive.' "[46]

Because the U.S. Supreme Court's decision in *Hall Street Associates, L. L. C.* abrogated public policy as grounds for vacating an arbitration award under the FAA, we reject the Arizona Seldins' argument. We hold that under the FAA, a court is not authorized to vacate an arbitration award based on public policy grounds because public policy is not one of the exclusive statutory grounds set forth in § 10 of the FAA. We also clarify that *Henderson* was governed by the UAA—not the FAA—and expressly disapprove of any language in *Henderson* that could be construed as authorizing courts to vacate awards on public policy grounds under the FAA.[47]

Because public policy is not a ground for vacating an arbitration award under the FAA, we need not address the merits of the Arizona Seldins' argument that the purported windfall in favor of the Omaha Seldins is contrary to public policy.

(c) Arbitrator's Award of Fees and Costs

In their third assignment of error, the Arizona Seldins argue that the district court erred in confirming the arbitrator's award of attorney fees because the award exceeded the scope of the separation agreement.

Pursuant to § 10(a)(4) of the FAA, a court is authorized to set aside an arbitration award where the arbitrator exceeded his or her powers. However, " '[i]t is not enough . . . to show that the [arbitrator]

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[46] *Id.*

[47] *Henderson*, *supra* note 31.

committed an error—or even a serious error.' "[48] The analysis is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."[49] "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits."[50]

In the final award, the arbitrator ordered the parties to pay their own attorney fees, expenses, and costs arising from the arbitration proceedings, "[e]xcept as specifically provided in Supplemental Interim Award Claim 16," which awarded $1,001,051 in attorney fees and costs to the Omaha Seldins as a partial measure of the damages caused by securities violations related to Sky Financial. The Arizona Seldins assert that the award of attorney fees exceeded the scope of the separation agreement because the agreement expressly prohibited such an award.

This assertion is based on a provision of the separation agreement, which states:

> In General: Except as otherwise provided in this Agreement, each Party shall bear its own costs and expenses (including legal fees and

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[48] *Oxford Health Plans LLC, supra* note 21, 569 U.S. at 569, 133 S.Ct. 2064 (quoting *Stolt-Nielsen S. A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)).

[49] *Oxford Health Plans LLC, supra* note 21, 569 U.S. at 569, 133 S.Ct. 2064.

[50] *Id.*, 569 U.S. at 569, 133 S.Ct. 2064 (quoting *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000)).

> expenses) incurred in connection with this Agreement and the transactions contemplated hereby. No party shall be required to pay to the other Party any commissions, penalties, fees or expenses arising out of or associated with any of the transactions contemplated by this Agreement.

In "Supplemental Interim Award Claim 16," the arbitrator interpreted the parties' agreement regarding the award of fees and costs and found that the agreement did not preclude an award of fees and costs incurred in prosecuting the lost corporate opportunity and securities violations claims related to Sky Financial. The arbitrator concluded that the agreement's "transactions contemplated" language referred to the transactions and process contemplated by the parties in separating their joint ownership interests in the jointly owned properties and entities and not ancillary claims.

The arbitrator's conclusion was based, in part, on the location of the provision within the separation agreement, and on another provision which stated: "Cooperation. The Parties acknowledge and agree that the transactions contemplated by this Agreement are intended to permit the Omaha Seldins, on the one hand, and the Arizona Seldins, on the other hand, to separate their joint ownership of the Properties." In addition, the arbitrator found that the rules of the AAA, which the parties had incorporated into the separation agreement, authorized the award of attorney fees and costs under circumstances such as those presented here.

We hold that the arbitrator did not exceed his authority under the separation agreement by issuing

the award of fees and costs. In the parties' separation agreement, the parties each agreed to resolve their disputes relating to severing their jointly owned properties through final and binding arbitration. By entering into the agreement, the parties bargained for the arbitrator's construction of that agreement. The arbitrator construed the agreement as permitting the award of attorney fees for the parties' ancillary claims. The Sky Financial claim was an ancillary claim, and thus, the arbitrator did not exceed his authority in awarding costs and fees related to that claim. The Arizona Seldins' third assignment of error is without merit.

(d) Sanctions Under § 25-824

In their fourth assignment of error, the Arizona Seldins argue that the district court erred in awarding sanctions against them under § 25-824. Scott individually asserts on cross-appeal that the district court abused its discretion in imposing sanctions against Scott for filing the various applications in CI 16-7509, CI 16-8394, CI 17-506, CI 17-651, and CI 17-3637 and in overruling his motion to alter or amend the district court's order.

Section 25-824(2) provides that

> in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

We have stated that attorney fees shall be awarded against a party who alleged a claim or defense that the court determined was frivolous, interposed any part of the action solely for delay or harassment, or unnecessarily expanded the proceeding by other improper conduct.[51] A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position.[52] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[53] Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[54]

In seeking to modify or vacate the final award, the Arizona Seldins asserted four arguments. As previously summarized, these arguments were that the arbitrator (1) engaged in misbehavior relating to the assignment of the Sky Financial property, (2) failed to provide a reasoned award on three affirmative defenses raised by the Arizona Seldins related to the Sky Financial claims, (3) exceeded his power in awarding legal fees and expenses to the Omaha Seldins, and (4) materially miscalculated the prejudgment interest when awarding damages.

In its May 3, 2018, order, the district court entered judgment in favor of the Omaha Seldins and against

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51 *Moore v. Moore*, 302 Neb. 588, 924 N.W.2d 314 (2019).

52 *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010).

53 *Id.*

54 *Id.*

the Arizona Seldins under § 25-824. When evaluating the Arizona Seldins' claim that the arbitrator engaged in misbehavior, the district court noted that the Arizona Seldins appeared to have consented to the assignment of Sky Financial, they had presented no evidence demonstrating the arbitrator had improper motives when accepting the assignment of Sky Financial, and their argument "conflicts with the facts and the law."

With regard to the argument that the arbitrator had failed to provide a reasoned award in relation to the Arizona Seldins' affirmative defense involving the claims bar date, the district court found this argument lacked merit and "mischaracterize[d]" the significance of the relation-back doctrine under Fed. R. Civ. P. 15. In doing so, the district court called attention to the arbitrator's written findings and awards relating to the Sky Financial claim, which consisted of 60 pages and contained multiple paragraphs explaining the arbitrator's reasoning when rejecting the defense.

The district court also rejected the argument that the arbitrator exceeded his power when awarding legal fees and expenses. Recognizing that the cases cited by the Arizona Seldins when asserting this argument either did not support their argument or were not relevant, the district court found the arbitrator had correctly interpreted and applied the separation agreement when awarding the fees and costs.

The district court characterized the Arizona Seldins' argument that the arbitrator had materially miscalculated the prejudgment interest as "misleading" and "fundamentally misplaced." Noting that allegations of an arbitrator's legal error are not

reviewable, the district court found that the Arizona Seldins had failed to identify *any* " 'mathematical error' " in the arbitrator's calculations. The court recognized that in making this assertion, the Arizona Seldins were attempting to challenge the merits of the final award by arguing that the arbitrator had committed legal error.

Addressing Scott's individual claims, the district court found there was no legal basis for Scott's challenge of the interim awards as the parties had agreed that the arbitrator's interim awards were nonfinal. Further, each of the 12 interim awards included the following statement: "The parties understand this Interim Award is not a final appealable arbitration award, but it will be part of the law of the case moving forward." Still, Scott proceeded to file lawsuits seeking to modify, vacate, and/or confirm five of these awards. In addition to finding the interim applications frivolous, the district court found Scott's argument that he should not be held jointly and severally liable to be "misleading."

Reviewing the record and arguments in this case, we agree with the district court in that "[w]hat should have been a fairly simple procedure, [the Arizona Seldins] literally turned into a re-litigation of the Arbitration itself." The district court issued the § 25-824 sanction after repeatedly finding the absence of rational factual or legal bases to support the Arizona Seldins' theories of modifying or vacating the final award. We hold that the district court did not abuse its discretion in awarding attorney fees and costs under § 25-824.

We also reject Scott's claim that the district court abused its discretion in overruling his motion to alter or amend the district court's order and judgment.

Scott argues that his arguments were not ridiculous and that the applications regarding the interim awards "were filed only in an 'abundance of caution' and sought an 'immediate stay' to minimize any action by the parties or the district court."[55]

In support of his argument, Scott first cites *In re Chevron U.S.A., Inc.*,[56] in which the Texas Court of Appeals held that an arbitrator's interim awards were sufficiently final for purposes of confirmation and vacation. The district court specifically rejected this argument in its February 28, 2019, order. The district court noted that *In re Chevron U.S.A., Inc.* lacked evidence demonstrating that the parties or arbitration panel had agreed or intended the interim decision to be nonfinal and non-appealable. The district court also recognized that the Arizona Seldins had "not cited to a case where an interim award that both the parties and the Arbitrator intended to be non-final was treated as a final, appealable arbitration award."

Scott also cites *American Intl. Specialty Lines Ins. Co. v. Allied Capital Corp.*[57] However, that case is clearly distinguishable from the facts presented here as the parties had specifically requested that the arbitration panel make a final determination on one of the issues.

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55 Brief for appellee Scott on cross-appeal at 34.

56 *In re Chevron U.S.A., Inc.*, 419 S.W.3d 329 (Tex. App. 2010).

57 *American Intl. Specialty Lines Ins. Co. v. Allied Capital Corp.*, 167 A.D.3d 142, 86 N.Y.S.3d 472 (2018).

We hold that the district court did not abuse its discretion in finding Scott's interim applications to be frivolous and ordering sanctions accordingly.

(e) Evidence of Omaha Seldins' Claims in Arizona State Court

In their fifth assignment of error, the Arizona Seldins argue that the district court erred in excluding evidence of the Omaha Seldins' acting contrary to the separation agreement and the award by currently seeking additional damages in other litigation for the same Sky Financial investment.

This court has held that " '[a]n appeal or error proceeding, properly perfected, deprives the trial court of any power to amend or modify the record as to matters of substance[.]' "[58] An appeal is taken by filing a notice of appeal and depositing the required docket fee with the clerk of the district court.[59]

The Arizona Seldins filed their notice of appeal in these cases on March 27, 2019. On July 5, the Arizona Seldins filed a motion in the district court seeking to supplement the bill of exceptions and/or to reopen the record. The Arizona Seldins claimed that after the arbitration award had been confirmed, the Omaha Seldins filed a complaint in an Arizona state court alleging the same or similar claims regarding Sky Financial that had been arbitrated in these cases. The Arizona Seldins sought to supplement the record with evidence of the newly filed Arizona cases for purposes of this appeal. The district court overruled the motion on the ground that perfection of an appeal

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[58] *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 231, 159 N.W.2d 310, 313 (1968).

[59] See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018).

deprives the trial court of any power to amend or modify the record as to matters of substance.

We hold that the district court did not err when overruling the motion to supplement the record. Because the Arizona Seldins had perfected their appeal prior to the filing of the motion, the district court did not have jurisdiction to supplement the record with evidence of the Omaha Seldins' purported filings. The Arizona Seldins' fifth assignment of error is without merit.

(f) Description of "Respondents"

Scott individually asserts on cross-appeal that the district court erred in failing to modify or correct an evident material mistake in the description of "Respondents" in the final award relating to Scott. Scott argues that the parties agreed Scott had not personally violated any securities laws and, therefore, he cannot be jointly and severally liable on the Sky Financial award.

In the Arizona Seldins' motion to modify or vacate the arbitration award, Scott individually asserted that the arbitrator had made a material mistake in the final award relating to the description of "Respondents." In its May 3, 2019, order overruling the motion, the district court found the final award had properly provided that Scott was jointly and severally liable for all damages awarded. Classifying Scott's argument as misleading, the district court recognized that although the parties agreed Scott had not violated any securities laws, he usurped corporate opportunities relating to Sky Financial. The district court also noted that Scott's liability was not based on common-law principles of joint and several liability,

but on his contractual liability as set forth in the parties' separation agreement.

Scott attempts to invoke § 11(a) of the FAA, which permits a court to modify or correct an award "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award."

