IN THE SUPREME COURT OF THE STATE OF NEVADA

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NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; and LAS VEGAS REVIEW-JOURNAL, INC., a Delaware limited liability company, Appellants/Cross-Respondents vs. LAS VEGAS SUN, INC., a Nevada corporation, Respondent/Cross-Appellant.	Supreme Court No. 80511 District Court Case No. A772591

APPELLANTS'/CROSS-RESPONDENTS' REPLY IN SUPPORT OF MOTION TO FILE PORTIONS OF OPENING BRIEF AND APPENDIX UNDER SEAL

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I. Introduction

The Sun's opposition attempts to create a compelling story that the Review-Journal's sealing and redacting requests are "strategic" and that the Review-Journal is attempting "to control the public narrative." 6/8 Opp., 1. But when reviewing the Review-Journal's requests and the District Court Sealing Order, it is clear that there is nothing "strategic" about it. 5/28 Notice, Ex. 1 (the "District Court Sealing Order").

The Review-Journal's motion simply requests to seal confidential arbitration documents (and district court briefs and/or portions of briefs that reference those documents)[1] included in the appendix.[2] Each document and/or district court brief that the Review-Journal is seeking to seal in this Court has been ***ordered sealed*** by the district court in its 17-page Sealing Order, which the Sun hardly mentions. 5/28 Notice, Ex. 1, 16 ¶¶ (b)-(g). Although the Sun wants to completely ignore the district court's detailed, well-reasoned decision—which was the culmination of seven months of briefing and hearings—that decision is the reason why the confidential documents "shall" remain sealed in this Court absent a further order pursuant to SRCR 7.

Out of an abundance of caution and to ensure compliance with SRCR 7, the

[1] The Sun alleges the Review-Journal misrepresented the fact that four of the six briefs filed in the district court were filed with redactions and not blanket sealed. 6/8 Opp., 8. That is untrue. Both fn. 1 of the Review-Journal's motion and the appendix itself indicate which documents were completely sealed or had portions sealed by the district court (with the publicly-filed version redacted).

[2] The Sun states that the Review-Journal is asking this Court to redact and seal "four volumes of Appendices." 6/8 Opp., 1. The Review-Journal is not requesting to seal the entire four volumes. It is only seeking to seal the portions that the district court ordered sealed. 6/1 Mot., 1-2.

Review-Journal's motion also requests to redact portions of its opening brief that reference, discuss, and cite to the records sealed by the district court. After further review and to demonstrate the Review-Journal has nothing to hide, the Review-Journal will stipulate to further limit the redacted portions of its opening brief to a small handful of excerpts quoting non-public portions of the Award, screenshots of the profit and loss statement, and excerpts of that statement on the following pages: 3, 6-7, 9, 18-20, 22-28, 31-33, 38-39, 41, 44, 46, 51, 53. The information in these sections of the brief was the subject of one or more of the specific motions to seal granted by the district court. 5/28 Notice, Ex. 1, 16 ¶ (c); *see also* AA231-234, 236-247.

Although the Review-Journal agrees to lift certain redactions in its opening brief, it maintains its narrowly-tailored request to seal the pages of its appendix that include documents ordered sealed by the district court: AA147-178, 179-204, 230-247, 335-359, 360-405, 406-473, 474-507, and 530-551.[3] The Review-Journal makes this sealing request not only pursuant to SRCR 7, but also because of the several independent, compelling grounds that exist to keep the confidential arbitration records sealed, including this unique situation where the underlying arbitration involved a private accounting dispute between two sophisticated competitors that exchanged confidential business information. *See* SRCR 3(4); *see also* 6/1 Mot., fn. 5.

[3] It is anticipated that, as it did in the district court, the Sun will attach thousands of pages of irrelevant documents to its brief in this Court in an attempt to unseal many of the confidential arbitration records. *See* 5/28 Notice, Ex. 1, 3:22-24. The Review-Journal will strongly oppose that request.

II. The Sun Ignores SRCR 7 and the District Court Sealing Order.

Instead of focusing on SRCR 7 and the fact that certain documents attached to the Review-Journal's appendix have already been ordered sealed by the district court, the Sun muddies the record and claims those documents are public, which is not true. 6/8 Opp., 7-8. SRCR 7 states that "[c]ourt records sealed in the trial court shall be sealed from public access in the Nevada Supreme Court subject to further order of that court." Because all documents in the Review-Journal's appendix that the motion seeks to seal have already been ordered sealed by the district court, SRCR 7 requires they remain sealed absent a further court order. *See* 5/28 Notice, Ex. 1, 16 ¶¶ (b)-(g). The Sun cannot get around that and cites to no case law when alleging in conclusory fashion that this Court "owes no deference to the district court's earlier sealing determination." 6/8 Opp., 4.[4] The Sun's opposition is a collateral attack on the District Court Sealing Order. The documents sealed by the district court should remain sealed in this Court.

III. The Compelling Circumstances that Justify the Sealing of the Documents in this Court Go Far Beyond the Arbitrator's Protective Order.

SRCR 3(4) states that the Court may seal records if "compelling privacy or safety interests . . . outweigh the public interest in access to the court record." If this Court

[4] The Sun cites to SRCR 4 for the authority that this Court has the "express authority to unseal court records on its *own* motion," 6/8 Opp., 4, *but see United States v. Sealed Search Warrants*, 686 F.3d 385, 398 (5th Cir. 2017) (holding district court in "best position" to "assess . . . the impact of unsealing" records). Although there are only two Nevada Supreme Court cases, both unpublished, that cite to SRCR 4, both state that, "a party must first seek to unseal a document in district court." *Schweickert v. UNR*, 126 Nev. 754, *1 (June 30, 2010) (unpublished); *see also Hopkins v. Selznick*, 125 Nev. 1045, fn. 3 (Sept. 28, 2009) (unpublished).

declines to defer to or even consider the District Court Sealing Order, several provisions of SRCR 3(4) still independently justify sealing the documents.

The Sun focuses on the Arbitrator's protective order when claiming that order "alone" is "insufficient to seal the records." 6/8 Opp., 9. The Review-Journal, however, set forth numerous other factors in its motion that further justify sealing the documents. Although the Review-Journal argued that SRCR 3(4)(a) permits the sealing of the documents based on the Arbitrator's protective order authorized by NRS 38.233(5), it also cited to SRCR 3(4)(b), which independently authorizes sealing based on the district court's now-modified protective order entered under NRCP 26(c). The Review-Journal also cited to SRCR 3(4)(h), which independently justifies sealing the documents based on Nevada's *public* interest in respecting and protecting private arbitration and the parties' privacy expectations for all materials generated in the arbitration. And lastly, the Review-Journal cited to SRCR 3(4)(e) for the proposition that, like Nevada's compelling interest in promoting settlements by respecting confidentiality agreements, Nevada's strong public policy favoring arbitration provides an equally compelling basis for sealing private arbitration records (*especially* ones that are not material to the issues on appeal). *See also* 6/1 Mot., fn. 6 (referencing compelling reasons listed in District Court Sealing Order). The Sun fails to address *any* of these arguments.

IV. Following the Statutory Process to Confirm or Vacate the Award Does Not Automatically Destroy the Arbitration's Privacy.

