IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 68700
District Court Case No. A715008

DR PARTNERS, a Nevada General Partnership, d/b/a STEPHENS MEDIA GROUP,

Appellant,

vs.

LAS VEGAS SUN, INC., a Nevada Corporation,

Respondent.

Appeal from an Order of the Eighth Judicial District Court
Clark County, Nevada
Judge Elizabeth Gonzalez

APPELLANT'S OPENING BRIEF

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NRAP 26.1(a) Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26(a)(1), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DR Partners, a Nevada general partnership and the named defendant in this case, was dissolved in June 2006. Stephens Media LLC, a Nevada limited liability company and the appellant in this matter, is the successor in interest to the rights and obligations of DR Partners. It was the publisher of the Las Vegas *Review-Journal* newspaper until it sold its assets to DB Acquisition, Inc. on March 18, 2015, after this case was commenced in the district court. DB Acquisition, Inc. now publishes the *Review-Journal;* it has assumed the post-March 2015 obligations of Stephens Media under the Joint Operating Agreement with Las Vegas *Sun*, Inc. which is at issue in this appeal. Stephens Media is owned 99% by SF Holding Corp. and 1% by Stephens Holding Corporation, neither of which is a publicly-held company.

Stephens Media was represented in the district court by Steve Morris and Akke Levin of Morris Law Group, and it is represented by the same counsel on appeal.

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I. JURISDICTIONAL STATEMENT.

The Court has jurisdiction over this appeal under NRS 38.247(1)(a) of Nevada's Uniform Arbitration Act, which provides for a right of appeal from an order denying a motion to compel arbitration. The district court's order denying Stephens Media's ("Stephens" or "*Review-Journal*") Renewed Motion to Compel Arbitration was entered on August 19, 2015. Appellant Appendix ("AA") 315.[1] Stephens timely filed its notice of appeal on August 21, 2015 under NRAP 4(a)(1). AA 321.

II. ROUTING STATEMENT.

This appeal is one for the Court because the case originated in business court and proceeds here from the district court's order denying a motion to compel arbitration. NRAP 17(a)(10)-(11).

III. STATEMENT OF ISSUES PRESENTED.

1. This is a contract-based dispute over the calculation of the Sun's "Annual Profits Payment" under a Joint Operating Agreement ("JOA") signed by the parties in 2005. Stephens published the Review-Journal; Las Vegas Sun, Inc. published the Las Vegas Sun. Under the JOA, Las Vegas Sun Inc. (the "Sun") is entitled to an Annual Profits Payment, which is adjusted annually, based on the change in "earnings, before interest, taxes, depreciation, and amortization ("EBITDA")" from year to year. Any dispute over amounts owed to the Sun under this formula shall be resolved by "arbitration . . . conducted according to the commercial arbitration rules of the American Arbitration Association."

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[1] Stephens' counsel conferred with the *Sun*'s counsel to reach agreement on the content of a joint appendix, but could not agree on a joint appendix that conforms to the brevity admonition of NRAP 30(b).

ISSUE 1: Did the district court err in denying Stephens' renewed motion to compel arbitration?

2. The *Sun* seeks a judicial declaration that Section 4.2 of the JOA precludes Stephens (publisher of the Review-Journal) from deducting its editorial costs in calculating EBITDA. The standards for calculating EBITDA are not addressed in Section 4.2 but appear in Appendix D of the JOA where the parties' arbitration agreement also appears.

ISSUE 2: Can the district court decide—based solely on Section 4.2 of the JOA—that "editorial costs" Stephens pays to publish the *Review-Journal* may not be considered an expense of doing business to arrive at EBITDA under Appendix D? Put another way, can the court tell the arbitrator how to calculate EBITDA under Appendix D?

3. The *Sun's* initial complaint sought to exclude editorial costs from EBITDA under Appendix D of the JOA and sought payment of $6 million from Stephens for having treated the *Review-Journal's* editorial costs as an expense to arrive at EBITDA. With the district court's encouragement, the *Sun* filed a first amended complaint, omitting any reference to Appendix D or damages, seeking only a "declaration" that Section 4.2 of the JOA prohibits treating editorial costs as an expense in determining EBITDA.

ISSUE 3: Can the *Sun* frustrate Stephens' contract right to arbitration of the *Sun's* claim to recover the *Review-Journal*'s editorial costs

as part of its Annual Profits Payment by alleging this is an issue of contract interpretation that Nevada's arbitration statute, case law, and the JOA say is for the arbitrator to decide?

