Case No. 80511

In the Supreme Court Of The State Of Nevada

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

Appellants/Cross-Respondents,

v.

LAS VEGAS SUN, INC., a Nevada corporation,

Respondent/Cross-Appellant.

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

ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL
REDACTED

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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 disqualifications or recusal.

1. Respondent/Cross-Appellant Las Vegas Sun, Inc., is owned entirely by Greenspun Media Group, LLC. Neither Las Vegas Sun, Inc., nor Greenspun Media Group, LLC, is publicly owned or traded.

2. Las Vegas Sun, Inc., was represented in the underlying district court proceedings by E. Leif Reid, Esq., Kristen L. Martini, Esq., and Nicole Scott, Esq., of Lewis Roca Rothgerber Christie LLP, and James J. Pisanelli, Esq., Todd L. Bice, Esq., and Jordan T. Smith, Esq., of Pisanelli Bice PLLC.

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

DATED this 22nd day of June, 2020.

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STATEMENT OF ISSUES PRESENTED

Whether the Arbitrator manifestly disregarded the law in concluding that the parties' Amended and Restated [Joint Operating] Agreement ("JOA") prohibits Appellants/Cross-Respondents from charging the Las Vegas Review-Journal's (i) news and editorial costs, and (ii) independent promotional costs, against the joint operation EBITDA.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this appeal, the RJ[1] seeks an order reversing the district court's confirmation of the Arbitrator Award on the basis that the Arbitrator manifestly disregarded the law when interpreting the JOA. Specifically, the RJ challenges the Arbitrator's interpretation of Section 4.2 and Section 5.1.4 of JOA to preclude the RJ from charging its editorial and independent promotional costs against the joint operation EBITDA. The Arbitrator, a dually-licensed lawyer and certified public accountant, made no error in interpreting the JOA in these respects. The Arbitrator understood how the parties' accounting transitioned from the original 1989 JOA to the amended JOA—a necessary element that the parties specifically provided for in the JOA.

For eight days, the Arbitrator heard testimony and received other evidence, including from both parties' accounting experts, about the parties' proffered

[1] Appellants/Cross-Respondents News+Media Capital Group LLC and Las Vegas (continued)

interpretations of the JOA, and the circumstances surrounding and context of the amended JOA's formation. After applying governing contract interpretation principles to the JOA, against the backdrop of accounting principles and practicalities, the Arbitrator rejected the RJ's interpretation of the JOA.

The RJ's lack of foundational competency in accounting under both JOAs continues to plague the RJ's interpretation and has metastasized in its Opening Brief. The Arbitrator's interpretations of the amended JOA concerning editorial and promotional costs are the only reasonable interpretations that give effect to the plain language of and the circumstances surrounding the JOA. The Arbitrator did not manifestly disregard the law. The RJ has failed to meet its burden of establishing by clear and convincing evidence otherwise. An order affirming the promotional and editorial cost portion of the Award is required.

STATEMENT OF THE FACTS AND CASE

A. THE PARTIES' ENTER INTO THE 1989 JOINT OPERATING AGREEMENT

The Sun and News+Media each own one of the two daily morning print newspapers of general circulation in Las Vegas, Nevada. The Sun owns, operates, and publishes the Las Vegas Sun (also referred to herein as, the "Sun"). Appellant/Cross-Respondent News+Media Capital Group LLC ("News+Media"),

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Review-Journal, Inc., are together referred to as the "RJ."

through Appellant/Cross-Respondent Las Vegas Review-Journal, Inc., operates and publishes the Review-Journal.

1. Maintaining Two Competing Editorial Voices in Las Vegas was of Paramount Importance

The Sun has been a source of news for Nevadans since 1950. By the late 1980s, the Sun—a morning paper—had been operating at a substantial loss and was in probable danger of financial failure. 1AA33.[2] At that time, the Review-Journal was an "all day" paper. *Id.* It was the Sun and the Review-Journal's prior owners, Donrey of Nevada, Inc.'s, firm belief that the continued publication of at least two newspapers of general circulation, editorially and reportorially separate and independent, was of paramount importance to the citizens of Las Vegas and its environs. *Id.* The parties' belief was similarly held by Congress through the Newspaper Preservation Action of 1970, 15 U.S.C. §§ 1801-04 ("NPA"). *See* 15 U.S.C. § 1801 ("In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint

[2] Citations refer to the volume of Appellants/Cross-Respondents' Appendix ("AA") or Respondent/Cross-Appellant's Appendix ("RA"), then page number. The Sun's RA is the appendix the Sun submitted to the district court with its motion to confirm the arbitration award.

operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.").

In June 1989, the Sun and Donrey of Nevada, Inc., entered into a joint operating agreement in accordance with the NPA. *See* 1AA35 (the "1989 JOA").

2. The Joint Production and Distribution of the Newspapers

As consideration for the 1989 JOA, and in exchange for the ability to remain in publication until at least December 31, 2040, the Sun paid the Review-Journal $25 million in stock and relinquished its printing press, circulation lists, advertising lists and contracts, and all non-editorial business functions. 1AA37-42 (§§ 3.1, 3.3). The Sun was also required to cede its coveted morning position to the Review-Journal, and the Sun was thereafter published as an afternoon paper. *Id.* at 45 (§ 5.1); 7RA1342-44.

Under the 1989 JOA, the parties operated separate daily news publications, the Sun and Review-Journal, which they referred to in the agreement as the "Newspapers." 1AA45. The 1989 JOA allowed the Newspapers to maintain their editorial independence as required by the NPA while, at the same time, realizing the savings of joint production, distribution, advertising, and other non-editorial functions. *See generally id.* at 33-76.

3. The Third-Party "Agency" as Manager and Administrator of the Parties' Joint Operation

Because all non-editorial functions for the Sun and Review-Journal would now use existing Review-Journal equipment and resources (including printing, selling, and distributing the Newspapers), to facilitate the management and administration of the joint operation, the 1989 JOA obligated the Review-Journal to form a separate business corporation, the "Agency." 1AA37 (Art. 2). The Agency was supposed to own or lease all assets and assume the duties and obligations of the joint operation, such as paying the joint expenses and collecting the joint revenues and executing fiduciary responsibilities to both parties. *Id.* at 50-51 (Art. 6). Thus, it was the "Agency," not the Review-Journal, who was required to handle "all duties and obligations" under the 1989 JOA. *Id.* at 37. The Review-Journal, however, never actually established the Agency. *E.g.*, 11RA2451-52.

4. The Sun's Compensation Structure, and Allowable "Agency Expenses" under the Parties' Joint Operation

Pursuant to the 1989 JOA, the Sun would receive two payments from the joint operation. First, the Sun would receive a 10 percent profit distribution of the Agency "Operating [P]rofit." 1AA75. Operating Profit meant "the excess of "Agency Revenues over Agency Expense." *Id.* Appendices B and C of the 1989 JOA defined certain expenses and revenues as "Agency Expense" and "Agency Revenues," respectively. *Id.* at 68-74. Among other things, Agency Expense included: amounts allocated for each newspaper's editorial and promotional costs; salaries, and

vacation and severance pay, for non-news and non-editorial employees (*e.g.,* JOA operational staff); office supplies; utilities; and monthly charges for rent, capital expenditures, management services, and the Sun's newsroom equipment. *Id.* at 68-73. The Sun's editorial cost allocation, discussed below, was the second of the two payments the Sun received from the joint operation.

i. The Parties' Editorial Cost *Allocations* as Agency Expense

Both parties received news and editorial cost allocations and these were defined as Agency Expense. Therefore, the editorial cost allocations were allowed deductions from the joint operation's Operating Profit. More specifically, the 1989 version of Section 4.2 read:

> 4.2 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 expenses.

1AA42 (italic emphasis added). As cross-referenced in Section 4.2, Appendix A reads:

> A.1. Pursuant to Section 4.2 of this Agreement, for each fiscal year after the Effective Date Review-Journal shall establish an *allocation* for Review-Journal news and editorial expenses, and the *allocation* for, news and editorial expenses for the Sun shall be equal to sixty-five percent (65%) of the Review-Journal allocation, subject to a minimum of Two Million Two Hundred Fifty Thousand Dollars ($2,250,000) per fiscal year . . . .

Id. at 65 (emphasis added). Appendix B defined "Agency Expense," which included "[t]he amounts *allocated* to Review-Journal and Sun for news and editorial expenses. . . set forth in Appendix A." *Id.* at 68 (App'x B.1.1) (emphasis added).

In the event either the Sun's or the Review-Journal's editorial costs exceeded their respective editorial cost allocations, Section 5.2 required that those additional expenses be borne by the newspaper that incurred them:

> 5.2 News and Editorial Autonomy. . . . All news and editorial expense of the Sun or the Review-Journal in excess of the amounts set forth in Appendix A shall be borne by the respective newspaper.

Id. at 49.

Therefore, under Section 4.2 of the 1989 JOA, both parties' news and editorial allocations—not their actual news and editorial expenses—were approved deductions allowed as an Agency Expense. The Sun and the Review-Journal each physically paid their respective editorial expenses incurred by them, whether those expenses were covered by the editorial allocations or exceeded the allocation amount. *See* 2AA368.

ii. The Parties' Promotional Cost *Allocations* as Agency Expense

The parties to the 1989 JOA provided for promotional cost allocations similar in structure to the parties' editorial cost allocations. *See* 1AA47-48 (§ 5.1.4). In part, Section 5.1.4 of the 1989 JOA read:

> Promotional Activities. Review-Journal shall establish for each fiscal year a budget for promotional activities which shall be *allocated* between the Review-Journal and the Sun in accordance with the provisions of Appendix A, attached hereto and made a part hereof by reference.

Id. (italic emphasis added). Appendix A provided as follows:

> A.3. Pursuant to Section 5.1.4 of this Agreement, the Review-Journal shall establish for each fiscal year after the Effective Date a *budget* for promotional activities of the Review-Journal and the Sun and at least forty percent (40%) of each total *budget* shall be allocated to the Sun.

Id. at 66 (emphasis added).

The promotional cost allocations were treated identically to the editorial cost allocations because they were: (1) "Agency Expense, up to the amount of the promotional budget allocation," *id.* at 47; and (2) identified in Appendix B.1.1 as Agency Expense. *Id.* at 68. Further mirroring the parties' treatment of the editorial allocations, any promotional costs incurred in excess of the allocations were not Agency Expense. *Id.* at 47 (§ 5.1.4) ("If either the Review-Journal or the Sun determines that it wishes to incur expenses in excess of those in the promotional budget, such expenses shall not be included in Agency Expense.").

Therefore, the parties' promotional cost allocations—not their actual promotional expenses—were approved deductions allowed as an Agency Expense.

5. The Parties' Mutual Rights to Inspect the Other's Books and Records

Under the 1989 JOA, either party was allowed to inspect the books and records of the other party within certain limitations. *See* 1AA59-60 (§ 10.3). Any dispute arising under the 1989 JOA that could not be informally resolved by the parties was subject to litigation, as the 1989 JOA did not provide for any alternative dispute resolution procedure. *See generally id.* at 33-76.

B. ONGOING DISPUTES CULMINATE INTO A SETTLEMENT

By 2002, the parties had persistent disputes related to the Sun's compensation, with particular strain on the Sun's editorial cost allocation. 7RA1362-69. The Sun consistently discovered that Donrey of Nevada, Inc., and the successor-owner of the Review-Journal, DR Partners, were hiding and reclassifying valid editorial costs to avoid paying the Sun its full 65 percent editorial allocation. *Id.* As a result of these ongoing disputes, DR Partners and the Sun entered into a settlement agreement whereby DR Partners agreed to pay the Sun for amounts that included certain editorial, profit, and other adjustments due to the Sun. *See generally* 1AA59-60 (§ 10.13); 7RA1366-69.

C. THE 2002 SETTLEMENT SPURS THE PARTIES TO AMEND THE 1989 JOA, AND ENTER INTO THE 2005 AMENDED AND RESTATED JOA

Following the 2002 settlement, in 2004, the parties began renegotiating the 1989 JOA to eliminate the recurring disputes and to specifically eliminate the friction related to editorial costs. 7RA13:66-72. DR Partners, through its General Partner

Stephens Media, and the Sun executed the amended JOA on June 10, 2005. *See generally* 1AA78-102.