The Sun contends, without legal support, that the parties' agreement to confidentially arbitrate their accounting dispute and the Arbitrator's confidentiality order are nullified simply because the parties moved to confirm/vacate the Award. 6/8 Opp., 9. If that were true, *private* arbitrations would cease to exist because the statutorily required "next step" after every arbitration is a motion to confirm or vacate an award. *See* NRS §§ 38.239, 38.241. This involuntary publication of private arbitration materials would undercut a key benefit of arbitration, and, as a result, discourage parties from agreeing to arbitrate. The district court acknowledged this potential chilling effect on private arbitrations and expressed "grave concerns about the use of a motion to vacate and/or confirm an arbitration award as a tool to transform a bargained for private dispute into a public dispute by merely filing a motion." 5/28 Notice, Ex. 1, 14:1-3.

V. <u>Conclusion</u>

Based upon the foregoing, the Review-Journal respectfully requests that limited excerpts of its opening brief and accompanying appendix be maintained under seal in this Court (as they have been in the district court). The pages of the appendix with documents the Review-Journal is seeking to keep sealed in this Court are: AA147-178, 179-204, 230-247, 335-359, 360-405, 406-473, 474-507, and 530-551. As a compromise, and to maximize open access to the courts under the circumstances, the Review-Journal has further limited its request to redact portions of its opening brief to: 3, 6-7, 9, 18-20, 22-28, 31-33, 38-39, 41, 44, 46, 51, 53. If directed by this Court to do so, the Review-Journal will re-file its opening brief in the form attached hereto as **Exhibit 1**.

DATED this 15th day of June, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Kemp Jones, LLP and that on June 15, 2020, I caused the foregoing APPELLANTS'/CROSS-RESPONDENTS' REPLY IN SUPPORT OF MOTION TO FILE PORTIONS OF OPENING BRIEF AND APPENDIX UNDER SEAL to be served by electronically filing the foregoing with the Clerk of the Supreme Court of Nevada by using the court's electronic filing system, which will send notice of electronic filing to the following:

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EXHIBIT 1

NEEIN THE SUPREME COURT OF THE STATE OF NEVADA

NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; and LAS VEGAS REVIEW-JOURNAL, INC., a Delaware corporation, Appellants/Cross-Respondents v. LAS VEGAS SUN, INC., a Nevada corporation, Respondent/Cross-Appellant.	Supreme Court No. 80511

OPENING BRIEF OF APPELLANTS/CROSS-RESPONDENTS

Appeal from the Eighth Judicial District Court of the State of Nevada in and for the County of Clark
The Honorable Timothy Williams
District Court Case No: A-18-772591-B

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellants/Cross-Respondents News+Media Capital Group LLC ("News+Media") and Las Vegas Review-Journal, Inc. ("Review-Journal") are nongovernmental parties. Review-Journal is a wholly owned subsidiary of News+Media, and News+Media is a wholly owned subsidiary of Orchid Flower LLC. No publicly held corporation owns more than 10% of any of these entities' stock.

Appellants/Cross-Respondents have been represented throughout this litigation by attorneys at the law firms of Boies Schiller Flexner LLP, Morris Law Group, Kemp Jones, LLP, and Jenner & Block LLP.

DATED this 1st day of June, 2020.

KEMP JONES, LLP

/s/ J. Randall Jones
J. Randall Jones

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter under NRS 38.247(c), which makes an order confirming an arbitration award immediately appealable. Additionally, the district court entered a final judgment based on the arbitration award, so this Court also has jurisdiction under NRAP 3A(b)(1).

The district court issued its findings of fact, conclusions of law, and order affirming the arbitration award on January 28, 2020. VII AA at 1299.[1] That same day, the Review-Journal and News+Media filed their notice of appeal. V AA at 821. On February 28, 2020, the district court entered judgment on the arbitration award. V AA at 991. The Review-Journal and News+Media filed an amended notice of appeal on March 3, 2020, to include the judgment in the appeal. VI AA at 1030. This appeal is timely under NRAP 4(a)(1), which requires a notice of appeal to be filed no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served. NRAP 4(a)(1).

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[1] References to "__ AA at __" refer to the volume and page number of Appellants' Appendix.

ROUTING STATEMENT

This case is presumptively retained by this Court under NRAP 17(a)(9) because it originated in business court.

ISSUE PRESENTED FOR REVIEW

The joint operating arrangement ("2005 JOA") between the Las Vegas Review-Journal and Las Vegas Sun newspapers contains a clear formula for calculating EBITDA[2] to determine the Sun's profit-sharing payment. It requires EBITDA to be calculated "in a manner consistent with the computation of 'Retention' as that line item appears on the profit and loss statement for Stephens Media Group [the Review-Journal's former owner] for the period ended December 31, 2004."[3] [redacted]

Despite this plain language, the arbitrator ruled that the Review-Journal was *prohibited* from deducting editorial costs and certain promotional costs when calculating EBITDA. This Court's precedent requires arbitrators to follow the parties' contract, and mandates that an award that conflicts with the contract must be vacated. Did the district court err by confirming the award even though it conflicts with the 2005 JOA?

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[2] EBITDA stands for earnings before interest, taxes, depreciation, and amortization.
[3] II AA at 226.
[4] II AA at 233.

STATEMENT OF THE CASE

A. Nature of the Case.

An arbitrator presiding over a contractual arbitration is not entitled to ignore the parties' agreement or rewrite it to make a different bargain than the parties made for themselves. This has been settled law in Nevada for nearly 50 years. To be sure, arbitrators have broad discretion and are subject to limited review—but that does not mean courts must sit idly by while an arbitrator casts aside unambiguous, bargained-for contract provisions and replaces them with terms of his own choosing. To the contrary, an unbroken line of this Court's precedents makes clear that an arbitration award that conflicts with an unambiguous term in the parties' contract *must* be vacated.[5] This is one of the rare cases in which an arbitrator inexplicably decided not to follow the parties' contract.

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[5] *Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund*, 112 Nev. 1161, 1168-1169, 925 P.2d 496, 500-01 (1996) (reversing order confirming arbitration award that conflicted with the parties' contract); *Wichinsky v. Mosa*, 109 Nev. 84, 89, 847 P.2d 727, 730-31 (1993) (If an award is "unsupported by the agreement, it may not be enforced") (*quoting Exber, Inc. v. Sletten Constr. Co.*, 92 Nev. 721, 731, 558 P.2d 517, 523 (1976)).

The contract at issue, the 2005 JOA, provides that the Sun newspaper is to be distributed as an insert inside the Review-Journal newspaper, and requires the Review-Journal to "bear" (*i.e.*, pay) all operating costs for both newspapers, except for the Sun's editorial costs. The Sun receives compensation in the form of an annual profit-sharing payment from the Review-Journal. The amount of the Sun's payment is based on an EBITDA calculation that includes earnings of the Review-Journal/Sun joint media product, as well as certain of the Review-Journal's other print publications.[6] Effectively, if EBITDA increases from one year to the next, then the Sun's payment increases in the following year by the same percentage. If EBITDA decreases, the Sun's payment decreases by the same percentage.

The core issue presented to the arbitrator was straightforward: when the Review-Journal subtracts operating expenses from revenues in order to calculate EBITDA for the purpose of determining

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[6] EBITDA is a measure of profitability. To determine a company's EBITDA, one first computes earnings by subtracting expenses from revenues. Then, amounts reflecting interest, taxes, depreciation, and amortization are added back in. EBITDA is a common, well-known calculation. *See The Formula for Calculating EBITDA (with Examples)*, INVESTOPEDIA (Dec. 17, 2019), https://www.investopedia.com/ask/answers/031815/what-formula-calculating-ebitda.asp.

the Sun's annual profits payment, should the Review-Journal's editorial costs and promotional costs be included as operating expenses that are subtracted from its revenues, the same as all of its other costs? The issue is straightforward because it is answered in the 2005 JOA, which contains explicit instructions for how EBITDA must be calculated for the purpose of determining the Sun's annual profits payment:

> The Parties intend that EBITDA be calculated in a manner consistent with the computation of '**Retention**' as that line item appears on the profit and loss statement for Stephens Media Group for the period ended December 31, 2004."

