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 corporation, Appellants/Cross-Respondents v. LAS VEGAS SUN, INC., a Nevada corporation, Respondent/Cross-Appellant.	Supreme Court No. 80511

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APPELLANTS/CROSS-RESPONDENTS' COMBINED REPLY AND ANSWERING BRIEF [REDACTED]

Appeal from the Eighth Judicial District Court of the State of Nevada in and for the County of Clark
The Honorable Timothy Williams
District Court Case No: A-18-772591-B

KEMP JONES, LLP
J. Randall Jones (#1927)
Michael J. Gayan (#11135)
Mona Kaveh (#11825)
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169

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

Attorneys for Appellants/Cross-Respondents

NRAP 26.1 DISCLOSURE

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 judges of this court may evaluate possible disqualification or recusal.

Appellants/Cross-Respondents News+Media Capital Group LLC ("News+Media") and Las Vegas Review-Journal, Inc. ("Review-Journal") are nongovernmental parties. Review-Journal is a wholly owned subsidiary of News+Media, and News+Media is a wholly owned subsidiary of Orchid Flower LLC. No publicly held corporation owns more than 10% of any of these entities' stock.

Appellants/Cross-Respondents have been represented throughout this litigation by attorneys at the law firms of Boies Schiller Flexner LLP, Morris Law Group, Kemp Jones, LLP, and Jenner & Block LLP.

DATED this 6th day of July, 2020.

KEMP JONES, LLP

/s/ J. Randall Jones
J. Randall Jones

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 9

I. The 2005 JOA's Clear EBITDA Formula Is Controlling. 9

A. The plain language of the 2005 JOA explains how EBITDA must be calculated and mandates that [redacted] 9

B. The Sun's arguments for why the 2005 JOA supposedly does not require [redacted]. 12

C. Because the EBITDA formula is unambiguous, the analysis stops here. 16

D. The Sun's claim about what its subjective intent really was is legally irrelevant. 18

II. The Court Must Reject All Of The Sun's Arguments That Presume The Existence Of A Separate "Joint Operation" Entity, Since No Such Entity Exists Under The 2005 JOA. 21

A. The 2005 JOA does not provide for a separate "joint operation" entity. 21

B. The Sun is conflating the terminated 1989 JOA with the 2005 JOA. 24

C. Because there is no joint operation entity, the Sun's contention that the EBITDA formula produces absurdities is baseless. 25

III. The Sun's Attempts To Write [redacted]. 28

A. Section 4.2 does not say [redacted] 28

B. The Sun's reading of the term "bear" must be rejected because it would nullify the entire EBITDA calculation. 31

C. The fact that section 4.2 was negotiated before the EBITDA formula is irrelevant and, if anything, supports the Review-Journal's argument, not the Sun's argument. 34

D. The Sun's "Second Paragraph" argument relies on language that only applies to the EBITDA calculation for years prior to 2005. 36

E. How other JOAs between other newspapers handle editorial costs is irrelevant. 39

IV. The Arbitrator's Ruling As To Promotional Costs Conflicts With The 2005 JOA's Plain Language, And Nothing In The Sun's Brief Refutes That Fact. 40

V. The Sun Fails To Distinguish *Coblentz*, Which Mandates Reversal Here. 43

CONCLUSION 45

CROSS-RESPONDENTS' ANSWERING BRIEF 46

JURISDICTIONAL STATEMENT 46

ISSUE PRESENTED FOR REVIEW 46

STATEMENT OF THE CASE AND RELEVANT FACTS 46

A. The relevant provision of the 2005 JOA. 46

B. The Sun's claims, and the arbitrator's ruling. 47

C. The district court's order, and the Sun's cross-appeal. 48

SUMMARY OF THE ARGUMENT 49

ARGUMENT 49

CONCLUSION 54

TABLE OF AUTHORITIES

Page(s)

CASES

America First Federal Credit Union v. Soro,
131 Nev. 737, 359 P. 3d 105 (2015) 7, 18

C.I.R. v. Standard Life & Acc. Ins. Co.,
433 U.S. 148 (1977)...13

Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund,
112 Nev. 1161, 925 P.2d 496 (1996)................................passim

Davis v. Beling,
128 Nev. 301, 278 P.3d 501 (2012) 51

DeSage v. AW Fin. Grp., LLC,
461 P.3d 162, No. 71919, 2020 WL 1952504 (Nev. Apr. 22, 2020)
....16

Galardi v. Naples Polaris, LLC,
129 Nev. 306, 301 P. 3d 364 (2013) 21, 51

Geo. B. Smith Chem. Works, Inc. v. Simon,
92 Nev. 580, 555 P.2d 216 (1976) 16

Harrison v. Harrison,
132 Nev. 564, 376 P.3d 173 (2016) 50

Int'l Ass'n of Firefighters, Local 1285 v. City of Las Vegas,
107 Nev. 906, 823 P.2d 877 (1991) 8

Kaldi v. Farmers Ins. Exch.,
117 Nev. 273, 21 P.3d 16 (2001) 16, 17

Klabacka v. Nelson,
133 Nev. 164, 394 P.3d 940 (2017) 16, 23

Kreeger v. BCC Capital Partners LLC,
No. CVS041061KJDLRL, 2005 WL 8161910 (D. Nev. 2005) 17, 38

Lincoln Welding Works, Inc. v. Ramirez,
98 Nev. 342, 647 P.2d 381 (1982) 15

PaineWebber Inc. v. Bybyk,
81 F.3d 1193 (2nd Cir. 1996) 15

Paseo Verde Gibson Apts. LLC v. Valley Ass'n, Inc.,
No. 216CV03000KJDPAL, 2018 WL 1536806 (D. Nev. Mar. 29, 2018) 15

Pentax Corp. v. Boyd,
111 Nev. 1296, 904 P.2d 1024 (1995).................................. 15

Regent at Town Ctr. Homeowners' Ass'n v. Oxbow Constr., LLC,
419 P.3d 702, 2018 WL 2431690, Nos. 69777, 70296 (Nev. May 24, 2018) 15

Reno Club v. Young Inv. Co.,
64 Nev. 312, 182 P.2d 1011 (1947) 38, 53

Travelers Indem. Co. v. Bailey,
557 U.S. 137, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009) 21

U.S. Design & Const. Corp. v. Int'l Bhd. of Elec. Workers,
118 Nev. 458, 50 P.3d 170 (2002) 53

Washoe County School District v. White,
133 Nev. 301, 396 P.3d 834 (2017) ....passim

Wichinsky v. Mosa,
109 Nev. 84, 847 P.2d 727 (1993) 2, 8, 13, 45

Zahavi v. State,
131 Nev. 51, 343 P.3d 595 (2015) 51

STATUTES

N.R.S. § 38.237 54

N.R.S. § 38.242 54

N.R.S. § 104.1303 52

UCC 52

OTHER AUTHORITIES

ATTORNEY'S HANDBOOK OF ACCOUNTING, AUDITING, AND FINANCIAL REPORTING, § 4.04[2] (4th ed. 2017) 42

Rule R-47(d)(ii), AAA Commercial Arbitration Rules and Mediation Procedures (2013), https://adr.org/sites/default/files/Commercial Rules_Web.pdf 52

11 Williston on Contracts § 30:4 (4th ed. 1999) 21

11 Williston on Contracts § 32.6 (4th ed. 2020) 34

INTRODUCTION

The 2005 JOA is clear as to how EBITDA is to be calculated for the purpose of determining the Sun's annual profits payment. It defines the publications whose earnings are to be included in the EBITDA calculation: the Review-Journal newspaper, in which the Sun is an insert, and the Review-Journal's other print publications. It states how the EBITDA calculation is to be performed: consistent with the calculation of "Retention" in the 2004 profit and loss statement for Stephens Media Group, which owned the Review-Journal at the time. It specifies which costs are to be deducted in the EBITDA calculation: the Stephens Media profit and loss statement shows [redacted] And it lists those costs that are to be excluded from the EBITDA calculation. [redacted]

Despite these clear, unambiguous instructions, and despite acknowledging that the Stephens Media retention calculation shows [redacted], the arbitrator nonetheless found that the 2005 JOA *prohibited* the Review-Journal from [redacted]. That is the opposite of what the agreement provides. The Sun itself even admitted in the district court that a "literal reading" of the 2005 JOA supports the Review-Journal's position. IV AA at 649:6-9.

