IN THE SUPREME COURT OF THE STATE OF NEVADA

DR PARTNERS, a Nevada General Partnership, D/B/A STEPHENS MEDIA GROUP,

Appellant,

vs.

LAS VEGAS SUN, INC., a Nevada Corporation,

Respondent.

Case No. 68700

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable ELIZABETH GONZALEZ, District Judge
District Court Case No. A715008

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

1. Respondent Las Vegas Sun, Inc., is owned entirely by Greenspun Media Group.

2. Greenspun Media Group is owned by three members of the Brian and Myra Greenspun family or their family Trusts.

3. Las Vegas Sun, Inc., is neither publicly owned nor traded.

4. Las Vegas Sun, Inc., was represented in the underlying district court proceedings by E. Leif Reid, Esq., and Kristen L. Martini, Esq., of Lewis Roca Rothgerber LLP, and John T. Moran, Esq., and Jeffrey A. Bendavid, Esq., of Moran Brandon Bendavid Moran.

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5. Las Vegas Sun, Inc., is represented by the same counsel in this appeal.

DATED this 20th day of October, 2015.

LEWIS ROCA ROTHGERBER LLP

BY: _____

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INTRODUCTION

This case involves a single declaratory relief claim regarding the disputed interpretation of a sentence in a contractual provision. The contractual provision is Section 4.2 of the parties' 2005 Amended and Restated [Joint Operating] Agreement (the "2005 JOA"). In 2005, the parties specifically amended Section 4.2 (among other provisions) to require that each party "bear their own editorial costs." While Appellant DR Partners repeatedly—and self-servingly—categorizes the parties' disagreement as one which demands a complex accounting and audit pursuant to the arbitration provision contained in Appendix D of the 2005 JOA, this categorization is simply inaccurate. Respondent Las Vegas Sun, Inc. (the "Sun"), has asked for nothing more than a judicial declaration of what Section 4.2 means.

The arbitration provision contained in the parties' 2005 JOA is extremely narrow and this dispute falls outside of its limited scope. The dispute presented in the Sun's First Amended Complaint neither seeks a monetary award from the district court, nor presents a financial dispute requiring that the district court engage in any accounting analysis whatsoever.

DR Partners ignores both the substance of the Sun's First Amended Complaint, and the qualifying language riddled throughout the arbitration provision contained in Appendix D. With these intentional, incomplete readings, DR Partners continues to maintain that the Sun's First Amended Complaint seeks a judicial accounting and calculation of EBITDA, and the arbitration provision is far-reaching and all-encompassing. Both readings lack support from the express language of the Sun's operative pleading and the parties' contract, and controlling caselaw. The district court made no mistake in rejecting the arguments that DR Partners presents to this Court. The dispute presented in the underlying action is not arbitrable.

STATEMENT OF THE ISSUES PRESENTED

Whether the district court erred by concluding that the sole issue presented in the Sun's First Amended Complaint, the requested judicial declaration of the meaning of Section 4.2 of the 2005 JOA, was not subject to the limited arbitration provision contained in Appendix D of the 2005 JOA.

STATEMENT OF THE CASE

The parties' contractual rights and obligations at the heart of the underlying dispute were born from the Newspaper Preservation Act of 1970, codified in 15 U.S.C. sections 1801 through 1804 (the "Act"). *See generally* 1 Appellant's App. ("AA") 177-78.[1] The Act authorizes the formation of joint operating agreements among competing newspaper operations within the same market area. 15 U.S.C. § 1803. Allowing the survival of multiple daily newspapers in a given urban market where circulation was declining, and protecting at least one of the newspapers in that market from ceasing operations altogether, was the Act's purpose.[2] In line with the purpose of the Act, in 1989 the parties entered into a joint operating agreement. *See* 1 AA 177-220. The 1989 agreement ensured that

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[1] DR Partners states that it was unable to agree to the contents of a joint appendix with the Sun that would conform to the "brevity admonition of NRAP 30(b)." Appellant's Opening Br. n1. It should be noted that the filings that DR Partners refused to include were those ancillary to, and necessary to complete the briefing for, the motions that DR Partners insisted on including in its appendices; specifically, the Sun's opposition to DR Partners' motion to stay, DR Partners' opposition to the Sun's motion for summary judgment, with declarations, and the Sun's reply in support of motion for summary judgment. To complete the record presented to this Court through DR Partners' appendices, the Sun has included these related filings (consisting of a mere 65 pages) in Respondent's Appendix, for this Court's convenience. *See* 1 Respondent's App. 001-65.

[2] *See, e.g., Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1086 n.3 (10th Cir. 2003) ("In order to preserve multiple editorial voices in a given market and assist financially distressed newspapers, Congress encouraged the formation of [joint operating agreements] by giving them a limited exception to the antitrust laws."); *Hearst Communications, Inc. v. Seattle Times Co.*, 115 P.3d 262, 271 (Wash. 2005) ("There is a clear national policy that supports maintenance of two newspapers as long as one of the newspapers is 'failing' at the time that the attorney general approves of the joint agreement.").

the *Las Vegas Sun* would be in existence and published in the Las Vegas, Nevada, metropolitan area until at least 2040. *Id.* at 180.

In 2005, the parties amended and restated their 1989 agreement, resulting in the 2005 JOA. 1 AA 222-46. Towards the end of 2014, a dispute arose between the parties regarding the meaning and interpretation of Section 4.2 of the 2005 JOA.

On March 10, 2015, the Sun filed a Complaint for Specific Performance and Declaratory Relief, which presented the district court with the parties' disputed interpretation of Section 4.2. *See* 1 AA 001-80. Specifically, the Sun detailed DR Partners' deliberate refusal to abide by what the Sun contends is the plain meaning of Section 4.2. *Id.* at 004. In presenting the dispute to the district court, the Sun explained DR Partners' position and actions taken consistent with DR Partners' flawed interpretation of Section 4.2, *i.e.*, that it has charged the *Las Vegas Review-Journal*'s editorial costs against the joint operating expenses of the 2005 JOA. *Id.* To further frame the dispute for the district court, the Sun explained the wide-sweeping effect of DR Partners' violation of Section 4.2; that is, an improper decrease to the EBITDA calculation, the further consequence of which was a substantial depletion to the Sun's Annual Profit Payments. *Id.* These effects threatened the existence of the Sun, which the Act specifically sought to avoid.