Under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms."[60] "An evident material mistake is an error that is apparent on the face of the record and would have been corrected had the arbitrator known at the time.[61]

In the present case, the definition of which individuals and entities comprised each party was set forth in the separation agreement and in the first case management order. Throughout the arbitration proceedings, the individuals and entities comprising the Omaha Seldins and the Arizona Seldins agreed to joint and several liability for any award entered against the Omaha Seldins or the Arizona Seldins, respectively.

Scott entered into a binding agreement to arbitrate all claims relating to the separation of the parties' jointly owned properties, and he is included in the definition as one of the individuals comprising the Arizona Seldins. Scott also agreed to joint and several liability for all awards issued against the

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60 *Henry Schein v. Archer and White Sales*, —— U.S. ——, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)).

61 94 Am. Jur. *Trials* 211, § 96 at 359 (2004).

Arizona Seldins. According to the terms of the separation agreement, Scott is jointly and severally liable for all awards issued. We hold that the district court did not err in overruling Scott's motion.

(g) Claims Bar Date

Scott individually asserts that the district court erred in failing to vacate the final award relating to the Sky Financial claim because the claim was untimely and the arbitrator exceeded his powers by permitting the Omaha Seldins to bring the claim.

Again, §§ 10 and 11 of the FAA set forth the exclusive grounds for vacating or modifying an arbitration award.[62] " '[S]o long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the award should be confirmed."[63]

The separation agreement contains a provision stating that "reasonable amendments to Claims in pending actions shall be allowed in the Mediator's discretion based on discovery, admissions, interim decision, and other developments in the prosecution of the Claim, consistent with the Federal Rules of Civil Procedure." On December 3, 2013, the arbitrator granted the Omaha Seldins leave to amend their claims on or before December 6, "in the interests of justice and economy."

Scott complains that the parties' agreed-upon claims bar date was July 2, 2012, and that the Omaha Seldins' Sky Financial claim was untimely because it

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62 See *Hall Street Associates, L. L. C.*, *supra* note 17.

63 *Beumer Corp. v. ProEnergy Services, LLC*, 899 F.3d 564, 565 (8th Cir. 2018) (quoting *Medicine Shoppe Intern., supra* note 25).

was filed on November 14, 2014. Scott argues that the arbitrator exceeded his powers by granting leave to amend because under Fed. R. Civ. P. 15, he was required to apply the relation-back doctrine when assessing the timeliness of the claim.

Rejecting this argument, the district court found that the arbitrator interpreted the separation agreement when concluding leave to amend should be granted and that the arbitrator's decision was consistent with Fed. R. Civ. P. 15(a)(2). That section provides that "[t]he court should freely give leave [to amend] when justice so requires."[64] The district court also found that this argument mischaracterized the significance of "relation back" under Fed. R. Civ. P. 15 because the amended pleading did relate back to a claim that had originally been filed on October 9, 2011, prior to the parties' claims bar date.

We hold that the district court did not err in rejecting this claim. Scott does not argue that the arbitrator was not interpreting the separation agreement; rather, he argues that the arbitrator "was required to apply the 'relation-back' method of review under the [Federal Rules of Civil Procedure], before allowing the Sky Financial Claim to be brought after the Claims Bar Date."[65] The record clearly demonstrates the arbitrator was construing the separation agreement when he concluded that leave should be granted. The arbitrator's decision to grant the leave is not grounds to vacate the award. This argument is without merit.

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64 Fed. R. Civ. P. 15(a)(2).

65 Brief for appellee Scott on cross-appeal at 33.

4. OMAHA SELDINS' CROSS-APPEAL

On cross-appeal, the Omaha Seldins argue they are entitled to reasonable attorney fees and costs in the amount of $342,860.95. Alternatively, the Omaha Seldins seek a determination that the district court erred in denying their motion for order nunc pro tunc.

In determining the amount of a cost or attorney fee award under § 25-824(2), Neb. Rev. Stat. § 25-824.01 (Reissue 2016) states that "the court shall exercise its sound discretion."

In its May 3, 2018, order, the district court entered judgment in favor of the Omaha Seldins for an amount equal to the attorney fees and costs incurred in resisting the Arizona Seldins' application seeking vacation or modification of the final award and in seeking dismissal of the various applications filed by Scott. After the judgment was issued, the Omaha Seldins submitted evidence demonstrating that it had incurred $342,860.95 in fees and costs: $211,676.50 by the Bryan Cave law firm and $131,184.45 by the McGill law firm. However, when calculating the amount of fees to be awarded, the district court neglected to include the Bryan Cave law firm's fees of $211,676.50. Although intending to include the fees from both law firms, the district court's order included only the McGill law firm's fees for a total amount of $131,184.45.

The Omaha Seldins filed a motion for order nunc pro tunc, seeking an order substituting $342,860.95 for the total amount of fees incurred. In a written order, the district court stated that it had "clearly intended to award attorney fees to Petitioners in an amount, as stated in the Court's Order of February 28, 2019, equal to the attorney fees and costs

incurred." But the court denied the motion after concluding that "[a]n Order Nunc Pro Tunc [could not] be used to enlarge the judgment or substantially amend[ ] the judgment even though said judgment was not the order intended."

Pursuant to the May 3, 2018, order, the Omaha Seldins are entitled to their judgment for "an amount equal to the attorneys' fees and costs [the Omaha Seldins] incurred in resisting [the Arizona Seldins'] application seeking vacation or modification of the Final Award and in seeking dismissal of the various applications [filed by Scott]." The district court's error in calculating the amount of the award resulted in the Omaha Seldins' being unfairly deprived of their right to $211,676.50 in fees incurred by the Bryan Cave law firm. Thus, the district court abused its discretion in determining the overall amount of the award.

Ordinarily, an improper calculation of attorney fees would require a remand in order to reconfigure the award.[66] However, when the record is sufficiently developed that a reviewing court can apply the law to the facts and calculate a fair and reasonable fee without resorting to remand, that route is available to the appellate court.[67]

Here, a remand is not required because the Omaha Seldins presented evidence demonstrating the amount of fees incurred, and we find these fees to be reasonable. Further, a remand would serve only to needlessly prolong this litigation and further undermine the finality of the arbitration award. We

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66 *Cedars Corp. v. Sun Valley Dev. Co.*, 253 Neb. 999, 573 N.W.2d 467 (1998).

67 *Id.*

conclude that the Omaha Seldins are entitled to a total fee award of $342,860.95. Accordingly, we order the Arizona Seldins to pay the Omaha Seldins an additional $211,676.50 for fees incurred by the Byran Cave law firm on behalf of the Omaha Seldins.

Because we order the payment of $211,676.50, we do not reach or address the issue of whether the district court erred in denying the Omaha Seldins' motion for order nunc pro tunc. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[68]

5. ARIZONA SELDINS' MOTION TO DISMISS CROSS-APPEAL

The Arizona Seldins, along with Scott and Millard, filed a joint motion to dismiss the Omaha Seldins' cross-appeal on the ground that the Omaha Seldins' registration of the district court's judgment with an Arizona state court constituted a voluntary acceptance of the benefits of the judgment and, thus, prevents the Omaha Seldins from prosecuting their cross-appeal. The Omaha Seldins maintain that they have not attempted to collect upon the judgment entered on February 28, 2019, and that the registration of the judgment was merely a procedural act taken for purposes of collecting on the judgment when collection was permitted.

Generally, under the acceptance of benefits rule, an appellant may not voluntarily accept the benefits of part of a judgment in the appellant's favor and afterward prosecute an appeal or error proceeding

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[68] *Selma Development v. Great Western Bank*, 285 Neb. 37, 825 N.W.2d 215 (2013).

from the part that is against the appellant.[69] However, the rule does not apply when the appellant has conceded to be entitled to the thing he or she has accepted and where the appeal relates only to an additional claim on his or her part.[70] In asserting that the acceptance of benefits rule precludes an appeal, the burden is on the party asserting the rule to demonstrate that the benefits of the judgment were accepted.[71]

Here, the Omaha Seldins agree with the judgment, except for seeking an additional recovery of attorney fees that were mistakenly omitted from the district court's judgment. Further, the Arizona Seldins have presented no evidence demonstrating the Omaha Seldins have accepted the benefits of the judgment. We hold that the Omaha Seldins' mere registration of the judgment does not preclude their cross-appeal for the recovery of additional fees and costs. This argument is without merit.

VI. CONCLUSION

The FAA provides that a court must confirm an arbitration award unless grounds exist for vacating or modifying the award under § 10 or § 11 of the FAA.[72] Because neither the Arizona Seldins nor Scott have demonstrated any such grounds exist, the parties are bound by their agreement to arbitrate and the arbitrator's construction of that agreement.

We hold that the district court did not err in confirming the arbitration award and denying the

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69 *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006).

70 *Id.*

71 See 5 Am. Jur. 2d *Appellate Review* § 543 (2018).

72 *Hall Street Associates, L. L. C., supra* note 17.

motions to vacate and/or modify the award, nor did it err in denying the Arizona Seldins' motion to supplement the record. We further hold that the district court did not abuse its discretion when awarding attorney fees in favor of the Omaha Seldins or when denying Scott's motion to alter or amend the court's May 3, 2018, order. We conclude that the Omaha Seldins' registration of the district court's judgment does not preclude the Omaha Seldins' cross-appeal. Finally, we hold that the Omaha Seldins are entitled to reasonable attorney fees and costs incurred in confirming the arbitration award and resisting the various applications filed by the Arizona Seldins and Scott and that the district court abused its discretion when failing to include the Bryan Cave law firm's fees in its calculation of the amount of fees to be awarded.

Accordingly, we (1) affirm the district court's confirmation of the arbitration award, (2) affirm the district court's denial of the Arizona Seldins' and Scott's motions to vacate and/or modify the award, (3) affirm the district court's denial of the Arizona Seldins' motion to supplement the record, (4) affirm the district court's award of sanctions under § 25-824, (5) overrule the Arizona Seldins' motion to dismiss the Omaha Seldins' cross-appeal, and (6) sustain the Omaha Seldins' cross-appeal and order the fee judgment in favor of the Omaha Seldins be increased to $342,860.95.

Affirmed as modified.

THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THEODORE M. SELDIN, individually and as Trustee of the AMENDED AND RESTATED THEODORE M. SELDIN REVOCABLE TRUST, DATED MAY 28, 2008, Howard Scott Silverman, as Trustee of the AMENDED AND RESTATED STANLEY C. SILVERMAN REVOCABLE TRUST, DATED AUGUST 26, 2006; SILVERMAN HOLDINGS, LLC, a Nebraska limited liability company; SCS FAMILY, LLC, a Nebraska limited liability company; TMS & SNS FAMILY, LLC, a Nebraska limited liability company; Sarah N. Seldin and Irving B. Epstein, as Trustees of the THEODORE M. SELDIN AND SARAH N. SELDIN CHILDREN'S TRUST, DATED JANUARY 1, 1995; Uri Ratner, as Trustee of the STANLEY C. SILVERMAN AND

Case No. CI 17-4272 and Case No. CI 17-6276

(Companion Case Nos. CI 16-7509; CI 16-8394; CI 17-506; CI 17-651; and CI 17-3637)

ORDER

#44 FILED
IN DISTRICT
COURT
DOUGLAS
COUNTY
NEBRASKA

MAY 03 2018

JOHN M. FRIEND
CLERK DISTRICT
COURT

NORMA R. SILVERMAN IRREVOCABLE TRUST AGREEMENT (2008), DATED APRIL 10, 2008; John W. Hancock, Irving B. Epstein, and Randall R. Lenhoff, as Trustees of the THEODORE M. SELDIN AND SARAH N. SELDIN IRREVOCABLE TRUST AGREEMENT (2008), DATED MAY 12, 2008; and SELDIN COMPANY, a Nebraska corporation,

Petitioners,

vs.

MILLARD R. SELDIN, individually and as Trustee of the MILLARD R. SELDIN REVOCABLE TRUST, DATED OCTOBER 9, 1993, SCOTT A. SELDIN, individually and as Trustee of the SELDIN 2002 IRREVOCABLE TRUST, DATED DECEMBER 13, 2002, SELDIN REAL ESTATE, INC., an Arizona corporation; KENT CIRCLE INVESTMENTS, LLC, an Arizona limited liability company; and

BELMONT INVESTMENTS, LLC, an Arizona limited liability company

Respondents.