II AA at 226 (emphasis added).

"Retention" is a way of computing earnings used by many in the newspaper industry and used by Stephens Media. II AA at 240. It is similar to EBITDA. *See id.* Stephens Media Group owned the Review-Journal in 2005. When the parties were negotiating the 2005 JOA, the 2004 Stephens Media profit and loss statement was the most recent example of an EBITDA calculation for the Review-Journal.

[redacted]

[redacted]

[redacted]

II AA 233.

The Sun does not dispute that most of the operating costs "borne" by the Review-Journal can be deducted from revenues when calculating EBITDA, but the Sun claims editorial costs and certain promotional costs cannot be deducted, though the Sun is unable to explain why they should be treated differently than other costs "borne" by the Review-Journal.

Since the inception of the 2005 JOA, regardless of what entities owned the Review-Journal and its other publications, the Review-Journal calculated EBITDA in accordance with the agreement's plain language. And for the first nine years of the 2005 JOA, the Sun never complained about editorial expenses being deducted. And why would they have? The contract was clear.

However, in 2014, as the challenges facing the newspaper industry hit the Review-Journal's bottom line and, correspondingly, decreased the Sun's payout, the Sun suddenly decided that the Review-Journal had been calculating EBITDA wrong all these years. It sued the Review-Journal's then-owner, alleging it had breached the 2005 JOA by deducting editorial costs when calculating EBITDA—even though the 2005 JOA *requires* these costs to be deducted. That case was settled confidentially and dismissed with prejudice. Then, in 2018, the Sun asserted similar claims against the Review-Journal's current owners, the Appellants/Cross-Respondents.

It is hard to imagine how the EBITDA formula could have been more clear. The parties mutually agreed upon an existing profit and loss statement to use as a template, and incorporated it by reference into the agreement. [redacted] Yet the arbitrator ignored that template and ruled that the 2005 JOA *prohibits* the Review-Journal from deducting editorial costs and costs for certain promotional activities in the EBITDA calculation. He also, incredibly, ordered the Review-Journal to continue to *include* revenues from those same promotional activities in the EBITDA calculation without deducting the corresponding costs, violating both the 2005 JOA and basic accounting principles.

The arbitrator's failure to follow the contract leads to an absurd result. By requiring the Review-Journal to ignore its largest expense category in the EBITDA calculation, the arbitrator rendered EBITDA useless as a measure of profitability, thereby creating a situation where, for the next 20 years, the Review-Journal will potentially be forced to pay millions of dollars in "profit-sharing" payments to the Sun—even when the Review-Journal is losing money and has no profits to share.

It was obvious to everyone that the arbitrator's ruling conflicts with the agreement. At the hearing on the Review-Journal's motion to vacate, the Sun's counsel acknowledged that "a literal reading" of the EBITDA definition supported the Review-Journal's position.[7] The district court judge seemed to recognize this as well—his main concern at the hearing was whether he had the authority to overturn the award or whether his "hands were tied" by cases holding that arbitration awards cannot be vacated just because the arbitrator decided an issue incorrectly.[8]

In fact, the district court was so concerned about overstepping its role that it refused to consider this Court's precedents squarely holding that awards that conflict with the parties' contract must be vacated. Its opinion confirming the award focused almost exclusively on the high standard for overturning an award due to a legal error, and did not analyze whether the award is consistent with the 2005 JOA—even though that was the central question presented by the Review-Journal's motion to vacate.

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[7] IV AA at 649: 6-9.
[8] *Id.* at 614:12-17.

By confirming an award that, on its face, disregarded the express terms of the 2005 JOA, the district court disobeyed mandatory precedent and abdicated its responsibility to enforce the standards governing arbitrations in this state. Affirming the district court's decision would materially change the law, reverse decades of precedent, and undercut Nevada's strong public policy in favor of arbitration. Nevada law has always been clear that when parties agree to have a dispute resolved by arbitration, they undertake the risk that the arbitrator will apply the law incorrectly, but they *never* waive the right to have an unambiguous contract enforced as written. Businesses will have no choice but to abandon arbitration in favor of litigation if submitting a dispute to a private arbitrator means that contracts can be rewritten after fifteen years of performance, and existing business relationships can be dismantled and restructured with no concern for the agreement that the parties negotiated. The ruling below should be reversed.

B. Procedural History and Disposition below.

The Sun filed its complaint in April 2018, alleging, among other things, that the Review-Journal had breached the 2005 JOA by deducting editorial costs and certain promotional costs from earnings when calculating EBITDA for the purpose of determining the Sun's annual profits payment. I AA at 1, 21-29. The Sun sought a declaratory judgment prohibiting the Review-Journal from deducting these costs going forward, as well as damages for the Review-Journal's alleged breaches. *Id.* at 21-29. The Sun also asserted a claim for "tortious breach" of the duty of good faith and fair dealing. *Id.* at 28-29. Finally, the Sun asked the arbitrator to order an audit. *Id.* at 30. These claims were compelled to arbitration on November 21, 2018. I AA at 115.[9]

On July 2, 2019, the arbitrator ruled in favor of the Sun on some of its declaratory relief and breach of contract claims, finding that—notwithstanding the JOA's clear language—the Review-Journal was prohibited from deducting editorial costs and certain promotional activities costs when calculating EBITDA. II AA at 236. The arbitrator awarded the Sun $1.6 million plus interest on its claim

[9] The Sun's complaint also included claims that did not relate to amounts owed to the Sun; these claims remained with the district court. The Review-Journal has also asserted breach of contract counterclaims in the district court. Proceedings in the district court are currently stayed pending a federal court's determination, in a related case, of whether the 2005 JOA is enforceable under the Newspaper Preservation Act.

relating to editorial costs. *Id.* at 246. He found no damages on the Sun's claim relating to promotional activities costs. *Id.* at 241-43. However, he ordered that, going-forward, the Review-Journal must include revenues from certain promotional activities in the EBITDA calculation without deducting the corresponding costs—a methodology that violates the 2005 JOA and basic accounting principles. *Id.* at 240-41. He granted the Sun's request for an audit. *Id.* at 246.[10] Finally, the arbitrator rejected the Sun's tortious breach claims and denied its request for attorneys' fees. *Id.* at 245-47.

The Review-Journal moved to vacate the award on September 19, 2019. II AA at 179. The Sun moved to confirm the parts of the award in which it had prevailed and to vacate the parts in which it had lost. I AA at 147. The district court entered an order confirming the award in its entirety on January 28, 2020. V AA at 810. The Review-Journal filed a notice of appeal that same day. V AA at 821. On February 11, 2020, the Sun filed a notice of cross-appeal

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[10] The Review-Journal never refused to permit an audit, and therefore is not challenging the district court's confirmation of this portion of the award.

challenging the court's confirmation of the arbitrator's ruling with respect to attorneys' fees only. V AA at 975.

On February 18, 2020, the district court entered a judgment on the arbitration award. V AA at 991. The Review-Journal filed an amended notice of appeal on March 3, 2020. VI AA at 1030.

STATEMENT OF FACTS

A. The Old 1989 JOA.

The Review-Journal and the Sun are newspapers serving the Las Vegas metropolitan area. In June 1989, when the Sun was on the verge of financial collapse, the Review-Journal and the Sun entered a joint operating arrangement (the "1989 JOA") pursuant to the Newspaper Preservation Act, 15 U.S.C. §1801, *et seq.* ("NPA"). The NPA governs joint operating arrangements between a failing newspaper and a successful one willing to help out the failing newspaper. *Id.* at §1802.