Due to the parties' conflicting interpretations of Section 4.2, the Sun requested, through its Complaint, a judicial declaration as to the meaning of Section 4.2. 1 AA 005. In accordance with the express provision of Section 10.8 of the 2005 JOA,[3] the Sun also sought specific performance of the material

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[3] Section 10.8 of the 2005 JOA reads:

> Specific Performance. Because of the public interest in maintaining editorially and reportorially independent and

(continued)

provision set forth in Section 4.2. *Id.* at 006. Importantly, the Sun's Complaint was devoid of any request for a monetary award. *See generally id.* at 001-07.

Instead of filing a responsive pleading, DR Partners filed a Motion to Compel Arbitration on April 1, 2015, arguing as it does now "[t]hat this is a financial dispute." *See* 1 AA 081-89. The Sun opposed DR Partners' Motion to Compel Arbitration on April 20, 2015. *See id.* at 090-102.

The district court heard argument on DR Partners' Motion to Compel Arbitration on May 19, 2015, wherein DR Partners, again, argued that the dispute required a complex accounting. 1 AA 117-34.

At the conclusion of the hearing, the district court granted DR Partners' Motion to Compel Arbitration on the ground that the Complaint, as currently drafted, "resolves around the calculation of EBITDA." 1 AA 132; *see also id.* at 149-50. Like DR Partners raises now, the district court, too, focused on paragraph 27 of the Sun's original Complaint in so holding. *Id.* at 149. However, the district court then added that the Sun was free to seek leave to amend its Complaint. *Id.* at 132-33.

On May 26, 2015, the Sun sought leave to amend its Complaint. 1 AA 135-148. The Sun proposed to file its First Amended Complaint, which was "narrowly drafted so that it [wa]s clear that only the declaratory judgment to which the Sun is entitled, and not any dispute as to amounts that may be owing pursuant to the calculation set forth in Appendix D of the JOA," was presented to the district court

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> competitive newspapers in Las Vegas and its environs, and because of the inadequacy of damages in the event of default in the performance of material obligations hereunder, each party shall have the right to seek specific performance of the material provisions of this Restated Agreement . . . .

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for resolution. *Id.* at 140; *see generally id.* at 144-48. Again, "[n]owhere in the Sun's prayer for relief d[id] the Sun request monetary damages." *Id.*

DR Partners opposed the Sun's request (filing its opposition one day before the scheduled hearing), contending that the proposed amendment was futile. *See generally* 1 AA 151-58.

On June 4, 2015, the district court heard argument on the Sun's Motion for Leave to File First Amended Complaint. *See* 1 AA 159-67. The district court rejected DR Partners' position and granted the Sun's motion for leave to amend its Complaint. *Id.* at 165, 168-69. The district court concluded that "the justiciable controversy is a declaration as to the meaning of paragraph 4.2. For that reason, the [c]ourt will make a decision related to the declaration of that." *Id.* at 165. In its subsequent written order, the district court held,

> Here, allowing Plaintiff Las Vegas Sun, Inc., to file its First Amended Complaint would not be futile. The proposed First Amended Complaint sets forth a controversy as to the meaning of Section 4.2 of the parties' Amended and Restated Joint Operating Agreement [ ]. Plaintiff Las Vegas Sun, Inc.'s, claim for declaratory relief alleged in its proposed First Amended Complaint does not implicate the arbitration provision contained in Appendix D of the JOA.

Id. at 169.

On June 22, 2015, the Sun filed its First Amended Complaint. *See* 1 AA 170-246. The First Amended Complaint presented a single claim for declaratory relief. *See id.* at 173. The claim for declaratory relief concerned a basic issue of contract interpretation. *Id.* The Sun alleged, "A justiciable controversy exists between Plaintiff and Defendant as to the meaning and interpretation of Section 4.2

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1 AA 062-63.

and the obligations it places upon the Parties' performance under the 2005 Amended JOA." *Id.* Again, the Sun did not request monetary relief. *See generally id.* at 170-74.

On July 10, 2015, DR Partners filed its Renewed Motion to Compel Arbitration ("Renewed Motion"), from which the instant appeal stems. 2 AA 247-57. DR Partners reargued that the Sun's First Amended Complaint sought for the district "[c]ourt to declare, as a matter of law, that [the Sun] has been underpaid several million dollars in annual profits since 2005," presenting a near word-for-word parallel of its initial motion to compel arbitration. *Id.* at 249; *compare id.* at 247-57 *with* 1 AA 081-89. Again, DR Partners categorized the underlying dispute as "a computation dispute," 2 AA 249, which the district court could not declare the parties' rights or obligations to "without considering Appendix D and engaging in an accounting analysis." *Id.* at 253; *see also id.* at 254 ("The Court cannot determine the Sun's rights under the JOA without engaging in a comprehensive accounting analysis under Appendix D.").

The same day as DR Partners' filing, the Sun filed its motion for summary judgment on its declaratory relief claim.[4] *See* 2 AA 257-67. The district court scheduled the briefing and hearings on both DR Partners' and the Sun's motions for the same dates.

On July 17, 2015, DR Partners filed a motion to stay the proceedings.[5] *See* 2 AA 268-77.

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[4] This filing was made in accordance with the district court's directed briefing timeline. *See* 1 AA 165-66.

[5] DR Partners' request sought a stay of the filing of its opposition to, and the hearing on, the Sun's motion for summary judgment until the district court decided DR Partners' Renewed Motion. *See* 2 AA 268- 75. Notably, in its stay request, DR Partners argued—for the second time—that the dispute raised in the Sun's

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The Sun opposed DR Partners' request for a stay on July 22, 2015. Respondent's App. ("RA") 001-11.