There is no dispute that, under this Court's precedent, an arbitration award that conflicts with the parties' agreement must be vacated. *Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund*, 112 Nev. 1161, 1168-1169, 925 P.2d 496, 500-01 (1996); *Wichinsky v. Mosa*, 109 Nev. 84, 89, 847 P.2d 727, 731 (1993). The Sun itself recognizes this core principle and relies on it in its cross-appeal. *E.g.*, Respondents' Brief ("RB") at 25-26 (acknowledging that under Nevada common law, an award must be vacated if it is "unsupported by the agreement"); RB at 65-66.

The Sun also agrees that this Court must review the contract de novo, meaning it must independently analyze the 2005 JOA and determine whether it supports the award. RB at 66-67. The straightforward facts here—an agreement that says one thing, and an arbitration award that says the opposite—mandate reversal.

The Sun's answering brief fails to put forth any coherent defense of the arbitrator's ruling. Instead, the Sun has manufactured a convoluted set of justifications for the arbitrator's ruling that would require this Court to (i) ignore the 2005 JOA's plain language; (ii) disregard the 2005 JOA's clear provisions explaining how EBITDA is supposed to be calculated; (iii) create a whole new accounting structure and new EBITDA formula that appears nowhere in the fully-integrated 2005 JOA; (iv) overlook numerous factual inconsistencies and logical fallacies in the Sun's argument; and (v) reverse decades of case law prohibiting courts and arbitrators from rewriting a contract's clear terms.

The central premise of the Sun's brief is that the arbitrator was right to ignore the 2005 JOA's clear instructions for how to calculate EBITDA because, using his specialized knowledge as a CPA, he divined that the parties did not mean what they wrote. According to the Sun, the arbitrator comprehended, based on "context" and "surrounding circumstances," that the "EBITDA" referenced in the 2005 JOA was *not* supposed to be the EBITDA of the Review-Journal/Sun newspaper and the Review-Journal's other print publications, but rather was supposed to be the EBITDA of a "joint operation," an allegedly separate entity that the Sun does not define and that the 2005 JOA does not provide for.

The 2005 JOA does not contemplate the existence of a separate "joint operation" entity with its own assets and books. To the contrary, it clearly describes the relevant EBITDA as "the earnings[1] of the Newspapers [i.e., the Review-Journal/Sun joint newspaper] and the earnings of the Review-Journal's Affiliates derived from publications generally circulated in Clark, Nye, or Lincoln Counties, Nevada or any parts thereof." II AA at 225-26. This is why the 2005 JOA incorporates by reference the profit and loss statement of Stephens Media, the Review-Journal's then-owner. There would be no reason to use the profit and loss statement of the Review-Journal's owner as a template for the EBITDA calculation unless the relevant EBITDA was supposed to be the EBITDA of the Review-Journal and its other print publications.

Drawing on its fictional "joint operation" concept, the Sun also contends that when section 4.2 of the 2005 JOA states that the Review-Journal and the Sun shall each "bear" their own respective editorial costs, this means that the Review-Journal may not [redacted] The Sun claims that if

[1] "Earnings" are revenues minus costs.

the Review-Journal [redacted], it is "shifting" these costs to the "joint operation" instead of "bearing" them itself. But section 4.2 simply establishes that each newspaper pays its own editorial costs. It says nothing about the EBITDA calculation, which is addressed in detail in Appendix D and which makes plain that the Review-Journal's [redacted]. There is no separate "joint operation" to which costs can be shifted.

Moreover, there is a powerful, additional reason why it cannot be the case that any costs the Review-Journal is required to "bear" must be ignored in the EBITDA calculation. The 2005 JOA mandates that "*[a]ll costs*" under the agreement "*shall be borne by the Review-Journal.*" II AA at 208 (emphasis added). If the term "bear," as used in the 2005 JOA, means that any expense "borne" by the Review-Journal cannot be deducted from revenues when calculating earnings, then that would mean *no* costs could be deducted. This would destroy the whole purpose of an EBITDA calculation, which is a measure of profits calculated by subtracting costs from revenues.

The Sun has no response to this point other than the non-sequitur argument that Section 4.2 is more specific than section 5.1. The specificity of these two provisions is not the issue. The relative specificity of contract clauses is a concept used to determine whether one clause controls over another, inconsistent clause. Sections 4.2 and 5.1 are not inconsistent. Instead, the relevant question is whether the word "bear" in the 2005 JOA means "pay" or means "exclude from the EBITDA calculation." Because it is presumed that a term in a contract has the same meaning throughout the entire contract, "bear" cannot mean "pay" in section 5.1 and "exclude from the EBITDA calculation" in section 4.2. The Sun simply ignores this fatal flaw in its argument.

Needing a legal hook to argue that the 2005 JOA's plain language is not controlling, the Sun cites an out-of-context snippet from *Washoe County School District v. White*, 133 Nev. 301, 396 P.3d 834 (2017), for the proposition that even when a contract is unambiguous, courts must consider the "surrounding circumstances" to determine whether it should be enforced as written. The Sun then devotes most of its brief to what it refers to as the 2005 JOA's "surrounding circumstances"—i.e., an extended narrative about how, regardless of what the 2005 JOA clearly states, the parties supposedly really intended something different, and how this purported "context" proves that the 2005 JOA's plain language should be ignored. The contortions the Sun goes through to defend the arbitration award just highlight the stark incompatibility between the award and the unambiguous EBITDA formula in the 2005 JOA.

The *Washoe* case does not support the Sun. The language the Sun cites from *Washoe* is a citation from another case, *America First Federal Credit Union v. Soro*, 131 Nev. 737, 739, 359 P. 3d 105, 106 (2015). That case confirms that a court interpreting a contract "initially determines whether the language of the contract is clear and unambiguous"—and if it is, the analysis stops and the contract is "enforced as written." *Id.* It does not hold that courts may go directly to parol evidence in the first instance. The sentence in *Washoe* right after the one the Sun quotes reiterates this point: "If the contract is clear and unambiguous, then it will be enforced as written." *Washoe*, 133 Nev. at 304 (internal citation and quotation marks omitted). The Sun desperately does not want the 2005 JOA enforced as written.

The Sun seeks refuge in the broad discretion typically granted to arbitrators by claiming that the award can only be vacated if the Review-Journal proves that the arbitrator knew the law and recognized that the law required a particular result, but consciously disregarded it. But this Court has never applied that standard where, as here, the award on its face conflicts with an unambiguous provision in the parties' contract. To the contrary, issuing an award that is "unsupported by the agreement" is an independent basis for vacatur. *Wichinsky*, 109 Nev. at 89; *Washoe*, 133 Nev. at 304 ("*[t]he deference accorded an arbitrator . . . is not limitless; he is not free to contradict the express language of the contract.*") (emphasis added) (quoting *Int'l Ass'n of Firefighters, Local 1285 v. City of Las Vegas,* 107 Nev. 906, 910, 823 P.2d 877, 879 (1991)).

Moreover, this Court has also held that disregarding basic contract interpretation principles constitutes manifest disregard of the law. *Coblentz*, 112 Nev. at 1168-69. The arbitrator here disregarded basic contract interpretation principles by rewriting the 2005 JOA to eliminate, and thereby render meaningless, the entire EBITDA formula set out in Appendix D. Unless corrected, the arbitrator's ruling will fundamentally change the parties' contractual relationship and potentially force the Review-Journal to pay millions of dollars in profits payments to the Sun over the next 20 years—even when the Review-Journal has no profits. The district court was wrong to overlook these problems and confirm the award. The order confirming the award should be reversed.

