IN THE SUPREME COURT OF THE STATE OF IDAHO

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| T3 ENTERPRISES, INC., an Idaho corporation,<br><br>Plaintiff/Respondent,<br><br>vs.<br><br>SAFEGUARD BUSINESS SYSTEMS, INC., a Delaware corporation,<br><br>Defendant/Appellant. | Supreme Court Case No. 45093-2017<br>Ada County Case No. CV-OC-1416400 |

**RESPONDENT'S BRIEF**

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
FOR ADA COUNTY
HONORABLE STEVEN HIPPLER PRESIDING


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## STATEMENT OF THE CASE

At the outset of this action, Appellant/Defendant Safeguard Business Systems, Inc. ("Safeguard") moved to compel Respondent T3 Enterprises, Inc. ("T3") to arbitrate its claims against Safeguard. The district court granted Safeguard's motion. T3 subsequently filed a demand for arbitration, leading to a 6-day arbitration in Boise, Idaho. The Arbitration Panel consisted of a retired Washington Court of Appeals Judge, a commercial litigation attorney from Phoenix, Arizona, and a commercial litigation attorney from Denver, Colorado, who specializes in franchise law. The Panel found in T3's favor, awarding damages of $1,475,707.53.

The District Court then confirmed the Panel's award. Safeguard now brings this appeal, raising four primary arguments: (1) the Panel acted irrationally; (2) the Panel purposefully disregarded Texas law; (3) the Panel should not have considered two alleged privileged attorney-client communications (out of 282 exhibits); and (4) the District Court erred by requiring that arbitration take place in Boise, Idaho. There is no basis for any of Safeguard's arguments.

First, the Panel did not act irrationally or exceed its power. The Panel articulated its findings in a 35 page reasoned decision, with factual findings that are consistent with the jury verdict in the companion case of Thurston Enterprises v. Safeguard. And Safeguard cannot show that the Panel was not, at all relevant times, interpreting the T3 Distributor Agreement.

Second, assuming manifest disregard of the law is still a valid basis to contest an arbitration award, there is no showing that the Panel purposefully disregarded Texas law. Here, manifest disregard of the law would only apply if the Panel recited that Texas law does not recognize a category of damages and then purposefully disregarded that law. However, T3's

damages, attorneys' fees and expenses were all awarded pursuant to overwhelming Texas law. Thus, there is no error of law let alone manifest disregard.

Third, Safeguard never objected to T3's offer in the arbitration proceeding of the two documents that Safeguard now claims are privileged. Thus, Safeguard waived any privilege associated with those two documents. Additionally, the communications are not privileged because they are neither legal advice nor communications made for the purpose of the rendition of legal advice. Rather, they are business communications made in furtherance of Safeguard's oppressive, fraudulent, willful, and wanton attempts to get out of its obligation to pay the commissions that it owed to T3. Fourth, the District Court did not error by requiring the arbitration hearing take place in Boise, Idaho as Idaho Code section 29-110 was applicable.

Safeguard's appeal should be recognized for what it is, a frivolous attempt to avoid payment of a valid arbitration award for almost 2 years. For the reasons set forth below, this Court should affirm the District Court's confirmation of the arbitration award and award T3 its attorneys' fees and costs.

## STATEMENT OF FACTS

The Arbitration Panel set out the facts in detail in their Interim Award. *See* R. 8110-8129.

Safeguard is engaged in the distribution of Safeguard brand products and services ("Safeguard Systems") through a nationwide network of franchisees, who operate as its distributors. R. 8111. Safeguard administers customer billing and accounts receivable and pays commissions to distributors. *Id.* Safeguard distributors exclusively provide Safeguard Systems.

In 2006, after working for another Safeguard distributor, Roger Thurston, for 11 years,

Dawn Teply decided to start her own distributorship. R. 8112. Teply purchased Thurston's exclusive rights to commissions on Safeguard sales to almost 2,000 of Thurston's customers. *Id.* Teply formed T3 and transferred the customers. *Id.* Pursuant to their agreement, T3 agreed to pay Thurston $598,118.32, in 120 monthly installments of $4,984.32 in return for T3's "rights to solicit, and receive commissions on" more than 1,863 of Thurston's customers. *Id.*

Contemporaneously, T3 entered into a franchise agreement with Safeguard on July 28, 2006 ("T3 Distributor Agreement" or "Agreement"). *Id.* T3 purchased Thurston's accounts knowing that the T3 Distributor Agreement had contractual rights called "Account Protection":

> You shall have the exclusive right to the commissions generated on sales of Safeguard Systems to any customer listed on Exhibit B. This exclusive right to commissions applies to Safeguard Systems sales to each such customer for so long as is specified on Exhibit B or until this Agreement is terminated; however your exclusive right to commissions on sales of Safeguard Systems to any customer shall expire if that customer has not purchased any Safeguard System within thirty-six (36) months after the invoice date of such customer's last prior purchase of any Safeguard System.

R. 8114.

As the Panel found, this language was unambiguous. R. 8117. Safeguard agreed that, if T3 solicited an order with a customer for any Safeguard Systems, then T3 was entitled to the exclusive rights to all commissions generated from any and all sales of Safeguard Systems to that customer (the "Protected Customer"). *Id.* Consequently, if Safeguard distributors or Safeguard itself, solicit sales of Safeguard Systems to the Protected Customers of another Safeguard distributor, the commission is "rotated" (e.g. paid) to the distributor with the Account Protection Rights. R. 8118. Thus, the other distributors must refrain from making sales to Protected

Customers, or risk having the commissions "rotated". *Id.*

Evidence at the hearing established that Safeguard has implemented and utilizes its databases, including CMS software to track and to manage the activity of its distributors. *Id.* Safeguard was able to determine whether a customer was the Protected Customer of another distributor routinely within a day and in some circumstances within a few minutes. *Id.*

In 2008, Safeguard started its Business Acquisitions and Mergers ("BAM") Program wherein a holding company, Safeguard Acquisitions, was funded to acquire independent non-Safeguard distributor businesses in the small business forms, supplies and services product market. R. 8119. In 2013, as part of its BAM Program, Safeguard purchased DocuSource and Idaho Business Forms ("IBF"), two distributors in the Pacific Northwest. DocuSource and IBF were direct competitors of T3 in the same relevant geographic market in Idaho, and historically sold a full line of products (i.e., not Safeguard Systems) that competed directly with T3's sales of Safeguard Systems. *Id.* As a result, T3 had a high volume of cross-over customers with DocuSource and IBF. R. 8120.