DR Partners' motion to stay was heard by the district court on July 23, 2015. 2 AA 276-82. Knowing that DR Partners would appeal the district court's determination that the dispute presented in the Sun's First Amended Complaint was not arbitrable, the district court elected to continue the summary judgment hearing by one week, while maintaining the current briefing deadlines. *Id.* at 277-78, 280. The district court admonished DR Partners that it needed to file its opposition to the Sun's motion for summary judgment and "say what [its] position [wa]s," cautioning, "And [it] can't take two positions and talk out of both sides of [its] mouth depending on how [the court were to] rule on the motion to compel." *Id.* at 280-81.

On July 29, 2015, DR Partners filed its opposition to the Sun's motion for summary judgment. RA 012-30; *see also id.* at 031-37 (declarations filed in support of DR Partners' opposition to motion for summary judgment). That same day (in line with the district court's briefing schedule), the Sun filed its opposition to DR Partners' Renewed Motion. 2 AA 284-94.

On August 11, 2015, both the Sun and DR Partners filed their replies in support of their respective motion for summary judgment and Renewed Motion. *See* RA 038-65; 2 AA 295-304.

The hearing on DR Partners' Renewed Motion occurred on August 18, 2015. *See* 2 AA 305-12. The district court properly denied DR Partners' Renewed Motion. *Id.* at 310-11, 313-14. In its denial, the district court held that the "determination that the dec[laratory] relief claim as stated in the first amended

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First Amended Complaint was arbitrable under Appendix D of the 2005 JOA. *Id.* at 273-74.

complaint does not invoke the arbitration provision remains." *Id.* The Notice of Entry of Order Denying Renewed Motion to Compel Arbitration and Staying Proceedings was entered on August 19, 2015. *See id.* at 315-20.

DR Partners filed its Notice of Appeal from the district court's denial of its Renewed Motion on August 21, 2015. 2 AA 321-23. The Sun's motion for summary judgment remains fully briefed and ready for decision in the underlying action.

STATEMENT OF THE FACTS

In June 1989, the Sun and DR Partners' predecessor-in-interest, Donrey of Nevada, Inc., entered into a joint operating agreement (the "1989 JOA"). *See generally* 1 AA 177-220. The parties entered into the 1989 JOA in accordance with the Newspaper Preservation Act of 1970. *See id.* at 177-80.

Pursuant to the 1989 JOA, together the parties operated separate daily news publications. *See generally* 1 AA 177-220. The 1989 JOA specifically discussed how the parties were to share and allocate the news and editorial costs related to their separate news operations. *Id.* at 186 § 4.2. Under Section 4.2 of the 1989 JOA, entitled "News and Editorial Allocations," both parties' news and editorial expenses were explicitly-approved deductions from the parties' joint operations. *Id.* Section 4.2 of the 1989 JOA reads as follows:

> 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 expenses.

Id. (emphasis added). Under this 1989 version of Section 4.2, the Sun was allocated a minimum amount of funds for editorial expenses and compensated on a monthly basis for its editorial costs. *See id.* at 209 § A.1.

In 2005, the Sun and DR Partners (as Donrey of Nevada, Inc.'s, successor-in-interest) renegotiated, amended, and restated their 1989 agreement. *See generally* 1 AA 222-46. They did so in the form of the 2005 JOA. *See generally id.* While the parties to the 1989 JOA had previously shared news and editorial expenses in accordance with the allocation formula set forth in Appendix A, Section A.1., the Sun and DR Partners changed that provision, and several related provisions, during their 2005 amendment: they agreed in the 2005 JOA that each party would bear its own editorial costs. *Compare id.* at 186 § 4.2 *with id.* at 223 § 4.2.

Section 4.2 was changed in the 2005 JOA to read as follows:

> News and Editorial Allocations. The Review-Journal and the Sun shall each bear their own respective editorial costs and shall establish whatever budgets each deems appropriate.

1 AA 223 (second emphasis added). In conformance with this amended Section 4.2, every other reference to the parties' previous method of sharing editorial costs, and reference to those costs as a joint expense before EBITDA was calculated, was deleted from the parties' amended and restated agreement. *Compare id.* at 177-220 *with id.* at 222-46. The parties began disputing their editorial-cost obligations under Section 4.2 in late 2014.

Unable to resolve the dispute, DR Partners took the position that Appendix D of the 2005 JOA, concerning the Sun's Annual Profits Payments as referenced in Article 7 of the 2005 JOA,[6] governed the parties' dispute, and that arbitration was required. *See* 1 AA 140. The Sun disagreed.

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[6] Article 7 of the 2005 JOA is entitled, "Payment," and reads, "During the term of this Restated Agreement, DR [Partners] and the Sun shall receive the amounts set forth in Appendix D."

Appendix D of the 2005 JOA discusses the payment calculations for the Sun's Annual Profits Payments, including the EBITDA calculation and the Sun's yearly audit rights. 1 AA 242-45. The arbitration provision contained in Appendix D of the 2005 JOA, in full context, reads:

> The Sun shall have the right, exercisable not more than once every twelve months and after providing written notification no less than thirty days prior thereto, to appoint a certified public accounting firm or law firm as the Sun's representative to examine and audit the books and records of the Review-Journal and other publications whose earnings are included in EBITDA for purposes of verifying the determinations of the changes to the Annual Profit Payments. . . . If as a result of such audit, there is a dispute between the Sun and Review-Journal as to amounts owed to Sun and they are not able to resolve the dispute within 30 days, they shall select a certified public accountant to arbitrate the dispute. The arbitration shall be conducted according to the commercial arbitration rules of the American Arbitration Association, including such rules for the selection of a single arbitrator if Sun and Review-Journal are not able to agree upon an arbitrator. . . . The arbitrator shall make an award to Sun in the amount of the arrearage, if any, found to exist, together with interest thereon from the date any arrearage was due until paid at the corporate prime rate as quoted by the Wall Street Journal on the first business day of each month. The arbitrator shall also make an award of fees and costs among the parties in a manner determined by the arbitrator to be reasonable in light of the positions asserted and the determination made.