Under the 1989 JOA, the Sun, which was the failing newspaper, remained a separate and independent daily newspaper with its own subscribers. However, the Review-Journal handled and paid for all of the Sun's non-editorial business needs, such as printing and circulation. *See, e.g.,* II AA at 261-262, 284-89. As compensation under the 1989 JOA, the Sun received an annual payment from the Review-Journal for the Sun's editorial costs, and a share of the Review-Journal's and the Sun's combined profits. II AA at 281-83, 291.

B. The 2005 JOA.

In June 2005, the parties terminated the 1989 JOA and replaced it with a new JOA. II AA at 206. Under the 2005 JOA, the Sun ceased publishing as a standalone afternoon newspaper. Instead, the Sun became a six-to-ten page daily insert to the Review-Journal. II AA at 218-220, 208.

The 2005 JOA will be in effect until December 31, 2040, unless a court or the parties terminate it earlier. II AA at 207. The following provisions of the 2005 JOA are relevant to this appeal.

1. The Sun's new compensation structure.

As noted above, under the 1989 JOA, the Review-Journal provided the Sun a payment to be used for the Sun's editorial costs plus a share of the combined profits of both newspapers. II AA at 281-83, 291. Under the 2005 JOA, however, the Sun was no longer a standalone newspaper and no longer had its own sales, subscribers, or profits. Accordingly, the parties changed the Sun's compensation to reflect this new reality.

The formula for the Sun's compensation is set out in Appendix D to the 2005 JOA. Appendix D of the 2005 JOA provides that the Review-Journal is to make an annual profit-sharing payment to the Sun. II AA at 225-28. It also provides that the amount of the payment adjusts each year, according to a formula. *Id.* at 225.

The formula establishes a first-year payment, then the method by which to determine how each subsequent year would vary from the one before it. For fiscal year 2005, the first year of the 2005 JOA, the Sun received $12 million. II AA at 225. In each subsequent year, the Sun's payment is to be adjusted upward or downward by the same percentage that the combined EBITDA of the printed Review Journal/Sun and other Review-Journal print publications increased or decreased as compared to the prior year. *Id.* This ensures that the Sun's profit-sharing payment remains proportional to the Review-Journal's profit. *See id.* So, for example, if the EBITDA decreased by 10% between fiscal year 2005 and 2006, the Sun's payment in 2006 would have been $10.8 million, representing a 10% decrease from the $12 million payment in 2005 ($12 million minus $1.2 million is $10.8 million).

2. The instructions and template for calculating EBITDA.

Appendix D of the 2005 JOA contains explicit instructions for how to calculate EBITDA for the purpose of determining the Sun's annual profits payment. II AA at 225-228.

First, Appendix D specifies which publications are to be included in the EBITDA calculation: "EBITDA shall include the earnings[11] of the Newspapers [i.e., the Review-Journal and the Sun] and the earnings of the Review-Journal's Affiliates derived from publications generally circulated in Clark, Nye, or Lincoln Counties, Nevada, or any parts thereof." II AA at 225-26.

Second, the parties negotiated and provided for specific costs to be excluded from the EBITDA calculation. The list of excluded costs includes rents, leases or similar expenses for certain production

[11] "Earnings" refers to the profit left over when all expenses are deducted from revenues. *See How are Earnings and Income Different?*, INVESTOPEDIA (Nov. 6, 2019), https://www.investopedia.com/ask/answers/070615/what-difference-between-earnings-and-income.asp.

equipment (like presses). II AA at 226. The list of excluded costs does not include any editorial or promotional costs. *See id.*

Third, Appendix D provides that EBITDA is to be calculated the same way that Stephens Media, the Review-Journal's then-owner, had calculated "Retention" in the previous year. *Id.* Retention is a newspaper term of art for earnings that is very similar to EBITDA. II AA at 240. Specifically, Appendix D states:

> The parties intend that EBITDA be calculated in a manner consistent with the computation of '**Retention**' as that line item appears on the profit and loss statement for Stephens Media Group for the period ended December 31, 2004.

II AA at 226 (emphasis added). Here is a screenshot of the provision:

[redacted]

Id.

[redacted]

Id.

[redacted]

Id.

3. All costs under the 2005 JOA were to be "borne" by the Review-Journal, except the Sun's editorial costs.

The 2005 JOA expressly requires the Review-Journal to "bear" all operating costs under the 2005 JOA, except for the Sun's editorial costs. It states, "***[a]ll costs***, including capital expenditures, of operations under this Restated Agreement, except the operation of the Sun's news and editorial department, ***shall be borne by the Review-Journal***." II AA at 208 (emphasis added).

[redacted]

II AA at 233. Thus, the Review-Journal is responsible for paying the costs when they become due, and those costs are deducted from revenue when the Review-Journal calculates EBITDA.

4. The 2005 JOA's new provision regarding editorial costs.

The 2005 JOA treated editorial costs differently than the 1989 JOA. Under the 1989 JOA, the Review-Journal had borne the editorial costs of both the Review-Journal and the Sun by providing money to the Sun each month that was to go to the Sun's editorial costs. II AA at 258, 281-83.

The 2005 JOA changed this. Section 4.2 of the 2005 JOA provides that "[t]he Review-Journal and the Sun shall each bear their own respective editorial costs and shall establish whatever budgets each deems appropriate." II AA at 207. As a result, under the 2005 JOA, the Review-Journal pays its own editorial costs, as it always has, but the Sun is now responsible for its own editorial costs and does not receive money from the Review-Journal to cover those costs.

5. The 2005 JOA changed how promotional costs were handled.

The 2005 JOA also treated promotional costs differently than the 1989 JOA. The 1989 JOA had required the Review-Journal to establish a budget for promotional activities to be allocated between both newspapers. II AA at 263. Reflecting the fact that the Sun was now an insert to the Review-Journal, and not a separate newspaper, Section 5.1.4 of the 2005 JOA requires the Review-Journal to use reasonable efforts to promote both newspapers. II AA at 209.

The 2005 JOA mandates that promotions of the Review-Journal as an advertising medium or to advance circulation "shall include mention of equal prominence for the Sun." II AA at 209. However, it also provides that the Sun and the Review-Journal may "undertake additional promotional activities for their respective newspaper[s] at their own expense." *Id.* Often, the Review-Journal engages in additional promotional activities via trade deals where no money changes hands—for example, the Review-Journal might give free newspaper advertising to a company putting on an event (like a sporting event or trade show) in exchange for a sign promoting the Review-Journal at the event venue. *See* II AA at 241-42.

C. The Sun's Lawsuit against the Review-Journal.

The Review-Journal, regardless of who owned it, has always calculated EBITDA consistent with the 2004 Stephens Media profit and loss statement, [redacted] For the first nine years of the 2005 JOA, the Sun never complained about editorial costs being deducted. *See* II AA at 226.

However, in 2014, the Sun suddenly did an about-face and sued the Review-Journal's prior owner, claiming that the prior owner breached the 2005 JOA by deducting the Review-Journal's editorial costs when calculating EBITDA. I AA at 105. That case settled confidentially in 2016, and was dismissed with prejudice without a ruling on the merits. I AA at 113.