THESE MATTERS CAME before the Court on August 31, 2017 and, at the request of the Court's, a subsequent hearing was scheduled for January 26, 2018 to allow the parties to submit additional evidence and argument. Due to scheduling conflicts, the parties requested that the hearing be rescheduled. The hearing was held on February 27, 2018 at which time the Court took the matters under advisement.

Petitioners[1] were represented by counsel, Robert Lepp, Sean McElenney and Gregory Iannelli; Respondents[2] were represented by Bartholomew Mcleay, Matthew Enenbach, Alison Gutierrez, Jason Bruno, Robert Sherrets and Diana Vogt.

Petitioners' filed a Motion to Confirm Arbitration Award as Judgment (Motion to Confirm) on May 23, 2017 in Case No. CI17-4272 and Respondents filed an Application to Modify or Correct and Confirm as Modified or Corrected or, Alternatively to Vacate Arbitration Award (Motion to Vacate) on July 25,

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[1] Petitioners are often referred to as "the Omaha Seldins" in the Interim Awards and Final Award. For consistency, the Court will, for the most part, refer to the Omaha Seldins as Petitioners in this Order.

[2] Respondents are often referred to as the "the Arizona Seldins" in the Interim Awards and the Final Award. For consistency, the Court will, for the most part, refer to the Arizona Seldins as Respondents in this Order.

2017 in Case No. CI17-6276, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, or alternatively, Neb. Rev. Stats. §§ 25-2612, 25-2615 and 25-2617. Petitioners seek confirmation of the Arbitrator's Final Award and rendition of a judgment in their favor and against Respondents, jointly and severally, in the principal amount of $2,997,031, plus post-Final Award interest as provided by Revised Statutes of Nebraska § 45-103. In their Motion to Vacate, Respondents seek to modify, correct and/or vacate the Arbitrator's Final Award in a number of respects.

INTRODUCTION

Petitioners are the net prevailing parties in an arbitration with Respondents in the approximate amount of $2.997 million. The Arbitrator entered the Final Award in April, 2017. The Final Award was entered after several years of protracted discovery and sixty-one separate telephonic and in-person case management conferences with the Arbitrator, followed by arbitration hearings spanning fourteen months and fifty-three hearing days, during which fifty-eight tact and expert witnesses testified and 1,985 exhibits were admitted in evidence. After each of eleven bifurcated hearings, the Arbitrator issued findings in specifically designated "Interim Awards." The Arbitrator provided the parties the opportunity to seek reconsideration of the Interim Awards, and Respondents availed themselves of this opportunity. After the final Interim Award was issued, the Arbitrator further granted the parties a pre-Final Award procedure through which the parties again could challenge any aspects of an Interim Award. Following oral argument on Respondents' final objections, the Arbitrator entered a Final Award in which Respondents prevailed on some claims,

Petitioners prevailed on other claims, and under which the Petitioners are the net prevailing parties. Petitioners are now seeking an Order of the Court confirming the Final Award and render a judgment in the amount of $2,997,031 (plus post-award simple interest on the principal amount from and after the date of the Final Award until paid in full) in favor of Petitioners and jointly and severally against the Respondents.

Respondents oppose confirmation and seek to vacate and/or modify the Final Award for a number of reasons, each of which will be discussed below. Respondents also filed Applications in Case Nos. CI 16-7509; CI 16-8394; CI 17-506; CI 17-651; and CI 17-3637 (the Companion Cases) seeking to vacate, confirm and/or modify some of the Interim Awards. The Court will enter Orders in the Companion Cases simultaneously to the entry of this Order.

The parties agree that the FAA governs the post-arbitration motions before this Court. Under the FAA, an arbitrator's award is all but impervious to judicial review and the Court must confirm the Final Award absent proof by Respondents that one or more of the extremely limited and exclusive grounds for judicial review under the FAA is satisfied.

Respondents seek to modify or vacate the Final Award, summarized, as follows:

(1) **Arbitrator Misbehavior**. Respondent's agree that the Court should modify the Final Award by striking the Sky Financial Claim Award in the Final Award or, alternatively, vacate the Final Award based on the Arbitrator's alleged misbehavior, by which the rights of Respondents have been

prejudiced, concerning the assignment of the Sky Financial Property and further due to Petitioners lack of standing after the assignment to the Arbitrator was made;

(2) **No Reasoned Award on Key Affirmative Defense**. Respondents argue that the Court should vacate the Final Award because the Arbitrator failed to provide a reasoned award on three key affirmative defenses of Respondents relating to the Sky Financial Claims, namely, the Claims Bar Date;

(3) **Legal Fees and Expenses Not Allowed**. Respondents argue that the Court should vacate the Final Award because the Separation Agreement precludes the award of attorneys fees and the Arbitrator exceeded his power in awarding legal fees and expenses to Petitioners; and

(4) **Materially Miscalculated Prejudgment Interest**. Respondents argue that the Court should modify or correct the Final Award to reduce the damages in the form of prejudgment interest awa.r ded to Petitioners on the Sky Financial Claims by reducing the applicable interest rate on the Sky Financial Claims to 4.5%, reducing the total interest for MTS to $427,117.22 and for SD&M to $1,114,491.77, on the ground the Arbitrator materially miscalculated these figures. Alternatively, Respondents argue that the Court should vacate the Final Award on the basis the Arbitrator exceeded his power in awarding damages that included the

prejudgment interest shown in the Final Award.

Respondent Scott Seldin also seeks further, separate relief as follows:

(5) **Material Mistake in Description and No Joint and Several Liability.** Respondent Scott Seldin argues that the Final Award should be modified or corrected with regard to the evident material mistake in the description of "Respondents" and further to exclude him from joint and several liability with regard to the Sky Financial Claims on the ground the Arbitrator awarded upon matters not submitted to him in finding Scott liable under the Sky Financial Claims. Alternatively, Respondent Scott Seldin argues that the Court should vacate the Final Award on the basis the Arbitrator exceeded his power, or so imperfectly executed it, in rendering an award of liability and/or joint and several liability against Scott on the Sky Financial Claims.

FACTUAL AND PROCEDURAL HISTORY

The Separation Agreement

On or about February 18, 2010, Petitioners and Respondents entered into a "Separation Agreement." The Separation Agreement had two paramount objectives: (1) to separate Petitioners' and Respondents' joint interests in certain real estate assets through a bidding process; and (2) to resolve by arbitration all disputes by and between the Respondents and the Petitioners.

Sections 8.3 and 9.14.1 of the Separation Agreement govern the scope of arbitration, which claims the parties generally referred to as "Ancillary Claims." The parties to the Separation Agreement agreed that all Ancillary Claims would be resolved exclusively through binding arbitration before an arbitrator, Stefan Tucker ("Tucker"), a lawyer with the Washington D.C. office of the Venable, LLP law firm ("Venable"). If Tucker was unable to serve as the arbitrator, the Separation Agreement identified Robert Gottlieb ("Gottlieb"), a Venable partner, as Tucker's successor. If both Tucker and Gottlieb were unable to serve as arbitrator, the Separation Agreement instructed that the managing partner of Venable would choose the successor arbitrator. Petitioners and Respondents agreed that their arbitration proceeding would be conducted in accordance with the American Arbitration Association's ("AAA") Commercial Division Rules ("AAA Rules").

Sec. 9.1 of the Separation Agreement provides as follows:

> Except as otherwise provided in this Agreement, each Party shall bear its own costs and expenses (including legal fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby. No party shall be required to pay to the other Party any commissions, penalties, fees,, or expenses arising out of or associated with any of the transactions contemplated by this Agreement.

Sec. 9.14 of the Separation Agreement provides (in relevant part) as follows:

> Any Dispute shall be asserted by the aggrieved party in writing by setting forth the nature of the claim or cause of action, the facts supporting such claim or cause of action, and the remedy sought ("Claim") and by providing notice of the Claim to the other party and the Mediator . . . .

THE ARBITRATION PROCEEDINGS

Initial Arbitration before Tucker

In October, 2011, after the parties completed the bidding process to separate their jointly-owned real estate interests, the parties commenced arbitration of their Ancillary Claims before Tucker. In April, 2012, despite the on-going arbitration before Tucker, Respondents filed the first of three lawsuits before the Douglas County District Court,[3] wherein they sought to litigate their Ancillary Claims, or in the alternative remove Tucker as the parties' arbitrator. All three lawsuits were dismissed, and Respondents' claims were compelled back to arbitration.

On May 23, 2013, Tucker resigned. After Tucker's resignation, Venable declined any further involvement in the parties' arbitration.

Appointment of New Arbitrator

Given Tucker's resignation and Venable's refusal to be further involved in the parties' arbitration, the parties agreed to select a new arbitrator through the AAA, consistent with the requirements of the Separation Agreement. On October 15, 2013, Eugene R. Commander (the "Arbitrator'), then managing

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[3] These actions can be found at: CI 12-3558; CI 12-6030; and CI 12-11522.

partner with the Denver, Colorado office of the Polsinelli law firm, was appointed as the new arbitrator.

The Arbitration Hearings

The arbitration recommenced in October, 2013, before the newly-appointed Arbitrator. Respondents asserted six Ancillary Claims and Petitioners asserted four. Each Ancillary Claim involved numerous independent causes of action and affirmative defenses.

In an effort to manage progression of the extensive paper and electronic discovery conducted by the parties along with the host of other issues that would arise and need addressment on a regular basis, the Arbitrator held routine, bi-weekly case management conferences. The case management conferences were typically conducted by telephone; however, the parties also participated in day-long in-person case management conferences with the Arbitrator on separate occasions in Omaha, Denver, and Phoenix. In total, the parties participated in sixty-one case management conferences with the Arbitrator.

Due to the number of Ancillary Claims, the numerous causes of action and affirmative defenses asserted within each Ancillary Claim, pursuant to his authority under AAA Rules 8 and 32, the Arbitrator recommended, and the parties subsequently agreed, that the arbitration hearing on each claim would be bifurcated, with the first hearing to address liability and the second hearing to address damages, if necessary. The Arbitrator recommended bifurcation so that the parties could more effectively present their evidence in a manageable and digestible fashion for each Ancillary Claim, and so that liability and

damage determinations could be analyzed in a more efficient and cost-effective manner.

The parties were provided the opportunity to consider the Arbitrator's bifurcation proposal, and agreed to bifurcation and subsequently adopted the Arbitrator's proposed schedule of bifurcated proceedings.

After conducting extensive discovery, the parties participated in the bifurcated arbitration hearings which commenced in September, 2015. Eleven evidentiary hearings spanning fifty-three hearing days were held over the next fourteen months. During the eleven evidentiary hearings, fifty-eight fact and expert witnesses testified, and 1,985 exhibits were admitted in evidence. As required by the Separation Agreement, all of the evidentiary hearings were held in Omaha, Nebraska.

At the conclusion of each bifurcated hearing, the Arbitrator issued Interim Awards pursuant to AAA Rule 37, wherein he made determinations regarding liability or damages, as appropriate. The parties agreed that the Interim Awards would not be considered as final awards. The parties' chief concern in this regard was to avoid piecemeal pursuit of confirmation, modification, or vacation of an Interim Award before all Ancillary Claims had been arbitrated, the arbitration proceeding closed, and a comprehensive Final Award issued.

Between October 17, 2015, and November 14, 2016, the Arbitrator issued twelve Interim Awards addressing six Ancillary Claims (ten were originally filed but several were dismissed prior to hearing). After the last arbitration hearing, the Arbitrator provided the parties with a final opportunity to

submit extensive pre-final award statements addressing any relevant evidence or applicable legal authorities they felt the Arbitrator misconstrued or disregarded in issuing his Interim Awards. The parties were then afforded the opportunity to address these issues before the Arbitrator during a March 22, 2017, telephonic case management conference, at which time Respondents presented argument and Petitioners responded to questions posed by the Arbitrator. On April 12, 2017, the Arbitrator issued an Order to Close Evidence and Hearings, whereby he formally closed the evidence and hearings for purposes of issuing a final award pursuant to AAA Rule 45.