IV. STATEMENT OF THE CASE.

A. Nature of the Action.

This is a dispute between respondent the *Sun* and appellant Stephens over the annual calculation and distribution of profits under the JOA. The *Sun*'s compensation is adjusted annually, depending on the increase or decrease of the *Review-Journal's* earnings before interest, taxes, depreciation, and amortization, which are referred to as EBITDA. AA 074. The *Sun* alleges that *Review-Journal* has miscalculated EBITDA by deducting its editorial costs as a business expense to reduce Annual Profits in violation of § 4.2 of the JOA. AA 005 (¶ 27); AA 171 (¶¶ 20, 25).[2]

Appendix D of the JOA exclusively addresses the *Sun's* compensation and the manner in which it is calculated by reference to EBITDA. AA 242-243. Appendix D also stipulates the *Sun's* remedies in case of a dispute over the calculation of its annual profits payment. AA 243-244. If after an audit the parties are unable to resolve their differences over the *Sun's* compensation, they must "select a certified public accountant to arbitrate the dispute" in accordance with "the commercial arbitration rules of the American Arbitration Association." *Id.* By casting

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[2] Editorial costs are part of the cost of doing business, like the cost of materials to produce goods for sale. So, EBITDA represents "revenues less cost of goods sold and selling, general, and administrative expenses. In other words, a company's profit before the deduction of interest, income taxes, depreciation, and amortization expenses." GRETCHEN MORGENSON & CAMPBELL R. HARVEY, THE NEW YORK TIMES DICTIONARY OF MONEY AND INVESTING 84 (Times Books, 1st ed. 2002).

its claim for damages as one for declaratory judgment, the *Sun* hopes to avoid arbitrating the calculation of EBITDA by asking the district court to "declare" that editorial costs paid by the *Review-Journal* are not an expense of doing business but must be treated as revenue to increase Annual Profits payable to the *Sun* without arbitration of the issue.

B. Course of the Proceedings and Result Below.

On March 10, 2015, the *Sun* filed a complaint against Stephens for declaratory relief and for breach of contract-specific performance, seeking recalculation of its Annual Profits Payment and recovery of a "shortfall in payments to the *Sun*, of at least $6,000,000, plus interest" for the past 10 years. AA 001, 004-007.

Stephens moved to compel arbitration, AA 081-089, which the district court granted, saying that *Sun's* complaint, as "*currently* drafted," relates to the calculation of EBITDA and "squarely" invokes the arbitration clause in Appendix D of the JOA. AA 129:10-19; AA 132:4-8; 15-22; AA 149-150 (emphasis added). This prompted the *Sun's* counsel to seek leave to amend, which the district court accommodated. AA 132:23-25; AA 133:11-12.

On May 26, 2015, the *Sun* filed a Motion for Leave to File First Amended Complaint, which alleged a single claim for declaratory relief to determine the "meaning" of § 4.2 of the JOA and the rights and obligations it places on the parties' performance under the JOA. AA 135, 144, 147-48. The district court granted the Motion for Leave, concluding that a "justiciable controversy" exists as to the meaning of § 4.2 of the JOA that does not implicate the arbitration clause of Appendix D. AA 168-169. The

Sun filed its First Amended Complaint ("FAC") on June 22, 2015. AA 170-246.

On July 7, 2015, Stephens filed a Renewed Motion to Compel Arbitration. AA 247-56. That same day, the *Sun* filed a Motion for Summary Judgment ("MSJ") on its claim for declaratory relief. AA 257-67. Stephens sought a stay of proceedings under NRS 38.221(6), pending a decision on its Renewed Motion to Compel Arbitration. AA 268-75. The district court denied a stay and ordered Stephens to file an opposition to the MSJ, but set the hearing on Stephens' Renewed Motion to Compel Arbitration a week *before* the hearing on the MSJ. AA 280:12-21; AA 283. The district court denied Stephens' Renewed Motion to Compel Arbitration, finding that the claim for declaratory relief does not implicate Appendix D and the arbitration agreement. AA 310:24-311:1-3, AA 313-14. The order denying Stephens' Renewed Motion To Compel Arbitration, which also vacated the hearing on summary judgment pending this appeal, was entered on August 19, 2015. AA 315-323. Stephens filed its Notice of Appeal on August 21, 2015. AA 321-23.

V. STATEMENT OF THE FACTS.

A. The Parties' Joint Operating Agreement.

In 1989, the *Sun* and DR Partners (Stephens' predecessor in interest) entered into a Joint Operating Agreement to produce and distribute the two newspapers. AA 177-220. Under the 1989 JOA, the *Sun's* compensation consisted of two allocations: (1) 65% of every dollar the

Review-Journal spent on editorial costs; and (2) 10% of the net operating profit.[3] AA 194-95, 209, 219.