In April 2018, the Sun sued the Review-Journal's current owners, contending, among other things, that the Review-Journal breached the 2005 JOA by deducting editorial costs, and costs for promotions that did not feature the Sun in equal prominence, when calculating EBITDA. I AA at 1, 21-29. The Sun asserted claims for declaratory relief, breach of contract, and tortious breach of the covenant of good faith and fair dealing. *Id.* at 21-29. The Sun also asserted other claims not related to its compensation. *See id.* at 28-29. The Court ordered the parties to arbitrate all of the Sun's claims that related to any amounts owed under the 2005 JOA. I AA at 115.

D. The Arbitrator Disregarded the 2005 JOA's EBITDA Formula.

1. Despite the 2005 JOA's plain language, the arbitrator held that the Review-Journal's editorial costs could not be deducted.

[redacted]

II AA at 226, 233. The arbitrator, however, rejected the unambiguous

EBITDA formula in the 2005 JOA. Instead, he ruled, among other things, that the Review-Journal was prohibited from deducting editorial costs when calculating EBITDA for the purpose of determining the Sun's annual profit-sharing payment. II AA at 238-39.

[redacted]

Yet despite clearly acknowledging that the Review-Journal's editorial costs were *allowable* deductions under the EBITDA formula in the 2005 JOA and accepted by the Sun for nine years, the arbitrator nonetheless decided that the 2005 JOA *prohibits* the

Review-Journal from deducting its editorial costs, and awarded the Sun over $1.6 million as a result. II AA at 240-41, 246.

Although his reasoning is opaque, the arbitrator seems to have thought that section 4.2 of the 2005 JOA eliminated the express requirement that editorial expenses be deducted in the EBITDA calculation. Specifically, he seems to have thought that if the 2005 JOA required the Review-Journal to *bear* an expense, then that expense *could not be deducted* when calculating EBITDA. Thus, after acknowledging that Appendix D of the 2005 JOA required EBITDA to be calculated consistent with the computation of Retention in the 2004 Stephens Media profit and loss statement, II AA at 240, the arbitrator held that Section 4.2 of the JOA, which requires each newspaper to bear its own editorial expenses "mean[s] that the RJ would not, in keeping the books of the JOA, be permitted to deduct editorial expenses of the RJ in computing EBITDA of the JOA and the subsequent annual profits payment (if any) to the Sun." *Id.* The arbitrator made no attempt to square his ruling with the 2005 JOA's express requirement that the Review-Journal "bear" *all* of the newspapers' operating expenses [redacted]

[redacted] *See* II AA at 208, 233.

2. Despite the 2005 JOA's plain language, the arbitrator held that the Review-Journal's separate promotional costs could not be deducted.

With respect to promotional costs, the arbitrator recognized that under the 2005 JOA [redacted] II AA at 241. However, he held that the Review-Journal had breached the 2005 JOA by deducting as part of the EBITDA calculation the costs of promotional activities that did not include the Sun. *Id.* The arbitrator awarded the Sun no damages on this claim. *Id.* at 242.

As with his ruling on editorial costs, the arbitrator seems to have thought that since section 5.1.4 of the 2005 JOA allows additional promotional activities to be undertaken at each newspaper's "own expense," then the Review-Journal's costs for these promotional activities could not be deducted in the EBITDA calculation. *See* II AA at 241-43.

Compounding his mistake, the arbitrator further ordered, bizarrely, that, going forward, the Review-Journal was required to [redacted] II AA at 242. [redacted] *See id.* This violates basic accounting principles, which require expenses (*i.e.*, costs) to be matched to revenues, and completely rewrites the EBITDA formula.[12] [redacted] *See id.*

[12] ATTORNEY'S HANDBOOK OF ACCOUNTING, AUDITING, AND FINANCIAL REPORTING, § 4.04[2] (4th ed. 2017) ("[T]he matching principle has been integral to the calculation of a meaningful net income or net loss. Simply stated, *matching* means offsetting the expenses directly related to the production of revenues in any given period against those revenues to determine the entity's net earnings over that period.").

E. The District Court Rubber-Stamped the Award.

The Review-Journal moved to vacate the award, and the Sun moved to partially confirm and partially vacate the award. II AA at 179, I AA at 147.

At the hearing on October 22, 2019, while arguing that the arbitrator was right to ignore the 2005 JOA's plain language, the Sun's counsel acknowledged that a literal reading of the 2005 JOA supported the Review-Journal's argument. IV AA at 649: 6-9 ("the literal reading of the retention sentence is all the Review Journal has").[13]

The district court judge likewise seemed to agree that the arbitrator failed to follow the 2005 JOA's plain language. However, he repeatedly expressed concern that he was not permitted to overrule an arbitrator no matter what the circumstances. For example, after the Review-Journal's counsel walked through the 2005 JOA's language and how the award conflicted with that language, the district judge responded by saying "as a trial judge,

[13] It is hardly all the Review-Journal has, but it is all the Review-Journal needs, and it is quite telling that the Sun's counsel has admitted [redacted]

sometimes I feel when it comes to these specific issues my hands are somewhat tied." IV AA at 614:12-17, *see also* 619:4-6.

On January 28, 2020, the district court issued findings of fact and conclusions of law confirming the arbitration award in its entirety. Consistent with his stated concern that he did not have the power to overturn an arbitration award even if it was wrong, the judge carefully avoided engaging with the arbitrator's ruling. Instead, he just ruled, conclusorily, that there was no "clear and convincing evidence" that the arbitrator "manifestly disregarded" the 2005 JOA. V AA at 816.

SUMMARY OF THE ARGUMENT

The 2005 JOA could not have been more clear about how EBITDA was to be calculated. The parties even incorporated *a picture* showing each line item to be deducted. The arbitrator had no authority to unilaterally impose a new and different financial arrangement that the parties did not bargain for. Under this Court's settled precedent, the district court was obligated to vacate the award. Confirming the award was reversible error. *Coblentz*, 112 Nev. at 1169; *Wichinsky*, 109 Nev. at 89.

The district court's reliance on *Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 304, 396 P.3d 834, 838 (2017), as justification for confirming the award was misplaced. *Washoe* did not overrule this Court's precedent requiring vacatur when an arbitrator deviates from the plain language of the parties' agreement. To the contrary, the *Washoe* Court expressly recognized that an arbitrator "***is not free to contradict the express language of the contract***." *Washoe*, 133 Nev. at 304 (citations omitted) (emphasis added). Because the award here contradicted the 2005 JOA's express formula for calculating EBITDA, there was clear and convincing evidence of a conflict between the agreement and the award, mandating vacatur. *See Coblentz*, 112 Nev. at 1169.

The Court should reject the Sun's contention that by deducting editorial and promotional costs when calculating EBITDA, the Review-Journal is improperly "charging" its separate costs "to the JOA." That contention has no basis whatsoever in the 2005 JOA. The method the parties chose for compensating the Sun was an annual profits payment that adjusted based on the combined EBITDA of the Review-Journal/Sun joint media product, together with the Review-Journal's other print publications. II AA at 225-26. The EBITDA formula in the 2005 JOA was agreed to by both parties and it unambiguously [redacted] *Id.* If the Sun thought it was unfair to use an EBITDA formula that allowed deductions for costs that it claims did not directly benefit the Sun, it could have bargained for a different formula. But it did not.[14]

The Court should also reject the Sun's attempts to manufacture an ambiguity in the 2005 JOA that would justify the arbitrator's departure from the plain language. The Sun's unsupported assertion that when the 2005 JOA states in sections 4.2 and 5.1.4 that the Review-Journal must "bear" its editorial costs and engage in separate promotional activities "at its own expense," this really means that these costs cannot be deducted in the EBITDA calculation, deserves no weight. To bear a cost or do something at your own expense means that *you pay that cost.* It does not mean the cost cannot be deducted in an earnings calculation. Merely asserting idiosyncratic definitions

[14] The Sun's claims that editorial and promotional expenditures do not benefit the Sun are without merit, as well, though the issue is irrelevant to this case.

of common English words does not render a clear contract ambiguous.