The term of the amended JOA continued the original 50-year term, ending December 31, 2040. *Compare id.* at 79 (§ 1.2) *with id.* at 36 (§ 1.2). The JOA, appropriately entitled, "Amended and Restated Agreement," carefully tracked the 1989 JOA, demarking where certain provisions previously existed but were now "Intentionally omitted," and incorporated by express reference certain provisions of the 1989 JOA. *See generally id.* at 78-102; *e.g.*, *id.* at 78-79, 98. The parties agreed that the 1989 JOA "shall remain in full force and effect" for a period of time for transition purposes. *Id.* at 79.

1. The Parties Again Recognize the Public Interest in Maintaining Competing Editorial Voices in Las Vegas

Like the 1989 JOA, the amended JOA was entered into under the NPA, with the preservation of multiple editorial voices in mind. *E.g.*, 1AA78-79 (§ 1.1), 82 (§ 5.2). DR Partners and the Sun explicitly acknowledged the public interest in remaining editorially independent in the JOA, as the NPA requires. *See, e.g.*, *id.* at 86-87 (§ 10.8) ("Because of the public interest in maintaining editorially and reportorially independent and competitive newspapers in Las Vegas" specific performance is available to enforce the 2005 JOA) & 82 (§ 5.2) ("News and Editorial Autonomy. Preservation of the news and editorial independence and autonomy of both the Review-Journal and the Sun is of the essence of this Restated Agreement.").

2. The Newspapers Are Distributed in a Single Package and the Agency is Eliminated

The amended JOA combined the formerly separate Newspapers into a single-package, dual-media product that contained and separately branded the Review-Journal and the Sun. *See generally* 1AA80-82 (Art. 5). The parties removed all Agency-related concepts from the JOA. *Compare id.* at 33-76 *with id.* at 78-102. The Review-Journal was to control, supervise, manage, and perform all non-editorial operations under the JOA. *Id.* at 80-82.

3. The Parties' Editorial Cost Obligations under the New Section 4.2

Unlike the previous version of Section 4.2 (which referenced the parties' editorial cost *allocation* as Agency Expense, 1AA42), the parties altered Section 4.2:

> 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 79 (italic emphasis added).

In line with the new Section 4.2, the parties also modified Section 5.2. *Id.* at 82. The old statement in Section 5.2 that "[a]ll news and editorial expense of the Sun or the Review-Journal in excess of the amounts set forth in Appendix A shall be borne by the respective newspaper" was deleted entirely—no longer being necessary with Section 4.2's amendment. *Compare id. with id.* at 49.

Every other reference to the parties' previous method of calculating editorial cost allocations, and reference to those costs as a valid Agency Expense, was deleted from the JOA. *Compare generally id.* at 78-102 *with id.* at 33-76. Two such deletions

were Section A.1 of Appendix A, which provided for the parties' editorial cost allocations and the allocation formula, was "Intentionally omitted," and Appendix B, which previously defined Agency Expense to include the parties' editorial and promotional cost allocations, was replaced with a sample front page containing the Sun's noticeable mention. *Compare id.* at 65-73 *with id.* at 90-93.

Appendix D of the amended JOA, through its second paragraph ("Second Paragraph"), was also revised and likewise excluded the parties' editorial cost allocations from the baseline joint operation EBITDA used to calculate the Sun's new method of compensation. These revisions caused the JOA to conform with the new Section 4.2.

4. The Parties' Promotional Cost Obligations under the New Section 5.1.4

In the amended JOA, the parties also modified the 1989 JOA's provisions regarding the parties' promotional responsibilities and allocations. Under the 1989 JOA, each newspaper was separately promoted using promotional allocations (with the Sun receiving 40 percent of the Review-Journal's established promotional budget), and each party bore its own expenses incurred in excess of those allocations. *See* 1AA47-48 (§5.1.4). In the amended JOA, with the change to a single package, dual-media product, the parties eliminated the promotional cost allocations, and the Review-Journal was charged with marketing and promoting both Newspapers. *See id.* at 81 (§ 5.1.4). The parties amended Section 5.1.4 to provide, in part, as follows:

> Promotional Activities. 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*.

Id. (italic emphasis added).

Hence, if the Review-Journal included a mention of equal prominence for the Sun, the expense for that promotional activity was chargeable against the joint operation. However, if either party undertook to promote its newspaper individually, the costs incurred for those promotional activities were at the incurring newspaper's "own expense." *Id.*

5. Appendix D and the Sun's Annual Profit Payment: the Baseline Joint Operation EBITDA and the Retention Sentence

In light of the cost savings received from, among other things, eliminating the Sun as a separate product, as well as eliminating the Agency references and the parties' editorial cost allocations in the amended JOA, the parties restructured the Sun's compensation. The Sun and DR Partners replaced the Sun's two compensation streams—the 10 percent profit payment and editorial cost allocation—with "Annual Profits Payments," as set forth in the first paragraph of Appendix D. *Compare* 1AA65, 75, *with id.* at 98-101.

The new compensation arrangement required the Review-Journal to pay the Sun from the joint operation a $12 million Annual Profits Payment, payable in

monthly increments, for the first fiscal year (starting on April 1, 2005) of the JOA. *Id.* at 98. [redacted]. *See* 7RA1467-68. The parties then described how the Annual Profits Payment would fluctuate annually in the following years:

> Each fiscal year [ ]after [the fiscal year beginning April 1, 2005] during the term of this Agreement the Annual Profits Payment shall be adjusted as set forth in this Appendix D. Within thirty (30) days following the beginning of each such fiscal year, Review-Journal shall calculate the percentage change (the "Percentage Change") between the earnings, before interest, taxes, depreciation and amortization ("EBITDA") for the fiscal year immediately preceding (the "LTM EBITDA") and the EBITDA for the penultimate fiscal year (the "Prior Period EBITDA"). The Annual Profits Payment shall be increased, or decreased, as the case may be, by the Percentage Change between the LTM EBITDA and the Prior Period EBITDA.

1AA98.

i. The Required, Adjusted Baseline EBITDA Calculation

The Sun's new Annual Profits Payments were to be calculated on the year-over-year change in EBITDA, beginning in the second year under the JOA (since the first year was a $12 million payment). 1AA98. With all the modifications in the amended JOA, a baseline EBITDA that excluded the expenses now disallowed under the amended JOA needed to be calculated. Thus, the parties crafted a baseline EBITDA calculation reflecting the new provisions in the amended JOA as the starting point for subsequent years' EBITDA calculations. *Id.*

Consequently, the parties set forth explicit instructions on what 1989 JOA-era expenses must be *removed from the new EBITDA calculation* to establish the baseline joint operation EBITDA calculation. *See id.* The parties did this in the Second Paragraph.

The Second Paragraph provides, in relevant part:

> In calculating the EBITDA (i) for any period that includes earnings prior to April 1, 2005 [*i.e.*, the baseline EBITDA], 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 . . . .

Id. (emphasis added). Section A.1 of Appendix A of the 1989 JOA defined the parties' editorial cost allocations, and defined those allocations as Agency Expense. *Id.* at 65. In the amended JOA, Section A.1 was "Intentionally omitted." *Id.*

Regarding the Appendix B Agency Expense referenced in the Second Paragraph, Section B.1.16 concerned monthly rental charges in the amount of $550,000 for the Review-Journal's real property, plant, and equipment; Section B.1.17 dealt with the monthly charges of 1.5 percent of the cost of all equipment acquired in connection with Agency activities; Section B.1.18 addressed a monthly charge for general management services in the amount of 3.5 percent of Agency Revenues; and Section B.3 concerned a monthly charge in the amount of 1.5 percent for the Sun's newsroom interface equipment. *Id.* at 71-72. Each of the 1989 JOA

expenses that were referenced in the Second Paragraph were removed in the amended JOA.

Therefore, in setting the baseline EBITDA calculation to ensure that it was consistent with future years' EBITDA calculations, the parties agreed that the baseline calculation could not include the previously-allowed editorial cost allocations of the parties, and the Review-Journal's $550,000 rent, equipment, management, or Sun newsroom equipment fees. *Id.* at 98. In the following years, the Review-Journal abided by these mandated exclusions with one notable exception: it continued to charge its news and editorial costs to the JOA EBITDA.

ii. The Parties Exclude Certain Capital Expense Charges from the EBITDA Calculation, and the Sun Drafts the "Retention Sentence"

After identifying the baseline EBITDA calculation, Appendix D explains that EBITDA "shall include the earnings of the Newspapers" and other RJ publications included in the JOA. 1AA98-99. Next, it provides that EBITDA shall not include "any expense for rents, leases, or similar expense for Other Equipment [ ] if such expense, under generally accepted accounting principles . . . should be treated as a capitalized lease obligation," or if the expense is made for the use of any capital assets intended to replace other equipment owned by the Review-Journal, or expenses of press equipment or printing services attributable to the use of the press equipment. *Id.* at 99. Immediately following that capital expenditure provision, Appendix D reads,

> All calculations shall be made in accordance with generally accepted industry accounting principles consistently

> applied. 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.

Id. The profit and loss statement for Stephens Media for the period ended December 31, 2004 ("P&L") was not attached to or otherwise included in the JOA.[3] *See generally id.* at 78-102.

The Sun drafted the "Retention Sentence." *See* 7RA1390-92; 8RA1532-34. At the time the parties were negotiating Appendix D, the Review-Journal was considering purchasing a [redacted] press. 7RA1390-92. The Retention Sentence was added after the new Section 4.2 was settled and all references to news and editorial costs as valid Agency Expense had been removed from the JOA. *See* 8RA1532-34. The Retention Sentence was added to ensure that the Review-Journal could not charge capitalized leases (on a printing press, for example) as an expense to the joint operation EBITDA. *See id.*; *see also* 7RA1390-92.

6. <u>The Sun's Audit and Arbitration Rights</u>

The parties incorporated audit and arbitration rights exercisable only by the Sun in the JOA. *See* 1AA99-100. Because the Review-Journal was in control of all non-editorial management of the joint operation, an audit was provided as the sole

[3] The RJ's statement that the "parties even incorporated *a picture* showing each line item to be deducted," AOB 29, is not accurate. *See* 1AA78-102.

mechanism to ensure that the Review-Journal was complying with the amended JOA. *See generally id.* at 78-102 & *id.* at 99-100.

The Sun was also granted a right to arbitrate its audit and accounting disputes related to the calculation of the joint operation EBITDA and the Sun's Annual Profits Payments. *Id.* at 100; *see DR Partners d/b/a Stephens Media Group v. Las Vegas Sun, Inc.*, No. 68700, 132 Nev. 963, 2016 WL 2957115 (Nev. May 19, 2016) (unpublished disposition). The parties agreed that accounting disputes would be resolved by a CPA arbitrator: "If as a result of such an audit, there is a dispute between Sun and the Review-Journal as to amounts owed to Sun and they are not able to resolve the dispute within 30 days, they *shall* select a *certified public accountant* to arbitrate the dispute. The arbitration shall be conducted according to the commercial arbitration rules of the American Arbitration Association [("AAA")] . . . ." 1AA100 (emphasis added).

D. THE SUN AND DR PARTNERS LITIGATE EDITORIAL COSTS UNDER SECTION 4.2 WHILE NEWS+MEDIA PURCHASES THE REVIEW-JOURNAL

In July 2014, the Sun discovered that Stephens Media had reduced the baseline year and subsequent years' EBITDA by charging the Review-Journal's editorial costs to the joint operation. 16RA3650-51. The Sun made this discovery once Mr. Brian Greenspun obtained sole ownership of the Sun and engaged an industry consultant. *Id.* at 3650-55; 7RA1418-21.

Although the Sun immediately notified DR Partners and its then-successor-in-interest Stephens Media of their violation of Section 4.2 and Appendix D of the JOA, Stephens Media continued to reduce EBITDAs with the Review-Journal's individual editorial costs. 16RA3653-55. As a result, in 2015, the Sun initiated a lawsuit against DR Partners and Stephens Media. *See Las Vegas Sun. Inc. v. DR Partners*, Case No. A-15-715008-B (Nev. Dist. Ct., March 10, 2015). These proceedings were centered on the interpretation of Section 4.2 and Appendix D of the JOA, and DR Partners' and Stephens Media's editorial costs accounting practice. *Id.* The dispute was compelled to arbitration in August 2015 after an Order of Reversal and Remand from this Court in Appeal No. 68700. *See DR Partners*, 132 Nev. 963, 2016 WL 2957115.

