Case No. 80511

In 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 limited liability company,

Appellants/Cross-Respondents,

v.

LAS VEGAS SUN, INC., a Nevada corporation,

Respondent/Cross-Appellant.

APPEAL
From the Eighth Judicial District Court, Clark County
The Honorable Timothy C. Williams District Judge Presiding
District Court Case No. A-18-772591-B

REPLY BRIEF ON CROSS-APPEAL
(REDACTED)

E. Leif Reid (SBN 5750)
Kristen L. Martini (SBN 11272)
Nicole Scott (SBN 13757)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
One East Liberty Street, Suite 300
Reno, Nevada 89501

James J. Pisanelli (SBN 4027)
Todd L. Bice (SBN 4534)
Jordan T. Smith (SBN 12097)
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Respondent/Cross-Appellant Las Vegas Sun, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

OTHER AUTHORITIES

CROSS-APPELLANT'S REPLY BRIEF

INTRODUCTION

The Arbitrator defied the plain language and the parties' understanding of the JOA, creating yet another instrument for the RJ[1] to employ to end the Sun. Under the Arbitrator's erroneous ruling that the JOA prohibits an award of attorney fees, the RJ can and will use delay, avoidance, and obstruction to prevent the Sun from enforcing its rights—compelling the Sun to engage in devastatingly costly litigation—for a substantial net loss, until the Sun can no longer exist. Backed by its billionaire owner, the RJ can continue to manipulate this inequity with no concerns of facing any retribution or justice. The Arbitrator's error of excluding the recovery of attorney fees, no matter the dominant party's abuses, has given the RJ a license that will have ruinous consequences. The Arbitrator's error cannot stand.

The RJ admits, as it must, that the parties to the JOA have always understood the broad "fees and costs" provision in the contract to include attorney fees. The RJ's predecessors-in-interest requested attorney fees in a previous arbitration with the Sun, and the RJ requested them here in the underlying litigation. The RJ further concedes the parties specifically incorporated the AAA Commercial Rules into the JOA that expressly authorize the award of attorney fees. Lest there be any confusion, the

[1] The designations herein are consistent with those defined in the Sun's Answering Brief on Appeal and Opening Brief on Cross-Appeal.

agreement authorizes an award of attorney fees, and indeed, mandates the Arbitrator to make such an award.

The RJ agrees that the Sun was the prevailing party on nearly all issues adjudicated in the arbitration. The Arbitrator held that the RJ's conduct was improper and adopted the Sun's JOA interpretations in nearly all respects. The Arbitrator properly concluded that the RJ breached its duties by charging its editorial costs and promotional costs against the joint operation, thereby reducing the payments to the Sun. The Arbitrator determined the amount of damages to the Sun regarding editorial costs, but without an audit, could not determine how many more millions more would be owed to the Sun for the RJ's improper charging of its independent promotional expenses. *See* 2RA51 ("[redacted]"). Thus, the Arbitrator ordered the RJ to comply with the Sun's audit requests.

Yet, despite (1) the plain language of the JOA broadly mandating the Arbitrator to award "fees and costs," (2) the parties' understanding and custom of requesting attorney fees under this provision, (3) the JOA's incorporation of the AAA Commercial Rules authorizing attorney fee awards, and (4) the parties both requesting attorney fees here, the Arbitrator nevertheless construed the JOA as forbidding any attorney fee recovery ever. The only discretion the Arbitrator had in deciding whether

to award attorney fees was whether a *division* of the fees was appropriate. And in this case, it was not: the Arbitrator overwhelmingly found in favor of the Sun, awarding the costs of arbitration to the Sun.

The Arbitrator's improperly narrow construction of the JOA, which has 20 more years of performance remaining, must be reversed. The level of injustice resulting from the Sun having to spend more than a million dollars in attorney fees, without the possibility of recovering them, to simply enforce its rights to the RJ's never-ending accounting violations is an absurd interpretation of the JOA. Because the RJ maintains and manages all financials of the joint operation of the two Newspapers under the JOA, the RJ controls whether future financial disputes will recur and whether future arbitrations are required to address the RJ's accounting choices. Without reversal of the Arbitrator's conclusion and remand to correct the Award to include the Sun's attorney fees, the RJ can illicitly continue its litigation abuses to financially cripple the Sun. The attorney fee portion of the Award must be corrected.