The 1989 JOA was amended and restated in 2005. AA 222-246. The 2005 JOA eliminated the *Sun's* two-part allocations by providing for a single payment to the *Sun* to be calculated as "set forth in Appendix D." AA 226, 242.

1. Appendix D of the JOA.

Appendix D is dedicated to the manner and mechanism of determining the *Sun's* compensation—the "Annual Profits Payment." AA 242-43. Appendix D provides that for the fiscal year of 2005, the *Sun* "shall receive an Annual Profits Payment" of $12 million dollars. AA 242. "Each fiscal year thereafter . . . the Annual Profits Payment shall be adjusted"—*i.e.*, "increased or decreased, as the case may be"—by "the percentage change . . . between the earnings, before interest, taxes, depreciation and amortization ('EBITDA') for the fiscal year immediately preceding . . . and the EBITDA for the penultimate fiscal year. . . ." *Id.*

Appendix D provides both specific and general directives for the calculation of EBITDA to determine Annual Profits. AA 242-43. For example, "Review Journal shall calculate the percentage change" in EBITDA. AA 242. Certain capital items or expenses, such as Press Equipment, are excluded from the EBITDA calculation. AA 242-43. "All calculations shall be made in accordance with generally accepted newspaper industry accounting principles consistently applied." AA 243.

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[3] Thus, for every editorial dollar spent by the *Review-Journal* under the 1989 JOA, sixty-five cents was paid to the *Sun* without regard to the *Sun's* editorial costs. AA 209.

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

The remedies available to the *Sun* in case of a dispute over its Annual Profits Payment are also set out in Appendix D, which provides, in relevant part:

> Sun shall have the right . . . once every twelve months. . . to appoint a[] certified public accounting firm or law firm as Sun's representative to examine and audit the books and records of the Review-Journal . . . . If as a result of such an audit, there is a dispute between Sun and the Review-Journal as to amounts owed to Sun and they are not able to resolve the dispute within 30 days, they shall select a certified public accountant to arbitrate the dispute. The arbitration shall be conducted according to the commercial arbitration rules of the American Arbitration Association ["AAA"], including such rules for the selection of a single arbitrator if Sun and the Review-Journal are not able to agree upon an arbitrator. Sun and the Review-Journal shall request the arbitrator to render a decision within sixty (60) days of his or her selection, and Sun and the Review-Journal each hereby covenant to cooperate with the arbitrator to facilitate such request. . . . The arbitrator shall make an award to Sun in the amount of the arrearage, if any, found to exist, together with interest thereon . . . . The arbitrator shall also make an award of the fees and cost of arbitration, which may include a division of such fees and costs among the parties in a manner determined by the arbitrator to be reasonable in light of the positions asserted and the determination made.

AA 243-44.

B. The *Sun*'s Initial Complaint.

In March 2015—almost ten years after the 2005 amendment of the JOA—the *Sun* filed a complaint against DR Partners for declaratory relief and specific performance of the JOA. AA 001-078. The *Sun* alleged

that Stephens had miscalculated its Annual Profits Payment since 2005 by including the *Review-Journal's* editorial costs in calculating EBITDA, in violation of § 4.2 of the JOA that requires the parties to bear and budget their own editorial costs. AA 003-006 (¶¶ 14-21, 26-27, 32, 35-36).

The *Sun's* initial complaint expressly relied on and quoted from Appendix D of the JOA that addresses compensation. AA 003-005 (¶¶ 14-18, 26); AA 074-75. Specifically, the *Sun* alleged a dispute

> . . . **as to the meaning of section 4.2 and Appendix D of the 2005** Amended JOA, specifically **as to the relationship between the responsibilities of the parties to bear their own editorial costs and the calculation of EBITDA for purposes of determining the Annual Profits Payment owed to Las Vegas Sun, Inc.**

AA 005 (¶ 26) (emphasis added).

In its prayer for relief, the *Sun* sought: (1) a declaratory judgment that DR Partners "may not include the LVRJ's editorial costs in its EBITDA calculation pursuant to terms of the 2005 Amended JOA"; and (2) an order requiring DR Partners to exclude the *Review-Journal's* "editorial costs from its calculation of EBITDA and *payment of all Annual Profits Payment obligations*," which the *Sun* contends amount to "at least $6,000,000, plus interest." AA 007 (§§ A-B), 004-05 (¶ 21), 005 (¶ 27) (emphasis added).