The Final Award

On April 27, 2017, the Arbitrator served the Final Award upon the parties in compliance with AAA Rule 49. In compliance with AAA Rule 45, the Final Award was issued within thirty calendar days from the date the parties' arbitration hearing formally closed. The Final Award incorporates by reference all of the Arbitrator's previously issued Interim Awards. The Final Award renders a net award in favor of Petitioners and against Respondents in the amount of $2,997,031, plus post-award simple interest on the principal amount from and after the date of the Final Award until paid in full. The Final Award finds that Respondents are jointly and severally liable for the full amount awarded to the Petitioners under the Final Award.

DISCUSSION

The FAA governs transactions affecting "commerce among the several states." 9 U.S.C. § 1. The FAA clearly applies to the disputes between the

parties because the arbitration was a commercial dispute involving individuals, properties, and companies located in Arizona, Nebraska, and elsewhere in the United States. In a prior action between the parties in Douglas County District Court which involved the Separation Agreement, Judge Thomas A. Otepka found the arbitration provision within the parties' Separation Agreement "involves commerce" and is thereby governed by the FAA. (Case No. CI 12-3558 (Aug. 8, 2012)) Judge Otepka's Order states "The Court agrees and finds that the Separation Agreement, which involves commerce, is governed by the FAA.".

The Court must apply the FAA because "[t)he U.S. Supreme Court has held that the FAA is substantive law under Congress' Commerce Clause authority and that it applies in state and federal court." Aramark Unif. & Career Apparel. Inc. v. Hunan, Inc., 276 Neb. 700, 704-705 (2008). Nebraska's Uniform Arbitration Act ("UAA") applies only to purely procedural matters—provided the procedure does not conflict with the objectives of the FAA. See, Kremer v. Rural Community Ins. Co., 280 Neb. 591 (2010). An application to confirm an arbitration award is a substantive matter governed by the FAA. See, Dowd v. First Omaha Securities Corp., 242 Neb. 347, 356 (1993) (in state court action where arbitrating party sought to vacate arbitration award, the Nebraska Supreme Court found that arbitration agreement was governed by the FAA and determined that Section 10 of the FAA was controlling).

The FAA "expresses a presumption that arbitration awards will be confirmed." Nationwide Mutual Ins. Co. v. Home Ins. Co., 429 F.3d 640, 643 (6th Cir. 2005) (affirming judgment confirming

award); Frazier v. CitiFinancial Corp., LLC, 604 F.3d 1313, 1321 (11th Cir. 2010) The FAA provides that the Court "must grant" an order confirming the award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. This means that the Court "has no choice but to confirm" if the statutory exceptions are not satisfied. UHC Mgmt. Co. Inc. v. Computer Sciences Corp., 148 F.3d 992, 997 (8th Cir. 1998).

Under Section 10 of the FM, the only permissible grounds on which to vacate an award are:

> (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
>
> (3) 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.

9 U.S.C. §§ 11(a)-(c) provides that the Court may modify or correct an award only:

> (a) [w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; (b) [w]here the arbitrators have awarded upon a matter not submitted to them,

> unless it is a matter not affecting the merits of the decision upon the matter submitted; [and] (c) [w]here the award is imperfect in matter of form not affecting the merits of the controversy.

The grounds enumerated in Sections 10 and 11 of the FAA upon which an arbitration award may be vacated or modified are "exclusive" and "extremely limited." Rent-A-Center West, Inc. v. Jackson, 561 U.S. 63, 75 (2010); UHC Mgmt. Co. Inc., supra at 998. These grounds have been described as "one of the narrowest standards of judicial review in all of American jurisprudence." Nationwide, supra at 643 (quotation omitted); see also Manion v. Nagin, 392 F.3d 294, 298 (8th Cir. 2004) ("our scope of review of the arbitration award itself is among the narrowest known to the law").

"'Judicial review of arbitration awards is narrow because arbitration is intended to be the final resolution of disputes. Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.'" Marquis Yachts v. Allied Marine Grp., Inc., 2010 WL 1380137 at *9 (D. Minn. Mar. 31, 2010) (quoting Nat'l Wrecking Co. v. lnt'I Bhd. of Teamsters, Local 731, 990 F.2d 957, 960 (7th Cir. 1993)). Moreover, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987); see also, Doral Financial Corp. v. Garcia- Velez, 725 F.3d 27, 31 (1st Cir. 2013) (noting that "[a]rbitral awards are nearly impervious to judicial oversight"). Accordingly, this

Court must afford "great deference" to the Arbitrator's decision, and the award "must be confirmed" even if "the court thinks [the Arbitrator's] interpretation of the agreement is in error." Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007) (citations omitted).

The parties confirmed their commitment to a limited standard of review by agreeing in the Separation Agreement that the Final Award "shall not be appealable to the courts" and "shall be final, binding and non-appealable . . . .". While the law is unsettled on the effect of such clauses, several courts have held the inclusion of "non-appealability" language in an arbitration agreement requires an even narrower scope of judicial review. See e.g., Tabas v. Tabas, 47 F.3d 1280, 1288 (3d Cir. 1995) (limiting review to the arbitrator's "corruption, fraud, or partiality" and to charge that arbitrator "failed to provide a hearing to consider each party's views prior to his decision"); Kim C-1 LLC v. Valent Biosciences Corp., 756 F. Supp. 2d 1258, 1266-67 (E.D. Cal. 2010) (limiting review to arbitrator's bias, misconduct, or undue influence and precluding review under FAA Section 10(a)(4)).

Since the Final Award is nearly impervious to challenge and may be vacated only under the most unusual circumstances, Petitioner's Motion to Confirm must be sustained unless one or more of Respondents claims supporting their Motion to Vacate have merit.

Before addressing the merits of each of Respondents specific claims, the Court, in general, believes that several of Respondents' claims have been waived as a matter of law because they were never presented to the Arbitrator. "The failure to

pose an available argument to the arbitrator waives that argument in collateral proceedings to enforce or vacate the arbitration award." Ganton Tech., Inc. v. lnt'I Union, United Auto, Aerospace & Agricultural Implement Workers of Am., 358 F.3d 459,462 (7th Cir. 2004) (affirming denial of application to vacate award); see also, Boehringer lngelheim Vetmedica, Inc. v. United Food & Commercial Workers, 739 F.3d 1136, 1140 (8th Cir. 2014) ("In general, federal courts do not permit a party to withhold an issue or argument during arbitration and then, upon losing, raise it to the reviewing court.").

In the arbitration proceeding, Respondents do not appear to have argued (1) that the arbitrator was not legally or ethically permitted to accept tender of the Securities as a form of temporary interpleader, (2) that Petitioners lost standing to assert their securities fraud claims after interpleading the Securities; and (3) that the Arbitrator failed to provide a reasoned award on the issue of the Claims Bar Date. Therefore, these claims appear to have been waived. Nonetheless, the Court will still address the substantive merits of each of Respondents' claims.

Arbitrator Misbehavior

At one point in the Arbitration, Petitioners raised the issue of "tendering" the Sky Financial Securities as Respondents had raised the issue that a lack of tender is a defense under the Arizona Securities Act (the Act) as it relates to damages.

In an attempt to "tender" the Sky Financial Securities by "interpleading" the securities, the Petitioners, without objection by Respondents, requested the Arbitrator to take possession of the Sky Financial Securities "for purposes of effectuating the

relief to be awarded"—i.e., to award the Sky Financial Securities either to Petitioners or to whomever might have been appropriate.

In tendering the Sky Financial Securities, the following dialogue took place:

> ARBITRATOR: Well, I'm in unchartered waters here. I guess my first question is why would the assignment come to me?
>
> MR. McELENNEY: It's largely in the sense of an interpleaders. Is this to b -- I mean, it emphasizes the point which is the impossibility, to whom do we tender, do we tender to Millard, do we tender to Sky Financial, to whomever it is that it is deemed you think, to the extent it isn't impossible and excused by impossibility, you're welcome to determine to whomever it should be tendered.

Respondents appear to have consented to this procedure:

> ARBITRATOR: Well, the only way I know how to deal with this right now is to consider this an act of interpleading these interests to me. I'm not an officer of the court, but I do have jurisdiction over this matter, so for the time being, at least, I'll accept them. With that understanding in mind. Is that acceptable to both sides?
>
> MR. ROYAL: Yes.

Respondents appear to have expressed agreement that it was "acceptable" for the Arbitrator to accept the assignments as a form of interpleader. Respondents apparent consent to this procedure

belies their present claim that such action by the Arbitrator was "astonishing" and "surreal".

Given the narrow constraints of judicial review of arbitration awards, it is not surprising that Respondents major focus in this proceeding is on alleged misbehavior on the part of the Arbitrator for accepting the Sky Financial Securities to hold until his determination of an award.

Respondents argue that the transfer of the ownership the Sky Financial Securities to the Arbitrator was "immediately disqualifying" and that they were "prejudiced in their right to have a neutral arbitrator" decide the arbitration. Respondents, however, fail to explain how this relates in any way as to whether the Arbitrator actually committed misconduct. Respondents argue that they were not "going to commit" to stipulate as to "how the assignments would be legally recognized" and merely "acknowledged" that Petitioners had voluntarily come forward on their own with the intention to "make a record" at the hearing of the transfer. If Respondents objected to the "interpleader", they were required to object at the hearing. Boehringer lngelheim Vetmedica, supra at 1140.

Regardless, Respondents argument conflicts with the facts and the law. The AAA Rules permit an arbitrator flexibility in fashioning remedies. See AAA Rule 37(a) ("The arbitrator may take whatever interim measures he or she deems necessary . . . ."); AAA Rule 47(a) ("The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties . . . ."). The Arbitrator's acceptance of the Sky Financial Securities "as a form of temporary

interpleader" need not be coextensive with the concept of interpleader under Nebraska law.

Ultimately, the Arbitrator ruled for Petitioners on the merits and rejected the "tender" defense, thus finding that Petitioners were not legally required to relinquish the Sky Financial Securities in order to recover damages under the Act. Accordingly, the Arbitrator "disclaim[ed] and release[d] any and all right, title and interest in any and all membership interests that were or could have been the subject of the Original Assignments." Rather than constituting misconduct, this procedure appeared a reasonable and efficient way for the Arbitrator to handle Respondents' repeated assertions of the "tender" defense and ensure they had a fair hearing on the issue.

The Arbitrator's choice of procedure is entitled to great deference and should be viewed in the light of the purposes of arbitration:

> Arbitration proceedings are not constrained by formal rules of procedure or evidence. By agreeing to arbitration, a party trades the procedures and opportunities for review of the courtroom for the simplicity, informality, and expedition of arbitration. Arbitrators should be expected to act affirmatively to simplify and expedite the proceedings before them. They need provide only a fundamentally fair hearing. Courts reviewing arbitral award may not superimpose rigorous procedural limitations upon the conduct of the arbitrators.

Halliburton Energy Servs., supra at 754 (quoting Mantle, 956 F. Supp. at 730-31); see also, Stroh Container, supra at 749 ("[W]e must . . . accord even

greater deference to the arbitrator's decision on procedural matters than those bearing on substantive grounds."). Particularly when viewed in this context, the Arbitrator's decision to allow a form of interpleader (which the Respondents expressly approved by answering "Yes" when the Arbitrator asked, "Is that acceptable to both sides?") is not grounds to vacate the Final Award, and it did not deprive Respondents of a "fundamentally fair hearing." See, Halliburton Energy Servs., supra at 754.