ARGUMENT

A. THE JOA AUTHORIZES AND REQUIRES THE ARBITRATOR TO AWARD FEES AND COSTS

The RJ's new argument that the JOA does not "authorize, let alone require," an attorney fee award is wrong and duplicitous. CAB 49.[2] The RJ requested attorney fees when it hoped that it might prevail in the arbitration. Now that the Sun has prevailed, the RJ seeks to rewrite history.

The parties explicitly agreed that the Arbitrator was required to make such an award. Moreover, the parties incorporated the AAA Commercial Rules authorizing the award of attorney fees into the JOA, their governing contract. Where, as here, a contract is clear and unambiguous, then it must be enforced as written. *See Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 304, 396 P.3d 834, 838 (2017).

The JOA's language is clear: the Arbitrator "*shall* also make an award of the fees and costs of arbitration." 1AA100 (emphasis added). This provision is mandatory, and the Arbitrator was without discretion to ignore it. *See Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (recognizing that the term "shall" is mandatory and citing Black's Law Dictionary, defining "shall" as meaning "imperative or mandatory . . . inconsistent with a concept of discretion").

[2] The designation CAB refers to the RJ's Answering Brief on Cross-Appeal, and COB refers to the Sun's Opening Brief on Cross Appeal.

The language used in this provision is also broad, providing that the Arbitrator shall award "fees and costs" of arbitration. There is no limitation excluding the subset of "attorney fees" from the "fee" language in used in the provision. In fact, there is no type of list itemizing allowable or disallowable fees or costs. *Cf. Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (describing the canon of construction "'expressio unius est exclusion alterius,' the expression of one thing is the exclusion of the another"). The RJ asks this Court to affirm the Arbitrator's reading of a nonexistent exclusion for attorney fees into the provision. Such modification of the JOA is prohibited. *See Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 175, 87 P.3d 1054, 1059 (2004) ("[C]ourts should not revise a contract under the guise of construing it."); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("Under well-settled rules of contract construction a court has no power to create a new contract for the parties which they have not created or intended themselves.").

To the extent any question remained, the JOA also incorporated the AAA Commercial Rules. 1AA100 (providing that the "arbitration shall be conducted according to the commercial arbitration rules of the American Arbitration Association"). The AAA Commercial Rule R-47(d) speaks directly to an award of attorney fees, reading, "The award of the arbitrator(s) may include . . . (ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." *See* COB 71-72. Thus, the JOA not only authorizes

an award of attorney fees, but mandates that the Arbitrator make such an award in the arbitration.

The RJ's assertion that the Court would somehow be rewriting the JOA if the Arbitrator's conclusion is reversed is belied by the plain language of the JOA and the AAA rule it incorporates. CAB 50, 53. The Arbitrator failed to give the unambiguous fee and cost provision due regard in accordance with the parties' mandate. It was error for the Arbitrator to do so, for disregarding the plain language of the JOA and rules of contract interpretation was a manifest disregard for the law.

B. THE PARTIES' USAGE AND CUSTOM SHOWS THAT THE PARTIES INTENDED THE JOA'S BROAD AND MANDATORY "FEES AND COSTS" PROVISION TO INCLUDE ATTORNEY FEES

Despite agreeing that attorney fees were recoverable in both the 2019 and 2016 arbitrations with the Sun and pleading to that effect, the RJ now argues on appeal that its repeated, previous conduct in requesting attorney fees is "irrelevant" and that this Court should disregard the RJ's own practice and consistent interpretation of the JOA in this regard. CAB 50-51. But the reason for the RJ's change of heart is obvious. Where the RJ once sought to win an attorney fees award, it now seeks to avoid having to pay one. The RJ's recent adoption of the Arbitrator's interpretation of the "fees and costs" provision as prohibiting an attorney fee award is insufficient to render the provision ambiguous. The parties' prior practices of requesting attorney fees in their arbitrated disputes under the JOA, including by the original drafting parties to the JOA, confirms their intent that the Arbitrator was

authorized to make an award of attorney fees in the arbitration pursuant to the contract and Nevada law, and that the Arbitrator erred by refusing to do so.