Id. at 243-44.

After failed discussions to resolve the dispute, the Sun initiated the underlying declaratory relief action on March 10, 2015. *See generally* 1 AA 001-78.

On June 22, 2015, the Sun filed its First Amended Complaint, which contained one claim for relief for declaratory judgment. *See* 1 AA 170-246. The Sun alleged that "[a] justiciable controversy exists between Plaintiff and Defendant to the meaning and interpretation of Section 4.2 and the obligations it places upon the Parties' performance under the 2005 Amended JOA." *Id.* at 173. Accordingly, the Sun continued,

> Plaintiff is entitled to a Declaratory Judgment determining the rights, interests, and obligations of Plaintiff as to these justiciable controversies concerning the terms and conditions of the 2005 Amended JOA, and in particular, whether Section 4.2 of the 2005 Amended JOA requires Plaintiff and Defendant to bear their respective editorial costs.

Id.

The Sun's prayer for relief simply requested "[a] Declaratory Judgment in the manner permitted by NRS 30.040(1) determining and declaring Plaintiff's rights, status, and legal relations under the 2005 Amended JOA as alleged and requested above." 1 AA 174. The Sun also prayed for an award of its costs of suit, including reasonable attorney's fees, and made the catch-all request for an order granting such other and further equitable relief that the district court deemed just and appropriate. *Id.* Nowhere did the Sun request a monetary award. *See generally id.*

Upon the district court's denial of DR Partners' Renewed Motion, this appeal followed. *See* 2 AA 313-20.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's denial of a motion to compel arbitration de novo. *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990).

SUMMARY OF ARGUMENT

Upon employing basic principles of contract interpretation, it is clear that the arbitration provision contained in Appendix D of the 2005 JOA is narrow and particularly limited to factual accounting disputes resulting from and revealed by the Sun's audit procedures specified therein. The certified public accountant-arbitrator's limited authority to make only monetary awards in the form of (1) amounts owed to the Sun as arrearages, and (2) the fees and costs associated with the arbitration, further evidences the parties' intention. The plain language of the arbitration provision establishes that the underlying dispute raised in the Sun's First Amended Complaint is not arbitrable.

With respect to DR Partners' classification of the instant dispute as being an accounting disagreement, this classification is incorrect. The underlying declaratory judgment dispute presents a single issue of contract interpretation regarding the meaning of Section 4.2. No accounting analysis is necessary for the district court to render a judicial declaration on this issue of law. DR Partners' argument otherwise is disproven by a basic reading of the Sun's First Amended Complaint.

DR Partners' additional challenge to the district court's grant of the Sun's motion for leave to amend its Complaint and reliance on the Sun's original Complaint to frame the underlying dispute for this Court are improper. DR Partners has not and cannot appeal the district court's Order granting the Sun leave to file its First Amended Complaint, as that order is a nonappealable Order. And,

the Sun's First Amended Complaint supersedes the original Complaint, thereby rendering the original pleading nonexistent and totally obsolete.

Finally, any argument that DR Partners makes concerning the inequity or inconvenience associated with the district court first issuing a judicial declaration regarding the meaning of Section 4.2, and then the parties subsequently participating in an accounting arbitration is meritless. The law is clear that the parties can only be compelled to arbitrate disputes which they have contractually agreed to so submit. Moreover, the district court's declaration as to the meaning of Section 4.2 and a subsequent audit by the Sun may render an accounting arbitration moot.

For these reasons, the district court did not err by denying DR Partners' Renewed Motion.

ARGUMENT

Whether a dispute is subject to arbitration is an issue of contract interpretation. *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990). Because the arbitration provision at issue in this case is a product of the 2005 JOA, "its legal basis depends entirely upon th[at] particular contract," as agreed to by the parties. *See City of Reno v. IAFF, Local 731*, 130 Nev. Adv. Op. 100, ___, 340 P.3d 589, 593 (Dec. 31, 2014) (internal quotations and citation omitted). When interpreting a contractual provision such as the arbitration provision contained in Appendix D of the 2005 JOA, this Court has stated that it will construe the provision from the written language, as a whole, and enforce it as written. *See State ex rel. Masto v. Second Judicial Dist. Ct.*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009).

Although public policy favors arbitration, arbitration provisions "'must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.'" *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev.

629, 634, 189 P.3d 656, 660 (2008) (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)). Indeed, as this Court more recently reiterated, "'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *City of Reno*, 130 Nev. Adv. Op. at ___, 340 P.3d at 593 (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)). Simply put, the existence of an arbitration provision in a contract does not mean that every dispute between the contracting parties is arbitrable.

Despite DR Partners' argument otherwise, the instant dispute is not arbitrable. *See generally* Appellant's Opening Br. ("AOB"). As the district court correctly concluded (more than once, in fact), the underlying dispute is not subject to the arbitration provision contained in Appendix D of the 2005 JOA. DR Partners asserts that the arbitration provision of Appendix D is exceedingly broad and covers "any" and all disputes concerning the Sun's compensation. *Id.* at 12. However, as explained further below, the arbitration provision at issue in this case is not so broad, and the dispute presented in the Sun's First Amended Complaint does not fall within its scope. DR Partners' arguments are unavailing. For these reasons, the district did not err by concluding that the underlying dispute is not subject to arbitration.

I. THIS DISPUTE IS NOT ARBITRABLE.

In DR Partners' view, the arbitration provision contained in Appendix D of the 2005 JOA is far-reaching. AOB 12-15. According to DR Partners, the arbitration provision covers any unresolved dispute about the Sun's compensation, including issues of contract interpretation—not merely factual accounting disputes. *Id.* DR Partners further argues that the meaning of Section 4.2 cannot be construed without a comprehensive accounting analysis regarding the Sun's compensation. *Id.* at 15-18. DR Partners' arguments are meritless as

evidenced by a plain reading of the arbitration provision itself, and the employ of controlling rules of contract interpretation.