Safeguard was well aware of this. *See* R. 8120. As part of the BAM pre-sale due diligence process, Safeguard learned that at least $1 million of IBF's revenue over a 12 month period, and almost $3 million over the prior 36 month period, came from the Protected Customers of T3 and other Safeguard distributors. *Id.* Safeguard's internal documents showed that where IBF had greater sales, Safeguard intended to force the Safeguard distributor to either sell or share the account. *Id.* The Panel found that Safeguard knew that the IBF and DocuSource acquisitions would interfere with and violate T3's Account Protection Rights. *Id.* Nonetheless,

Safeguard proceeded with the transactions. R. 8121.

After acquiring DocuSource and IBF, Safeguard positioned both of them as company-owned distributors whom solicited orders on behalf of Safeguard and in competition with T3 and other Safeguard distributors. R. 8121. Safeguard encouraged, facilitated and allowed DocuSource and IBF sales agents to solicit and obtain orders for Safeguard's sale of Safeguard Systems to T3's Protected Customers. *Id.* At all times, Safeguard knew that it (through IBF and DocuSource's sales agents) was selling to T3's Protected Customers. R. 8127. Safeguard also provided IBF with lower prices than T3 thus allowing IBF to undercut T3's prices. R. 8132.

Because IBF and T3 shared the same Protected Customers, customer confusion ensued. R. 8122. Many of T3's Protected Customers no longer knew from whom they were supposed to order and to whom they were supposed to pay. *Id.* This confusion was exacerbated when Safeguard sent a solicitation letter to many of T3's Protected Customers directing them to use IBF for future sales. *Id.* Safeguard dispatched its general counsel, Michael Dunlap to deal with the predictable fallout from Safeguard's decision to grant Account Protection rights for the same Protected Customers to two different distributors (T3 being one). *Id.* Dunlap, like the rest of Safeguard, knew that T3 had enforceable Account Protection rights. *Id.*

Safeguard's reconciliation efforts, however, consisted of concealing the violations of T3's Account Protection rights. R. 8122. Safeguard did not notify T3 that Safeguard, through IBF and DocuSource, was selling Safeguard Systems to T3's Protected Customers. R. 8123. Safeguard did not rotate commissions as required under the Agreement. R. 8117. In response to Teply's continued efforts to find out about the scope of the encroachment problem, Dunlap for

years continued to prevaricate by concealing information, misrepresenting what Safeguard knew and trying to get Teply to relinquish her accounts for pennies on the dollar. R. 8123.

Throughout 2013 and into 2014, Safeguard employees continued to engage in a campaign of deception, misrepresenting to Teply that they did not have information about cross over accounts and giving Teply inaccurate partial lists of affected accounts. *Id.* At no point in time did Safeguard ever reveal to T3 the full list of Protected Customers Safeguard was selling to through, or by, IBF and DocuSource. R. 8127. Nor did Safeguard ever identify the sales that were being made to T3's Protected Customers. *Id.*

T3 called Robert Taylor as an expert witness to calculate its damages. R. 8129. With some minor adjustments, the Panel accepted Taylor's calculations. *Id.* The Panel awarded the same categories of damages for each of T3's claims: (1) $321,657.77 for past commissions (2) $373,473.76 for future commissions; (3) $214,432.39 for preferential pricing damages; and (4) $566,143.61 for the value of T3's distributorship. *Id.*

Rather than simply pay Teply her commissions, Safeguard engaged in a scorched earth litigation resulting in a 4 year case with an appellate record of nearly 20,000 pages, the very antithesis of what arbitration is supposed to be. *See* R. 8155-8176 (procedural history of the case). After considering Safeguard's egregious conduct and the attorneys' fees that resulted, the Panel awarded $2,449,208.14 in attorneys' fees and $437,126.28 in expenses to T3. R. 8257-64.

**ADDITIONAL ISSUES PRESENTED ON APPEAL**

1. Whether T3 is entitled to attorneys' fees and costs for the appeal under Tex. Civ. Prac. & Rem. Code § 38.001, Tex. Bus. & Comm. Code § 17.50 or Idaho Code § 12-121.

## STANDARD OF REVIEW

Courts, Idaho and federal alike, are reluctant to overturn an arbitration award because the purpose of arbitration is a faster, cheaper and conclusive alternative dispute resolution process. *See* R. 12740-43 (summarizing caselaw); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (en banc); *Hecla Min. Co. v. Bunker Hill Co.*, 101 Idaho 557, 617 P.2d 861 (1980). The standard of review for arbitration awards has been described as "among the narrowest known to the law." *ARW Exploration Corp. v. Aguirre,* 45 F.3d 1455, 1462 (10th Cir. 1995); *see also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (courts may vacate an arbitrator's decision "only in very unusual circumstances.").