Further, while ostensibly moving under the "misconduct" prong of the FAA (9 U.S.C. § 10(a)(3)), Respondents cite to no authority addressing an arbitrator's misconduct, instead relying exclusively on cases under 9 U.S.C. § 10(a)(2) dealing with an arbitrator's bias or "evident partiality." To overturn an award on grounds of bias, the moving party must carry the "heavy burden" to produce evidence that "objectively demonstrates such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives." Williams v. Nat'l Football League, 582 F.3d 863, 885 (8th Cir. 2009) (quoting Dow Corning Corp. v. Safety Nat'l Cas. Corp., 335 F.3d 742, 750 (8th Cir. 2003)) (affirming confirmation of award). Respondents have presented no evidence to carry the "heavy burden" of demonstrating that the Arbitrator had "improper motives" and rendered an award tainted by actual bias. This standard would not be satisfied "by the mere appearance of bias" even if, arguendo, such an appearance existed here, which the Court does not so find. Respondents almost admit that no such actual bias exists when they state that the act of "interpleader" "immediately disqualified" the

Arbitrator without so much as identifying any actual decision that demonstrates bias by accepting the Sky Financial Securities in order to make an eventual award.

While the Court does not believe that the Arbitrator's method of "interpleader" was the best solution to the issue (e.g., a separate trustee could have been appointed to hold the Sky Financial Securities) the Court cannot find that this act constitutes misconduct and/or such bias that Respondents did not obtain a fair and impartial proceeding.

The cases cited by Respondents are inapposite by their own terms. In Commonwealth Coatings Corp. v. Cont. Cas. Co., 393 U.S. 145, 149 (1968), the United States Supreme Court vacated an arbitration award because a member of the arbitral panel failed to disclose a material conflict of interest. No conflict or failure to disclose is alleged in this case (other than the bare assertion that by accepting the Securities the Arbitrator was "immediately disqualified"). In Dowd v. First Omaha Sec. Corp., supra at 357, the Nebraska Supreme Court affirmed the district court's entry of judgment on the arbitration award, refusing to find partiality. In State v. Pattno, 254 Neb. 733, 743 (1998), which did not involve an arbitration but rather a criminal sentencing, the Nebraska Supreme Court vacated a criminal sentence on grounds of partiality, as the trial judge had "interjected his own religious views immediately prior to sentencing, [and thus] a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge." No such conduct occurred or is alleged to have occurred in this case. In Conkling v. De Lany, 167 Neb. 4, 13 (1958), the Nebraska

Supreme Court prohibited a justice of the peace from hearing misdemeanor cases in which she would receive a fee taxed as costs against defendant if she convicted Defendant. Respondents do not allege, that the Arbitrator received or was promised money for his rulings in this case.

The Court finds no basis to vacate the Final Award for Arbitrator misconduct and/or bias.

No Reasoned Award on Key Affirmative Defenses

Respondents argue that the Arbitrator did not provide a "reasoned award" with respect to the Claims Bar Date defense. A "reasoned award" is "something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel." Leeward Constr. Co. Ltd. v. Am. Univ. of Antigua - College of Med., 836 F.3d 634, 640 (2nd Cir. 2016) (affirming confirmation of award). A reasoned award "sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties." Id.

Respondents do not argue that the Final Award as a whole is not reasoned. Instead, Respondents argue that the Arbitrator failed to include sufficient reasons to justify his decision to reject one of dozens of affirmative defenses asserted by Respondents to the Sky Financial Claim. Because a reasoned award "need not delve into every argument made by the parties," Respondents' argument lacks merit, particularly here, where the Arbitrator's written findings and awards related to Sky Financial Claim (including the Final Award) total sixty pages, not

including attachments. Respondents primary defense during the arbitration was that the claims were untimely under the substantive statute of limitations—not the Claims Bar Date in the Separation Agreement. The Arbitrator provided multiple paragraphs of reasoning explaining his rejection of Respondents statute of limitations defense.

The Arbitrator gave a detailed listing of his reasons for finding the Sky Financial Claim to be timely under the Separation Agreement:

> Claimants have satisfied their notice pleading obligations through, among others, (A) their Demand for Arbitration and Amended Demand for Arbitration; (B) their mandatory disclosures and discovery responses served in this proceeding; (C) their deposition testimony given in this proceeding; and (D) the joint final pretrial order. The allegations asserted by the Petitioners during the evidentiary hearing in support of Ancillary Claim 13 were all encompassed within the allegations set forth in their formal pleadings, and the allegations that Respondents objected to in the joint final pretrial order and during the evidentiary hearing could not genuinely have been a surprise to [Respondents] given the extensive deposition testimony that was given by Claimants in this proceeding and through prior discovery conducted by Respondents and others in related Sky Financial litigation in other jurisdictions.

The foregoing paragraph from the Final Award specifically references two of the primary reasons

urged by Respondents as justifying the timeliness of the Sky Financial Claim: (1) a "mandatory disclosure" (the Rule 26(f) Report) served by Petitioners on November 21, 2011 (eight months before the original Claims Bar Date), setting forth all of the factual grounds for the Sky Financial Claim on which Petitioners ultimately prevailed; and (2) the "Amended Demand for Arbitration" that Petitioners served on December 6, 2013, pursuant to the leave expressly granted by the Arbitrator to all parties.

In addition, the Arbitrator subsequently held that Respondents had "failed to meet their burden of proving any of their affirmative defenses" to the Sky Claim. Further, the Final Award explains that "in accordance with Section 9.14, the parties were given the opportunity to amend and clarify their original Ancillary Claims, which they elected to do during December 2013 - April 2014." Respondents do not argue that the Amended Demand for Arbitration submitted by Petitioners pursuant to this leave granted by the Arbitrator did not provide sufficient notice of the claims on which Petitioners prevailed nearly three years later.

Thus, Respondents' argument reduces to the technical position that these reasons are not enumerated in the paragraph specifically rejecting the. Claims Bar Date defense. This is not the standard under the FAA:

> Given the deference employed when evaluating arbitral awards, and as all doubts implicated by an award must be resolved in favor of the arbitration, the award in this case is sufficient to withstand Conoco's request for vacatur. Conoco's argument against the award hinges on

> the summary nature of the arbitrator's statement that, based upon all of the evidence, he found that the initial price formula should remain in effect. Conoco ignores that the preceding paragraph thoroughly delineates Rain's contention that Conoco had failed to show that the initial formula failed to yield market price, a contention that the arbitrator obviously accepted. Conoco would have this court vacate the arbitration award merely because the arbitrator did not reiterate this reason in the following paragraph. Such a narrow approach is inconsistent with the deference owed to arbitral awards and the congressional policy favoring arbitration of commercial disputes, and is also contrary to the interest of finality.

Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 474 (5th Cir. 2012) (affirming confirmation of award).

Because the Final Award and the Interim Awards incorporated therein clearly demonstrate that the Arbitrator accepted at least two of the arguments urged by Petitioners and found that Respondents had failed to prove their affirmative defense of untimeliness, it meets the standard of a "reasoned award" under the FAA.

Acknowledging that the Arbitrator based his ruling, in part, on a December, 2013 Amended Demand for Arbitration submitted by Petitioners with the Arbitrator's leave, Respondents next argue that the Arbitrator did not apply the correct "method" in granting leave to amend.

The Separation Agreement provides that "reasonable amendments to claims in pending actions shall be allowed in the Mediator's discretion based on discovery, admissions, interim decisions, and other developments in the prosecution of the Claim consistent with the Federal Rules of Civil Procedure." On December 3, 2013, the Arbitrator ordered:

> Claimants shall amend their claims against Respondents on or before December 6, 2013, by submitting a Demand for Arbitration in accordance with the Rules, which shall incorporate all claims against Respondents arising out of or related to the parties' rights and obligations under the Separation Agreement ('Ancillary Claims' as defined in the Separation Agreement). This leave to amend is freely granted in the interests of justice and economy . . . .

The Arbitrator's decision to "freely grant" an amendment "in the interests of justice and economy" is consistent with the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires"). The Arbitrator was construing and applying the Separation Agreement in granting leave to amend consistent with the Federal Rules of Civil Procedure. Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007) ("The award must be confirmed so long as the arbitrator is even arguably construing or applying the agreement even if the court thinks that his interpretation of the agreement is in error").

Respondents argue that amendments to claims must meet the standard of "relation back" under

Federal Rule of Civil Procedure 15(c)(1)(B). Although the Arbitrator did not address the concept of "relation back" in the Final Award, he determined on the record at the liability hearing that the amendment did relate back because it involved "the same transactions and occurrences" as the prior pleadings. In any event, the Separation Agreement does not require a finding that an amendment to a claim "relates back" to the Claims Bar Date, and the Arbitrator's determination that it was sufficient under the Separation Agreement for amendment to be freely granted when justice so requires is conclusive and entitled to deference.

Respondents mischaracterize the significance of "relation back" under Federal Rule of Civil Procedure 15. The concept of "relation back" comes into play only when an amended pleading asserts a new claim that is otherwise barred by the statute of limitations. Farber v. Wards Co., Inc., 825 F.2d 684, 689 (2d Cir. 1987). Here, while the Amended Notice of Claim sets forth additional legal theories such as securities fraud, the claim itself is the same as pied in the Rule 26(f) Report. County of Boyd v. U.S. Ecology, Inc., 858 F. Supp. 960, 967 (D. Neb. 1994) (two theories that "arise[] out of the same nucleus of operative facts, or [are] based upon the same factual predicate" are "really the same 'claim' or 'cause of action'"); Sanitary & Improvement Dist. No. 57 v. City of Elkhorn, 248 Neb. 486 (1995) ("A cause of action consists of the fact or facts which give one a right to judicial relief against another. A theory of recovery is not itself a cause of action."). Because no new "claims" were pled in the Amended Notice of Claim, the concept of "relation back" has no application here.

Legal Fees and Expenses Awarded by the Arbitrator are not Allowed in the **Separation Agreement**

Respondents argue that the Court should vacate, or modify and correct, the Final Award because the Arbitrator incorrectly applied or interpreted the Separation Agreement as allowing him to fully enforce the Arizona Securities Act, which provides for an award of attorneys' fees because the Separation Agreement provides that each party shall bear its own costs and expenses including legal fees and expenses. Respondents believe the Separation Agreement prevents an award of any attorney fees to either party.

Petitioners brought a claim under an Arizona statute that expressly provides for an award of attorneys' fees as an element of damages. A.R.S. § 44-2001(A). Respondents argue that the Separation Agreement precluded the Arbitrator from fully enforcing that statute because the Separation Agreement provides:

> Except as otherwise provided in this Agreement, each Party shall bear its own costs and expenses (including legal fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby.

In an eight-paragraph, reasoned decision, the Arbitrator rejected Respondents' argument, holding that Section 9.1.1 of the Separation applies only to the business 'transactions contemplated by the Separation Agreement, not the parties' of pursuit Ancillary Claims in arbitration, particularly where

attorneys' fees are an element of damages under a statute.

The cases Respondents cite are not to the contrary. In Missouri River Servs., Inc. v. Omaha Tribe of Neb., 267 F.3d 848 (8th Cir. 2001), the Eighth Circuit U. S. Court of Appeals reversed a judgment confirming an award because the gaming contract containing the parties' arbitration agreement specified that the Omaha Tribe would waive sovereign immunity and allow satisfaction of any judgment or award only out of the profits earned by the Tribe "under this Agreement," but the arbitrator inexplicably ordered the Tribe to satisfy the award out of profits from "all gaming operations on the reservation of the Omaha Tribe of Nebraska." The Eighth Circuit held that the award "failed to draw its essence from the Agreement" because the arbitrator ignored "unambiguous language" to "craft her own remedy."

Here, the Arbitrator did not ignore the Separation Agreement or craft his own remedy. Rather, the Arbitrator enforced the plain terms of the Arizona Securities Act after determining that the Separation Agreement required him to do so. Significantly, unlike the clear directive of the gaming contract in Missouri River Servs., supra, the Separation Agreement does not categorically forbid awards of attorneys' fees in arbitration. Rather, in a provision separate from the arbitration provision of the Separation Agreement, it provides that the parties shall bear their own costs "in connection with this [Separation] Agreement and the transactions contemplated hereby," not categorically, but only "[e]xcept as otherwise provided in this Agreement." The Arbitrator determined that the former clause did not apply to Ancillary Claims in arbitration, and in

any event, that the latter clause controlled because the Separation Agreement expressly incorporates the AAA Rules, which do authorize an arbitrator to award attorneys' fees if permitted by law, which the Arizona Securities Act does. Thus, the Final Award interprets the Separation Agreement (rather than simply disregards it) and draws its essence from that interpretation. The conduct of the arbitrator in Missouri River Servs, supra was fundamentally different.