A. The Arbitration Provision is Limited to Factual, Accounting Disputes.

Unlike many broad, all-encompassing arbitration provisions, the arbitration provision at issue in this case contains several qualifications and limitations. While DR Partners has taken a liking to omitting significant language from its recitation of the arbitration provision contained in Appendix D, *compare* AOB 12 *with* 1 AA 242-43, the arbitration provision at issue in this case—in its near entirety—provides as follows:

> The Sun shall have the right, exercisable not more than once every twelve months and after providing written notification no less than thirty days prior thereto, to appoint a certified public accounting firm or law firm as the Sun's representative to examine and audit the books and records of the Review-Journal and other publications whose earnings are included in EBITDA for purposes of verifying the determinations of the changes to the Annual Profit Payments. . . . **If as a result of such audit, there is a dispute between the Sun and Review-Journal as to amounts owed to Sun** and they are not able to resolve the dispute within 30 days, they shall select a certified public accountant to arbitrate the dispute. The arbitration shall be conducted according to the commercial arbitration rules of the American Arbitration Association, including such rules for the selection of a single arbitrator if Sun and Review-Journal are not able to agree upon an arbitrator. . . . **The arbitrator shall make an award to Sun in the amount of the arrearage, if any, found to exist, together with interest** thereon from the date any arrearage was due until paid at the corporate prime rate as quoted by the Wall Street Journal on the first business day of each month. **The arbitrator shall also make an award of**

> **fees and costs among the parties** in a manner determined by the arbitrator to be reasonable in light of the positions asserted and the determination made.

1 AA 243-44 (emphasis added).

Based on the plain language of this provision, it is clear that the arbitration process was intended by the parties to be contingent on the Sun first auditing the *Las Vegas Review-Journal*'s books and records through its certified public accountant to verify any changes to the Sun's Annual Profit Payment, and then disputing those changes and the amounts owed to the Sun. *See* 1 AA 243-44. The arbitration provision precisely states that arbitration is required for accounting disputes that arise from a formal audit of the *Las Vegas Review-Journal*'s books and records **and** the dispute of which concerns the amounts owed the Sun. This language is conclusive: it frames the precise kinds of disputes that trigger arbitration under the agreement. Simply because DR Partners elects to ignore this important language does not nullify its existence or meaning.[7]

1. The Arbitrator's Authority is Specifically Limited.

In line with this limitation in the arbitration provision, subsequent portions of that same provision continue on to restrict the arbitrator's authority. *See* 1 AA 244. More particularly, after providing for the rules governing the arbitration process, the parties expressly spelled out what the arbitrator is capable of doing. *Id.* The parties provided that the arbitrator may make two types of monetary awards: (1) a monetary award to the Sun in the amount of arrearage, if any, plus

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[7] The Sun anticipates that DR Partners will again suggest that an arbitrator—not a court—must decide if a condition precedent to arbitrability has been fulfilled. *See* 2 AA 107-08. Yet DR Partners' argument does nothing to change the plain language of the arbitration provision, which evidences the parties' intent was to limit its scope.

interest; and (2) a monetary award among the parties for fees and costs. *Id.* The "very reasonable maxim" *expressio unius est exclusio alterius* (the expression of one thing excludes the other) instructs that the parties' expression of these two forms of monetary relief that the arbitrator may award excludes all other relief that would otherwise generally be available. *See, e.g., Flyge v. Flynn*, 63 Nev. 201, 243, 166 P.2d 539, 557 (1946) ("By including in the assignment all the vendor's rights under the contract, and using the language equivalent in meaning to the term 'improvements and ranch equipment', that is to say the term 'real and personal property situated on the real property', and omitting the land, the intention to exclude the land is clear.").

Had the parties to the 2005 JOA intended the certified public accountant-arbitrator to have authority to (1) issue binding, declaratory rulings on issues of contract interpretation, which necessarily govern the parties' future conduct; (2) enter a ruling directing specific performance; or (3) provide any other form of relief, they would have omitted any provision detailing the arbitrator's authority to enter monetary awards. Such awards would have been implied. Yet, "[t]hat which is expressed makes that which is implied cease." *Flyge*, 63 Nev. at 243, 166 P.2d at 557. The fact that the parties agreed to have a certified public accountant-arbitrator preside over a post-audit dispute is in complete harmony with the limiting language of the provision. *See* 1 AA 244.

To ignore these important portions of the arbitration provision would render the entire audit procedure and monetary award-directive entirely superfluous and meaningless. The parties never intended that any and all disputes touching upon financial issues be subject to arbitration. They simply would have stated so if that was their intention, without linking the arbitration provision to the very detailed audit procedure or limiting the arbitrator's authority to enter awards for arrearages and fees and costs of arbitration only. Failing to afford these specific provisions

the plain meaning and weight to which they are entitled, in accordance with the parties' clear intention, is disallowed. Fundamental principles of contract interpretation demand otherwise. *See, e.g.*, *Musser v. Bank of Amer.*, 114 Nev. 945, 949-50, 964 P.2d 51, 54 (1998) (quoting *Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978)) ("A court should not interpret a contract so as to make meaningless its provisions"; "[h]ad the original parties intended section (iii) to have no effect, they would not have included such a provision in the leases. . . . Th[e contrary] interpretation contradicts the principle discussed above, that contracts should be construed so as to avoid rendering portions of them superfluous.").

2. Appellant Mischaracterizes the Nature of the Arbitration Provision.

DR Partners deliberately fails to acknowledge any of these limitations in the arbitration provision, and actually asserts that the arbitration provision is "unqualified," and therefore, the "unqualified language 'trumps any assumption that the parties would not have committed legal disputes to an accountants' resolution." *See generally* AOB 12-13 (quoting *Shy v. Navistar Int'l Corp.*, 781 F.3d 820, 825-26 (6th Cir. 2015)) (alteration in original). Besides the facts that DR Partners is presenting a new and therefore improper argument (and cites to a new case) not raised before the district court,[8] the plain language of the arbitration provision discussed above renders DR Partners' argument wholly devoid of merit.