"When reviewing a district court's decision to vacate or modify an award of an arbitration panel this Court employs virtually the same standard of review as that of the district court when ruling on the petition." *Moore v. Omnicare, Inc.*, 141 Idaho 809, 814, 118 P.3d 141, 146 (2005). Under the Federal Arbitration Act ("FAA"), a court must confirm an arbitration award unless there are statutory grounds to vacate, modify, or correct the arbitrator's decision. 9 U.S.C. § 9. The FAA limits judicial review to those situations where the award was procured through fraud, the Panel acted impartially, the Panel exceeded their authority, the Panel failed to give a party a fair opportunity to present their case, or the Panel made an obvious mathematical or other clerical error. 9 U.S.C. §§ 10(a) and 11.

Safeguard, in its appeal, only raises one of these issues on appeal, namely whether the Panel exceeded their authority. The remainder of Safeguard's appeal addresses judicial standards of review that go beyond the limited grounds set forth in the FAA, i.e. manifest disregard of the

law and allegations that the Panel violated public policy or acted irrationally. Whether these are proper judicial standards of review under the FAA is called into question by recent decisions from the United States Supreme Court and the federal circuits. But even if these nonstatutory grounds do apply, there is no basis to claim that they apply in this case.

## ARGUMENT

### I. SAFEGUARD DOES NOT PRESENT ANY GROUNDS FOR APPEAL UNDER THE FAA

In 2008, the Supreme Court held that 9 U.S.C, §§ 10 and 11 "respectively provide the FAA's exclusive grounds for expedited vacatur and modification." *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008). Safeguard's appeal is largely based on the "manifest disregard," "public policy" and "irrationality" non-statutory grounds for vacatur. In light of *Hall Street*, the First, Fifth and Eleventh circuits have held that these are no longer valid grounds for vacating an arbitration award. *See Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 fn. 3 (1st Cir. 2008); *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1322 (11th Cir. 2010).

The Fifth Circuit considered the effect of *Hall Street* in *Citigroup Global Markets*. 562 F.3d at 350. It first noted that "*Hall Street* clearly has the effect of further restricting the role of federal courts in the arbitration process". *Id.* "Based both on the text [of the FAA] and on the legislative history, *Hall Street* concluded that §§ 10 and 11 provide the exclusive regimes for review under the FAA." *Id.* at 353. The Fifth Circuit rejected the Second and Ninth Circuit's interpretation of manifest disregard as being shorthand or gloss on Section 10(a)(4). *Id.* at 356-358. "In the light of the Supreme Court's clear language that, under the FAA, the statutory

provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected." *Id.* at 358. The First Circuit followed this reasoning in *Frazier*, wherein it held that the judicially created grounds for vacatur; arbitrary and capricious, in violation of public policy, and manifest disregard for the law, are no longer valid in light of *Hall Street*. *Frazier*, 604 F.3d at 1323-1324.

As the language of Section 10 of FAA is plain and unambiguous there is no basis for construing additional grounds for vacatur. *See State v. Neal*, 159 Idaho 439, 444, 362 P.3d 514, 519 (2015) ("If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.") This Court should follow the Fifth Circuit's reasoning and *Hall Street's* holding that the exclusive grounds for vacatur are set forth in Section 10 of the FAA. Thus, any arguments based on "manifest disregard," "irrationality" or "public policy" should be denied.

Notwithstanding the Supreme Court's clear holding in *Hall Street* – that vacatur of an award is restricted to the statutory grounds set out in the FAA – some federal courts still apply very narrow non-statutory grounds for vacatur related to an arbitrator "exceeding his powers" under Section 10 above. The Ninth Circuit recognizes that "[a]rbitrators exceed their powers when they express a 'manifest disregard of law,' or when they issue an award that is 'completely irrational.'" *Bosack v. Soward*, 586 F.3d 1096, 1104 (9th Cir. 2009).

"Manifest disregard of the law requires that (1) the arbitrators knew of the governing legal principle and refused to apply it or ignored it altogether, and (2) the governing law was well defined, explicit, and clearly applicable." *Moore*, 141 Idaho at 819. In *Hecla*, this Court held that "manifest disregard" "is not an excuse for the court to weigh the 'degree of error' of law, if any,

and thereby thwart the rule of limited review." 101 Idaho at 566. This standard has been interpreted as requiring the arbitrators themselves to "clearly identify the applicable, governing law" in their award "and then proceed to ignore it." *Hoffman v. Cargill Inc.*, 236 F.3d 458, 462 (8th Cir. 2001). To the extent that this Court considers the manifest disregard standard, Safeguard should be required to show that the Panel stated (or at the very least recognized) the correct law in the award and then did not follow it. Safeguard cannot show any error of law let alone meet this standard.

Similarly, the "completely irrational" standard, to the extent it's still applicable, is "extremely narrow and is satisfied only 'where [the arbitration decision] fails to draw its essence from the agreement.'" *Comedy Club, Inc. v. Improv W. Assocs*., 553 F.3d 1277, 1288 (9th Cir. 2009). "To consider whether an award drew its essence from the … agreement, the court must ensure that the arbitrator looked to the words of the contract and to the conduct of the parties." *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 831 (9th Cir. 1995) (citation omitted). As the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of the merits. *Oxford Health Plans,* 569 U.S. at 569. The "sole question" for the court on motions to vacate under § 10(a)(4) is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Safeguard cannot show that the Panel disregarded the Agreement in any of its conclusions of law.

As Safeguard cannot satisfy either the statutory or nonstatutory grounds for vacating an arbitration award under the FAA, its appeal lacks merit.

## II. The District Court Did Not Err In Finding The Forum Selection Clause Unenforceable And It Is Not A Ground For Vacating An Award

### A. An Improper Forum Is Not a Ground for Vacating an Arbitration Award.

Safeguard argues that the arbitration should have taken place in Dallas, Texas rather than Boise, Idaho and faults the District Court for not enforcing the forum selection clause in the T3 Distributor Agreement. However, even if the District Court erred (it did not), such an error would not be grounds for vacating an arbitration award under the FAA. *See* 9 U.S.C. § 10(a).