Without citation to any authority, the RJ makes the sweeping assertion that "taking a litigation position is not a course of dealing" as a basis for this Court to ignore the practice between the parties here. CAB 51. Yet, the RJ's multiple prior admissions that the JOA authorizes an award of attorney fees to the prevailing party in arbitration should not be ignored. The RJ's prior requests for attorney fees demonstrate the intent of the parties. In asking this Court to ignore the RJ's historical interpretation of the JOA, the RJ fails to explain why it should not be bound by its prior representations to the court. *See generally id.* Parties are routinely bound to prior positions taken in a court of law, including in circumstances such as these where equity should prevent the RJ's change in position now. *See In re Harrison Living Tr.*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-62 (2005) ("Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." (quoting *Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 853, 839 P.2d 606, 611 (1992))).

The RJ's prior position asserted twice in litigation further works to supplement the JOA to the extent any ambiguity exists. Under the RJ's argument that the fee provision is silent on "attorney fees," this Court's prior rulings clarify that when a contract is silent, the parties' custom and usage routinely fills in any gap in the contract. The parties' demonstrated understanding and custom here confirms

the parties' intent in including the provision; that is, the parties intended that the arbitrator make an award of attorney fees in the arbitration.

"[T]he rule in Nevada is that the interpretation placed upon the contract by the parties is entitled to great, if not controlling, influence in determining the contract terms."[3] *Lagrange Const., Inc. v. Kent Corp.*, 88 Nev. 271, 275, 496 P.2d 766, 768 (1972); *see also Flyge v. Flynn*, 63 Nev. 201, 239-40, 166 P.2d 539, 555 (1946) ("It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention.").

At all times prior to the Arbitrator's erroneous interpretation of the fee and cost provision, the parties were in agreement that the JOA mandated that the Arbitrator award attorney fees. In the 2016 arbitration, the original, drafting parties to the JOA, the Sun and DR Partners, both sought an award of attorney fees. *See* 3AA499-501, 544, 550; *see also* 1AA78 (identifying the original parties to the JOA). Similarly, both parties in the underlying arbitration agreed that the Arbitrator was required to make an award of attorney fees based on the fee and cost provision. *E.g.*, 6RA1172, 1178, 1229-30.

---

[3] Courts routinely fill in *any* gaps in a contract, including those related to arbitration, with custom or usage, not just in the UCC context as the RJ argues. CAB 51-52; *see, e.g.*, *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 95 n.1, (2000) (Ginsburg, J., concurring) ("In Alabama, as in most States, courts interpret a contract's silence (about arbitration fees and costs) according to 'usage or custom.'").

The RJ's conclusory statement that the parties "decided not to authorize the arbitrator to award attorneys' fees" is false. CAB 53. As described above, the JOA expressly authorizes the award through its broad fees and cost provision and its incorporation of the AAA Commercial Rules. To the extent there is any ambiguity as to whether the fees and costs provision includes attorney fees, the parties' course of conduct and consistently-asserted positions in briefs filled that gap, and did so up to and through the issuance of the Award in this case. The parties' own interpretations control the interpretation of the provision as a result.

C. JUSTICE COMPELS THAT THE AWARD INCLUDE ATTORNEY FEES

The RJ's newfound interpretation that the JOA forbids awarding attorney fees exposes the RJ's real motives. The RJ recognizes that the Sun will be forced to lose money to enforce its rights under the JOA—money that it will never be able to recover—rendering the Sun's yearly audit and the Sun's ability to challenge the RJ's miscalculation of the Sun's Annual Profits Payments meaningless. Soon, the RJ's delays and procedural gamesmanship will be too costly for the Sun to pursue its rights. The RJ can violate the JOA's required accounting in myriad ways—little and big—to slowly nibble away what the Sun is entitled to from the joint operation of the Newspapers. If the RJ can shutter the Sun by continuing to illegally diminish the Sun's payments and force the Sun into yearly arbitration, the RJ wins by malfeasance default. The Sun should not have to choose between two equally losing situations: (1) remaining idle while the RJ drives the Sun out of business by unlawfully

diminishing and eliminating the Sun's Annual Profits Payments, or (2) enforcing the only rights granted to it under the JOA to hold the RJ accountable through protracted litigation with one of the world's richest men. In both scenarios, the RJ will always win the war of financial attrition.