In November 2016, Stephens Media and the Sun settled the Sun's dispute with the parties to that litigation and arbitration. 1AA113-14. The settlement resulted in a confidential settlement agreement. *Id.*; 7RA1422-23.

The Review-Journal experienced two ownership changes during the Sun's litigation with DR Partners and Stephens Media, resulting in the RJ's ownership and operation of the Review-Journal on December 10, 2015. *Id.* at 1423-24. The RJ was notified of the disputes and pending legal proceedings initiated by the Sun at the time of its succession, and took ownership subject to the Sun's claims. 11RA2490-92; *see also DR Partners*, 132 Nev. 963, 2016 WL 2957115. The RJ was provided a copy of the confidential November 2016 settlement. *See* 11RA2491; 15RA3371-72.

While the RJ should have known from the settlement that a change in its accounting practice was required, the RJ refused to do so. By the fiscal year ending March 31, 2017, the RJ—for the first time in the history of the joint operation—recorded a negative EBITDA in the amount of negative $2.25 million. 3RA465. This constitutes a negative 122.43 percent EBITDA change from the prior year. *Id.* The RJ had increased the Review-Journal's editorial costs from $6.78 million in 2016 to $8.88 million in 2017. *Id.* at 480. The Review-Journal's editorial costs in the amount of $8.88 million in 2017 is close to the amount of editorial costs that the Review-Journal maintained in 2004, [redacted]. *Compare id.* with 2AA401-04.

While the RJ's predecessors had a history of violating the JOA, once News+Media purchased the Review-Journal, the RJ's breaches became systematic, and more significant and far reaching in scope than any predecessor.[4] *See e.g.*, 3RA465, 480; 16RA3707-08, 3723-31. The RJ refused to cooperate in the Sun's requests for an audit. 16RA3685-87.

[4] The RJ states that the Sun only complained about the RJ's editorial cost charges after years of accepting. *See* AOB 8. However, the Arbitrator heard testimony concerning the Sun's discovery of the RJ charging its editorial costs in 2014, after Mr. Greenspun obtained sole ownership of the Sun. 7RA1418-21; 16RA3650-55. The Arbitrator also found it significant that the RJ purchased the paper in December 2015, when the Sun and Stephens Media were litigating the Section 4.2 dispute, and took ownership of the Review-Journal subject to the Sun's claims. 11RA2490-92; 14RA3246-47; 15RA3371; 2RA52-53. The Arbitrator properly rejected the RJ's waiver and course of dealing arguments.

E. THE SUN INITIATES THE UNDERLYING DISTRICT COURT ACTION AND ARBITRATION

As a result of the RJ's refusals to correct its accounting practices, and cooperate in the Sun's audit (among other things), the Sun initiated arbitration. *See generally* 1AA1-30. The RJ objected to arbitration and the Sun was forced to file its Complaint and move to compel certain claims to arbitration pursuant to this Court's Order of Reversal and Remand in the 2016 appeal. *See generally id.* The district court granted the Sun's motion to compel and the parties proceeded in AAA to arbitrate the editorial and promotional cost disputes before a dually-licensed CPA/lawyer arbitrator. *See generally* 2RA48-59.

1. The Arbitration Award

After an eight-day arbitration hearing, in which both parties requested attorney fees and presented witnesses and documents culled from thousands of pages of discovery advancing their respective positions and interpretations of the JOA, the Arbitrator issued the Award on July 2, 2019. *See id.* The Award and rationale consist of the following:

i. The Award Regarding the RJ's Editorial Costs

The Arbitrator ruled in the Sun's favor on the editorial cost dispute and held that "[redacted]." 2RA50-51. The Arbitrator noted that the term [redacted] *Id.* at 52. The Arbitrator concluded that

"[t]he term 'Retention' was very similar to earnings before interest, taxes, depreciation and amortization (EBITDA). *The prior (pre-2005) computation* of 'Retention' included Editorial Expenses of the RJ as allowable deductible expenses." *Id.* (emphasis added). The Arbitrator concluded that Section 4.2 was a provision new to the calculation under the JOA, which "specifically indicates that [each party] would each bear their own editorial costs[,] meaning that the RJ would not, in keeping the books of the JOA, be permitted to deduct editorial expenses of the RJ in computing EBITDA of the JOA and the subsequent annual profits payments (if any) to Sun." *Id.*

The Arbitrator found that "[t]he weight of the evidence leads to the conclusion that the RJ has improperly deducted the RJ editorial expenses reducing the EBITDA of the JOA resulting in improperly low annual profits payments to Sun." *Id.* Thus, the Arbitrator awarded the Sun $1,662,720 in damages plus $208,596 in simple interest, totaling $1,871,316 for the period December 15, 2015 through March 31, 2018. *Id.* at 51.

ii. The Award Regarding the RJ's Promotional Costs

The Arbitrator also ruled in Sun's favor for the promotional cost dispute, declaring that "[redacted]." 2RA51. The Arbitrator explained that the

[redacted]

[redacted]

Id. at 54. The Arbitrator determined that "[t]he weight of the evidence indicated that the RJ charged all promotional expenses to the JOA (both expenses that would be allowed as promotion of both the RJ and Sun in equal prominence and additional promotional activities expenses of the RJ only) resulting in lower EBITDA and payments to the Sun." *Id.* at 53. The Arbitrator concluded that the RJ may not include its independent promotional activities in the expenses charged to the JOA EBITDA. *Id.* at 54.

During the arbitration hearing, the Arbitrator received a substantial amount of evidence and testimony concerning the hundreds of trade agreements that the RJ entered into, without any mention of the Sun. *See e.g.*, 8RA1699-1719. Addressing the RJ's patterned use of trade agreements, the Arbitrator found for example:

[redacted]

2RA53-54 (italic emphasis added). The Arbitrator's conclusion that the revenue from the expense of the independent promotional activity was properly included as joint operation revenues, but not properly included as joint operation expense was not limited to a [redacted] basis. *Compare id. with* AOB 26-27.

Additionally, the Arbitrator noted, [redacted]

[redacted]" *Id.* at 55. Upon finding that the RJ's accounting system prevented the Sun from presenting a definitive damages calculation of the "wrongfully charged additional promotional activities expenses by the RJ" without an audit, the Arbitrator stated that "the 'audit' awarded in this matter could determine the damages (and additional profits payment due)" from the RJ's charging of promotional expenses to the JOA EBITDA. *Id.* at 53; *see also id.* at 51 ("[redacted]").

2. The District Court Confirmed the Award

After the district court received briefing and oral argument on the parties' motions to confirm and vacate the Award, the district court confirmed the Award in its entirety on December 4, 2019. *See* 5AA804-04. On February 2, 2020, the district court entered Judgment on the Award in favor of the Sun in the amount of $1,924,179.94 (with post-judgment interest accruing). *Id.* at 991-93. The RJ appealed the district court's confirmation Order, and subsequently the Judgement. *Id.* at 1030-1298.

ARGUMENT

A. STANDARD OF REVIEW

"This [C]ourt reviews a district court's decision to vacate or confirm an arbitration award de novo." *Washoe Cty. Sch. Dist.*, 133 Nev. 301, 303, 396 P.3d 834, 838 (2017). The scope of a district court's review of an arbitration award, however, is limited. *Health Plan of Nev., Inc. v. Rainbow Med. LLC*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004). "The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." *Id.*

Nevada's Revised Statutes provide specific statutory grounds for vacating an arbitration award. *See* NRS 38.241. Nevada also recognizes the following two common-law grounds for a court to vacate an arbitrator's award: (1) "the arbitrator manifestly disregarded the law," and (2) "the award is arbitrary, capricious, or

unsupported by the agreement." *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006).

As explained by this Court, when reviewing a district court's decision to vacate or confirm an arbitration award, the Court reviews a district court's interpretation of a contract de novo. *Washoe Cty. Sch. Dist.*, 133 Nev. at 303, 396 P.3d at 837.

B. THE ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW

Despite the RJ's suggestion otherwise, the Sun has never argued that the JOA was ambiguous, because the JOA is not ambiguous. *See generally* AOB 43-49. The Award suffers from no error for the Arbitrator enforced the JOA as written. In doing so, the Arbitrator employed governing contract interpretation and accounting principles in interpreting Sections 4.2 and 5.1.4, among other provisions. *See* 2RA48-59. As explained below, the Arbitrator gleaned the parties' intent in how to account for editorial and independent promotional costs under the JOA by looking to the plain language of Section 4.2, together with the Second Paragraph, and Section 5.1.4. The Arbitrator's interpretation is properly supported and further confirmed by the context in which the parties formed the amended JOA.

Specially qualified in accounting, the Arbitrator understood the parties' intent in transitioning their accounting from the 1989 JOA to the amended JOA. From an accounting and common sense perspective, this transition was a crucial element in calculating the joint operation EBITDA and the Sun's Annual Profits Payments under the amended JOA, in order to address costs that the parties agreed were now

disallowed joint operation expenses. Armed with this comprehension, the Arbitrator correctly rejected the RJ's interpretation of the JOA. The RJ's reading of the Retention Sentence and reliance on the P&L to conflict and supersede the plain language of Section 4.2 and 5.1.4, and the JOA as a whole, violated contract interpretation principles and was unreasonable and practically unworkable. The RJ's challenge to the district court's confirmation of the Award under this Court's decision in *Coblentz v. Hotel Employees & Restaurant Employees Union Welfare Fund*, 112 Nev. 1161, 925 P.2d 496 (1996), fails to provide any basis to vacate the Award; rather, *Coblentz*, and this Court's other decisions, supports the district court's order of confirmation.

The RJ has failed to provide clear and convincing evidence to vacate the Award. The Arbitrator did not manifestly disregard the law when interpreting the JOA to prohibit the RJ from charging its editorial and promotional costs against the joint operation EBITDA. An Order affirming the district court's confirmation of the Award in this respect is warranted.

1. The Manifest Disregard Standard of Review

As this Court recently reiterated, "'[j]udicial inquiry under the manifest-disregard-of the law standard is *extremely limited*. A party seeking to vacate an arbitration award based on manifest disregard of law may not merely object to the results of the arbitration.'" *Washoe Cty. Sch. Dist.*, 133 Nev. at 306, 396 P.3d at 840 (quoting *Clark Cty. Educ. Ass'n*, 122 Nev. at 342, 131 P.3d at 8). Rather, "the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator,

knowing the law and recognizing that the law required a particular result, simply disregarded the law." *Id.* The RJ must therefore prove by clear and convincing evidence that the Arbitrator knew the law and recognized that the law required a particular result, but consciously disregarded it. The RJ has failed to meet its burden.

2. The Arbitrator Properly Endorsed the Plain Language of the JOA, Applying Governing Rules of Contract Interpretation

Nevada's recognized principles of contract interpretation, when applied to the JOA, reveal that the JOA prohibits the RJ from charging its editorial and independent promotional costs against the joint operation EBITDA, thereby reducing the Sun's Annual Profits Payments. The RJ's interpretation ignores material and unambiguous provisions in the JOA, and lacks reason—and feasibility. The Arbitrator knew the law and recognized that the law required the JOA to be interpreted and enforced as written. The Arbitrator did just that.

i. Nevada's Traditional Rules of Contract Interpretation

Nevada employs "[t]raditional rules of contract interpretation." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (en banc). When interpreting a contract, the objective is to discern the intent of the contracting parties. *Washoe Cty. Sch. Dist.*, 133 Nev. at 303-04, 396 P.3d at 837. In discerning the intent of the contracting parties, the Court first looks to the plain language of the agreement. *Id.* "[T]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it." *Soro*, 131 Nev. at 742, 359 at 108. Ambiguity is not required before

the Court may consider evidence of trade usage to ascertain or illuminate contract terms. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 313, 301 P.3d 364, 367 (2013).