The sole grounds for vacatur are set forth under section 10 of the FAA. None of which regard forum selection. Safeguard provides no legal authority for its contention that section 5 of the FAA regards forum selection (by its language it does not) and even if it did, whether it would provide grounds for vacatur. Fundamentally, "an incorrect ruling of law that is *not* the basis for an award is insufficient" to vacate or modify an arbitration award. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1178 (10th Cir. 2007). "[T]he fact that an arbitration was held in an improper venue does not call into question the merits of the [arbitration] award." *Id.; see also Richardson v. Citigroup, Inc.*, No. 12-CV-0485-WJM-KMT, 2014 WL 503203, at *2 (D. Colo. Feb. 7, 2014) ("The fact that an arbitration was held in the wrong venue is not sufficient to vacate an arbitration award.") Thus, even if Safeguard's arguments as to the enforcement of the forum selection clause had merit, it would not present a basis for vacatur.

Safeguard cites to *PoolRe Ins. Corp. v. Org. Strategies, Inc.*, 783 F.3d 256 (5th Cir. 2015) for the proposition that a failure to comply with the process set forth under Section 5 of the FAA is grounds for subsequently vacating an arbitration award. However, the *PoolRe* court applied

section 10(a)(4) in finding that an arbitrator exceeded his power and authority because he was appointed in a manner contrary to that provided in the agreement (and in fact by another agreement). *Id.* at 263. Here, however, the parties properly appointed the arbitrators.

Safeguard argues that had the arbitration been in Dallas, the arbitration *would* have involved different arbitrators. However, there was no restriction in the arbitration provision requiring that the AAA arbitrators be domiciled in Texas. *See* R. 7717-7120. Thus, the same arbitrators could have been appointed had Dallas been the forum. Absent a specific provision to the contrary, the AAA could determine which potential arbitrators would hear the dispute. *See e.g. Bulko v. Morgan Stanley DW Inc.*, 450 F.3d 622, 626 (5th Cir. 2006) (reversing district court's decision to vacate arbitration and holding that determining qualifications and eligibility of arbitrators was left to the arbitration provider absent a contrary contractual provision).

Regardless of where the arbitration hearing took place, there is no question that the Arbitration Panel had the authority to rule on the dispute. The arbitration provision in the T3 Distributor Agreement required that the arbitration "be conducted in accordance with the then current commercial arbitration rules of the American Arbitration Association by a Panel of three (3) arbitrators." R. 7118-7119. The Idaho arbitration was governed by the AAA Commercial Arbitration Rules and the Panel was composed of three AAA arbitrators. R. 7576, 8110, 13822-29. The same AAA rules would have governed any arbitration in Texas and the qualifications for an AAA arbitrator are nationally uniform. Nor has Safeguard shown that only attorneys from inside Texas can construe Texas law. Thus, the selection of the arbitrators was not inconsistent with the T3 Distributor Agreement. The arbitrators had authority and did not exceed their power

in deciding the dispute. There is no basis for vacatur under section 10(a)(4).

**B. Even if the Forum was Incorrect, Any Error Was Harmless**

Under the string of authority Safeguard cites to, a "trivial departure" from the arbitrator selection method does not warrant vacatur. *PoolRe*, 783 F.3d at 263. Similarly, Safeguard must show that the choice of Idaho as the forum affected its substantial rights or prejudiced it. *See* I.R.C.P. Rule 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights"); *Saleemi v. Doctor's Assocs., Inc.,* 176 Wash. 2d 368, 387, 292 P.3d 108, 117 (2013) (a "party that fails to seek review of an order compelling arbitration on grounds of venue… until after the arbitrators award is known must show prejudice before an appellate court will reach the merits and grant relief").

Here, Safeguard has not shown that the choice of venue effected its hearing in any way. In support of the Motion to Vacate, Safeguard's attorney submitted a declaration. R. 7698-7700. Conspicuously absent from that declaration is any mention that the location of the arbitration impeded discovery or the presentation of evidence. *Id.* The selection of Idaho as the forum did not prevent Safeguard from calling any of its witnesses at arbitration and thus it had no effect on the outcome. Consequently, it had no effect on any substantial right of Safeguard.

The Washington Supreme Court considered the same argument in *Saleemi v. Doctor's Associates, Inc.,* 292 P.3d 108 (Wa. 2013). There, the Washington Supreme Court, en banc, reviewed a case wherein the franchisees had sued the franchisor for violation of franchise agreements. *Id.* at 371. The superior court found that the Connecticut forum selection clause was unconscionable and compelled arbitration in Washington. *Id.* at 373-374. After the franchisees

prevailed at arbitration, the franchisor appealed, arguing that because the arbitration was held in Washington instead of Connecticut, the award should be vacated. The Washington Supreme Court rejected the argument noting the following:

> Even assuming for the moment that the court erred in failing to change venue of the arbitration from Washington to Connecticut, no harm is apparent. The arbitration in Washington was conducted by the same arbitration group and under the same rules as required by the franchise agreements. DAI is a Florida corporation, the parties, the sandwich shops, and the witnesses all appear to be in Washington. DAI fails to show any harm or prejudice in the venue selection.

*Id.* at 384. The same result applies here. As Safeguard cannot show any harm or prejudice or that its rights were effected in any way, an improper forum is not grounds for vacatur.

**C. Safeguard Waived the Right to Appeal the Forum Selection Clause Ruling**

Safeguard also waived its right to challenge any error as to the forum selected. Parties are "required, to raise their complaints about the arbitration during the arbitration process itself". *Marino v. Writer's Guild of America, East, Inc.*, 992 F.2d 1480, 1484 (9th Cir. 1993).[1] At the very least, "objections to the composition of arbitration Panels must be raised at the time of the hearing." *Brook v. Peak Intern, Ltd.,* 294 F.3d 668, 674 (5th Cir. 2002). The failure to object at the hearing constitutes a waiver. *Id.*

Safeguard did not object to the composition of the Arbitration Panel at any time. Indeed, at the arbitration hearing, Safeguard stipulated that it accepted the Panel's composition. R. 8111

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[1] *See also* American Arbitration Association, Commercial Arbitration Rules, R7, https://www.adr.org/sites/default/files/Commercial%20Rules.pdf ("A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection.") (last accessed April 27, 2018).

at p. 2:1-2 ("At the commencement of the evidentiary hearing, the parties, through Ms. Teply and Mr. Dunlap affirmed that they accepted the Panel's composition."). Consequently, Safeguard waived the right to challenge the forum selected.

Safeguard also waived the right to challenge enforcement of the purported delegation provision in the Agreement. Safeguard did not previously argue that the Arbitration Panel should determine the enforceability of the forum selection clause. Instead, Safeguard argued the opposite in its Motion to Compel Arbitration (and Reply), stating that "[t]he court must simply ensure that the arbitration agreement was validly entered into by the parties…" R. 759; *see also* R. 766. This constitutes a waiver. *See Kirkman v. Stoker*, 134 Idaho 541, 544, 6 P.3d 397, 400 (2000) ("This Court does not consider issues raised for the first time on appeal.")[2]

**D. The District Court Had Jurisdiction to Consider the Clause's Enforceability**

Setting aside that even an error would not be grounds for vacatur, the District Court did not err in deciding whether the forum selection clause was enforceable. Questions of arbitrability are typically reserved for the court. *See AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). The one exception is where a contract has a delegation provision. *Id.* However, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also AT & T Techs., Inc.*, 475 U.S. at 649. The "clear and

[2] *See also In re Checking Account Overdraft Litigation*, 754 F.3d 1290, 1291–92 (11th Cir. 2014) (holding that defendant waited too long to invoke delegation clause where it asked district court to decide threshold question of arbitrability and did not mention delegation clause); *Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320, 1324 (11th Cir. 2016).

unmistakable" test reflects a "heightened standard of proof" that reverses the typical presumption in favor of the arbitration of disputes. *See First Options of Chi.*, 514 U.S. at 945.

Here, there was no clear and unmistakable delegation giving the arbitrators the power to decide questions of arbitrability in the T3 Distributor Agreement. The T3 Distributor Agreement contains contradictory provisions in Section 21(B) and Section 21(C). R. 7718-20. While Section 21(B) states that "the validity of this agreement" would be decided by the Arbitration Panel, Section 21(C) states that any dispute "relating to the interpretation of this agreement or… the parties' respective rights and obligations under this agreement" are reserved for a "court of competent jurisdiction by a judge sitting without a jury." *Id.* In light of these contradictory provisions, the Court was well within its jurisdiction to determine arbitrability. *See e.g. Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 792 (2012) ("where one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision indicates that the court might also find provisions in the contract unenforceable, there is no clear and unmistakable delegation of authority to the arbitrator.")[3]

Further, assuming *arguendo* that there was a clear and unmistakable delegation, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a question of arbitrability for a court to decide." *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002). The District Court had jurisdiction as T3 challenged the entire arbitration clause,

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[3] *Rent–A–Center, W., Inc., v. Jackson*, 561 U.S. 63, 66 (2010), is factually distinguishable because the arbitration provision there explicitly stated that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."

including the delegation provision, as being unenforceable in light of Idaho's public policy against forum selection clauses. R. 963. *See e.g. MacDonald v. CashCall, Inc*, 883 F.3d 220 (3d Cir. 2018) ("Because the Loan Agreement's forum selection clause is an integral, non-severable part of the arbitration agreement and because the CRST arbitral forum designated in that clause is illusory, the entire arbitration agreement, including the delegation clause, is unenforceable.").

Nor has Safeguard shown that the Arbitration Panel would have enforced the forum selection clause any differently than the District Court. "The arbitrators would presumably enforce the venue-selection clause in precisely the same way that a court would." *McCullagh v. Dean Witter Reynolds, Inc.*, 177 F.3d 1307, 1310 (11th Cir. 1999). Thus, any error is harmless.

### E. The Forum Selection Clause Was Unenforceable

The District Court did not err in finding that the forum selection clause was unenforceable under Texas law. Idaho has a strong public policy against the enforcement of out-of-state forum-selection clauses, as codified at Idaho Code § 29-110. That statute provides that:

> Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho. Nothing in this section shall affect contract provisions relating to arbitration *so long as the contract does not require arbitration to be conducted outside the state of Idaho*.

Idaho Code § 29-110(1) (emphasis added).

This Court dealt with a forum selection clause like the one in the T3 Distributor Agreement in *Cerami-Kote, Inc. v. Energywave Corp.*, 116 Idaho 56, 773 P.2d 1143 (1989). In *Cerami-Kote*, this Court noted that the Florida Supreme Court had expressly adopted the view

regarding the enforceability of forum selection clauses and public policy enunciated by the U.S. Supreme Court in *The Bremen v. Zapata Off-Shore Co*. *Id.* at 1146. *The Bremen* sets forth that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *The Bremen*, 407 U.S. 1, 15 (1972). This Court held that the enforcement of the forum selection clause would violate Idaho's public policy as expressed in I.C. § 29-110(1) and thus Florida courts would refuse to enforce the clause under *The Bremen*. *Cerami-Kote*, 773 P.2d at 1147. Federal Courts in Idaho have similarly held that other states' courts would refuse to enforce a forum selection clause because of Idaho's public policy.[4]

Safeguard argues that this Court should reverse its holding in *Cerami-Kote*. However, *The Bremen* explicitly and clearly requires considering the public policy of "the forum in which suit is brought". *The Bremen*, 407 U.S. at 15. Courts consistently interpret "the forum in which suit is brought" to be where the plaintiffs filed their case. T3 filed its case in Idaho. Therefore, application of *The Bremen* factors requires looking at the public policy of Idaho. *See e.g. Brandt v. Comtrust, Inc.*, No. CV06-166-S-EJL, 2006 WL 2136145, at *2 (D. Idaho July 28, 2006) ("the suit has been filed in Idaho, so Idaho public policy should apply to determine if the enforcement of the clause would be unreasonable").

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[4] *Matunas v. Practiceworks Sys., LLC*, No. CV-06-484-S-BLW, 2007 WL 1729738, at *3 (D. Idaho June 13, 2007) (holding that Georgia would not enforce the forum selection clause because of Idaho's strong public policy against enforcing forum-selection clauses); *IDACORP, Inc. v. Am. Fiber Sys., Inc.*, No. 1:11-CV-00654-EJL, 2012 WL 4139925, at *2 (D. Idaho Sept. 19, 2012) (finding forum selection clause unenforceable under either New York or Federal Law because of Idaho's strong public policy against enforcing forum-selection clauses).

Texas courts would refuse to enforce the forum selection clause in light of Idaho's public policy. Texas currently follows the direction of *The Bremen* and recognizes that a forum selection clause is unenforceable when the clause contravenes the public policy of the *forum where the suit was brought* (in this case, Idaho). *In re AIU Ins. Co.*, 148 S.W.3d 109, 112 (Tex. 2004) ("a clause would come within these exceptions if enforcement would contravene a strong public policy of the forum in which suit was brought, or when the contractually selected forum would be seriously inconvenient for trial.").[5] Nor does the FAA change the analysis. Arbitration agreements are "as enforceable as other contracts, *but not more so*." *Opals on Ice Lingerie v. Body Lines, Inc.*, 320 F.3d 362, 369 (2d Cir. 2003) (emphasis in original). Because the tenet that a contract may be invalidated on grounds that it violates public policy is a principle of state contract law that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," *see Perry v. Thomas*, 482 U.S. 483, 492–493 fn. 9 (1987), any conclusion that the forum selection clause is unenforceable is not preempted by the FAA. *See e.g. Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 990-993 (9th Cir. 2007).

As Idaho Code section 29-110(1) evidences Idaho's strong public policy against forum selection clauses designating forums outside Idaho boundaries, the District Court did not err in finding the forum selection clause in the T3 Distributor Agreement to be unenforceable.

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[5] *See also In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231-32 (Tex. 2008) ("A trial court abuses its discretion in refusing to enforce a forum-selection clause unless the party opposing enforcement of the clause can clearly show that ... (3) enforcement would contravene a strong public policy of the forum where the suit was brought.]"); *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (same).

## III. The District Court Did Not Abuse Its Discretion In Overruling Safeguard's Assertion Of Attorney-Client Privilege And It Is Not A Ground For Vacating An Arbitration Award

In response to Safeguard concealing documents in discovery through the improper use of the attorney-client privilege designation, T3 and Thurston filed a motion to compel the production of the withheld documents. After the motion was filed, Safeguard and parent company Deluxe withdrew their claim of privilege as to hundreds of documents. R. 1863-1871, 13129-13269. They maintained a privilege as to only 41 documents. R. 2219 at fn. 2. After an in-camera review, the District Court held that 35 of those 41 documents had to be produced. R. 2226-27. At issue are two of those documents which were used in the arbitration hearing.

Safeguard argues that 21 exhibits fall under the attorney-client privilege, shouldn't have been produced and that they prejudiced Safeguard in the arbitration hearing. However, only seven of the exhibits Safeguard discusses were subject to the District Court's order.[6] Safeguard voluntarily produced the other 14 exhibits and therefore those exhibits cannot be subject to this appeal. Further, the District Court's ruling is only relevant to the extent a document was used in the arbitration hearing and thus could play a role in the Panel's award. Of those 7 documents that were ordered produced, the only two documents that Safeguard challenged as being used in the arbitration hearing are T3's Arbitration Exhibits 58 (Thurston Ex. 157) and 169 (Thurston Ex. 327). *See* Appellant's Brief, p. 25.

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[6] Thurston Trial Exhibits 157, 245, 267, 327, 336, 352, 356 were produced pursuant to the District Court's Order. This can be verified by comparing the bates numbers on the exhibits as compared to the bates numbers identified in the District Court's Order. R. 2226-27. Thurston Trial Exhibits 266, 268-270, 326, 328-330, 338, 357-360 and 362 were not subject to the Order.

**A. The Use of Attorney-Client Privileged Documents Is Not a Basis for Vacatur**

Safeguard has not provided any legal basis for why even if the District Court incorrectly ruled that the two documents in question were not privileged, that it would justify vacating an arbitration award under the FAA. Discovery issues are not grounds for vacating an arbitration award. *See e.g. Bain Cotton Co. v. Chesnutt Cotton Co.,* 531 Fed.Appx. 500, 501 (5th Cir. 2013) ("Regardless whether the district court or this court—or both—might disagree with the arbitrators' handling of Bain's discovery requests, that handling does not rise to the level required for vacating under any of the FAA's narrow and exclusive grounds."); *Osco Motors Co., LLC v. Quality Mark, Inc.,* No. CIV. 14-887 MJD/JJK, 2014 WL 4163595, at *7 (D. Minn. Aug. 21, 2014) ("the Court must afford the arbitrator great deference on matters not contemplated by § 10 of the FAA" including any ruling "characterized as a discovery decision").

Further, Safeguard is not only asking the Court to reconsider a discovery decision, which is not grounds for vacatur, but also asking the Court to consider how the use of the purported privileged documents affected the arbitration award. Determining whether exhibits used in arbitration affected the award requires examining and weighing the facts that were before the Arbitration Panel. There is no basis for such a review under Section 10 of the FAA, even under the Ninth Circuit's standards. *See Coutee v. Barrington Capital Grp., LP*, 336 F.3d 1128, 1134 (9th Cir. 2003) (under the FAA, courts have "no authority to re-weigh the evidence".)

**B. Safeguard Waived the Right to Appeal the Award on Privilege Grounds**

Safeguard waived the privilege issue by (1) not objecting to the two purportedly privileged exhibits being admitted as evidence; (2) instead, stipulating to their admission; and (3)

not moving to vacate the arbitration award on the basis that the exhibits should have been excluded. R. 8111 at p. 2:7-9 (stipulating). Consequently, under both Idaho law and AAA rules, Safeguard waived its right to challenge any award on the basis that the evidence should have been excluded. *See Am. Semiconductor., Inc. v. Sage Silicon Sols., LLC*, 162 Idaho 119, 395 P.3d 338, 350 (2017) (holding that a party cannot raise an issue on appeal where it did not object to the lower court); *Marino*, 992 F.2d at 1484 (parties are "required, to raise their complaints about the arbitration during the arbitration process itself"); AAA Commercial Arbitration Rules, R-34(c) ("The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client."); R-41, ("Any party who proceeds with the arbitration … and who fails to state an objection in writing shall be deemed to have waived the right to object.")

Safeguard also waived any claim of privilege as to Safeguard's General Counsel Michael Dunlap's communications based on its discovery productions. Under Idaho law, a privilege is waived when the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the matter or communication." I.R.E. 510. "[C]ourts typically apply such a waiver to all communications on the same subject matter." *PaineWebber Grp., Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 992 (8th Cir. 1999). Safeguard withdrew the privilege claim as to hundreds of emails to and from Dunlap, amounting to about 90% of the documents that Safeguard has erroneously marked privileged. R 1863-1871, 13129-13269. Indeed, of the 21 exhibits Safeguard contends fall under the attorney-client privilege, Safeguard voluntarily produced 14 of them. By producing Dunlap's communications with Safeguard employees as to

the same topics, Safeguard waived any privilege as to Dunlap's other communications.

### C. The District Court Did Not Abuse its Discretion in Ordering Production

Idaho Rules of Civil Procedure 26(b)(1) permits broad discovery over any relevant matter that is not privileged. "The trial court has broad discretion in determining whether or not to grant a motion to compel." *Nightengale v. Timmel*, 151 Idaho 347, 351, 256 P.3d 755, 759 (2011). A decision "will only be reversed where there has been a clear abuse of discretion." *Quigley v. Kemp*, 162 Idaho 408, 410, 398 P.3d 141, 143 (2017).

Idaho Rules of Evidence 502(b) describes the attorney-client privilege as "a privilege to refuse to disclose and to prevent any other person from disclosing [1] *confidential communications* [2] *made for the purpose of facilitating the rendition of professional legal services to the client*. I.R.E. 502(b) (emphasis added). The party asserting a privilege, Safeguard, bears the burden of showing information is privileged. *Kirk v. Ford Motor Co.*, 141 Idaho 697, 704, 116 P.3d 27, 34 (2005). With regard to in-house counsel, their communications are generally not presumed to be made for the purpose of obtaining legal advice. *Dewitt v. Walgreen Co.,* 2012 WL 3837764, at *3 (D. Idaho Sept. 4, 2012), *citing United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002). This presumption does not vitiate the attorney-client privilege. Instead, it aligns with the attorney-client privilege in general, as the "privilege impedes the truth-finding process and must be strictly construed". *Id.* at *2.

The two exhibits at issue do not implicate the attorney-client privilege as defined in I.R.E. 502(b). Exhibit 58 is an email string that begins with communications between Michael Dunlap and third parties Tressa McLaughlin and Jamie McCormick. *See* Thurston Trial Ex. 157.

The email represents an attempt by the parties to set up a meeting to discuss the fact that IBF and T3 are selling to the same customers. When the parties are unable to agree on a meeting time, a frustrated Dunlap forwards the string to then Safeguard employee Amy Tiller-Shumway. There is no legal research, analysis or advice given or solicited in the communications between Dunlap and Tiller-Shumway. Dunlap tells Tiller-Shumway that she can "tell Distributor Accounting that if there is a conflict with legacy distributors, the rule applies and it rotates to the legacy distributor". This repeats the business policy in place at Safeguard Distributor Accounting of rotating commissions to the party who first made a sale to that account. Dunlap is not analyzing what the policy should be or any legal considerations. *Compare Kirk*, 141 Idaho at 704 (the "Suspension Orders contained legal advice and recommendations related to pending litigation.")

Safeguard argues broadly that because Dunlap was a lawyer, these communications were done in the overall context of providing a legal service. However, "[t]he mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege," *In re Grand Jury Proceedings*, 616 F.3d 1172, 1182 (10th Cir. 2010). "[R]ather, the communication must also relate to legal advice or strategy." *Id.*[7] Where a lawyer tenders advice regarding a business decision, "the non-legal aspects of the decision are not protected simply because legal considerations also are involved." *Adams v. United States*, 2008 U.S. Dist. LEXIS 53533, *3-4 (D. Idaho July 3, 2008); *Cedillo v. Farmers*

[7] *See also United States v. Halifax Hospital Medical Center*, No. 6:09–cv–1002–Orl–31TBS, 2012 WL 5415108 *3 (M.D. Fla. Nov. 6, 2012) ("The content of the message must request legal assistance, and the information conveyed must be reasonably related to the assistance sought."); *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) ("The privilege applies only when legal advice is sought 'from a professional legal advisor in his capacity as such.'")