There is no dispute the JOA grants the Sun a unilateral right to audit the RJ's books and records on an annual basis. *See* 1AA99-100; *see also* 2RA55. Even though Appendix D of the JOA guarantees the Sun an audit right, the RJ had stonewalled every audit attempt that the Sun has made since the RJ bought the Review-Journal, including by categorically objecting to the Sun's request for certain documents and challenging the Sun's chosen representative. *See* 2RA102-16. The Sun attempted to audit the RJ beginning in May 2016, and after almost two years of delays and obstruction, the Sun was forced to initiate arbitration. *See* 1AA20-21. This was in February 2018.

Even then, the RJ objected to AAA's jurisdiction, and the Sun was forced to file the underlying complaint. *Id.*. And when the Sun moved to compel arbitration, the RJ continued its obstructionist tactics, opposing the motion despite the law of the case from this Court's previous order interpreting the exact arbitration provision at issue, making arguments already rejected by this Court in the prior appeal. *E.g.*, 1RA115-16. The Arbitrator found that "[redacted]" 2RA55. The combination of these delay tactics and litigation maneuvers cost the Sun

hundreds of thousands of dollars in legal fees. That was the cost just to get to arbitration. The Arbitrator entered the award in July 2019. 2RA48-59. Now, one year later, and after briefing to expedite the appeal, the Sun is still litigating this dispute.[4]

The oft-quoted phrase, "The best predictor of future behavior is past behavior," is verifiable in this case, and it carries a hefty price to the Sun. Since the RJ purchased the newspaper in December 2015, history has proven the RJ's proclivity to accounting violations and stonewalling the Sun's audit and arbitration rights. Each year that the RJ continues to improperly reduce the Sun's payments and prevent the yearly audit, the Sun's sole recourse is to initiate arbitration for the new EBITDA year. As a result and at this rate, the Sun will be initiating arbitrations while existing arbitrations have yet to be finally resolved. If the Sun is not entitled to its attorney fees, the audit and arbitration protections afforded the Sun in the JOA are meaningless. The RJ will be free to flout the JOA as it sees fit with no threat of

[4] To recall, the RJ has sole control of the books and records of the joint operation, and thus the only protection the Sun has is an annual audit. *See* COB 17-18; 10RA2104; 1AA100. The JOA drafters envisioned a speedy resolution to disputes: If there is still a dispute post-audit that is not resolved within 30 days, the parties "shall select a certified public accountant to arbitrate this dispute" requiring a 60-day decision from the arbitrator. *See* 1AA100. It has taken the Sun *years* just to get to this point, costing the Sun millions of dollars in legal fees along the way. Without the expectation of attorney fees, this renders assertion of the simplest of rights to be financially untenable and creates an incentive for the RJ to abuse its duties under the JOA knowing the Sun will be eaten up by legal fees.

reckoning. If the JOA, and the Sun, are to survive, it cannot be interpreted as the Arbitrator did.

The Sun attempted to exercise it unfettered right to audit the RJ's books and records, and when the RJ disregarded that right entirely, it forced the Sun to litigate, The Sun should not have to bear the additional expense to enforce its rights, where the Sun's recovery would be a wash for the costs incurred to enforce those rights and succeed in doing so. The harsh penalty in the Arbitrator's misreading of the agreement unconscionably means the Sun will always have to lose money to get the RJ to perform properly under the JOA. Without the ability to recover its attorney fees, the Sun will always lose when asserting its rights, and the RJ is incentivized to act with impunity. This endless cycle of loss in the face of a win is not a reasonable interpretation of the JOA in this case.