The Court must also be mindful to read the contract as a whole, "giv[ing] effect to the general purpose as revealed within its four corners or in its entirety," and interpreting the contract "in a manner that gives reasonable meaning to all of its provisions, if possible." 11 Williston on Contracts § 32:5 (4th ed. 2019); *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). "An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable." 11 Williston on Contracts § 32:5.

This Court has made clear that, even on a challenge to a district court's confirmation of an arbitration award, the Court will "look[ ] to the . . . surrounding circumstances" of the parties' formation of the agreement to discern the parties' intent. *Washoe Cty. Sch. Dist.*, 133 Nev. at 303-04, 396 P.3d at 837.

"[I]n the absence of ambiguity or other factual complexities, contract interpretation presents a question of law." *Galardi*, 129 Nev. at 309, 301 P.3d 364 at 366. "[A]n ambiguous contract is an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." *Id.* A contract will be deemed ambiguous only "if its terms may *reasonably* be interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract." *Id.* (emphasis added).

Interpretations that "render the contract fair and reasonable are preferred to those which render the contract harsh or unreasonable to one party." 11 Williston on Contracts § 32:11.

ii. New Provisions of the JOA Specific to Editorial and Promotional Costs Dictate that those Expenses Cannot be Charged to the Joint Operation EBITDA

The mandates in Section 4.2 and Section 5.1.4 of the JOA are clear: (1) the parties "shall each bear their own respective editorial costs"; and (2) if either party undertakes promotional activities for its own newspaper, it must do so "at [its] own expense." 1AA79, 81. The ordinary and common meaning of the terms used in these provisions require the RJ to shoulder the burden of its editorial and independent promotional costs; that is, it cannot charge them to the joint operation, thereby shifting a portion of the costs to the Sun. The circumstances surrounding the formation of the JOA, together with the Second Paragraph, confirms the parties' intentions in this regard.

a. Section 4.2 of the Amended JOA

The new Section 4.2 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 79 (italic emphasis added). The express language in this provision is not capable of any other reasonable interpretation. Section 4.2 addresses the topic of the parties' editorial costs, and specifically speaks to how those costs are to be treated under the

JOA. Section 4.2 need not include the term "EBITDA" for its intent to be clear. *See* AOB 49-50. The context in which the parties' amended the JOA confirms the parties' already clear intentions. The RJ's interpretation of Section 4.2 as only requiring the parties to "pay" their own editorial costs contradicts the parties' clear intent set forth in Section 4.2, and it is unpersuasive. Section 4.2 was new and specific to editorial costs in the amended JOA. Section 4.2 directs that each of the parties' bear the burden of their respective editorial costs, and the Arbitrator properly enforced it as written.

The Plain and Unambiguous Language of Section 4.2

As used in Section 4.2's requirement that each party "bear their own respective editorial costs," the ordinary and common meaning attributed to the word "bear" is "to support the weight of : sustain." MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/bear (last visited June 22, 2020); *accord* Bear, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To support or carry."). Affording the word "bear" its plain meaning in Section 4.2's requirement that each party "bear" their own editorial costs dictates that each party support, carry, and sustain the burden of those costs. This necessarily requires that neither party shift the burden of those costs to the joint operation, and therefore the other party is burdened. Section 4.2 is not capable of any other reasonable interpretation.

To illustrate, when the RJ charges its editorial costs to the joint operation, those costs reduce the joint operation EBITDA. The reduction in the joint operation

EBITDA reduces (and has reduced) the Sun's Annual Profits Payments (to zero in fact). The fiscal year-end joint operation EBITDA is used to calculate the Sun's Annual Profits Payments. *See* 1AA98. As a result, when the RJ charges its editorial costs to the joint operation EBITDA, the Sun is forced to subsidize a portion of the RJ's editorial costs every year. This contradicts the parties' clear intent expressed in Section 4.2.

The plain language interpretation of Section 4.2 is consistent with industry practice for newspapers operating under JOAs. *See Galardi*, 129 Nev. at 313, 301 P.3d at 369 (holding lower court's considering trade usage and industry custom in interpreting a contract proper). The Section 4.2's requirement that *both* parties bear their own editorial costs is consistent in other JOAs. *See* 2RA169. No witness who testified at the arbitration had ever heard of only *one* JOA partner being allowed to expense its editorial costs against the joint operation: either both partners' editorial costs were included as a joint operation expense, or both were excluded from the joint operation. *E.g.*, 9RA1846-47; 12RA2725-27; 13RA2821-22; 17RA3818. Instead, witnesses uniformly agreed that all other JOAs carefully ensure that mutual treatment of editorial costs is afforded to both parties. *Id.* The RJ failed to controvert the plain language interpretation of Section 4.2 or the meaning afforded to that provision in the industry of JOAs during the arbitration.

The History Surrounding the New Section 4.2

The "surrounding circumstances" of the parties' formation of the JOA further evidences the parties' intentions already reflected in the plain language used in Section 4.2. *See Washoe Cty. Sch. Dist.*, 133 Nev. at 303-04, 396 P.3d at 837; *Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 460-61, 254 P.3d 641, 647-48 (2011). Contrary to the RJ's assertion, no ambiguity is required for this Court to look to these circumstances. *Compare id. with* AOB 43-50.

The parties amended the JOA, in part, to resolve existing editorial cost disputes caused by the 1989 JOA, under which both parties' news and editorial *allocations* were approved deductions from the parties' joint earnings as Agency Expense. 1AA42 (§ 4.2), 65 (App'x A), 68 (App'x B); *see also* 7RA1366-72. The editorial cost dispute that the parties sought to resolve, specifically through Section 4.2, stemmed from the RJ consistently hiding and reclassifying valid editorial costs to avoid paying the Sun its full 65 percent editorial allocation. 7RA1362-69. In the 2002 settlement, which triggered the renegotiation of the 1989 JOA, for example, the RJ paid the Sun for certain editorial and promotional adjustments, among other things, nearly [redacted]. *Id.* at 1362-69

Accordingly, the contracting parties changed Section 4.2 to abolish the friction related to the editorial cost disputes accordingly:

> 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 1AA42 *with id.* at 49. Had the parties intended for the RJ to continue charging its editorial expenses to the joint EBITDA, they would *not* have removed that language from Section 4.2 and would *not* have explicitly agreed that *each* Newspaper was to "bear their own respective editorial costs." *See id.* Rather, the amended JOA would simply say that the "*Sun* shall bear its own editorial costs." As mentioned above, the language of Section 4.2 is mutual and cannot be ignored: "every word must be given effect if at all possible." *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013).

The RJ's Interpretation of Section 4.2 as Only Requiring the Parties to "Pay" Their Own Editorial Costs is Unreasonable and Unpersuasive

According to the RJ's interpretation of Section 4.2, Section 4.2's requirement that each party "bear" their own editorial expenses only means that each party "pay" their own expenses (and therefore, the RJ may still charge its own editorial costs to the joint operation, although the Sun cannot). AOB 31-33, 44-46. The RJ argues that the purpose in amending Section 4.2 was to now require the *Sun* to *pay* its own editorial costs, since the RJ always paid its own under the 1989 JOA. *Id.* at 21, 46, 48. The RJ cites to a separate, general provision in the JOA that governs the operational obligations of the RJ (Section 5.1), to support its "to pay" interpretation. *See id.* at 44-45. The RJ's interpretation fails for three reasons: (1) it contradicts the plain language

of Section 4.2, (2) the factual basis on which the interpretation relies is inaccurate, and (3) it does not give due deference to the specificity of Section 4.2 as qualifying general provisions in the JOA. The Sun addresses each of these three reasons below.

First, the terms "bear" and "pay" are not synonymous. The definition of "pay" is "to make due return to for services rendered or property delivered," or "to discharge a debt or obligation." MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pay last visited June 22, 2020); *compare with id.* at "bear," *supra*. Its synonyms include "compensate," "remunerate," "satisfy," and "reimburse." *Id.* Witnesses, including the Review-Journal's former controller, testified about the RJ's reading of Section 4.2 and disagreed, stating that the RJ and the Sun are to *not only* pay their own editorial expenses, but that neither newspaper could charge the other or seek reimbursement for their editorial expenses from the joint operation. *E.g.*, 2AA393-94, 397.

Second, the RJ's suggestion that the purpose of Section 4.2 was to require the *Sun* to pay its own expenses under the amended JOA is incorrect as a matter of fact. *See* AOB 21, 46, 48. The Sun and the RJ have always physically "paid" for their own editorial costs, even under the 1989 JOA. To the extent the RJ suggests that *it paid* the Sun's editorial cost *allocation* under the 1989 JOA, that, too, is inaccurate. Under the 1989 JOA, the Sun's editorial cost *allocation*, paid as part of its compensation, was paid from the *joint operation*—not from the Review-Journal individually, as it now argues. *Compare* 1AA37, 50, 65, 68 *with* AOB 20-21. Therefore, the RJ has never "paid" for

nor "bore" the Sun's editorial costs at any time during the parties' 30-year relationship. The Arbitrator was correct in rejecting RJ's interpretation of Section 4.2.

Third, in further arguing that Section 4.2's to "bear" must mean to "pay," the RJ points to Section 5.1, which includes a sentence requiring that the operational expenses except the Sun's editorial expenses also be "bourne" by the RJ. AOB 7-8, 32, 44-47. As argued by the RJ, if the plain meaning is afforded to the term "bourne" in Section 5.1, none of the joint operation expenses could be allowable deductions; therefore, Section 4.2 must mean that each party shall "pay" their own editorial costs. *Id.* Section 5.1, however, must be considered under applicable contract interpretation principles, just like the other provisions of the JOA, and a proper contract interpretation analysis renders the RJ's interpretation unreasonable.

More specifically, what is gleaned from Section 5.1's plain language, together with the JOA as a whole, is the parties' intent that Section 5.1 functions as a general provision governing the operational obligations of the RJ. It is not instructive as to how the parties are to treat their editorial costs specifically, which is addressed separately and independently in the new Section 4.2.

Article 5, entitled, "CONTINUING PUBLICATION AND NEWS AND EDITORIAL AUTONOMY," addresses the technical production and promotion of the Newspapers, the parties' overarching news and editorial autonomy, performance and cooperation of the parties, and the Sun's office space. 1AA80-82. Section 5.1 is the prefatory paragraph governing the technical aspects and operational

responsibilities related to "Production and Promotion of the Newspapers." *Id.* at 80-81. Naturally, it discusses an array of subtopics, such as: the new Appendix A's requirements for the number, placement, and characteristics of the Sun's pages, and edition times; the Sun's obligations under Article 4 "to furnish news and editorial copy, features and services" to the RJ; the RJ's agreement to produce the Sun as a daily morning paper; the RJ's obligations to print the Newspapers at its plant; and the RJ's obligations to perform all operations except the operation of the Sun's news and editorial department, including that the RJ "shall control, supervise, manage and perform all operations involved in managing and operating" under the JOA (*e.g.*, supplements and comics, market coverage, publication programs, printing, selling and distributing the newspapers, and all other mechanical and technical functions of the Newspapers, and advertising and circulation). *Id.* at 80-81. Buried amongst Section 5.1's lengthy recitation of the various production and promotion technicalities of the Newspapers is the general statement that "[a]ll costs, including capital expenditures, of operations under this [JOA], except the operation of the Sun's news and editorial department, shall be borne by the Review-Journal." *Id.* at 80.

Reading this statement in its context, *i.e.*, with Section 5.1 as a whole, reveals its purpose. That is, to set forth the RJ's operational obligations, including its management and administration of the joint operations costs.[5] Its generality in

[5] Notably, the "capital expenditures" reference highlighted by the parties in Section (continued)

referring to all joint operation costs cannot be used to contradict the parties' specific, expressed intent to exclude editorial costs as an expense of the joint operation in Section 4.2. As a matter of law, Section 4.2's specificity in how editorial costs are to be treated qualifies Section 5.1's general statement of the RJ's overall obligations. *See* 11 Williston on Contracts § 32:10 (4th Ed. 2019) (providing that under the principle of *ejusdem generis*, "[w]hen general and specific clauses conflict, the specific clause governs the meaning of the contract"). Section 5.1 cannot be interpreted to trump or render meaningless the parties' specific intention reflected in Section 4.2.