C. The District Court Compels Arbitration.

The district court granted Stephens' first Motion to Compel Arbitration, agreeing with Stephens that the relief sought by the *Sun*—a calculation of EBITDA to exclude editorial costs as an expense and payment of alleged outstanding amounts—fell "squarely" within Appendix D to the JOA and its arbitration clause. AA 129:10-14. At the same time,

however, the district court told the *Sun's* counsel that she would consider a motion for leave to file an amended complaint to reach a different result, AA 133:11-12, which the *Sun* thereafter filed and the district court granted. AA 135-148, 168-169.

D. The *Sun's* First Amended Complaint.

Unlike the initial complaint, the *Sun's* First Amended Complaint ("FAC") seeks only declaratory relief. AA 170, 174. The FAC alleges a "justiciable controversy" as to the "meaning and interpretation of Section 4.2 [of the JOA]," which provides that the parties "shall each bear their own respective editorial costs and shall establish whatever budgets each deems appropriate." AA 173 (¶¶ 24, 26), AA 223 (§ 4.2). The *Sun* seeks a declaration to determine its rights and the parties' obligations under the JOA which, of course, includes Appendix D and the obligation to arbitrate, but the *Sun* neglected to say so. AA 173 (¶¶ 26-27), 174 (§ A).

The FAC does not mention Appendix D or the calculation of EBITDA. The FAC avoids any reference to alleged damages. AA 173. However, the *Sun* alludes to Stephens' alleged improper calculation of EBITDA in paragraphs 20 and 25 by alleging that Stephens failed to comply with Section 4.2 and "expensed its editorial costs . . . in violation of Section 4.2 . . . ." *Id.* (¶¶ 20, 25).

E. Stephens Renews Its Motion to Compel Arbitration.

Stephens renewed its motion to compel arbitration on the grounds that: (1) the arbitration clause covers the declaratory relief claim; (2) despite the *Sun's* creative pleading, the declaratory relief claim requires an interpretation of Appendix D and a comprehensive accounting analysis

the parties agreed to submit to arbitration; and (3) the interpretation and meaning of § 4.2 of the JOA is a false issue because § 4.2 does not address the *Sun's* compensation or the manner in which it is calculated. AA 247-255.

F. The *Sun* Files a Motion for Summary Judgment.

On the same day Stephens filed its Renewed Motion to Compel Arbitration, the *Sun* filed a Motion for Summary Judgment ("MSJ") on its declaratory relief claim in the FAC. AA 247, 257. The MSJ asks the Court to declare as a matter of law that the "plain language" of § 4.2 of the JOA that says the parties must bear and budget their own editorial costs means that the *Review-Journal* cannot consider its editorial costs as an expense of doing business in calculating EBITDA under Appendix D. AA 265:23-266:3). As the *Sun* put it:

> the issue before this Court whether Section 4.2 directs the parties to bear their own editorial fees . . . necessarily includes rejecting DR Partners' position that Section 4.2 allows DR Partners to include its editorial costs as a chargeable expense and proper input to the EBITDA/2004 Retention formula.

AA 263 (fn. 1).

In other words, the *Sun* seeks a judicial declaration under Section 4.2 as to how the arbitrator (and *Review Journal*) should calculate EBITDA under Appendix D, without consideration of the accounting directives of Appendix D.

G. The District Court Denies Stephens' Renewed Motion to Compel Arbitration.

This time around, the district court denied Stephens' Motion to Compel Arbitration. AA 313-14, AA 310:24-311:03. However, the district

court stayed the proceedings to allow Stephens to file this appeal, 311:9-14, 313-14, which Stephens did two days later. AA 321-23.

VI. SUMMARY OF ARGUMENT

The district court got it right the first time: at its core, this is a financial dispute about the manner in which the *Sun*'s Annual Profits Payment is calculated, which is an issue that "squarely" falls within the parties' agreement to arbitrate any unresolved dispute "as to amounts owed to Sun" under the JOA. Whether the *Review-Journal* can deduct its editorial costs as an expense of doing business in calculating EBITDA is directly related to, and depends on, issues of accounting for EBITDA that the parties agreed to have a neutral certified public accountant-arbitrator decide.

The district court does not have the authority to make that determination, much less decide it as a matter of law based solely on "the meaning of section 4.2" of the JOA: The *Sun's* compensation and the manner in which it is calculated are not set forth in § 4.2 but in Appendix D of the JOA. AA 242-43. Any determination as to the *Review-Journal's* calculation of EBITDA necessarily requires engaging in an accounting analysis under Appendix D, *id.*, "in accordance with generally accepted newspaper industry accounting principles consistently applied." AA 243. The district court therefore erred by denying Stephens' Renewed Motion to Compel Arbitration and concluding that the alleged "justiciable controversy" over the meaning of § 4.2 does not invoke the arbitration provision under Appendix D.