The remaining cases cited by Respondents are not relevant. The Ninth Circuit U.S. Court of Appeals in S.M. Wilson & Co. v. Smith lnt'l Inc., 587 F.2d 1363, 1375 (9th Cir. 1978), was not reviewing an arbitration award; the case concerned only the enforceability of a contract limiting recovery of consequential damages. In Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117 (2d Cir. 1991), the Second Circuit U.S. Court of Appeals did not consider whether the arbitrator failed to arguably interpret the agreement; rather, the court reversed a judgment confirming an award of punitive damages because the governing state law did not permit arbitrators to award punitive damages. Here, the governing law—Arizona Revised Statutes § 44-2001(A) (which the parties agreed applied to Petitioners securities Claims)—expressly directs the Arbitrator to award attorneys' fees as an element of damages. Likewise, in Bacardi Corp. v. Congreso de Uniones lndustriales de Puerto Rico, 692 F.2d 210, 214 (1st Cir. 1982), the award provided for $200 in attorneys' fees but "cites no provision of the contract authorizing . . . attorneys' fees. Indeed, it gives no rationale for these awards. Nor is there anything in the record to show that the grieving union made any claim for such damages . . . ." Here, Petitioners

demanded fees in the pleadings and the Arbitrator cited both Arizona Revised Statutes § 44-2001(A) and AAA Rules 47(a) and 47(d) as authority to award attorneys' fees.

Finally, Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728,745 (1981), stands only for the basic proposition that an arbitrator is "confined to interpretation and application of the [arbitration] agreement" and that his "award is legitimate only so long as it draws its essence from the [arbitration] agreement." Here, the Arbitrator did correctly interpret and apply the Separation Agreement.

Material Miscalculation of Prejudgment Interest

Respondents next argue that the Arbitrator materially miscalculated the prejudgment interest in the Award. The Arbitrator awarded Petitioners interest at 10% for the securities violations. Respondents argue that 10% is far in excess of the prime plus1% interest allowed by Arizona law.

Under the FAA, an arbitration award may be modified upon a showing that there was "an evident material miscalculation of figures." 9 U.S.C. § 11(a). To make this showing, the challenging party must demonstrate more than "a mistake of fact or misinterpretation of law by an arbitrator." Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188, 194 (4th Cir. 1998) (affirming judgment confirming award). ("[w]here no mathematical error appears on the face of the award an arbitration award will not be altered.")

Respondents' argument is fundamentally misplaced because they have not identified any "mathematical error" in the calculation of

prejudgment interest under the Final Award. Rather, Respondents argue the merits of the Final Award by contending the Arbitrator committed legal error in his determination of the correct rate of pre-judgment interest under Arizona law. Legal error is not reviewable by this Court. See,e.g., SBC Advanced, 794 F.3d at 1027 (precluding merit-based review); Air Line Pilots, supra at 578 (recognizing elimination of manifest disregard for the law as basis to seek vacatur).

Further, Respondents' characterization that the Arbitrator "mistakenly identified the wrong number in the statute" is misleading. The parties contested the appropriate rate of pre-judgment interest awarded as damages under the Arizona Securities Act, an issue of statutory 'interpretation that apparently has not been decided in any published Arizona case. Ultimately, the Arbitrator selected the statutory rate proposed by Petitioners over the statutory rate proposed by Respondents. The Arbitrator's selection of the applicable statutory rate of interest is not a miscalculation and it is not reviewable by this Court. Apex Plumbing, supra at 194.

Respondents do not cite to any case in which a reviewing court reversed an arbitrator's selection of the pre-judgment interest rate under the FdAA. The only case is an unpublished case from Minnesota, in which the reviewing court applied the Minnesota Arbitration Act, not the FAA. See, Alpine Glass, Inc. v. Am. Family Ins. Co., 2010 WL 5088188 at *2 (D. Minn. Dec. 7, 2010). Notably, under Minnesota law, "questions of law are subject to de novo review" upon review of an arbitration award. Thus, in Alpine Glass, the court conducted a searching review of the

legal grounds for the award of pre-judgment interest and re-determined the appropriate rate of interest to reflect the court's view that the arbitrator committed legal error in his interpretation of the pre-judgment interest statute. This broader scope of review is foreign to the FAA. See e.g., Manion, supra at 298 ("our scope of review of the arbitration award itself is among the narrowest known to the law").

The other cases cited by Respondents on this issue are inapposite. In Priority One Servs., Inc. v. W&T Travel Servs:, LLC, 825 F. Supp. 2d 43 (D.D.C. 2011), the court modified the arbitrator's award to eliminate a double recovery evident on the face of the award. Id. at 57 ("When an arbitration award orders a party to pay damages that have already been paid or which are included elsewhere in the award, a court may modify the award"). Respondents do not argue that the Arbitrator's pre-judgment interest calculation awards a double recovery—they argue that the Arbitrator applied the wrong rate as a matter of law. Likewise, in Ford v. Merkle, Inc., 2014 WL 11510421 (E.D. Ark. Dec. 16, 2014), the court modified the pre-judgment interest award because the arbitrator used the wrong dates to calculate interest, resulting in a "windfall" to the claimant. Respondents do not argue that the Arbitrator's calculation is incorrect nor do they argue that his calculation gave Petitioners a windfall. In New Jersey Regional Council of Carpenters v. AG Constr. Corp., 2015 WL 1472011 (D.N.J. Mar. 30, 2015), the court merely declined to confirm the interest component of an award because the award did not reveal the start and end dates for the interest calculation. No such infirmity is alleged in this case.

Scott Seldin's Separate Relief to Modify or Vacate the Arbitration Award Due to Material Mistake in Description and No Joint and Several Liability

Respondent Scott Seldin argues that he did not violate any securities laws and therefore cannot be jointly and severally liable for the Sky Financial Claim. Initially, this argument is misleading because the Sky Financial Claim includes a securities fraud claim and a claim for theft of corporate opportunity. While Petitioners agreed that Respondent Scott Seldin did not personally violate any securities laws, Respondent Scott Seldin did take corporate opportunities from SD&M and M.T.S..

As with every other issue raised by Respondents, the Final Award is firmly rooted in the terms of the Separation Agreement in regard to Respondent Scott Seldin's liability. The parties agreed years ago that "[t]he individuals and entities that comprise [Petitioners] and [Respondents] shall be jointly and severally liable for any Award entered against the [Petitioners] and/or the [Respondents], respectively." The Sky Financial Claim was pleaded as a claim by Petitioners against Respondents and the awards reflect the same alignment of parties. Respondents acknowledged on the record that all claims in this arbitration were pursued by and against Petition rs and Respondents collectively:

> ARBITRATOR: And haven't we been working since Day 1 with the understanding that the claims were being asserted on behalf of Omaha Seldins or on behalf of Arizona Seldins with the belief that, if and when a final award is entered, you all will organize that as you see fit for collection?

MR. ROYAL: Yes.

ARBITRATOR: That's been the deal, hasn't it?

MR. ROYAL: Yes.

Thus, all awards in this proceeding have been awards against Petitioners and Respondents, within the meaning of Case Management Order No. 1. Pursuant to Respondent Scott Seldin's contractual agreement reflected in that case management order, the Final Award properly provides that Respondent Scott Seldin is jointly and severally liable for all damages awarded. Whether or not Respondent Scott Seldin would be subject to the same liability under common law principles of joint and several liability is not relevant in the arbitration as he has contractually agreed to the possibility of liability.

CONCLUSION

The Court enters the following Order:

(1) The Court overrules Respondents' Motion to Vacate the Arbitrator's Final Award and CI17-6276 is dismissed;

(2) The Court sustains Petitioners' Motion to Confirm Arbitration Award as Judgment at CI17-4272;

(3) Judgment is entered at CI17-4272 for Petitioners as provided in the Final Award in the amount of $2,997,031 plus interest on the principal amount from April 27, 2017, at the statutory post-judgment interest rate provided by Revised Statutes of Nebraska § 45-103; and

(4) Judgment is entered at CI17-4272 for Petitioners and against Respondents, jointly and severally, pursuant to Neb. Rev. Stat. § 25-834 in an amount equal to the attorneys' fees

and costs Petitioners incurred in resisting Respondents application seeking vacation or modification of the Final Award and in seeking dismissal of the various applications (Case Nos. CI 16-7509; CI 16-8394; CI 17-506; CI 17-651; and CI 17-3637) Respondent Scott Seldin filed seeking to modify, vacate, or confirm the Arbitrator's Interim Awards.

DATED THIS 2 DAY OF MAY, 2018.

BY THE COURT:

s/ J. Russell Derr

J. RUSSELL DERR

DISTRICT COURT JUDGE

THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THEODORE M. SELDIN, individually and as Trustee of the AMENDED AND RESTATED THEODORE M. SELDIN REVOCABLE TRUST, DATED MAY 28, 2008, Howard Scott Silverman, as Trustee of the AMENDED AND RESTATED STANLEY C. SILVERMAN REVOCABLE TRUST, DATED AUGUST 26, 2006; SILVERMAN HOLDINGS, LLC, a Nebraska limited liability company; SCS FAMILY, LLC, a Nebraska limited liability company; TMS & SNS FAMILY, LLC, a Nebraska limited liability company; Sarah N. Seldin and Irving B. Epstein, as Trustees of the THEODORE M. SELDIN AND SARAH N. SELDIN CHILDREN'S TRUST, DATED JANUARY 1, 1995; Uri Ratner, as Trustee of the STANLEY C. SILVERMAN AND

Case No. CI 17-4272 and Case No. CI 17-6276

(Companion Case Nos. CI 16-7509; CI 16-8394; CI 17-506; CI 17-651; and CI 17-3637)

ORDER ON

Motion to Alter or Amend, Motion for Attorney Fees and Costs, Motion for Supersedeas Bond.

NORMA R. SILVERMAN IRREVOCABLE TRUST AGREEMENT (2008), DATED APRIL 10, 2008; John W. Hancock, Irving B. Epstein, and Randall R. Lenhoff, as Trustees of the THEODORE M. SELDIN AND SARAH N. SELDIN IRREVOCABLE TRUST AGREEMENT (2008), DATED MAY 12, 2008; and SELDIN COMPANY, a Nebraska corporation,

Petitioners,

vs.

MILLARD R. SELDIN, individually and as Trustee of the MILLARD R. SELDIN REVOCABLE TRUST, DATED OCTOBER 9, 1993, SCOTT A. SELDIN, individually and as Trustee of the SELDIN 2002 IRREVOCABLE TRUST, DATED DECEMBER 13, 2002, SELDIN REAL ESTATE, INC., an Arizona corporation; KENT CIRCLE INVESTMENTS, LLC, an Arizona limited liability company; and

BELMONT INVESTMENTS, LLC, an Arizona limited liability company

Respondents.

THESE MATTERS CAME before the Court on July 30, 2018 and November 15, 2018.

The Court entered an Order on May 3, 2018 confirming the Arbitrators Award (the Order).

There are four Motions presently before the Court. Arizona Seldins and Scott Seldin (collectively Respondents as referenced in the Order) have filed a Motion to Alter or Amend and a Motion to Set Supersedeas Bond. Omaha Seldins (Petitioners) have filed a Motion to Set Attorney Fees and Costs.[1]

MOTION TO ALTER OR AMEND

"A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion." Lombardo v. Sedlacek, 299 Neb. 400, 411 (2018). A motion to alter or amend pursuant to Revised Statutes of Nebraska § 25-1329 is the "functional equivalent" of a motion under Federal Rule of Civil Procedure 59(e). Woodhouse Ford, Inc.