As discussed above, the RJ's proffered interpretation of Section 4.2 is unreasonable. It requires this Court to attribute erroneous meanings to its terms, ignore the factual inaccuracies relied on to support the purpose of the amendment, and violate other fundamental contract interpretation principles. The Arbitrator was correct in rejecting the RJ's interpretation of Section 4.2 as a result.

b. The Second Paragraph of Appendix D

Section 4.2 must be read with the JOA as a whole. The Second Paragraph reaffirms the parties' intent to exclude editorial costs from the joint operation EBITDA and it cannot be ignored, despite the RJ's attempt to do so. *See generally* AOB. The Second Paragraph delineates the crucial baseline EBITDA calculation.

5.1 are disallowed joint operation expenses, *see* 1AA80, 99, like the parties' editorial costs.

1AA98. Because the RJ's interpretation of Section 4.2 nullifies the Second Paragraph, the RJ's interpretation cannot stand. *See Bielar*, 129 Nev. at 465, 306 P.3d at 364.

The Purpose and Plain Language of the Second Paragraph

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." 1AA98 (emphasis added). The Second Paragraph and the 1989 JOA provisions referenced therein parallel the plain language of Section 4.2, solidifying that neither party may charge its editorial costs against the joint operation EBITDA. *See* 8RA1552-58.

Since the Sun's Annual Profits Payment was set at $12 million the first year, and then set to fluctuate annually based on the yearly change in the joint operation EBITDA for the remaining 35 years of the term, the Second Paragraph is crucial to the JOA. A baseline EBITDA calculation was imperative for getting an "apples-to-apples" comparison when calculating the change in EBITDA, *i.e.*, the "delta," going forward. *See* 1AA98; 8RA1558-62.

Importantly, the baseline EBITDA calculation depicted in the Second Paragraph prohibits a reduction in the baseline EBITDA by the parties' editorial cost allocations, *i.e.*, "amounts that during such period [(pre-2005)] may have been otherwise been deducted from earnings under section A.1 of Appendix A." 1AA98;

see also id. at 65 (App'x A.1); *id.* at 68 (App'x B.1.1); 8RA1558-62 (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 baseline EBITDA calculation had to exclude the parties' editorial costs so that the parties were capable of computing an accurate percentage change in the EBITDA going forward under the new calculation, which did not include the parties' editorial costs. This calculation effectuated a direct mandate of Section 4.2.

Under the RJ's reading that it, and only it, is allowed to charge its editorial costs to the joint operation, the parties' first calculation of the change in EBITDA (from the baseline to the next year) would require comparing an EBITDA that included editorial cost allocations to an EBITDA under the amended JOA that had removed those expenses. Excluding both parties' editorial allocations 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* 8RA1566-67. This interpretation is not only unreasonable, but it is unworkable and irrational from an accounting perspective.

The RJ has Never been Able to Explain how to the Second Paragraph of Appendix Functions Under Its Interpretation

To date, the RJ has never articulated how the Second Paragraph works under the RJ's interpretation of the JOA. Not a single RJ witness was able to harmonize the Second Paragraph's baseline EBITDA calculation with its argument that it is allowed to deduct its editorial costs from the joint operation. *E.g.*, 11RA2465-68; 2479-82. While all RJ witnesses were quick to discuss the Retention Sentence and ignore the Second Paragraph entirely, *see* 11RA2479-81; 13RA3898-2904, in the end, the RJ's financial expert agreed that the baseline calculation was necessary for consistency going forward from the base year to properly calculate the percentage change in EBITDA. 13RA2898-2900. And even that witness could not explain how the Second Paragraph would (or could) function under the RJ's practice of including its editorial costs. *See* 12RA2778-80; 13RA2898-2911. The RJ's Chief Financial Officer also admitted that the baseline calculation was to exclude *both* papers' editorial costs. 11RA2467-73. By virtue of establishing the baseline 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).

Rather than explain how its interpetation of the JOA can be read in harmony with the Second Paragraph, the RJ summarily argues that "because the 2005 JOA contains a list of costs to be excluded from the EBITDA calculation, and promotional and editorial costs are not on that list," its editorial and promotional expenses may be

deducted from the joint operation EBITDA. AOB 50. The RJ neither points to which part of Appendix D itemizes a "list of costs" to be excluded from EBITDA, nor acknowledges its own concession during arbitration that editorial costs must be removed from the baseline EBITDA calculation.[6] *See generally id.*

Of important note concerning the RJ's failure to explain the Second Paragraph under its interpretation of Section 4.2 is how the RJ has treated other expenses that the Second Paragraph excluded from the baseline EBITDA. The RJ has *complied* with the Second Paragraph's baseline EBITDA calculation for all other costs excluded from the baseline. *E.g.*, 12RA2593-41. It has not charged those once-allowed-and-now-disallowed expenses to the joint operation. Those expenses include the monthly rental charge in the amount of $550,000, the 1.5 percent charge for Agency equipment, the 3.5 percent monthly management fee, and the 1.5 percent monthly expense fee for Sun's newsroom interface equipment. *See* 1AA98 (providing that "such earnings shall not be reduced by any amounts that during such period may have been otherwise been deducted from earnings under . . . section B.1.16, B.1.17, B.1.18, or B.3 of Appendix B of the 1989 Agreement" (emphasis added)). The RJ has not charged these costs under the amended JOA, yet it charges its editorial costs.

[6] To the extent the RJ is referring to the parties' exclusion of certain classifications of capital expenditures for equipment from the EBITDA calculation, that is not a "list of costs." *See* 1AA99. Rather, that portion of Appendix D specifically and only addresses capital expenditures for "Press Equipment" and "Other Equipment." *See id.*; *see also*

(continued)

The RJ cannot reasonably dispute that the Second Paragraph complements Section 4.2's demand that both parties bear their own editorial expenses. The RJ cannot explain how the Second Paragraph could ever operate under the RJ's interpretation that the RJ could charge its editorial costs to the joint EBITDA. It cannot resurrect 1989 JOA-era financial statements in the amended JOA-era. This obsolete accounting is simply improper and unworkable from an accounting practicality perspective. Adopting the RJ's interpretation renders Section 4.2 and the Second Paragraph meaningless, a prohibited result. *See Bielar*, 129 Nev. at 465, 306 P.3d at 364.

c. Section 5.1.4 of the Amended JOA

Section 5.1.4, in part, reads in no uncertain terms:

> 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*.

1AA81 (emphasis added). Applying Nevada's rules of contract interpretation to Section 5.1.4 dictate that the Arbitrator was correct in enforcing the JOA as written, and concluding that the RJ could not charge its independent promotional costs to the

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infra. Again, the parties' failure to reiterate that editorial and promotional costs could not be charged is irrelevant and unnecessary.

joint operation. The RJ's accounting challenge to the Arbitrator's interpretation of 5.1.4 for trade agreements is factually and legally meritless as well. *See* AOB 22, 27, 39.

The Plain and Unambiguous Language of Section 5.1.4

Section 5.1.4 is unambiguous. Section 5.1.4 obligates the RJ to promote both Newspapers, using commercially reasonable efforts, and any promotional activity undertaken by the RJ "as an advertising medium or to advance circulation" of the Newspapers must include a mention of the Sun in equal prominence. 1AA81. Where the RJ promotes itself without a mention of the Sun in equal prominence, that independent promotional cost must be incurred at the RJ's "own expense." *Id.*

Contrary to the RJ's conclusory assertion otherwise, Section 5.1.4's language "at their own expense" cannot be attributed any plain or ordinary meaning other than the expense of the RJ's independent promotional activity is the RJ's alone—not the joint operation's.[7] *See* AOB 44-47. The fact that Section 5.1.4 does not mention "EBITDA," *see id.* at 33-34, 49-50, is inconsequential.[8] Section 5.1.4 was

[7] The RJ groups its challenges to the Arbitrator's conclusion that the JOA prohibits the RJ from charging its editorial and promotional costs to the joint operation, including its argument that "to bear" means "to pay." *See, e.g.*, AOB 44-46, 48-49. Section 5.1.4 does not use the "to bear" language included in Section 4.2. The RJ's argument is inapplicable to this analysis. *See* AOB 27, 39.

[8] The RJ's argument that Sections 4.2 and 5.1.4 do not mention "EBITDA" is without merit. *E.g.*, AOB 33-34, 49-50. These sections need not mention the word for them to describe whether they are allowed expenses. For example, there is no dispute Section 4.2 in the 1989 JOA *authorizes* the application of editorial cost allocations to be deducted from the profit calculation there. Section 4.2 in the amended JOA *revokes*

(continued)

expressly modified and speaks directly to the parties' independent promotional costs, and how those costs are to be expensed. *Compare* 1AA47 *with id.* at 81.

Affording Section 5.1.4's terms their ordinary and usual meanings, Section 5.1.4 makes clear that the RJ cannot charge its independent promotional expenses to the joint operation. Like its charging of editorial costs, the RJ's charging of its independent promotional expenses reduces the joint operation EBITDA and, as a result, the Sun's Annual Profits Payments. The Sun is therefore forced to subsidize a portion of the RJ's independent promotional expenses. An interpretation that allows this result ignores Section 5.1.4's plain language that the RJ is to undertake its independent promotional activities at it "own expense."

The History Surrounding Section 5.1.4

Examining the parties' transition from the 1989 JOA to the amended JOA with respect to how they treated promotional expenses also gives Section 5.1.4. context, and reinforces the plain language of Section 5.1.4. *See Washoe Cty. Sch. Dist.*, 133 Nev. at 303-04, 396 P.3d at 837.

Under the 1989 JOA, the parties treated their respective promotional costs like they treated their editorial costs. Whereas the parties' promotional cost *allocations* were approved deductions as allowable Agency Expense, *id.* at 47, 66 (App'x A.3), 68 (App'x B.1.1), their promotional costs that exceeded the allocated amounts were

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that authorization (as does the rest of the contract).

disallowed Agency Expense. *Id.* at 47, 66. And again, where the Sun received a promotional cost allocation, that allocation was from the parties' joint operation, not the RJ individually.

When the parties' amended the JOA in 2005 and merged two, formerly distinct publications into a single, dual-media product, the RJ became responsible for promoting both Newspapers in equal prominence, and the parties' prior promotional allocations—an Agency Expense—were eliminated entirely. *Id.* at 80 (§ 5.1), 81 (§ 5.1.4). The 1989 JOA Appendices A (setting forth the promotional allocations) and B (defining the promotional allocations as Agency Expense) were replaced as a result. *Compare id.* at 65-73 *with id.* at 90-96. Analogous to the 1989 version of Section 5.1.4, where either party could elect to incur individual promotional costs in excess of the deductible costs, the costs could not be charged to the joint operation. *See* 1AA47. How the contracting parties amended Section 5.1.4 to transition from the 1989 JOA to the amended JOA, provides context that supports the plain language of Section 5.1.4. That is, Section 5.1.4 requires that independent promotional costs shall be incurred at the sole "expense" of the incurring party, and cannot be charged to the joint operation EBITDA.[9] *Id.* at 81. Significantly, for a decade prior to News+Media's purchase of the Review-Journal, the RJ's predecessors routinely included the Sun in

[9] In line with the RJ's obligation to promote the Newspapers, promotions mentioning the Sun in equal prominence are allowable joint operation expenses. *See id.*

equal prominence in promotions in accordance with the amended JOA. 16RA3599-60.

The RJ's Parsing of Trade Agreements from the Section 5.1.4 is Based on a Flawed Premise

While finding in favor of the Sun with respect to 5.1.4, the Arbitrator paid special attention to the RJ's handling of trade agreements. Such agreements contain both a revenue component and an offsetting expense component in financial statements. Where the trade agreement promotion failed to mention the Sun in equal prominence, the Arbitrator found the revenue should accrue to the benefit of the joint operation EBITDA calculation because JOA assets were used. The RJ must recognize the offsetting expense component, however, outside of the JOA EBITDA calculation in order to satisfy the amended JOA's requirement that independent promotions are the party's own expense.