D. EVEN IF THE ARBITRATOR'S ERRONEOUS INTERPRETATION OF THE FEE AND COSTS PROVISION STANDS, THE DISTRICT COURT FAILED TO ADDRESS AND CORRECT THE ARBITRATOR'S OMISSION OF ALL DIRECT COSTS AWARDED

In its opening brief, the Sun described how the district court erred in confirming an Award that did not include all direct costs. COB 74-75. In response, the RJ argues that the Sun should have petitioned the Arbitrator to correct or modify the award, suggesting it was "clerical error." CAB 53-54. The Arbitrator's error was not clerical. More importantly, however, despite complaining about the Sun's proper

procedural methods, the RJ does not dispute the substance of the Arbitrator's error. *See id.* The Arbitrator's error must be corrected.

The Arbitrator's error in this aspect of the Award goes beyond a mere "mistake in [a] description" in the Award, and it was not appropriate for the Sun to merely petition the Arbitrator to modify or correct the Award. *See* CAB 53-54.; *see also* NRS 38.237 (citing NRS 38.242(1) as basis for a motion to arbitrator to modify or correct an award). The Sun's request made first to the district court to vacate the Award as to the fees and cost determination was the appropriate procedural avenue to address the Arbitrator's error. And, even if the district court disagreed as to that proffered procedural mechanism, the Sun also asked the district court to correct the award to include all allowable costs. *See* 1AA171-74. Regardless, when the Sun petitioned the district court to confirm the Award, in part, the district court had the authority to "submit the claim to the arbitrator to consider whether to modify or correct the award." NRS 38.238(4). The Sun properly asked the district court to correct the award as a result, and the RJ's procedural challenge is a meritless exercise in diversion elevating form over substance.

Critically, the RJ does not dispute that the Arbitrator failed to include all costs of the arbitration. The RJ instead only hypothesizes the Arbitrator must have deemed only certain costs, like the Arbitrator's fees, were "reasonable," and transcription costs or costs incurred in reserving the arbitration space (at the RJ's request) must have been deemed unreasonable. *See* CAB 53-54. The RJ has no basis

for this assertion, *see id.*, and there certainly was no explanation in the Award. *See generally* 2RA48-59. The Sun chiefly won in Arbitration; indeed, the Arbitrator awarded costs to the Sun. The Sun prevailed on every one of its claims for declaratory relief. The Sun was awarded millions in damages for its breach of contract claim. The RJ is prohibited from charging its editorial costs to the joint operation, and the Sun will be owed much more after a necessary (and ordered) audit revealing the RJ's other transgressions. The RJ's blanket suggestion the Arbitrator must have found only certain costs "reasonable" fails when acknowledging the Sun prevailed in Arbitration. As such, the Award must be corrected to include all costs.

CONCLUSION

For the foregoing reasons, an order vacating the district court' confirmation of the Award regarding attorney fees and costs is warranted.

DATED this 13th day of July, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ E. Leif Reid*
E. LEIF REID, SBN 5750
KRISTEN L. MARTINI, SBN 11272
NICOLE SCOTT, SBN 13757
PISANELLI BICE PLLC
JAMES J. PISANELLI, SBN 4027
TODD L. BICE, SBN 4534
JORDAN T. SMITH, SBN 12097
Attorneys for Respondent/Cross-Appellant

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 requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

2. I further certify that this Brief complies with the page- or type-volume limitations of NRAP 32(a)(7), excluding parts of the brief exempted by NRAP 32(a)(7)(C), because it is proportionally spaced, has a typeface of 14 points or more and contains 3,563 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any 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 a 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 in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of July, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ E. Leif Reid*
E. LEIF REID, SBN 5750
KRISTEN L. MARTINI, SBN 11272
NICOLE SCOTT, SBN 13757

PISANELLI BICE PLLC
JAMES J. PISANELLI, SBN 4027
TODD L. BICE, SBN 4534
JORDAN T. SMITH, SBN 12097
Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP and that on this date, I caused the foregoing **REPLY BRIEF ON CROSS-APPEAL** to be served by electronically filing the foregoing with the Clerk of the Supreme Court of Nevada by using the ECF system, which will send notice of electronic filing to the following:

J. Randall Jones
Michael J. Gayan
Mona Kaveh
KEMP JONES, LLP
3880 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

Richard L. Stone
Amy M. Gallagos
David R. Singer
JENNER & BLOCK LLP
633 West 5th Street, Suite 3600
Los Angeles, California 90071

DATED this 13th day of July, 2020.

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP