UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 04-15876-G

ROLLINS, INC., and ORKIN, INC., f/k/a Orkin Exterminating Company, Inc.,

Plaintiffs/Appellees/
Cross-Appellants,

vs.

COLLIER BLACK,

Defendant/Appellant/
Cross-Appellee.
_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT COLLIER BLACK

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Collier Black respectfully requests oral argument in this case. It concerns a district court's modification of an arbitration award to strike the Arbitrators' award of punitive damages, on the ground that the counts of the complaint on which the Arbitrators found for Mr. Black do not permit punitive damages under Florida law. The district court did so notwithstanding the Arbitrators' subsequent Supplemental Award, clarifying their original intention, consistent with numerous factual findings made in the earlier award, to find for Mr. Black on counts which do permit punitive damages under Florida law.

The district court's order implicates a number of important principles concerning the scope of a district court's review of an arbitration award. These include the construction of an ambiguous award, whose factual findings contradict its legal rulings, and the options of the district court in seeking to clarify it; the definition of finality in an arbitration award, and thus the permissibility of the Arbitrators' subsequent clarification; recognized exceptions to any rule of finality, permitting arbitrators to clarify ambiguous rulings; and the extent to which the error perceived by the district court was sufficiently egregious to warrant its alteration of the arbitration award. Some of these issues involve consideration of a substantial body of case law, including decisions of this Court; some of them present nuances specific to the facts of this case. It is respectfully submitted that oral argument will assist the Court in both contexts.

I
STATEMENT OF JURISDICTION

This is a plenary appeal of a final order under 28 U.S.C. §1291.

II
ISSUE ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED IN RULING, FROM THE FACE OF THE INTERIM AWARD ALONE, THAT THE INTERIM AWARD OF PUNITIVE DAMAGES WAS BASED EXCLUSIVELY ON FDTUPA, AND THEREFORE MANIFESTLY DISREGARDED THE LAW.

B. WHETHER THE DISTRICT COURT ERRED IN RULING THAT INTERIM AWARD WAS FINAL UNDER BOTH THE AAA RULES AND THE *FUNCTUS OFFICIO* DOCTRINE, AND THEREFORE THAT THE SUPPLEMENTAL AWARD WAS IMPERMISSIBLE.

C. EVEN IF THE INTERIM AWARD WAS FINAL, WHETHER THE ARBITRATORS' SUPPLEMENTAL AWARD WAS PERMITTED BY AN EXCEPTION TO THE COMMON-LAW *FUNCTUS OFFICIO* DOCTRINE.

D. EVEN IF THE ARBITRATORS HAD INTENDED IN THE INTERIM AWARD TO AWARD PUNITIVE DAMAGES ONLY UNDER FDUPTA, WHETHER SUCH A RULING EVIDENCED A MANIFEST DISREGARD OF THE LAW.

E. EVEN IF THE INTERIM AWARD WAS FINAL, WHETHER THE DISTRICT COURT HAD AUTHORITY TO REVIEW THE INTERIM AWARD.

F. WHETHER THE DISTRICT COURT ERRED IN DECLINING TO AWARD PRE-JUDGMENT INTEREST FROM THE DATE OF THE ORIGINAL ARBITRATION

AWARD.

III
STATEMENT OF THE CASE

A. Introduction. This is an appeal of a Final Judgment which reduced an Interim Arbitration Award made to Appellant Collier Black from approximately $4.25 million to approximately $1.9 million, by striking its punitive award of $2.25 million. The basis for this ruling was that the Arbitrators purportedly had found for Mr. Black on only two counts of his Arbitration Complaint, neither of which assertedly permitted punitive damages under Florida law. The court also rejected as a nullity the Arbitrators' later Supplemental Award, which clarified their original intent, consistent with numerous unchallenged factual findings made in the earlier Interim Award, to rule for Mr. Black on other counts of his complaint which did support the punitive award.

B. Course of Proceedings.

1. The Arbitration. In late November of 2000, Mr. Black filed with the American Arbitration Association (AAA) a demand for arbitration and Complaint against Orkin, Inc., f/k/a Orkin Exterminating Company ("Orkin") and its parent corporation, Rollins, Inc. ("Rollins") (hereinafter, collectively, "Orkin"), as the result of a termite infestation at Mr. Black's home. Black's Arbitration Complaint alleged eleven counts, including breach of contract; civil RICO; violation of Florida's Deceptive and Unfair Trade Practices Act, §501.201, Fla. Stat. ("FDUTPA");

negligence; and fraud (R-16, Vol. 1, Tab 8). In a general prayer applicable to all counts, the Arbitration Complaint sought compensatory damages, special damages, incidental damages, attorneys' fees, punitive damages, and a declaration of rights and duties under Black's agreement with Orkin (*id.*).

On September 3, 2003, the three-person Arbitration Panel (a law professor, a former President of the Florida Bar, and a 40-year attorney) issued a unanimous ruling styled "Interim Arbitration Findings and Award" (hereinafter "Interim Award") (R-16, Tab 2). The Interim Award did not address all issues, reserving on the question of the amount of attorneys fees to be awarded to Mr. Black (R-16, Tab 2 at 3). In its factual findings, the Interim Award found that Orkin had "actively and knowingly participated in; knowingly condoned, ratified or consented to the following types of gross and flagrant conduct evidencing reckless disregard of human life, safety of persons exposed to its dangerous effects, or a conscious indifference to the consequences of such conduct . . ." (*id.* at 3). The order makes seven findings of "gross and flagrant conduct" (*id.* at 3-5). One of these was fraud--that Orkin "affirmatively represented to the Plaintiff COLLIER BLACK and other customers that their homes were repaired in a commercially reasonable way and Defendants ORKIN EXTERMINATING and ROLLINS, INC. knew that such repairs were not done in a commercially reasonable way" (*id.* at 4-5). The findings were:

> 1. Orkin failed to perform repairs by making repairs only to visible damage and left concealed damage;

2. Orkin failed to obtain permits from the appropriate building departments for repair work for Black as well as other customers, even though such permits were required for structural repairs;

3. Orkin established, maintained and condoned a compensation system for its employees which gave the employees an incentive to breach Orkin's repair incentives guaranteed to Black as well as other customers;

4. Orkin affirmatively represented to Black, and other customers that their homes were repaired in a commercially reasonable way, despite Orkin's actual knowledge that was not true;

5. Orkin affirmatively represented to Black and other customers that their homes were free from termite infestation when Orkin knew, or should have known, that was untrue;

6. Orkin failed to provide Black with a report indicating substantial termite infestation of his home;

7. Orkin failed to give appropriate review and background checks to its subcontractor agents, which resulted in Black and other customers unknowingly allowing convicted felons in their home; and

8. Orkin subjected Black and his family to living in a portion of the home that was demonstrably structurally unsound, which could have caused serious and permanent damage or death to Black and/or his family.

Notwithstanding these findings of negligence, gross negligence and fraud, the legal conclusion in the Interim Award stated that Mr. Black had prevailed only on his claims of breach of contract and FDUTPA, and stated that the Panel found for Orkin

and Rollins on all other counts (R-16, Tab 2 at 2):

> 1. . . . The Panel finds in favor of the Plaintiff COLLIER BLACK under Count I, Breach of Contract, and Count V, Florida's Deceptive and Unfair Trade Practices Act (Fla. Stat. §501.201).
>
> 2. The Panel finds in favor of the Defendants ORKIN EXTERMINATING COMPANY, INC. and ROLLINS, INC. on each of the remaining counts in Plaintiff COLLIER BLACK['s] Second Amended Complaint.

Consistent with its factual findings, however, the Panel awarded $750,000.00 in compensatory damages and $2.25 million in punitive damages, reserving on the question of attorney's fees (*id.* at 2-3).

2. The District Court. Orkin filed the instant action on September 10, 2003, seeking to vacate the Interim Award under §10 of the Federal Arbitration Act (FAA), 9 U.S.C. §§1-16 (R-1). Orkin pleaded that the panel had committed legal errors--among them that the punitive award was impermissible--which assertedly rose to the level of a manifest disregard for the law (*id.* at 3). Orkin later withdrew its complaint (R-13) and substituted a motion to vacate the Interim Award (R-14, R-25). Black filed a motion to confirm the Interim Award (R-10).

3. The Arbitration. Orkin also filed several pleadings in the Arbitration protesting that the Panel's legal findings of breach of contract and violation of FDUPTA did not permit the punitive award. For example, Orkin filed a Motion to Stay Proceedings in the Arbitration (*see* R-10, Ex. C), which attached a copy of its

civil complaint (*id.*). Thus, Orkin informed the Arbitrators of this action, and made clear its position that their Interim Award did not justify punitive damages.

On November 12, 2003, the Arbitration Panel *sua sponte* responded to Orkin's protests by issuing its Supplemental Interim Arbitration Findings and Award (hereinafter "Supplemental Award") (R-29). Consistent with the Arbitrators' prior factual findings of fraud and gross negligence, the Supplemental Award substituted the following for the first paragraph of the prior Interim Award (R-29-1):

> 1. This matter came on before the undersigned arbitrators for final hearing on July 28, 29, 30, 31, August 1, 2, 4 and 5, 2003. The Panel finds in favor of the Claimant COLLIER BLACK under Count I, Breach of Contract, Count IV, Florida's Deceptive and Unfair Trade Practices Act (Fla. Stat. §501.201), Count VI, Negligence, Count VII, Fraud, and Count XI, Alter Ego.

The Supplemental Award repeated that punitive damages were appropriate because Orkin "actively and knowingly participated in, knowingly condoned, ratified or consented to the following types of gross and flagrant conduct evidencing reckless disregard of human life, safety of persons exposed to its dangerous effects, or a conscious indifference to the consequences of such conduct . . ." (*id.* at 3).

On December 1, 2003, the Arbitrators disposed of the remaining issues in an order entitled Award of the Arbitrators, awarding Mr. Black $975,000.00 in attorney's fees, $189,902.00 in costs, and $88,783.29 as compensation and expenses of the Arbitrators (R-43). The order recited that "this Award is in full settlement of all claims submitted to this Arbitration" (*id.* at 1).

4. The District Court. Orkin filed a motion to vacate the Supplemental Award (R-33), and later a motion to vacate the Award of the Arbitrators (R-47). Black moved to confirm them (R-56).

In an order dated August 20, 2004 (R-60) and accompanying Judgment (R-61), the district court modified the Arbitrators' Interim Award, striking the punitive damages. The order found that the court had jurisdiction to review the Arbitration proceedings, notwithstanding the parties' agreement that the Arbitrators' award would be final and non-appealable (R-60-5-6); that the Arbitrators' Interim Award was a final order (*id.* at 7-8); that under the AAA Rules and the common-law doctrine of *functus officio*, the Arbitrators' Supplemental Award was not an authorized clarification or correction of the Interim Award (*id.* at 6-7);[1/] that no exception to the

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[1/] In making this ruling, the court did not acknowledge the inconsistency between the Arbitrators' factual findings of fraud and gross negligence on the one hand, and their legal rulings on the other. However, in a later, unrelated section of its order (R-60-9 n. 8), the court did acknowledge Mr. Black's argument that the evidence supporting

> the Panel's findings, which were cited to support its award of punitive damage . . . also supports a finding of negligence, fraud, and alter ego. The Panel does not mention those claims and instead cites to Florida Statutes §768.737, which requires an arbitrator to provide her basis for the granting of punitive damages. Regardless of whether the evidence might support a finding of negligence, fraud, or alter ego, it is clear that the Panel listed those findings to support its award of punitive damages.

As we will argue, this observation missed the point. These factual findings may well

doctrine of *functus officio*, such as the clarification of an ambiguity, was available to the Arbitrators (*id.* at 9-10) (*see supra* note 1); that punitive damages were not authorized for breach of contract or violation of FDUPTA (*id.* at 11-12); and that all other damages were affirmed (*id.* at 12-13). We will review the district court's rationale for each ruling in the course of each argument.

Black moved for reconsideration (R-62) and both sides moved to alter or amend the Judgment (R-63; R-65). In an order dated October 7, 2004, the court denied Black's motions, and granted Orkin's unopposed motion to reduce the Judgment by $88,783.29, which already had been paid by Orkin to the AAA (R-73). The district court entered an Amended Judgment reducing the award to $1.9 million (R-74). Orkin then filed a motion under Rules 60(a) and 59(e), Fed. R. Civ. P., seeking to correct asserted clerical mistakes in the Amended Judgment (*see* R-75; R-76).

Both sides appealed (R-77; R-79; R-81). This Court suspended Black's appeal and Orkin's designated cross-appeal until the district court ruled on Orkin's pending motion. The district court partially granted the motion on January 12, 2005 (R-87) and entered a Second Amended Judgment on January 13 (R-88). Black's appeal, and

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have been recorded in the Interim Award only as support for the punitive damages. But the same findings also sustain Mr. Black's claims of fraud and negligence, which are a proper predicate for punitive damages under Florida law. Therefore, these factual findings cannot be reconciled with the legal ruling for Orkin on those two counts in the same Interim Award.

Orkin's designated cross-appeal, were then consolidated with the first appeal.

IV
STATEMENT OF FACTS

A. The Arbitration. The Arbitrators' findings of gross misconduct, fraud, and wanton actions provide the factual basis for their punitive award. The Arbitration Transcript is at R-17, Tabs 21-23; R-18, Tabs 24-28.

Orkin and Black executed the Orkin Full Renewable Subterranean Termite Home Ownership Repair Guarantee on February 17, 1995 (R-16, Tab 1). Despite the "continuous protection guarantee", Orkin failed to properly inspect and treat the Black family home when it was first treated in 1995. *See* R-16, Tab 2 at 5. Orkin tacitly admitted this failure by reinspecting, and then claimed to have properly repaired the reoccurring damage in 1996, 1997, 1998, 1999 and 2000. *See* R-18, Tab 24 at 902-28. But each annual re-treatment was necessitated by the swarms of termites undisturbed because of Orkin's failure to properly inspect and re-treat in the preceding years. *See* R-17, Tab 21 at 124; Tab 25 at 215-16. In 1998 and 1999, according to a former Orkin employee, the back supporting columns leading from the Black's daughter Charlotte's room to the upstairs guestroom were "devastated," "totally devastated" (R-17, Tab 22 at 304; *see id.* at 304-12, 564). When this employee reported the damage to Orkin, he was told to "patch and paint"--in other words, to cover it up (*id.* at 311). As a result of Orkin's failures, the Black family endured approximately twenty-six separate swarms of termites in their home over this

time period. *See* R-18, Tab 24 at 928. One swarm covered Charlotte while she was sleeping. *See* R-17, Tab 22 at 522.

In April 2000, Black retained an entomologist to evaluate Orkin's systemic failures. *See* R-17, Tab 21 at 194; R-18, Tab 24 at 933-34. He recommended corrective measures which Orkin vetoed, refusing to reimburse Black if he should mitigate his damages. R-17, Tab 21 at 194; *see* R-16-5. Orkin threatened that if Black did so, Orkin would void the contract. R-42, Exhibit 62.

The contract (R-16, Tab 1, ¶9) required Black to mediate prior to arbitration. In the Spring of 2000, Black filed a demand for mediation. The mediation lasted several months, producing an impasse. Contrary to its concession over three years later (*see infra* p. 11), Orkin denied liability throughout.

On May 31, 2001, Black filed a Demand for Arbitration and Complaint with the AAA. The Orkin contract says that arbitration is "final, binding and non-appealable" (R-16, Tab 1, ¶19). Orkin continued to deny any wrongdoing, and its stonewalling extended to material misrepresentations in the early stages of the Arbitration. On July 23, 2001, Orkin's attorney wrote to the Blacks: "I honestly do not believe that Mr. Black has suffered any damages which are recoverable under the Orkin contract. Further, the treatment of the property, in our view, exceeded industry standards. (Dr. Mulrennan confirms this opinion)" (R-42, Ex. 58). Not only did Orkin deny all liability, but Orkin filed a counterclaim for breach of contract, asserting in part that Orkin was entitled to reimbursement for the cost of repairs the

Blacks had made.

Throughout three years of litigation, Orkin claimed that its work on the Black home exceeded industry standards. This was not true, and Orkin knew it. Orkin knew about the gutted foundation wall by 1999. Before its July 23, 2001 disclaimer, Orkin's attorney had been told by its own expert, John Mulrennan, that Orkin had *not* met the standard of care (*see* R-42, Ex. 25, Deposition of John A. Mulrennan, at 99, 100-02, 103; R-18, Tab 24 at 888). Orkin even continued to deny liability after the Arbitration proceedings commenced, despite Malrennan's testimony that Orkin's treatment fell short of industry standards.

After three years of stonewalling, in its opening statement at the Arbitration hearing on July 28, 2003, Orkin retracted its prior misrepresentations, acknowledging that at least it had been negligent. R-17, Tab 2 at 66.[2/] Moreover, having consistently denied that the Black family had suffered any compensable damages, Orkin now conceded that the Black family had incurred reasonable out-of-pocket expenses of $142,000.00 in repairing the damage. *See* R-18, Tab 27 at 1575. And Orkin repeatedly conceded in closing argument its liability for breach of contract, negligence, and gross negligence (R-18, Tab 28 at 2034, 2042, 2047, 2084, 2097):

> I also certainly concede that there are a lot of very

[2/] With this concession, Black's negligence claim was never again at issue in the Arbitration, and a ruling for Black on that claim was inevitable. This concession strongly indicates that the Arbitrators' omission of such a ruling in their Interim Award was inadvertent, which is what they indicated in their Supplemental Award.

> embarrassing and terrible things that happened to the Blacks that shouldn't have happened. . . .
>
> I'm not saying there weren't mistakes made, there were terrible mistakes, and the worst part about it was we didn't catch those mistakes, and we accept responsibility for that. . . .
>
> You heard testimony where Mr. Black testified Dr. Mulrennan was a guy who will say whatever Orkin wants him to say. You saw the videotape of him telling the treatment was terrible. And that happens several different occasions. . . .
>
> We breached the contract, we did a terrible job on the contract, but this is a breach of contract claim. . . .
>
> This is a case where the company did a lot of mistakes, there are breaches of contract, there's negligence, there's at times *gross negligence*, but they're not the types of thing that meet the manslaughter standard (emphasis added).

As we noted, the Arbitrators unanimously found "gross and flagrant conduct evidencing reckless disregard," "conscious indifference," and fraud (R-16, Tab 2 at 3-5).

V
STANDARD OF REVIEW

A. This Court's Review. In a reviewing a district court's confirmation or alteration of an arbitration panel's decision, this Court reviews questions of law *de novo* and findings of fact for clear error. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995); *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1289 (11th

Cir. 2002). In the instant case the district court did not question any of the Arbitrators' factual findings. Its decision therefore is reviewable *de novo*.

B. The Standard Governing the District Court.

1. Scope of Review. The district court noted that under §10(a)(1-4) of the FAA, it could vacate the award only if it was (1) procured by corruption, fraud, or undue means; (2) a reflection of evident partiality or corruption; (3) the product of misconduct in refusing to hear evidence, postpone a hearing, or other prejudicial behavior; or (4) either an excession of the arbitrators' power, or so imperfectly executed that a mutual, final and definite award was not made. In addition, the district court noted that in this Circuit, it could vacate or amend an award which was entered in "manifest disregard of the law," or was "irrational, arbitrary or capricious" (R-60-4), *citing Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1460-62 (11th Cir. 1997). *Accord, University Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1337 (11th Cir. 2002); *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007 (11th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999); *Lifecare International, Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995). We will discuss that ruling near the end of this brief, but will accept it *arguendo* for most of the arguments made.

2. Standard of Review. In light of the "federal policy favoring arbitration," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), the district

court addressed the Arbitration Award against a heavy presumption of its validity.[3/] In all but the most extreme cases, a final award is the controlling determination of the parties' rights. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 23 (1983); *Dean v. Sullivan*, 118 F.3d 1170, 1171 (7th Cir. 1977). As the district court recognized (R-60-4), its review was extremely limited. *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990). Under the "manifest disregard" standard, an award is not reviewable for "mere error in interpreting the law." *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999). *Accord, BEM I, Inc. v. Anthropologie, Inc.*, 301 F.2d 548, 556 (7th Cir. 2002) ("[I]t is of no moment whether the arbitrators got Illinois law right--or very wrong"); *Americas Ins. Co. v. Seagull Compania Naviera, S.A.*, 774 F.2d 64, 67 (2nd Cir. 1985). The challenger's burden of proof, *see Scott v. Prudential Securities, Inc.*, 141 F.3d at 1014, is to address the most liberal reading of the award,[4/] and demonstrate that the arbitrators' reasoning "is [so] palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Safeway Stores v. American Bakery Confectionary Workers*, 390 F.2d 79, 82 (5th Cir. 1968). *See*

[3/] *See Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1288 (11th Cir. 2002); *Gianelli Money Purchase Plan and Trust v. ADM Investor Services, Inc.*, 146 F.3d 1309, 1312 (11th Cir.), *cert. denied*, 525 U.S. 1016 (1998); *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1190 (11th Cir. 1995); *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990).

[4/] *Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 126, 133 (2nd Cir. 2003); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 212 n. 8 (2nd Cir. 2002).

Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993). In contrast, "where an arbitral award contains more than one plausible reading, manifest disregard cannot be found if at least one of the readings yields legally correct justification for the outcome." *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 390 (2nd Cir. 2003) (and cases cited).

Orkin's burden could be satisfied only "when the record indicates that the panel knew the law and disregarded it." R-60-4-5, *citing Montes v. Sherman Lehman Brothers, Inc.*, 128 F.3d at 1460, *and O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 747 (11th Cir. 1988). *Accord, Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000). That means "that the arbitrator was subjectively aware of the proper legal standard but proceeded to disregard it," *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410, 1412 (11th Cir. 1990)--that he was "conscious of the law and deliberately ignore[d] it." *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997). *Accord, Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 69 (2nd Cir. 2003); *University Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1337 (11th Cir. 2002); *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000); *Robbins v. Day*, 954 F.2d 679, 683-84 (11th Cir.), *cert. denied*, 506 U.S. 870 (1992); *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 747 (11th Cir. 1988).

VI
SUMMARY OF THE ARGUMENT

First, the district court erred in ruling, based entirely on the face of the Arbitrators' Interim Award, that the punitive award was based exclusively on FDTUPA, and therefore manifestly disregarded the law. Even assuming *arguendo* that the Interim Award was final, and that the Supplemental Award was unauthorized, the Interim Award is inherently ambiguous on the question of punitive damages, because its factual findings rule for Mr. Black on his claims of fraud and gross negligence (which was conceded)--rulings which form a proper predicate for its award of punitive damages--but its formal legal rulings rejected both claims. Given an inherent ambiguity, the district court had three options, none of which included its dismissal of the Arbitrators' factual findings in favor of exclusive reliance on their legal rulings. It could resolve the ambiguity on the face of the Interim Award, by accepting its factual findings; it could resolve the ambiguity in accordance with the Arbitrators' subsequent clarification in their Supplemental Award, even if that Supplemental Award did not formally amend the Interim Award; or it could remand to the Arbitrators for clarification. In all events, the Court erred in its resolution of the ambiguity by fiat.

Second, the district court erred in ruling that the Interim Award was final, and therefore that the Arbitrators had no authority to issue the Supplemental Award. Under the AAA rules and the common-law doctrine of *functus officio* (which in any

event is an obsolete doctrine which should be discarded), the Interim Award was not final.

Third, even if the Interim Award had been final, its ambiguity permitted the Arbitrators' clarification in their Supplemental Award, under an exception to the common-law *functus officio* doctrine.

Fourth, even if the Interim Award had been final, and even accepting the district court's interpretation--that the Arbitrators intended to contradict their own findings of fraud and gross negligence, and to award punitive damages only under FDUPTA--given the uncertainty under Florida law as to whether FDUPTA permits punitive damages, their ruling was not made in manifest disregard of the law.

Fifth, we will argue a) that the district court had no authority to review the Interim Award, even if it was final, because the parties' agreement precluded judicial review; and b) (principally in order to preserve the point in the event of any subsequent review) that the district court erred in applying the "manifest disregard" standard, which is not authorized by the AAA rules.

Sixth, the district court erred in declining to award both pre-judgment interest from the date of the original arbitration award, and attorneys fees.

VII
ARGUMENT

A. THE DISTRICT COURT ERRED IN RULING, FROM THE FACE OF THE INTERIM AWARD ALONE, THAT THE INTERIM AWARD OF PUNITIVE DAMAGES WAS BASED EXCLUSIVELY ON

FDTUPA, AND THEREFORE MANIFESTLY DISREGARDED THE LAW.

Even accepting *arguendo* the district court's rulings that the Arbitrators' Interim Award was final, and that the Supplemental Award was not authorized, because the Interim Award is inherently ambiguous, the district court erred in ruling, based solely on the language of the Interim Award, that the Arbitrators manifestly disregarded the law in awarding Mr. Black punitive damages.

The district court made that ruling in a single paragraph (R-60-11-12), which made no mention of the Arbitrators' factual findings of fraud and gross negligence (*but see supra* note 1). It held that under Florida law, an award of punitive damages for breach of contract or violation of FDTUPA "is a legal error"; said that Mr. Black's counsel, at one point in the arbitration--in a statement which was "not the paradigm of clarity"--assertedly conceded that Mr. Black was not seeking punitive damages under FDTUPA; and on that basis *alone*, ruled that the panel had awarded punitive damages "in manifest disregard of the law . . ." (*id.* at 12).

1. The Interim Award is Facially Ambiguous. Mr. Black pleaded claims of fraud and negligence, and asked for punitive damages on all counts (*see* R-16, Tab 8). Regardless of the context in which the Arbitrators stated their factual findings of reckless misconduct and fraud--that is, even if the district court was correct (R-60-9 n. 8) that they did so in the Interim Award only to state the factual basis for the punitive award (*see supra* note 1)--the fact remains that these *are* findings of

negligence and fraud, both of which were pleaded (and one of which was admitted), and of wrongful conduct sufficient to justify punitive damages under either count. Therefore, the Arbitrators' factual findings and their legal conclusions are inherently contradictory.[5/]

This Court has recognized that an inconsistency between factual findings and legal rulings is ambiguous. In *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1268 (11th Cir. 2000), *cert. denied*, 539 U.S. 941 (2003), in which the district court ruled against the EEOC on its claim of disparate treatment (intentional discrimination), but for the EEOC on its claim of disparate impact, this Court reversed the disparate-impact finding, but held that "some of the district court's subsidiary factual findings are in apparent conflict with its conclusion that Joe's was not liable for intentional discrimination . . . ." Although "these factual findings do not mesh easily with the disparate impact theory," "Joe's could be found liable for intentional discrimination . . . ." *Id.* at 1282. *See id.* at 1283. The Court held, *id.* at 1286 (first emphasis in original):

> Since the state of this record is replete with conflicting witness testimony *and* conflicting conclusions

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[5/] Orkin did not dispute that the Arbitrators' factual findings are sufficient under Florida law both to warrant findings of negligence and fraud, and to justify an award of punitive damages. *See* §768.72(2), Fla. Stat. (2004); *First Interstate Development Corp. v. Ablanedo*, 511 So.2d 536, 539 (Fla. 1987); *American Cyanamid Co. v. Roy*, 498 So.2d 859 (Fla. 1987). Moreover, any such argument would have exceeded the district court's authority. Therefore, it is conceded that the Arbitrators' factual findings provide a lawful predicate for their award of punitive damages.

> drawn by the district court, the wisest approach, we think, is to remand the case to the factfinder for more detailed findings on the EEOC's intentional discrimination claims. Only in this way, can we be assured of reaching an outcome truly consonant with the *factfinder*'s view of the evidence. We therefore abide by the general rule of law that "'a remand is the proper course unless the record permits only one resolution of the *factual* issue.'" *Cooper-Houston v. Southern Ry. Co.*, 37 F.3d 603, 604 (11th Cir. 1994) (*quoting Kelly v. Southern Pacific Co.*, 419 U.S. 318, 331-32, 95 S. Ct. 472, 42 L. Ed.2d 498 (1974)).

The Court's objective was not a blinded application of the lower tribunal's formal legal rulings, but "reaching an outcome truly consonant with the factfinder's view of the evidence." Indeed, Judge Hull dissented on the ground that the district court's factual findings should supercede its inconsistent legal ruling: "I would affirm on the alternative ground of disparate treatment thus pretermitting any need for remand." *Id.* at 1296.

An inconsistency between factual findings and legal rulings is no less ambiguous in an arbitration case. In *Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 126, 134 (2nd Cir. 2003), the arbitrators found a defendant liable solely on a theory of respondeat superior, but the only evidence recited established the defendant's active negligence; and the order recited no evidence of an employer/employee relationship. The court held that "we have crossed the line from confusion to inexplicability, and we can discern no reading of the Award that resolves its apparent contradiction with the law of respondeat superior." *Id.* at 132. We will

examine below the options available to the district court in such a situation. In *Hardy* the court remanded to the arbitrators for clarification.

In the pages which follow, we will examine the criteria governing both a district court's options in dealing with an inherently ambiguous arbitration award, and the arbitrators' power to clarify an award, under both the AAA rules and the common-law *functus officio* doctrine.

2. The District Court Erred in Ruling that the Arbitrators' Interim Award of Punitive Damages Reflected a Manifest Disregard of the Law. Notwithstanding the legal rulings in their Interim Award, the Arbitrators' strong factual findings connote their intention to rule for Mr. Black on his claims of fraud and negligence. And "[a]ssuming that the panel in the instant case did intend" such a ruling, "the district judge clearly frustrated that intent." *American Ins. Co. v. Seagull Compania Naviera, S.A.*, 774 F.2d 64, 67 (2nd Cir. 1985), *quoted in Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 126, 133 (2nd Cir. 2003). The district court had three options in dealing with the inherent ambiguity in the Arbitrators' Interim Award. None of them included its declaration that the Arbitrators' factual findings should be ignored, their conclusory legal findings should be controlling, and thus their punitive award was made in manifest disregard of the law.[6/]

[6/] The district court's options, discussed below, are not defined or constrained by the common-law doctrine of *functus officio* (discussed *infra*), which is a limitation on the arbitrator's power to re-visit a final arbitration award--not on the district court's authority to interpret such an award, or on the scope of such authority. As the court

a. The District Court Should Have Ruled on the Face of the Interim Award That the Punitive Damages Were Not Awarded in Manifest Disregard of the Law. As we noted, *supra* pp. 13-15, the district court's judgment can be affirmed only if the arbitrators' punitive award was so "palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Safeway Stores v. American Bakery Confectionary Workers*, 390 F.2d 79, 82 (5th Cir. 1968). But "where an arbitral award contains more than one plausible reading, manifest disregard cannot be found if at least one of the readings yields a legally correct justification for the outcome." *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 390 (2nd Cir. 2003) (and cases cited). Against this standard, when the

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put it in *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d 327, 334 (3rd Cir. 1991), in considering the district court's authority to remand to the arbitrator for clarification:

> Because of the limited purpose of such a remand, which serves the practical need for the district court to ascertain the intention of the arbitrators so that the award can be enforced, there is not even a theoretical inconsistency with the *functus officio* doctrine. *See Industrial Mut. Ass'n v. Amalgamated Workers, Local Union No. 383*, 725 F.2d 406, 412 n. 3 (6th Cir. 1984) (despite *functus officio* rule, remand proper to qualify ambiguous award or to require arbitrator to address submitted but unresolved issue).

Accord, Office & Professional Employees International Union v. Brownsville General Hospital, 186 F.3d 326, 331-32 (3rd Cir. 1999); *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 993-94, 996 (3rd Cir. 1997). In any event, as we will argue, the *functus officio* doctrine also is not applicable in its own terms.

arbitrator's award is supported by the facts recited in his opinion, a finding of manifest disregard is impossible.

In *Brown v. ITT Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000) (emphasis added), this Court said flatly that a district court cannot vacate an arbitration award unless "no ground for the decision can be inferred *from the facts*." *Accord, Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999); *Ainsworth v. Skurnik*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993); *Robbins v. Day*, 954 F.2d 679, 684 (11th Cir.), *cert. denied*, 506 U.S. 870 (1992), *disapproved on other grounds, First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990). *See Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 126, 131 (2nd Cir. 2003); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 216 (2nd Cir. 2002); *In Re South East Atlantic Shipping Ltd.*, 356 F.2d 189, 192 (2nd Cir. 1965) ("[W]e are bound by the arbitrators' factual findings . . ."). An arbitrator's award cannot manifestly disregard the law if any ground supporting that award can be inferred from the *facts* recited. *See Wallace v. Buttar*, 378 F.3d 182, 193 (2nd Cir. 2004); *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2nd Cir. 1991), *cert. denied*, 502 U.S. 942, 1120 (1992).[7/]

[7/] Although some of the cited decisions address this point in the context of the "arbitrary and capricious" test, *see supra* p. 13, that test in turn depends on whether "a ground for the arbitrator's decision can be inferred from the facts of the case," *Raiford*, 903 F.2d at 1413. *Accord, Lifecare International, Inc. v. CD Medical, Inc.*,

In the instant case, Orkin has not denied that the facts found by the Arbitrators justify a finding of fraud, and also gross negligence (which Orkin conceded), and in turn justify an award of punitive damages under Florida law. Consistent with the policy expressed by this Court in *Joe's*--that the lower tribunal's factual findings are paramount--the district court erred in ruling that the Arbitrators' award of punitive damages was made in manifest disregard of the law.

b. The District Court Erred in Declining to Consider Extrinsic Evidence, Including the Arbitrators' Supplemental Award, Even if That Award Was Incompetent as a Formal Amendment. Even accepting *arguendo* the district court's finding that the Arbitrators had no authority to disturb the asserted finality of the Interim Award, and therefore to formally amend or clarify the Interim Award in the Supplemental Award, the district court missed the forest for the trees. Because the Interim Award is ambiguous, the court was required to consider the Supplemental Award, if not as a permissible amendment, at least as an unequivocal declaration by the draftsmen of their intentions in the Interim Award.

If the court cannot determine on the face of the award whether it was made in manifest disregard of the law, it should consider any relevant extrinsic evidence to

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68 F.3d 429, 435 (11th Cir. 1995); *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993). That inquiry in turn invokes the same caveat applicable to the "manifest disregard" test--that "a mere error in application of the law will not support the reversal of an arbitration award." *Scott*, 141 F.3d at 1018, and that the award "will be vacated only if there is no ground whatsoever for the panel's decision." *Lifecare*, 68 F.3d at 435.

resolve the ambiguity. Although many courts favor (and some require) a remand to the arbitrators, *see infra*, others hold that "remand for clarification is a disfavored procedure," and "a court is permitted to interpret and enforce an ambiguous award if the ambiguity can be resolved from the record." *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 280 (7th Cir. 1992). *Accord, Tri-State Business Machines, Inc. v. Lanier Worldwide, Inc.*, 221 F.3d 1015, 1019 (7th Cir. 2000) (*dictum*); *Teamsters Local No. 579 v. B&M Transit, Inc.*, 882 F.2d 274, 278 (7th Cir. 1989); *United Steelworkers of America, AFL-CIO-CLC v. Danly Machine Corp.*, 852 F.2d 1024, 1027 (7th Cir. 1988); *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 188 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986); *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437, 440-41 (6th Cir.), *cert. denied*, 474 U.S. 948 (1985).

Thus, for example, in *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1264 (5th Cir. 1980), "the arbitrator not only wrote a letter to the trustees upon request clarifying his decision, but he himself testified at the trial, and the court simply interpreted the purported ambiguities in the [arbitration] decision to comport with what the arbitrator said he meant." Likewise in *San Antonio Newspaper Guild Local No. 25 v. San Antonio Light Division*, 481 F.2d 821, 825 (5th Cir. 1973), in light of the arbitrator's subsequent clarification, the court held that a remand "in this case . . . would be a pointless gesture." And in *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439, 442 (7th Cir.), *cert. denied*, 393 U.S. 925 (1968), the court resolved the ambiguity by soliciting clarification from the arbitrators, rather than formally

remanding. *Accord, Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 993-94, 996 (3rd Cir. 1997) ("the *functus officio* doctrine did not proscribe the district court from examining the arbitrator's post award letter which purported to clarify the intended scope of the award"; court did not address district court's "decision to call the arbitrator to testify at a hearing," because the district court properly vacated the award on independent procedural grounds); *Flender Corp. v. Techa-Quip Co.*, 953 F.2d 273, 280 (7th Cir. 1992).

In the instant case, as in the cited cases, no remand was necessary because the Arbitrators resolved the ambiguity of their Interim Award by clarifying in their Supplemental Award that they found both fraud and gross negligence (which was conceded), permitting the award of punitive damages. Therefore, even if the Supplemental Award did not lawfully modify the Interim Award, it should have been considered by the district court in interpreting the Interim Award.

c. At the Least, the District Court Should Have Remanded for Clarification of the Ambiguity by the Arbitrators. In *Hyle v. Doctor's Associates, Inc.*, 198 F.3d 368, 369-70 (2nd Cir. 1999), the arbitrator's award was ambiguous in failing to indicate whether some of the relief was intended to apply to all parties. The arbitrator issued a "corrected Arbitration Award," but the court held that because the earlier award had addressed all issues, the corrected award was prohibited by the *functus officio* doctrine. *Id.* at 370. The court acknowledged the district court's authority to consider extrinsic evidence to interpret the arbitrator's original order, but ruled that

the better course was to remand the case so that the arbitrators could formally clarify it. *Id.* at 371. Likewise, "a contradiction in the arbitrators' opinion . . ., if it created a serious doubt as to the arbitrators' bottom line, would be a basis for a remand to the arbitrators." *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 556 (7th Cir. 2002). *Accord, Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 126, 134 (2nd Cir. 2003) (inconsistency between facts showing only active negligence and legal ruling of only vicarious liability).

A remand to resolve an ambiguity "avoid[s] any judicial guessing as to the meaning of the award." *Galt v. Libby-Owens-Ford Glass Co.*, 397 F.2d 439, 442 (7th Cir.), *cert. denied*, 393 U.S. 925 (1968). It "avoids the court's misinterpretation of the award and is therefore more likely to give the parties the award for which they bargained." *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d 327, 334 (3rd Cir. 1991). In the instant case, the court's choice of the Arbitrators' formal legal ruling over their factual findings was a "judicial guess[]."

Some courts have held that in the face of an ambiguity, the district court is required to remand for clarification by the arbitrators. *See, e.g., Brown v. Witco Corp.*, 340 F.3d 209, 216 (5th Cir. 2003); *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co., Ltd.*, 868 F.2d 52, 58 (3rd Cir. 1989); *America Ins. Co. v. Seagull Compania Naviera, S.A.*, 777 F.2d 64, 67 (2nd Cir. 1985); *Island Creek Coal Sales Co. v. City of Gainesville, Fla.*, 764 F.2d 437, 440 (6th Cir.), *cert. denied*, 474 U.S. 948 (1985) (*dictum*). Other courts, including this Court, have held that the

district court has the option to remand for clarification. *See, e.g.*, *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 556 (7th Cir. 2002) (and cases cited); *Tri-State Business Machines, Inc. v. Lanier Worldwide, Inc.*, 221 F.3d 1015, 1019 (7th Cir. 2000); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990); *Office & Professional Employees International Union v. Brownsville General Hospital*, 186 F.3d 326, 331-32 (3rd Cir. 1999); *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 279-80 (7th Cir. 1992); *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d at 333-34 (and cases cited); *York Research Corp. v. Landgarten*, 927 F.2d 119, 123 (2nd Cir. 1991); *Olympia & York Florida Equity Corp. v. Gould*, 776 F.2d 42, 45 (2nd Cir. 1985). *See also Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993) (noting district court's remand). *Cf. La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 573 (3rd Cir. 1967) (common-law rule).

In the instant case, given the primacy of factual findings over bare legal rulings, a remand was particularly appropriate. As the court said in *Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 26, 134 (2nd Cir. 2003): "In this case, the Panel chose to make an explicit legal conclusion in the award, a conclusion that may very well be wrong. It should be given the opportunity to explain themselves [sic]." "The intent of a panel of arbitrators should not be frustrated merely because its members may have misinterpreted the law." *Americas Ins. Co. v. Seagull Compania Naviera, S.A.*, 774 F.2d 64, 67 (2nd Cir. 1985).

The Interim Award is inherently ambiguous. If the district court could not resolve the ambiguity on the face of the award, by recognizing the primacy of its factual findings (which it could); if the court could not resolve the ambiguity through extrinsic evidence, in the form of the Arbitrators' clarifying Supplemental Award (which it could); then the court was required to remand to the Arbitrators for clarification. Even assuming *arguendo* that the Supplemental Award was ineffective to formally modify the Interim Award, the district court erred in ruling that the Arbitrators' award of punitive damages was made in manifest disregard of the law.

> B. THE DISTRICT COURT ERRED IN RULING THAT THE INTERIM AWARD WAS FINAL UNDER BOTH THE AAA RULES AND THE *FUNCTUS OFFICIO* DOCTRINE, AND THEREFORE THAT THE SUPPLEMENTAL AWARD WAS IMPERMISSIBLE.

1. The AAA Rules.

a. The District Court's Ruling. The district court focused on two AAA rules (R-60-6-7). Rule R-46 defines the scope of the Arbitrators' authority to amend "an award" at the instance of a party:

> R-46. Modification of Award.
>
> Within 20 days of the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award.

The district court held that the Supplemental Award did not satisfy this standard. We agree.

The district court also paraphrased Rule R-43 (quoted below), but described it only as permitting "interim, interlocutory, and partial rulings." It then suggested that the definition of those terms is controlled by Rule R-34, which it quoted only in part, and mischaracterized as providing that an interim award is permitted only "for the protection or conservation of property and disposition of perishable goods." In fact, Rule R-34(a) says exactly the opposite (emphasis added): "The arbitrator may take *whatever interim measures he or she deems necessary, including* injunctive relief and measures for the protection or conservation of property and disposition of perishable goods." Based on its mischaracterization, the district court held that the Interim Award "was not interim as the term is used in Rule 34. . . . Thus, Rule 34 does not provide a basis for conclude [sic] that the Interim award is interim and not final" (R-60-6 n. 5).

Moreover, even apart from the district court's mischaracterization of Rule R-34, the language of Rule R-43, which the district court did not quote, also is unqualified. Rule R-43 provides in its first three sub-sections:

> R-43. Scope of Award.
>
> (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.
>
> (b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory,

> or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.
>
> (c) In the final award, the arbitrator shall assess fees, expenses, and compensation provided in Section R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

Unlike Rule R-46, governing modification of an award, Rule R-43 (a) and (b) do not condition the Arbitrators' authority on the motion of any party. They permit the Arbitrators to act *sua sponte*.

Although the court did not acknowledge the language of Rule R-43(a) and (b), it did say that even if an interim award were permissible on grounds broader than its erroneous description of Rule R-34, the Interim Award here "was not partial, as it conclusively settled all aspects of the case" (R-60-7) (except attorneys fees). The court cited *Black's Law Dictionary*, defining "interlocutory" as "interim or temporary, not constituting a final resolution of the whole controversy" (*id.* at 7 n. 6). The district court also ruled that the Interim Award was final because it ordered payment within 30 days (R-60-7).

b. Argument. First, the district court's ruling is contradicted by Rule R-43(c), providing that a final arbitration award "shall assess fees, expenses, and compensation . . . ." The Interim Award here does *not* assess fees, expenses or compensation, and therefore is *not* final under the AAA rules. Therefore, under the

AAA rules, the Interim Award was not final. The district court had no authority to contravene the AAA rules.

Second, the district court erred in ruling that the Interim Award had to be final because Rule R-34 permits an interim award only for the "protection or conservation of property and disposition of perishable goods". As we noted, *supra* p. 30, that ruling was is wrong. Both Rule R-34(a) and Rule R-43(b) permit any interim award which the arbitrator thinks appropriate.

Third, in ruling that an arbitrator's award is final if it resolves all material issues in a case, and that such finality precludes any subsequent ruling by the arbitrators (R-60-7), the district court ignored Rule R-43(a), allowing the arbitrator to grant "any remedy or relief that the arbitrator deems just and equitable . . . ." Rule R-43(a) thus permits the Arbitrators to *designate* an award as interim, even if it covers every issue, and thus to retain the authority to revisit its rulings. As the court put it in *Michaels v. Mariform Shipping, S.A.*, 624 F.2d 411, 414 (2nd Cir. 1980), "[i]n order to be 'final' an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them." *Accord, Fradella v. Petricca*, 183 F.3d 17, 19 (1st Cir. 1999); *Anderson v. Norfolk and Western Ry. Co.*, 773 F.2d 880, 882 (7th Cir. 1985). We will address the common-law doctrine of *functus officio* in a moment. Under Rule R-43(a), because they designated the first award as interim, the Arbitrators had the authority to correct its ambiguity by issuing their Supplemental Award, because doing so was "just and equitable." Rule R-43(a)

requires nothing more.

Fourth, even if finality did preclude further action by an arbitrator, there is no support in the AAA rules for the district court's ruling that an arbitration award is final if it disposes of only the material issues, leaving undecided the non-material issues (R-60-6-7). Although reservation of such matters as fees, expenses and compensation may be collateral in a district court, Rule R-43(c) says the opposite--that an award is not final until fees, expenses and compensation are determined. *Black's* definition defines "interlocutory" as "not constituting a final resolution of the whole controversy" (R-60-7 n. 6). "The general rule is that in order to be final and definite, [the award] must resolve all issues submitted to the arbitrators, and determine each issue fully so that no further litigation is necessary to finalize the obligation of the parties under the award." *Dighello v. Busconi*, 673 F. Supp. 85, 90 (D. Conn. 1987), *aff'd*, 849 F.2d 1467 (2nd Cir. 1988), *citing Puerto Rico Maritime Shipping Authority v. Star Lines, Ltd.*, 454 F. Supp. 368, 372 (S.D.N.Y. 1978). *Accord, Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1069 (8th Cir. 2003); *ConnTech Development Co. v. University of Connecticut Educational Properties, Inc.*, 102 F.3d 677, 687 (2nd Cir. 1996). Thus in *Gas Aggregation*, by failing to "fully decide the issue of prejudgment interest", "the panel failed to make a final determination." 319 F.3d at 1069.

Fifth, even if the AAA rules defined an arbitrators' ruling as final (despite their declaration to the contrary) if it resolves all material issues, the Interim Award did not

decide a material issue--the amount of attorney's fees (*see* R-16, Tab 2 at 3). Although a reservation for fees may be collateral for purposes of a plenary appeal of a district court's judgment, there is no analogous provision of the AAA rules. The eventual award of attorneys' fees was $975,000.00, with costs of $189,902.00 (R-43)--or $1.16 million. As we noted, the failure to resolve the issue of prejudgment interest precluded finality in *Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*, 319 F.3d at 1069.

Sixth, there is no merit to the district court's ruling that the Interim Award was final "because it was not temporary," but rather ordered immediate payment (R-60-7). Again, there is nothing in the AAA rules to that effect. Rule R-43(b) says that the Arbitrators can make "interim, interlocutory, or partial rulings, orders *and awards*" (emphasis added). That language does not limit the word "awards" to those which are stayed. It says "awards." Nor is there anything inherently final in an order of immediate payment of that part of the award which has been decided.

The AAA rules preclude finality if fees, expenses and compensation are not resolved; they permit the Arbitrators to designate a ruling as interim--even one which might be considered final by the standards governing a district court's judgment; such an interim ruling can tentatively decide all issues; or it can leave open an issue like attorneys fees; it can order immediate payment; but still, by its terms, it can retain jurisdiction. Under the AAA rules, the Arbitrators were permitted to designate the Interim Award as interim, and to clarify the Interim Award in their Supplemental

Award.[8/]

2. The Common-Law Doctrine of Functus Officio.

a). The Doctrine Should Not Apply. Before examining the rule, there is a significant question of whether the district court should even have considered it. Even assuming it still exists, *see infra*, this common-law doctrine, *see Office & Professional Employees International Union v. Brownsville General Hospital*, 186 F.3d 326, 331 (3rd Cir. 1999), cannot supercede the parties' contractual agreement to be bound by a different set of rules--the AAA rules. Arbitration agreements "are a creature of contract," *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1011 (11th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999), and should be treated no differently from any other contract. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 934 (10th Cir. 2001); *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995). Parties to a contract can waive

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[8/] If the Court agrees with this conclusion, there is some question whether the district court had jurisdiction to review a non-final arbitration award. *See Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231, 233 (1st Cir. 2001) (no partial review unless there was "a formal, agreed to bifurcation" in the arbitration); *Folse v. Richard Wolf Medical Instruments Corp.*, 56 F.3d 603, 605 (5th Cir. 1995) (only if final); *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 282 (2nd Cir. 1986) (no review absent arbitrator's ruling on "independent and separate" claim); *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2nd Cir. 1980) (only if final). Arguably the Interim Award was severable and thus reviewable even if not final. In all events, however, if the Interim Award was not final, the Supplemental Award was permissible.

common-law doctrines, federal or state statutes, regulations, even constitutional rights.[9/] "[P]arties can stipulate to whatever procedures they want to govern the arbitration of their dispute . . . ." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) *(see also infra* p. 45, waiver of judicial review).

The *functus officio* doctrine should be available to interpret a contract or statute only if the parties or the statute adopt it as a rule of construction. This doctrine is most prominent in the construction of collective-bargaining agreements under §301 of the Labor Management Relations Act, 28 U.S.C. §185, but only because the Supreme Court in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), "instructed federal courts to fashion and apply a substantive body of federal labor law in §301 LMRA enforcement proceedings . . . ." *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 991 (3rd Cir. 1997). That evolution incorporated the common-law rule (which otherwise would yield to any inconsistent statutory requirement) as part of the statute's construction. *See Industrial Mutual Ass'n v. Amalgamated Workers Local Union No. 383*, 725 F.2d 406, 412 n. 3 (6th Cir. 1984). Nevertheless, and at least in other Circuits, "despite certain distinctions between common law and statutory arbitrations," and without benefit of any statutory authorization, "the *functus officio* doctrine has been routinely applied in federal cases brought pursuant to the Federal Arbitration Act . . . ." *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943

[9/] *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Boykin v. Alabama*, 395 U.S. 238, 243 & n. 5 (1969); *Patton v. United States*, 281 U.S. 276 (1930).

F.2d 327, 331 (3rd Cir. 1991).

To our knowledge, this Court has not endorsed the doctrine in this context. Moreover, in any context the rule is all-but obsolete--born "in the bad old days" out of the notion that arbitrators might improperly be pressured to change their minds after making their decisions, but now "riddled with exceptions" and "hanging on by its fingernails." *Glass, Molders, Pottery, Plastics and Allied Workers International Union v. Excelsior Foundry Co.*, 56 F.3d 844, 846 (7th Cir. 1995). It is respectfully submitted that this doctrine cannot supercede the parties' agreement to follow the AAA rules.

b). The Interim Award Was Not Final Under the Functus Officio Doctrine. The district court acknowledged that the prohibition depended on its ruling that the Arbitrators made a "final determination on the matter submitted to them" (R-60-7). *See Office & Professional Employees International Union v. Brownsville General Hospital*, 186 F.3d 326, 331 (3rd Cir. 1999), *citing Bayne v. Morris*, 68 U.S. (1 Wall.) 97, 99, 17 L. Ed. 495 (1863). *Accord, Glass, Molder, Pottery, Plastics and Allied Workers International Union v. Excelsior Foundry Co.*, 56 F.3d 844, 845 (7th Cir. 1995). The court also recognized that under the common-law doctrine, two relevant factors are whether the language of the award indicates finality and whether the panel intended it to be final (R-60-7-8). *See Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718,

720 (8th Cir. 1999).[10/]

As against these two standards, the Interim Award was not final. It certainly does not indicate finality, but rather the opposite; and there is no indication either on the face of the award or in any extrinsic evidence that the Panel intended it to be final. Nevertheless, the district court ruled that under the common-law doctrine, "an award cannot be final if there are significant issues left to be determined, but an award does not have to be final in all respects to be a final award" (R-60-8).

The court repeated two earlier rulings made in connection with the AAA rules. First, it said again that the Arbitrators' instruction that the Interim Award be paid within 30 days signified "that the Interim Award is final, but that the Panel will issue a final award that includes the issue of attorneys' fees" (*id.*). We adopt our prior response, *supra* p. 34.

Second, the court said again that the Interim Award disposed of all issues, because the question of attorney's fees "is not so significant to make the Interim Award anything less than final" (R-60-8). But neither the district court nor Orkin cited any authority that reserving on fees and costs should not preclude finality under the common-law rule. As we noted earlier, the fees awarded here were substantial.

[10/] The district court found this "test repetitive, because the Panel's intent can only be gleaned from whether the award indicates that it is final" (R-60-8 n. 7). We respectfully disagree. There is no Arbitration rule, and no common-law rule, which precludes a district court's consideration of extrinsic evidence of the panel's intention. Therefore, what the award says and what the panel intended invite different inquiries.

If the Court agrees with this contention, it need not consider the exceptions to the *functus officio* doctrine. The Supplemental Award was permissible because the Interim Award was not final.

We will examine the exceptions to the *functus officio* doctrine in the next argument. Before doing so, we need to briefly address four quick statements of the district court which assertedly supported application of the doctrine (R-60-10).

c). The Court's Miscellaneous Rulings. First, the court said that the Arbitrators had provided no notice of their intention to issue the Supplemental Award. This point does not address the rule of finality (or its exceptions).[11/]

Second, the court said that in issuing the Supplemental Award, "the Panel was not in possession of any of the evidence that had been used at the arbitration." This ruling too does not address the finality of the prior Interim Award. If the Interim

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[11/] For the record, on the merits of the point, arbitration proceedings are not state action, and are not subject to constitutional due process requirements. *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (and "numerous" cited cases) (no procedural infirmity; no due process challenge to arbitrators' punitive award). *Accord, Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991) (no due process challenge to arbitrators' punitive award). The relevant statute is 9 U.S.C. §10(a)(3), permitting judicial review if the arbitrators refused to hear evidence *on the merits* of the controversy. *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 996 (3rd Cir. 1997); *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir.), *cert. denied*, 506 U.S. 870 (1992). There is no authority that the Arbitrators were required to give prior notice of their correction of an ambiguity. As we noted earlier, *supra* p. 31, Rule 46 permits the arbitrators to act on their own motion, without being asked to do so by any party. And in any event, it was Orkin which had raised the issue (*see supra* pp. 5-6), already had briefed it, and briefed it again in the district court.

Award was not final, then it was not the court's concern whether the Arbitrators reviewed the evidence.[12/]

Third, the court held that "in the Supplemental Award, the Panel did not provide any sort of explanation of why it issued the Supplemental Award or whether the award should be read in conjunction or independently." This too does not concern finality. If the Interim Award was not final, then the court had no concern for the Arbitrators' explanation.[13/]

Fourth, the court said that the Arbitrators' clarification "seems to be in response [to] the Petitioner's Motion to Vacate . . . in this Court and not a true reconsideration of the merits of the case." This too does not address finality. Regardless of the motivation, the Interim Award was either final or it wasn't. If it wasn't, then the Arbitrators had authority to proceed further, and their reasons for doing so were not the court's concern.[14/]

[12/] For the record, the Panel had no need to review the evidence; it was seeking to clarify its original intention, based on its earlier factual findings (which were not challenged).

[13/] For the record, the explanation is clear. Orkin had continuously protested to the Arbitrators that the punitive damages were not supported by their rulings for Mr. Black on the breach-of-contract and FDUPTA claims (*see supra* p. 5). The Supplemental Award clarified the findings for Mr. Black on his claims of negligence and fraud, and thus the predicate for the punitive award.

[14/] For the record, this was not a "reconsideration"; it was a clarification. Moreover, the Panel's asserted response to the civil action was Orkin's doing. It was Orkin which filed in the Arbitration proceeding a copy of the Motion to Vacate which it had filed in the district court (*see* R-10, Ex. C).

C. EVEN IF THE INTERIM AWARD WAS FINAL, THE ARBITRATORS' SUPPLEMENTAL AWARD WAS PERMITTED BY AN EXCEPTION TO THE *FUNCTUS OFFICIO* DOCTRINE.

The Supplemental Award was permissible because the Interim Award was ambiguous. As the district court recognized (R-60-9-10), there are three exceptions to the common-law doctrine. Amendment of a final order is permissible 1) to correct a mistake apparent on the face of the award;[15/] 2) to address a matter presented to the Panel but not yet ruled on; or 3) to clarify an ambiguity in a seemingly complete award. *See Office & Professional Employees v. Brownsville General Hospital*, 186 F.3d 326, 331 (3rd Cir. 1999); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Silver State Disposal Service, Inc.*, 109 F.3d 1409, 1411 (9th Cir. 1997).

As we noted earlier, at least two decisions recognize that an arbitrator's award is ambiguous if its factual findings are inconsistent with its legal rulings. *See Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 126, 134 (2nd Cir. 2003); *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 556 (7th Cir. 2002). When an arbitrator's award is ambiguous, even if it is final, the *functus officio* doctrine permits clarification. Any question raised by the award which "can fairly be characterized as

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[15/] The district court found the first exception inapplicable because the Supplemental Award did not purport to correct "a minstrel [sic] mistake or scrivener's error" (R-60-9). *See Hyle v. Doctor's Associates, Inc.*, 198 F.3d 368, 370 (2nd Cir. 1999); *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d 327, 332 (3rd Cir. 1991).

'interpretive'" allows the parties "to crawl through the loophole in the doctrine of functus officio for clarification or completion, as distinct from alteration, of the arbitral award." *Glass, Molders, Pottery, Plastics and Allied Workers International Union v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995). *See, e.g., Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local 24*, 357 F.3d 546, 554 (6th Cir. 2004); *Brown v. Witco Corp.*, 340 F.3d 209, 217-19 (5th Cir. 2003); *BEM I, L.L.C. v. Anthopologie, Inc.*, 301 F.3d at 556; *Green v. Ameritech Corp.*, 200 F.3d 967, 977-78 (6th Cir. 2000); *Hyle v. Doctor's Associates, Inc.*, 198 F.3d 368, 371 (2nd Cir. 1999); *Office & Professional Employees International Union v. Brownsville General Hospital*, 186 F.3d 326, 331-33 (3rd Cir. 1999); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1271-72 (10th Cir. 1999); *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 991, 993-94 (3rd Cir. 1997); *Glass, Molders, Pottery, Plastics and Allied Workers International Union v. Excelsior Foundry Co.*, 56 F.3d 844, 845 (7th Cir. 1995). Because the Arbitrators' Interim Award is ambiguous, the *functus officio* doctrine permitted their Supplemental Award.

D. EVEN IF THE INTERIM AGREEMENT HAD BEEN FINAL, AND EVEN IF IT HAD CLEARLY STATED THAT THE ARBITRATORS INTENDED TO AWARD PUNITIVE DAMAGES ONLY UNDER FDUTPA, THEIR RULING WAS NOT MADE IN MANIFEST DISREGARD OF THE LAW.

Mindful that a mistake of law is insufficient, *see supra* p. 14, even accepting

the district court's ruling that the Interim Award erroneously intended to award punitive damages for the FDUTPA violation, any such error would not satisfy the "manifest disregard" standard. The governing law must be of "pristine clarity, and irrefutable applicability," compelling the assumption "that the arbitrators knew the rule and, notwithstanding, swept it under the rug." *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990). *Accord, Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 382 (5th Cir. 2004) (and cases cited); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 69 (2nd Cir. 2003).

The district court cited *dictum* in a case in which punitive damages were not even awarded--*Heindel v. Southside Chrysler-Plymouth, Inc.*, 476 So.2d 266, 271 (Fla. 1st DCA 1985) ("recovery of punitive damages is clearly beyond the scope of proceedings under chapter 501, part II"). *Accord, Rollins, Inc. v. Hoeller*, 454 So.2d 580, 586 (Fla. 3rd DCA 1984), *review denied*, 461 So.2d 114 (Fla. 1985). Despite these statements, the issue is not settled in Florida.

To begin with, the statute itself does not forbid punitive damages. In fact, §501.213 says that "[t]he remedies of this part are in addition to remedies otherwise available for the same conduct under state or local law." That pronouncement alone creates substantial doubt.[16/]

[16/] *See Dorsey v. Honda Motor Co.*, 655 F.2d 650, 657 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982) (minimal, non-exclusive regulations do not pre-empt punitive damages). *See generally Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1982).

Moreover, the case law is not of "pristine clarity, and irrefutable applicability." In *PNR, Inc. v. Beacon Property Mangement, Inc.*, 842 So.2d 773 (Fla. 2003), in the process of holding that FDUTPA applies to private causes of action arising from a single act, the Supreme Court affirmed a punitive-damage award entered on a complaint alleging seven counts, one of them under FDUTPA. Of course the decision is not controlling, but it did not exclude the FDUTPA claim from the punitive award. In *Hauser Motor Co. v. Byrd*, 377 So.2d 773 (Fla. 4th DCA 1979), the court remanded for a new trial on the issue of punitive damages in a two-count complaint--FDUTPA and fraud--without suggesting that such damages were available only under the fraud count. Again, this is not definitive, but it creates enough uncertainty, in conjunction with the statutory language, to preclude determination that the Arbitration Panel knowingly and deliberately violated Florida law. This Court said in *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1993): "As there was no definitive interpretation of the statute, the panel's interpretation was not wholly unfounded. Thus we cannot say that the Panel's award was arbitrary and capricious". *Accord, Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 70 (2nd Cir. 2003) (law "not sufficiently well-defined or explicit").[17/]

[17/] We respectfully disagree with the district court's comment (R-60-12) that a single remark by Mr. Black's counsel during the arbitration, though "not a paradigm of clarity," conceded that punitive damages are unavailable under FDTUPA. A "'stray and unnecessary remark'" is not definitive. *Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 126, 130 (2nd Cir. 2003) (quoting district court). In any event, what a party said does not necessarily mean that the arbitrator's ruling on the point was

E. EVEN IF THE INTERIM AWARD WAS FINAL, THE DISTRICT COURT HAD NO AUTHORITY TO REVIEW IT OR TO APPLY A "MANIFEST DISREGARD" STANDARD.

The contract in this case, which Orkin drafted, states that "the award of the arbitrators . . . shall be final, binding and *non-appealable*" (R-16, Tab 1 ¶9, at 2) (emphasis added). As we noted, *supra* pp. 35-36, arbitration agreements should be treated like any other contract. Litigants, by contract or otherwise, can waive even the most fundamental constitutional rights. *See* note 9, *supra*. "[P]arties can stipulate to whatever procedures they want to govern the arbitration of their dispute." *Baravati v. Josephtahl, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). Every settlement--every plea bargain--is a waiver of the parties' right of review, except only to enforce their agreement.

The decision to arbitrate itself is a waiver of jury trial. This Court has held that agreements to arbitrate are analogous to forum-selection clauses, enforcing a plaintiff's contractual promise over his right to choose a forum. *Anders v. Hometown Mortgage Service, Inc.*, 346 F.3d 1024, 1027 (11th Cir. 2003); *Randolph v. Green Tree Finance Corp.--Alabama*, 244 F.3d 814, 817 (11th Cir. 2001). *Accord, Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1156 n. 12 (5th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993) (no Seventh Amendment problem). In this light, some courts have held that a contract to arbitrate can waive all forms of judicial

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made in manifest disregard of the law.

review. *See, e.g., Department of Air Force v. Federal Labor Relations Authority*, 775 F.2d 727, 733 (6th Cir. 1985); *Aero Jet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973). *See also Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995) (enforcing parties' agreement to modified judicial review). Such decisions seem especially persuasive in light of the common-law rule that a contract should be construed against its draftsman--here Orkin.[18/]

As the district court noted, however (R-60-5-6), other decisions hold that even though the federal statute says nothing to preclude its waiver, the parties cannot by contract supersede its prescription of limited judicial review. *See, e.g., Goodall-Sanford v. United Textile Workers of America, AFL*, 233 F.2d 104, 107 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 550 (1957); *Dean v. Sullivan*, 118 F.3d 1170, 1171 (7th Cir. 1997); *Baugher v. Dekko Heating Technology*, 202 F. Supp.2d 847, 850 (N.D. Ind. 2002); *Team Scandia, Inc. v. Greco*, 6 F. Supp.2d 795, 798 (S.D. Ind. 1998). However, none of these decisions involved an action brought by the party which drafted the contract, including its prohibition against further review, and then presented the contract to a consumer on a take-it-or-leave-it basis.

This Court should join those Circuits which enforce the parties' contract. If a

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[18/] *See City of Homestead v. Johnson*, 760 So.2d 80 (Fla. 2000); *Vargas v. Schweitzer-Ramras*, 878 So.2d 915 (Fla. 3rd DCA 2004); *School Board of Broward County v. Great American Ins. Co.*, 807 So.2d 750 (Fla. 4th DCA 2002).

criminal defendant can waive his constitutional rights to a jury trial, to counsel, and to confront witnesses, then the parties to a contract can waive a statutory right to judicial review of an arbitration ruling.

2. Application of the "Manifest Disregard" Standard. No provision of the FAA permits a district court to review an arbitration award for manifest disregard of the law. However, this Court has recognized such authority. In order to preserve the point in the unlikely event of any further review, we respectfully note the conflict with decisions of other courts holding that a district court's authority to review is limited to the terms of the statute. *See, e.g., Wallace v. Buttar*, 378 F.3d 182, 191-92 (2nd Cir. 2004); *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 279 n. 5 (7th Cir. 1992); *Aerojet General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973); *Payne v. S.S. Tropic Breeze*, 423 F.2d 236 (1st Cir.), *cert. denied*, 400 U.S. 964 (1970). We adopt the reasoning of those cases--that specific statutory grounds exclude the application of other grounds.

F. THE DISTRICT COURT ERRED IN DECLINING TO AWARD PRE-JUDGMENT INTEREST FROM THE DATE OF THE ORIGINAL ARBITRATION AWARD, AND ATTORNEYS FEES.

1. Pre-Judgment Interest. Mr. Black requested pre-judgment and post-judgment interest on the district court's judgment (*see* R-10-1; R-40-2; R-54-2; R-56-2). In its initial order amending the Arbitration Award (R-60), the district court did not address the question. Black raised the issue in his motion to alter or amend the

judgment under Rules 59(e) and 60(b), Fed. R. Civ. P. (R-62). The district court entertained the motion on the merits, and held that post-judgment interest was available under federal law (R-73-6), but that under Florida law, pre-judgment interest was not (*id.* at 6-8).[19/]

The district court agreed that as a general rule, "pre-judgment" interest in a proceeding to review an arbitration award is tantamount to post-judgment interest in the arbitration, because it is available only from the date of the arbitration award.[20/] The court also recognized that numerous Florida courts have awarded "pre-judgment" interest from the date of the arbitration award. *See supra* note 19. Nevertheless, the court held that pre-judgment interest was not available primarily because it had

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[19/] The parties and the court cited Florida law on this question. "Courts are not entirely in accord on the question whether federal or state law governs entitlement to, and the rate of, post-award, pre-judgment interest." *Fort Hill Builders, Inc. v. National Grange Mutual Ins. Co.*, 866 F.2d 11, 14 (1st Cir. 1989) (and cases cited). However, the Florida and federal rules both award "pre-judgment" interest from the date of the arbitration award. *See Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 63 (3rd Cir. 1986); *Parsons & Whittemore Alabama Machinery and Service Corp. v. Yeargin Construction Co.*, 744 F.2d 1482, 1484 (11th Cir. 1984); *Marion Mfg. Co. v. Long*, 588 F.2d 538, 542 (6th Cir. 1978); *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So.2d 929 (Fla. 1996); *Rock v. Prairie Building Solutions, Inc.*, 854 So.2d 722 (Fla. 2nd DCA 2003); *Okun v. Litwin Securities, Inc.*, 652 So.2d 387, 389 (Fla. 3rd DCA), *review denied*, 660 So.2d 713 (Fla. 1995).

[20/] *See Fort Hill Builders, Inc. v. National Grange Mutual Ins. Co.*, 866 F.2d at 14 ("the court did not regard post-award interest to be, strictly speaking, pre-judgment interest, but rather apparently saw it as closer to post-judgment interest . . ."); *Northrop Corp. v. Triad International Marketing, S.A.*, 842 F.2d 1154, 1155-56 (9th Cir. 1988) (referring to post-arbitration interest as post-judgment, and applying federal law).

altered the arbitration award before entering judgment.[21/]

Of course, if this Court reinstates the arbitration award, then pre-judgment interest will run from the date it was entered. If this Court affirms, it is respectfully submitted that the district court's ruling on pre-judgment interest was erroneous. The district court based its ruling on a 1983 intermediate Florida decision which in turn based its holding on the Florida rule in force at the time regarding *post*-judgment interest, providing that if the district court altered or amended a judgment, post-judgment interest ran only from the date of the new judgment (R-73-7). *Haskell v. Forest Land and Timber Co.*, 426 So.2d 1251, 1254 (Fla. 1st DCA 1983). As we said earlier, we accept the court's analogy to post-judgment interest, but the Florida rule has changed. Rule 9.340(c), Fla. R. App. P., adopted in 1984, now provides that if a money judgment is reversed with instructions to enter judgment on remand, "the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict."[22/] By analogy (the same analogy which the district court found

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[21/] The Court also reasoned that because the Arbitrators had awarded a "fixed amount" of post-award interest, "[i]t follows that the general rule regarding interest does not apply when the arbitration award is later overturned . . ." (R-73-7). We fail to see the logic. The Arbitrators' award of interest did not preclude a subsequent award of pre-judgment interest on a subsequent civil judgment.

[22/] *See Green v. Rety*, 616 So.2d 433 (Fla. 1993); *Brown v. Estate of Stuckey*, 710 So.2d 679 (Fla. 1st DCA 1998). The federal rule also recognizes that "post judgment interest runs from the entry of the original judgment, not from the entry of the new judgment on remand," and it also applies "the analogy between reinstatement of a jury verdict and reinstatement of an arbitration award . . . ." *Northrop Corp. v. Triad International Marketing S.A.*, 842 F.2d at 1156.

appropriate), in an arbitration case, in which interest runs from the date of the initial award, the appropriate date is not changed by the court's subsequent alteration of that award. Therefore, even if this Court affirms, the district court's denial of pre-judgment interest was erroneous.

2. Attorneys Fees. Black moved for fees in the district court (R-10-9-10; R-40-41-46); the district court did not rule on the motion in its order (R-60); but it said later that a motion it had not addressed was denied (R-73-6).

Orkin's contract with Black provides, under the heading "Collection Cost", that Black "agree[d] to pay any necessary court costs if ORKIN or RAC [Rollins] file suit to collect plus reasonable attorney's fees, if allowed by state law" (R-16, Tab 2). "[S]tate law", in the form of what is now §57.085(7), Fla. Stat. (§57.085(6) at the time of this action) provides:

> (7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. . . .

Therefore, if Mr. Black prevailed on any issue, he was entitled to attorney's fees under Florida law.

Moreover, Mr. Black prevailed under FDUTPA, in both the arbitration and the district court, entitling him to attorney's fees under §501.2105(1): "In any civil litigation resulting from an act or practice involving a violation of this part . . . the

prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the non-prevailing party." Fees also are allowed under §501.211(2): "In any action brought by a person who has suffered a loss as a result of the violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in S. 501.2105." Mr. Black argued that he had "brought" an action by his counter-claim for confirmation, and in any event that he was entitled to fees as the "prevailing party" under §501.2105. The district court erred in denying fees.

VIII
CONCLUSION

It is respectfully submitted that the district court erred in striking the Arbitrators' punitive award, and that the cause should be remanded for its reinstatement, and for entry of a final judgment plus fees and pre-judgment interest from the date of the award. In the alternative, it is respectfully submitted that the judgment of the district court should be reversed, and the cause remanded with instructions that the district court remand to the Arbitrators for clarification of the Interim Award, and for subsequent confirmation with pre-judgment interest and fees.

Respectfully submitted,

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of February, 2005, to all counsel of record on the attached service list.

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WE ALSO HEREBY CERTIFY that the brief in PDF format was uploaded into the Eleventh Circuit Court of Appeals website on _____ at _____.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 32(a)(7)(B). This brief contains 13,792 words.

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