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[1] Petitioners are often referred to collectively as "the Omaha Seldins" in the Interim Awards and Final Award. For consistency and simplicty, the Court will, for the most part, refer to the Omaha Seldins as Petitioners in this Order. Respondents are often referred to collectively as the "the Arizona Seldins" in the Interim Awards and the Final Award. Again, the Court will, for the most part, refer to the Arizona Seldins as Respondents in this Order. The Court used these references in the Order for consistency and will continue to do in this Order.

v. Laflan, 268 Neb. 722, 726 (2004). "Relief under Rule 59(e) is granted in only 'extraordinary' circumstances." Blue Cross Blue Shield of Minn. v. Wells Fargo Bank, N.A., 2017 U.S. Dist. LEXIS 89240 at *9 (D. Minn. June 8, 2017) (quoting United States v. Young, 806 F.2d 805, 806 (8th Cir. 1986)).

The Court will address each of Respondents' arguments.

THE COURT'S FAILURE TO ADDRESS ALL OF RESPONDENT'S ARGUMENTS

One of the arguments made by Respondents in the Motion to Alter/Amend is that the Court failed to explicitly address several of their arguments in the Order.

"Generally . . . when a trial court clearly intends its order to serve as a final adjudication of the rights and liabilities of the parties, the order's silence on requests for relief can be construed as a denial of those requests." Nowak v. Hedke (In re Estate of Hedke), 278 Neb. 727, 757 (2009) (construing order as denying all relief, although it did not mention "the specific transactions that the appellants complain about"); Dawes v. Wittrock Sandblasting & Painting, Inc., 266 Neb. 526, 537 (2003), overruled in part on other grounds, Kimminau v. Uribe Refuse Serv., 270 Neb. 682, 684-85, (2005) (construing order's silence as rejection of arguments, where the judge did not reserve them for "further determination," and where "the substantial effect of the judgment was to dispose of the entire case").

The Court did not overlook or intend to reserve determination of any of Respondents' arguments. The Court's recitation of the issues in the Order is, in fact, taken directly from Respondents' Brief in Support of

Application to Modify or Correct and Confirm as Modified or Corrected or, Alternatively, to Vacate Arbitration Award (pp. 27 29). The Court addressed all of those issues in the Order.

THE ARBITRATOR'S AWARD OF ATTORNEY FEES

With regard to the award of attorney fees by the Arbitrator, Respondents direct the Court to a recent opinion of the United States District Court for the District of New Jersey, Sabre GLBL, Inc. v. Shan, 2018 U.S. Dist. LEXIS 68010 (D.N.J. April 23, 2018), appeals filed, 18-2079 (May 1, 2018), 18-2144 (May 21, 2018) with regards to the Arbitrators award of attorney fees. Respondents contend the dispute decided in Sabre, where the Court found an award of attorney fees to be improper, is "indistinguishable from the facts here."

Respondents present the following—truncated—passage from Sabre in their brief: "Here, the Arbitrator [sic] awarded attorney's fees despite the parties' unambiguous agreement that each 'shall bear their own attorneys' fees . . . .' ***By including this provision, the parties restricted the Arbitrator's authority to award attorney fees***." (emphasis in Respondent's brief). As presented by Respondents, the passage is broken-up with an ellipsis. The language omitted by the ellipsis is critical to the analysis of whether the fee clauses in Sabre and the Separation Agreement are similar. Inclusion of the omitted language reveals they are not.

Quoted in full—without an ellipsis—the passage in Sabre actually states:

> Here, the Arbitrator awarded attorney's fees despite the parties' unambiguous agreement

> that each "shall bear their own attorney's fees, and shall bear equally the expenses of the arbitral proceedings, including without limitation the fees of the Arbitrator." By including this provision, the parties restricted the Arbitrator's authority to award attorney fees.

2018 U.S. Dist. LEXIS 68010 at 13-14 (internal citation omitted).

The language omitted by Respondents identifies the parties' "arbitral proceedings" and their "Arbitrator." It is thereby clear the fee clause in Sabre was intended to apply to the parties' arbitration proceedings.

By contrast, the fee clause in the Separation Agreement provides:

> Except as otherwise provided in this Agreement, each Party shall bear its own costs and expenses (including legal fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby. No Party shall be required to pay to the other Party any commissions, penalties, fees or expenses arising out of or associated with any of the transactions contemplated by this Agreement.

Unlike the clause in Sabre, the fee clause in the Separation Agreement—which is contained in a different section of the Separation Agreement (Sec. 9.1.1) from the clauses governing the parties' agreement to arbitrate (Secs. 8.3, 9.14.1)—does not reference the parties' arbitration proceedings. Instead, the clause relates solely to fees "incurred in connection with this Agreement and the *transactions*

contemplated hereby." (emphasis added). The Arbitrator correctly found the "transactions" identified in the Separation Agreement's fee clause did not encompass the parties' arbitral claims. This determination is thoroughly discussed in nine paragraphs of a reasoned decision issued by the Arbitrator.

There is no clause in the Separation Agreement that limited the Arbitrator's authority to award attorney fees as a measure of damage in the arbitration. Conversely, the fee clause in Sabre expressly applied to the parties' arbitration proceedings. This is an important, differentiating feature between the fee clauses in Sabre and the Separation Agreement. Respondents' ignore—indeed, omit—this distinguishing aspect from their presentation of the "indistinguishable" circumstances in Sabre to this Court.

The Court finds no merit to Respondent's argument with regard to the award of attorney fees by the Arbitrator.

ATTORNEY FEES AS A SANCTION

Respondents argue that the Court did not have the authority to award attorney fees under a statute "that has been repealed." The Court made an error in the Order. In the Order, the Court stated that attorney fees were awarded pursuant to Neb. Rev. Stat. § 25-834. Unfortunately, this error was repeated several times in the Order. However, despite this error it is patently obvious that the Court intended to award attorney fees pursuant to Neb. Rev. Stat. § 25-824.

Next, Respondents argue that "neither the requisite rules nor conditions" of § 25-824 "has been satisfied." and that "[t]he Order did not identify,

discuss or make any of the necessary findings or conclusions required by Neb. Rev. Stat. § 25-824." To the contrary, the Order sets out detailed findings supporting its award of attorney fees and costs under § 25-824.

§ 25-824(4) provides:

> The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. If the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney's fees and costs.

Neb. Rev. Stat. § 25-824.01 sets forth those factors a court must consider when evaluating whether to award attorney fees under § 25-824. Those factors are: 1) the extent to which any effort was made to determine the validity of the claim before it was asserted; 2) the availability of facts to assist the party to determine the validity of a claim or defense; 3) the relative financial position of the parties involved; 4) whether or not the action was prosecuted in whole or in part in bad faith; 5) whether or not issues of fact, determinative of the validity of the party's claim, were reasonably in conflict; and 6) the extent to which the party prevailed with respect to the amount of and number of claims in controversy.

While § 25-824.01 "requires the court to specify the reasons for an award of attorney fees, . . . [it]

imposes no such requirement as to the factors" set forth in the statute. White v. Kohout, 286 Neb. 700, 708 (2013). Rather, § 25-824.01 solely "directs the court to *consider* the delineated factors when determining whether to assess attorney fees and costs and the amount to be assessed." White, supra at 708. The reasons supporting the Court's award of attorney fees are stated throughout the Order.

Confirmation of the Final Award did not involve resolution of complicated factual disputes; rather, it involved mere procedural issues—Respondents alleged the Arbitrator engaged in misconduct by accepting a "tender" of the Sky Financial Securities as a form of interpleader, which was an issue raised only in these actions to confirm and, as the Order thoroughly discusses, was meritless and frivolous. Respondents' simply refused to abide by the Arbitrators award even though they had agreed to arbitration.

The U.S. Court of Appeals for the Eleventh Circuit addressed the impropriety of a non-prevailing arbitration participant's "never-say-die attitude" in B.L. Harbert lnt'I v. Hercules Steel Co., 441 F.3d 905, 913 (11th Cir. 2006). The non-prevailing party in Hercules Steel (Harbert) sought to vacate the Arbitrator's award on grounds the award manifestly disregarded the law. The court found "[t]he only manifest disregard of the law evident in th[e] case [wa]s Harbert's refusal to accept the law of th[e] circuit which narrowly circumscribes judicial review of arbitration awards." Id. Rebuking the practice of seeking vacatur without an objectively reasonable belief of prevailing,' the court discussed why sanctioning parties in such circumstances is necessary:

In litigating this case without good basis through the district court and now through this Court, Harbert has deprived Hercules and the judicial system itself of the principal benefits of arbitration. Instead of costing less, the resolution of this dispute has cost more than it would have had there been no arbitration agreement. Instead of being decided sooner, it has taken longer than it would have to decide the matter without arbitration. Instead of being resolved outside the courts, this dispute has required the time and effort of the district court and this Court.

When a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken. Arbitration's allure is dependent upon the Arbitrator being the last decision maker in all but the most unusual cases. The more cases there are, like this one, in which the Arbitrator is only the first stop along the way, the less arbitration there will be. If arbitration is to be a meaningful alternative to litigation, the parties must be able to trust that the Arbitrator's decision will be honored sooner instead of later.

Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions. A realistic threat of sanctions may discourage baseless litigation over

> arbitration awards and help fulfill the purposes of the pro-arbitration policy contained in the FAA. It is an idea worth considering.
>
> Id. at 913-14

The U.S. Court of Appeals for the Eighth Circuit has long-held a similar view. See St. John's Mercy Med. Ctr. v. Delfino, 2006 U.S. Dist. LEXIS 13844 at *12 (E.D. Mo. Mar. 29, 2006) (quoting Int'I Union v. United Farm Tools, Inc., 762 F.2d 76, 77 (8th Cir. 1985)) ("'An unjustified refusal to abide by an Arbitrator's award may constitute bad faith for the purpose of awarding attorneys' fees' under Rule 11.")[2] Say Elec., Inc. v. IBEW, Local 292, 1985 U.S. Dist. LEXIS 17697 at *5 (D. Minn. July 19, 1985) (citing General Drivers & Helpers Union v. Young & Hay Transportation Co., 522 F.2d 562 (8th Cir. 1975); United Steel Workers v. Butler Manufacturing Co., 439 F.2d 1110 (8th Cir. 1971)) ("A party is entitled to reasonable attorney's fees and costs when required to bring an action to confirm an Arbitrator's award if the opposing party's refusal to abide by the award is without justification.").

Other jurisdictions are in accord. See e.g. Dreis & Krump Mfg. Co. v. Int'I Ass'n of Machinists & Aero. Workers, 802 F.2d 247, 255-56 (7th Cir. 1986) ("It is human nature to crave vindication of a passionately held position even if the position lacks an objectively reasonable basis in the law. But the amended Rule 11 makes clear that he who seeks vindication in such

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[2] Federal Rule of Civil Procedure 11, just like Revised Statutes of Nebraska § 25-824, focuses on whether an attorney has "abused the judicial process by pursuing a claim that is frivolous or made in bad faith." *Fla. ex rel. Dep't of Ins. of Fla. v. Countrywide Truck Ins. Agency, Inc.*, 294 Neb. 400, 406 (2016).

circumstances and fails to get it must pay his opponent's reasonable attorney's fees. A company dissatisfied with the decisions of labor Arbitrators . . . will not be permitted to nullify the advantages to the union by spinning out the arbitral process unconscionably through the filing of meritless suits and appeals. For such conduct the law authorizes sanctions that this court will not hesitate to impose. . . . Lawyers practicing in the Seventh Circuit, take heed!"); Burke v. Hogan, 418 F. Supp. 2d 236, 243 (W.D.N.Y. 2005) (citations and quotations omitted) ("A court may properly make an award of attorneys' fees in certain circumstances; for example, when a party has unjustifiably refused to abide by an Arbitrator's award, or when a party spin[s] out the arbitral process unconscionably through the filing of meritless suits and appeals."); Unite Here Local 23 v. I.L. Creations of Md. Inc., 148 F. Supp. 3d 12, 24 (D.D.C. 2015) ("[E]ven a cursory examination of the governing law should have dissuaded I.L. Creations from resisting compliance with the Arbitrator's decision, from challenging the Arbitrator's jurisdiction (for the first time) in the context of a counterclaim filed in this Court, and from attacking the award's scope without any basis for doing so in light of the extremely deferential applicable standard. Thus, whether or not I.L. Creation's conduct ultimately amounts to subjective bad faith, it is clearly sufficient to entitle Unite Here to reasonable attorneys' fees."); Rutan v. George Kerasotes Corp., 2008 Mich. App. LEXIS 1017 at **7-8 (May 15, 2008) ("After receiving an unfavorable arbitration decision, defendants attempted to re-litigate the issue in circuit court under the guise of arguing a material error of law, despite the existence of a bona fide evidentiary

dispute . . . . The circuit court did not clearly err by finding that defendants' attempt to re-litigate the facts of this case was frivolous. Moreover, defendants' motion to vacate the arbitration award, which did nothing more than attack the Arbitrators' findings of fact, was devoid of legal merit. We perceive no clear error in the circuit court's award of sanctions.").

In the Order, the Court found Respondents' positions were not credible, legally "mischaracterize[d]," "fundamentally misplaced," and repeatedly "misleading." (finding Respondents' explicit consent to the tender procedure "belies their present claim that such action by the Arbitrator was 'astonishing' and 'surreal'"); ("Respondents mischaracterize the significance of 'relation back' under Federal Rule of Civil Procedure 15."); ("Respondents' argument is fundamentally misplaced because they have not idehtified any 'mathematical error' in the calculation of prejudgment interest under the Final Award."); (finding Respondents "argue[d] the merits of the Final Award" even though legal error is not a basis upon which vacatur or modification can be pursued); ("Respondents' characterization that the Arbitrator 'mistakenly identified the wrong number in the statute' is misleading."); (finding Scott Seldin's argument that he should not be held jointly and severally liable because he did not violate any securities laws "is misleading").

Arguments that mislead, mischaracterize, and refusing to accept the governing legal standard are sanctionable. Cornett v. City of Omaha Police & Fire Ret. Sys., 266 Neb. 216, 221 (2003) (citation omitted) ("We have said that the term 'frivolous,' as used in § 25-824(2), connotes an improper motive or legal position so wholly without merit as to be ridiculous.");

see also, Soroof Trading Dev. Co. v. GE Fuel Cell Sys. LLC, 842 F. Supp. 2d 502, 519 (S.D.N.Y. 2012) (quoting Williamson v. Recovery Ltd. Partnership, 542 F.3d 43, 51 (2d Cir. 2008)) ("Financial sanctions, such as an order to pay an award of attorneys' fees and costs to the opposing party, may be imposed pursuant to Federal Rule of Civil Procedure 11 when a party makes 'false, misleading, improper, or frivolous representations to the court.'").

When a party does not present "rational argument based on law and evidence to support [the] litigant's position," the position is equally frivolous under § 25-824. First Nat'I Bank v. Union Ins. Co., 246 Neb. 636, 645 (1994); see also Shanks v. Johnson Abstract & Title, Inc., 225 Neb. 649, 655-56 (1987) (quoting Ltown Ltd. v. Sire Plan, 108 A.D.2d 435, 442-43 **(N.Y.** 1985)) (holding that a claim is frivolous "when it indisputably has no merit").

The Order repeatedly identified the absence of rational factual or legal basis to support Respondents' theories of modifying or vacating the Final Award. The Order found that Respondents "fail[ed] to explain" how the transfer of the Sky Financial Securities to the Arbitrator "relates in any way as to whether the Arbitrator actually committed misconduct" and that "while ostensibly moving under the 'misconduct' prong of the FAA (9 U.S.C. § 10(a)(3)), Respondents cite to no authority addressing an Arbitrator's misconduct"); "Respondents have presented no evidence to carry the 'heavy burden' of demonstrating that the Arbitrator had 'improper motives' and rendered an award tainted by actual bias."; "Respondents almost admit that no such actual bias exists . . . without so much as identifying any actual decision that demonstrates

bias . . . ." finding the cases cited by Respondents were "inapposite by their own terms," "not relevant," and "not to the contrary" of the Arbitrator's findings; and ("Respondents have presented no evidence to carry the 'heavy burden' of demonstrating that the Arbitrator had 'improper motives' and rendered an award tainted by actual bias.").

The Court also found three of Respondents' principal arguments claiming Arbitrator error had been waived because Respondents never apprised the Arbitrator of the alleged error during the arbitration. This included Respondents' belated assertion that the Arbitrator committed "misconduct" by taking temporary possession of the Sky Financial Securities the focal point of their briefing and argument in these proceedings, a claim first raised in these proceedings.

In United Food & Commercial Workers, Local 400 v. Marval Poultry Co., 876 F.2d 346, 353 (4th Cir. 1989), a losing arbitration party sought to vacate an award by asserting waived defenses never raised in the arbitration. The U.S. Court of Appeals for the Fourth Circuit Court reprimanded this practice, holding:

> "Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the Arbitrator."
>
> While the district court rightly recognized that a losing party's "afterthoughts should not form the basis of continued, protracted litigation in federal courts." it then failed to hold, as it should have, that for this very reason Marval's litigation conduct here was "unjustified." The

> mere fact that there may have been an "arguable basis" for the substantive position belatedly raised, did not justify its belated raising for the first time in district court.

Id. at 353.

Similarly, the non-prevailing arbitration party in Deluxe Labs., Inc. v. lnt'l All., Local 683, 2001 U.S. Dist. LEXIS 18099 at 24 (C.D. Cal. Aug. 30, 2001), was sanctioned for belatedly asserting a factually unsupported claim of arbitrator bias. Concluding the argument was frivolous not only because it was never raised in arbitration, but also because it was factually unfounded, the court held:

> This is a classic case of waiver. A party "cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first."
>
> . . . . . .
>
> Deluxe's legal and factual contentions are without merit. The facts clearly establish that Deluxe waived the right to challenge the award on the ground of Arbitrator bias under existing law. Nevertheless, . . . Deluxe and its counsel maintained the position that Deluxe may properly raise this challenge at this late date. Additionally, the bias argument is based on nothing more than an unfavorable award and the Arbitrator's post- award comment . . . acknowledging that the award was "tough on [Mr. Franklin] personally." Deluxe's bias argument is frivolous.

Id. at 15, 24 (citations omitted).

Courts have also sanctioned parties for failing to adhere to the limited standard of review when arguing an arbitrator has exceeded his authority; specifically, that an award must be confirmed if the arbitrator even arguably construed the contract at issue. In Corp. Printing Co. v. N.Y. Typographical Union No. 6, 1994 U.S. Dist. LEXIS 9728 at **10-11 (S.D.N.Y. July 14, 1994), the losing arbitration participant sought vacatur on grounds the award violated public policy and was based upon a flawed interpretation of the contract at issue. The court rejected both arguments and confirmed the arbitration award. In addition to confirming the award, the court found the losing party's "treatment of th[e] matter and its arguments in opposition to confirmation of the Award [we]re wholly without merit, unsupported by the facts and the law and reflect bad faith and wantonness, justifying an award of costs and fees to the" prevailing arbitration party.

Respondents argued the Arbitrator's interpretation of the contract at issue—the Separation Agreement—was incorrect . But that is not the standard. Instead, Respondents were required to show the Arbitrator was not "even arguably construing or applying" the Separation Agreement. See, e.g., Misco, 484 U.S. at 38.

On the attorney fee issue, the Order stated that the Arbitrator explained why the Separation Agreement permitted an award of attorney fees in "an eight-paragraph, reasoned decision" As in Hercules Steel, supra and Corp. Printing, supra, Respondents should not have raised this issue.

Similarly, on the issue of the Claims Bar Date, Respondents alleged the Arbitrator did not issue a reasoned award and failed to apply the correct "method" specified by the Separation Agreement. In making this allegation, Respondents ignored that "[t]he Arbitrator gave a detailed listing of his reasons for finding the Sky Financial Claim to be timely under the Separation Agreement[.]" as stated in the Order.

Courts forbid parties from challenging factual and legal determinations under the pretext of the very limited allowable FAA challenges as Respondents did here. Halim v. Great Gatsby's Auction Gallery, Inc., 2007 U.S. Dist. LEXIS 21891 (N.D. Ill. Mar. 12, 2007) is instructive. Dealing with similar conduct, the court in Halim ordered the imposition of sanctions, and in so doing described the impropriety of "dressing up" otherwise barred arguments as legitimate challenges under the FAA:

> Halim's contentions are wholly unsupported by the evidence, and his attempt to shoehorn his disagreement with the Arbitrator's interpretation of the law and the evidence into grounds for vacatur is groundless. Halim's briefs supporting his motion to, vacate make clear he is aware of the law. He should have known, then, that the Arbitrator's conduct did not approach grounds for vacatur. Nonetheless, he sought to vacate the award. . . . Even though Halim expressly recognizes that courts will not review an Arbitrator's errors of law but only his or her refusal to follow the law set out in the parties' arbitration agreement, he has dressed up his arguments concerning his disagreement with the substance of the Arbitrator's determination as arguments that

> the Arbitrator had exceeded his authority under the parties' contract. This type of subterfuge is not sufficient to avoid sanctions. Thus, we conclude that sanctions under Fed. R. Civ. P. 11(c) are warranted.

Id. at 8-9 (internal citations omitted).

As for the multiple interim applications filed by Respondents, they had no legal basis to selectively pursue modification, vacation, and/or confirmation of five of the Arbitrator's twelve interim awards (collectively "interim applications"), the interim applications were frivolous. Respondents state the interim applications were filed "solely to avoid an adverse result by a court reviewing the interim awards and declaring one or more of them to be final awards under the FAA, even despite an explicit agreement of the parties and the consent of the Arbitrator to the contrary

Respondents cite to In re: Chevron, 419 S.W. 3d 329 (Tex. App. 2010) in support of their argument on this issue. Chevron involved an arbitration where the parties agreed to bifurcate certain claims, just as Petitioners and Respondents did here. In Chevron, there is no mention that either the parties or the arbitration panel agreed or intended the interim decisions, as was done here, to be non-final and non-appealable. Respondents have not cited to a case where an interim award that both the parties and the Arbitrator intended to be non-final was treated as a final, appealable arbitration award.

As a final thought, the Court has reviewed the recent decision of the Nebraska Supreme Court in Pinnacle Enters. v. City of Papillion, 302 Neb 297 (2019) and finds that case inapplicable to the

determinations that must be made by the Court in this matter.

The Court awards attorney fees pursuant to Neb. Rev. Stat. § 25-824 in the amount of $131,184.85 (Exhibit 54A). This amount is for fees and costs incurred by Petitioners in confirming the Arbitration award. What should have been a fairly simple procedure, Respondents literally turned into a re-litigation of the Arbitration itself.

CONCLUSION

For the foregoing reasons, the Court:

-Overrules the Arizona Seldins Motion to Alter/Amend;

-The Court orders a nunc pro tunc modification of the May 3, 2018 Order to substitute "25-824" for references to "25-834";

-The award of attorney fees by the Arbitrator was proper and not in conflict with the Separation Agreement

-Exhibit 54A is placed under seal and received into evidence; and

-The Omaha Seldins are awarded attorney fees in the amount $131,184.45 as a sanction pursuant to Neb. Rev. Stat. § 25-824.

The total judgment is approximately $3,000,000 plus the attorney fees awarded as a sanction of $131,184.45 The Court sets the supercedeas bond at $3,300,000..

DATED this 28 DAY OF FEBRUARY, 2019.

BY THE COURT:
s/ J Russell Derr
J RUSSELL DERR
DISTRICT COURT JUDGE

[seal omitted]

CLERK OF THE NEBRASKA SUPREME COURT AND NEBRASKA COURT OF APPEALS
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August 4, 2020

Matthew Mark Enenbach
matthew.enenbach@kutakrock.com

IN CASE OF: S-19-000310, Seldin v. Estate of Silverman
S-19-000311, Seldin v. Seldin

TRIAL COURT/ID: Douglas County District Court CI17-6276
Douglas County District Court CI17-4272

The following filing: Motion Appe Seldin for Rehearing & Brief
Filed on 03/16/20
Filed by appellee Scott A Seldin Individually

Has been reviewed by the court and the following order entered:

Motion of appellee for rehearing overruled.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

9 U.S.C. § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10

§ 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.

9 U.S.C. § 11

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.