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,

v.

LAS VEGAS SUN, INC., a Nevada corporation,

Respondent.

District Court Case No. A-18-772591-B

RESPONDENT/CROSS-APPELLANT'S OPPOSITION TO MOTION TO FILE PORTIONS OF OPENING BRIEF AND APPENDIX UNDER SEAL

LEWIS ROCA ROTHGERBER CHRISTIE LLP
E. LEIF REID, SBN 5750
KRISTEN L. MARTINI, SBN 11272
NICOLE SCOTT, SBN 13757
One East Liberty Street, Suite 300
Reno, Nevada 89501

PISANELLI BICE PLLC
JAMES J. PISANELLI, Bar No. 4027
TODD L. BICE, Bar No. 4534
JORDAN T. SMITH, Bar No. 12097
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

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

I. INTRODUCTION

As a newspaper, the RJ is supposed to be a guardian that ensures court records remain open so the public remains informed about happenings in the judiciary. While the RJ routinely litigates to obtain open access to court records, the RJ takes the antithetical approach when it comes to its own lawsuits, citing "minimal" public interest when asking this Court to redact and seal entire sections of its Opening Brief and four volumes of Appendices. In doing so, the RJ leans into its self-serving generalities and vague statements of "privacy" (capitalizing on the Court's busy caseload), in hopes of dissuading this Court from actually reviewing what the RJ asks to be withheld from the public's eye. But the public has a substantial interest in how a dispute between the only two competing daily print newspapers in Las Vegas, where one is threatening to put the other out of business, is handled in the judiciary.

Reviewing the information the RJ seeks to seal reveals that the information has already been published in *open court* and in *unsealed and unredacted court filings*. The RJ's proposed redactions and sealing are strategic and do not implicate any privacy interest under SRCR 3(4). Examining these documents exposes the driving motivation behind the RJ's sealing efforts: to control the public narrative about its malfeasance under the parties' Joint Operating Agreement.

The RJ repeats a "privacy-is-paramount-arbitration-policy" and rests the blanket Arbitration SPO as a basis to seal this Court's records. But these reasons remain unpersuasive. Resolving even supposedly "private" disputes can deeply affect the

public's interests. This is why the starting point for sealing or redacting court records is the presumption of open access, which is overcome only by *compelling* privacy interests. Neither the Nevada Legislature nor this Court has extended the confidentiality they have afforded to mediations and settlements to private, contracted-for arbitrations, especially when state courts are called upon to vacate or enforce the private arbitration awards. And courts around the country overwhelmingly do not defer to parties' stipulated confidentiality orders in arbitration either. In short, the RJ has not identified any compelling interest sufficient to justify its proposed redactions and blanket sealing.

II. PERTINENT FACTUAL BACKGROUND

The RJ's facts and procedural history section of its Motion is a literal copy and paste from its Opposition to the Sun's Renewed Motion to Unseal. *Compare* Mot. 3-4 *with* RJ's Opp'n to Sun's Renewed Mot. 2-3. The Sun will not restate the facts set forth in its Renewed Motion; however, it bears reminding that nothing in Appendix D, or anywhere else in the JOA, provides that the arbitration was confidential. *See* Sun's Mot. to Unseal at Ex. 2. The lone mention of confidentiality requires the arbitrator to maintain the confidentiality of the RJ's *financial records* inspected by the auditor. *See id.*, App'x D at 20. The parties entered into the stipulated confidentiality and protective order in the arbitration ("Arbitration SPO"), "subject to [ ] the provisions of Appendix D," in early February 2019 before the parties' exchanged any discovery documents. The arbitrator did not make any determination as to the confidentiality of any of the

documents at issue, and certainly did not engage in any sealing analysis.[1] *See* Sun's Renewed Mot. to Unseal ("Renewed Mot.") 8.

III. THE RJ HAS FAILED TO REBUT THE PRESUMPTION OF OPEN ACCESS TO THIS COURT'S APPELLATE RECORD

The starting point for sealing or redacting court records is the presumption of open access, a presumption "firmly rooted in our nation's history." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006). Overbroad sealing practices and "secret judicial proceedings" erode the public's trust and "confidence in this court and the judiciary." *Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 108-09, 318 P.3d 1078, 1085 (2014). When the public cannot see what the courts are doing, it is impossible to determine whether the courts are exercising their authority properly. The public has a right to know how the law is being applied (and developed) by the courts, including on appellate review from a district court's order confirming an arbitration award. "Openness promotes public understanding, confidence, and acceptance of judicial process and results." *Id.*

The clear "presumption favoring public access to judicial records and documents is only overcome when the party requesting the sealing of a record or document demonstrates that 'the public right of access is outweighed by a significant competing

[1] While the RJ reiterates the district court's statement that it "'already made public the relevant and limited parts of the record that were required to render its decision in this matter,'" the RJ ironically attacks the district court's Order in its Opening Brief as failing to engage the arbitrator's erroneous analysis while moving to seal the document that it asks *this* Court to consider. The RJ wants this Court's review to be done in secret.

interest.'" *Id.* (citation omitted). Only when the sealing is "justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court records" will sealing be appropriate. SRCR 3(4). The parties' private confidential arbitration agreement alone is insufficient to justify sealing. *Id.*

This is the same standard that applies every time this Court is asked to seal or redact a document. SRCR 1(4) (providing that the rules govern and apply to "all court records in civil actions"); *see also* Renewed Mot. 2; Sun's Reply to Renewed Mot. ("Reply") 1. As SRCR 7 makes clear, however, while records sealed in the district court shall be sealed by the Clerk of the Court on appeal, the sealing will only remain in effect until *further order* of the Court. SRCR 4 grants this Court express authority to unseal court records on its *own* motion. SRCR 4(2). The RJ's suggestion that this Court should defer to the trial court's sealing decision, *see* Mot. 4-5, is unsupported by the cases it cites and ignores the clear mandates of SRCR. *See* Reply 3-5 & n.3. When deciding whether to seal its own court files, this Court owes no deference to the district court's earlier sealing determination.

The RJ has made no effort to show a compelling interest to overcome the transparency presumption existing in this Court, and it offers no justification to redact or seal any portions of its Opening Brief or any document contained in Appendix Volumes 1 through 4.

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A. The Information at Issue has Already been Published in the Public Domain, Losing All Protection, if it Ever had Any

A party cannot seal information that has been made publicly available since the information has already lost any confidentiality that may have been afforded to it.. *E.g.*, *Janssen Products, L.P. v. Lupin Ltd.*, No. CIV. 2:10-05954 WHW, 2014 WL 956086, at *3 (D.N.J. Mar. 12, 2014) (stating, "It is well established that once confidential information has been published, it is no longer confidential. In those circumstances, sealing is not appropriate," and collecting cases[2]); *Apple Inc. v. Samsung Elecs. Co. Ltd.*, No. 11-CV-01846 LHK PSG, 2012 WL 4120541, at *2 (N.D. Cal. Sept. 18, 2012) (denying a request to redact certain information and noting "that much of the information the parties want sealed has become publicly available, either through presentation at trial or through the parties' commercial activities"); *see also BASF Corp. v. SNF Holding Co.*, No. 4:17-CV-251, 2019 WL 2881594, at *13 (S.D. Ga. July 3, 2019) (unsealing an order granting motion for summary judgment and concluding that "because the proposed redactions largely comprise material that is already available to the public, they do not involve the

[2] *Id.* (citing *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013) ("[O]nce the parties' confidential information is made publicly available, it cannot be made secret again"); *Ameziane v. Obama,* 620 F.3d 1, 5 (D.C. Cir. 2010) ("[O]nce [redacted information] is revealed publicly, the disclosure cannot be undone."); *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) ("Secrecy is a one-way street: Once information is published, it cannot be made secret again."); *Gambale v. Deutsche Bank AG,* 377 F.3d 133, 144 n. 11 (2d Cir. 2004) ("Once the cat is out of the bag, the ball game is over." (citation omitted)); *SmithKline Beecham Corp. v. Pentech Pharmaceuticals, Inc.*, 251 F. Supp. 2d 1002, 1009 (N.D. Ill. 2003) (Posner, J., sitting by designation) (granting a motion to seal terms of a settlement agreement but only to the extent he chose not to discuss those terms in his opinion, as "there the cat is out of the bag")).

type of confidential trade secrets that need to be shielded from public access on the Court's docket").

The rationale supporting this well-established rule is as follows: "[B]ecause the information has been made publicly available—and indeed remains publicly available—the Court does not 'have the power, even were [it] of the mind to use it, to make what has thus become public private again.'" *Janssen Products,* , No. CIV. 2:10-05954 WHW, 2014 WL 956086, at *3 (quoting *Gambale v. Deutsche Bank AG,* 377 F.3d 133, 144 (2d Cir. 2004); *see id.* (further explaining that "however confidential [the information] may have been beforehand, subsequent to publication it was confidential no longer. It now resides on the highly accessible databases of Westlaw and Lexis and has apparently been discussed prominently elsewhere."). Consequently, information already disclosed to the public in an open court proceeding or unsealed court filing is not appropriate for sealing later. *E.g.*, *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006);[3] *see also Delaware Display Group LLC v. LG Elecs. Inc.*, 221 F. Supp. 3d 495, 497 (D. Del. 2016).[4]

[3] The court concluded the movant's redactions supported unsealing the records, where, for example, a party sought to redact deposition references to information already published in the complaint, and where a redaction was proposed although the information was referenced several times elsewhere without redaction. *Id.* at 1184 (footnote omitted).

[4] "Simply because the parties have designated the information as "restricted—attorneys' eyes only," or with some lesser designation under a protective order is almost irrelevant to the present issue, that is, whether the information should be redacted from a judicial

The documents discussed in the portions of the RJ's Opening Brief that it *now* seeks to redact are: (1) the JOA; (2) the October 22, 2019, Hearing Transcript ("Transcript"); (3) the Arbitration Award; and (4) the 2004 Stephens Media Profit & Loss Statement ("P&L"). *See generally* AOB. The JOA and the Transcript are public. The JOA has been filed in the district court multiple times, and in this Court. The three-and-a-half-hour Hearing was open to the public, and no part of the Transcript has been sealed. *See* 4 AA 557-694 (Tr.). Therefore, the RJ's redactions in its Opening Brief discussing—even quoting and citing to—the JOA and Transcript are improper. The RJ's request to redact what is undisputedly public information demonstrates the lengths to which it will go in an effort to write an alternate version of events for the public.

The RJ's attempt to seal the Arbitration Award and the P&L suffers similar problems. The same information and nearly verbatim arguments were already published in open court by the RJ itself during the Hearing, disclosed in the parties' *unredacted* briefs (discussed *infra*), and later in the district court's filed Order and Judgment. Ignoring for a moment the information published in the parties' underlying, redacted briefs, a comparison of the RJ's redactions to its Opening Brief with the Transcript, Order, and Judgment—none of which were sealed or redacted—proves the point.[5] One

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transcript. . . . Things that typically weigh against the necessity of sealing include that the information is old, or general, or already in the public record." *Id.*

[5] *Compare* AOB ii-iv (headings and subheadings of fact and argument section) *with e.g.*, 4 AA 594-632 (Tr.); *compare* AOB 3 (issues presented for review) *with* 5 AA 812-20 ("Order") ¶¶ 13, 16-19 & 4 AA 628; *compare* AOB 4, 5-6, 30 *with* Order ¶¶ 13-19 & 4 AA 604-05, 628; *compare* AOB 9 *with* 4 AA 606-07, 622-23; *compare* AOB 10 *with* 4 AA

notable example is the RJ's substantial reliance on the P&L. *See* AOB 6-7, 9, 18-19, 20, 23, 24, 29, 32, 33, 38, 41, 44, 46, 53. The RJ published the P&L in open court during the Hearing in a slide demonstrative exhibit. *See* 4 AA 605-10 & 655. The RJ discussed the contents of the P&L. *E.g.*, *id.* at 606-09 (counsel reading the line items of the P&L).

As mentioned above, the Appendices the RJ requests to seal consist of the parties' underlying motions to confirm and vacate the Award. *See generally* Mot. Of these six filed briefs, *four* of them were filed with *redactions*; they were not blanket sealed.[6] *See* Exs. 1-4. More importantly, every argument made, issue raised, and finding of the arbitrator referenced in the parties' underlying briefs was argued in detail and at length in open court during the Hearing, and reiterated in the district court's Order and Judgment. *Compare* Exs. 1-4 *with* 4 AA 557-694, Order & Judgment. The RJ cannot now claim that what has been repeatedly published to the public can be sealed in this Court.

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628, 649; *compare* AOB 12 *with* Order ¶¶ 5, 6, 13-19; *compare* AOB 12-13, 25, 38-39 *with* 5 AA 991-93 (" Judgment"); *compare* AOB 13 *with* Order ¶¶ 20, 23, 26-29 & 4 AA 622-23; *compare* AOB 16-17, 18, 31 (citing JOA) *with* JOA App'x D at 18, 19; *compare* AOB 22, 24-25 (citing the JOA) *with* 4 AA 610-11, 648-49, 659-60; *compare* AOB 23-24, 33, 34, 49 *with* Order ¶ 16; *compare* AOB 25 *with* Order ¶ 16 & 4 AA 633-23; *compare* AOB 26 *with* Order ¶ 18; *compare* AOB 26-27, 39 *with* 4 AA 622-23; *compare* AOB 27 *with* 4 AA 573-76; *compare* AOB 28 (citing Tr.) *with* 4 AA 649, 614-19; *compare* AOB 29 (citing Order) *with* Order; *compare* AOB 31, 34, 35, 36, 38, 39, 47 *with* Order & 4 AA 628; *compare* AOB 47 *with* Order ¶¶ 13-19 & 4 AA 621; *compare* AOB 51 *with* 4 AA 651; *compare* AOB 51 *with* Order ¶¶ 13, 16, 18; *compare* AOB 53 *with* 4 AA 624-26.

[6] The RJ misrepresents this fact when requesting that "portions of its opening brief and appendix ***remain*** sealed pursuant to SRCR 7" and stating that all four redacted briefs are "documents ordered sealed by the district court." Mot. 2.

B. The Arbitration SPO, alone, is Insufficient to Seal the Records

The RJ's argument that sealing these records is permitted under SRCR 3(4) due to the "privacy" of arbitration and the arbitrator's execution of the Arbitration SPO is meritless. *See* Mot. 7-9. The RJ has admitted to this Court that a "split of authority exists on this issue," but the RJ fails to acknowledge that the majority of courts across the nation regularly refuse to seal arbitration documents based on an arbitrator's stipulated confidentiality order. *See, e.g.*, Renewed Mot. 6-7. Courts overwhelmingly recognize that the expectations of privacy in arbitration proceedings disappear when parties move into the judicial arena and use public resources; instead, the public access consideration trumps arbitration privacy interests. *E.g.*, *Redeemer Comm. of Highland Credit Strategies Funds v. Highland Capital Mgmt., L.P.*, 182 F. Supp. 3d 128, 133 (S.D.N.Y. 2016) (internal quotation marks omitted).

The Arbitration SPO has no bearing on whether a court record may be sealed. The arbitrator in the underlying action did not examine any of the documents at issue before signing off on the parties' stipulation; in fact, the parties had yet to exchange any discovery documents. *See* Renewed Mot. at 3 & Ex. 1. The Arbitration SPO was a boilerplate, prehearing discovery order, and courts in this country do not defer to such agreements under these circumstances. *See* Renewed Mot.; Reply. As the Ninth Circuit accurately explained, "[l]ike many pretrial protective orders, the judge signed off on the order without the benefit of making an individualized determination as to specific documents." *Kamakana*, 447 F.3d at 1183. Thus, any "claimed reliance on the order is

not a 'compelling reason' that rebuts the presumption of access." *Id.* Parties entering into such agreements do so with the understanding that their private agreement for confidentiality does not control whether court records can be sealed from the public. *Id.* The RJ's cited authority, Mot. 7-8, represents jurisdictional outliers with minimal, conclusory, or no sealing analysis, or they are based on unopposed motions to seal or entirely distinguishable facts. Renewed Mot. 9, Reply 5.

Moreover, contrary to the RJ's suggestion, Nevada's policy favoring arbitration does not extend to sealing court records. *See* Mot. 1, 6-7; Renewed Mot. 8-9; Reply 3-5. This Court has neither recognized "confidentiality" or "privacy" of arbitrations when expressing its policy favoring arbitration as a dispute resolution mechanism, nor cited any policy favoring arbitration when sealing its court records. *See* Renewed Mot. 9.

Allowing parties' stipulated confidentiality orders to reign supreme or permitting the blanket sealing of court documents threatens the very foundation of our judiciary. SRCR and the fundamental presumption of open access to the judiciary would be deemed irrelevant. Parties could stipulate to sealing court records from arbitration, while using taxpayer resources to resolve their disputes in the public forum. This is what the RJ asks this Court to do, and it is not sanctioned by Nevada law or public policy.

IV. CONCLUSION

An order denying the RJ's Motion is proper under SRCR 3(4) and the presumption of open access to court records.

DATED this 8th day of June, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Kristen L. Martini*

E. LEIF REID, SBN 5750
KRISTEN L. MARTINI, SBN 11272
NICOLE SCOTT, SBN 13757
One East Liberty Street, Suite 300
Reno, Nevada 89501

JAMES J. PISANELLI, Bar No. 4027
TODD L. BICE, Bar No. 4534
JORDAN T. SMITH, Bar No. 12097
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP and that on June 8, 2020, I caused the foregoing **RESPONDENT/CROSS-APPELLANT'S OPPOSITION TO 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 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. Gallegos
David R. Singer
JENNER & BLOCK LLP
633 West 5th Street, Suite 3600
Los Angeles, California 90071

/s/ Autumn D. McDannald
Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT 1

EXHIBIT 1

J. Randall Jones, Esq. (#1927)
r.jones@kempjones.com
Michael J. Gayan, Esq. (#11135)
m.gayan@kempjones.com
Mona Kaveh, (#11825)
m.kaveh@kempjones.com
3800 Howard Hughes Parkway, 17th Fl.
Las Vegas, Nevada 89169
Ph.: (702) 385-6000
Fax: (702) 385-6001

Richard L. Stone, Esq. (*pro hac vice pending*)
rstone@jenner.com
David R. Singer, Esq. (*pro hac vice pending*)
dsinger@jenner.com
Amy M. Gallegos, Esq. (*pro hac vice pending*)
agallegos@jenner.com
JENNER & BLOCK
633 West 5th Street, Suite 3600
Los Angeles, CA 90071-2054

Attorneys for Defendants and Counterclaimants
News+Media Capital Group LLC &
Las Vegas Review-Journal, Inc.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS SUN, INC., a Nevada corporation, Plaintiff, vs. NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; LAS VEGAS REVIEW-JOURNAL, INC., a Delaware corporation; and DOES, I-X, inclusive, Defendants.	Case No. A-18-772591-B DEPT.: XVI **HEARING REQUESTED** **DEFENDANTS' MOTION TO VACATE ARBITRATION AWARD**

Defendants News+Media Capital Group LLC and Las Vegas Review-Journal, Inc. (collectively "Review-Journal"), by and through their counsel of record, hereby respectfully submit this Motion to Vacate Arbitration Award.

This Motion is made and based upon the following Memorandum of Points and Authorities, the Declaration of Michael Gayan, the exhibits attached thereto, the pleadings and papers on file herein, the oral argument of counsel, and such other or further information as this Honorable Court may request.

DATED this 18th day of September, 2019.

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP

/s/ J. Randall Jones

J. RANDALL JONES, ESQ. (#1927)
MICHAEL J. GAYAN, ESQ., (#11135)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

Counsel for Defendants

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is the rare case where an arbitration award is so irrational and so inconsistent with the parties' contract and fundamental legal principles that vacating it is the only option under controlling law. The Arbitrator disregarded the contract provisions that formed the basis for the entire dispute. He rewrote the parties' agreement, forcing the Review-Journal into a business arrangement with financial terms that it did not choose and that still has over 20 years remaining on its term. The Arbitrator's error is manifest, and correcting it will dispose of all the issues raised in the pending motions to vacate because all of the Sun's claims are premised on an incorrect reading of the controlling agreement [redacted]. The Court should vacate the Award [redacted].[1]

The core issue addressed by the Arbitrator here was straightforward: when the Review-Journal subtracts expenses from revenues in order to calculate its EBITDA (earnings before interest, taxes, depreciation, and amortization) for the purpose of determining the Sun's share of the Review-Journal's profits, should the Review-Journal's editorial expenses and promotional expenses be subtracted from its revenues, similar to other expenses? [redacted] the contract between the parties expressly and unambiguously states that these expenses, which are incurred to generate revenues that benefit both parties, are to be deducted as part of the EBITDA calculation. [redacted].

The operative contract in this case is a 2005 joint operating arrangement ("2005 JOA") between the Review-Journal, which was then owned by Stephens Media Group, and the Sun. The 2005 JOA superseded the parties' prior agreement (the 1989 Agreement). In the 2005 JOA, the parties restructured their relationship so that rather than distribute two separate daily newspapers, the Sun became an insert to the Review-Journal.

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[1] To the extent the Court is inclined to confirm any part of the Award, it should only confirm [redacted], for the reasons discussed in the Review-Journal's forthcoming opposition to the Sun's motion to confirm the award in part and vacate it in part.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

The 2005 JOA expressly states how EBITDA is to be calculated for the purpose of determining the Sun's share of the Review-Journal's profits (the Sun's "Annual Profits Payment"). The contract states that "[t]he 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." Ex. A, App'x. D, p. 19 (emphasis added).[2] Retention is a way of computing earnings in the newspaper industry that is very similar to EBITDA. [redacted].

To repeat: Appendix D of the contract specifically sets forth how to calculate EBITDA. [redacted]

[2] All exhibits are attached to the Declaration of Michael Gayan filed concurrently herewith.

[3] [redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted]

Section 4.2 is irrelevant and does not state that the Review-Journal's editorial expenses must be excluded from the EBITDA calculation. Section 4.2 has nothing whatsoever to do with the EBITDA calculation. [redacted]

First, Section 4.2 did not change anything with respect to how the Review-Journal's editorial expenses were handled. The Review-Journal paid its own editorial expenses (and deducted those expenses from its earnings) both before and after the 2005 JOA. [redacted] Section 4.2 only impacted ***the Sun's*** editorial expenses, not the Review-Journal's. Under the parties' prior agreement, the Review-Journal had paid the editorial expenses of ***both*** newspapers. Section 4.2 simply made it clear that under the 2005 JOA the Sun was responsible for paying its own editorial expenses.

Second, Section 4.2 was not any "newer" than the EBITDA formula. Both Section 4.2 and the EBITDA formula were added to the 2005 JOA at the same time. It is not as if Section 4.2 was newly added and the EBITDA formula in Appendix D was an artifact of a prior agreement that had been left in the contract by accident. ***Third***, the 2005 JOA has a specific provision identifying expenses to be excluded from EBITDA in calculating the Sun's profit payment. This

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

provision states, for example, that certain equipment expenses are to be excluded. This provision does not mention editorial expenses being excluded. If the parties had intended editorial expenses to be excluded, they would have listed them in this provision or at minimum cross-referenced Section 4.2. ***Finally***, for nine years the Sun read the contract as requiring editorial and promotional expenses to be deducted, just as the Review-Journal did. [redacted] In sum, Section 4.2 has nothing to do with the EBITDA formula [redacted] But, like Section 4.2, Section 5.1.4 has nothing to do with the EBITDA calculation. Section 5.1.4 does not state that promotional expenses paid by the Review-Journal must be excluded from the EBITDA calculation unless they feature the Sun in equal prominence. Indeed, the section of the JOA that specifically covers expenses that should not be deducted in calculating EBITDA, Appendix D, does not state that expenses for promotional activities not prominently featuring the Sun should be excluded. Section 5.1.4 is in a separate part of the contract and does not even mention EBITDA. As with editorial expenses, promotional expenses paid by the Review-Journal are properly deducted when calculating the earnings of the Review-Journal. This is why [redacted] the 2005 JOA requires them to be deducted by reference to that profit and loss statement. Ex. A, App'x D, p. 19.

[redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted] The 2005 JOA limits the Arbitrator's authority to resolving post-audit disputes about amounts owed to the Sun. *See* Ex. A, at App'x D, p. 20. [redacted] When the governing contract is read correctly, the Sun's claims for declaratory relief, breach of contract, "tortious" breach, and attorneys' fees all necessarily fail, because each is premised on the argument that the 2005 JOA prohibits the Review-Journal from deducting editorial and promotional expenses from EBITDA. [redacted][4]

[4] Because the plain language of the 2005 JOA compels a finding that the Review-Journal did not breach the JOA by deducting editorial and promotional expenses when calculating EBITDA, a rehearing would be inappropriate and unnecessary.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

II. STATEMENT OF FACTS

A. The Review-Journal And Sun Entered A Joint Operating Arrangement To Rescue The Failing Sun.

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 Agreement) 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. Under the 1989 Agreement, the Sun, which was the failing newspaper, remained a separate and independent daily afternoon newspaper, but the Review-Journal handled for the Sun all of the Sun's non-editorial business needs. *See, e.g.,* Ex. D, at 1 and App'x B.

B. The Parties Replaced Their Original Agreement With The 2005 JOA.

The relationship between the Sun and the Review-Journal's prior owners under the 1989 Agreement was rocky. The Sun frequently complained that it was entitled to more money for editorial expenses than the Review-Journal was paying. To resolve the tension and settle the disputes, in June 2005 the parties entered the 2005 JOA.[5] The 2005 JOA significantly restructured the relationship between the newspapers, as described below.

1. The 2005 JOA Converted The Sun From A Standalone Paper To An Insert To The Review-Journal.

Under the 2005 JOA, the Sun ceased publishing as a standalone daily afternoon newspaper. Instead, the Sun became a six-to-ten page insert to the Review-Journal. Ex. A, ¶ 5.1 and App'x A.

2. The 2005 JOA Gave The Sun An Annual Profits Payment Based On A Formula Tied To EBITDA.

Consistent with the conversion of the Sun to an insert in the Review-Journal, the 2005 JOA provided that the Sun would receive an Annual Profits Payment based on a formula tied to the earnings of the Review-Journal, including both earnings from the combined Review-Journal/Sun and earnings from the Review-Journal's other print publications. Ex. A, App'x D,

[5] *See* the Sun's Complaint, ¶ 30.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

pp. 18-19. Under the formula set forth in Appendix D to the 2005 JOA, the Sun's Annual Profits Payment would rise or fall each year by the same percentage that the EBITDA of the Review-Journal print publications rose or fell. *Id.*, App'x D, p. 18.

3. The 2005 JOA Expressly And Specifically Stated How EBITDA Was To Be Calculated.

The 2005 JOA expressly defined how EBITDA was to be calculated for the purpose of determining the Sun's Annual Profits Payment. It was to be calculated the same way that the owner of the Review-Journal, who at the time was Stephens Media Group, had calculated "Retention" in the past for the Review-Journal. Ex. A, App'x D, pp. 18-19. Retention, as noted above, is a newspaper term of art for earnings that is very similar to EBITDA. Appendix D to the 2005 JOA states: "[t]he 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." *Id.*, App'x D, p. 19.

[redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

There is nothing surprising or unusual about this. It is how EBITDA is normally calculated. EBITDA is a common way of figuring out a company's earnings. Earnings are determined by subtracting expenses from revenues.[6]

To the extent that the parties wanted to exclude certain expenses from the EBITDA calculation, they expressly identified those excluded expenses in the 2005 JOA. Ex. A, App'x. D, p. 19. For example, expenses relating to certain press equipment must be excluded from the calculation of the Review-Journal's EBITDA. *Id.*

4. The 2005 JOA Required The Sun To Bear Its Own Editorial Expenses.

Under the 1989 Agreement, the Review-Journal had paid the editorial expenses of both the Review-Journal and the Sun according to an allocation formula. Ex. D, ¶ 4.2 and App'x B. 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." Ex. A, ¶ 4.2. As a result, under the 2005 JOA, the Review-Journal had to bear its own editorial expenses, as it had always had, but the Sun now became responsible for its own editorial expenses.

Significantly, Section 4.2 does not state that editorial expenses paid by the Review-Journal are to be excluded from the EBITDA calculation. *Id.* Likewise, editorial expenses are not on the list of expenses that the parties agreed to exclude from the EBITDA calculation in Appendix D. *Id.*, App'x D, p. 19.

5. The 2005 JOA Treated Promotional Activities Differently.

The 1989 Agreement had required the Review-Journal to establish a budget for promotional activities to be allocated between both newspapers. Ex. D, ¶ 5.1.4. Reflecting the fact that the Sun was now an insert to the Review-Journal, and not a separate newspaper, Section

[6] With EBITDA, once the earnings are calculated, depreciation and amortization are added back in. https://m.wikihow.com/Calculate-EBITDA, last visited 9/6/19; Earnings Before Interest and Taxes—EBIT, https://www.investopedia.com/terms/e/ebit.asp, last visited 9/6/19; EBITDA Guide, https://www.myaccountingcourse.com/financial-ratios/ebitda, last visited 9/6/19; What Is EBITDA, https://corporatefinanceinstitute.com/resources/knowledge/finance/what-is-ebitda/, last visited 9/6/19. [redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

5.1.4 of the 2005 JOA required the Review-Journal to use reasonable efforts to promote both newspapers. Ex. A, ¶ 5.1.4. The 2005 JOA mandated that "[a]ny promotion of the Review-Journal as an advertising medium or to advance circulation shall include mention of equal prominence for the Sun." *Id.* However, it also provided that the Sun and the Review-Journal could "undertake additional promotional activities for their respective newspaper[s] at their own expense." *Id.*

Significantly, Section 5.1.4 does ***not*** state that if promotional activities do not include the Sun in equal prominence then they must be excluded from the EBITDA calculation. *Id.* Likewise, expenses for promoting the Review-Journal are ***not*** on the list of expenses that the parties agreed to exclude from the EBITDA calculation in Appendix D. *Id.*, App'x D, p. 19.

C. **The Arbitration and Award.**

In February 2018, the Sun, no longer satisfied with its profit-sharing payments, attempted to initiate an arbitration against the Review-Journal. Among other things, the Sun contended that the Review-Journal breached the 2005 JOA by including the Review-Journal's editorial expenses and separate promotional expenses in its calculation of the Review-Journal's EBITDA—even though the Sun accepted these deductions as part of the profit calculation for the first nine years of the 2005 JOA. The Court ordered the parties to arbitrate some of the Sun's claims.

As required by the 2005 JOA, the Arbitrator was a certified public accountant. Ex. A, p. 20. [redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted]

the only time it is appropriate for a company to deduct an expense when calculating EBITDA is when the company is actually paying (or "bearing") that expense.

[redacted] The Sun claimed for the first time that editorial expenses could not be deducted from EBITDA in 2014, after accepting the Review-Journal's calculations for nine years. The Sun's conduct demonstrates that the Sun knows perfectly well that the Review-Journal has been calculating its EBITDA correctly, and that the Sun's claims were not brought in good faith. [redacted] As noted above and as further explained below, Section 5.1.4 does not mention the EBITDA calculation and is in an entirely different section of the 2005 JOA than the provisions addressing

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

the EBITDA calculation. Ex. A, ¶ 5.1.4. [redacted]

[redacted]

III. THE AWARD MUST BE VACATED.

[redacted]

Under Nevada law, an arbitration award must be vacated if the Arbitrator ignores the express language of the parties' agreement, or refuses to apply established principles of contract law. *Coblentz*, 112 Nev. at 1169 (1996) (reversing trial court order affirming an arbitration award, where the arbitrator disregarded the contract's plain language and interpreted the contract in a way that rendered one of its provisions meaningless); *Wichinsky*, 109 Nev. at 89 (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)); *Kreeger v. BCC Capital Partners LLC*, No.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

CVS041061KJDLRL, 2005 WL 8161910 at *2 (D. Nev. 2005) ("Under Nevada law, an arbitration award must be vacated where the arbitrator . . . refuses to apply established principles of contract law, or ignores the express language of the agreement.").

Coblentz is on point. That case involved a lease agreement that required the lessee to name the property owner as an additional insured under on its liability insurance policy. 112 Nev. at 1164-65. After a guest slipped and fell on the property's outdoor stairs 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. *Id.* at 1165. The property owner filed a cross-claim against the lessee, and the issue of their liability to the injured guest was ultimately submitted to arbitration. *Id.* at 1165. Notwithstanding the contract's plain language, the arbitrators held that the lessee did not breach its contractual obligation to name the property owner as an additional insured. *Id.* at 1168. The trial court affirmed the award. *Id.* The Nevada Supreme Court reversed, holding that: "The arbitrators' conclusion that the Fund [i.e., the Lessee] had no duty to name the Coblentzes on its insurance policy rendered one of the lease agreement's provisions meaningless and without effect and thus constitutes a manifest disregard of the law." *Id.* at 1169. [redacted]

Kreeger is also instructive. *Kreeger* involved a dispute over the termination of a contract under which the plaintiff employed the defendant to assist with the creation of an employee stock ownership plan (ESOP) for its business. 2005 WL 8161910 at *1. The arbitrator found the defendant to be in breach. *Id.* The award was premised on the finding that it would be impossible for the defendant to complete the ESOP before a December 31, 2003 deadline—however, the contract contained no such deadline. *Id.* at *1. Citing *Coblentz*, the *Kreeger* court explained that under Nevada law, "an arbitration award must be vacated where the arbitrator . . . refuses to apply established principles of contract law, or ignores the express language of the agreement." *Id.* at *2. Applying this rule, the court vacated the award because the arbitrator disregarded the contract's plain language, added new terms, and provided no reasoned basis for doing so. *Id.*

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

Other courts are in accord with Nevada. *See, e.g., In re Vital Basics Inc.*, 472 F.3d 12, 17 (1st Cir. 2006) ("[W]e can vacate an award where it is contrary to the plain language of the relevant contract, or where the arbitrator has construed the contract "in a way that cannot possibly be described as plausible or rational."); *Int'l Union of Operating Eng'rs, AFL–CIO, Local No. 670 v. Kerr–McGee Refining Corp.*, 618 F.2d 657, 659 (10th Cir. 1980) (holding that "an award cannot be upheld if it is contrary to the express language of the contract"); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 25 (2d Cir. 1997) ("We will overturn an award where the arbitrator merely mak[es] the right noises—noises of contract interpretation—while ignoring the clear meaning of contract terms. We apply a notion of 'manifest disregard' to the terms of the agreement analogous to that employed in the context of manifest disregard of the law.") (citations omitted, punctuation in original); *Pennsylvania Turnpike Com'n v. Teamsters' Local Union No. 77*, 45 A.3d 1159, 1166 (Pa. Cmwlth. 2011) ("a court may vacate an arbitration award if the . . . interpretation of the agreement was 'totally unsupported by principles of contract construction' or if it is manifestly unreasonable.") (citations omitted).

[redacted]

The 2005 JOA clearly stated—and even illustrated—how EBITDA was to be calculated: "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." Ex. A, App'x. D, p. 19.

The 2005 JOA is not ambiguous. It identifies a specific document that calculates Retention, and states that EBITDA is to be calculated the same way. The Stephens Media profit and loss statement calculates Retention by adding up revenues and then subtracting operating expenses, ***including editorial expenses***. Ex. B, p. 2. [redacted]

[redacted] As noted above, courts must vacate an arbitration award if the arbitrator manifestly disregarded the law and, as the Nevada Supreme Court held in *Coblentz*, this standard is met when the arbitrator ignores settled contract law principles. *Coblentz*, 112 Nev. at 1169; *Kreeger*, 2005 WL 8161910 at *2; *see also Graber v. Comstock Bank*, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995) (reversing trial court's order affirming arbitration award, and holding that the trial court "had the authority and obligation to review the arbitrator's award to determine whether the arbitrator manifestly disregarded the law.").

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KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted]

Section 4.2 did not change anything with respect to the Review-Journal's editorial expenses. The Review-Journal has always borne its own editorial expenses (and it deducted those expenses from its earnings) both before and after the 2005 JOA.

[redacted]

Section 4.2 only impacted ***the Sun's*** editorial expenses, in that it made the Sun responsible for its own editorial expenses.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted]

[redacted] Under the prior agreement, the Review-Journal was paying both newspapers' editorial costs, and the Sun's compensation was structured differently and did not involve an EBITDA calculation. Ex. D, App'x B. The EBITDA formula in the 2005 JOA was not a forgotten carryover from the prior agreement, as the Arbitrator wrongly implied. Rather, it was new language that specifically set forth the method for calculating EBITDA under the 2005 JOA. To suggest that Section 4.2 is the more specific provision with regard to the EBITDA calculation is baseless, since that provision does not mention EBITDA at all. Ex. A, ¶ 4.2.

[redacted]

Bearing an expense means paying that expense. The Review-Journal has always borne its own editorial expenses, i.e., it paid the costs of its newsroom. *See* Ex. B, p. 2; Ex. D, App'x B. Indeed if the Review-Journal were not bearing its editorial costs, it would be ***improper*** to deduct those editorial costs as an expense. The only change made by Section 4.2 was that the Sun would now have to bear its own editorial expenses, unlike before. The Review-Journal, having borne its own editorial expenses all along, deducted the editorial expenses it paid from earnings when calculating Retention (or EBITDA), as shown on the Stephens Media profit and loss statement

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

from 2004 that the parties used as a roadmap for how to calculate EBITDA under the 2005 JOA. Ex. A, App'x D, pp. 18-19; Ex. B, p. 2.

[redacted]

[redacted] Section 4.2 is perfectly consistent with the EBITDA formula. Ex. C, p. 5. There is nothing contradictory about requiring the Review-Journal to pay its own editorial expenses and also deduct the expenses it paid when calculating its EBITDA. Because Section 4.2 and Appendix D are harmonious on their face, the Arbitrator should not have read them as contradictory. This is yet another way in which the Arbitrator ignored basic contract law. *See, e.g., Chemeon Surface Technology, LLC v. Metalast International, Inc.*, No. 315CV00294MMDVPC, 2017 WL 1015009, *1 (D. Nev. 2017) ("The usual rule of interpretation of contracts is to read provisions so that they harmonize with each other, not contradict each other.").

[redacted] The purpose of the EBITDA calculation is to determine the Sun's share of the Review-Journal's profits. The Sun's Annual Profits Payment rises if the Review-Journal's earnings rise and falls if the Review-Journal's earnings fall. [redacted]

[redacted] The 2005 JOA defines "additional promotional expenses" as promotional activities that are not joint, but instead are undertaken by the Review-Journal and the Sun to promote their respective newspapers without

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

mention of the other newspaper. Ex. A, ¶ 5.1.4. [redacted] In addition, promotional expenses are not on the 2005 JOA's list of expenses that must be excluded from the EBITDA calculation. Ex. A, App'x D, p. 19. Thus, under the contract's plain language, the parties intended for the Review-Journal to deduct its promotional expenses in calculating EBITDA. *Id.*, App'x D, p. 19. [redacted] Moreover, it makes perfect sense that the promotional activities for the Review-Journal would be deducted when calculating EBITDA for the purpose of the Sun's Annual Profits Payment—the Sun is getting a cut of the Review-Journal's profits, so it reaps the benefit of any successful promotions, whether the Sun is featured or not. Ex. A, App'x D. [redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted] Section 5.1.4, which requires certain promotions to feature the Sun in equal prominence, has nothing to do with the EBITDA calculation. It is in a completely different section of the contract, and that section makes clear the parties can also promote their newspapers without promoting the other. Nowhere in Section 5.1.4–or anywhere else in the 2005 JOA—does it say that promotional activities must feature the Sun equally to be included in the EBITDA calculation. If the parties had believed that any promotions that did not feature the Sun should be excluded from the EBITDA calculation, they would have expressly stated this in Appendix D's list of excluded expenses. But they did not do this. Ex. A, App'x D, p. 19. Moreover, as the more specific provision directly addressing the EBITDA calculation, Appendix D would control over Section 5.1.4 in the event there were a conflict—though there is no conflict because, again, Section 5.1.4 has nothing to do with the EBITDA calculation at all.

[redacted] As explained above, the 2005 JOA provides for promotional expenses to be deducted from earnings in the EBITDA calculation, and the EBITDA calculation is required to include all revenues and expenses associated with printed Review-Journal publications regardless of whether they have anything to do with the Sun. Ex. A, App'x D, p. 19.

[redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted]

Under Nevada law, a court may vacate an arbitration award if it is arbitrary and capricious. *Wichinsky*, 109 Nev. at 89. An award is arbitrary and capricious if the arbitrator's findings are not supported by substantial evidence. *Graber*, 111 Nev. at 1428.

[redacted]

An arbitration award must be vacated where the arbitrator "exceeded his or her powers." NRS 38.241(1)(d). An arbitrator exceeds his powers if he "addresses issues or make[s] awards outside the scope of the governing contract." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 697, 100 P.3d 172, 178 (2004).

[redacted]

[redacted]

[redacted]

IV. CONCLUSION

The 2005 JOA is clear and unambiguous 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." Ex. A, App'x D, p. 19. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] Settled Nevada law requires the Award to be vacated under these circumstances.

DATED this 18th day of September, 2019.

KEMP, JONES & COULTHARD, LLP

By: /s/ J. Randall Jones
J. RANDALL JONES, ESQ. (#1927)
MICHAEL J. GAYAN, ESQ. (#11135)
3800 Howard Hughes Parkway, 17th Fl.
Las Vegas, Nevada 89169

Attorneys for Defendants

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

Certificate of Service

I hereby certify that on the 18th day of September, 2019, I served a true and correct copy of the foregoing **DEFENDANTS' MOTION TO VACATE ARBITRATION AWARD** via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2, to all parties currently on the electronic service list.

/s/ Pamela Montgomery
An employee of Kemp, Jones & Coulthard, LLP

J. Randall Jones, Esq. (#1927)
r.jones@kempjones.com
Michael J. Gayan, Esq. (#11135)
m.gayan@kempjones.com
Mona Kaveh, (#11825)
m.kaveh@kempjones.com
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001

Richard L. Stone, Esq. (*pro hac vice pending*)
rstone@jenner.com
David R. Singer, Esq. (*pro hac vice pending*)
dsinger@jenner.com
Amy M. Gallegos, Esq. (*pro hac vice pending*)
agallegos@jenner.com
JENNER & BLOCK
633 West 5th Street, Suite 3600
Los Angeles, CA 90071-2054

Attorneys for Defendants and Counterclaimants
News+Media Capital Group LLC &
Las Vegas Review-Journal, Inc.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kic@kempjones.com

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS SUN, INC., a Nevada corporation,

Plaintiff,

v.

NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; and LAS VEGAS REVIEW-JOURNAL, INC., a Delaware limited liability company,

Defendants.

Case No.: A-18-772591-B
Dept. No.: XVI

DECLARATION OF MICHAEL J. GAYAN IN SUPPORT OF DEFENDANTS' MOTION TO VACATE ARBITRATION AWARD

Hearing Date: September 25, 2019
Hearing Time: 9:00 a.m.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kic@kempjones.com

DECLARATION OF MICHAEL J. GAYAN

I, Michael J. Gayan, declare as follows:

1. I am an active member of the State Bar of Nevada, and am employed by the law firm of Kemp, Jones & Coulthard, LLP, counsel for Defendants News+Media Capital Group LLC and Las Vegas Review-Journal, Inc. (collectively "Review-Journal") in this action.

2. I have personal knowledge of the facts stated in this declaration. If called as a witness, I could and would testify as set forth herein.

3. Attached hereto as Exhibit A is a true and correct copy of the fully executed Amended and Restated Agreement ("2005 JOA"), signed by Stephens Media Group, Inc. ("Stephens Media"), and the Las Vegas Sun, Inc. ("Las Vegas Sun"), dated June 10, 2005.

4. Attached hereto as Exhibit B is a true and correct copy of the Stephens Media profit and loss statement for the period which ended on December 31, 2004 which was Exhibit 77 in the Arbitration.

5. Attached hereto as Exhibit C is a true and correct copy of the Final Award of Arbitrator for the arbitration between the Las Vegas Sun and Review-Journal, dated July 2, 2019.

6. Attached hereto as Exhibit D is a true and correct copy of the Agreement ("1989 JOA"), signed by Donrey, Inc, and the Las Vegas Sun, dated June 12, 1989.

I declare under penalty and perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 18th day of September, 2019.

KEMP, JONES & COULTHARD, LLP

Michael J. Gayan, Esq. (#11135)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for Defendants

EXHIBIT 2

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OPPM
E. LEIF REID, ESQ., BAR NO. 5750
KRISTEN L. MARTINI, ESQ., BAR NO. 11272
NICOLE SCOTT, ESQ., BAR NO. 13757
LEWIS ROCA ROTHGERBER CHRISTIE LLP
One East Liberty Street, Suite 300
Reno, Nevada 89501
Tel: (775) 823-2900
Fax: (775) 823-2929
Email: lreid@lrrc.com
kmartini@lrrc.com
nscott@lrrc.com

JAMES J. PISANELLI, ESQ., BAR NO. 4027
TODD L. BICE, ESQ., BAR NO. 4534
JORDAN T. SMITH, ESQ., BAR NO. 12097
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100
Email: JJP@pisanellibice.com
TLB@pisanellibice.com
JTS@pisanellibice.com

Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS SUN, INC., a Nevada corporation,

Plaintiff,

v.

NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; and LAS VEGAS REVIEW-JOURNAL, INC., a Delaware limited liability company;,

Defendants.

CASE NO.: A-18-772591-B

DEPT.: 16

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO VACATE ARBITRATION AWARD

(REDACTED)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In their Motion to Vacate the Arbitration Award, the RJ[1] disturbingly misstates and apparently misunderstands the history of both joint operating agreements between the parties, the RJ's corresponding operational and accounting obligation under these agreements, and the record before and evidence heard by the Arbitrator. The RJ is either confused or is attempting to deliberately misdirect this Court. Under either scenario, the RJ's logic is legally and factually flawed and should be rejected for the second time, but now by this Court.

The Arbitrator made no mistake in finding that the RJ cannot charge its editorial costs and independent promotional costs against the joint operation. The original joint operating agreement (the "1989 JOA") allowed two newspapers, the Las Vegas Review-Journal ("Review-Journal") and the Las Vegas Sun ("Sun") to combine all non-editorial functions. The 1989 JOA required the Review-Journal's owners to form an Agency, essentially a third-party with fiduciary responsibilities to both parties that would handle all of the non-editorial functions of the combined operations such as accounting, record-keeping, and circulation. The Review-Journal, however, never created the Agency, and instead assumed all responsibilities required of the Agency, including its fiduciary obligations to the Sun.

The 1989 JOA prescribed certain accounting processes. The Review-Journal and the Sun shared in the profits of the combined operation under a formula that was, in essence, "Agency Revenues" less "Agency Expenses." The 1989 JOA referred to expenses that were allowable deductions as "Agency Expenses," and similarly referred to the combined revenues from the joint operation as "Agency Revenues." Agency Expenses included both parties' separate *allocations* for their respective editorial and promotional expenses, but excluded the parties' *actual* editorial and promotional expenses incurred *in excess* of those deductible allocations.

In 2005, the 1989 JOA was renegotiated (the "2005 JOA"), resulting in several significant changes. As part of the restructuring of the 1989 JOA, the parties agreed that the contractual

[1] Defendants News+Media Capital Group LLC and Las Vegas Review-Journal, Inc., are together referred to as the "RJ."

One East Liberty Street, Suite 300
Reno, NV 89501-2128
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Agency-based concept in the 1989 JOA for determining allowable expenses and revenues of the joint operation, including both newspapers' allocations for editorial and promotional expenses, as well as the parties' respective share of profits, would be eliminated. All references to editorial costs as being valid expenses of the joint operation were removed. The parties' editorial cost allocations (*i.e.*, part of the previously allowable deductions as an Agency Expense described in Section A.1 of the 1989 JOA) were eliminated. Instead, each party is to "bear their own respective editorial costs." For the parties' promotional cost allocations (*i.e.*, also part of the previously allowable Agency Expenses), those too were eliminated. In their place, the Review-Journal was tasked with the obligation to promote both newspapers. This was because when the 2005 JOA took effect the Sun ceased being a standalone afternoon newspaper and instead began to be published and distributed in a single-packaged, joint product with the Review-Journal in the morning. Since the 2005 JOA, any promotional activities of the Review-Journal that do not feature the Sun in equal prominence cannot be charged to the joint operation, for those are to be at the Review-Journal's "own expense." Joint promotions including the Sun in equal prominence are allowable expenses of the 2005 JOA. *Id.*

The profit split between the parties had to be readdressed in the 2005 JOA as a result of these changes. The parties decided the Sun would initially receive a $12 million "Annual Profits Payment" the first year, *i.e.*, the base-line year, and that amount would fluctuate in direct correlation with the joint operation profits (EBITDA) calculated annually. In order to determine this "delta," the parties had to establish a method for the 1989 JOA-based financials to be used in the 2005 JOA era. This way the percentage-based Agency Allocations, Agency Expenses, and other synthetic expenses that were specifically defined in the 1989 JOA could be used in the post-2005 (no-Agency) era that did not permit such expenses or allocations. To that end, the parties included a detailed description in the 2005 JOA to demonstrate how to convert pre-2005 financials to establish the apples-to-apples, base-line year to calculate variations going forward. This description is found in the "Second Paragraph" of Appendix D to the JOA. The Second Paragraph of Appendix D makes clear that both the RJ's and the Sun's editorial costs, and other disallowed expenses, would receive

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mutual/identical treatment under the 2005 JOA and could not be included in the base-line year calculation of EBITDA. Despite this paragraph and unequivocal provisions in the 2005 JOA expressly mandating that the Review-Journal bear those expenses independent of the joint operation, the Review-Journal continued to charge its editorial expenses and later its individual promotional expenses to the joint operation.

The Arbitrator, a dually-licensed lawyer and certified public accountant, received testimony and evidence during the eight-day hearing related to the 1989 JOA and the 2005 JOA, the parties' intentions behind the agreements, the RJ's accounting practices, and the conduct of the parties. Based on the substantial evidence presented, the Arbitrator agreed with the Sun and held that the RJ is prohibited under the 2005 JOA from charging its editorial costs and independent promotional expenses to the joint operation. The timeframe for the disputes arbitrated was from December 10, 2015 (the date when Defendant News+Media Capital Group LLC purchased the Review-Journal) through March 31, 2018, the fiscal-year ending before the Sun initiated this action.

Nevertheless, the RJ has asked this Court to ignore and disregard these findings and the overwhelming evidence supporting them, and to become a de novo fact-finder. The RJ does so by framing its challenge as a mere "plain language" interpretation, in an attempt to corral this Court away from the evidence and into adopting the RJ's absurd view that *its interpretation* of one sentence in the 2005 JOA, the "Retention Sentence," overrides all of the other JOA provisions. In short, the RJ asks this Court to find that the *Review-Journal's* pre-2005 financial statements (that weren't even attached to the 2005 JOA) govern and that various provisions contained in the 2005 JOA should be ignored and rendered null.

The Arbitrator, well-versed in accounting principles, already heard this argument from the RJ ad nauseum, and properly rejected it. The plain language of the 2005 JOA, the parties' intentions, and the additional evidence submitted during the hearing that contravened the RJ's interpretation—including from the RJ's own witnesses—demonstrates the Arbitrator made no reversible error. To date, the RJ cannot explain away the meaning and mechanics of the Second Paragraph of Appendix D, or contravene the plain language of the specific provisions of Sections

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4.2 and 5.1.4, which state in no uncertain terms that the RJ must bear those certain expenses individually and apart from the joint operation. The RJ either does not understand that the 1989 JOA, Agency-based accounting went away, as well as the many other structural differences between the 1989 JOA and the 2005 JOA provisions that govern today—or it is attempting to misinform the Court. Regardless of the RJ's motives, the arguments presented in its Motion are completely untenable, as the Arbitrator properly found based on the plethora of evidence presented. No basis exists to vacate the Arbitrator's award as requested by the RJ. An order denying the RJ's Motion and confirming the award as described below is required.[2]

II. THE RJ'S STATEMENT OF FACTS ARE ERRONEOUS AND MISLEADING

The RJ misstates the facts and the record. The Sun corrects the following inaccurate statements.

A. The 1989 JOA Required the Review-Journal's Owner to Establish an Agency to Administer the Operations

The RJ asserts that under the 1989 JOA, the Sun "remained a separate and independent daily afternoon newspaper, but the Review-Journal handled for the Sun all of the Sun's non-editorial business needs." Mot. 8. This is wrong.

First, as part of the consideration in entering the 1989 JOA, the Sun was *required* to switch from a morning paper to an afternoon newspaper; the Review-Journal would become the sole morning paper. 7 PA 1287:14-1288:14.[3] Second, and most importantly, the 1989 JOA required the Review-Journal to establish a separate, independent entity, "the Agency," to handle the "management, administration, record keeping and tax administration under [the 1989 JOA]." *See* 2 PA 199. The "Agency"—not the Review-Journal—was required to handle "all duties and obligations" under the 1989 JOA, and it was not until 2014 that the Sun learned the Agency was

[2] The RJ does not address the Arbitrator's other findings, and the Sun therefore incorporates its arguments from its Motion to Confirm Arbitration Award, in part, and to Vacate or Alternatively, Modify or Correct the Award, in Part (Sept. 13, 2019) as those arguments pertain to these unaddressed Arbitrator findings.

[3] Citations refer to the Appendix of Exhibits submitted in support of the Sun's Motion to Confirm Arbitration Award, in part, and to Vacate or Alternatively, Modify or Correct the Award, in Part (Sept. 13, 2019), by volume number of the Plaintiff's Index, followed by page number.

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never actually established by the RJ.[4] 7 PA 1303:8-1304:20. Here, the RJ's failure to grasp this foundational concept confounds the purposes for entering into the 2005 JOA, which were, in part, (1) to eliminate the editorial cost allocations, and instead have each newspaper fund its editorial operations separate and apart from the joint operation; and (2) to eliminate the promotional cost allocations, and instead publish and circulate the two newspapers together, with all promotion of the Newspapers' joint editions to be paid by the Review-Journal.

B. After Multiple Disputes Involving the Review-Journal's Improper Accounting, the Parties Entered into the 2005 JOA

The RJ summarily suggests that the relationship between the Sun and the Review-Journal was "rocky" because the Sun "frequently complained that it was entitled to more money for editorial expenses than the Review-Journal was paying." Mot. 8. The RJ refuses to acknowledge the evidence presented to the Arbitrator concerning the accounting practices giving rise to the disputes between the parties, and constant audits resulting in the RJ paying the Sun for additional amounts owed, which the RJ had previously hidden.

Under the 1989 JOA, the Sun received 65 percent of the Review-Journal's allocation of news and editorial expenses, both of which were allowable deductions as "Agency Expense." *See* 2 PA 227. This allocation method created repeated disputes in large part because the RJ consistently hid and reclassified valid editorial costs to avoid paying the Sun its full editorial allocation payment. 7 PA 1306:12-1310:6. As a result, in 2002, [redacted]. 7 PA 1310:7-1313:23. Following the 2002 settlement, the parties began a years-long renegotiation of the 1989 JOA to eliminate these plaguing disputes and to specifically eliminate the friction related to constant editorial-cost disputes addressed in the 2002 settlement. 7 PA 13:10:9-1316:18. As part of

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[4] The RJ's own financial expert, Mr. Miller, admitted setting up the Agency was a requirement and the Review-Journal violated the 1989 JOA. 13 PA 2805:15-2806:2.

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their new agreement, the 2005 JOA, the parties changed Section 4.2, accordingly, as follows:

> News and Editorial Allocations. The Review-Journal and the Sun shall ~~establish, in accordance with the provisions of Appendix A attached hereto and made a part hereof by reference, the amounts to be allocated to Agency Expense, as hereinafter defined, for each for news and editorial expense.~~ each bear their own respective editorial costs and shall establish whatever budgets each deems appropriate.

Compare 2 PA 204 § 4.2 *with* 1 PA 2 § 4.2.

The only evidence before the Arbitrator regarding the intent of Section 4.2 came from the Sun: Mr. Greenspun (who negotiated the 2005 JOA on behalf of the Sun) testified the intent of Section 4.2 was for each paper to bear its own editorial costs separate from the JOA calculations. 7 PA 1324:5-1325:18. This was consistent with other JOAs throughout the country in that no other witness with any JOA experience had ever known or heard of a JOA where only one party's editorial costs could be charged to the JOA. *E.g.*, 13 PA 281:23-282:3

1. The Retention Sentence in Appendix D does Not Dictate Allowable Expenses in Calculating the 2005 JOA's Annual Profits Payments

The Sun does not dispute that the 2005 JOA describes how EBITDA was to be calculated, but the Sun absolutely disputes the EBITDA calculation is derived from one mere sentence in Appendix D. Indeed, the RJ relies on a *single sentence* in Appendix D as taking precedence over every other sentence in Appendix D, and the rest of the JOA. That single sentence relied on by the RJ, the Retention Sentence, reads: "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."[5] 1 PA 22. While the RJ attaches a copy of that profit and loss statement in its Motion, Mot. 9, that profit and loss was **not** an attachment to the 2005 JOA. *See* 1 PA 1-25. The Arbitrator, based upon more than substantial evidence received during the arbitration hearing, rejected the RJ's argument as to the meaning of the Retention Sentence. *See, e.g.*, 2 PA 39-40.

[5] There is no dispute that Retention Sentence was added after the parties had determined the language of Section 4.2. *See* 7 PA 1476:4-1478:11; *see also id.* at 1334:22-1336:9.

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Preliminarily, the RJ's statement that "Retention" is a "newspaper term of art for earnings that is very similar to EBITDA," is inaccurate. Mot. 9. As the Arbitrator correctly qualified, "Retention" is a term of art "used" by the Review-Journal's prior owners. 2 PA 39. It is not a generally-accepted term of art in the industry as the RJ states. Because the RJ fails to comprehend the Agency structure and accounting concepts set forth in the 1989 JOA, the RJ's reliance on the Retention Sentence as being synonymous with the joint operation EBITDA under the 2005 JOA results in a completely erroneous representation as to how the EBITDA calculation actually works.

The Annual Profits Payment is a formula derived from what was *supposed* to be the Agency's financial statements, *i.e.*, the financial statements of the joint operation, and *not* the Review-Journal's own financial statements that disregarded the 1989 JOA's allowable deductions as Agency Expense. *See* 1 PA 21-22. The Agency concept and all of the Agency terminology was eliminated from the 2005 JOA, and along with those items were the editorial allocations to the Review-Journal and the Sun as Agency Expenses. In short, the 2005 JOA provided the necessary base-line year EBITDA calculation to convert 1989 JOA Agency financial statements to conform with the new 2005 JOA requirements.

More specifically, the 2005 JOA's new method for payments to the Sun was calculated on the year-over-year change in EBITDA which required establishing an accurate baseline year at the start of the 2005 JOA that would be consistent with the terms of the 2005 JOA. However, there was a mismatch between expenses allowed under the 1989 JOA and expenses allowed under the 2005 JOA. Consequently, the 2005 JOA needed to include explicit instructions on what 1989 JOA-era expenses must be *removed from the EBITDA calculation* for the first base-line year. In so doing, the baseline calculation expressed in faithful terms the intentions of both parties with respect to allowable expenses going forward.

This base-line year conversion is found in the Second Paragraph of Appendix D. The Second Paragraph demands that when establishing the base year for the joint operation EBITDA, both newspapers' previously-allowed editorial expenses under the intentionally omitted Section A.1 of the 1989 JOA were to be excluded. *See* 1 PA 19. This is in harmony with Section 4.2's clear

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requirement that "[t]he Review-Journal and the Sun shall each bear their own respective editorial costs." 1 PA 2. In short, the December 2004 profit and loss statement containing the Review-Journal's *actual* expenses and *Agency* Expenses could never provide the accounting basis going forward. After hearing all the evidence, the Arbitrator disagreed with the RJ and found that all provisions of the 2005 JOA (not one sentence) provide the bases for the Sun's Annual Profit Payments, including Section 4.2 and *all of* Appendix D.[6]

2. The 2005 JOA Required Each Party to Bear its Own Editorial Expenses

The RJ states that the "Review-Journal had paid the editorial expenses of both the Review-Journal and the Sun according to an allocation formula" and that with the 2005 JOA the only change was the "Sun now became responsible for its own editorial expenses." Mot. 10. The RJ then asserts that "Section 4.2 does not state that editorial expenses paid by the Review-Journal are to be excluded from the EBITDA calculation." *Id.* These statements are inaccurate, unsupported by the record, and were rejected by the Arbitrator in the Arbitration Award.

Again, the 1989 JOA established the mechanism to provide the allocations to the Review-Journal and the Sun for their editorial expenses: The Review-Journal was not paying the Sun's editorial expenses. Accordingly, the shift from the 1989 JOA's allowable editorial cost allocations as Agency Expense to the 2005 JOA's requirement that both parties were to bear their own editorial expense under Section 4.2 was dramatic and, in fact, "new" to the 2005 JOA as found by the Arbitrator. 2 PA 39.

3. The RJ's Separate Promotional Expenses under the 2005 JOA Cannot be Charged to the Joint Operation

The RJ's assertion that "Section 5.1.4 does ***not*** state that if promotional activities do not include the Sun in equal prominence then they must be excluded from the EBITDA calculation" is inaccurate. *See* Mot. 11. Section 5.1.4's language speaks for itself: "Either the Review-Journal or

[6] The Sun also disagrees with the RJ's contention that if an expense were to be *excluded* from the joint operation EBITDA calculation it has to be mentioned in Appendix D. *E.g.*, Mot. 11. The specific, express provisions that occur throughout the entire 2005 JOA demonstrate the falsity of the RJ's contention. The RJ's absurd interpretation of the 2005 JOA that all disallowed expenses had to be reiterated in Appendix D was rejected by the Arbitrator after his review of all of the evidence. *See, e.g.*, 2 PA 39-40.

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Sun may undertake additional promotional activities for their respective newspapers *at their own expense*." The Arbitrator found that Section 5.1.4 does not need to include the word EBITDA to ascertain what is an allowable expense. The RJ's argument also ignores basic accounting principles. Indeed, the "E" in EBITDA stands for earnings, which is calculated by subtracting allowed operating expenses from revenues.[7]

The RJ also claims "[t]o the extent that the parties wanted to exclude certain expenses from the EBITDA calculation, they expressly identified those excluded expenses in the 2005 JOA," but then only cites to one page of Appendix D to the 2005 JOA. Mot. 10. According to the RJ, if the parties wanted to exclude expenses from the EBITDA calculation, they should have done so expressly in Appendix D. However, as found by the Arbitrator, the 2005 JOA contains specific provisions throughout the body of the document that identifies allowable and disallowable expenses. *See, e.g.*, 1 PA 1-25 §§ 4.2, 8.1.2, 8.1.3.

C. The Arbitration and Award

The RJ misstates what caused the Sun to initiate arbitration. The RJ argues as fact that the Sun "accepted" the Review-Journal's calculations for years, while failing to identify all the testimony and evidence presented to the Arbitrator about how the Sun discovered the RJ's illegal accounting practices. The Arbitrator made specific findings on the RJ's defense in this regard. 2 PA 39-40.

The Arbitrator heard and accepted several witnesses' testimony concerning the Sun's discovery that the RJ was charging its editorial costs in violation of the 2005 JOA in July 2014, 15 PA 3542:2-3543:11, when the Sun engaged an industry consultant after Mr. Brian Greenspun obtained sole ownership of the Sun. *Id.* at 3542:2-3547:4; 7 PA 1341:17-1350:2, 1362:7-1365:5. Upon discovery of the RJ's illegal charges, the Sun took immediate action, resulting in not one, but *two* lawsuits. 16 PA 3544:4-3547:4. This discovery and the prior litigation concerning Section 4.2 occurred before and was pending during the RJ's purchase of the newspaper on December 10, 2015. 11 PA 2411:25-2413:2; 14 PA 3274:4-22; *see also DR Partners v. Las Vegas Sun, Inc.*, No. 68700,

[7] *See, e.g.*, Business News Daily, What is EBITDA?, https://www.businessnewsdaily.com/4461-ebitda-formula-definition.html (last visited Sept. 28, 2019).

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2016 WL 2957115 (Nev. May 19, 2016). The RJ admits that the prior litigation was expressly disclosed to the RJ prior to its purchase and the RJ took ownership of the RJ ***subject to the Sun's claims***. 11 PA 2411:25-2413:2; 14 PA 3150:23-3151:2, 3130:25-3131:3, 3152:24-3153:11. Thus, the RJ's statement that the Sun accepted the Review-Journal's calculations or that the Sun did not bring these claims in good faith is not founded in fact.

Additionally, the RJ claims that the EBITDA calculation had always included the RJ's "separate promotional expenses" in the past. Mot. 11. This is not true. The Review-Journal, under its new owners, the Adelson family, has dramatically diverged from its prior practices vis-à-vis promotional expenses. In the past, the Review-Journal had only minor issues not promoting the Sun in equal prominence, which were usually promptly addressed. 16 PA 3599:8-3600:8, 3607:5-7, 3615:19-3620:8, 3622:7-3623:2. Since the RJ succeeded in ownership to the Review-Journal, the RJ has systematically and nearly uniformly refused to promote the Sun at all, and has illegally charged its unilateral and independent promotional costs against the JOA. *Id.* Thus, the RJ's conclusory and self-serving statement that the Sun had "accepted" promotional deductions before, when promotional misconduct was not an issue with the prior owners, is wrong.

1. The Arbitrator's Ruling on Editorial Expenses

The RJ misrepresents the Arbitrator's acknowledgement that editorial expenses can be deducted. Mot. 11. To be clear, the Arbitrator's finding was in reference to the 1989 JOA: [redacted] 2 PA 39 (emphasis added). Thus, the Arbitrator was referring to the financial statements conducted under the prior Agency structure of the 1989 JOA—not in the post-2005 JOA era. The Arbitrator did not find that the RJ's editorial expenses were allowable expenses under the 2005 JOA; rather, the Arbitrator concluded the opposite.

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2. The Arbitrator's Ruling on Promotional Expenses

The RJ contends that Section 5.1.4 does not mention EBITDA and thus complains about the Arbitrator's ruling that the RJ cannot deduct "expenses for promotional activities that do not include the Sun in equal prominence when calculating the [2005 JOA] EBITDA." Mot. 13. The RJ also takes aim at the Arbitrator's finding that the RJ is required to add revenues of its promotions into the joint operations, but not include the RJ-only expenses, claiming this is a "windfall to the Sun." *Id.* This is inaccurate.

In making these statements, and throughout its Motion, the RJ keeps referring to the JOA EBITDA as the "Review-Journal's EBITDA" or stating that the Sun will receive a portion of the "Review-Journal's profits." *See*, *e.g.,* Mot. 4, 13, 18, 21. Under the express terms of the 2005 JOA, the EBITDA "shall include the earnings of ***the Newspapers***" (defined as *both* the RJ and the Sun). It is the *joint operation's* EBITDA, not the Review-Journal's. *See* 1 PA 18. All of the RJ's statements predicated on this factual fallacy fail as a result.

Moreover, fundamentally, Section 5.1.4 does not mention EBITDA because it already describes what expenses are allowable under the 2005 JOA. *See* 1 PA 4. Consistent with the 2005 JOA, the Arbitrator found that the RJ was *charging* expenses it should not have, and these must be removed from the joint operation:

[redacted]

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2 PA 39-40 (last emphasis added). This is not a windfall to the Sun. The RJ, in the Arbitrator's example, would be using JOA assets, and thus the revenue must be booked to the JOA. But because the Sun was not mentioned in equal prominence, the RJ must pay for these expenses.

III. LEGAL ARGUMENT

A. The Applicable Standard of Review does Not Support Vacating the Arbitration Award as Requested by the RJ

In determining whether to vacate an arbitration award, courts apply a clear and convincing evidence standard. *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 696, 100 P.3d 172, 176 (2004). Two common-law grounds exist where a court may vacate an arbitration award: "(1) whether the award is arbitrary, capricious, or unsupported by the agreement; and (2) whether the arbitrator manifestly disregarded the law." *Clark Cnty. Educ. Ass'n v. Clark Cnty. Sch. Dist.*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006). A court may "vacate an arbitration award when an arbitrator manifestly disregards the law. The law in regard to interpretation of contracts . . . is clear. ***[Courts] should not interpret the contract so as to render its provisions meaningless***. If at all possible, [courts] should give effect to every word in the contract." *Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund*, 112 Nev. 1161, 1169, 925 P.2d 496, 501 (1996) (emphasis added) (internal quotation marks and citations omitted).

For the reasons explained herein, the RJ cannot demonstrate that the Arbitrator manifestly disregarded the law. If the RJ's arguments are accepted, other provisions of the 2005 JOA would be rendered meaningless.

B. The Arbitrator's Ruling on Editorial Expenses Should be Confirmed

1. The Arbitrator Endorsed the 2005 JOA's Plain Language, Taking into Account All Provisions of the Parties' Contract

Relying on one sentence in the entire 2005 JOA, the RJ argues that the Arbitrator's ruling on editorial expenses must be vacated because it ignores the "express language of the parties' agreement." Mot. 13. The Arbitrator did not ignore the express language of the 2005 JOA—the plain language supports the Sun's interpretation.

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Nevada employs "[t]raditional rules of contract interpretation" and "initially determines whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (Nev. 2015) (en banc) (citations and quotation marks omitted); *see also Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 487-88, 117 P.3d 219, 223-24 (2005). The objective of interpreting contracts "is to discern the intent of the contracting parties." *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012). Courts first look to the plain language of the agreement, affording its terms their common and ordinary meanings, *Soro*, 131 Nev. at 742, 359 P.3d at 108, and reading the contract as a whole. *Nat'l Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Exec. Air, Inc.*, 682 P.2d 1380, 1383, 100 Nev. 360, 364 (1984).

Applying these governing contract interpretation principles, Section 4.2 of the 2005 JOA specifically governs and directly speaks to the parties' news and editorial costs. 1 PA 2. Its mandate is clear: "The Review-Journal and the Sun shall each bear their own respective editorial costs and shall establish whatever budgets each deems appropriate." *Id.* (emphasis added). This language is not capable of any other reasonable interpretation, and multiple witnesses testified to the same; that is, the RJ and the Sun are obligated to ***bear*** their own editorial expenses, and neither newspaper can charge the other or seek reimbursement or subsidy from the joint operation for those costs.[8] *E.g.*, **Ex. 1** at 112:15-113:13, 275:3-23 (Dep. Tr. of RJ's former controller, J. Perdigao); 7 PA 1276:13-1277:16. Section A.1—which had defined which editorial expenses could be included in the JOA profits calculation under the 1989 JOA—was "intentionally omitted" in the 2005 JOA because editorial expenses were no longer allowable expenses of the joint operation.[9]

Other provisions in the JOA support the Sun's reading of Section 4.2. The Second Paragraph of Appendix D is one such provision, and one which the RJ has categorically failed to explain, or

[8] Any other interpretation would raise antitrust concerns.

[9] The RJ has consistently argued that the term to "bear" as used in Section 4.2 means to "pay" in support of its assertion that this provision only requires the RJ to write the check for its editorial expenses, but does not prohibit the RJ from charging those expenses against the joint operation EBITDA, while simultaneously prohibiting the Sun from charging its expenses. *See, e.g.*, Mot. 5. This argument is nonsensical—both parties have always "paid" for their own editorial costs even when the allocations were deemed an Agency Expense. *See infra* § III(B)(3).

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harmonize with its reading of the Retention Sentence. The Second Paragraph provides, in relevant part, "In calculating the EBITDA (i) for any period that includes earnings prior to April 1, 2005, such earnings shall not be reduced by any amounts that during such period may have been otherwise been deducted from earnings under section A.1 of Appendix A or section B.1.16, B.1.17, B.1.18, or B.3 of Appendix B of the 1989 Agreement." 1 PA 18 (emphasis added). The Second Paragraph of Appendix D, and the 1989 JOA provisions referenced therein, parallels the parties' editorial-cost obligations stated in Section 4.2. *See* 7 PA 1496:5-1502:20. The base-year EBITDA calculation depicted in the Second Paragraph categorically precludes both parties from reducing the joint base-year EBITDA with their editorial cost allocations. *See id.* at 1502:21-1506:23 (describing that Section A.1 of Appendix A of the 1989 JOA was the provision defining the parties' editorial cost allocations, defining those allocations as Agency Expense (*i.e.*, an allowable deduction from the joint operating profit), and explaining the omission).

The Second Paragraph's purpose is both obvious and crucial to the JOA. It provides the base-year computation, an essential component considering that the Sun's Annual Profits Payment is derived from the yearly percentage change in the JOA EBITDA. The base-year calculation is imperative for getting an "apples-to-apples" comparison when calculating the delta going forward. Thus, excluding both parties' editorial costs from the base year and then including only the RJ's editorial costs going forward, as the RJ argues, would not be an "apples to apples" comparison. *See* 7 PA 1510:8-1511:7.

Testimony offered by the Sun regarding the meaning and mechanics of the Second Paragraph of Appendix D remained, and continues to remain, uncontroverted by the RJ. The RJ could not provide any explanation as to how the Second Paragraph could ever operate under the RJ's interpretation which allows the RJ to charge its editorial costs to the joint EBITDA. Notably, the RJ's financial expert agreed that the base-year calculation was necessary for consistency going forward from the base year to calculate the EBITDA percentage change, but could not explain how the Second Paragraph would (or even could) function under the RJ's practice of including its editorial costs. *See* 12 PA 2694:7-2695:17; 13 PA 2808:15-2821:20. Additionally, when describing

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the Second Paragraph's instruction, the RJ's Chief Financial Officer admitted that the calculation was to exclude both papers' editorial costs:

11 PA 2388:10-2394:10. The Second Paragraph unequivocally supplements Section 4.2's demand that both parties bear their own editorial expenses. Further, there is no dispute that Retention Sentence was added after the parties had determined the language of Section 4.2. *See* 7 PA 1476:4-1478:11; *see also id.* 1334:22-1336:9.

Simply stated, the RJ cannot and does not explain how it can resurrect 1989 JOA-era financial statements in the 2005 JOA-era. This zombie accounting is simply improper. Moreover, the RJ cannot reconcile its interpretation of the Retention Sentence with the Second Paragraph, indeed ignoring it again in its Motion. Not a single RJ witness was able to harmonize the Second Paragraph's base-year EBITDA calculation with its Retention Sentence argument. *E.g.*, 7 PA 1279:21-1301:5. All RJ witnesses were quick to discuss the Retention Sentence and ignore the Second Paragraph entirely. 11 PA 2400:19-2402:5; 13 PA 2808:15-2812:25. But, in the end, the RJ's financial expert agreed that consistency was necessary going forward from the base year to properly calculate the percentage change in EBITDA, 2 PA 2694:7-2695:17; 13 PA 2808:15-2810:6, and the RJ's Chief Financial Officer admitted that the base-year calculation was to exclude both papers' editorial costs. 11 PA 2388:10-2394:10. By virtue of establishing the base-year

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calculation, the Second Paragraph is a pure expression of the intentions of the JOA (particulalry coupled with 4.2's requirement that neither party may charge their editorial expenses to the JOA).[10]

The RJ's proffered interpretation, that the Retention Sentence and its vague language controls over every other specific and instructive provision in the JOA, renders multiple sections of the 2005 JOA meaningless, including the governing Section 4.2 and the Second Paragraph of Appendix D. *See Coblentz*, 112 Nev. at, 1169, 925 P.2d at 501. An interpretation that renders the 2005 JOA's provisions superfluous is disallowed as a matter of law. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155 (9th Cir. 2015). The Arbitrator did not ignore the plain language of the 2005 JOA. The Arbitrator did not manifestly disregard the law, and the Arbitrator's finding should be confirmed.

2. The Arbitrator Followed Basic Principles of Contract Law

The RJ complains that the Arbitrator "violate[d] multiple basic contract law principles" by (1) interpreting EBITDA to mean something different than how it was defined, (2) adding a term to the 2005 JOA that the RJ must exclude its editorial expenses from its EBITDA calculation, and (3) rendering EBITDA's definition meaningless. Mot. 16-17. The RJ's claims are meritless for the reasons explained above, and further discussed below.

At the risk of belaboring the point, the RJ's focus on the Retention Sentence as the end-all-be-all definition for EBITDA disregards the 2005 JOA's plain language and governing provisions. Indeed, Appendix D mentions "EBITDA" in excess of 10 times, but the RJ ignores all of this except for the Retention Sentence. The Second Paragraph of Appendix D specifically describes how to calculate EBITDA for the 1989 JOA financial statements, and *excludes* the editorial expense allocations, which were *previously* allowed joint operation expenses. If the 2005 JOA EBITDA could somehow be calculated in the way the RJ claims, there would have been **no reason** to include the entire Second Paragraph of Appendix D.

[10] Other provisions in the JOA support the Sun's argument as well. For example, Section 8.1.3 states, "For the purpose of this Article 8, each party shall separately maintain and pay for, as an item of news and editorial expense, insurance to the extent reasonably available protecting against losses." 1 PA 6. The plain language of Section 8.1.3 demands that insurance be paid for separately by each party as an editorial expense. *Id.*. The RJ's argument that it can charge its editorial expenses, including insurance costs, to the joint EBITDA renders Section 8.1.3 nugatory as well.

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Moreover, the Sun offered testimony during the arbitration that explained why the Retention Sentence was included in the first place. The purpose and intent of the Retention Sentence was to address the Sun's concerns over the RJ's potential purchase of a printing press. 7 PA 1476:4-1478:11. It "[redacted]" *Id.* The placement of the Retention Line after the sentences concerning equipment are also indicative of its purpose, along with the other sentences specifically designed to prevent the RJ from including other expense items, including capital leases. *See* 1 PA 19. And again, Section 4.2 had already been long agreed to while negotiations were continuing on other topics, including Appendix D. *See* 7 PA 1476:4-1478:11; *id.* at 1334:22-1336:9.

The RJ provided no evidence that the Retention Sentence was added to permit it to charge its editorial costs to the joint operation, rendering Section 4.2 of the 2005 JOA without meaning. In fact, Mr. Greenspun's testimony about the purpose and intent of the Retention Sentence and Section 4.2 went unchallenged by the RJ. The Arbitrator was correct to rely on this testimony in finding against the RJ.

In addition, the RJ's interpretation of the Retention Sentence, when examined in detail, directs an absurd and impractical result. The RJ, more specifically, [redacted]

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[redacted]. *Id.*; *cf.* 7 PA 1505:24-1509:15. The basis for the RJ's interpretation of the Retention Sentence is absurdly impractical and unworkable. The joint operation earnings have never been synonymous with or equal to Review-Journal earnings. The RJ's interpretation of the "Retention" line item seeks to render them one in the same, which is completely improper.

Finally, the RJ's interpretation conflicts with public policy. The RJ's reading that it may charge its editorial costs to the joint operation while the Sun cannot results in a JOA that conflicts with the Newspaper Preservation Act, which renders the JOA unlawful. 15 U.S.C. § 1801. The JOA is permissible purely by virtue of the Act. *See id.* The Department of Justice's ("DOJ") approval was required. *See* 28 C.F.R. § 48.16; 7 PA 1336:11-21. A JOA allowing the dominant paper to charge its editorial costs to the joint EBITDA while precluding the weaker positioned paper from doing the same, would effectively allow the former to force the latter out of business. This is a monopolistic practice that is illegal under antitrust laws, and flies in the face of the Act. *See Comm. for an Indep. P-I v. Hearst Corp.*, 704 F.2d 467, 470 (9th Cir. 1983) (for approval from the Attorney General, a JOA "must 'effectuate the policy and purpose' of the Act") (quoting 15 U.S.C. § 1803(b)); 7 PA 1472:23-1474:12. The DOJ would have never approved such a reading.

The RJ's position that it may unilaterally decide to charge its own editorial costs to the joint operation is anomalistic and unreasonable. It threatens the Sun's financial solvency and continued publication, and, therefore, contravenes Congressional policy and the recognized public interest. The Arbitrator heard the testimony and evidence on these points, in accordance with principles of contract interpretation, and properly concluded that the 2005 JOA prohibits the RJ from charging its editorial costs against the joint operation EBITDA.

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3. The Arbitrator's Interpretation of Section 4.2 is in Accord with Rules of Contract Interpretation

The RJ argues the Arbitrator "essentially admit[ed] that the 2005 JOA required editorial expenses to be deducted." Mot. 17. The Arbitrator did no such thing—Hard stop. And the RJ's suggestion of the same is misleading and improper.

The Arbitrator merely noted in the Award that the [redacted] 2 PA 39. The Arbitrator was **not** discussing the 2005 JOA EBITDA calculation, and for the RJ to suggest as much is fiction. Not only did the Arbitrator not say what the RJ contends, the pre-2005 computation dealt with the 1989 JOA accounting and editorial allocations, which was under the prior Agency and separate allocation system that was jettisoned in the 2005 JOA.

As described above, Section 4.2 was rewritten in the 2005 JOA. *See* § II(B) *supra*. This language was settled on *before* the Retention Sentence was ever considered. It is not accurate, as the RJ contends, that Section 4.2 "trumped" the EBITDA formula. *See* Mot. 17. What is accurate is that the entire agreement conflicts with the RJ's reliance on and interpretation of the Retention Sentence as the sole authority governing the EBITDA computation. Throughout the 2005 JOA, all elements that had previously suggested editorial expenses would be permitted were removed. The RJ essentially asks for its interpretation of the Retention Sentence to trump the rest of the agreement. This is an absurd result because it would suggest that a 2004 financial statement—not attached to the agreement at all—was of such supremacy and importance that the actual, unambiguous language of the 2005 JOA itself is not relevant at all.

The RJ further argues that the only thing new to editorial costs in the 2005 JOA was that Section 4.2 "made the Sun responsible for its own editorial expenses." Mot. 17. Again, this is not so. The Sun had always been responsible for its own editorial expenses; it paid these from an allocation made by the Agency, *i.e.*, the joint operation, under the 1989 JOA. Similarly, under the 1989 JOA language, the Review-Journal received an allocation from the joint operation to fund its own editorial expenses. The parties were treated the same with respect to their editorial cost allocations, and how those allocations could be treated under for profits calculations. *See* 2 PA 227.

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The RJ's reference to the 2004 profit and loss statement wrongly confuses the historical agreement between the parties. This financial statement was created under the 1989 JOA, that required the Agency to allocate editorial expenses. As described in Appendix D, to derive the percentage change of EBITDA going forward, it would have to *remove* the Agency-related expenses in the 1989 JOA accounting to get an apples-to-apples comparison. *See* 1 PA 21. The RJ's statements otherwise are misleading and simply untrue.

The RJ then goes on to complain again that (1) 4.2 is not part of the EBITDA calculation, (2) the EBITDA language in Appendix D was new and more specific, and (3) editorial expenses could have been listed in Appendix D as a separate exclusion. Mot. 18. As described above, Section 4.2 did not need to mention the word "EBITDA" for it to describe whether editorial expenses are chargeable expenses to the EBITDA calculation. Section 4.2 in the 1989 JOA **authorizes** the application of editorial expenses to be deducted from EBITDA. Section 4.2 in the 2005 JOA **revokes** that authorization (as does the rest of the contract).

The RJ offers a self-serving reading of Appendix D—it wants it to be authoritative, and yet does not want the entirety of Appendix D read or considered. Including "editorial expenses" again in Appendix D would have been unnecessary surplus, particularly given that the Second Paragraph expressly makes clear that editorial expenses must be deducted for the base-year EBITDA calculation. Moreover, there are other expenses **not listed in Appendix D**, but listed elsewhere in the 2005 JOA, that cannot be deducted from the EBITDA calculation. *E.g.*, 1 PA 1-25 §§ 5.1.4, 8.1.2, 8.1.3.

The RJ's next argument that the "Review-Journal has always borne its own editorial expense, i.e. paid the costs of its newsroom" and the "only change made by Section 4.2 was that the Sun would not have to bear its own editorial expenses, unlike before" is again incorrect. *See* Mot. 18. Both parties had always "borne" their own editorial costs, and under the 1989 JOA the Agency provided allocations for each party to do so. Thus, the RJ's argument that the "only change" the 2005 JOA made with respect to editorial costs was that the Sun was now having to pay its own costs is preposterous. The RJ's tortured reading of the unambiguous language of 4.2 is telling: Had

One East Liberty Street, Suite 300
Reno, NV 89501-2128

the parties intended for the Sun only to bear its own editorial expenses, they would have written it as such. But, they did not: the language of Section 4.2 is mutual and applies to both parties.

The RJ then complains that "[b]ecause Section 4.2 and Appendix D are harmonious on their face, the Arbitrator should not have read them as contradictory." Mot. 19. This assertion, like the others, is absurd. As explained above, Appendix D includes the Second Paragraph base-year calculation, which under the RJ's Retention Sentence interpretation would be inharmonious. The only way to read Section 4.2 and Appendix D in harmony is the way the Arbitrator found. Both 4.2 and the explicit instructions of the second paragraph of Appendix D forbid the charging of editorial expenses against the joint operation EBITDA. Indeed, no single RJ witness could describe how to reconcile the Second Paragraph with the Retention Sentence interpretation. *See supra* § III(B)(1).

Finally, the RJ's claim that the ruling creates an absurd result can only be viewed with irony for two reasons. First, the Sun reiterates an important factual correction—the RJ states the "purpose of the EBITDA calculation is to determine the Sun's share of the Review-Journal's profits." Mot. 19. The profits are a result of the *combined* newspaper revenues from the publication of the two newspapers together; hence, the Sun does not share in the RJ's-sole profits. *See* 1 PA 18. Second, while the RJ complains that having to exclude its editorial expenses means "there could be years where the Review-Journal is operating at a loss but could have substantial fictional 'earnings' for the purpose of calculating the Sun's Annual Profit Payments," Mot. 19, the mathematical reality is [redacted]. *See, e.g.*, 16 PA 3611:21-3612:5. If the RJ includes its editorial expenses in the EBITDA calculation, this means the Sun is bearing a burden of the RJ's editorial expense before it receives its Annual Profits Payment. The Sun bearing any of the RJ's editorial expenses directly conflicts with Section 4.2. To use the RJ's language, "[t]his was, to say the least, never intended by the parties." Mot. 19.

In sum, it is the RJ's interpretation that is contrary to the plain language of the contract, is absurd, and would render other provisions of the contract meaningless. The Arbitrator's finding is in line with every contract interpretation tenet and the evidence. Thus, no reason exists to vacate

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the Arbitrator's conclusion, and this Court should confirm the Arbitrator's finding regarding editorial expenses.

C. The Arbitrator's Ruling on Promotional Expenses Should be Confirmed

The RJ makes similar arguments regarding the Arbitrator's ruling with respect to promotional expenses. The RJ again argues that the 2004 profit and loss statement somehow guides the EBITDA calculation, that Section 5.1.4 does not mention EBITDA, and that it would be impossible for the RJ to keep a separate accounting of its own promotional activities. Mot. 19-22. These arguments are without merit, and were properly rejected by the Arbitrator.

First, as stated before and for the same reasons, the RJ's reliance on the outdated 1989 JOA Agency-era accounting statements is unreasonable and impractical. The 2005 JOA *eliminated* the Agency concepts and terminology, including Agency Expenses. The parties' promotional allocations that were listed in the 1989 JOA-era financial statements were one such Agency Expense. However, like the 2005 JOA's treatment for editorial costs, Appendix A.3 to the 1989 JOA—which established the Sun's 40 percent promotional allocation and identified it as an Agency Expense—was intentionally omitted in the 2005 JOA. *Compare* 2 PA 228 App'x A *with* 1 PA 13-15 App'x A. Throughout both the 1989 JOA and 2005 JOA, multiple clauses authorize allowable expenses and their attendant conditions. And, again, the 2005 JOA Appendix D prescribed how to calculate EBITDA going forward by describing the calculation for the base-year apples-to-apples comparison. *See* 1 PA 18. Thus, the RJ's assertion that the "parties agreed-to method for calculating EBITDA—the December 2004 profit and loss statement—deducts the Review-Journal's promotional expenses from earnings" is a delusion. Mot. 20. Such a misconception cannot be reconciled with the requirements contained in the rest of the 2005 JOA.

The RJ's argument also cannot be reconciled with the new Section 5.1.4 language that requires the RJ to promote *both* newspapers. Under the 1989 JOA, the Sun received its own promotional cost allocation, which was delineated on accounting statements in the 1989 JOA-era. With the 2005 JOA, however, the Sun's promotional allocation was eliminated (as was the standalone Sun publication), and the RJ was tasked with promoting both newspapers together. In

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other words, the Sun is reliant on the RJ for all promotional activity, naturally, since the Sun is published and distributed as a newspaper inside the Review-Journal under the 2005 JOA. Therefore, for the RJ to permissibly deduct promotional activities from the joint EBITDA as an allowable expense, it follows that the RJ must include equal mention for the Sun—an express requirement under Section 5.1.4 of the 2005 JOA. Simply put, the equal mention of the Sun is a prerequisite before any promotional expense may be charged to the joint operation. The RJ cannot skirt its obligation to promote the Sun and have carte blanche to charge all of its separate, independent promotional activities to the joint operation.

Second, like other provisions of the 2005 JOA, Section 5.1.4 did not need to mention the word "EBITDA" for the parties to understand whether an expense was allowed under the joint operation. Section 5.1.4 provides, in clear terms, that the

> Review-Journal shall use commercially reasonable efforts to promote the Newspapers. Any promotion of the Review-Journal as an advertising medium or to advance circulation shall include mention of equal prominence for the Sun. Either the Review-Journal or Sun may undertake additional promotional activities for their respective newspaper at their own expense.

1 PA 4 (emphases added). This language is unambiguous. Section 5.1.4 requires the RJ to promote both the Sun and the Review-Journal, and any independent promotions or promotions that do not feature the Sun in equal prominence must be paid for separately by the RJ. There was no need to include the language elsewhere.

Finally, the RJ's protest to the Arbitrator's findings on the basis that the RJ would have to "keep separate books, and calculate a separate EBITDA" is unavailing. Mot. 20. [redacted] 10 PA 2031:4-2033:3. In other words, [redacted],[11] an entity [redacted]

[11] While it is true that the RJ expenses some costs separately to its Digital company, it systematically charges many costs to the JOA EBITDA that it should not. The Arbitrator's findings about these practices support the many reasons for why the Review-Journal must submit to an audit. *See* 2 PA 42-44.

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[redacted]. In fact, it was the RJ's own former Controller, Mr. Perdigao, who testified about how the RJ should have set up its books with accounts for the RJ to pay separately for RJ-only promotions.[12] **Ex. 1** at 268:9-269:6 (J. Perdigao Dep. Tr.).

Overall, the RJ has not demonstrated that the Arbitrator manifestly disregarded the law. All of his findings regarding the proper accounting for promotional expenses incurred by the RJ that do not mention the Sun are supported in the record. This Court should confirm these described rulings regarding promotional expenses.

D. The Arbitrator's Ruling was Not Arbitrary and Capricious

The RJ claims the "Arbitrator's rulings were not supported by any evidence whatsoever." Mot. 22. At the outset, it is unclear if this relates to the entire Arbitration Award or just the RJ's complaint about the ruling on editorial and promotional expenses. Either way, the RJ misses the mark.

The RJ claims that the award was not "supported by any evidence whatsoever." *Id.* The Sun, in its separate motion regarding the Arbitration Award, submitted volumes of testimony and evidence that was before the Arbitrator. *See, e.g.*, 2 PA 47-131; 6 PA 1218-17 PA 3970. The RJ's claim that the Award is "at odds with the express contract language and which are unsupported by any evidence" is wildly inaccurate. The Arbitrator's findings on these discrete issues were related to contract interpretation. The Arbitrator's articulation of the plain language of the 2005 JOA is all that is necessary for declaratory relief. What is more, the evidence (such as the parties' intent, taking the contract as a whole, and the public policy) all supports the RJ's complained-of findings.

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[12] The matching principle, as proffered by the RJ, is inaccurate. *See* Mot. 21. While there may be separate line items on the books for RJ-only, JOA, or RJ digital, there would not be a "mismatch" as the RJ argues. For example, if the RJ entered into a trade with a third-party customer for its digital account using the JOA resources to give away advertising (in the Newspapers), and the reviewjournal.com received promotions or tickets to an event, the revenues would be JOA-earned revenues, and the off-setting expenses are digital expenses. When the RJ's books are consolidated at the higher "parent" level, the revenue and expense items offset and do match.

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E. The Arbitrator's Ruling is the RJ Must Submit to an Audit Should be Confirmed

The RJ complains that the Arbitrator exceeded his authority by "lament[ing] that the audit provision in the 2005 JOA is not more clear and specific, and lays down rules for how the audit must conducted." Mot. 22. The RJ asks that these rules "exceed the Arbitrator's powers." *Id.*

Crucially, the RJ does not disagree that the Sun is entitled to an audit—and thus, this order must be confirmed. Here, the Arbitrator merely provided an example of what an audit should look like, especially given the breadth of the RJ's improperly charged expenses to the JOA. *See* 2 PA 43-44 (an auditor should [redacted]) (emphases added). The Arbitrator's rules are not even at issue considering the RJ has to this day refused the Sun's audit requests. Importantly, the Arbitrator nevertheless reiterated that the Sun is entitled to an audit regarding anything that affects amounts that is owed to the Sun, which the RJ does not dispute. This ruling should be confirmed.

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Reno, NV 89501-2128

IV. CONCLUSION

The RJ has failed to demonstrate why any of the particular rulings challenged in its Motion should be vacated. As such, this Court confirm the Arbitration Award as it relates to the Arbitrator's findings that both the RJ's editorial expenses and separate promotional expenses cannot be deducted from the JOA EBITDA.

DATED this 30th day of September, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ E. Leif Reid*

E. LEIF REID, Bar No. 5750
KRISTEN L. MARTINI, Bar No. 11272
NICOLE SCOTT, Bar No. 13757
One East Liberty Street, Suite 300
Reno, NV 89501-2128

JAMES J. PISANELLI, ESQ., BAR NO. 4027
TODD L. BICE, ESQ., BAR NO. 4534
JORDAN T. SMITH, ESQ., BAR NO. 12097
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Plaintiff

DECLARATION OF KRISTEN L. MARTINI IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO VACATE ARBITRATION AWARD

I, KRISTEN L. MARTINI, declare under penalty of perjury and based on personal knowledge that:

1. I am an attorney at Lewis Roca Rothgerber Christie LLP, and am counsel of record for Plaintiff Las Vegas Sun, Inc. (the "Sun"). This Declaration is filed in support of the Sun's Opposition to Defendants' Motion to Vacate Arbitration Award ("Opposition"). I have personal knowledge of the matters discussed herein and if called upon to do so, I am able to competently testify as to all of these matters.

2. In support of the Sun's Opposition, the Sun contemporaneously filed two exhibits, Exhibits 1 and 2, as authenticated below.

3. The document identified as **Exhibit 1** to the Sun's Opposition is a true and correct copy of excerpts from the February 28, 2019, deposition transcript testimony of John Perdigao in the American Arbitration Association Case No. 01-18-0000-7567 (hereinafter "AAA Case").

4. The document identified as **Exhibit 2** to the Sun's Opposition is a true and correct copy of Exhibit C291 to the AAA Case.

Executed this 30th day of September, 2019.

/s/ Kristen L. Martini
KRISTEN L. MARTINI

One East Liberty Street, Suite 300
Reno, NV 89501-2128
Lewis Roca ROTHGERBER CHRISTIE

CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Civil Procedure 5(b), I certify that I am an employee of LEWIS ROCA ROTHGERBER CHRISTIE LLP, and that on this date, I caused the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO VACATE ARBITRATION AWARD** to be served by electronically filing the foregoing with the Odyssey electronic filing system, which will send notice of electronic filing to the following:

Steve Morris, Esq., SBN 1543
Akke Levin, Esq., SBN 9102
MORRIS LAW GROUP
411 E. Bonneville Ave., Ste. 360
Las Vegas, Nevada 89101

J. Randall Jones, Esq., SBN 1927
Michael J. Gayan, Esq., SBN 11135
Monah Kaveh, Esq., SBN 11825
KEMP, JONES & COULTHARD, LLP
3880 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

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

DATED this 30th day of September, 2019.

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

One East Liberty Street, Suite 300
Reno, NV 89501-2128

EXHIBIT LIST

EXHIBIT NO.	DESCRIPTION	NO. OF PAGES
1	Excerpts from February 28, 2019, Deposition Transcript Testimony of John Perdigao	9
2	Exhibit C291 from American Arbitration Association Case No. 01-18-0000-7561	7

One East Liberty Street, Suite 300
Reno, NV 89501-2128
Lewis Roca ROTHGERBER CHRISTIE

EXHIBIT 3

EXHIBIT 3

J. RANDALL JONES, ESQ. (#1927)
MICHAEL J. GAYAN, ESQ. (#11135)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Fl.
Las Vegas, Nevada 89169
Ph.: (702) 385-6000
Fax: (702) 385-6001
r.jones@kempjones.com
m.gayan@kempjones.com

RICHARD L. STONE, ESQ. (*PRO HAC VICE*)
DAVID R. SINGER, ESQ. (*PRO HAC VICE*)
AMY M. GALLEGOS, ESQ. (*PRO HAC VICE*)
JENNER & BLOCK LLP
633 West 5th Street, Suite 3600
Los Angeles, CA 90071-2054
Ph.: (213) 239-5100
Fax: (213) 239-5199
rstone@jenner.com
dsinger@jenner.com
agallegos@jenner.com
Attorneys for Defendants and Counterclaimants
News+Media Capital Group LLC &
Las Vegas Review-Journal, Inc.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kic@kempjones.com

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS SUN, INC., a Nevada corporation, Plaintiff, vs. NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; LAS VEGAS REVIEW-JOURNAL, INC., a Delaware corporation; and DOES, I-X, inclusive, Defendants.	Case No. A-18-772591-B DEPT.: XVI **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO VACATE ARBITRATION AWARD**

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

I. Introduction

The Sun agrees that, as a matter of Nevada law, the parties' contract must be enforced as written, according to its plain language.[1] The Sun also agrees that the Arbitrator was "confined to interpreting and applying the agreement, and his award need not be enforced if it is . . . unsupported by the agreement."[2] And, finally, the Sun agrees that arbitrators exceed their powers in violation of NRS 38.241(1) "when they address issues or make awards outside the scope of the governing contract."[3]

Tellingly though, the Sun spends virtually its entire opposition manufacturing reasons why the plain language of the 2005 JOA should not be faithfully followed. [redacted] As often happens when plain language is ignored, this leads to an unintended and unfair result— [redacted].[4]

To recap: Appendix D to the 2005 JOA sets forth in precise detail how to calculate EBITDA for purposes of determining the Sun's "Annual Profits Payment." [redacted]

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[1] Plaintiff's Opposition to Defendants' Motion to Vacate Arbitration Award ("Sun Opp.") at 14.
[2] Plaintiff's Motion to Confirm Arbitration Award, In Part, And To Vacate Or, Alternatively, Modify or Correct The Award, In Part, at 10 (citing *Health Plan of Nev., Inc. v. Rainbow Medical, LLC,* 120 Nev. 689, 100 P. 3d 172 (2004).
[3] *Id.* at n. 6.
[4] *Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund*, 112 Nev. 1161, 1169, 925 P.2d 496, 500-01 (1996); *Wichinsky v. Mosa*, 109 Nev. 84, 89, 847 P.2d 727, 730-31 (1993).

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted]

The Sun's entire claim was obviously and necessarily manufactured. The 2005 JOA 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.***" Ex. A, App'x D, p. 19 (emphasis added)[5]. The incorporated 2004 profit and loss statement for Stephens Media Group—the Review-Journal's prior owner—clearly shows that the Review-Journal's editorial and promotional expenses are deducted from earnings in the "Retention" calculation. Ex. B. Full stop. Therefore, the Review-Journal's calculations complied with the contract. [redacted] Unable to argue against the contract's plain language or the controlling law—[redacted]—the Sun's entire opposition is a confusing series of post-hoc rationales for why something different than the specific EBITDA calculation negotiated, and unmistakably illustrated, in the profit and loss statement incorporated by reference should be used. [redacted]

[5] References to Exhibits A-D refer to the exhibits attached to the Declaration of Michael Gayan, which was filed concurrently with the Review-Journal's motion. The 2005 JOA (Ex. A) and the 2004 Stephens Media profit and loss statement (Ex. B) are attached to this reply brief as well, for the Court's convenience.

[redacted] The Court should not be fooled by the Sun's attempts to confuse a very simple issue. [redacted].[6]

II. [redacted]

A. The 2005 JOA Clearly Requires The Review-Journal's Editorial Expenses To Be Deducted In The EBITDA Calculation.

There is no mystery about how the parties to the 2005 JOA intended EBITDA to be calculated. They wrote it in plain English in the contract:

> **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.**

Ex. A, App'x D, p. 19 (emphasis added).

It is undisputed that the Stephens Media profit and loss statement for the period ended December 31, 2004 showed the Review-Journal's editorial expenses being deducted:

[redacted][7]

The Sun first grouses that the Stephens Media profit and loss statement was not physically attached to the 2005 JOA, but this does not matter. Because it 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.

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[6] [redacted]

[7] "Gayan Decl." refers to the Declaration of Michael Gayan, filed concurrently with the Review-Journal's motion.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

216CV03000KJDPAL, 2018 WL 1536806, at *3 (D. Nev. Mar. 29, 2018). The Sun then dismissively rejects the idea that the parties' intent as to how the EBITDA should be calculated can be gleaned from a "single sentence"—but of course it can. The "single sentence" in question literally states the parties' intent as to how EBITDA should be calculated. Ex. A, App'x D, p. 19 ("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.").

The 2005 JOA is susceptible to only one possible reading. The parties intended that the Review-Journal's editorial costs would be deducted from earnings when calculating EBITDA. This reading is confirmed by the fact that the Sun knew for the first nine years of the agreement that the Review-Journal was deducting its editorial costs, but it never complained. *See* Ex. E, 15 PA 3355:5-17, 3375:11-17 [redacted]

[redacted] The Sun does not and cannot dispute this basic legal principle. *See* Sun Opp. 13 (citing *Coblentz*) [redacted]

[redacted]

[8] [redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

B. [redacted]

1. The EBITDA Formula And Section 4.2 Are Perfectly Consistent.

After accepting the Review-Journal's EBITDA calculations for nine years, the Sun [redacted] It accomplished this by manufacturing a phony conflict between the clear EBITDA formula based on the Stephens Media profit and loss statement and Section 4.2 of the 2005 JOA, which requires the Review-Journal and Sun to each bear their own editorial costs. Ex. A, ¶ 4.2. [redacted] The Stephens Media profit and loss statement requires EBITDA to be calculated by subtracting expenses paid by the Review-Journal, including its editorial costs, from revenues. Ex. A, App'x D, p. 19; Ex. B. This formula ***assumes*** that the Review-Journal ***is bearing its own editorial costs***. As the Review-Journal explained in its motion and the Sun does not dispute, EBITDA is a measure of profit. Profit is revenue minus expenses. A company can ***only*** deduct costs from EBITDA if it is bearing those costs.

[redacted] Section 4.2 was not any newer than the EBITDA formula in Appendix D.[9] Both provisions were new to the 2005 JOA, a fact even the Sun must concede. Sun Opp. 8-9.

[9] "EBITDA" was not a term or concept used in the 1989 Agreement. Under that Agreement, the Sun's 10% profits payment was based on operating profit ("Agency Revenues over Agency Expenses"). *See* Gayan Decl., Ex. D, App'x D.

[redacted] Appendix D expressly states the parties' intent as to the EBITDA calculation and directs them to a document—the Stephens Media profit and loss statement—that walks them through how to calculate EBITDA and shows, specifically, that the Review-Journal's editorial costs are to be deducted from earnings. Ex. A, App'x. D, pp. 18-19; Ex. B. Section 4.2, on the other hand, does not tell the parties anything about how to calculate EBITDA. The word "EBITDA" does not even appear in Section 4.2. It just states that each party must bear its own editorial costs—which, again, is entirely consistent with requiring the Review-Journal to deduct its editorial costs when calculating EBITDA, as shown on the Stephens Media profit and loss statement.

2. [redacted]

First, the Sun contends that if the Review-Journal deducts its editorial costs from the EBITDA calculation then it is somehow not "bearing" those costs. This is just not so. As explained above, costs that a company bears are ***supposed*** to be deducted from EBITDA. In fact, ***the only time it is ever appropriate*** for a company to deduct costs from EBITDA is when the company itself is bearing those costs. Anything else would be accounting fraud.

Moreover, we know that the parties to the 2005 JOA did not use the phrase "bear costs" to mean that the costs being borne could not be deducted from EBITDA. We know this because the 2005 JOA requires the Review-Journal to bear ***all*** of the costs of operating under the JOA—including printing costs, business expenses, capital expenditures, and so on. Ex. A, ¶ 5.1 ("***All 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.***") (emphasis added). ***If the Sun's interpretation of the phrase "bear costs" were correct, it would***

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

mean that no costs of any type could be deducted from EBITDA at all, because the Review-Journal is required to "bear" all of the newspapers' costs (except for the Sun's editorial costs). If this were the case, then the whole concept of EBITDA would fly out the window because revenues without costs deducted are not EBITDA, they are just pure revenue. The fact that the parties required the Review-Journal to "bear" ***all*** costs, and also required an EBITDA calculation, shows that they could not possibly have been using the phrase "bear costs" idiosyncratically to mean that the costs being borne could not be deducted from EBITDA.

Second, the Sun argues that Section 4.2 was negotiated before Appendix D. Sun Opp. 20:11-12. If anything, this argument just confirms that the Sun's reading of the contract is incorrect. After all, the Sun claims that Section 4.2 reflects the parties' intent that the Review-Journal's editorial costs should be ignored in the EBITDA calculation. If this were true, and if Section 4.2 was negotiated ***before*** Appendix D, then the parties would ***never*** have written in Appendix D that EBITDA was to be calculated "in a manner consistent with the computation of 'Retention' on the profit and loss statement for Stephens Media Group for the period ended December 31, 2004," Ex. A, App'x D, p. 19. They would have ***rejected*** the Stephens Media profit and loss statement as a template because that statement shows the Review-Journal's editorial costs being deducted. The fact that the parties ***first*** negotiated Section 4.2 ***and then*** decided to use a profit and loss statement on which the Review-Journal's editorial costs were deducted to show how to calculate EBITDA ***proves*** that Section 4.2 was ***not*** intended to prohibit the Review-Journal's editorial costs from being deducted from EBITDA.

Third, the Sun argues that calculating EBITDA according to the contract's plain language would render Section 4.2 meaningless. This is obviously wrong because, as explained above, Section 4.2 does not say anything about how EBITDA should be calculated. Section 4.2 of the 2005 JOA establishes that the parties are to bear their own editorial costs. Ex. A, ¶ 4.2. This is different from the 1989 Agreement, which required the Review-Journal to bear both its own

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

editorial costs as well as the editorial costs of the Sun. Gayan Decl., Ex. D, ¶ A.1.[10] That change, therefore, necessitated that the Review-Journal no longer deduct ***the Sun's*** editorial expenses.

[redacted] However, that is a misquote. [redacted].[11]

[redacted]

[10] The Sun claims that it always paid its own editorial expenses and that the 1989 Agreement treated the parties "the same" as far as the payment of editorial expenses. That is false. The 1989 Agreement required the Review-Journal to pay the Sun an amount for editorial and news expenses that equaled 65% of what the Review-Journal allocated for its own editorial expenses. Gayan Decl., Ex. D, ¶ A.1. The Review-Journal paid this amount to the Sun in monthly installments, payable on the first day of each month. *Id.* ("On the first day of each month following the Effective Date, Review Journal shall pay to Sun an amount equal to one-twelfth (1/12th) of the Sun's annual allocation for news and editorial expenses as herein provided.").

[11] [redacted] "[I]t is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009) (citing Williston on Contracts).

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted]

The plain language of the 2005 JOA requires editorial costs to be deducted as part of the EBITDA calculation. [redacted]

C. The Sun's Arguments For Why The Court Should Ignore The Contract's Plain Language Have No Merit.

The Sun does not seriously dispute that the 2005 JOA says what it says, [redacted] The Sun's arguments are convoluted, and some of its points are more in the nature of asides than fully-developed arguments—but either way they all fall apart when confronted with actual facts.

1. The Review-Journal Is Not "Charging" The "JOA" For Its Editorial Costs.

Throughout its brief, the Sun insinuates that the Review-Journal is trying to "charge" its editorial costs "to the joint operation." *E.g.*, Sun Opp. 14, 18, 19. The Sun wants to create the impression that there is a separate JOA entity, with its own set of books, which is responsible for paying joint expenses of the Review-Journal and Sun insert. From this false premise, the Sun then suggests that, by deducting its editorial expenses from earnings in the EBITDA calculation, the

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

Review-Journal is improperly shifting its separate costs onto the "joint operation's EBITDA." *E.g.*, Sun Opp. 12:12.

Under the 2005 JOA, there is no separate JOA entity paying expenses of the "joint operation." The major change in the 2005 JOA was that the Sun went from being a separate newspaper to being an insert in the Review-Journal. Consistent with the fact that the Sun was being reduced to an insert in the Review-Journal, the Review-Journal itself became responsible for all expenses of the Review-Journal and Sun insert, except for the Sun's editorial costs. Ex. A, 5.1 ("All 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."). This is why the parties used the profit and loss statement of the Review-Journal's owner—which shows the Review-Journal's expenses being deducted—as the roadmap for how to calculate EBITDA.

The Sun is trying to confuse the Court, [redacted] Under the 1989 Agreement, the Sun and Review-Journal were separate newspapers, the expenses of the joint operation were supposed to have been paid by a separate entity called the "Agency," and the Sun was to receive a share of the Agency's profits. Gayan Decl., Ex. D, Art. 2, App'x B, D.[12] However, as the Sun itself acknowledges, those "Agency" concepts were ***eliminated*** in the 2005 JOA. *See, e.g.*, Sun Opp. 5:2-4, 8:11-13.

The 2005 JOA makes clear that the Sun is not receiving a share of profits from a separate entity. Instead, the Sun's Annual Profits Payment is an annual payment ***from the Review-Journal.*** *See* Ex. A, App'x. D, p. 18. The EBITDA calculation only comes into play because the formula to determine the amount of the Sun's annual payment from the Review-Journal is tied to whether the EBITDA rises or falls. Specifically, the Sun's payment was set at $12 million in 2005, and

[12] The Sun argues in its opposition that the Review-Journal breached the 1989 Agreement because the Agency was never actually established. However, Mr. Greenspun admitted he knew the parties never created a separate legal entity to act as the "Agency," and, in any event, any claimed breaches of the 1989 Agreement were released by both parties by virtue of the "clean slate" release in the 2005 JOA. Ex. A, ¶ 10.13.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

after that the payment increases or decreases each year by the same percentage that the EBITDA rises or falls. *Id.*[13] Tying the Sun's payment to the EBITDA keeps it in proportion to the Review-Journal's financial results. And again, the expenses to be deducted in calculating EBITDA are shown on the Stephens Media profit and loss statement, and are all paid by the Review-Journal and not some fictional separate entity.

In sum, when the Sun accuses the Review-Journal of charging its separate expenses to the "joint operation," it is trying to trick the Court [redacted]. These concepts simply do not exist under the 2005 JOA. There is no way to "charge" the "joint operation" for expenses because there is no separate entity and no separate set of books. There is no separate "JOA EBITDA" that differs from the EBITDA calculation the parties agreed to in the contract, i.e., the calculation based on the Stephens Media profit and loss statement. The Review-Journal is doing exactly what the 2005 JOA requires—it is calculating the EBITDA of all of its print publications, and its calculations are consistent with the computation of "Retention" in the Stephens Media profit and loss statement for the period ended December 31, 2004.

2. Basing The EBITDA Calculation On The Stephens Media Profit And Loss Statement Is An Express Contractual Requirement, Not "Zombie Accounting."

Throughout its brief, the Sun scoffs at the idea that the EBITDA calculation could possibly be based on the 2004 Stephens Media profit and loss statement. It derides the Review-Journal for supposedly trying to "resurrect 1989 JOA-era financial statements" and engaging in "zombie accounting." *E.g.,* Sun Opp. 16:14-15. These arguments are strange, as they seem to assume the Court will not read the parties' contract. As explained above, 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." Ex. A, App'x D, p. 19. This is an express contractual requirement that the Sun's owner and publisher, Brian Greenspun, agreed to when he negotiated the 2005 JOA. *See* Sun Opp. 18:4-8 [redacted]

[13] Contrary to the Sun's bare, unsupported assertion in a footnote 8, there is no basis whatsoever for this structure to raise any "antitrust concerns."

[redacted] It is not some crazy idea that the Review-Journal pulled out of thin air.

[redacted] As noted above, the Review-Journal's editorial expenses were already listed as a deduction in the 2004 Stephens Media profit and loss statement. *See* Ex. B. Thus, by deducting those expenses in the EBITDA calculation, the Review-Journal was not "adding new lines of deductions." It was deducting the same items that were deducted in the Stephens Media profit and loss statement, [redacted]

The Sun argues that using the Stephens Media profit and loss statement to calculate EBITDA produces the "absurd result" of allowing the Review-Journal's editorial costs to be deducted because they appeared "above the retention line" but not the Sun's editorial costs, because they appeared "below the retention line." Sun Opp. 18:16-20. No one is saying that. The parties expressly agreed and wrote in their contract that EBITDA was to be calculated consistent with the computation of "retention" in the Stephens Media profit and loss statement. Yes, that statement shows the Review-Journal's editorial costs being deducted but not the Sun's editorial costs. That is the entire point. The Sun's editorial costs cannot be deducted because under Section 4.2 the Review-Journal is no longer paying the Sun's editorial costs. Only costs the Review-Journal pays can be deducted from EBITDA; it cannot deduct costs paid by someone else.

The Sun's remaining complaints about using the Stephens Media profit and loss statement are meritless and all basically reduce to the idea that the Sun now, in retrospect, wishes the parties had selected another method for calculating EBITDA. The Sun argues that some expenses reflected in the Stephens Media profit and loss statement no longer apply. Sun Opp. 18:20-26. That does not matter. The JOA does not say that if the expenses stop being incurred they must be created out of thin air. If those expenses exist, however, then they must be deducted. The Sun also

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

claims that the 2005 JOA "expressly disallowed" certain items listed in the Stephens Media profit and loss statement. But in support of this proposition, the Sun only cites Sections 4.2 and 5.1.4 of the 2005 JOA. As discussed herein, these provisions say nothing about EBITDA or Appendix D and certainly do not "expressly disallow" certain expenses from being deducted in the EBITDA calculation. The Sun mentions a few other items it claims are also "disallowed" by the 2005 JOA—but the Sun cites no contract provisions supporting this claim. [redacted]

3. The Sun Relies On Language That Only Applies To The EBITDA Calculation For Years Prior To 2005.

Throughout its brief, the Sun tries to confuse the issues by citing a provision that it calls "the Second Paragraph" of Appendix D to the 2005 JOA. What the Sun actually seems to be referring to is the first clause of the first sentence of the second paragraph of Appendix D. It states:

> In calculating the EBITDA (i) ***for any period that includes earnings prior to April 1, 2005***, such earnings shall not be reduced by any amounts that during such period may have been otherwise been [sic] deducted from earnings under section A.1 of Appendix A or sections B.1.16, B.1.17, B.1.18, or B.3 of Appendix B of the 1989 Agreement . . . .

Ex. A, App'x D, p. 18 (emphasis added). The Sun devotes pages and pages of its brief to arguing that this clause requires the Review-Journal's editorial expenses to be excluded from the EBITDA calculation. *See, e.g.*, Sun Opp. 8:24-28; 15:1-12.

There is a huge flaw in the Sun's argument. This clause, on its face, is expressly limited to "***any period that includes earnings prior to April 1, 2005***." Ex. A, App'x D, p. 18 (emphasis added). [redacted] The years 2015 through 2018 do not include earnings prior to April 1, 2005. Thus, this provision cannot apply to the EBITDA calculations at issue here.[14]

[14] This language is in the Agreement because the formula for determining the Sun's annual profits payment in the years following the $12 million payment in 2005 requires a comparison of the EBITDA for the fiscal year just ended to the prior fiscal year. Ex. A, App'x D, p. 18. Thus, when the Sun's payment was calculated for the first time in 2006, the EBITDA calculation would have included earnings prior to April 1, 2005. The clause, by its clear terms, only applies to this unique situation (pre-April 1, 2005, earnings).

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

The Sun argues that if the Review-Journal's editorial costs were excluded from the EBITDA calculation for years prior to 2005, then the parties must have intended them to be excluded from post-2005 calculations as well. Sun Opp. 15:13-19. There are numerous flaws in this argument, the most obvious one being that if the parties had intended the Review-Journal's editorial costs to be excluded from post-2005 calculations, they would have written that in the agreement—but they did not. Instead, they expressly wrote that EBITDA was to be calculated consistent with the computation of "Retention" in the 2004 Stephens Media profit and loss statement. Ex. A, App'x D, p. 19. That profit and loss statement shows editorial expenses being deducted. Ex. B. Moreover, Appendix D specifically lists additional specific costs that must be excluded from the EBITDA calculation. The Review-Journal's editorial costs are not on that list. Ex. A, App'x D, p. 19. The JOA's plain language precludes the interpretation urged by the Sun.

[redacted] As explained above, the first year of the calculation would have included earnings for periods prior to April 1, 2005, so the special rule for those time periods would have applied. The years 2015 through 2018, which are at issue here, are not the "first year" of the 2005 JOA. [redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted]

Although unclear, the gist of the Sun's "Second Paragraph" argument appears to be that, in retrospect, the parties should not have used the Stephens Media profit and loss statement as a template for calculating EBITDA because it allowed different deductions than the parties had allowed for earnings prior to April 1, 2005. But the Sun agreed to both provisions. And, to be clear, the provisions are not inconsistent—they just set out different rules for different time periods. The Sun's eleventh-hour 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."); 11 Williston on Contracts § 31:5 (4th ed.) ("[W]hen interpreting a contract, a court may not insert, delete, or ignore contractual provisions . . . even if the resulting contract would be economically more efficient or advantageous to one or both of the parties, or more fair or equitable, in the court's view, than the agreement the parties were satisfied to make.").

III. [redacted]

A. The 2005 JOA Clearly Requires Promotional Expenses To Be Deducted From EBITDA.

Under the 2005 JOA, the Review-Journal's promotional expenses must be deducted from EBITDA for the same reason that the Review-Journal's editorial expenses must be deducted. As explained above, the 2005 JOA contains explicit instructions on how to calculate EBITDA: "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." Ex. A, App'x D, p. 19.

The Stephens Media profit and loss statement for the period ended December 31, 2004 shows the Review-Journal's promotional expenses being deducted:

[redacted]

[redacted] The Sun does not dispute that the profit and loss statement shows promotional expenses being deducted. Based on the contract's plain language, the 2005 JOA is susceptible to only one possible reading: the parties intended that the Review-Journal's promotional expenses would be deducted from earnings when calculating EBITDA.

[redacted]

[15] At times, the Review-Journal engages in promotional activity in which some or all of the cost is returned in trade with the other entity or in sales of advertising to the other entity.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

B. Section 5.1.4 Does Not Say That Promotional Expenses Cannot Be Deducted From EBITDA.

[redacted]

Although the 2005 JOA clearly allows the Review-Journal to promote itself at times without promoting the Sun as well, whether the Review-Journal can or cannot promote itself independently is irrelevant to the EBITDA calculation. Nowhere in the 2005 JOA does it say that if the Review-Journal engages in promotional activities that do not feature the Sun equally, it is forbidden from deducting the cost of those promotions from earnings when calculating EBITDA for the purposes of the Sun's Annual Profits Payment. Moreover, Appendix D specifically lists costs that must be excluded from the EBITDA calculation. Costs for promotions that only feature the Review-Journal are not on that list. Ex. A, App'x D, p. 19.[16]

At best, if the Sun believes it was damaged by not being included in equal prominence in the Review-Journal's promotional activities, then the Sun's remedy was to seek damages based on any losses it allegedly occurred by virtue of not being included in the Review-Journal's promotional activities—a fact the Sun impliedly concedes, having sought leave to amend its complaint to assert precisely this damage claim. *See* Sun's Proposed First Amended Complaint, ¶¶ 190-91. [redacted]

C. The Sun, Again, Tries To Confuse The Court By Conflating The 2005 JOA And The Terminated 1989 Agreement.

[redacted]

[16] In support of its argument that the Review-Journal should not be permitted to deduct the costs of promotional activities that do not feature the Sun, the Sun states that under the 2005 JOA, it is "reliant on the RJ for all promotional activity." Sun Opp. 24:1. This is untrue. Section 5.1.4 of the 2005 JOA allows both papers to engage in independent promotional activities at their own expense. Ex. A, ¶ 5.1.4.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted]

As explained above, there is no separate entity. No promotional costs are being "charged" to the "joint operation." The JOA does not pay for anything, cannot be "charged" for anything, and does not have its own EBITDA because it is not a separate entity. These are concepts from the 1989 Agreement that do not apply since that agreement was terminated and replaced by the 2005 JOA. Moreover, it makes perfect sense that the promotional activities for the Review-Journal that do not include the Sun would still be deducted when calculating EBITDA for the purpose of the Sun's Annual Profits Payment. Under the formula in Appendix D, the Sun's Annual Profits Payment is tied to the EBITDA, rising when the EBITDA rises and falling when the EBITDA falls. Thus, the Sun reaps the benefit of any successful promotions, whether or not the promotions feature the Sun equally. Ex. A, App'x D. And as noted above the 2005 JOA expressly allows the parties to engage in independent promotional activities. Ex. A, 5.1.4.

D. The Stephens Media Profit & Loss Statement Is Not "Outdated" or a "Delusion." It Is The Tool The Parties Chose To Show How To Calculate EBITDA.

As it does with editorial expenses, the Sun argues that the EBITDA calculation cannot be based on the 2004 Stephens Media profit and loss statement because it is "outdated" and using it would be "unreasonable and impractical." Sun Opp. 23:9-10. The Sun also argues, bizarrely, that the Review-Journal's reliance on the Stephens Media profit and loss statement to show how to calculate EBITDA is a "delusion." Sun Opp. 23:19-21.

As explained above, the 2005 JOA, on its face, *requires* the parties to calculate EBITDA the same way that "Retention" is calculated in the 2004 Stephens Media profit and loss statement. Ex. A, App'x D, p. 19. The parties chose that profit and loss statement to be the roadmap for how

to calculate EBITDA going forward. The 2004 profit and loss statement was not outdated in April 2005 when the 2005 JOA was entered. It was the most recent profit and loss statement available at the time. And using it made sense, since the Review-Journal was paying all of the costs of the Review-Journal and Sun under the 1989 Agreement, and would continue to do so under the 2005 JOA (except for the Sun's editorial costs). As also noted above, the Sun may not be happy now with the deal that it made fourteen years ago, [redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted] As mentioned above, the EBITDA calculation for the purpose of determining the Sun's Annual Profits Payment is determined by reference to the 2004 Stephens Media profit and loss statement. Ex. A, App'x D, p. 18. Everything that is deducted on the profit and loss statement is properly deducted from the EBITDA calculation. *Id.* [redacted]

IV.

[redacted]. An arbitration award may be vacated as "arbitrary and capricious" if the arbitrator's findings are not supported by substantial evidence. *Graber v. Comstock Bank*, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-116 (1995).

[redacted] The issue, however, is not how much evidence was submitted to the Arbitrator in total. The issue is whether the evidence that was submitted justifies the Arbitrator's ruling. [redacted]

[17] [redacted]

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

[redacted] Under Nevada law, an arbitrator may not consider parol evidence when the contract provision at issue is clear, as it is here. *Kreeger*, 2005 WL 8161910 at *2 (vacating arbitration award in part because the contract was "clear and explicit" and the arbitrator "did not adequately explain the basis for . . . admitting parol evidence to vary or contradict express terms of the contract"); *see also Klabacka v. Nelson*, 133 Nev. 164, 171 (2017) ("[w]here a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning"); *Ringle v. Burton*, 120 Nev. 82, 91 (2008) ("The parol evidence rule does not permit the admission of evidence that would change the contract terms when the terms of a written agreement are clear, definite, and unambiguous.").

V. [redacted]

VI. Conclusion

[redacted]. Again, the language of the 2005 JOA is crystal clear as to how the parties intended EBITDA to be calculated:

> **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.**

Ex. A, App'x D, p. 19 (emphasis added).

The Stephens Media profit and loss statement for the period ended December 31, 2004 unmistakably shows the Review-Journal's editorial expenses and promotional expenses being deducted in the "Retention" calculation:

[redacted]

The Sun's opposition brief is nearly thirty pages—[redacted]

[redacted]

DATED this 11th day of October, 2019.

KEMP, JONES & COULTHARD, LLP

By: _____
Michael J. Gayan, Esq. (#11135)
3800 Howard Hughes Pkwy,
17th Floor
Las Vegas, Nevada 89169
Attorney for Defendants and Counterclaimants

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

Certificate of Service

I hereby certify that on the 11th day of October, 2019, the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO VACATE ARBITRATION AWARD** was served on the following by Electronic Service to all parties on the Court's service list.

/s/ [signature]
An employee of Kemp, Jones & Coulthard, LLP

EXHIBIT 4

EXHIBIT 4

RPLY

E. LEIF REID, ESQ., BAR NO. 5750
KRISTEN L. MARTINI, ESQ., BAR NO. 11272
NICOLE SCOTT, ESQ., BAR NO. 13757
LEWIS ROCA ROTHGERBER CHRISTIE LLP
One East Liberty Street, Suite 300
Reno, Nevada 89501
Tel: (775) 823-2900
Fax: (775) 823-2929
Email: lreid@lrrc.com
kmartini@lrrc.com
nscott@lrrc.com

JAMES J. PISANELLI, ESQ., BAR NO. 4027
TODD L. BICE, ESQ., BAR NO. 4534
JORDAN T. SMITH, ESQ., BAR NO. 12097
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100
Email: JJP@pisanellibice.com
TLB@pisanellibice.com
JTS@pisanellibice.com

Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS SUN, INC., a Nevada corporation,

Plaintiff,

v.

NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; and LAS VEGAS REVIEW-JOURNAL, INC., a Delaware limited liability company,

Defendants.

CASE NO.: A-18-772591-B

DEPT.: 16

PLAINTIFF'S REPLY TO DEFENDANTS' NEWS+MEDIA CAPITAL GROUP LLC AND LAS VEGAS REVIEW JOURNAL, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO CONFIRM ARBITRATION AWARD, IN PART, AND TO VACATE OR, ALTERNATIVELY, MODIFY OR CORRECT THE AWARD, IN PART

AND

DEFENDANTS' CONDITIONAL COUNTERMOTION TO CONFIRM ARBITRATION AWARD, IN PART, AND TO VACATE THE AWARD, IN PART

[REDACTED]

I. INTRODUCTION

The Sun submitted to this Court volumes of testimony and documents admitted during the Arbitration hearing to support its Motion to Confirm in Part and Vacate in Part the Arbitration Award. But the RJ[1] never addresses these details in its Opposition.[2] Instead, the RJ offers vague pronouncements that are inapplicable, incorrect, or misleading, or inconsistent with other positions taken by the RJ.

The RJ also now makes an overarching request that this Court "not engage in piecemeal review but rather vacate the Award in its entirety." Opp'n 2. This request is unprecedented, and the RJ offers no basis for this Court to grant it. The RJ would have this Court disregard two years of litigation between the parties, hundreds of admitted exhibits, and eight days of hearing testimony, and in its place adopt the RJ's superficial arguments about what the RJ believes the 2005 JOA means. Paradoxically, this argument is also inconsistent with the relief the RJ requested in its own Motion to Vacate Arbitration Award, which failed to challenge let alone address other portions of the Arbitration Award. The RJ's continuous change in position to suit whatever it needs at the time is not foreign to this Court.[3] And again, the RJ's inconsistency, together with its vague and erroneous arguments, are indicative of the desperate and meritless nature of the RJ's position, a position so tortured apparently even the RJ has difficulty articulating it or keeping it straight.

The RJ's Opposition makes very clear that the RJ has yet to comprehend the basic mechanics of the parties' governing agreement (the 2005 JOA) and tenets of contract interpretation, the fundamental accounting principles clearly applied and understood by the Arbitrator, and the drafting parties' historical practices and intentions. The RJ's confusion is highlighted in its argument that the Arbitrator's rulings on editorial and promotional expenses "conflate" the 2005 JOA and the 1989 JOA. The RJ's arguments ignore the plain language of the 2005 JOA.

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[1] Defendants News+Media Capital Group LLC and Las Vegas Review-Journal, Inc., are together referred to as the "RJ."

[2] Defendants' News+Media Capital Group LLC and Las Vegas Review-Journal, Inc.'s Opposition to Plaintiff's Motion to Confirm Arbitration Award, in Part, and to Vacate or, Alternatively, Modify or Correct the Award, in Part And Conditional Countermotion to Confirm Arbitration Award, in part, and to Vacate the Award in Part is referred to as "Opposition."

[3] *See generally* Pl.'s Mot. to Compel Arbitration & Pl.'s Opp'n to Defs.' Mot. for R.

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Reno, NV 89501-2128

What the RJ also fails to comprehend, and what the Sun and the Arbitrator easily understood, is that the transformation between the two agreements resulted in a change in obligations and significant change in accounting for the joint operation EBITDA. These changes rendered the RJ's historical accounting practices inapplicable post-2005. Yet, as a practical matter, the 2005 JOA cannot be interpreted without considering the 1989 JOA due to the parties' express references to the 1989 JOA, many provisions of which must be considered when calculating the base-line year EBITDA under the 2005 JOA. The RJ's lack of foundational competency in accounting under the 2005 JOA plagues the RJ's Opposition. The result is shallow, inconsistent, and inaccurate arguments. The Arbitrator's interpretations of the 2005 JOA concerning editorial and promotional expenses are the only reasonable interpretations that harmonize the 2005 JOA. This was understood by the Arbitrator, who is trained, licensed, and expert qualified in accounting.

Despite the Arbitrator's undeniable accounting knowledge and proper finding that the 2005 JOA prohibits the RJ from charging its editorial and individual promotional expenses to the joint operation, the Arbitrator erred in ruling on certain other claims and issues not based in accounting. Specifically, the Arbitrator manifestly disregarded the law or consciously ignored the 2005 JOA, and entered arbitrary and capricious findings on the Sun's other claims. These erroneous portions of the Award include where the Arbitrator improperly excluded the RJ's individual house ads from Section 5.1.4's broad requirements requiring their exclusion from the joint operation EBITDA, failed to make any ruling on the Sun's claim for breach of the audit provision, applied an incorrect legal standard to the Sun's claims for tortious breach, and interpreted the 2005 JOA to not allow for an award of attorney fees. Where the Arbitrator committed these errors, the Sun seeks to vacate and/or modify those portions of the Award. Rather than address the Sun's arguments, the RJ deflects and continues to torture the language of the 2005 JOA, and overlooks governing law and uncontroverted evidence. The RJ's arguments are without merit. An order granting the Sun's Motion[4] is required.

/ / /

[4] Plaintiff's Motion to Confirm Arbitration Award, in Part, and to Vacate or, Alternatively, Modify or Correct the Award, in part is referred to herein as the "Motion."

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II. STATEMENT OF FACTS

The RJ does not dispute the Sun's Statement of Facts set forth in the Sun's Motion. *See generally* Opp'n 3. The RJ refers this Court to its separately-filed Motion to Vacate Arbitration Award as an alternative, claiming that "[m]any of those facts support the Review-Journal's Countermotion." *Id.* But the RJ has not controverted the Sun's pointed explanation as to how woefully inaccurate the facts in the RJ's Motion to Vacate Arbitration Award are. *See* Pl.'s Opp'n to Defs.' Mot. to Vacate Arbitration Award 5-13. The Sun therefore directs this Court to, and incorporates herein, the corrected facts set forth in the Sun's Opposition to Defendants' Motion to Vacate Arbitration Award, along with the statement of fact included in the Sun's instant Motion.

III. THE RJ'S REQUEST THAT THE AWARD BE SET ASIDE IN ITS ENTIRETY HAS NO BASIS IN FACT OR LAW

Although its heading requests setting the Award aside in its "entirety,"[5] in its five-sentence argument the RJ broadly claims that the Arbitrator's ruling on editorial and promotional costs "substantially deviates" from the 2005 JOA. Opp'n 3 (incorporating its Motion to Vacate Arbitration Award). The RJ's defective understanding of the JOAs takes center stage when it attempts to support this sweeping assertion in the four sentences that follow—that is, that the Arbitrator "conflated the now-terminated 1989 JOA with the 2005 JOA and then applied terms and concepts from the 1989 Agreement" to rewrite the 2005 JOA. *See id.*

As discussed in the Sun's Opposition to Defendants' Motion to Vacate Arbitration Award, the Arbitrator properly found that, under the 2005 JOA, the RJ cannot charge its editorial costs and its independent promotional costs against the joint operation EBITDA. *See* Pl.'s Opp'n to Defs.' Mot. to Vacate Arbitration Award 2-10, 13-25. Lest one forget, the RJ maintains that because Stephens Media's 2004 Profit and Loss Statement included the Review-Journal's editorial expenses in its "Retention" line item, the lone "Retention Sentence" in Appendix D of the 2005 JOA overrides every other provision in the 2005 JOA and allows the RJ to charge its editorial costs against the joint operation EBITDA. *See* Pl.'s Opp'n to Defs.' Mot. to Vacate Arbitration Award

[5] As stated above, the RJ has not provided any basis or authority to support its request to set aside the Award in its entirety. *See generally id.*

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7-9, 13-23. The fact that the RJ hypocritically accuses the Arbitrator of applying 1989 JOA concepts to the 2005 JOA accounting is shocking, although it is simultaneously characteristic of the RJ.

The Arbitrator did not apply the 1989 JOA accounting treatment to the 2005 JOA when concluding that the RJ is prohibited from charging its editorial costs and individual promotional expenses to the joint operation EBITDA. While portions of the parties editorial and promotional costs were once allowable expenses of the joint operation under the 1989 JOA (*i.e.*, the parties' editorial and promotional cost "allocations" under Appendix A.1), the parties to the 2005 JOA deliberately and substantially changed how the parties were to account for editorial and promotional costs (among several other things). *See id.* Under the 2005 JOA, those RJ's editorial costs and independent promotional expenses are specifically described as being separate from the joint operation, with the RJ to independently bear and subsidize those expenses. Sections 4.2 and 5.1.4, and related provisions, of the 2005 JOA, specifically state that the RJ must bear its editorial costs and independent promotional expenses. *See id.*

The Arbitrator, a CPA, understood the changes that the parties made between the 1989 JOA and the 2005 JOA, and the accounting changes that resulted as a deliberate intention of the drafters. Consequently, the Arbitrator accurately concluded that it would be contrary to Section 4.2 and related provisions of the 2005 JOA for the RJ to force the Sun to "bear" or subsidize the RJ's editorial expenses charged against the joint operation EBITDA. *See generally id.* The Arbitrator also properly concluded that expenses for promotional activities that do not mention the Sun in equal prominence must be excluded from the joint operation EBITDA. *See generally id.* Unlike the RJ, the Arbitrator understood that the 1989 JOA-era accounting was no longer applicable in the post-2005 JOA era.

The RJ's convoluted argument that the Arbitrator conflated the JOAs appears to be premised on—but fails to comprehend—the fact that the Arbitrator, and the parties, are required to consult the 1989 JOA when interpreting the 2005 JOA. The Arbitrator's consultation of the 1989 JOA is a necessary result of the 2005 JOA's express references to provisions of the 1989 JOA. *See,*

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e.g., 1 PA 21. The Second Paragraph of Appendix D references, by section, the previously allowed 1989 JOA expenses that are now disallowed when calculating the EBITDA:

> In calculating the EBITDA (i) for any period that includes earnings prior to April 1, 2005, such earnings shall not be reduced by any amounts that during such period may have been otherwise been deducted from earnings under Section A.1 of Appendix A or sections B.1.16, B.1.17, B.1.18, or B.3 of Appendix B of the 1989 Agreement.

Id. (emphasis added). Thus, not only are the drafting parties' intentions made obvious by the significant changes they made when entering into the 2005 JOA, including where prior expenses provisions are now "Intentionally omitted," but the drafters made their intentions undisputable by cross-referencing specific 1989 JOA provisions to illustrate that those previously-allowed expenses must be excluded from the parties' calculation of EBITDA under the 2005 JOA. The RJ cannot complain about the Arbitrator considering what the drafting parties demanded, and expressly referenced, in the 2005 JOA.

Indeed, for the several reasons set forth in the Sun's Opposition to Defendants' Motion to Vacate Arbitration Award, and the admitted evidence cited to therein, the Arbitrator's findings are correct. The Arbitrator's reading of the 2005 JOA as precluding the RJ from charging its editorial costs and independent promotional costs against the joint operation EBITDA is the only way to read all of the 2005 JOA harmoniously, evidencing the accuracy of the ruling as a matter of law.

IV. THE ARBITRATOR'S RULING ON TRADE AGREEMENTS AS INDEPENDENT PROMOTIONAL ACTIVITIES AND EXPENSES MUST BE CONFIRMED

It is undisputed that the RJ has ceased nearly all efforts to promote the Newspapers jointly. The Arbitrator correctly found that any promotional agreements that failed to mention the Sun were disallowed expenses that could not be charged to reduce the joint operation EBITDA. 2 PA 38.

Now having been found liable for its flagrant breaches of the 2005 JOA by improperly charging these expenses, the RJ argues the Arbitrator must be wrong. *See* Opp'n 4-6. First, the RJ argues that the Arbitrator's finding that the RJ must rightfully pay for its independent promotional activities is a "penalty," while oddly boasting that "[a]wareness of the Review-Journal *necessarily* creates awareness of the Sun" *Id.* at 4-5 (emphasis added). Second, the RJ avoids the plain language

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of Section 5.1.4 and argues that since trade agreements end up being, in their view, a "wash," using JOA assets unilaterally to benefit the RJ should be allowed for it does not harm the Sun. *Id.* at 5. These arguments are meritless, as they are directly contradictory to the plain language of Section 5.1.4. The Arbitrator correctly found that the RJ must separately pay for its Sun-excluded trade agreements pursuant to the 2005 JOA. *See* 2 PA 38.

The RJ's first assertion that the Arbitrator's finding amounts to a penalty could not be more wrong. *See* Opp'n 4-5. The 2005 JOA provides the RJ shall promote both Newspapers "in equal prominence," and if the RJ undertakes additional promotional activities that do not feature the Sun in equal prominence, it must do so at its "own expense." *See* 1 PA 4 (emphasis added). The Arbitrator's interpretation of the plain language of Section 5.1.4 of the 2005 JOA cannot be deemed a penalty where both parties agreed to each pay separately for independent promotions. Section 5.1.4 creates a mandatory prerequisite that the Sun shall be mentioned in equal prominence to the Review-Journal in order for a promotional expense to be an allowable charge to the joint operation EBITDA; otherwise, it must be a separate expense. *See id.* The damages arising from the RJ's failure to undertake additional promotional activities "at their own expense" is, appropriately, and necessarily, the amount of those expenses, which is what the Arbitrator concluded. *See* 2 PA 40-42. Rather than a penalty, the Arbitrator applied Section 5.1.4 to give the parties exactly what they both bargained for under the 2005 JOA.

The fact that Section 5.1.4 does not spell out a monetary remedy for the RJ's breach, or that Section 5.1.4 is not an "accounting provision" in the RJ's view, is irrelevant and incorrect. *See* Opp'n 4-5. The RJ's assertion that Section 5.1.4 was required to expressly state that the RJ's breach would result in money damages, or that it should have included language to make it an "accounting provision,"[6] whatever the RJ considers an "accounting provision," is unsupported by any theory in contract law or the 2005 JOA. *See* Opp'n 4-5.

[6] While it is unclear what the RJ now believes is required for a contractual provision to be deemed an "accounting provision." Section 5.1.4 describes which party is burdened with an "expense" for independent additional promotional activities, and was understood by the CPA Arbitrator and other accounting witnesses, including the RJ's former controller. *See, e.g.*, Pl.'s Opp'n to Defs.' Mot. to Vacate Arbitration Award 24-35; *see also id.* at Ex. 1 at 268:9-269:6 (where the former RJ Controller John Perdigao testified about how

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Section 5.1.4 unambiguously states that the RJ must separately pay for promotional expenses that do not mention the Sun in "equal prominence." 1 PA 4. This provision directly contradicts the RJ's overarching argument that the Arbitrator's ruling amounts to a "penalty" that is "'disproportionate to the damage which could have been anticipated from breach of the contract, and which is agreed upon in order to enforce performance.'" *See* Opp'n 4 (quoting *Am. Fire & Safety, Inc. v. Cty. of N. Las Vegas*, 109 Nev. 357, 360, P.2d 352, 355 (1993)). Clearly, the foreseeable outcome of the RJ's failure to mention the Sun in a promotion is that the RJ would have to bear the expense independently. The parties agreed in Section 5.1.4 that the RJ would include the Sun in equal mention in the promotion of the Newspapers, or it would be required to pay for those expenses independently. Thus, the RJ cannot complain that its liability amounts to a "disproportionate" and "unanticipated" "penalty" when the RJ is imposing the damage upon itself each time it elects to exclude the Sun from its promotions, in violation of the 2005 JOA. The RJ's arguments are unsupported by any fact and directly contradict the clear and unambiguous directive set forth in Section 5.1.4.

Relatedly, the RJ's attempt to glorify the sheer volume of its independent trade agreements to deflect from its clear breaches of Section 5.1.4, and claim that those trade agreements "necessarily create[ ] awareness of the Sun," Opp'n 5, in no way excuses the RJ from its obligations under Section 5.1.4. Again, the language and requirements of Section 5.1.4 are explicit: if the RJ fails to mention the Sun in equal prominence (or, as here, fails to mention the Sun at all), then the RJ must bear the expense alone and not apply those expenses to reduce the joint operation EBITDA, and therefore the Sun's annual profit payments. The RJ failed to introduce any credible evidence that demonstrates a benefit to the Sun (only offering its own self-aggrandizing opinions). Irrespective of the RJ's irrelevant personal beliefs, Section 5.1.4 states precisely what the Sun bargained for, and to what the RJ's predecessors agreed—a "mention of equal prominence **for the Sun**." 1 PA 4 (emphasis added). The parties did not bargain for the RJ to reduce the Sun's profit payments for the expenses of the RJ's independent promotional activities so long as the RJ could,

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the RJ should have set up its books with accounts for the RJ to pay *separately* for RJ-only promotions under Section 5.1.4).

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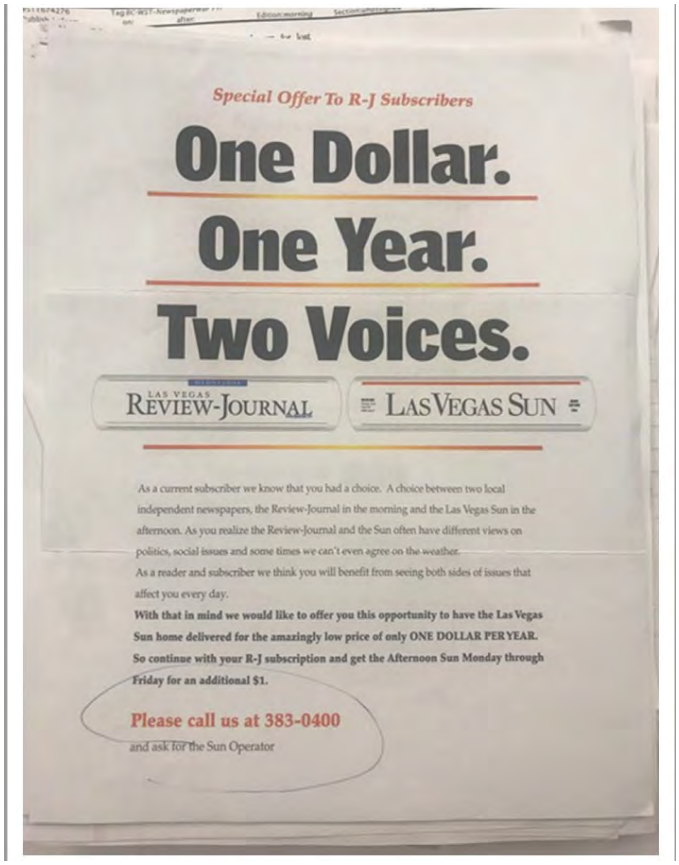
in its own discretion, argue that the promotion somehow and in some way generates a byproduct of Sun "awareness." A more specious, unreasonable, and self-serving reading of Section 5.1.4 does not exist.

To recall, in the 2005 JOA, the parties contracted for the RJ to assume all obligations to promote the Sun, and the Sun agreed to give up the millions of dollars per year that it was receiving under the 1989 JOA to fund the Sun's promotional activities. *Compare* 1 PA 4 § 5.1.4 *with* 2 PA 227 (Appendix A.1 of the 1989 JOA). The previous owners of the Review-Journal had no misunderstanding about their duty to promote the Sun and to do so in equal prominence pursuant to Section 5.1.4. *E.g.*, 16 PA 3622:7-23; *see also id.* at 3615:19-3617:11. Below is an example of a promotional expenditure that was typical under prior ownership of the Review-Journal:


Special Offer To R-J Subscribers

One Dollar.
One Year.
Two Voices.

LAS VEGAS REVIEW-JOURNAL | LAS VEGAS SUN

As a current subscriber we know that you had a choice. A choice between two local independent newspapers, the Review-Journal in the morning and the Las Vegas Sun in the afternoon. As you realize the Review-Journal and the Sun often have different views on politics, social issues and some times we can't even agree on the weather.

As a reader and subscriber we think you will benefit from seeing both sides of issues that affect you every day.

With that in mind we would like to offer you this opportunity to have the Las Vegas Sun home delivered for the amazingly low price of only ONE DOLLAR PER YEAR.

So continue with your R-J subscription and get the Afternoon Sun Monday through Friday for an additional $1.

Please call us at 383-0400

and ask for the Sun Operator

Ex. 1. The above example of a Review-Journal promotion demonstrates the type of joint promotional activity required under Section 5.1.4, which was a proper promotional expense to be charged against the joint operation EBITDA. *See id.*; *see also* 2 PA 52-57. The Arbitrator correctly

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found that the RJ's current promotional activities, which fail to mention the Sun at all and are in stark contrast to the prior owners' promotions, cannot be included as expenses of the joint operation. The RJ's argument that the Arbitrator's finding amounts to a penalty cannot override Section 5.1.4's unequivocal mandate that the RJ promote the Sun with equal prominence, a prerequisite before a promotional expense may be charged against the joint operation EBITDA. Any promotion not conforming to that mandate must be paid for individually by the RJ.

Concerning the RJ's second challenge to the Arbitrator's finding that it must post the revenue earned from trade agreements to the joint operation while separately expensing those costs itself, the RJ contends that the finding violates GAAP's matching principle.[7] Opp'n 5-6. According to the RJ, since the trade is a "wash," being neither an increase nor a decrease in joint operation revenue, the trade has no effect on the joint operation. *Id.* at 5. This is absurd.

According to the RJ, it can rightfully offer JOA resources to third parties (amounting to millions of dollars' worth of advertising in the Newspapers) in exchange for third-party promotions (including signage, television commercials, ads in programs, honorable mentions, and tickets and accommodations) that do not promote the Sun or are otherwise available to the Sun, but promote only the RJ, its sister publications, or its non-JOA digital website operations—all without bearing the expense for these promotions independently.[8] *See id.* However, the Arbitrator properly rejected the RJ's argument and found that such RJ-only promotional activities are expressly disallowed under the 2005 JOA. 2 PA 40-42; 1 PA 4 § 5.1.4 ("Either the Review-Journal or Sun may undertake additional promotional activities for their respective newspaper at their own expense.").

Under basic accounting principles conforming with the 2005 JOA, which the Arbitrator recognized, when the RJ enters into a trade agreement using JOA resources (newspaper advertisements) there are two parts of the trade that must be "booked." For example, the trade customer (such as a baseball field/stadium) agrees to give the RJ tickets and a box for the baseball

[7] It should be noted that the RJ's apparent understanding of accounting principles derives from the *Attorney's Handbook of Accounting, Auditing, and Financial Reporting*, § 4.04[2] (4th ed. 2017). *See* Defs.' Mot. to Vacate Arbitration Award 21.

[8] To be clear, there is no dispute that the RJ must book the revenues and expenses associate with a trade agreement under GAAP; the RJ's complaint is that the expense portion must be paid for outside of the JOA.

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games, and a large advertisement on its field or visual display (worth $100,000) in exchange for ads in the Newspapers (also worth $100,000). In recording the accounting for this trade agreement, the $100,000 advertising value in the Newspapers must be booked as revenue to the joint operation under generally accepted accounting principles (GAAP). This is because the JOA has earned the revenue when it publishes the ads for the third-party, *e.g.*, when the Newspapers [redacted]

But, booking the trade value as revenue to the joint operation does not change the fact that the expenses are disallowed under the parties' agreement. *Id.* [redacted] (Emphasis added)). As the second part of accounting for a trade agreement, the inquiry is where to book the expense. If the RJ complied with Section 5.1.4 and included the mention of the Sun in equal prominence, then the trade would be an allowed promotional activity and expense of the joint operation, which could be charged to the joint operation EBITDA. Alternatively, if the RJ did not promote the Sun in equal prominence as required under Section 5.1.4 (and has, for example, promoted only itself or its separate-entity website), the RJ must "book" the expense outside of the joint operation, *i.e.*, pay for it separately, and not charge it to the joint operation EBITDA.

The Arbitrator correctly saw through the emptiness of the RJ's "matching principle" argument. There are several completely acceptable ways of handling the award under GAAP. The RJ knows one way to do this extremely well. [redacted]

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[redacted]

Despite its proper practice for entities outside the JOA, the RJ has failed to set up its accounting system correctly to separate out expenses that should not be charged to the joint operation. *See* 2 PA 41 [redacted] *see also* Pl.'s Opp'n to Defs.' Mot. to Vacate Arbitration Award 24-35; *see also id.* at Ex. 1 at 268:9-269:6 [redacted] The RJ ignores the requirements under the 2005 JOA by never promoting the Sun in equal prominence and either obliviously or resolutely charging all expenses to the joint operation, irrespective of whether the expenses are disallowed.[9]

For these reasons, the Arbitrator's finding and conclusion that the 2005 JOA prohibits the RJ from charging its independent promotional activity expenses to the joint operation EBITDA is correct and should be confirmed.

V. THE LAW AND SUBSTANTIAL EVIDENCE DEMONSTRATE THE ARBITRATOR'S FINDINGS REGARDING HOUSE ADS MUST BE VACATED

While the Arbitrator ruled properly on the promotional activity issue, he inconsistently applied the ruling and incorrectly carved-out from Section 5.1.4 those promotions referred to as "house ads." 2 PA 38, 40-41. This nonexistent exception for house ads that the Arbitrator arbitrarily

[9] The RJ's additional assertion that the Arbitrator rewrote the equal prominence provision is without merit. *See* Opp'n 6. At the outset, this clause was well understood by the Review-Journal's previous owners. *See supra*. Additionally, this finding is not a "rewrite." Section 5.1.4 is clear in that the Sun must be mentioned in equal prominence, a requirement under the 2005 JOA. 1 PA 4. The following sentence in Section 5.1.4 then states that the individual paper must bear the expense for any additional, individual promotions. *Id.* The RJ's reading flies in the face of the plain language of Section 5.1.4.

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read into Section 5.1.4 gives the RJ an unrestricted license to promote itself, alone, in the newspaper and not bear the expense of those independent promotions. This interpretation disregards the broad, unqualified language of Section 5.1.4, and is at odds with the Arbitrator's correct declaration that the RJ is prohibited from charging its independent promotional expenses against the joint operation EBITDA. The RJ has not—and cannot—counter the Sun's contract interpretation analysis of Section 5.1.4 or the necessary conclusion that house ads are included Section 5.1.4 as it is written. *Compare* Mot. 14-15 *with* Opp'n 6-15. The Arbitrator's ruling on this issue must be vacated.

A. Whether a House Ad is Published to Fill Space in the Newspaper is Irrelevant under Section 5.1.4

The RJ argues that house ads are "fillers" for holes in the newspaper; therefore, the Arbitrator's finding that house ads are not included Section 5.1.4 was correct. Opp'n 7-8. Though house ads may sometimes be used as "fillers" in the newspaper, it is unreasonable to conclude that house ads are not promotional advertisements under Section 5.1.4. The two are not mutually exclusive, and a house ad being a "filler" does not affect its function as a promotional advertisement. Besides the fact that the RJ might choose to use full pages for one house ad on occasion, or that it might find space it needs to fill in another occasion, the RJ's use of house ads under either circumstance is irrelevant to the contractual obligations imposed upon the RJ by the 2005 JOA.

Applying governing rules of contract interpretation, Section 5.1.4 unambiguously provides that "any" promotion that is used as "an advertising mechanism or to advance circulation" must mention the Sun in equal prominence or it will be deemed an independent promotional activity of the RJ, for which the RJ must bear the expense. 1 PA 4. Section 5.1.4's use of the term "any" means "all" promotional activities used as an advertising mechanism or to advance circulation. *See Diamond v. Linnecke*, 87 Nev. 464, 467, 489 P.2d 93, 95 (1971).

House ads are essential promotional devices used by all newspapers. *See, e.g.*, 11 PA 222:7-12 [redacted] 2 PA 47-85. The RJ, too, uses

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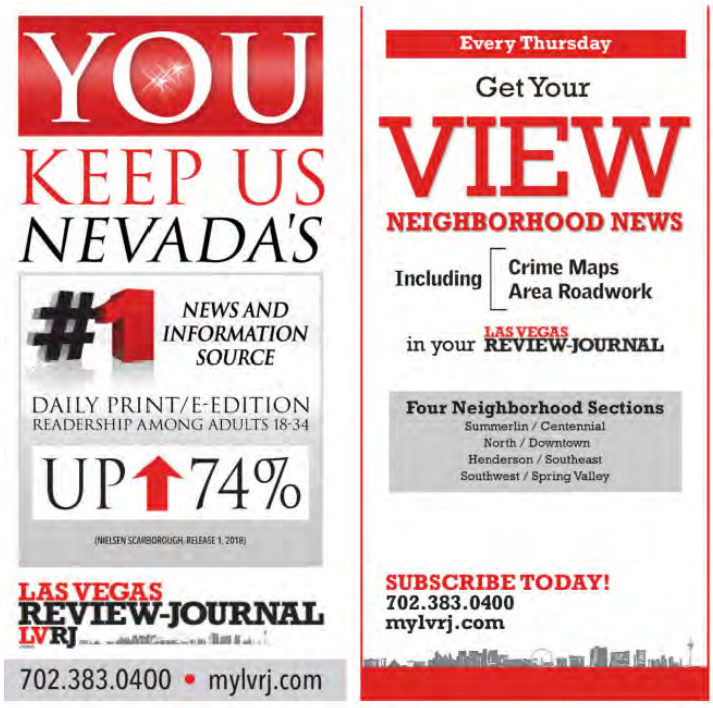
its house ads as a promotional device to advertise or advance circulation. *See* C291 (illustrating the RJ's house ads that promote the Newspapers as an advertising medium or to highlight different sections in the Newspapers to increase circulation); *see also* **Ex. 2**. Because the RJ's publication of house ads are "promotional" activities under Section 5.1.4, the RJ's house ads must comply with the mandates of Section 5.1.4. That is, the RJ must include the Sun in equal mention, or pay for its individual house ads separately.

Nonetheless, the RJ attempts to distinguish house ads from other promotional activities and urges, "House Ads are not 'promotional activities' *in the ordinary sense*." Opp'n 8 (emphasis added). This argument contravenes the RJ's hearing testimony, *see supra*, and is nonsensical because house ads are used industrywide, including by the RJ itself, for the precise purpose of promotion. In fact, as used by the RJ, a major volume of its house ads appear in the main pages of the Review-Journal, including as full-, half-, and quarter-page advertisements. *See, e.g.*, 2 PA 78-83; *see also* **Ex. 2**. Moreover, the RJ uses its house ads to promote itself along with its separate website entity in the majority of its house ads. *See, e.g.*, 2 PA 78-81, 83.

An example of a half-page house ad the RJ published in Section 2B of the Review-Journal illustrates the falsity of the RJ's argument that it uses house ads are mere fillers for newshole:



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2 PA 79; **Ex. 2**. In this half-page house ad, the RJ promotes its print and digital operations—lvrj.com (which redirects the user to reviewjournal.com)—an entity that is outside the joint operation. 10 PA 2031:4-2033:3. Attached as **Exhibit 2** are over a dozen more examples of the RJ publishing large house ads in the main pages of its newspaper for the specific purpose of promoting itself and its website, or sister publications, as stand-out advertisements.

The evidence presented to the Arbitrator, and published to the world, shows that the RJ uses house ads for promotional purposes, in a very ordinary and traditional sense. And yet, the RJ continues to publish its promotional house ads to the exclusion of the Sun, with nothing preventing it from publishing house ads that comply with the terms of the 2005 JOA, and promote the Sun "in equal prominence." Under the RJ's proposed interpretation (and the Arbitrator's erroneous finding), the RJ and its digital operation, a non-party stranger to the Sun and the JOA, gets free advertising in the Newspapers. Any other customer would have to pay the standard advertising rate to appear in these ads, and the corresponding revenue would go to the joint operation. This interpretation and result is a manifest abuse of discretion.

The RJ's argument that mentioning the Sun in its house ads that promote other sections of the Review-Journal, which occur only in the Review-Journal, is "virtually impossible" because the Sun "has nothing to do with" those products is, once again, contrary to the plain language of Section 5.1.4. *See* Opp'n 13-14. Moreover, this position taken by the RJ is a new phenomenon. The Review-Journal's previous owners complied with this provision for more than 10 years. *See* 16 PA 3622:7-23. (Indeed, if the provision that the RJ must promote the Sun was truly "impossible" it is beyond suspect that the provision was written as it was, and that it would take the Review-Journal 14 years to complain of this purported "impossibility"). The prior owners used to promote the Sun alongside the RJ, in equal mention, even in classified house ads— despite that the Sun does not have its own classified section. *See, e.g.*, 2 PA 52-57; *see also* **Ex. 1**. Additionally, where it would be truly "impossible" or inappropriate to include the Sun in a mention of equal prominence in any promotion of the newspaper, the advertisement would categorically be deemed an independent promotion, and the RJ must be pay for it separately.

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For the RJ to also argue that its promotions for a job fair or employment opportunity, and the like, are not to advertise or advance circulation is equally meritless. *See* Opp'n 13. If a third party were to publish in the newspaper a job fair or an employment opportunity, it most certainly would be an advertisement. And if it truly is promotion for something other than the Review-Journal, then by definition it would be deemed an additional promotional activity. The RJ is no different from a third-party customer of the JOA, and must pay the joint operation for the fair market value of the ad.

Section 5.1.4 requires the RJ to promote the Sun in equal prominence for all promotional activities that either increase circulation or advertising. 1 PA 4. If the RJ does not mention the Sun in equal prominence in its promotional activities as required under Section 5.1.4, it must separately pay for the expense. Section 5.1.4 provides no exception for house ads, and no evidence exists to support any finding that the house ads are not promotional activities. The plain language of Section 5.1.4 mandates the RJ to pay the joint operation the fair market value for all house ads the RJ published that failed to mention the Sun in equal prominence. The RJ chose not to promote the Sun, and the Arbitrator's finding and the RJ's claim that the RJ may use JOA resources to the exclusion of the Sun for its house ads, of *any* type, contravenes the plain language of Section 5.1.4.

B. House Ads Constitute an Expense

The RJ argues that house ads, as "in house promotional ads," "do not result in an 'expense'" to the joint operation, and therefore should be excluded from Section 5.1.4. *See* Opp'n 8-11. This is wrong on two levels.

At the most basic level, creating and publishing house ads cost the joint operation. Graphic designers are required to create the ads (like the one above), which costs the joint operation salary and overhead; newspaper layout staff are required to build the pages containing the house ads, again costing the joint operation salary and overhead; and the newspapers were required to be printed with the house ads, costing the joint operation newsprint and ink. *See, e.g.*, 9 PA 1898:1-9. These costs are undisputable.

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But the expense of the RJ's house ads to the joint operation is more than basic, raw costs of production. The RJ's house ads that exclude the Sun from mention in equal prominence deprives the joint operation of any meaningful opportunity where the amount of newsprint used could have been used for news content or paid advertising. Instead, the RJ has chosen to insert itself, and its non-JOA digital operation, into the newspaper for free, and the joint operation is deprived of the revenue for those promotions despite the expense to the joint operation. 8 PA 25 1658:24-1659:17, 1661:1-8, 1676:8-1677:2; 9 PA 1902:14-1904:8.

To illustrate, when the RJ elects to publish advertisements that promote only the RJ and make no mention of the Sun, the RJ breaches Section 5.1.4. The Arbitrator properly agreed with this. But house ads are no different—the RJ could have easily published house ads that complied with its obligations under Section 5.1.4, but it consciously elected not to. The same is true when the RJ published house ads promoting its digital entity, lvrj.com and reviewjournal.com, instead of promoting the Newspapers jointly and the Sun in equal prominence. And when the RJ chooses to promote itself, or its website (a literal third-party under the 2005 JOA), the value accruing to the RJ's promotions is something that must be reimbursed to the joint operation. The RJ's digital operation has received millions of dollars' worth of house ads. A sampling of the Review-Journal paper published from March 19, 2016, to March 17, 2019, that was submitted during the arbitration hearing revealed that out of 1,306 house ads, the RJ mentioned the Sun in only 3.75% of them (for a total of 49 mentions of the Sun only). 2 PA 48, 49. The RJ consistently mentioned its digital operation in its house ads, even in the majority of the 49 house ads mentioning the Sun.[10] *See id.* at 51-65. The overwhelming, and undisputed evidence presented to the Arbitrator demonstrated that the RJ promotes itself, alongside its non-JOA, separate entity digital operation, daily, while intentionally omitting the Sun.[11]

[10] Out of the RJ's mere 49 mentions of the Sun in its 1,306 sampled house ads, the Sun was mentioned only 19 of those times without the house ad also mentioning the RJ's website. 2 PA 51-57.

[11] This behavior by the RJ bears notice for an additional reason: the RJ argues that it is "impossible" to include the Sun in equal prominence, but magically finds a way to include its non-JOA digital operations in ads.

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[redacted] 8 PA 25 1658:24-1659:17, 1661:1-8, 1676:8-1677:2; 9 PA 1902:14-1904:8. By failing to include the Sun in its house ads, the RJ becomes a third-party customer of newspaper and the joint operation. *Id.* While the RJ argues that the Sun's expert's opinion on this issue was "impromptu" and unsupported at the arbitration hearing, Opp'n 9-10, the RJ neglects to mention that it never objected to, controverted, or challenged Ms. Cain's testimony on this topic at any time during the arbitration hearing. *See generally* 8 PA 1619-9 PA 1932. An opposition to a motion to confirm an arbitration award is not a timely place to first object to the admission of evidence, or to argue about its weight. Ms. Cain's testimony is substantial evidence in support of the Sun's damage calculation for the RJ's illegal house ads, and the RJ has waived its ability to challenge Ms. Cain's testimony on the basis that the opinion exceeded her report or that she was otherwise unqualified to testify on the subject.[12]

The RJ's citation to witness testimony describing how house ads were accounted for at other newspapers to argue that house ads do not result in an "expense" is unpersuasive. *See* Opp'n 8-9. Stating the obvious, the 2005 JOA here is unique, and testimony about how other newspapers account for house ads does not support the Arbitrator's finding that house ads are not promotional activities subject to Section 5.1.4 and must be paid for independently when they are individual promotional activities. *See* 8 PA 1658:16-1659:17. Under this contract, the 2005 JOA, the RJ alone bears the burden to promote both newspapers. *Id.* (Indeed, this is the only JOA the Sun is aware of where one newspaper is published inside of the host paper.) Sections 5.1 and 5.1.4 of the 2005 JOA

[12] In order to calculate damages for house ads that did not mention the Sun in equal prominence, two items are needed: (1) the quantity or estimate of house ads not featuring the Sun in equal prominence; and (2) the advertising rate from the RJ's rate cards. Damages are easily calculated by multiplying these two inputs. The Sun's expert report was due March 1, 2019, *see* **Ex. 3**, but the RJ did not produce its rate card until it March 22, 2019, and final arbitration exhibits were due April 1, 2019. *See* **Ex. 4**; **Ex. 5**. The RJ did not produce the rate cards until after Ms. Cain's expert report; yet, the RJ never challenged the Sun's admission of the rate cards or Ms. Cain's testimony on this point, or her qualification as a Certified Public Accountant. See 8 PA 1619-9 PA 1932; 7 PA 1489:1-3; 15 PA 2604:5-3607:23; 2 PA 47-85. The Sun included the damages calculation during its closing based upon the admitted evidence and testimony. 17 PA 3889:3-3891:19. The Sun again provided the foundational information in its post-hearing brief, without challenge from the RJ. *See* 6 PA 1115-16.

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set forth the RJ's obligation to promote the Sun. *See* 1 PA 3-4. These provisions were included in the 2005 JOA as a result of the Newspapers being jointly published in a single-package yet separately-branded product, and the RJ taking over all promotional obligations for both Newspapers. *See* Pl.'s Opp'n to Defs.' Mot. to Vacate Arbitration Award 23-24. The Sun relinquished its 40% promotional cost allocation that was provided for under the 1989 JOA—saving the RJ millions of dollars per year—in exchange for the RJ's commitment in Section 5.1.4 to promote the Newspapers, and the Sun in "equal prominence."

In summary, the RJ's argument and the Arbitrator's finding that house ads do not result in an "expense" to the joint operation is unsupported by the evidence. No different from its other independent promotional activities, including activities like trade agreement that do not include an exchange of money, or any promotion of another third-party customer, the RJ independent house ads costs the joint operation. The RJ must be required to pay for its independent house ads under Section 5.1.4.

C. Section 5.1.4 Encompasses All Promotional Activities, and the Arbitrator's Focus on the Term "Additional" to Exclude House Ads was Arbitrary and Capricious

The RJ piggybacks on the Arbitrator's erroneous finding [redacted].[13] Opp'n 11-13. For the reasons stated above, *supra* § V(B), the Arbitrator's finding that the RJ's independent house ads [redacted] was reversible error. 2 PA 38, 42 (emphasis added).

The RJ and the Arbitrator misconstrued the "additional" promotional activity requirement set forth in Section 5.1.4. Instead of addressing the plain language of the provision, the RJ tries to carve out an exclusion to its compulsory promotion requirement by arguing that it can use JOA assets for promotions to increase circulation or as an advertising medium that do not mention the

[13] The RJ challenges the Sun's use of the phrase "promotional *materials*" instead of "promotional *activities*," as if that were consequential. *See* Opp'n 11. It is not.

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Sun if (under the RJ's analysis) the promotions have no "expenses." Opp'n 12. This argument misstates Section 5.1.4—the point is the RJ must include the Sun in these promotions, as prior owners did. The RJ is making a choice on what type of house ad it is including, and when it does not include the Sun in equal prominence, the RJ must pay for the ads. The Sun bargained for inclusion in these promotions, and letting the RJ breach its promotional requirements must be remedied.

Moreover, the RJ speciously misquotes the Arbitration Award. The Arbitrator found house ads are [redacted] 2 PA 38 (emphasis added). The Arbitrator did not say (as the RJ contends) that "House Ads are not 'promotional activities' under Section 5.1.4 of the JOA." Opp'n 12. The Arbitrator did not make such a broad finding. Importantly, the modifier in Section 5.1.4, "additional," was always used by Arbitrator, and thus the Sun's arguments regarding the Arbitrator's improper focus on the word "additional" as ignoring the preceding sentences in Section 5.1.4 and renders them meaningless are meritorious. *See* Mot. 14-17, 16 n.9.

[redacted] as used in Section 5.1.4, the Arbitrator wrongfully limited Section 5.1.4's unqualified reference to "any" promotional activities, and therefore, all promotional activities. It bears repeating the beginning of Section 5.1.4 as a result:

> Review-Journal **shall** use commercially reasonable efforts to promote the Newspapers. Any promotion of the Review-Journal as an advertising medium or to advance circulation **shall** include mention of equal prominence for the Sun. Either the Review-Journal or Sun may undertake additional promotional activities for their respective newspaper at their own expense.

1 PA 4 (emphases added). And, as explained above, and in the Sun's several post-arbitration briefs filed in this Court, no exception for house ads exists in this language. The RJ's argument that 5.1.4 does not "encompass all promotional materials" is belied by the language in the provision. *See Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (describing contract interpretation principles).

The Arbitrator's finding is also contrary to the drafting parties' intent, and effectively denies the Sun its bargained-for promotional value, which reduces the Sun's compensation under the 2005

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JOA. To recall, Section 5.1.4 was put in place of the Sun receiving a promotional budget equaling 40% of whatever the Review-Journal would spend on promotional activities. Thus, by including the RJ's independent promotions as an expense of the joint operation without requiring the RJ and its separate digital entity to pay the fair market value of those promotions effectively reduces the value returned by the joint operation to the Sun and completely denies the Sun its specifically bargained-for benefit that was recognized by prior owners of the Review-Journal.

While the Arbitrator correctly ruled on the broader issue (*i.e.*, requiring an audit to determine if promotional activities do not feature the Sun in equal prominence and in those cases requiring separate payment by the RJ for the same), the Arbitrator did not evenly apply the ruling. Section 5.1.4 clearly identifies allowed and disallowed promotional expenses: if the Sun is mentioned in equal prominence, it's an allowable promotional expense; if the Sun is not mentioned in equal prominence, it is an "additional" promotion that must be paid for independently. Where the RJ's independent house ads do not mention the Sun in equal prominence, they are by definition "additional" and the joint operation must be compensated at fair market value for these breaches of the 2005 JOA.

D. The Arbitrator's House Ad Ruling Failed for Other Independent Reasons

In a last ditch effort to convolute its position and repeat itself, the RJ restates arguments previously made in its Opposition but reargues them as "independent reasons" that support the Arbitrator's ruling. *See* Opp'n 13 (repeating its arguments that it is "impossible" to promote both newspapers, the Sun did not prove damages in the form of an expense resulting from the house ads, and Section 5.1.4 does not provide a remedy). These arguments are without merit for the reasons already discussed *supra* §§ V(A), V(B), IV. Addressing the RJ's one outstanding argument that the Arbitrator's house ad ruling was correct because RJ's independent house ads somehow "benefit" the Sun outrageously misses the mark. *See id.* at 13-14. As explained above, the RJ publishes a significant amount of house ads that are for its separate digital operation, an entity outside the JOA and wholly unrelated to the Sun. No reasonable person would consider these ads as a "benefit" to the Sun. More fundamentally, and already belabored, the 2005 JOA requires the RJ to promote both

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Newspapers. In exchange for giving up its promotional budget (the Sun previously received 40 percent of the RJ's promotional budget under the 1989 JOA), the RJ agreed to promote the Sun in equal prominence. As already mentioned, the parties did not bargain for the RJ to reduce the Sun's profit payments for the expenses of the RJ's independent promotional activities so long as the RJ could, in its own discretion, argue that the promotion somehow and in some way generates a byproduct of Sun "awareness." The RJ's argument fails.

V. THE RJ'S TORTIOUS BREACHES MUST BE REMEDIED THROUGH AN ORDER VACATING THE ARBITRATOR'S DENIAL OF THE SUN'S CLAIM FOR TORTIOUS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH

The Arbitrator's ruling on the Sun's tortious breach claim must be vacated and the RJ has failed to demonstrate otherwise. Despite the Arbitrator's other findings that demonstrate the RJ's tort liability, *see generally* 2 PA 35-46, the Arbitrator manifestly disregarded Nevada law by creating his own arbitrary legal standard and summarily concluding that [redacted] *Id.* at 44.

Rather than focusing on the Sun's argument and the Arbitrator's finding, the RJ asserts that no special relationship exists between the parties to support any tortious breach claim, a finding not addressed by the Arbitrator. *See* Opp'n 15-16; *see also* 2 PA 44. The RJ also argues that the Arbitrator properly denied the Sun's tort claims because it was not arbitrable and the Arbitrator lacked jurisdiction to enter an award for tort damages. Opp'n 18-19. The RJ's arguments fail, and the Arbitrator's finding on the Sun's tort claims must be vacated.

A. Substantial Evidence was Admitted to Establish the Parties' Special Relationship

The Arbitrator was presented with clear and convincing evidence that a special relationship exists between the parties in this case. *See* 2 PA at 147-150; 6 PA 1119-20. As fully briefed and demonstrated to the Arbitrator, a special relationship exists between the RJ and Sun by sheer virtue of the JOA itself—the RJ has all accounting and operational control. *See id.* The Sun is wholly reliant on the RJ for the Sun's Annual Profits Payments, for proper accounting practices, and to conduct itself in a manner that effectuates the goals of the JOA. *See id.* The 2005 JOA's delegation

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of significant financial control to the RJ creates the "superior-inferior power differential" between the parties.[1] *See K Mart Corp. v. Ponsock*, 103 Nev. 39, 49, 732 P.2d 1364, 1371 (1987) (an agreement evincing a "superior-inferior power differential" warrants tort liability), *abrogated on other grounds by Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

In addition, as a result of the 2005 JOA's creation under the Newspaper Preservation Act, the recognized public interest supports the finding of a special relationship between the parties. Such a finding is consistent with federal policy allowing the Sun, a newspaper in a trusting position, to rely on the RJ's good faith and fair dealing for the survival of both newspapers. *See* 15 U.S.C. § 1801 (declaring, "the public policy of the United States to preserve the publication of the newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into . . . ."). The RJ's attempt to support the Arbitrator's denial of the Sun's tortious breach claims on the basis that a special relationship does not exist fails as a matter of law.

B. The "Sophisticated-Businessman Exception" does Not Apply in this Case

The RJ's assertion that the sophisticated-businessman exception precludes a finding of liability, *see* Opp'n 16-17, is misplaced, for that exception is inapplicable here. *See* 2 PA 149-50; 6 PA 1119-20. The sophisticated-businessman exception is generally applicable where "agreements have been heavily negotiated and the aggrieved party was a sophisticated businessman" and when the sophisticated person argues that the contract is unconscionable or seeks to preclude the other party from exercising rights under the contract. *E.g.*, *Aluevich v. Harrah's*, 99 Nev. 215, 660 P.2d 986 (1983). Unlike the cases in which the sophisticated-businessman exception applies, the Sun is seeking to enforce the 2005 JOA. The exception does not apply here—and the Arbitrator did not find that it did.

C. Substantial Evidence was Admitted and Demonstrates the RJ's Tortious Conduct

The Sun provided substantial evidence to the Arbitrator demonstrating the ubiquitous and shameful tortious breaches by the RJ. While the RJ asserts that its significant editorial costs increases and promotional activities were mere business decisions, this contradicts the evidence

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adduced during the arbitration hearing. *See* Opp'n 17-18. The RJ's systematic tortious conduct is succinctly exemplified in the RJ's then-publisher Craig Moon's directive to the Review-Journal's accounting department to write hundreds of thousands of dollars off as debt for the specific purpose of making the Sun's payment as close to zero as possible. 10 PA 2151:5-16. That instruction was made under the RJ's owner, Sheldon Adelson's, stated desire to get rid of the Sun and break the 2005 JOA. 14 PA 3064:22-3065:23, 3071:10-16. The RJ eliminated the Sun's visible presence to the public, literally and purposefully, and in violation of the contract, even removing the Sun from the electronic replica edition, 16 PA 3572:6-3573:6, all while choosing to omit the Sun from nearly every single promotion. *See supra* (The RJ's own expert testified that the RJ has a choice to mention the Sun its promotional activities, but that the RJ chooses not to. 12 PA 2773:16-2674:15; 13 PA 2790:16-21.) Coinciding with these breaches, was the RJ's outright refusals to permit and cooperate in the Sun's requested audit. *E.g.*, 2 PA 86-121. Nothing as severe or pervasive ever occurred with the Review-Journal's previous owners. The evidence demonstrated that the RJ's conduct was "[g]rievous and perfidious misconduct," as the RJ, in a superior and entrusted position, engaged in conduct that explicitly violated the contract and the RJ lacked any reasonable contractual basis to support its conduct. *See State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 989-90, 103 P.3d 8, 19-20 (2004). Because of the overwhelming, and clear and convincing evidence admitted during the arbitration that proved the RJ perfidious and grievous misconduct, the Award must be vacated in this regard.

D. <u>The Sun's Tortious Breach Claims were Properly Compelled to Arbitration</u>

The RJ attempts to relitigate for the third time the propriety of this Court's order compelling the Sun's tortious breach claims to arbitration, contending that the parties did not "agree" to arbitrate tort claims.[14] Opp'n 18-19. This argument should be rejected for the third time. Through the Sun's claims for tortious breach, the Sun asserted that the RJ breached its duty of good faith

[14] This issue was previously before this Court through the Sun's Motion to Compel Arbitration and the RJ's Motion for Reconsideration. The Sun moved to compel arbitration on the arbitrable claims, which was heard on October 24, 2018, and the RJ argued that the arbitration provision did not include tort claims. This Court entered its order compelling arbitration on the Sun's tortious breach of the implied covenant claim on November 15, 2018. The RJ then moved for reconsideration, rearguing this issue, which this Court denied. *See* Order (Jan. 10, 2019).

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and fair dealing under the 2005 JOA with respect to its unlawful charging of editorial expenses and independent promotional activities to the joint operation EBITDA, and bad faith delays and obstruction of the Sun's audit requests (in addition to the RJ's unilateral redesign of the Front Page, and bad faith breach of the arbitration provision). *See* Compl. For the RJ's tortious acts that related to arbitrable claims, the Sun's ancillary tortious breach claims were required to be arbitrated as well. This Court was correct in finding the same, and compelling the tort claim to arbitration.

Where tort claims are inextricably tied to contract issues that are subject to an arbitration provision, those tort claims fall within the scope of arbitration clauses as well. *See, e.g.*, *Int'l Asset Mgmt., Inc. v. Holt*, 487 F. Supp. 2d 1274, 1288 (N.D. Okla. 2007); Thomas A. Oehmke, 1 Commercial Arbitration § 24:98 ("Tort claims are arbitrable where they arise out of, and relate to operations or activities under a contract which contains a broad arbitration clause."). The Nevada Supreme Court interpreted the arbitration provision in the 2005 JOA, at the RJ's predecessor's insistence, and adopted the Review-Journal's broad interpretation of the provision. The Nevada Supreme Court concluded that any disputes concerning amounts owed to the Sun, including accounting, contract interpretation, and information disputes bearing on the calculation of the amounts owed to the Sun, must be arbitrated. *See* Mot. to Compel Arbitration (citing *DR Partners v. Las Vegas Sun, Inc.*, No. 68700 (Nev. May 19, 2016)).

The Sun's claims stemming from the parties' disputes over editorial costs, promotional costs, and the audit concern "amounts owed to [the] Sun," and indeed, the Sun's tortious breach claims would not have arisen had the RJ fully complied with the 2005 JOA in these respects, and not breached the contract in a tortious manner. *Cf. Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 384 (11th Cir. 1996) (holding that the complaint itself stated that the facts constituting defaults under the agreement were critical to the other "tort claims" and none of the tort claims would have been brought if defendant had fully complied with the contract). Because the Sun's tortious breach claims are predicated on the RJ's breaches of Section 4.2 and related provisions (editorial cost dispute), Section 5.1.4 (promotional cost dispute), and the audit provision (audit dispute), which involve matters already covered by the 2005 JOA's broad arbitration provision as evaluated by the

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Nevada Supreme Court, *see DR Partners*, *supra*, the Sun's related tortious breach claims are similarly subject to arbitration. Irrespective of the claim for relief, any dispute over amounts owed to the Sun is arbitrable.

VI. THE RJ'S INCONSISTENT ARGUMENT REGARDING ATTORNEY FEES FAILS, AND AN ORDER VACATING THE ARBITRATOR'S DENIAL OF ATTORNEY FEES IS WARRANTED

With respect to whether attorney fees should be awarded, one thing should be very clear: The RJ argued for the award of attorney fees until the moment that the Sun became the prevailing party in the arbitration. Only then did the RJ's position change. The RJ should be estopped from now arguing that attorney fees are not recoverable because of its prior, diametrically inconsistent stance on attorney fees.

As described in the Sun's Motion, the plain language of Appendix D provides for attorney fees, and both the drafters of the 2005 JOA and the RJ have always interpreted it the same. *See* 2 PA 133-34; 3 PA 507-08; 6 PA 1124; 6 PA 1180-81; *see also* 17 PA 3930-32. Before the RJ lost in arbitration, the RJ expressly prayed for an award attorney fees and costs in defense of the matter. *See* Ans. to Compl. 29 (filed Dec. 14, 2018). In lieu of filing an Answering Statement in Arbitration, the RJ submitted its Answer to the Sun's Complaint. *Id.* The RJ's request for attorney fees, along with the Sun's like request, was before the Arbitrator.

The parties' joint interpretation that attorney fees were recoverable in arbitration pursuant to the 2005 JOA is not new. All parties to the 2005 JOA have consistently interpreted the agreement as authorizing an award of attorney fees and costs. This was undisputed by the drafting parties to the 2005 JOA. Both the Sun's and the Review-Journal's prior owner's requests for attorney fees were pending before the arbitrator in the prior arbitration conducted in 2016. In that arbitration, at the close of the hearing, the arbitrator stated that attorney fees were going to be awarded if he were to render a decision:

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[redacted]

Ex. 6 at 433:6-16; *see also id.* at 14:19-23 [redacted] Shortly after this statement was made, the parties settled that action.

The RJ only now supports the Arbitrator's erroneous interpretation that the 2005 JOA does not allow for an award of attorney fees. The RJ should be equitably estopped from arguing otherwise for the sole reason that its loss has now come to fruition. *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))).

Notwithstanding the RJ's newfound, situational interpretation of the attorney fee provision, common sense and logic reveal the absurdity of the RJ's new interpretation. There is no dispute that the RJ is in complete control over all non-editorial functions of the joint operation, which includes total control over the Newspaper promotions, and the joint operation accounting and the EBITDA calculation, and therefore the Sun's profits payments. And the Sun has only two mechanisms available to it that checks the RJ's conduct. It may audit the RJ's books and records to ensure that the RJ is complying with the 2005 JOA, and it may initiate a lawsuit against the RJ. Therefore, when the RJ fails to participate and cooperate in the Sun's requested audit, or refuses to abide by the plain meaning of the 2005 JOA and abuses the Sun through its unreasonable and

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oppressive conduct, the Sun is required to sue the RJ. The Sun is then forced to incur millions of dollars in legal fees.

As stated in the Sun's Motion, for years the Sun has been litigating these issues with the RJ, while the RJ has delayed, hindered, and obstructed the Sun's rights and attempts to enforce its rights under the 2005 JOA. It is implausible and absurd to interpret the fee provision in the 2005 JOA to disallow an attorney fee award where the Sun prevails in these actions. The result of this interpretation: the Sun is required to lose money in order to enforce its rights under the contract, and suffer a loss even when successful in doing so. Mot. 27. In other words, RJ could use its near-complete control over the joint operation and financial power to breach the 2005 JOA, where the Sun's limited recourse still causes the Sun to suffer additional financial harm. *See id.* Such a result defies the 2005 JOA and the parties' expressed intentions. The JOA must be given a reasonable meaning, and the Arbitrator was required to "endeavor to give a construction most equitable to the parties and which will not give one of them an unfair or unreasonable advantage over the other."[15] *See, e.g.*, 11 Williston on Contracts § 32:11 (4th ed); *Canton Ins. Office v. Woodside*, 90 F. 301, 303-04 (9th Cir. 2019).

The RJ cannot reconcile the absurdity and harsh result stemming from its ever-changing argument that attorney fees are not recoverable in arbitration when it is convenient for the RJ. The Arbitrator's finding that the 2005 JOA does not authorize an award of attorney fees must be vacated as a result.

VII. THE OMITTED AUDIT BREACH FINDING MUST BE VACATED

The RJ incorrectly argues that the Sun did not seek audit-related relief. Opp'n 21. In its Complaint, the Sun requested and prayed for such relief. *See, e.g.*, Compl. ¶¶ 201-11 (Apr. 10, 2018). Following hearings on the Sun's Motion to Compel Arbitration and the RJ's subsequent Motion for Reconsideration, the claims compelled to arbitration included the Sun's Sixth Claim for Relief (Breach of Contract-Audit). *See, e.g.*, Order (Jan. 15, 2019). The Arbitration Award itself

[15] The parties' previously proffered interpretation of the attorney fee provision is fair to both parties of the 2005 JOA, as it incentivizes the RJ to comply with the terms of the JOA and allows the RJ to recover its fees where the RJ prevails.

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provides [redacted]

2 PA 36.

In line with the Sun's requested relief, the Arbitrator heard evidence regarding this claim. The Sun's COO testified about the Sun's frequent and repeated attempts to audit the books and records as permitted under the 2005 JOA. 16 PA 3577-3579:22. For example, Mr. Cauthorn described how the RJ delayed, hindered, and refused the Sun's audit requests. *See id*. In closing, the Sun described how the Sun has been damaged by the RJ's breaches. 17 PA 3892. The Sun addressed its requested relief in its post-hearing brief. *See* 6 PA 1118.

The Sun's request for an order vacating or correcting or modifying the Award on this issue is not an untimely request to modify or correct the Arbitrator's ruling, as the RJ claims. *See* Opp'n 21. The Sun's request to this Court seeks to correct substantive errors, not simply modification or corrections that are allowed under the AAA rules or NRS Chapter 38. The American Arbitration Association Commercial Rule R-50 is limited and pertains only to those minor errors in the award, which strictly consist of "clerical, typographical, or computational errors."[16] Nevada's statutes reiterate the same. *See* NRS 38.242(1) (entitled, "Modification or correction of award," and providing that the court shall modify or correct the award if there was "an evidence mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award," the arbitrator "made an award on a claim not submitted to the arbitrator," or the award is "imperfect in a matter of form not affecting the merits of the decision on the claims submitted"). The Arbitrator's error in providing factual findings indicative of the RJ's breach of the audit provision, but failing to rule on the Sun's claim for breach of contract, exceeds the types of corrections properly submitted through a motion to modify or correct the award.

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[16] *Available at* https://www.adr.org/sites/default/files/Commercial%20Rules.pdf (last visited Oct. 11, 2019).

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VIII. THE RJ'S CONDITIONAL COUNTERMOTION LACKS MERIT

The RJ's conditional countermotion asking for alternative relief is inconsistent with its Motion to Vacate Arbitration Award and its opposition here. *E.g.*, *compare* Opp'n 22 *with* Defs.' Mot. to Vacate Arbitration Award. The Sun disagrees with the RJ's request, and to the extent this Court considers the RJ's conclusory countermotion, the Sun incorporates its arguments made above and those made in the Sun's Opposition to Defendants' Motion to Vacate Arbitration Award.

IX. CONCLUSION

For the reasons stated above and as set forth its Motion, the Sun asks this Court to confirm the Arbitration Award, in part, and vacate the Arbitration Award, in part.

DATED this 11th day of October, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ E. Leif Reid*

E. LEIF REID, Bar No. 5750
KRISTEN L. MARTINI, Bar No. 11272
NICOLE SCOTT, Bar No. 13757
One East Liberty Street, Suite 300
Reno, NV 89501-2128

JAMES J. PISANELLI, ESQ., BAR NO. 4027
TODD L. BICE, ESQ., BAR NO. 4534
JORDAN T. SMITH, ESQ., BAR NO. 12097
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Plaintiff

One East Liberty Street, Suite 300
Reno, NV 89501-2128
Lewis Roca ROTHGERBER CHRISTIE

DECLARATION OF E. LEIF REID IN SUPPORT OF PLAINTIFF'S REPLY TO DEFENDANTS' NEWS+MEDIA CAPITAL GROUP LLC AND LAS VEGAS REVIEW JOURNAL, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO CONFIRM ARBITRATION AWARD, IN PART, AND TO VACATE OR, ALTERNATIVELY, MODIFY OR CORRECT THE AWARD, IN PART AND DEFENDANTS' CONDITIONAL COUNTERMOTION TO CONFIRM ARBITRATION AWARD, IN PART, AND TO VACATE THE AWARD, IN PART

I, E. LEIF REID, declare under penalty of perjury and based on personal knowledge that:

1. I am an attorney at Lewis Roca Rothgerber Christie LLP, and am counsel of record for Plaintiff Las Vegas Sun, Inc. (the "Sun"). This declaration is filed in support of the Sun's Reply to Defendants' News+Media Capital Group LLC and Las Vegas Review Journal, Inc.'s Opposition to Plaintiff's Motion to Confirm Arbitration Award, in part, and to Vacate or, Alternatively, Modify or Correct the Award, in part and Defendants' Conditional Countermotion to Confirm Arbitration Award, in part, and to Vacate the Award, in part ("Reply"). I have personal knowledge of the matters discussed herein and if called upon to do so, I am able to competently testify as to all of these matters.

2. Attached as **Exhibit 1** to the Sun's Reply is a true and correct copy of a circular ad published by the Las Vegas Review-Journal.

3. Attached as **Exhibit 2** to the Sun's Reply are true and correct copies of examples of large house ads published by the Las Vegas Review-Journal.

4. Attached as **Exhibit 3** to the Sun's Reply is a true and correct copy of email correspondence dated February 26, 2019, from Lance Tanaka confirming discovery deadlines, and is filed concurrently under seal.

5. Attached as **Exhibit 4** to the Sun's Reply is a true and correct copy of email correspondence dated March 22, 2019, from Douglass Mitchell transmitting "RJ Production 08," and is filed concurrently under seal.

6. Attached as **Exhibit 5** to the Sun's Reply is a true and correct copy of the American Arbitration Association Preliminary Hearing Record and Order March 26, 2019, and is filed concurrently under seal.

One East Liberty Street, Suite 300
Reno, NV 89501-2128
Lewis Roca ROTHGERBER CHRISTIE

7. Attached as **Exhibit 6** to the Sun's Reply is a true and correct copy of excerpts from the October 4, 2016, Transcript of Proceedings, Volume 2, in AAA Case No. 01-16-0001-9187, and is filed concurrently under seal.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of October, 2019.

/s/ E. Leif Reid
E. Leif Reid, Esq.

One East Liberty Street, Suite 300
Reno, NV 89501-2128
Lewis Roca ROTHGERBER CHRISTIE

CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Civil Procedure 5(b), I certify that I am an employee of LEWIS ROCA ROTHGERBER CHRISTIE LLP, and that on this date, I caused the foregoing **PLAINTIFF'S REPLY TO DEFENDANTS' NEWS+MEDIA CAPITAL GROUP LLC AND LAS VEGAS REVIEW JOURNAL, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO CONFIRM ARBITRATION AWARD, IN PART, AND TO VACATE OR, ALTERNATIVELY, MODIFY OR CORRECT THE AWARD, IN PART AND DEFENDANTS' CONDITIONAL COUNTERMOTION TO CONFIRM ARBITRATION AWARD, IN PART, AND TO VACATE THE AWARD, IN PART [REDACTED]** to be served by electronically filing the foregoing with the Odyssey electronic filing system, which will send notice of electronic filing to the following:

Steve Morris, Esq., SBN 1543
Akke Levin, Esq., SBN 9102
MORRIS LAW GROUP
411 E. Bonneville Ave., Ste. 360
Las Vegas, Nevada 89101

J. Randall Jones, Esq., SBN 1927
Michael J. Gayan, Esq., SBN 11135
Monah Kaveh, Esq., SBN 11825
KEMP, JONES & COULTHARD, LLP
3880 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

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

DATED this 11th day of October, 2019.

/s/ Autumn D. McDannald
Employee of Lewis Roca Rothgerber Christie LLP

One East Liberty Street, Suite 300
Reno, NV 89501-2128
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EXHIBIT LIST

EXHIBIT NO.	DESCRIPTION	NO. OF PAGES
1	Circular Ad published by Las Vegas Review-Journal	1
2	Examples of large house ads published by Las Vegas Review-Journal	19
3	Email correspondence dated February 26, 2019, confirming discovery deadlines (FILED UNDER SEAL)	2
4	Email correspondence dated March 22, 2019, transmitting "RJ Production 08" (FILED UNDER SEAL)	2
5	American Arbitration Association Preliminary Hearing Record and Order March 26, 2019 (FILED UNDER SEAL)	2
6	Excerpts from October 4, 2016, Transcript of Proceedings, Volume 2, AAA Case No. 01-16-0001-9187 (FILED UNDER SEAL)	12

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