ARGUMENT

I. The 2005 JOA's Clear EBITDA Formula Is Controlling.

A. The plain language of the 2005 JOA explains how EBITDA must be calculated and mandates that [redacted]

The plain language of the 2005 JOA conclusively defeats all of the Sun's arguments and confirms that the arbitrator failed to follow the parties' contract when he held that [redacted] The 2005 JOA contains clear, unambiguous instructions for how EBITDA is to be determined. First, it specifies which publications are to be included in the EBITDA calculation: "EBITDA shall include the earnings of the Newspapers [i.e., the Review-Journal and the Sun] and the earnings of the Review-Journal's Affiliates derived from publications generally circulated in Clark, Nye, or Lincoln Counties, Nevada, or any parts thereof." II AA at 225-26.

The 2005 JOA then states how EBITDA is to be calculated:

> The parties intend that EBITDA be calculated in a manner consistent with the computation of '**Retention**' as that line item appears on the profit and loss statement for Stephens Media Group for the period ended December 31, 2004.

II AA at 226 (emphasis added).

II AA at 233.

[redacted]

II AA at 233.

As the arbitrator himself acknowledged, the Sun accepted the Review-Journal's calculations as consistent with the 2004 Stephens Media profit and loss statement for nine years without complaint. II AA at 240. This confirms that the Sun understood from the beginning that the EBITDA calculation was to be consistent with the Stephens Media profit and loss statement.[2]

The 2005 JOA also provides that "[a]ll costs" under the agreement are to be "borne by the Review-Journal." II AA at 208. As shown above, the Stephens Media profit and loss statement shows the operating costs that the Review-Journal is required to bear (*i.e.*, pay) being subtracted from revenue in the Retention calculation. II AA at 233. Thus, the Review-Journal is responsible for paying the costs when they become due, and those costs are deducted from revenue when the Review-Journal calculates EBITDA.

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[2] The Sun claims it overlooked the fact that [redacted] for the first nine years because its editor and publisher Brian Greenspun did not have "sole ownership" of the company during that time. RB at 20 n.4. However, the Sun has been owned by Greenspun's family for decades, Geenspun was the Sun's editor from 1990 to the present, and Greenspun negotiated both the 1989 and the 2005 JOAs. VII RA 1335-37, 1341-42, 1383-85. And during this time period, [redacted] *See* IV RA 849. Moreover, [redacted]

The fact that the 2005 JOA requires the Review-Journal to bear all costs under the agreement, and then to deduct those costs when calculating EBITDA, is important. As explained in more detail below, the Sun contends that the word "bear/borne," when used in the 2005 JOA, means that costs borne by the Review-Journal *cannot* be deducted in the EBITDA calculation. Not only does this reading conflict with the JOA's plain language, it would nullify the entire EBITDA calculation since, under the Sun's reading, *no costs at all* can be deducted when calculating EBITDA. EBITDA is a measure of profit, i.e., revenues minus costs. If no costs are deducted then there is no EBITDA; revenues with no costs deducted are just pure revenues. The Sun has no response to this fatal defect in its argument.

B. The Sun's arguments for why the 2005 JOA supposedly does not require [redacted]

The Sun offers a few weak arguments for why the clear language described above does not really [redacted], none of which have merit. First, the Sun suggests that the language requiring EBITDA to be calculated consistent with the Stephens Media profit and loss statement can be ignored because it is just "one sentence." RB at 49. That is not how contracts work. The arbitrator was required to follow the 2005 JOA's instructions for calculating EBITDA—even if they those instructions are contained in a single sentence. *See Coblentz*, 112 Nev. at 1168-69 (arbitrator must follow the parties' contract); *Wichinsky*, 109 Nev. at 89 (same).

The Sun also contends that the deductions shown on the Stephens Media profit and loss statement are not controlling because the agreement merely requires the EBITDA calculation to be "consistent with" the Retention calculation, not "identical" to it. RB at 51. This argument ignores the fact [redacted] II AA at 233. Eliminating one of the largest deductions on the profit and loss statement would not result in an EBITDA calculation "consistent with" that profit and loss statement.[3]

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[3] *See C.I.R. v. Standard Life & Acc. Ins. Co.*, 433 U.S. 148, 162 (1977) (Statute that required accounting computations to be "made in a manner consistent with the manner required for purpose of the annual statement approved by the National Association of Insurance Commissioners [i.e., NAIC]" required the use of the NAIC accounting method).

The Sun next creates a strawman to knock down by asserting that calculating EBITDA "identically" to the Retention calculation, produces "an impractical result" because "no business could expect that its expenses would or could remain fixed for decades into the future." RB at 51. Of course the expense *amounts* are going to change. That is why the 2005 JOA requires the calculation to be "consistent" with the Retention calculation, not "identical" to it. A calculation that is consistent with the Retention calculation would deduct the same *categories* of costs, not the same *dollar amounts*.

The Sun also argues that it does not make sense to use the Stephens Media profit and loss statement as a template for the EBITDA calculation because it includes costs that no longer exist under the 2005 JOA. RB 55-56. But just because a category of costs reflected on the profit and loss statement is no longer being incurred does not mean it is impossible to calculate EBITDA consistent with that profit and loss statement. It just means that cost, which would be included if it were incurred, becomes zero for the purpose of the calculation.

Finally, the Sun points out that the Stephens Media profit and loss statement was not attached to the 2005 JOA. The Review-

Journal never said that it was. The Review-Journal accurately pointed out that it was incorporated in the agreement, since it was referenced in the 2005 JOA and the parties were instructed to calculate EBITDA consistent with that profit and loss statement. *See* Appellants' Opening Brief at 11.

The Sun itself admits that "[w]here a written contract refers to another document it is considered incorporated by and part of the contract." RB at 71 (citing *Pentax Corp. v. Boyd*, 111 Nev. 1296, 1300, 904 P.2d 1024, 1026 (1995)); *see also Regent at Town Ctr. Homeowners' Ass'n v. Oxbow Constr., LLC*, 419 P.3d 702, 2018 WL 2431690, Nos. 69777, 70296, at *2 (Nev. May 24, 2018) (unpublished disposition) (report incorporated by reference in contract was part of the contact) (citing *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2nd Cir. 1996) ("a paper referred to in a written instrument and sufficiently described may be made a part of the instrument as if incorporated into the body of it")); *Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345, 647 P.2d 381, 383 (1982) (writings made part of a contract by reference are construed as part of the contract); *Paseo Verde Gibson Apts. LLC v. Valley Ass'n, Inc.*, No. 216CV03000KJDPAL, 2018 WL 1536806, at *3 (D. Nev. Mar. 29,

2018) (statute and regulation referenced in document granting right of way were part of that document and not parol evidence).

C. Because the EBITDA formula is unambiguous, the analysis stops here.

Because the EBITDA formula is unambiguous, the arbitrator was required to follow it, and was not permitted to ignore it based on contrary testimony or argument. The bedrock rule that unambiguous contracts must be enforced as written and cannot be changed based on parol evidence has been settled law for decades. *Klabacka v. Nelson*, 133 Nev. 164, 171, 394 P.3d 940, 946 (2017) ("[w]here a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning" (quoting *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001)); *Geo. B. Smith Chem. Works, Inc. v. Simon*, 92 Nev. 580, 582, 555 P.2d 216, 216 (1976) ("Where, as here, a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning.").

In fact, this Court reaffirmed this very rule just two months ago. *See DeSage v. AW Fin. Grp., LLC*, 461 P.3d 162 (Table), No. 71919, 2020 WL 1952504 at *2 (Nev. Apr. 22, 2020) (unpublished disposition) ("Under Nevada law, which controls this issue, 'parol evidence may not be used to contradict the terms of a written contractual agreement.'" (quoting *Kaldi*, 117 Nev. at 281)).

The rule against using parol evidence to change a contract's plain language is basic Nevada contract law that applies to arbitrators as well as courts. *See Kreeger v. BCC Capital Partners LLC*, No. CVS041061KJDLRL, 2005 WL 8161910 at *2 (D. Nev. 2005) (applying Nevada law to vacate arbitration award in part because the contract was "clear and explicit" and the arbitrator "did not adequately explain the basis for . . . admitting parol evidence to vary or contradict express terms of the contract"); *see also* C*oblentz*, 112 Nev. at 1169 (vacating award because arbitrator failed to follow basic contract law).

Fighting uphill against an unbroken line of this Court's precedent, the Sun cites *Washoe County Sch. Dist. v. White* for the proposition that arbitrators and courts are free to consider "surrounding circumstances" even when the agreement at issue is unambiguous. RB at 29. The Sun thus tries to excuse the arbitrator's disregard of the EBITDA formula in the 2005 JOA by claiming that his conclusion was based on "surrounding circumstances," such as the history of the parties' JOAs, the "transition" from the 1989 JOA to the 2005 JOA, Brian Greenspun's personal opinions, and so on.

This Court in *Washoe* did not hold that when interpreting a contract, courts and arbitrators may go directly to parol evidence in the first instance. That has never been the law in Nevada. The language the Sun cites from *Washoe* is a partial quotation from *America First Federal Credit Union v. Soro*, in which this Court actually held that a court interpreting a contract "initially determines whether the language of the contract is clear and unambiguous"—and if it is, the analysis stops and the contract is enforced as written. 359 P. 3d at 106. In fact, in *Washoe*, the sentence immediately after the one the Sun quotes reiterates this point: "If the contract is unambiguous, then it will be enforced as written." *Washoe*, 133 Nev. at 304. Thus, *Washoe* confirms that the Court must reject the Sun's "surrounding circumstances" argument and enforce the 2005 JOA as written.

D. The Sun's claim about what its subjective intent really was is legally irrelevant.

Consistent with the rule that an unambiguous contract must be enforced as written, the Sun's claim that it never intended the

EBITDA calculation to be based on the Stephens Media profit and loss statement must be rejected. The Sun asserts that it only included the language requiring EBITDA to be calculated consistent with the Retention calculation because it wanted to "ensure that the RJ could not create new EBITDA line items" such as a printing press the Review-Journal was considering buying, which the Sun was afraid would be deducted from EBITDA as a capital expense. RB at 52.

Preliminarily, this argument makes no logical sense. If the parties wanted to prevent new press equipment from being deducted, they would have included a provision specifying that. *And, in fact, they did just that.* The 2005 JOA expressly prohibits the Review-Journal from deducting costs of new press equipment as capital expenses. II AA at 226. New press equipment [redacted] are on the list of items that the parties excluded from the EBITDA calculation in Appendix D. *Id.*[4] The very idea that

[4] Specifically, Appendix D of the 2005 JOA states: "EBITDA, whether determined for any period before or after April 1, 2005, shall not include (a) any expense for rents, leases, or similar expenses for Other Equipment (i) if such expense, under generally accepted accounting principles, should be treated as a capitalized lease obligation . . . ."

the parties included a provision requiring them to calculate EBITDA according to the Stephens Media profit and loss statement just to ensure that certain costs relating to printing presses were excluded, *when there was already another express provision excluding those costs*, is nonsensical.

To be sure, the Sun probably did want to ensure that no new line items were added to the EBITDA calculation, but that does not actually help the Sun here. [redacted] II AA at 233. So the Review-Journal was not creating any "new" EBITDA line items when it deducted those costs in the EBTDA calculation. In fact, the Sun's argument demonstrates that the purpose of incorporating the Stephens Media profit and loss statement was to ensure that future EBITDA calculations used the same categories as that profit and loss statement (other than a few categories expressly carved out, like press equipment).

In any event, even if the Sun's argument made logical sense, which it does not, it would not matter. The Sun's professed subjective intent is legally irrelevant and cannot be used to justify the arbitrator's failure to enforce the 2005 JOA according to its terms. "It is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009) (citing 11 Williston on Contracts § 30:4 (4th ed. 1999); *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 313, 301 P. 3d 364, 368 (2013) (holding that a court may not consider "a party's subjective understanding of a contract's terms, when that understanding contradicts the contract's express terms").

II. <u>The Court Must Reject All Of The Sun's Arguments That Presume The Existence Of A Separate "Joint Operation" Entity, Since No Such Entity Exists Under The 2005 JOA.</u>

A. The 2005 JOA does not provide for a separate "joint operation" entity.

A central premise of all of the Sun's arguments is that there was supposed to be a "joint operation" entity with its own assets and books that was maintained separately from the Review-Journal's assets and books. According to the Sun, the EBITDA used to calculate the Sun's profit payment is supposed to be the EBITDA of the "joint operation," not the EBITDA of the Review-Journal/Sun joint newspaper and the Review-Journal's other print publications, as specified in the Retention clause and the incorporated Stephens

Media profit and loss statement. *E.g.*, RB at 11-13, 30-32, 43-56. Thus, the Sun concludes that calculating EBITDA consistent with the Stephens Media profit and loss statement is improper. The Sun also contends that [redacted] because deducting them amounts to "shifting" them to the "joint operation." E.g., RB at 30-32, 43-56.

The Sun does not and cannot point to any language in the 2005 JOA requiring the parties to maintain a separate "joint operation" entity with its own assets and books. It nonetheless contends that "surrounding circumstances," "context," and "history" establish that this is what the parties intended.

The "joint operation" concept that the Sun is urging has no basis in the parties' agreement and in fact directly conflicts with the plain-language EBITDA formula. As explained above, the 2005 JOA is very clear about whose earnings are to be included in the EBITDA calculation. It states that EBITDA "shall include the earnings of the Newspapers [i.e., the Review-Journal and the Sun] and the earnings of the Review-Journal's Affiliates derived from publications generally circulated in Clark, Nye, or Lincoln Counties, Nevada, or any parts thereof." II AA at 225-26.[5] The 2005 JOA never even mentions a "joint operation EBITDA." *See* Section II.A, above. Because the 2005 JOA is unambiguous, "surrounding circumstances" and "history" are legally irrelevant and cannot be used to eliminate the parties' express, agreed-upon EBITDA formula from the 2005 JOA. *See, e.g., Klabacka*, 133 Nev. at 171.

The audit provision in the 2005 JOA further confirms that there is no separate "joint operation" entity under the 2005 JOA. That provision states that, in the event of a dispute about the Sun's profit payment, the Sun has the right "to examine and audit the books and records *of the Review-Journal and the other publications whose earnings are included in EBITDA* for the purpose of verifying the determinations of the changes to the Annual Profit Payments." II AA at 243 (emphasis added). The audit provision does not mention auditing a "joint operation" because no such entity exists under the 2005 JOA.

[5] Unable to rebut this point, the Sun urges the Court to ignore it on the ground that it supposedly was "never raised before." RB 53 n. 11. The Review-Journal pointed out this language multiple times below. *E.g.*, II AA at 186-87, 198-99; III AA at 417. In any event, logical arguments based on the plain language of the contract at issue are never waived.

B. The Sun is conflating the terminated 1989 JOA with the 2005 JOA.

The Sun's insistence that there was supposed to be a separate "joint operation" entity with its own profits and costs appears to be a deliberate attempt to sow confusion by conflating the former, terminated 1989 JOA with the 2005 JOA.[6] The 1989 JOA envisioned the creation of a separate "Agency" that would maintain the revenue from both daily, separately circulated papers, pay joint expenses, and distribute the joint profits. *See* II AA at 253, 284-89, 291. Under the 1989 JOA, the Sun was compensated, in part, with a share of the newspapers' joint profits that were to have been maintained and paid out by the Agency. II AA at 281-83, 291.

However, the 2005 JOA *expressly terminated* the 1989 JOA. *See* II AA at 207 (terminating the 1989 JOA as of September 30, 2005). The Sun itself admits the 2005 JOA eliminated the "Agency" concept. RB at 11. It also concedes that the "clear intention" of the 2005 JOA was to "create a clean break from prior accounting." RB at 56. It makes sense that the parties eliminated the concept of a separate

[6] Although unclear, it appears that the arbitrator thought the 2005 JOA required there to be a separate "joint operation," which may be why he disregarded the EBITDA formula.

entity to distribute JOA profits because under the 2005 JOA, the Sun newspaper no longer has its own profits because it is now an insert inside the Review-Journal. II AA at 218-220, 208.

Consistent with these changes, there is no separate "joint operation" entity referenced in the 2005 JOA that would pay joint costs and distribute joint profits. Instead, the Sun's annual profit payment under the 2005 JOA is a payment that is adjusted upward or downward by the same percentage that the combined EBITDA of the printed Review-Journal/Sun and other Review-Journal print publications increased or decreased as compared to the prior year. II AA at 225. The Sun's suggestion that the concept of a separate "joint operation" entity survived the termination of the 1989 JOA, and still exists in the 2005 JOA despite being inconsistent with the parties' replacement accounting method, is based on a fiction that conflicts with what the parties actually agreed and drafted.

C. Because there is no joint operation entity, the Sun's contention that the EBITDA formula produces absurdities is baseless.

Operating from the false premise that its profit payment is supposed to be based on the EBITDA of a separate, fictitious joint operation entity, the Sun contends that the EBITDA formula in the

2005 JOA is absurd if read literally because (i) the relevant EBITDA is the EBITDA of the "joint operation," not the EBITDA of the Review-Journal; and (ii) the profit and loss statement is inconsistent with the accounting required by the 1989 JOA. RB at 52-56. Both arguments are baseless.

First, as explained above, the relevant EBITDA is the EBITDA of the Review-Journal/Sun newspaper and the Review-Journal's print publications. *See* II AA at 225. The revenues and costs of the newspaper and the other print publications included in the EBITDA calculation are reflected on the Stephens Media profit and loss statement that the parties agreed to use as a template. II AA at 226. There is no separate joint operation entity or joint operation EBITDA. There is nothing "absurd" about this structure; the parties have been following it since 2005, and the Sun did not even complain about it until 2014. By claiming now that the parties actually intended something completely different, the Sun is just denying the contract's plain language.

Second, it does not matter that the Stephens Media profit and loss statement is inconsistent with accounting under the 1989 JOA or that certain deductions are allowed under the 2005 JOA that may not have been allowed under the 1989 JOA. As explained above, the 2005 JOA *expressly terminated* the 1989 JOA as of September 30, 2005. II AA at 206. It eliminated the prior "Agency" accounting method and replaced it with a different formula for determining the Sun's profit payment that used the EBITDA of the Review-Journal and its other print publications. *See* II AA at 225-28.

Under the 2005 JOA, the formula for determining the Sun's profit payment requires EBITDA to be calculated consistent with the Stephens Media profit and loss statement. II AA at 226. It does not require EBITDA to be calculated consistent with the old "Agency" accounting method from the 1989 JOA that was expressly terminated. The fact that accounting under the 2005 JOA is different than accounting under the 1989 JOA is not "absurd." As the Sun admits, changing the accounting method was the *whole reason* the parties terminated the 1989 JOA. Again, the Sun is trying to sow confusion by conflating the 1989 JOA and the 2005 JOA.

III. **The Sun's Attempts To Write** [redacted]

A. **Section 4.2 does not say** [redacted]

The Sun's contention that section 4.2 prohibits the Review-Journal from deducting its editorial costs has no merit and is premised on a misreading of the provision's plain language and the fiction that the parties intended there to be a separate "joint operation" entity.

Section 4.2, which states that "[t]he Review-Journal and the Sun shall each bear their own respective editorial costs and shall establish whatever budgets each deems appropriate," II AA at 207, does not mention EBITDA. It just says that each newspaper determines its own editorial budget and pays its own editorial costs. *See id.* This was a change from the 1989 JOA, under which the

Review-Journal paid the editorial costs of both papers pursuant to an allocation formula.[7]

The Sun's attempts to direct the Court's attention to an inapplicable provision that has nothing to do with the EBITDA calculation, when there is a clear section of the 2005 JOA explaining how EBITDA must be calculated, is right out of the losing party's playbook in *Coblentz*. In *Coblentz*, the arbitrator read the express contract provision requiring the defendant to provide insurance for the plaintiffs out of the agreement because the defendant convinced him that the relevant provision was really an unrelated provision about indemnity. *Coblentz,* 112 Nev. at 1168-69. This Court reversed the district court's order confirming the award because the arbitrator conflated the concepts of indemnity and insurance, and in doing so disregarded the parties' contract. *Id*.

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[7] The Sun claims that it always paid for its own editorial costs. RB at 34. That is false. The 1989 Agreement required the Review-Journal to pay the Sun an amount for editorial and news expenses that equaled 65% of what the Review-Journal allocated for its own editorial expenses. II AA at 281 ("On the first day of each month following the Effective Date, Review Journal shall pay to Sun an amount equal to one-twelfth (1/12th) of the Sun's annual allocation for news and editorial expenses as herein provided.").

The Sun is attempting the same maneuver here. It is trying to convince the Court to ignore the EBITDA formula plainly set out in Appendix D by falsely claiming that the provision relevant to this dispute is section 4.2. The Sun does this by arguing that the phrase "bear their own respective editorial costs" in Section 4.2 means that the Review-Journal's editorial costs cannot be deducted. To get to this conclusion—even though section 4.2 does not mention EBITDA—it contends that the use of the word "bear" implies that "neither party [can] shift the burden of those costs to the joint operation." RB at 31.

This argument fails because it conflicts with the 2005 JOA's clear language and presumes the existence of a separate "joint operation" entity when in fact no such entity exists. The 2005 JOA *requires* the Review-Journal to [redacted] *See* II AA at 226, 233. No costs are being "shifted" to the "joint operation" because the joint operation does not have, and is not required to have, separate assets or separate books to which costs can be "shifted."

Nor is the Review-Journal "charging" the Sun for its editorial costs or "seek[ing] reimbursement . . . from the joint operation" as the Sun wrongly claims. RB at 35. The Sun is not being "charged" for anything—it did not pay the Review-Journal a dime. And the "joint operation" is not "reimbursing" the Review-Journal for its costs because there is no joint operation entity and there are no joint operation assets. Yes, if the Review-Journal's costs, [redacted] That is the arrangement the Sun agreed to. *See* II AA at 225-26.

B. The Sun's reading of the term "bear" must be rejected because it would nullify the entire EBITDA calculation.

As noted above, the Sun's interpretation of the word "bear" is fatally flawed for another, independent reason. Editorial costs are not the only costs the Review-Journal is required to "bear." Section 5.1 of the 2005 JOA requires the Review-Journal to bear *all costs* under the JOA. It states: "*All costs*, including capital expenditures, of operations under this Restated Agreement, except the operation of the Sun's news and editorial department, *shall be borne by the Review-Journal*." II AA at 206 (emphasis added).

The fact that the 2005 JOA requires all costs under the JOA to be "borne" by the Review-Journal proves that when the parties wrote that the Review-Journal must bear a cost, they meant that the Review-Journal was to *pay* the cost, and they did not mean the cost could not be deducted in the EBITDA calculation. If the Sun were correct that any costs "borne" by the Review-Journal could not be deducted, then *no costs could be deducted at all*. This would defeat the purpose of an EBITDA calculation, because EBITDA is a measure of profit, which is calculated by subtracting costs from revenues. The Sun's proposed reading is not just incorrect, it is impossible.

The Sun wholly fails to grapple with the logical conclusion that flows from its reading of "bear/borne." If the Sun truly believed in good faith that the Review-Journal cannot deduct costs it is required to "bear," then the Sun would be arguing that the Review-Journal is not allowed to deduct *any* costs and must base the Sun's profits payment on gross revenue. The Sun is conspicuously not claiming that other costs borne by the Review-Journal cannot be deducted, nor is it claiming that its profit payment should be based on pure revenue instead of EBITDA. The fact that even the Sun is not making these arguments shows that the Sun is trying to give an idiosyncratic meaning to the word "bear" in section 4.2 [redacted].[8]

The Sun, not surprisingly, has no rebuttal to this point. After talking around the issue for a page and a half, it weakly asserts that Section 4.2 is more specific than 5.1. RB at 37-38. That is not the issue and, in fact, is a complete non-sequitur. The rule that a specific provision controls over a general one applies when two contract terms are inconsistent. Here, sections 4.2 and 5.1 are perfectly consistent: Section 5.1 says all costs under the 2005 JOA except the Sun's editorial costs must be borne by the Review-Journal; section 4.2 says each newspaper bears its own editorial costs. *See* II AA at 208, 207.

The question here is whether, as the Sun claims, when the JOA says that the Review-Journal must bear an expense, that means the expense cannot be deducted in the EBITDA calculation. Section 5.1 is important because it uses the same word as Section 4.2

[8] The Sun suggests that there is something unfair about the fact that *the Sun's* editorial costs cannot be deducted from EBITDA, but that makes perfect sense since the Sun, not the Review-Journal, bears the Sun's editorial costs. Because the Review-Journal is not paying the Sun's editorial costs, the Review-Journal cannot deduct those costs when calculating EBITDA. *See* II AA 233. It is the Review-Journal's profits, if any, that are calculated for the purpose of determining the Sun's profits payment.

(bear/borne) in the same context (the Review-Journal is to bear certain costs). For the reasons described above, in the context of section 5.1, "bear/borne" cannot mean "exclude from the EBITDA calculation." Thus, it cannot have that meaning in section 4.2 either, because a term used by the parties in a contract must be given the same meaning throughout the contract. *See* 11 Williston on Contracts § 32.6 (4th ed. 2020).

C. The fact that section 4.2 was negotiated before the EBITDA formula is irrelevant and, if anything, supports the Review-Journal's argument, not the Sun's argument.

In another "surrounding circumstance" that is irrelevant because the contract is unambiguous, the Sun also asserts that Section 4.2 was negotiated before Appendix D, which sets forth the EBITDA formula and requires the parties to use the Stephens Media profit and loss statement as a template. RB at 51. Even if the Court could consider parol evidence, which it cannot, this point does not even support the Sun.

After all, if the Sun were correct that Section 4.2 reflects the parties' intent that the Review-Journal's [redacted], and Section 4.2 was settled *before* the parties negotiated Appendix D, then the parties would never have written in Appendix D that EBITDA was to be calculated "in a manner consistent with the computation of 'Retention' as that line item appears on the profit and loss statement for Stephens Media Group for the period ended December 31, 2004." II AA at 226. The parties would have *rejected* the idea of using the Stephens Media profit and loss statement as a template because that statement [redacted]

Moreover, the Sun admitted that *it drafted* the language requiring EBITDA to be calculated consistent with the "Retention" calculation in the Stephens Media profit and loss statement. RB at 17. That fact makes the Sun's version of events even *less plausible*. If the Sun wanted the Review-Journal's [redacted]

D. The Sun's "Second Paragraph" argument relies on language that only applies to the EBITDA calculation for years prior to 2005.

As further "context" to support its atextual reading of section 4.2, the Sun points to a provision in the 2005 JOA that it calls "the Second Paragraph." The Sun is referring to the first clause of the first sentence of the second paragraph of Appendix D, which states:

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

II AA at 225 (emphasis added); *see also* RB at 39.

This clause, on its face, is expressly limited to "***any period that includes earnings prior to April 1, 2005***." II AA at 225 (emphasis added).[9] It does not apply to calculations for the years after April 1, 2005. *See id.*

The arbitration at issue in this appeal was about the EBITDA calculations for the years 2015 through 2018. II AA at 238. The years 2015 through 2018 do not include earnings prior to April 1, 2005.

[9] April 1 is the start of the year for the purpose of the annual EBITDA calculation for the purpose of determining the Sun's profits payment.

Thus, the “Second Paragraph” cannot apply to the EBITDA calculations at issue in the arbitration and in this appeal.

Although the first clause of the “Second Paragraph” on its face does not apply in this case, the Sun contends that when one considers it in conjunction with section 4.2, the “context” somehow reveals that editorial costs are to be excluded from the EBITDA calculation for the duration of the 2005 JOA. There are numerous flaws in this argument, the most obvious one being that if the parties had intended the Review-Journal’s editorial costs to be excluded from post-2005 calculations, they would have written that in the agreement—but they did not. Instead, they expressly wrote that EBITDA was to be calculated consistent with the computation of “Retention” in the 2004 Stephens Media profit and loss statement. II AA at 226.

The Sun insinuates that testimony from the arbitration proves that, notwithstanding the fact that the “Second Paragraph” on its face is limited to earnings prior to April 1, 2005, it was really supposed to apply to all EBITDA calculations for the years after April 1, 2005. See RB at 41. This is just false; none of the record excerpts the Sun cites include anyone testifying to that. *See* 12RA2898-2900, 11RA2467-

73, 13RA2898-2911. In any event, if the arbitrator had based his decision to disregard the parties' agreement on parol evidence, that would just provide an independent basis to vacate the award since, as noted above, Nevada law prohibits parol evidence from being considered when a contract provision is clear. *Kreeger*, 2005 WL 8161910 at *2 (applying Nevada law to vacate arbitration award in part because the arbitrator used parol evidence to vary the terms of an unambiguous contract).

The Sun agreed that EBITDA would be calculated consistent with the Retention calculation in the 2004 Stephens Media profit and loss statement. It also agreed to the language that expressly limits the "Second Paragraph" to periods that include earnings prior to April 1, 2005. These provisions are not inconsistent—they just set out different rules for different time periods. The Sun's eleventh-hour dissatisfaction with the deal that it made is not a basis to rewrite the contract. *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 324, 182 P.2d 1011, 1016–17 (1947) ("Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties.").

E. How other JOAs between other newspapers handle editorial costs is irrelevant.

Finding no support for its argument in the 2005 JOA at issue in this case, the Sun resorts to arguing that *other* JOAs involving *other* newspapers supposedly have separate JOA assets, and in those JOAs either the joint operation pays both newspapers' editorial costs, or they each pay their own. *See* RB at 32. The purported terms of other JOAs involving other newspapers are not relevant to the question of whether the arbitrator disregarded the express EBITDA formula in the 2005 JOA between the Review-Journal and the Sun.

The Sun claims other JOAs are relevant because courts may consider "trade usage" and "industry custom." But parties are always free to draft contracts with terms of their choosing regardless of what others in their industry have purportedly chosen to do. "Trade usage" and "industry custom" are used to give meaning to terms of art in an industry—they do not allow an arbitrator to rewrite an unambiguous contract to make it more like other, different, contracts.

IV. The Arbitrator's Ruling As To Promotional Costs Conflicts With The 2005 JOA's Plain Language, And Nothing In The Sun's Brief Refutes That Fact.

The Sun's argument for why it was supposedly acceptable for the arbitrator to ignore the 2005 JOA's clear mandate that [redacted] are similar to its arguments as to [redacted], and equally unavailing.

The Sun claims that the language in section 5.1.4 stating that each party "may undertake additional promotional activities for their respective newspaper at their own expense" means that [redacted] RB at 43-44. [redacted] the Review-Journal is "charg[ing] its independent promotional expenses to the joint operation" and thereby supposedly forcing the Sun to "subsidize" the Review-Journal's promotional costs. *Id.* at 45.

Not to belabor the point, but [redacted], and the 2005 JOA requires the parties to calculate EBITDA consistent with that profit and loss statement. *See* II AA at 226, 233. This is the contract the Sun negotiated and agreed to. The Review-

Journal is paying its separate promotional costs, as section 5.1.4 requires. No costs are being "charged" to the "joint operation" because the joint operation does not have separate assets or separate books. The Sun is not subsidizing anything—it did not pay the Review-Journal any money. Again, as explained above, [redacted] This is the agreement the parties made—the payments from the Review-Journal to the Sun, if any, are based on the Review-Journal's profits, if any.

In addition to ignoring the plain language of 2005 JOA and ruling that [redacted], the arbitrator bizarrely ordered that [redacted] As the Review-Journal noted in its brief, this ruling had no basis in the 2005 JOA, [redacted], as shown in the Stephens Media profit and loss statement. It also violates basic accounting principles, since it is not appropriate to book revenues without also booking the corresponding cost.[10]

The Sun's defense of this ruling makes no sense. The Sun states that the value received in a trade agreement should be booked as revenue because "JOA assets were used." RB at 47. However, under the 2005 JOA, there are no separate "JOA assets." The Sun's position is based on a fiction.

The rest of the Sun's argument on this point, again, depends on its insistence that there is supposed to be a separate set of books reflecting assets and costs of the "joint operation." *See* RB at 48-49. As explained above, this is not only not a requirement, it would not make any sense in the context of the 2005 JOA, which eliminated the "Agency" concept and tied the Sun's profits payment to the increase or decrease in the combined EBITDA of the Review-Journal/Sun joint

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[10] ATTORNEY'S HANDBOOK OF ACCOUNTING, AUDITING, AND FINANCIAL REPORTING, § 4.04[2] (4th ed. 2017) ("[T]he matching principle has been integral to the calculation of a meaningful net income or net loss. Simply stated, *matching* means offsetting the expenses directly related to the production of revenues in any given period against those revenues to determine the entity's net earnings over that period.").

newspaper and the Review-Journal's other print publications. *See* Sections III.A-B, above.

V. <u>The Sun Fails To Distinguish *Coblentz*, Which Mandates Reversal Here.</u>

As explained above, none of the Sun's arguments for why the arbitration award was supposedly consistent with the 2005 JOA survive even minimal scrutiny. The 2005 JOA unambiguously establishes that the Review-Journal's [redacted] disregarding and rendering meaningless key provisions of the agreement. The Sun's arguments about "surrounding circumstances," "history," and "context" cannot change these unescapable facts.

The Sun does not dispute that this Court's precedent requires an arbitration award to be vacated if it conflicts with the parties' agreement, nor can it. *See Coblentz*, 112 Nev. at 1169 (holding that it was reversible error for the district court to confirm an award that conflicted with the parties' agreement); *see also* RB at 25-26. Tellingly, the Sun makes no serious effort to distinguish *Coblentz*. The Sun argues only that the arbitrator in *Coblentz* rendered a provision in the underlying contract meaningless, RB at 59, as if that distinguishes *Coblentz* from this case. However, that is not a point of distinction because the arbitrator's award here rendered the entire EBITDA formula meaningless by ruling [redacted]

Finding no support in the 2005 JOA's plain language or the law, the Sun seeks refuge in the high standard for vacating an arbitration award, contending the Review-Journal is required to prove that the arbitrator knew the law and recognized that the law required a particular result, but consciously disregarded it. RB at 27-28. But this Court has never applied that standard where, as here, the award on its face conflicts with an unambiguous provision in the parties' contract. To the contrary, in *Coblentz*, the Court reversed the order confirming the award because the award, on its face, conflicted with the parties' contract, and because the arbitrator manifestly disregarded the law when he read a term requiring one party to insure the other out of the agreement altogether. *Coblentz*, 112 Nev. at 1168-69.

Moreover, this Court has held numerous times that issuing an award that is unsupported by the agreement is an independent ground for vacatur. *See Washoe*, 133 Nev. at 304 (an arbitrator is not free to contradict the express language of the contract."); *Wichinsky*, 109 Nev. at 89 (if an award is "unsupported by the agreement, it may not be enforced"). This is such a case: The award is unsupported by the 2005 JOA, and by rendering an award that read out the entire EBITDA calculation that the parties negotiated and agreed upon (and which the Sun assented in for nine years with no complaint), the arbitrator manifestly disregarded the law. Vacatur was mandatory, and it was reversible error for the Court to confirm the award.

<u>CONCLUSION</u>

For the foregoing reasons, the Court should *reverse* the judgment below and remand with instructions to *vacate* the portions of the award that (1) hold that [redacted], (2) award damages on the Sun's breach of contract claim based on [redacted] and (3) order the Review-Journal to [redacted]

CROSS-RESPONDENTS' ANSWERING BRIEF

JURISDICTIONAL STATEMENT

The Review-Journal incorporates the jurisdictional statement from its opening brief.

ISSUE PRESENTED FOR REVIEW

The 2005 JOA states that the arbitrator shall award the "fees and costs of arbitration." It says nothing about attorneys' fees. Did the arbitrator disregard the JOA when he declined to award the Sun its attorneys' fees?

STATEMENT OF THE CASE AND RELEVANT FACTS

A. The relevant provision of the 2005 JOA.

The 2005 JOA does not authorize or require the arbitrator to award attorneys' fees. The fees and costs of arbitration are addressed in Appendix D; attorneys' fees are not mentioned. After authorizing the arbitrator to award arrearages, if any, to the Sun in an arbitration arising from an audit dispute, the relevant provision states:

> The arbitrator shall also make an award of the ***fees and costs of arbitration***, which may include a division of such fees and costs among the parties in a manner determined by the arbitrator to be reasonable in light of the positions asserted and the determination made.

II AA at 227 (emphasis added).

B. The Sun's claims, and the arbitrator's ruling.

In the arbitration, the Sun asserted multiple claims against the Review-Journal, including claims for declaratory relief, breach of contract, and "tortious" breach of the covenant of good faith and fair dealing, and asked the arbitrator to order an audit. II AA 237; *see also* I AA at 21-29.

As described in the Review-Journal's opening brief, the arbitrator ruled in favor of the Sun on some of its declaratory relief and breach of contract claims, ignoring the plain language of the 2005 JOA to hold that the Review-Journal was prohibited from deducting editorial and certain promotional costs when calculating EBITDA. II AA at 236. The arbitrator awarded the Sun $1.6 million plus interest on its claim relating to editorial costs. *Id.* at 246. He awarded no damages on the Sun's claim relating to promotional activities costs. *Id.* at 241-43. However, he imposed rules for how promotional costs should be accounted for. *Id.* at 240-41. He also granted the Sun's request for an audit (although the Review-Journal had never refused to permit an audit). *Id.* at 246. The Review-Journal prevailed on the Sun's tortious breach claim, which the arbitrator rejected in its entirety. *Id.* at 245.

Both parties requested attorneys' fees, litigation costs, and the costs of arbitration. II AA at 246. The arbitrator declined to award attorneys' fees and litigation costs, observing that [redacted] *Id.* However, he recognized that Appendix D [redacted] *Id.* The arbitrator awarded the fees and costs of the arbitration to the Sun, stating [redacted] *Id.* at 247.

C. The district court's order, and the Sun's cross-appeal.

The district court confirmed the arbitration award in full. V AA at 819. With respect to the arbitrator's decision not to award the Sun its attorneys' fees, the court held:

> [T]he arbitrator interpreted Appendix D of the JOA and found that Appendix D addressed the award of arbitration fees and costs. As a consequence, the Arbitrator awarded only fees and costs of the arbitration. Thus, the Court finds that the Arbitrator did consider the entire JOA and more specifically Appendix D to support his ruling. Accordingly, the Court Affirms the arbitrator's ruling on attorneys' fees and costs.

Id.

The Sun has only appealed the portion of the district court's order that confirmed the arbitrator's decision not to award attorneys' fees. It has not appealed any other issues.

SUMMARY OF THE ARGUMENT

The Sun's cross-appeal is meritless. The 2005 JOA did not authorize, let alone require, the arbitrator to award the Sun its attorneys' fees. The fact that both parties requested attorneys' fees in the arbitration does not change the 2005 JOA's unambiguous language, nor does the fact that the Sun is unhappy about paying its attorneys' fees in this litigation.

ARGUMENT

The arbitrator's decision not to award the Sun its attorneys' fees was correct. Nowhere does the 2005 JOA expressly allow either party to recover their attorneys' fees or litigation costs. The 2005 JOA, which was heavily negotiated with the assistance of counsel, requires the arbitrator to "make an award of the fees and costs of arbitration, which may include a division of such fees and costs among the parties in a manner determined by the arbitrator to be reasonable in light of the positions asserted and the determination made." II AA at

227 (2005 JOA at 20). As the arbitrator correctly observed, the 2005 JOA says nothing about attorneys' fees.

The arbitrator was not even required to award all (or even any) arbitration fees and costs to the Sun. The provision contemplates that fees and costs be divided. It does not mandate an award of all fees and costs (let alone attorneys' fees and litigation costs). It does not even speak in terms of the prevailing party. The Court should reject the Sun's invitation to rewrite the parties' contract to include a term that the Sun now wishes it had negotiated for 15 years ago. *See Harrison v. Harrison*, 132 Nev. 564, 570, 376 P.3d 173, 177 (2016) (recognizing that "[i]t is the contracting parties' duty to agree to what they intend").

The Sun contends that the parties' "course of dealing" establishes that this provision, which explicitly references the "fees and costs *of arbitration*," II AA at 227 (emphasis added), was really supposed to include attorneys' fees. By "course of dealing" the Sun is referencing the fact that both parties requested an award of attorneys' fees in this and a prior arbitration. RB at 67-69.

Whether or not the parties requested attorneys' fees is irrelevant. The provision the Sun relies on is clear, and does not authorize attorneys' fees. Traditional rules of contract interpretation apply to attorneys' fees provisions, just as they do to all other contract provisions. *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012). "Therefore, the initial focus is on whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Id.*

Parol evidence—including course of dealing—cannot be used to contradict a contract's plain meaning. *See Zahavi v. State*, 131 Nev. 51, 57, 343 P.3d 595, 599 (2015) (holding that the plaintiff's argument that casinos' course of dealing established that their markers were short term loans that would not be cashed immediately "fails in the face of the clear and unambiguous language of the markers"). Likewise the parties' subjective interpretation of a provision does not control. *See Galardi v. Naples Polaris LLC*, 129 Nev. at 309 (holding that "contract interpretation presents a question of law" for the court, and the court need not accept a party's proposed interpretation).

In any event, taking a litigation position is not a course of dealing. A course of dealing is a sequence of conduct concerning previous transactions between the parties to a particular transaction, that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. *See*, *e.g.*, N.R.S. § 104.1303(2) (defining course of dealing in the UCC context). Litigation is not a transaction, and attorneys' fees requests are submissions to a court, not a course of dealing between parties. An example of a course of dealing would be the Sun accepting the Review-Journal's EBITDA calculations in accordance with the Stephens Media profit and loss statement for nine years without complaint.

The Sun also argues that it was error for the arbitrator to decline to award attorneys' fees because attorneys' fees are authorized by the American Arbitration Association's rules. RB at 71-73. However, the AAA rules simply state that the award "*may include*" an award of attorneys' fees "if all parties have requested such an award or it is authorized by law or their arbitration agreement."[11] The AAA rules do not *require* the arbitrator to award attorneys' fees. The

[11] Rule R-47(d)(ii), AAA Commercial Arbitration Rules and Mediation Procedures (2013), https://adr.org/sites/default/files/Commercial Rules_ Web.pdf (emphasis added).

arbitrator's decision not to award the Sun its attorneys' fees under this discretionary provision is not a manifest disregard of the law.

The Sun complains that it is unfair not to award attorneys' fees because if it has to pay its own attorneys then this lawsuit, as well as the meritless lawsuits it intends to keep filing well into the future, will result in a net loss. The Court should disregard this argument. The 2005 JOA was negotiated between sophisticated parties who were represented by attorneys. Those parties decided not to authorize the arbitrator to award attorneys' fees. It is hardly out of the ordinary for litigants to litigate even when they have no right to recover fees if they win. In fact, that is the typical situation. The Court is not permitted to rewrite the parties' agreement to add an attorneys' fee provision to which the parties did not agree. *Reno Club*, 64 Nev. at 324. Nor is it authorized to award fees to the Sun in the absence of a statute, rule, or contract provision authorizing attorneys' fees. *U.S. Design & Const. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002)

Finally, the Sun argues that the arbitrator erred by awarding it about $40,000 less than the costs the Sun claims it incurred. However, the JOA expressly allows the arbitrator to allocate costs "in a manner determined by the arbitrator to be reasonable" under the circumstances, and the Sun does not contend that the arbitrator's ruling in this regard was arbitrary and capricious or a manifest disregard of the law. II AA at 227. If the Sun thought that this was a clerical error, it could have petitioned the arbitrator to correct or modify the award, but it did not do so. *See* N.R.S. § 38.237(2); N.R.S. § 38.242(1).

CONCLUSION

The arbitrator was correct not to award attorneys' fees to the Sun because the 2005 JOA does not authorize an award of attorneys' fees. The Sun has shown no error in this aspect of arbitrator's decision or in the district court's order confirming it.

DATED this 6th day of July, 2020.

KEMP JONES, LLP

/s/ J. Randall Jones
J. Randall Jones, (#1927)
Michael J. Gayan, (#11135)
Mona Kaveh, (#11825)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

Richard L. Stone, (pro hac vice)
David R. Singer, (pro hac vice)
Amy M. Gallegos, (pro hac vice)

JENNER & BLOCK LLP
633 West 5th Street, Suite 3600
Los Angeles, California 90071-2054

Attorneys for Appellants/Cross-Respondents
News+Media Capital Group LLP and Las Vegas Review-Journal, Inc.

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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 of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in Bookman Old Style.

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an 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 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

DATED this 6th day of July, 20200

KEMP JONES, LLP

/s/ J. Randall Jones

J. Randall Jones, (#1927)
Michael J. Gayan, (#11135)
Mona Kaveh, (#11825)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2020, the foregoing Appellants/Cross-Respondents' Combined Reply and Answering Brief was filed electronically with the Clerk of the Supreme Court of Nevada by using the court's electronic filing system, which will send notice of electronic filing to the following:

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

PISANELLI BICE PLLC
JAMES J. PISANELLI
TODD L. BICE
JORDAN T. SMITH
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

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

I further certify that hard copies of the sealed version were served by First Class U.S. Mail, postage prepaid, addressed as follows:

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

PISANELLI BICE PLLC
JAMES J. PISANELLI
TODD L. BICE
JORDAN T. SMITH
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

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

Supreme Court of Nevada
201 South Carson Street, #201
Carson City, Nevada 89701

/s/Michael Gayan
An employee of Kemp Jones, LLP