The *Sun* should not be permitted to frustrate Stephens' bargained-for right to arbitration by "creative" pleading in an effort to avoid arbitration, even if encouraged by the district court to do so. The *Sun* has already *admitted* in its initial complaint that the calculation of its compensation cannot be based solely on § 4.2 of the JOA: it also sought declaratory relief on "the meaning of . . . Appendix D of the 2005 Amended JOA. . . ." AA 005 (¶ 26). If, as the *Sun* alleges, the language of section 4.2 is so "plain" and unambiguous, there is no reason an arbitrator cannot consider this argument in the course of deciding the core dispute between the parties. The Court should reverse the order denying Stephens' Renewed Motion to Compel Arbitration.

VII. ARGUMENT

A. Standard of Review.

The question whether a dispute is subject to arbitration "is a matter of contract interpretation, which is a question of law" that the court reviews "de novo." *Nevada ex. rel. Masto v. Dist. Ct.*, 125 Nev. 37, 199 P.3d 828 (2009) (citing *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 798 P.2d 136 (1990) (" . . . the reviewing court is obligated to make its own independent determination on this issue, and should not defer to the district court's determination").

B. The Declaratory Relief Claim is Subject to Arbitration.

In determining whether to compel arbitration, the court's analysis is limited to resolving whether: (1) a valid arbitration agreement exists; and (2) whether the arbitration agreement covers the dispute. NRS 38.219(2). The *Sun* does not contest the existence or validity of the

arbitration agreement. Thus, the only issue below and on appeal is whether the arbitration clause in Appendix D covers the *Sun's* declaratory relief claim.

As this Court recently held, "disputes concerning the arbitrability of a subject matter are resolved *under a presumption in favor of arbitration.*" *City of Reno v. IAFF, LOCAL 731*, 130 Nev. Adv. Op. 100, 340 P.3d 589 (2014) (citing *Pearson*, 106 Nev. at 591, 798 P.2d at 138 (1990)) (emphasis added); *accord Int'l Ass'n of Firefighters v. City of Las Vegas*, 104 Nev. 615, 764 P.2d 478 (1988) (All doubts "concerning the arbitrability of the subject matter of a dispute" should be decided "in favor of arbitration"). This means that courts should order arbitration of a particular dispute "*unless* it may be said with *positive assurance* that the arbitration clause is *not susceptible of an interpretation that covers the asserted dispute.*" *City of Reno*, 340 P.3d at 593 (internal quotation marks and citations omitted) (emphasis added).

Arbitration clauses are liberally construed in order to provide the parties with the benefits of arbitration they bargained for. *Kindred v. Dist. Ct.*, 116 Nev. 405, 411, 996 P.2d 903, 907 (2000), *overruled in part on other grounds in Tallman v. Dist. Ct.*, 2015 Nev. LEXIS 84, at *7, 131 Nev. Adv. Rep. 71 (Nev. Sept. 24, 2015). Thus, if there is any ambiguity in the arbitration clause, the ambiguity should be resolved "in favor of arbitration," *Pacificare of Nevada, Inc. v. Rogers*, 127 Nev. __ n.3, 266 P.3d 596, 600 n.3 (2011), "*even when an arbitration clause is limited in scope.*" *Shy v. Navistar Int'l Corp.*, 781 F.3d 820, 826 (6th Cir. 2015) (emphasis added).

Here, the *Sun* claims that it is entitled to more compensation, which is exclusively addressed in Appendix D and calls for arbitration if the parties disagree.

1. The Arbitration Clause Covers Any Unresolved Dispute About the Sun's Compensation.

The arbitration agreement of the JOA provides, in relevant part:

> Sun shall have the right . . . to examine and audit the books and records of the Review-Journal. If . . . there is ***a dispute*** between Sun and the Review-Journal ***as to amounts owed*** to Sun and they are not able to resolve the dispute within 30 days, ***they shall select a certified public accountant to arbitrate the dispute. The arbitration shall be conducted according to the commercial arbitration rules of the American Arbitration Association*** ["AAA"], including such rules for the selection of a single arbitrator if Sun and the Review-Journal are not able to agree upon an arbitrator.

AA 244 (emphasis added).

Thus, the parties agreed to submit any unresolved dispute as to the *Sun's* compensation to a neutral CPA for arbitration under the commercial arbitration rules of the AAA.

2. The Arbitration Agreement is Not Limited to Factual Accounting Disputes.

The fact that the parties' compensation dispute "potentially involve[s] questions of contract interpretation as well as accounting" does not put the dispute "outside the plain text of the arbitration agreement." *Shy*, 871 F.3d at 825. As the Sixth Court persuasively reasoned, "the accountant-based nature of the [arbitration] at most creates some ambiguity as to whether the scope . . . was intended to be restricted to disputes in which no legal analysis whatsoever might be necessary." *Id.* But where, as here, the language of the arbitration agreement is "otherwise

unqualified," the unqualified language "trumps any assumption that the parties would not have committed legal disputes to an accountant's resolution." *Id.* at 825-26. "The ambiguity—if there is any—must be "resolved in favor of arbitration *even when an arbitration clause is limited in scope.*" *Id.* at 826 (internal quotation marks omitted) (emphasis added).

Here, as in *Shy*, the arbitration clause "is not limited by its terms to disputes over the calculation involved." *Shy*, 871 F.3d at 825. The arbitration clause applies to *any* unresolved dispute "as to amounts owed to Sun." AA 244. Thus, there is no basis for the *Sun's* argument that the arbitration agreement is limited to "*factual*, accounting disputes" or "only for circumstances where accounting professionals . . . differ on the amount of a *calculation*," AA 095, 288 (emphasis added). These limitations the *Sun* wishes to read into the arbitration clause in Appendix D are simply not there and cannot be reasonably implied. *See Reno Club v. Young Inv. Co.*, 64 Nev. 312, 324, 182 P.2d 1011, 1017 (1947) (holding that courts may neither insert words the parties have not used, nor "by interpretation . . . engraft on a contract a limitation inconsistent with the apparent object of the parties").

3. The Parties Agreed to Leave Issues of Contract Interpretation to the Arbitrator.

The "interpretation of the underlying contract is an issue for the arbitrator to decide, even though contract construction is generally a question of law," and even if the arbitrator is not an attorney. *Benson Pump Co. v. South Cent. Pool Supply, Inc.*, 325 F. Supp. 2d 1152, 1158 (D. Nev. 2004) (citing *United Steelworkers of Am. v. Enter. Wheel and Car Corp.*, 363 U.S. 593, 599 (1960)). Although not binding on this Court, *Benson Pump* is instructive. There, the defendant purchased almost all of the plaintiff's

assets. *Benson Pump*, 325 F. Supp. at 1154. The purchase price consisted of a base amount "plus or minus the amount of any adjustments listed in the Agreement, including an 'Accounts Receivable Adjustment.' " *Id.* at 1155. The parties agreed that "disputes concerning the Accounts Receivable Adjustment would be taken to an independent auditor for resolution . . . ." *Id.* at 1156 (emphasis added). Much like the instant arbitration clause, the dispute resolution clause in *Benson Pump* provided, in relevant part:

> If [the parties] are unable to resolve any such disagreements within twenty (20) days . . . [they] will submit such dispute for resolution to an . . . independent, nationally-recognized accounting firm mutually agreeable to [SCP] and [Benson Pump].

Id. at 1155 (quoting agreement) (emphasis added).

A dispute over the accounts receivable adjustment arose, and the plaintiff in *Benson Pump* filed a lawsuit for breach of contract and declaratory relief. *Id.* at 1156. Like the *Sun*, the plaintiff in *Benson Pump* resisted arbitration by arguing that the independent auditor could not and "should not be allowed to decide legal issues" relative to the dispute. *Id.* at 1157-58. The *Benson Pump* court rejected that argument and held that the "interpretation of the underlying contract is an issue for the arbitrator to decide, even though contract construction is generally a question of law." *Id.* at 1158. The court concluded that "the parties bargained to have an independent auditor decide all issues concerning the Accounts Receivable Adjustment, including issues of contract construction." *Benson*, 325 F. Supp. 2d at 1159.

Similarly here, the *Sun* takes issue with the application of EBITDA to determine its compensation. AA 003-005 (¶¶ 14-18, 26), 173.

The *Sun* contractually agreed to have a CPA decide disputes over its compensation—even if the dispute may present an issue of contract interpretation. AA 244. The district court should have "refuse[d] to step-in and second guess that decision simply because [the *Sun*] now has concerns about its agreement." *Benson Pump*, 325 F. Supp. 2d at 1159.

Moreover, the parties here agreed to arbitrate under the commercial arbitration rules of the American Arbitration Association ("AAA"). AA 244. These rules expressly give the arbitrator the authority "to determine the existence or validity of a contract of which an arbitration clause forms a part." AAA Rule R-7(b). The AAA commercial rules also grant arbitrators authority to make rulings on dispositive issues in the case, AAA Commercial Rules R-33, and grant as part of an award "any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." AAA Commercial Rule R-47(a) ("Scope of Award"); *see also* NRS 38.231(2) (permitting arbitrator to "decide a request for summary disposition of a claim or particular issue . . .").

There is no reason why an arbitrator cannot be entrusted with interpreting what the *Sun* calls "the plain language of Section 4.2," AA 173 (¶ 20), if such is necessary to resolve the parties' compensation dispute.

4. The Alleged "Justiciable Controversy" as to the Meaning of § 4.2 Is Directly Related to Accounting for The *Sun's* Compensation.

Whether a particular claim is subject to arbitration does not depend on how the plaintiff characterizes the claim, but on "the relationship of the claim to the subject matter of the arbitration clause." *In*

re Oil Spill By Amoco Cadiz, etc., 659 F. 2d 789, 794 (7th Cir. 1981). "Were the rule otherwise, a party could frustrate any agreement to arbitrate simply by the manner in which it framed its claims." *Id.* (citations omitted). Even if the parties agreed to arbitration before an accountant, a claim that raises an issue of contract interpretation is subject to arbitration if that issue "depend[s] on questions of accounting . . . ." *Shy*, 871 F.3d at 826.

Here, the *Sun's* claim for declaratory relief alleges a "justiciable controversy . . . as to the meaning and interpretation of Section 4.2 *and the obligations it places on the Parties' performance under the 2005 Amended JOA.*" AA 173 (¶ 26) (emphasis added). The *Sun* alleges there is an issue whether "the plain language" of § 4.2 of the JOA means what it says when it requires the parties to bear their respective editorial costs and establish their respective budgets. AA 173 (¶¶ 20, 24-27).

Although the *Sun's* First Amended Complaint carefully avoids mention of Appendix D and employs cryptic abstractions to avoid arbitration, what the *Sun* really seeks from the district court is a declaration—based solely on **Section 4.2** of the JOA—that the *Review-Journal* (and the arbitrator) may not expense the *Review-Journal's* editorial costs in calculating EBITDA under **Appendix D** of the JOA. AA 173 (¶ 25) (alleging a "justiciable controversy . . . as to the obligations [section 4.2] it places upon the parties' performance under the [] JOA"); *see also id.* (complaining that "Defendant has *expensed* its editorial costs for the LVRJ. . . .") (emphasis added).

The *Sun* made the scope of the relief it seeks crystal clear in its Motion for Summary Judgment, where it concedes:

> The issue . . . **whether Section 4.2 directs the parties to bear their own editorial fees . . . necessarily includes rejecting DR Partners' position that Section 4.2 allows DR Partners to include its editorial costs as a chargeable expense and proper input to the EBITDA/2004 Retention formula.**

AA 263 (fn.1)(emphasis added).[4]

The *Sun's* counsel said the same thing in so many words during the hearing on Stephens' initial Motion to Compel Arbitration:

> *Mr. Reid*: If for some reason the Court were to determine that Section 4.2 doesn't mean . . . that Stephens Media or the R-J **can't push its editorial costs into the JOA and they're not required to bear them separately**, then . . . we don't have a basis to pursue an audit process, to have a CPA appointed to calculate what we're owed.

AA 131:13-18.

The alleged contract "interpretation" issue under § 4.2 of the JOA is subject to arbitration, because it directly relates to the *Sun's* annual profits calculation—the EBITDA adjustment—and depends on issues of accounting—*i.e.*, whether editorial costs may be deducted as a cost of expense in calculating EBITDA. *Compare Shy*, 871 F.3d at 826 (concluding that the contract interpretation issues did not fall outside the arbitration agreement, *inter alia*, because they were related to "particular components of the Qualifying Profits calculation" and depended on "issues of accounting . . . .").

The district court cannot make a judicial declaration of the *Sun's* rights and Stephens' obligations in a vacuum, based solely on § 4.2 of the JOA. Section 4.2 is not even concerned with the *Sun's* compensation.

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[4] Please see Note 2, *supra* at 1; *compare* BLACK'S LAW DICTIONARY 1329 (9th ed. 2009) ("profit" is the "excess of revenues over expenditures in a business transaction").

AA 223 (§ 4.2). The *Sun's* compensation is addressed in Section 7 of the JOA ("Payment"), which in turn refers to Appendix D: "During the term of this Restated Agreement, DR and the Sun shall receive the amounts set forth in Appendix D." AA 226. Appendix D *requires, inter alia,* that: (1) all EBITDA calculations "be made in accordance with generally accepted newspaper industry accounting principles"; and (2) 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 for the period ended December 31, 2004." AA 243.

In sum, a determination whether "Section 4.2 allows DR Partners to include its editorial costs as a chargeable expense and proper input to the EBITDA/2004 Retention formula" requires an accounting analysis in an arbitration under Appendix D. "These issues involve complex and technical accounting questions" that are not only "far more appropriate for resolution by [a CPA]," but "***the parties agreed in their contract that an arbitrator with appropriate expertise should do so.***" *Campeau Corp. v. May Dept. Stores Co.,* 723 F. Supp. 224, 228 (S.D.N.Y. 1989) (emphasis added). Thus, the district court erred in deciding that the declaratory relief claim did not invoke arbitration under Appendix D. It would usurp the jurisdiction of the arbitrator to decide a dispute over the *Sun's* compensation under Appendix D by "interpreting" § 4.2 to tell the arbitrator what EBITDA means.

C. The Meaning of Section 4.2 is a False Issue that has been Tendered To Avoid Arbitration.

This Court has condemned efforts to avoid arbitration through careful pleading in an amended complaint. *See Phillips v. Parker,* 106 Nev.

415, 418, 794 P.2d 716, 718 (1990) (compelling arbitration and rejecting the plaintiff's "clear effort to avoid the [arbitration] agreement" because his claims "stem from rights relate[d] to the agreement"). Courts should be wary of and not condone amendments aimed at avoiding arbitration. *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993) ("courts should be cautious of . . . amendments alleging meritless claims in an attempt to save a case from summary judgment").

Here, the *Sun's* First Amended Complaint is a clear attempt to avoid the arbitration clause in Appendix D. In its initial complaint, the *Sun* sought declaratory relief as to the meaning of "Section 4.2 ***and*** Appendix D" and "the ***relationship between the responsibilities of the parties to bear their own editorial costs and the calculation of EBITDA for purposes of determining the Annual Profits Payment owed to Las Vegas Sun, Inc.***" AA 005 (¶ 26) (emphasis added). The *Sun* also sought a "proper" calculation of EBITDA and payment of all outstanding profits amounts. AA 006 (¶ 36), 007 (§ B).

Faced with an order compelling arbitration, the *Sun* amended its complaint to seek only a judicial declaration as to the meaning of § 4.2 of the JOA—even though it alleges that the language is "plain," AA 173 (¶ 20), "clear and unambiguous," AA 290:18-19, and the nature of the dispute has not changed: the *Sun* still seeks a "proper" calculation of EBITDA but asks the district court to "declare" how that calculation must be made. AA 127:2, 286:1.

The *Sun* not only wishes to garner a benefit that it did not bargain for (the district court's legal analysis on "the meaning of Section 4.2"), but also by splitting the arbitrable compensation dispute into: (a) an

alleged "legal" standalone issue under Section 4.2 of the JOA; and (b) an accounting/"calculation" issue about the alleged outstanding amounts to predetermine the compensation dispute and manipulate the arbitration process. Should the *Sun* obtain a judicial declaration—based solely on Section 4.2, in disregard of Appendix D— that the *Review-Journal* must bear its own editorial costs but not treat them as an expense when calculating EBITDA, the arbitrator's task would be reduced to recalculating EBITDA without regard to the editorial expense of newspaper operations. This would contradict the parties' agreement in Appendix D, including that "[a]ll calculations shall be made in accordance with generally accepted newspaper industry accounting principles consistently applied." Such a result would also render arbitration before "a certified public accountant" (as Appendix D specifies) illusory.

The Court should not reward the *Sun's* gamesmanship, nor should the district court. Permitting the Sun to obtain judicial relief in court would frustrate Nevada's policy "favoring contractual provisions requiring arbitration as a dispute resolution mechanism." *Phillips*, 106 Nev. at 417, 794 P.2d at 718. Any relief in court would be limited to declaratory relief. The economic relief the *Sun* seeks would still have to be arbitrated—separately. There is no just reason for the *Sun* to needlessly tie up the district court with a matter that could and should be resolved in a single arbitration proceeding.

The Court should reverse the district court's order denying Stephens' motion to compel arbitration and direct the parties to arbitrate their entire dispute, as they contracted to do in 2005 when they executed the current JOA.

VIII. CONCLUSION.

The order denying Stephens' Renewed Motion to Compel Arbitration should be reversed.

Dated this 5th day of October 2015.

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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 requirements of NRAP 32(a)(6) because:

(a) This brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2007 in 14-point Palatino typeface.

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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 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 5th day of October, 2015.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b-d) and NEFCR Rule 9, I certify that I am an employee of MORRIS LAW GROUP and that on the date below, I caused the following document to be served via the Court's E-Flex filing system: **APPELLANT'S OPENING BRIEF.** The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

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DATED this 5th day of October, 2015.

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