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[8] Never before has DR Partners suggested that the accountant-based nature of the arbitration provision contained in the 2005 JOA renders it ambiguous in scope, nor has DR Partners referenced the *Shy v. v. Navistar Int'l Corp.*, 781 F.3d 820 (6th Cir. 2015), case, as its does now. *See* AOB 12-13. This Court has repeatedly stated that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."

(continued)

DR Partners attempts to liken the cases *Shy v. Navistar International Corp.*, 781 F.3d 820 (6th Cir. 2015), and *Benson Pump Co. v. South Central Pool Supply, Inc.*, 325 F. Supp. 2d 1152, 1158 (D. Nev. 2004), to the instant case. AOB 12-15. DR Partners describes these cases as being "instructive" simply because they both concern accounting-based arbitration provisions that are not like traditional, all-encompassing provisions. *See* AOB 12-15. Certainly, at first glance, the arbitration provisions appear similar on this basis alone. However, the arbitration provisions contained in those cited cases are distinguishable, and therefore unpersuasive, as they are still much broader than the arbitration provision contained in Appendix D of the 2005 JOA.

In the *Shy* case, for example, the arbitration provision covered only those disputes about "the information or calculations" provided to one party pursuant to the parties' agreement. 781 F.3d 820, 833 (6th Cir. 2015). Nowhere in that decision does the *Shy* court mention the presence of any additional qualifying language contained in the arbitration provision. *See generally id.* Contrarily, the authority quoted by the *Shy* court, and cited by DR Partners now, expressed that "the otherwise unqualified language of the ['accountant-based nature of the dispute resolution procedure contained in the'] agreement trumps any assumption that the parties would not have committed legal disputes to an accountant's resolution." *Id.* at 825-26. Accordingly, while the arbitration provision at issue in *Shy* was narrower than the traditional, broad-based arbitration provisions, it was still broader than the provision at issue in this case, because it encompassed any and all "information and calculation" disputes. *See generally id.* There was no further

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Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52-53, 632 P.2d 981, 983-84 (1981); *State ex rel. State Bd. Of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("[T]his court generally will not consider arguments a party raises for the first time on appeal."). DR Partners has waived this argument.

qualification about the procedure giving rise to arbitration and the arbitrator's authority. *See id.*

The *Benson Pump* case is no different. The accountant-based arbitration provision at issue in *Benson Pump*, while limited to disputes concerning the base purchase price and accounts receivable adjustment, contained no other qualification or limitation. *See* 325 F. Supp. 2d 1152, 1155 (D. Nev. 2004). The dispute resolution procedure, in its entirety, read as follows:

> If [Benson Pump] disagree[s] with [SCP's] determination of the Base Purchase Price, [Benson Pump] shall notify [SCP] in writing of such disagreement within (20) days. Such writing shall be accompanied by a written notice from [Benson Pump's] accountants setting forth the basis for such disagreement in reasonable detail. [SCP] and [Benson Pump] thereafter will negotiate in good faith to resolve any such disagreements. If [SCP] and [Benson Pump] are unable to resolve any such disagreements within twenty (20) days after the delivery of [Benson Pump's] objection letter, [SCP] and [Benson Pump] will submit such dispute for resolution to an independent, nationally-recognized accounting firm mutually agreeable to [SCP] and [Benson Pump] . . . .

Id. Similar to the arbitration provision raised in the *Shy* case, while the arbitration in *Benson Pump* was narrowly tailored to concern a certain category of dispute, *i.e.*, financial disputes regarding the base purchase price and accounts receivable adjustment, the agreement did not include any additional qualification regarding the conditions triggering the arbitration, or the arbitrator's authority to enter awards. *See id.*

Importantly, the court in *Benson Pump* limited the scope of which claims were arbitrable and which were not. *See id.* at 1159-60. While compelling arbitration of claims concerning accounts receivable, the *Benson Pump* court

expressly declined to stay litigation of the remaining causes of action asserted which were not covered by the arbitration clause.

In short, neither case addresses an arbitration provision that was tied to one of the party's right to audit the other's books and records annually. Neither case concerned an arbitration provision that was conditioned upon a dispute directly resulting from that audit. Neither case contained an arbitration provision that expressly spelled out the types of awards that the certified public accountant-arbitrator could issue. Indeed, both cases involved accountant-based arbitrations that were limited to a certain category of disputes; but, even those categories were broader than the very narrow, tailored agreement contained in Appendix D of the 2005 JOA. These material differences render DR Partners' reliance on the *Shy* and *Benson Pump* cases unpersuasive.

3. The AAA Rules do not Make this an Arbitrable Dispute.

Along this same line of challenge, DR Partners also cites to the American Arbitration Association's commercial arbitration rules to suggest that because the parties agreed to arbitrate under the AAA commercial rules, any limiting provisions contained in the express agreement of the parties are invalid or rendered meaningless by virtue of the AAA rules. *See* AOB 15. In particular, according to DR Partners, the underlying dispute is arbitrable because the AAA commercial arbitration rules (1) give the arbitrator the authority "'to determine the existence of or validity of a contract which an arbitration clause forms a part'" (quoting R-7(b)); (2) grant arbitrators authority to make rulings on dispositive issues in the case (citing R-33); and (3) grant "'any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract'" (quoting R-47(a)). AOB

15. DR Partners' argument is meritless since none of these rules can change, or were intended to change, the written agreement of the parties.

As stated previously, an arbitration provision will be interpreted and enforced according to traditional contract principles. *See, e.g., City of Reno v. IAFF, Local 731*, 130 Nev. Adv. Op. 100, ___, 340 P.3d 589, 593 (Dec. 31, 2014) (providing that the legal basis of an arbitration provision clause "depends entirely upon th[at] particular contract," as agreed to by the parties) (internal quotations and citation omitted); *State ex rel. Masto v. Second Judicial Dist. Ct.*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) (explaining that when interpreting a contractual provision (such as an arbitration provision), this Court will construe the provision from the written language, as a whole, and enforce it as written); *Burch v. Second Judicial Dist. Court of State ex rel. Cnty. of Washoe*, 118 Nev. 438, 442-43, 49 P.3d 647, 650 (2002) (explaining that the United States Supreme Court has held, "States may regulate contracts, including arbitration clauses, under general contract law principles").

The AAA commercial arbitration rules recognize this universal principle. AAA commercial arbitration rule R-1, governing "Agreement of the Parties," explains that "[t]he parties, by written agreement, may vary the procedures set forth in these rules." R-47(a), governing an arbitrator's "scope of award," and quoted by DR Partners, is in agreement. R-47(a), too, reiterates the caveat that the arbitrator may render any award that is "within the scope of the agreement of the parties."

In its discussion of R-47, DR Partners surreptitiously ignores both the presence and the impact of R-47(c) on the arbitration provision in this case. R-47(c) mirrors the language contained in the arbitration provision in Appendix D in its mandate that the arbitrator assess fees, expenses, and compensation, and that the arbitrator may apportion those amounts against the parties as the arbitrator deems

fit. *Compare* R-47(c) ("In the final award, the arbitrator shall assess the fees, expenses, and compensation . . . . The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.") *with* 1 AA 244 ("The arbitrator shall also make an award of fees and costs among the parties in a manner determined by the arbitrator to be reasonable in light of the positions asserted and the determination made."). If it were the parties' intention that the certified public accountant-arbitrator enter all awards contained in R-47, there would have been no need to spell out that the arbitrator shall also make an award of fees and costs and apportion them amongst the parties as the arbitrator determined appropriate. *See* 1 AA 244. That very language is already contained in R-47(c). This expression of the arbitrator's award authority would have been wholly unnecessary, superfluous in fact.

In sum, the arbitration provision contained in Appendix D of the 2005 JOA is specific and unequivocal. It limits the arbitrator's authority to only enter monetary awards to the Sun for arrearages and to the parties for fees and costs. These clear expressions evidence the arbitration provision's narrow and specific tailoring to factual, accounting disputes resulting from an audit. The authority and AAA commercial arbitration rules cited by DR Partners cannot, and do not, change the plain language of the arbitration provision. The arbitration provision is plain on its face, it is unambiguous, and it must be enforced as written. In no event can the arbitration provision in Appendix D of the JOA be construed as broadly as DR Partners desires. As further explained below, based upon this plain reading of the arbitration provision, the contractual dispute concerning the meaning and interpretation of Section 4.2 does not fall within its narrow scope.

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B. The Instant Dispute is Not an Accounting Dispute: It is a Contract Interpretation Dispute.

In the underlying action and now on appeal, DR Partners has repeatedly asserted that the Sun is claiming that it is entitled to more compensation and requesting that the district court enter a monetary award, and/or engage in a substantial accounting analysis. *See generally* AOB. This assertion is grounded in DR Partners' bald attempt to force this dispute into the particular strictures of the arbitration provision contained in Appendix D of the 2005 JOA; hence, DR Partners' tiresome efforts to read into the Sun's First Amended Complaint a request for money damages. Yet, DR Partners' attempts fail.

A review of the Sun's First Amended Complaint reveals that the Sun merely seeks a judicial declaration of the meaning of Section 4.2. *See generally* 1 AA 170-75. Section 4.2 of the 2005 JOA provides:

> News and Editorial Allocations. The Review-Journal and the Sun shall each bear their own respective editorial costs and shall establish whatever budgets each deems appropriate.

Id. at 223 (second emphasis added). Based upon this unambiguous language, the Sun seeks a judicial declaration that the parties are obligated to bear their own editorial costs, without exception. *See id.* at 170-74. Section 4.2 is a stand-alone provision, located in an entirely separate article of the 2005 JOA. It is independent of and free from reference to either Article 7 or Appendix D. *See id.* at 223.

From the inception of the underlying dispute and now on appeal, however, DR Partners has inferentially argued that Section 4.2 is ambiguous, and that its language does not mean that DR Partners cannot charge its editorial expenses against the 2005 JOA. *See* 1 AA 163-64, 156-57; *see generally* AOB. To support its unreasonable reading of Section 4.2, DR Partners has tried to find support in

Appendix D. *See id.* As a result, DR Partners uses its reliance on Appendix D in an attempt to squeeze this dispute into the limited confines of the arbitration provision contained therein. *See id.* But, the only connection that the underlying dispute has with the arbitration provision contained in Appendix D is DR Partners' unreasonable and unsupportable position stating so.

While not before this Court, it should be noted that what DR Partners knows will not be lost on the district court is that every other reference to the parties' previous method of sharing editorial costs, and reference to those costs as a joint expense before EBITDA was calculated, was deleted from the parties' amended and restated agreement in 2005. *Compare* 1 AA 177-220 *with id.* at 222-46. For this reason, DR Partners desperately seeks to manipulate this dispute into arbitration in hopes that a certified public accountant, not trained in the law, will not be so shrewd in contract interpretation principles.

However, this is not the basis of the dispute raised in the Sun's First Amended Complaint. The Sun is entitled to a judicial declaration as to the meaning of Section 4.2, and nothing in Appendix D of the 2005 JOA provides otherwise. The district court correctly agreed.

II. DR PARTNERS CANNOT CHALLENGE THE DISTRICT COURT'S DECISION GRANTING THE SUN LEAVE TO FILE ITS FIRST AMENDED COMPLAINT.

DR Partners argues that the Sun's request for a judicial declaration as to the meaning of Section 4.2 is a "false issue" and that "[c]ourts should not condone amendments aimed at avoiding arbitration." AOB 18-19. In so arguing, DR Partners reiterates arguments previously made and cites to authority previously referenced in its opposition to the Sun's request for leave to amend, all of which spoke to Rule 15(a) amendments and arbitration provisions. *Compare id. with* 1 AA 156. What DR Partners is doing, in actuality, is challenging the district court's decision to grant the Sun leave to amend its original Complaint. *See generally*

AOB 18-19 (even citing to *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993), which, in discussing denials of motions for leave to amend, this Court stated, "courts should be cautious of last-second amendments alleging meritless claims in an attempt to save a case from summary judgment: the proper method to deal with such tactics is to deny leave to amend on grounds of futility").

Tellingly, DR Partners goes so far as referring to and citing the Sun's original Complaint to categorize the underlying dispute before this Court. *E.g.*, AOB 14 (citing to the original Complaint (1 AA 003-005) and stating, "Similarly here, the *Sun* takes issue with the application of EBITDA to determine its compensation"), 19 (quoting paragraphs 26 and 36 of the original Complaint). Both DR Partners' challenge to the district court's grant of the Sun's motion for leave to amend its Complaint, and DR Partners' continued reliance on the Sun's original Complaint are improper.

DR Partners has not appealed the district court's Order Granting Plaintiff's Motion for Leave to File First Amended Complaint on Order Shortening Time. *See generally* 2 AA 321-23 (where DR Partners noticed its appeal of the district court's order denying its Renewed Motion). Such an order is nonappealable in any event. *See* NRAP 3A(b). Thus, this Court lacks jurisdiction to hear DR Partners' complaints in this regard. *See, e.g., Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (holding that "where no statutory authority to appeal is granted, no right exists," and the Court is without jurisdiction to entertain it).

Additionally, despite that DR Partners dedicates substantial emphasis on the allegations contained in the Sun's original Complaint, that Complaint is no longer operative, having been replaced in its entirety by the Sun's First Amended Complaint. "[An] amended complaint is in itself a full, distinct, and complete pleading, and entirely supersedes the original." *E.g., McFadden v. Ellsworth Mill*

& Mining Co., 8 Nev. 57, 60 (1872); 61B Am. Jur. 2d Pleading § 789 (updated Aug. 2015) (providing that the amended complaint replaces the original complaint in its entirety and becomes the operative complaint, rendering the original "null and void," with the original "becom[ing] a dead letter and no longer perform[ing] any function in the case," and which is treated thereafter as "nonexistent"); *accord* 61A Am. Jur. 2d Pleading § 702 (updated Aug. 2015). The very case cited by DR Partners directly parallels this well-established authority, stating:

> The original complaint clearly referred to the agreement and its breach and would clearly have been subject to the arbitration provision. We note, however, that because the district court committed no abuse of discretion in allowing Parker to amend his complaint, our decision is based solely on the content of the amended complaint.

Phillips v. Parker, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990) (cited in AOB 18-19). DR Partners' continuous reliance and citation to the Sun's original Complaint is inappropriate and unpersuasive.

Disregarding the impropriety of DR Partners' argument, DR Partners' contention that the Sun still seeks a calculation of EBITDA from the district court is simply not true. *See* AOB 19. As discussed above, in section I.B., the underlying dispute concerns a single issue of contract interpretation. Nothing in the underlying dispute requests or in any way requires that the district court engage in an accounting analysis. DR Partners' *ad infinitum* assertion otherwise does not give credence to its self-serving and unsubstantiated characterization. It was neither error for the district court to grant the Sun leave to amend its Complaint nor error for the district court to deny DR Partners' Renewed Motion.

III. DR PARTNERS' SUGGESTION THAT ARBITRATION SHOULD BE COMPELLED FOR CONVENIENCE IS MERITLESS.

DR Partners maintains that because any relief afforded to the Sun in the underlying action would be limited to declaratory relief, and the economic relief "the *Sun* [purportedly] seeks would still have to be arbitrated separately[,] [t]here is no just reason for the *Sun* to needlessly tie up the district court with a matter that could and should be resolved in a single arbitration proceeding." AOB 20. Besides the inequity of DR Partners' suggestion, it would be improper for any court to compel arbitration simply for the convenience of having a single tribunal decide all issues. In actuality, it would be contrary to the law. *See, e.g.*, *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634, 189 P.3d 656, 660 (2008) (providing that although public policy favors arbitration, arbitration provisions "'must not be so broadly construed as to encompass claims and parties that were not intended by the original contract'") (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)); *City of Reno v. IAFF, Local 731*, 130 Nev. Adv. Op. 100, ___, 340 P.3d 589, 593 (Dec. 31, 2014) (reaffirming the proposition that "'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'") (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)).

DR Partners further attempts to persuade this Court by arguing the merits of the underlying dispute. *See* AOB 19-20. DR Partners asserts the supposed "reasonableness" of its interpretation of Section 4.2 through expressing its concern that

> [s]hould the *Sun* obtain a judicial declaration—based solely on Section 4.2, in disregard of Appendix D—that the *Review-Journal* must bear its own editorial costs but not treat them as an expense when calculating EBITDA, the arbitrator's task would be reduced to recalculating

> EBITDA without regard to the editorial expense of newspaper operations.

Id. at 20. Significantly, none of this is before this Court. The merits of the underlying dispute have been fully briefed to the district court, awaiting a decision upon the conclusion of this appeal. *See generally* 2 AA 257-67; RA 012-65. Accordingly, DR Partners' argument is not entitled to any meaningful consideration now.

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CONCLUSION

No amount of cases cited by DR Partners as analogous to the instant case can govern the arbitrability of the underlying dispute: the Court must look to the parties' specific contract as the governing authority on whether the dispute presented is arbitrable. DR Partners' belabored assertion that the arbitration provision contained in Appendix D of the 2005 JOA is all-encompassing and includes every financial dispute demands that specific, substantial, and governing portions of the arbitration provision be rendered superfluous and meaningless. Universally-accepted tenets of contract interpretation, and the parties' clear, expressed intentions do not permit such a result. The dispute raised in the declaratory relief action is one of contract interpretation and is not arbitrable. A decision affirming the district court's denial of DR Partners' Renewed Motion to Compel is therefore warranted.

DATED this 20th day of October, 2015.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman typeface;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, contains 9,665 words, and does not exceed 30 pages.

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

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Pursuant to Nevada Rule of Appellate Procedure 25(d), I certify that I am an employee of LEWIS ROCA ROTHGERBER LLP, and that on October 20, 2015, I caused the foregoing **RESPONDENT'S ANSWERING BRIEF** to be served:

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