The RJ argues that the CPA Arbitrator disregarded accounting principles in concluding that the RJ must separately bear its independent promotional costs, but must book revenues while not charging the expenses to the joint operation, particularly as that applied to the RJ's trade agreements. AOB 9, 22, 27, 39. The Arbitrator—qualified in accounting—did not disregard the law or any accounting principles. The RJ's challenge is premised on the faulty assumption that its individual EBITDA is identical to the joint operation EBITDA. (This same erroneous premise is

threaded throughout the RJ's Opening Brief when relying on the P&L as well. *See infra.*

The RJ's conflation of its individual EBITDA with the joint operation EBITDA is evidenced by the RJ's arguments in its Opening Brief, and the Arbitrator specifically considered this fact when entering the Award. In particular, there has never been any dispute that the RJ charges all of its promotions against the joint operation EBITDA regardless of Section 5.1.4's mandates. *See* 2RA53; *see also id.* at 171. It was, and still is, also undisputed that the RJ makes no accounting distinction between independent or joint promotional activities, and admitted that its "[redacted]" *Id.* The RJ does not even maintain an accounting method capable of tracking independent promotional expenses separate from joint promotional expenses. *E.g.*, 2RA54. The RJ's failure to separate any of its promotional costs under the JOA from its individual promotional costs aligns with the RJ's loose treatment of its individual profit and loss as being the same as the joint operation EBITDA. The RJ's refusal to recognize the distinction between its individual EBITDA and the joint operation EBITDA is fatal to the RJ's challenge to the Arbitrator's interpretation of Section 5.1.4.

In particular, the RJ's individual profits and losses are distinct from the joint operation EBITDA. Therefore, the joint operation must recognize the revenue from a trade agreement (*e.g.*, advertisements in the newspaper) as they are earnings for the

joint operation (*see* 1AA98-99 (App'x D, describing earnings)), but the costs are not allowed if they are the result of an individual promotional activity pursuant to Section 5.1.4. *See* 8RA1699-1704; *see also* 10RA2105-06 (showing the RJ confusing its P&L with JOA). As a result, the JOA requires that booking the costs of these trades not be charged to the joint operation EBITDA. 8RA1632-34. The Arbitrator understood this[10] and did not disregard the law when concluding that Section 5.1.4 prohibited the RJ from charging its independent promotional activities to the joint operation.

The RJ's Interpretation of the Retention Sentence is Unreasonable, and Renders the Remaining Provisions of the JOA Meaningless

The RJ's sole argument advanced to vacate the Award is that *one* sentence within Appendix D, the Retention Sentence (which references its predecessor's *pre-2005* P&L), trumps all other provisions, thereby rendering them meaningless. *See generally* AOB. While the RJ asserts that the Sun conceded during the district court hearing that a literal reading of the Retention Sentence dictates the definition of the joint operation EBITDA under the JOA, the RJ's assertion is belied by the hearing transcript to which the RJ cites. *Compare* AOB 10, 28 *with* 4AA638-49. Both the Arbitrator and the district court heard the Sun's interpretation (that was confirmed by

[10] The Arbitrator understood the difference in the JOA's requirement the RJ keep two separate accounting books—one for the JOA and for the Review-Journal personally. *E.g.*, 2RA54 ("[redacted]

(continued)

the Arbitrator) of the Retention Sentence, which discerned the parties' intention by looking to the plain language of the sentence, affording its terms their plain and ordinary meanings, and the circumstances surrounding the inclusion of the Retention Sentence. The Arbitrator did not err when it rejected the RJ's reading of the JOA.

d. *Plain Language of the Retention Sentence*

Looking first to its plain language, 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." 1AA99. Despite the RJ's contention, the term "Retention" is not a newspaper term of art and is not synonymous with EBITDA. *See* AOB 6, 18. As the Arbitrator properly acknowledged in the Award, "Retention" was a specific term used by Stephens Media in its operations. 1AA2RA52. Retention is not recognized as a universal accounting principle, and certainly not a recognized accounting principle in the newspaper industry at large. *E.g.*, 8RA1571-73. "Retention" is not synonymous with the joint operation EBITDA either. *See* AOB 6-7, 18-19, 20, 38, 44-46. As noted by the Arbitrator, "Retention," as used by Stephens Media, was "very similar to" EBITDA under the "prior (pre-2005) computation." 1AA240. Affording the ordinary meaning of the words used in the Retention Sentence, and considering the practical application

[redacted]") (emphasis added).

of the sentence, the RJ's interpretation that the joint operation EBITDA is identical to Stephens Media's Retention must be rejected (for the third time).

The Retention Sentence provides that EBITDA be calculated in a manner "consistent with"—*not identical to*—Retention. 1AA99. While the RJ again attempts to attribute different meanings to ordinary terms, "consistent with" does not have the same meaning as "identical to," or alike in any detail, and the terms are not interchangeable. From a common sense standpoint, the RJ's reading of the Retention Sentence to require the joint operation EBITDA under the amended JOA be calculated *identically* to Retention produces an impractical result. The amended JOA's term lasts several decades, and no business could expect that its expenses would or could remain fixed for decades into the future. The contracting parties certainly knew that the joint operations expenses would not remain identical for the next 35 years.

e. *The History Surrounding the Retention Sentence*

Setting aside the circumstances surrounding the formation of the JOA as a whole (which support the Arbitrator's interpretation), the context in which the Retention Sentence was added to the JOA solidifies that the Retention Sentence had no bearing on editorial costs, and that the parties intended EBITDA to be "consistent" with Retention, not identical to it.

By the time the parties were negotiating Appendix D, Section 4.2 had long been settled. *See* 8RA1532-34; *see also* 7RA1390-92. The Sun proposed the Retention Sentence, and did so using language reflecting the parties' intentions, *i.e.*, that

EBITDA would be "consistent with" the Retention line item in the P&L. 7RA1390-92 The Sun proposed the Retention Sentence to ensure that the RJ could not create new EBITDA line items. Capital expenditures are an example of a new line item that the Sun sought to address through the Retention Sentence. At the time the parties were negotiating Appendix D, the RJ was seeking to purchase a [redacted] printing press. *Id.* The Sun was concerned that such a massive expense, and others, would be charged to the joint operation EBITDA by using forms of lease expenses to substitute for Review-Journal capital expenses, which are never included in EBITDA calculations. As noted earlier, the RJ was to independently bear all capital expenses under the amended JOA. 1AA99; 8RA1532-34. The placement of the Retention Sentence in Appendix D is not happenstance: the Retention Sentence immediately follows the provision discussing Press Equipment and Other Equipment as capital expenditures, and how to account for such items under the joint operation EBITDA. 1AA99. This evidence remained uncontroverted by the RJ during the arbitration hearing.

f. *The Expenses in the P&L Cannot Dictate Allowable Expenses Under the Amended JOA*

When arguing that its interpretation of the Retention Sentence supports charging its editorial and promotional costs to the joint operation, the RJ places significant focus on the Stephens Media P&L from 2004, which includes editorial and promotional costs in the Retention line item. *See* AOB 6-7, 18-19, 20, 38, 44-46. The

RJ then reasons that all costs incurred by a *company* must be deducted when calculating EBITDA as a matter of accounting principles. *E.g.*, *id.* at 33-34, 45-46. As already mentioned above, the RJ's interpretation is based on its wrongful conflation of Stephens Media's individual profit and loss statement with the joint operation EBITDA (which is not a traditional EBITDA calculation). Stephens Media's profit and loss, like a traditional company EBITDA calculation, is not the same as and is inapplicable to the joint operation EBITDA of the Newspapers.[11] *See id.* at 5-7, 32-34, 43-47.

To reiterate, the joint operation's profits, whether calculated as Operating Profit under the 1989 JOA or EBITDA under the amended JOA, have always been dictated by and calculated according to the governing JOA. The RJ cannot find solace in complaining that the JOA does not follow a traditional EBITDA calculation formula, because the JOA EBITDA is the EBITDA of the parties' joint operation, *i.e.*, the "Newspapers"—not either of the parties' individual EBITDA. Examining

[11] The RJ submits an errant argument recasting the Sun's argument as only deductions benefitting the Sun and RJ jointly are supposed to be deducted, then challenging the "Sun's" purported argument with the Review-Journal's separate publications that are included in the JOA's earnings and the P&L. *See* AOB 41-42. The RJ's new argument that because the earnings of the other publications are part of the EBITDA calculation must congruently mean the RJ's editorial costs can be charged ignores that these publications were *always* part of the JOA accounting. 1AA404. The RJ has never raised this argument before because the Sun has never made that argument. It should be disregarded as a result. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

meritless the P&L against both JOAs illustrates this flaw in the RJ's argument, and renders the RJ's interpretation that it must deduct its editorial and independent promotional costs from the joint operation EBITDA.

First examining the P&L against the 1989 JOA, the P&L includes expenses that the parties agreed were *disallowed* under that contract. To recall, the 1989 JOA specifically defined the joint operation's profit, *i.e.*, Operating Profit, and calculated it as the remainder of Agency Expense deducted from Agency Revenues. *See* 1AA75. The 1989 JOA defined Agency Expense to include, among other agreed-upon expenses: the parties' editorial cost and promotional cost allocations (§ B.1.1); a monthly rent expenses in the amount of $550,00 (§ B.1.16); a 1.5 percent monthly charge for capital expenditures (§ B.1.17); a monthly charge of 3.5 percent as a management fee (§ B.1.18); and a monthly charge of 1.5 percent for the Sun's newsroom interface equipment (§ B.3). *Id.* at 68-73. The 1989 JOA also expressly directed that certain expenses could *not* be charged as Agency Expense. These disallowed expenses included editorial and promotional costs in excess of the allocations (§ 5.2 & App'x A.1); libel insurance (§ 8.1.3); and legal fees for non-JOA claims (§ 8.1.2). *Id.* at 49, 53-55 & 65. These expressly disallowed expenses were, indeed, incurred by the joint operation or by Stephens Media and therefore *appeared* in *Stephens Media's* P&L, under the Retention line item as the Review-Journal's independent expenses, despite being expressly disallowed as Agency Expense under the 1989 JOA.

Thus, what the P&L reflects is Stephens Media's expenses, not Agency Expenses of the joint operation. The contracting parties to the 1989 JOA knew and intended that the 1989 JOA governed the joint operation's profit calculation, and not their individual profits calculation. This is why the parties calculated the Operating Profit under the 1989 JOA per the terms of the contract and not based on what the Stephens Media's P&L included. *Compare* 1AA401 *with id.* at 403.

Examining the P&L against the amended JOA further exemplifies the flaw in the RJ's argument. As stated above, the P&L includes other Agency Expenses that the parties agree are expressly disallowed under the Second Paragraph baseline EBITDA calculation, *i.e.*, monthly rent under B.1.16, the 1.5 percent charge for capital expenditures under B.1.17, the management fees under B.1.18, and the Sun's newsroom interface equipment expenses under B.3. 1AA98. While the RJ has charged its editorial costs against the joint operation despite being expressly disallowed under the Second Paragraph, the RJ has never charged any of the Appendix B Agency Expense items to the joint operation EBITDA *despite their inclusion in the P&L. E.g.*, 11RA2472-73.

The P&L includes additional Agency Expenses not referenced in the Second Paragraph, which the parties also agree are *disallowed* under the amended JOA because they were eliminated under the JOA. These expenses include: the Sun's production and delivery costs, circulation costs, sales costs associated with Sun advertising, the Sun's expenses for newsprint and ink, and the 40 percent promotional allocation

dedicated to the Sun. *E.g.*, *compare* 2AA401-05, *with* 3RA465-71, 474-44. In addition, the P&L also includes revenues associated with Sun circulation and advertisings which did not survive the changes in the amended JOA. *E.g.*, *id.* The parties also presently agree and the RJ has never charged any of these expenses to the joint operation EBITDA since the amendment as they are invalid expenses in the amended JOA scheme. *E.g.*, 3RA465-71, 474-77.

The inclusion of these undisputed disallowed costs in the P&L shows how absurd it is to rely—in any respect—on the P&L when calculating the joint operation EBITDA calculation after the amended JOA came into effect. The clear intention is to create a clean break from prior accounting because of the changes made in the amended JOA. The expenses included in the P&L that the RJ has not charged the joint operation under the amended JOA also demonstrates that, in reality, even the RJ does not believe that the P&L dictates the joint operation EBITDA. The P&L's limited relevance was also demonstrated by the fact that it was not affixed or otherwise attached to the JOA.