Importantly, the 2005 JOA mandates that "all costs" under the JOA except for the Sun's editorial costs "shall be borne by Review-Journal." II AA at 208. [redacted] *See* II AA at 233. This confirms that the term "bear/borne," as used in the 2005 JOA, means pay, not "exclude from the EBITDA calculation." Moreover, if the Sun really believed that any costs that the contract said should be "borne" by the Review-Journal could not be deducted when calculating EBITDA, it would be arguing the Review-Journal is not entitled to deduct *any costs at all* from revenues in that calculation. After all, Section 5.1 states that all operating costs are borne by the Review-Journal. Yet the Sun is conspicuously not arguing that no operating costs whatsoever can be deducted in the EBITDA calculation—and with good reason, because it knows an EBITDA calculation *requires* costs to be deducted.

As a matter of basic accounting, expenses (*i.e.*, costs) *borne* by a company *must* be deducted when calculating EBITDA. EBITDA is a measure of profitability, which is determined by subtracting expenses from revenues. An EBITDA calculation thus *requires* expenses to be deducted from revenues. That is the *entire point* of the calculation. [redacted] The arbitrator's conclusion that costs borne by a company *cannot* be deducted when calculating EBITDA is exactly backwards.

Contrary to the Sun's assertions, following the 2005 JOA's plain language does not render sections 4.2 and 5.1.4 meaningless. Section 4.2 establishes that instead of the Review-Journal paying both newspapers' editorial costs, as was the case under the 1989 JOA, each newspaper is now responsible for its own editorial budget and costs. Section 5.1.4, among other things, establishes each newspaper is entitled to engage in separate promotional activities. Because these provisions have nothing to do with the EBITDA calculation, following the contractually-mandated EBITDA formula cannot render these provisions meaningless. Similarly, because sections 4.2 and 5.1.4 have nothing to do with the EBITDA calculation and do not conflict with the EBITDA formula in Appendix D, they cannot operate to eliminate that unambiguous formula, as the arbitrator wrongly thought they did for some reason.

The arbitration award, on its face, conflicts with the unambiguous EBITDA formula in the 2005 JOA. There is no colorable argument to the contrary. This Court's precedent, including *Coblentz* and *Washoe*, makes clear that arbitrators do not have the discretion to issue awards that contradict the underlying contract. As explained in more detail below, the district court's order confirming the award should be reversed.

ARGUMENT

I. Standard of Review.

This Court reviews a district court's decision to vacate or confirm an arbitration award de novo. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). Likewise, a district court's interpretation of a contract is also reviewed de novo. *Anderson v. Sanchez*, 132 Nev. 357, 360, 373 P. 3d 860, 863 (2016).

II. The District Court Failed to Follow Mandatory Precedent that Required the Award to be Vacated.

A. This Court's Precedent Requiring Courts to Vacate Arbitration Awards that Contradict the Parties' Agreement Was Controlling Here.

The district court's refusal to vacate the award out of fear of overstepping its authority was reversible error grounded in a misunderstanding of this Court's precedents.

This Court has never held that trial courts must turn a blind eye when an arbitrator disregards or rewrites the parties' contract, as the arbitrator did here. To the contrary, this Court has repeatedly admonished trial courts that "*the deference accorded an arbitrator . . . is not limitless; he is not free to contradict the express language of the contract.*" *Washoe*, 133 Nev. at 304 (emphasis added); *Int'l Ass'n of Firefighters, Local 1285 v. City of Las Vegas*, 107 Nev. 906, 910, 823 P.2d 877, 879 (1991) (same).

Accordingly, a district court *must* vacate an arbitration award that conflicts with the express language of the parties' contract. *Coblentz*, 112 Nev. at 1169 (reversing district court order affirming arbitration award that conflicted with the contract); *Wichinsky*, 109

Nev. at 89 (if an award is "unsupported by the agreement, it may not be enforced") (*quoting Exber*, 92 Nev. at 731).

Coblentz is directly on point and compelled vacatur of the award here. *Coblentz* involved a lease agreement that required the lessee to name the property owner as an additional insured on its liability insurance policy. *Coblentz*, 112 Nev. at 1164-65. After a guest slipped and fell on the property and sued both the property owner and the lessee, it was revealed that the lessee had not named the property owner as an additional insured, as the contract required. *Id*. at 1165. The property owner filed a cross-claim against the lessee, and the issue of whether the lessee was obligated to insure the property owner was submitted to arbitration. *Id*. Just as the arbitrator here ignored the express, unambiguous EBITDA formula and template in the 2005 JOA, the arbitrators in *Coblentz* ignored the unambiguous insurance provision and held that the lessee did *not* breach its contractual obligation to name the property owner as an additional insured. *Id*. at 1166.

The arbitrators in *Coblentz*, just like the arbitrator here, read a material provision out of the agreement because they wrongly thought it was modified by another, unrelated provision. In addition to requiring the lessee to name the property owner as an insured, the agreement in *Coblentz* also required the lessee to "indemnify and hold harmless" the property owner in certain limited circumstances. *Coblentz,* 112 Nev. at 1168. The arbitrators in *Coblentz* conflated the concepts of insurance and indemnity, and wrongly concluded that the limitations on the lessee's duty to indemnify also applied to the duty to insure. *Id.* And, like the district court here, the district court in *Coblentz* confirmed the award, holding that arbitration awards must be confirmed "even if the decision is erroneous." *Id.* at 1169.

This Court reversed. It held that "the arbitrators erred as a matter of law in not recognizing that [the lessee] had violated its duty to insure, which was obvious in the contract and distinct from its duty to indemnify." *Coblentz,* 112 Nev. at 1168-69. Notably, the *Coblentz* Court was undeterred by the fact that the arbitrators had duly considered the contract language, and the opinion does not suggest that the trial court should have deferred to the arbitrators' plainly incorrect conclusion. *See id.* Instead, the Court observed that the award conflicted with the contract, and held that the award should have been vacated because the arbitrators manifestly disregarded the law by reading a provision—the lessee's duty to name the property owner as an additional insured—out of the contract. *Id.* at 1169.

Coblentz thus clearly holds, consistent with this Court's other jurisprudence, that an arbitration award must be vacated if it conflicts with the parties' contract. *Coblentz,* 112 Nev. at 1168-69; *Wichinsky*, 109 Nev. at 89. And *Coblentz* controls here because, as explained above, there is no real dispute that the arbitrator's ruling conflicts with the 2005 JOA's plain language. The 2005 JOA requires the parties to calculate EBITDA consistent with the "Retention" calculation on the 2004 Stephens Media profit and loss statement. II AA at 226. [redacted] II AA at 233.[15] Notwithstanding the 2005 JOA's unambiguous instructions for how to calculate EBITDA, the arbitrator ruled that deducting editorial costs and certain promotional costs was prohibited, and ordered the Review-Journal to pay the Sun over $1.6 million dollars

[15] Because the profit and loss statement was expressly referenced in the 2005 JOA, it is part of that agreement. *Pentax Corp. v. Boyd*, 111 Nev. 1296, 1300, 904 P.2d 1024, 1026-27 (1995); *Paseo Verde Gibson Apts. LLC v. Valley Ass'n, Inc.*, No. 216CV03000KJDPAL, 2018 WL 1536806, at *3 (D. Nev. Mar. 29, 2018).

for supposedly breaching the 2005 JOA by deducting editorial costs. II AA at 240-41, 246. Also contrary to the 2005 JOA, he ordered the Review-Journal to [redacted] *Id.* at 242.