As the P&L and the JOAs demonstrate, the joint operation's expenses have never followed the Review-Journal's individual EBITDA calculation, or a traditional EBITDA calculation like that explained in the RJ's cited "Investopedia" website article. *See* AOB 5 n.6, 46 n.16. While a company may generally deduct its expenses in its income statements when determining its personal profits and losses, the joint operation EBITDA at issue in this case is not and never has been the Review-

Journal's individual EBITDA: the joint operation EBITDA is for *the joint operation* of two separate entities.[12] This, the CPA Arbitrator knew. The Arbitrator's interpretation of the JOA was correct under the law and the plain language of the JOAs. This Court's Decision in *Coblentz* does Not Support the RJ's Request to Vacate the Award

The RJ challenges the district court's confirmation of the Award on the basis that the district court failed to follow this Court's precedent requiring courts to vacate arbitration awards that contradict the parties' agreement. AOB 28-30, 34, 35-40, 47. According to the RJ, the district court erred by purportedly concluding that *Washoe County School District v. White*, 133 Nev. 301, 396 P.3d 834, (2017), overruled *Coblentz v. Hotel Employees & Restaurant Employees Union Welfare Fund*, 112 Nev. 1161, 925 P.2d 496 (1996), and that *Coblentz* does not "justify the district court's refusal to vacate the Award." AOB 35-40, 39. The RJ's challenge to the district court's confirmation of the Award misses the point. This Court reviews a district court's decision to confirm or vacate an arbitration award *de novo*. *Washoe Cty. Sch. Dist.*, 133 Nev. at 303, 396 P.3d at 838. Therefore, this Court will consider anew whether the RJ has proven by "clear and convincing evidence" the statutory or common-law ground relied upon for vacating the Award. *Id.* The RJ fails to acknowledge the standard of review set forth in

[12] The RJ's claim THAT the "Sun *expressly agreed* to have its compensation tied to the Review-Journal's EBITDA" is wrong. AOB 46. The RJ's error is that it uses JOA EBITDA and Review-Journal EBITDA interchangeably.

Coblentz. The RJ's heavy reliance on *Coblentz* by analogy is also misplaced. Under the appropriate standard of review, the RJ cannot meet its burden.

In *Coblentz*, this Court explained the manifest-disregard-of-law standard, and stated that 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*.

112 Nev. at 1169, 925 P.2d at 501 (emphasis added). As this Court reiterated 11 years later in *Washoe County School District*,

> [J]udicial inquiry under the manifest-disregard-of-the-law standard is *extremely limited*. A party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration. Thus, the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law.

133 Nev. at 306, 396 P.3d at 840. Consequently, as *Coblentz* and *Washoe County School District* make clear, under this Court's *extremely limited* review, the RJ bears the burden of showing, by clear and convincing evidence, that the Arbitrator manifestly disregarded the law of contract interpretation in concluding that the JOA prohibits the RJ from charging its editorial and independent promotional costs to the joint operation.

This case is distinguishable from *Coblentz*. In *Coblentz*, this Court held that the arbitrators ignored a provision of a lease agreement requiring the tenant to name the landlord as an additional insured, and instead only considered the tenant's duty to indemnify. 112 Nev. at 1167-68, 925 P.2d at 500. The lease agreement required two separate duties of the tenant—the duty to insure and the duty to indemnify. *Id.* This Court concluded that the arbitrators manifestly disregarded the law because their findings rendered a provision of the lease (the duty to insure) meaningless. *Id.* at 1169, 925 P.2d at 501.

Unlike *Coblentz*, the Arbitrator did not render any provisions of the JOA meaningless. On the contrary, the RJ's interpretation of the Retention Sentence plainly conflicts with Sections 4.2, 5.1.4, and the Second Paragraph of Appendix D of the JOA. The Arbitrator considered the Sun's and RJ's proffered interpretations of the Retention Sentence *and* the P&L, in conjunction with the JOA as a whole, and the circumstances surrounding the creation of the JOA. *E.g.*, 2RA52-53. The Arbitrator rejected the RJ's interpretation.

This Court's decision in *Clark County Education Ass'n v. Clark County School District*, 122 Nev. 337, 131 P.3d 5 (2006), is instructive. In *Clark County*, this Court considered whether an arbitrator manifestly disregarded the law when he affirmed a school district's nonrenewal of a teacher's contract. 122 Nev. at 340-41, 131 P.3d at 8. The teacher argued the arbitrator disregarded a statute that would have allowed her to improve her performance after an admonition. *Id.* at 342, 131 P.3d at 9. This Court

noted the arbitrator "clearly appreciated the significance" of the statute by citing to it in the arbitration award, and held "we may not concern ourselves with the correctness of the arbitrator's *interpretation* of the statute" and therefore "the arbitrator did not manifestly disregard the statute." *Id.* at 345, 131 P.3d at 10 (emphasis added); *see also Washoe Cty. Sch. Dist.*, 133 Nev. at 307, 396 P.3d at 840-41.

In rejecting the RJ's interpretation, the Arbitrator appreciated the significance of the Retention Sentence, for the arbitrator heard argument and testimony offered by the RJ to support its purported "plain language" argument. *See* 2RA52. The Arbitrator recognized that parties offered different readings of the JOA. *Id.* After considering the entirety of both the 1989 JOA and the amended JOA, and eight days' of testimony and evidence, the Arbitrator rejected the RJ's interpretation. To summarize, for all the reasons discussed herein, accepting the RJ's interpretation would require the Arbitrator to ignore numerous provisions of the JOA, rendering them meaningless and failing to give every word effect, in turn violating *Coblentz*. The RJ cannot show, by clear and convincing evidence, the Arbitrator manifestly disregarded the laws of contract interpretation. The RJ's disagreement with the Arbitrator's interpretation of the JOA is not a basis to vacate the Award.

CONCLUSION

The RJ has not met its burden to prove by clear and convincing evidence that the Arbitrator manifestly disregarded the law in concluding that the JOA prohibits the RJ from charging its editorial and independent promotional costs to the joint

operation EBITDA. An order affirming the district court's confirmation of the Arbitration award in this respect is required.

CROSS OPENING BRIEF

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to NRS 38.247(c) and NRAP 3A(b)(1).

STATEMENT OF THE ISSUE PRESENTED

Whether the Arbitrator's finding was a manifest disregard of the law, or was arbitrary or capricious, when the Arbitrator found that a parties' agreement providing the "arbitrator shall also make an award of the fees and costs of arbitration" excludes attorney fees despite the plain language of this and other provisions, the parties' understanding, the parties' recurrent requests for attorney fees, and the harsh penalty for exclusion.

STATEMENT OF THE FACTS AND THE CASE

On January 15, 2019, the district court compelled the editorial cost and promotional cost disputes, among others, to arbitration. 1AA115-16. Early in the AAA proceedings, during the parties' preliminary hearing after appointing the Arbitrator, the parties agreed that the Arbitrator would render a "[redacted] . . . " 2RA44. Additionally, the RJ filed its district-court answer as its answer in the AAA proceedings, requesting attorney fees.

See 3AA499. The parties further agreed, and the arbitration Scheduling Order reflected, that "[redacted]." 2RA44. Both parties requested attorney fees and arbitration costs in the Pre-Hearing Briefs. 2RA183; 4RA539-40.

On the last day of the arbitration hearing, the Arbitrator asked the parties the procedure used in Nevada for awarding attorney fees, acknowledging that both parties requested the award. 18RA4045. Both parties agreed that the parties should include a portion of their post-hearing briefs discussing attorney fees. *Id.* at 4045-47.

The Sun again requested an award for attorney fees and costs in its Post-Hearing Brief. 6RA1172, 1178. In the RJ's Post-Hearing Brief, the RJ agreed that an award of attorney fees and costs was allowed under the JOA. *See id.* at 1229-39. at 1180-81. But, after the eight-day arbitration, the RJ anticipated that the Sun was going to prevail, and requested that the Arbitrator, "[redacted] . . . ." *Id.* The RJ did not argue or suggest to the arbitrator that the JOA excludes an award of attorney fees and costs. *See id.* Thereafter, the Arbitrator issued the Award. *See* 2RA48-59.

For the parties' requests for attorney fees, the Arbitrator concluded, "[redacted]" *Id.* at 52. The Arbitrator acknowledged that both parties requested attorney fees, costs, and the costs of arbitration. *Id.* at 58. But the Arbitrator found that [redacted]." *Id.* The JOA, according to the Award, allowed for costs of arbitration in form of AAA's administrative fees and the compensation and expenses of the Arbitrator, totaling an award in favor of the Sun in the amount of $40.666.38. *Id.* at 59.

After the district court confirmed the Award in its entirety and entered Judgment in the underlying action, *see* 5AA804-20, the Sun filed its Notice of Cross-Appeal, and Notice of Appeal from the Judgment. 7AA1184-1298.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Despite the Arbitrator's undeniable accounting knowledge and proper finding that the JOA prohibits the RJ from charging its editorial and individual promotional expenses to the joint operation, the Arbitrator erred in ruling on an issue not based in accounting. The Arbitrator found "[redacted]." 2RA58. The Arbitrator manifestly disregarded the law, entered an arbitrary and capricious decision, and

exceeded its powers in this finding, and vacating the award on this basis is warranted for three reasons.

First, the JOA mandated an award of attorney fees and costs under its plain language. Second, even if the JOA was ambiguous as to whether attorney fees were to be included in the mandatory award of "fees and costs," the parties' course of dealing, evidenced by their repeated requests for attorney fees in multiple arbitrations, confirms the parties' intent of the contractual provision. Finally, the Arbitrator's interpretation is both unreasonable and impermissibly unfair as the Arbitrator fashioned a new term to the agreement that no prevailing party attorney fees would ever be awarded in an executory contract set to continue for at least 20 more years.

Consequently, and as further discussed below, the Arbitrator manifestly disregarded the law with a finding directly contravening the agreement's plain language, the parties' understanding and any rational purpose of including a fees and cost provision in the amended JOA. The Arbitrator's finding was also arbitrary and capricious as it consciously ignored the plain language of the agreement. Such error requires an order vacating the district court's confirmation of the award on this issue.

ARGUMENT

A. THE ARBITRATOR MANIFESTLY DISREGARDED THE LAW BY IGNORING THE PARTIES' AGREEMENT REQUIRING THE ARBITRATOR TO MAKE AN AWARD OF FEES AND COSTS, INCLUDING AN AWARD OF ATTORNEY FEES

The Arbitrator's finding that "[redacted]" was wrong. 2RA58. The

arbitrator manifestly disregarded the parties' agreement when he ignored the laws of contract interpretation. The JOA's broad language requiring a "fees and costs" award, the parties' recurrent understanding of this provision, and the unreasonable effects from his interpretation, clearly and convincingly demonstrate this Court should vacate the Award. Moreover, the Arbitrator's disregard for the parties' specific provision that incorporates the AAA Rules further requires this Court to vacate. Thus, even if the broad "fees and costs of arbitration" language in Appendix D is ambiguous as to whether it includes "attorney" fees (which it is not), the parties nevertheless incorporated AAA Rules authorizing the arbitrator to award attorney fees. Disregarding the parties' contract and the rules of contract interpretation was a manifest disregard for the law.

1. The JOA's Plain Language Mandates an Award of Fees and Costs

The Arbitrator ignored the plain language of the JOA: "The arbitrator shall also make an award of the fees and costs of the arbitration, which may include a division of such fees and costs among the parties in a manner determined by the arbitrator to be reasonable in light of the positions asserted and the determinations made." 1AA100 (emphasis added). As a result of that contractual obligation, the Arbitrator's only discretion was in determining how to divide those fees and costs. The Arbitrator therefore manifestly disregarded the law when he rewrote the parties' contract by crafting a limitation to the broad, mandatory fees and costs provision that does not expressly exist.

"Contract interpretation is subject to a de novo standard of review." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). When interpreting a contract, this Court "look[s] to the language of the agreement and the surrounding circumstances" in order "to discern the intent of the contracting parties." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). If "the contract is clear and unambiguous,' then "[it] will be enforced as written." *Id.* If no ambiguity exists, the words of the contract must be taken in their usual and ordinary meaning. *See Parsons Drilling Inc. v. Polar Res. Co*., 98 Nev. 374, 376, 649 P.2d 1360, 1362 (1982).

Here, the JOA plainly states the Arbitrator "*shall* also make an award of the fees and costs of arbitration." 1AA100 (emphasis added). In the Award, the Arbitrator concluded that this provision only addresses fees and costs charged by AAA and the Arbitrator (*i.e.*, the administrative fees of AAA and the arbitrator's compensation and expenses). 2RA58. According to the Arbitrator, no party is entitled to recover its attorney fees and costs. The Arbitrator manifestly disregarded the law as his ruling directly conflicts with the JOA's broad provision. Appendix D says the Arbitrator "*shall*" award fees and costs "of the arbitration." 1AA100 (emphasis added). Appendix D does not provide that an award will be for the "fees and costs of [only AAA and the] arbitrat[or]." *See id.*

This manifest disregard of the law should have been considered and addressed by the district court. Instead, the district court merely found the Arbitrator considered the agreement and therefore affirmed the Arbitrator's finding. 5AA819. The district

court did not independently consider the agreement. *See id.* Had it done so, it would have found the unambiguous provision of the parties agreement required the Arbitrator to award attorney fees and costs. The district court erred by affirming the Arbitrator's decision that was at odds with the plain language of the 2005 Amended JOA.

2. The Parties' Course of Dealing Confirms They Always Intended the JOA to Allow an Award of Attorney Fees

If there was any ambiguity regarding the meaning of fees and costs, the parties' course of dealing settles the question. *E.g.*, Restatement (Second) of Contracts § 212 (1981) (considering course of dealing for ambiguous contract provisions); *cf. Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 312, 301 P.3d 364, 368 (2013). The parties to the JOA had always agreed that "fees and costs of arbitration" under the JOA include attorney fees and costs. *E.g*, 6RA1172, 1178, 1229-30. The Stipulated Scheduling Order at the start of the arbitration proceedings, expressly provided that "[redacted]" 2RA44. Both parties subsequently requested attorney fee awards in their Pre-Hearing Briefs. 2RA182; 4RA539-40. And both parties again addressed their respective requests during the post-hearing briefing. 6RA1172, 1178, 1229-30.

The parties' joint interpretation that attorney fees were recoverable in arbitration pursuant to the 2005 Amended JOA is not new. All parties to the 2005 Amended JOA have consistently interpreted the agreement as authorizing an award of attorney fees and costs. This was undisputed by the drafting parties to the amended 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. *See* 3AA499-501. 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: "[redacted]." *Id.* at 544; *see also id.* at 550. Shortly after this statement was made, the parties settled that action.

In the underlying arbitration, both parties requested attorney fees throughout the proceedings, which communicated to the arbitrator that the issue of attorney fees was being submitted by agreement of the parties. Certainly, arbitrators are authorized to award attorney fees when both sides request them. *E.g.*, *Hollern v. Wachovia Securities, Inc.*, 458 F.3d 1169, 1774-76 (10th Cir. 2006) (holding district court erred in vacating attorney fee portion of arbitration award where both parties included parallel requests for attorney fees and neither objected to arbitrator's authority to award fees during the arbitration, thus the parties "expressly empowered the arbitrators to award attorney fees"); *accord Marshall v. Duke*, 114 F.3d 188, 190 (11th Cir. 1997); *Prudential-Bache Sec.*

Inc. v. Tanner, 72 F.3d 234, 243 (1st Cir. 1995). Despite the parties' submission regarding attorney fees, the Arbitrator ignored the parties agreement, and refused to make an award.

There was no dispute between the parties that the fee provision in Appendix D is unambiguous and allows for an award of attorney fees: the Arbitrator "shall" make an award of attorney fees and costs at the conclusion of the arbitration and may reasonably divide the fees in his/her discretion depending on the claims and positions taken. *E.g.*, 6RA1172, 1178, 1229-30. The only perceivable "limitation" on the award of fees and costs is that the Arbitrator may exercise discretion to divide the fees and costs between the parties. Thus, the Arbitrator manifestly disregarded the law when he ignored the parties' routine understanding of the fees and costs provision.

3. The Arbitrator's Interpretation that No Contractual Provision Permits an Award of Attorney Fees Leads to an Unreasonable and Unduly Harsh Result

The Arbitrator's erroneous interpretation not only defies the JOA and the contractual expectations of the parties, but results in an unfair and unreasonable injury to the Sun in this case, and for the remaining 20-year duration of the JOA. "[A]n interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results." *Sterling v. Goodman*, 102 Nev. 218, 220, 719 P.2d 1262, 1263 (1986). By artificially limiting the fees and costs recoverable by the Sun to AAA's administrative costs and fees and costs of the

Arbitrator, the Arbitrator has now given the RJ an unfair and unreasonable—and predatory—advantage over the Sun.

Conversely, the parties' agreed-upon interpretation is both reasonable and equitable in context. When the RJ chooses to improperly withhold the Sun's annual profit payments (as it did for fiscal years 2014 through 2018, and as it has continued through the present), the Sun is forced to initiate legal proceedings to recover those arrearages and other, related damages. *See* 1AA99-100. The Sun will necessarily incur attorney fees and costs to do so. Under the Arbitrator's incorrect and restrictive reading of the JOA, the Sun will, as here, incur fees and costs to succeed in legal proceedings, to enforce its contracted-for rights; indeed, it is the RJ that controls all the accounting and records. 10RA2104.

Consequently, as a practical matter, any arrearages awarded by the Arbitrator would always be reduced and likely mooted by the amounts the Sun must expend in attorney fees and costs just to right the wrong. This result is contrary to the purpose of the audit and arbitration provisions, which is to protect the Sun and provide a disincentive for the RJ to abuse its powers. Indeed, the JOA gives only the Sun a unilateral audit right so it can confirm the RJ's calculations of the joint operation EBITDA and the Sun's resulting annual payments. *See generally* 1AA78-101. Where the Sun disputes the RJ's calculation method or process, it is the Sun who is obligated to submit the dispute to arbitration if it seeks any resolution. Thus, the Arbitrator's improper reading of the JOA strips the Sun of the benefits of its bargain and results in

an absurd and unreasonable interpretation of the JOA, ignoring the contracting parties' intention. An interpretation, it must be stressed, that exposes the Sun potentially to decades of predatory behavior by the RJ without hope of reasonable and fair recourse. Given the RJ's history of abusing the JOA, this outcome is nearly inevitable unless the Arbitrator's ruling on legal fees is vacated.

4. The Arbitrator Ignored the Parties' Inclusion of the AAA Rules Authorizing an Award of Attorney Fees

An arbitrator is not free to manifestly disregard the law, but did so here when he ignored the parties' incorporation of AAA Rules, which authorizes an award of attorney fees. The error is not a misinterpretation of the law, but a complete disregard for the law.

Where a written contract refers to another document it is considered incorporated by and part of the contract. *E.g.*, *Pentax Corp. v. Boyd*, 111 Nev. 1296, 1300, 904 P.2d 1024, 1026 (1995) ("The essential terms of the agreement must be ascertained by the writing itself, *or by reference in it to something else*."). Here, the JOA between the parties expressly incorporated by reference and stipulated that the "arbitration *shall* be conducted *according to the commercial arbitration rules of the American Arbitration Association* . . . ." 1AA100. Under Rule R-47(d) of the AAA Commercial Rules, "[t]he award of the arbitrator(s) may include . . . (ii) an award of attorneys' fees *if all parties have requested such an award* or it is authorized by law or their arbitration

agreement."[13] AAA, https://adr.org/sites/default/files/Commercial%20Rules.pdf (last visited June 22, 2020) (emphasis added).

To be sure, appellate courts generally consider the more imprecise situation where a contract is silent as to attorney fees but incorporates arbitration rules authorizing such an award. For example, in *Lasco, Inc. v. Inman Construction Corp.*, the Tennessee Court of Appeals considered whether the arbitrator had authority to award attorney fees if the contract was silent, but incorporated by reference arbitration rules that awards may "include . . . an award of attorney's fees if all the parties have requested such an award." 467 S.W.3d 467, 473-75 (Tenn. Ct. App. 2015). There, both parties requested attorney fees throughout the arbitration, and it was only after one party was awarded attorney fees that the other disputed the authorization to award fees. *Id.* at 474. The appellate court held that even though the original contract was completely silent as to any fees, because the parties' understood attorney fees may be awarded under AAA construction rules, the arbitrator had authority to award fees when both parties requested them. *Id.* at 475.

The parties' agreement here is much more discernable regarding attorney fees compared to *Lasco*. Yet, not only did the Arbitrator erroneously find the JOA was

[13] Similarly, NRS 38.238(1) provides that "[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim *or by the agreement of the parties to the arbitral proceeding*." (Emphasis added.)

silent as to attorney fees, he completely ignored the parties' reference to AAA Rules. As described above, both parties requested fees and the Arbitrator manifestly disregarded the law by overlooking these provisions in the JOA. While afforded deference, an arbitrator cannot ignore the law. *See Washoe Cty. Sch. Dist*, 133 Nev. at 304, 396 P.3d at 838; *see also Health Plan of Nev., Inc.*, 120 Nev. at 699, 100 P.3d at 179. The Arbitrator's finding that the parties' contract did not address attorney fees and costs, not only contradicts the express language of the JOA, it ignores the contractual term incorporating AAA Rules and therefore is a manifest disregard of the law.

B. THE ARBITRATOR'S CONCLUSION THAT THE PARTIES' AGREEMENT DID NOT PROVIDE AUTHORITY FOR AN AWARD OF ATTORNEY FEES IS ARBITRARY, CAPRICIOUS, AND UNSUPPORTED BY THE JOA

An arbitrator's finding is not arbitrary and capricious when it is a mere misinterpretation of the law, but only when it is a finding that is not supported by substantial evidence in the record. *Washoe Cty. Sch. Dist.*, 133 Nev. at 308, 396 P.3d at 841. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

The combination of the JOA's plain language providing for an award of fees and costs, the parties' longstanding understanding of this provision, the parties' parallel requests for attorney fees, and the incorporation of AAA Rules providing for an attorney fee award if requested by the parties renders the arbitrator's finding that "[redacted]

[redacted]. 2RA58. Reviewing whether the award was arbitrary, capricious, or unsupported by the agreement is to ensure "that the arbitrator does not disregard the facts or terms of the arbitration agreement." *Clark Cty. Educ. Ass'n*, 122 Nev. at 341-42, 131 P.3d at 8-9. But here, the Arbitrator did just that—he disregarded the terms of the arbitration agreement. The parties expressly (1) contracted for an award of fees and costs specifically within Appendix D of the JOA, (2) incorporated AAA's Rules authorizing an award of attorney fees; and (3) requested an award of attorney fees throughout the arbitration. No evidence (let alone substantial evidence) supported the Arbitrator's finding here. The Arbitrator's finding regarding attorney fees is wholly unsupported by the parties' agreement, understanding, and conduct, and must be vacated.

C. THE DISTRICT COURT ERRED BY CONFIRMING AN ARBITRATION AWARD THAT DID NOT INCLUDE ALL DIRECT ARBITRATION COSTS

Even if the Arbitrator correctly ruled that the JOA only allows direct fees and costs from AAA and the arbitrator (and not any other fees), the Arbitrator's exclusion of certain expenses from its costs awarded to the Sun was arbitrary and capricious. The Arbitrator ruled that "[redacted]" signifying that all allowable costs should be awarded to the Sun. 2RA52. Nevertheless, without explanation, the Arbitrator did not include in the Award the total amounts the Sun incurred as arbitration costs, including the costs charged to hold the

arbitration hearing and for transcription, almost $40,000. *See* 1AA174. The district court never addressed this issue in its findings, and such an error must be reversed.

CONCLUSION

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

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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 Garamond font.

2. I further certify that this Brief complies with the page- or type-volume limitations of NRAP 32(a)(7), excluding parts of the brief exempted by NRAP 32(a)(7)(C), because it is proportionally spaced, has a typeface of 14 points or more and contains 18,484 words.

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

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CERTIFICATE OF SERVICE

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

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