Accordingly, because the award, on its face, conflicted with the 2005 JOA's plain language, the district court should have followed *Coblentz* and vacated the award.

B. *Washoe* Did Not Overrule *Coblentz* and Does Not Justify the District Court's Refusal to Vacate the Award.

The district court apparently believed that this Court's decision in *Washoe*, 133 Nev. at 304, precluded it from vacating the award even though it conflicted with the 2005 JOA. But *Washoe* did not overrule *Coblentz* or call into question the settled rule that arbitrators may not disregard the parties' contract.

Washoe involved an arbitration in which a principal who misappropriated school funds challenged her termination for cause. *Washoe*, 133 Nev. at 302-03. After the arbitrator ruled against her, she moved to vacate the award, claiming that the arbitrator disregarded a provision in the collective bargaining agreement requiring progressive discipline prior to termination. *Id.* at 304. This Court analyzed the contract provision at issue and concluded that, contrary to the teacher's assertion, progressive discipline was not required in cases of egregious or repeat infractions. *Id.* at 305.

Washoe did not change the law requiring arbitrators to follow the parties' contract. To the contrary, the *Washoe* Court *recognized* and *reaffirmed* the rule that "the deference accorded an arbitrator . . . is not limitless; he is not free to contradict the express language of the contract." *Washoe*, 133 Nev. at 304 (quoting *Int'l Ass'n of Firefighters, Local 1285*, 107 Nev. at 910). The award in *Washoe* was affirmed because the Court there analyzed the parties' contract and concluded that the arbitrator followed it. *Washoe*, 133 Nev. at 304-05. Here, by contrast, the district court judge concluded, incorrectly, that he was obligated to defer to the arbitrator without independently analyzing the 2005 JOA to see if the award conflicted with the agreement's language. Nothing in *Washoe* compels that result.

III. None of the Sun's or the Arbitrator's Arguments Justify Ignoring the 2005 JOA's Plain Language.

A. The Review-Journal Is Not Improperly "Charging the JOA" For Separate Costs.

In the proceedings below, the Sun tried to confuse the court with convoluted rhetoric about how the Review-Journal is supposedly "charging the JOA" for its separate editorial and promotional costs, when the only deductions are supposed to be for costs that jointly benefit the Review-Journal and Sun. This whole argument is a fiction with no basis in the 2005 JOA.

The mandatory deductions under the 2005 JOA are expressly *not* limited to costs that jointly benefit the Review-Journal and Sun. To the contrary, as the 2005 JOA [redacted] *See* II AA at 233, 225-26 (Appendix D of the 2005 JOA stating that the EBITDA calculation "*shall include the earnings of the Newspapers and the earnings of the Review-Journal's Affiliates derived from publications generally circulated in Clark, Nye, or Lincoln Nevada or any parts thereof.*") (emphasis added).

The fact that the parties chose an EBITDA formula that included earnings from publications that were *not even part of the Review-Journal/ Sun joint media product* defeats the Sun's contention that the EBITDA calculation was supposed to be limited to joint expenses of the Review-Journal and Sun. Moreover, not that it matters since the 2005 JOA is clear about which deductions are required, the Sun is *an insert* in the Review-Journal and makes more money if the Review-Journal is profitable. Costs expended by the Review-Journal on the editorial product of the newspaper, or on promotions, benefit *both* the Review-Journal *and* the Sun. Plainly, the Sun now wishes it had made a different arrangement—but its years-after-the-fact dissatisfaction with the deal that it made is not a basis to rewrite the contract. *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 324, 182 P.2d 1011, 1016–17 (1947) ("Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties.").

B. The Sun's Attempt to Avoid the 2005 JOA's Plain Language by Manufacturing an Ambiguity Is Baseless.

Straining to justify the arbitrator's conclusion, the Sun has resorted to simply denying the 2005 JOA means what it says. The Sun apparently hopes arguing against the 2005 JOA's plain language will be enough to persuade this Court that the EBITDA formula is ambiguous, so that it can then pitch the award as a valid act of "contract interpretation" by the arbitrator.

The EBITDA formula in the 2005 JOA, like the insurance provision in *Coblentz*, is unambiguous and does not require "interpretation." *Coblentz*, 112 Nev. At 1169. The 2005 JOA contains clear instructions and even incorporates a template for how to calculate EBITDA. II AA at 226, 233. The only applicable contract interpretation principle here is the one requiring a contract's plain language to be enforced as written. *See Mendenhall v. Tassinari*, 133 Nev. 614, 624, 403 P.3d 364, 373 (2017) (a clear and unambiguous contract must be enforced as written); *Reno Club*, 64 Nev. at 323-24 ("Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it.").

In an attempt to avoid the 2005 JOA's plain language, the Sun asserts that when Section 4.2 states that each party must "bear" its own editorial costs, this really meant that editorial costs could not be deducted in the EBITDA calculation. The Sun likewise asserts that when Section 5.1.4 states that each party may engage in separate promotional activities "at their own expense," this meant the costs of those activities could not be deducted in the EBITDA calculation.

These assertions are obviously wrong. There simply is no ambiguity. The terms "bear . . . costs" and "and at their own expense" mean that the Review-Journal pays these costs. Importantly, the parties used the terms "bear" and "borne" consistently throughout the 2005 JOA to refer to costs *paid* by the Review-Journal. *See* II AA at 208 ("*[a]ll* costs, including capital expenditures, of operations under this Restated Agreement, except the operation of the Sun's news and editorial department, *shall be borne by Review-Journal.*") (emphasis added). [redacted] II AA at 233.

The 2005 JOA simply cannot be read the way the Sun proposes. The word bear/borne cannot mean "pay" in section 5.1 while at the same time meaning "exclude from the EBITDA calculation" in section 4.2 and section 5.1.4. This would violate the established rule that a term used by the parties in a contract must be given the same meaning throughout the contract. 11 Williston on Contracts § 32.6 (4th ed. 2020). Moreover, by twisting the contractual language beyond recognition to manufacture a conflict between provisions, the Sun also is violating the rule that contract provisions cannot be read as conflicting if they can be harmonized. *See Chemeon Surface Technology, LLC v. Metalast International, Inc.*, No. 315CV00294MMDVPC, 2017 WL 1015009, *1 (D. Nev. Mar. 15 2017).

It is worth noting the Sun's argument gets basic accounting principles backwards. Accounting principles require that costs *borne* by a company *must* be deducted when calculating EBITDA. This is because to calculate EBITDA, which is a measure of profit, expenses must be deducted from revenues.[16] The fact that the Review-Journal pays its own editorial costs and the costs of its separate promotional activities is *entirely consistent* with Appendix D [redacted], which shows that the editorial costs and separate promotional costs borne by the Review-Journal must be deducted in the EBITDA calculation.

The Sun may argue that if editorial and promotional costs are deducted, then the Sun is essentially bearing (*i.e.*, paying) these costs because the deductions reduce the Review-Journal's EBITDA and therefore correspondingly reduce the Sun's profits payment. But this argument necessarily fails because the Sun *expressly agreed* to have its compensation tied to the Review-Journal's EBITDA. II AA at 225-26. By the Sun's logic, *all* of the Review-Journal's deductions for *any* operating costs violate the 2005 JOA because any costs being deducted thereby become, supposedly, "borne" by the Sun, when section 5.1 of the agreement requires all costs to be borne by the

[16] *See The Formula for Calculating EBITDA (with Examples)*, INVESTOPEDIA (Dec. 17, 2019), https://www.investopedia.com/ask/answers/031815/what-formula-calculating-ebitda.asp.

Review-Journal. Yet the Sun is conspicuously not making this argument, because it knows it is absurd.

The arbitrator should have rejected the Sun's argument out of hand and followed the unambiguous EBITDA formula. Instead, he was lured into making the same error that the arbitrators made in *Coblentz*. In *Coblentz*, the arbitrators wrongly held that the lessee did not have to insure the property owner because they thought that an unrelated provision that placed conditions on the lessee's duty to indemnify was inconsistent with the express provision that imposed on the lessee an unambiguous duty to insure. *Coblentz*, 112 Nev. at 1168. Here, the arbitrator wrongly held that the Review-Journal was barred from deducting editorial and separate promotional costs because, in direct conflict with the plain language of the unambiguous contract, he decided that unrelated provisions establishing who must pay these costs were inconsistent with and therefore eliminated the express EBITDA formula. As *Coblentz* makes clear, this is not a valid exercise of discretion. It is a failure to honor the parties' contract that mandates vacatur of the award. *Id.* at 1169.

C. The Court Should Reject the Sun's Attempt to Use "Contract Interpretation" to Avoid the 2005 JOA's Plain Meaning.

In the proceedings below, the Sun put forward several "contract interpretation" arguments that it claims justify the arbitrator's failure to follow the 2005 JOA. However, whenever the Sun tries to invoke contract interpretation principles to explain why unambiguous contract provisions should be ignored, it just trips over its own feet. This is because when a contract provision is clear, as the EBITDA formula is here, any reading that conflicts with the plain language will necessarily violate numerous contract interpretation principles.

First, the Sun has argued that following the EBITDA formula set out in Appendix D of the 2005 JOA and the Stephens Media profit and loss statement would render Section 4.2 and 5.1.4 meaningless. This is wrong. Section 4.2 does the work of establishing who pays for whose editorial costs in the first instance and sets the editorial budget for each paper—it provides that each paper pays its own editorial costs and establishes whatever budget it deems appropriate. This was a change from the 1989 JOA, under which the Review-Journal bore the editorial costs of both newspapers. Similarly, Section 5.1.4 explains how promotional activities costs are to be handled and paid for now that the Sun is not a separate newspaper but instead an insert in the Review-Journal. II AA at 209. Because these provisions are all perfectly consistent, enforcing one of them cannot render the others meaningless.[17]

Second, the Sun has argued—and apparently persuaded the arbitrator—that section 4.2 supposedly superseded the EBITDA formula because it was "new" and "specific." II AA at 240. The newness or specificity of section 4.2 is irrelevant because section 4.2 has nothing to do with the EBITDA calculation and does not conflict with the unambiguous EBITDA formula that appears in Appendix D. In any event, the EBITDA formula and section 4.2 both came into being for the first time in the 2005 JOA. The 1989 JOA did not require an EBITDA calculation. *See* II AA at 258, 281-83. The same is true of section 5.1.4—it was created at the same time as the EBITDA formula, and was not a later addition. All three of these provisions were equally new. And the EBITDA formula, which identifies every

[17] To the contrary, ignoring the 2005 JOA's clear instructions for calculating EBITDA impermissibly renders those instructions meaningless. *Coblentz*, 112 Nev. at 1169 (vacating award because the arbitrator ignored an unambiguous contract provision, rendering it meaningless).

line item to be deducted, is plainly the more specific instruction for how to calculate EBITDA than either section 4.2 or 5.1.4, neither of which mention EBITDA at all.

Third, because the 2005 JOA contains a list of costs to be excluded from the EBITDA calculation, and promotional and editorial costs are not on that list, the JOA cannot as a matter of law be read to exclude those costs from the EBITDA calculation. *See Nevada Food King, Inc. v. Reno Press Brick Co.*, 81 Nev. 135, 138, 400 P. 2d 140, 142 (1965) (Nevada courts apply the maxim of *expressio unius est exclusio alterius* or "the expression of one thing excludes others," meaning that when a contract expressly enumerates items, any items not included on the list must be excluded.).

Finally, the Sun is asking this Court to endorse a patently absurd result: a doctored "EBITDA" calculation that fails to account for large expense categories, potentially causing the Review-Journal to report profits that do not exist, and forcing it to make profit-sharing payments to the Sun even when there are no profits to share. This violates the settled rule that contracts cannot be read to lead to absurd results. *Reno Club,* 64 Nev. at 325 (providing that "[a] contract should not be construed so as to lead to an absurd result").

IV. Because the Award, on Its Face, Conflicts with the 2005 JOA's Unambiguous EBITDA Formula, the Conflict Was "Clear And Convincing."

It is difficult to imagine a more clear and convincing example of an arbitrator disregarding the parties' agreement than what the arbitrator did here. Whether or not the 2005 JOA required editorial and promotional activities costs to be deducted in the EBITDA calculation is a legal question that is answered conclusively by the 2005 JOA and its bargained-for template for the EBITDA calculation. There were no factual issues to weigh.

The 2005 JOA requires the parties to calculate EBITDA "in a manner consistent with the computation of 'Retention' as that line item appears on the profit and loss statement for Stephens Media Group for the period ended December 31, 2004." II AA at 226. [redacted] II AA at 240-41. The evidence that the award conflicts with the 2005 JOA is not just clear and convincing, it is beyond any doubt.

Tellingly, although the district court incorrectly believed, for some reason, that the "clear and convincing" standard was not met, it was wholly unable to articulate any way in which the arbitrator's ruling was even conceivably consistent with the 2005 JOA. In the place of analysis, the court simply recited the arbitrator's conclusion. *See* V AA at 815-19. Presumably, the court believed that the mere fact that the arbitrator had stated a basis for his conclusion, regardless of how erroneous, precluded a finding that the "clear and convincing" standard was met. *See id.*

Regardless, the district court's affirmance is a misapplication of the law. "Clear and convincing evidence" is simply an evidentiary standard that means "beyond a mere preponderance of the evidence." *King v. St. Clair*, 134 Nev. 137, 139-140, 414 P.3d 314, 316 (2018) (holding that to satisfy the "clear and convincing" standard, evidence need not "possess such a degree of force as to be irresistible") (citations omitted). In this case, the evidence is irresistible, even though it need not be. The evidence is clear and convincing that the arbitrator wrongly ignored the express language of the 2005 JOA. *See Coblentz*, 112 Nev. at 1169.

CONCLUSION

The 2005 JOA clearly and unambiguously requires that EBITDA is to be calculated "consistent with the computation of 'Retention' as that line item appears on the profit and loss statement for Stephens Media Group for the period ended December 31, 2004." II AA at 226. [redacted] II AA at 233. The separate list of items to be excluded from the calculation does not include editorial or promotional costs. II AA 226. The arbitrator was legally obligated to follow the plain terms of the 2005 JOA; instead, he rewrote the agreement, thereby potentially giving a windfall to the Sun by basing its profit payments on a doctored, inflated "EBITDA" that ignores large expense categories. Under this Court's precedents, it was error for the district court to confirm the award.

The Review-Journal respectfully requests that this Court reverse the judgment below and remand with instructions to vacate the portions of the award that (1) hold that editorial costs and promotional costs may not be deducted in the EBITDA calculation, (2) award damages on the Sun's breach of contract claim based on allegedly improper editorial expense deductions, and (3) order the Review-Journal to include revenues from additional promotional activities in the EBITDA calculation without deducting the associated costs.

DATED this 1st day of June, 2020.
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in Bookman Old Style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2)(B)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 10,775 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript

or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions.

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CERTIFICATE OF SERVICE

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