*Ins. Co.*, 163 Idaho 131, 408 P.3d 886, 896 (2017) (Burdick, C.J., dissenting) ("quasi-fiduciary tasks of investigating and evaluating or processing the claim" were not privileged, only counsel's evaluation as to potential liability).[8] "Corporations may not conduct their business affairs in private simply by staffing a transaction with attorneys." *Chevron*, 241 F. Supp. 2d at 1076.

*In Re Human Tissue Products Liability Litigation*, 255 F.R.D. 151, 161 (D. N.J. 2008) is illustrative. There, the court found that documents relating to the lawyers' tasks on that assignment pertained to business matters, rather than legal services because: (1) "none of the documents appear to contain any legal research or analysis"; and (2) the work could have as easily been performed by non-lawyers. The same can be said for Dunlap's role here.

The District Court was very familiar with Michael Dunlap's role from the parties' voluminous briefing throughout the case. R. 2226. In this context, the District Court made the factual finding that Dunlap "was extensively involved in the business aspects of [Safeguard], including monitoring cross-over customer sales and commissions and corresponding with [Teply and Thurston] regarding the extent of [Teply and Thurston's] cross-over customers." R. 2226. Similarly, Dunlap testified that he was not acting in a legal role when he was communicating in this capacity. R. 8123 at ¶ 35. As Dunlap's concern has to do with his negotiations[9] with the

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[8] *Chevron Texaco Corp.*, 241 F. Supp. 2d at 1076 ("Corporations may not conduct their business affairs in private simply by staffing a transaction with attorneys."); *see also Oasis Int'l Waters, Inc. v. United States*, 110 Fed. Cl. 87, 98 (2013) (privilege "does not apply when an attorney acts as a client's business or economic advisor").

[9] *Boss Mfg. Co. v. Hugo Boss AG*, No. 97 CIV. 8495, 1999 WL 47324 SHS MHD (S.D.N.Y. Feb. 1, 1999) is distinguishable. It involved Hugo Boss's attorneys attempting to settle ongoing

parties as to who would service which customers, rather than any legal issues, the message has no privilege ramifications.

The other exhibit simply represents facts being communicated. Exhibit 169 contains an email from a third party, McLaughlin, to Dunlap wherein she identifies the amount of sales to certain cross-over customers. Thurston Trial Ex. 327. Dunlap then forwards the email to Sorrenti and notes that there is a possibility that Teply may request all commissions paid to IBF on her cross-over customers just like another distributor, the Strongs are claiming. In so doing, Dunlap is simply commenting on a possible outcome based on his conversations with Teply. Dunlap does not provide any legal analysis as to whether Safeguard would be liable if T3 took such a position. Indeed, both of these communications could easily have been made by non-lawyers.

Communications consisting of purely factual information, without any legal advice, or not for the purpose of facilitating legal services, are not privileged. *See In re Grand Jury Proceedings*, 616 F.3d at 1182 ("when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged."); *Dewitt*, 2012 WL 3837764 at *3. Dunlap's communications with regard to Teply or McLaughlin's inquiries regarding cross-over customer sales and commissions are factual in nature and were not sent for the purpose of the facilitation of legal services. Thus, the District Court correctly held that they were not privileged.

**D. The Two Exhibits Did Not Have a Dispositive Effect on the Arbitration Award**

"[W]hen appealing from an evidentiary ruling reviewed for abuse of discretion, the

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litigation. *Id.* at *2. "[T]he attorneys were participating in this process because of their legal expertise or acumen and not because they had any particular experience in business affairs." *Id.*

appellant must demonstrate both the trial court's abuse of discretion and that the error affected a substantial right." *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012). Even if the two documents at issue were privileged, any error was harmless.[10] The entirety of the 35 page interim award makes clear that the exhibits Safeguard challenged were not the sole basis for the arbitration award. T3 introduced at least 282 exhibits into evidence. R. 8111 at 2:7-9. The other 280 exhibits more than presented grounds upon which the award was made. Indeed, it is notable that Safeguard is not challenging the finding of liability whatsoever, merely the damages.

For example, the breach of contract claim was established entirely from other exhibits. The evidence showed that T3 had a valid distributor agreement that gave it Account Protection and product pricing contractual rights. R. 8130, 32 at ¶¶ 75, 82. These contractual rights were shown by the T3 Distributor Agreement and a course of dealing in receiving rotated commissions. R. 8130 at ¶ 76. The loss in value of the distributorship, the amount of the owed commissions and preferential pricing damages were established through T3's expert Robert Taylor. R. 8133-35 at ¶¶ 91, 96, 100. The exhibits discussed in the breach of contract section are exhibits 6, 10, 19-22, 263, 264, 565. R. 8129-35 at ¶¶ 73-101. None of these exhibits are at issue. As the breach of contract claim gives rise to all of the damages and the breach of contract claim did not rely on any of the challenged documents, any error is consequently harmless.

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[10] Safeguard's cases are distinguishable in that they involved clearly privileged evidence which was "highly prejudicial" and dispositive. *See State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984) (attorney's testimony regarding privileged conversation about black market or under the counter types of adoptions prior to purported kidnapping of two children); *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.,* 136 F.3d 695, 706 (10th Cir. 1998) (there was a "significant probability that the evidence may have unduly influenced the jury to conclude the cause of the accident was Frontier's negligence rather than the Gormon-Rupp pump.")

## IV. THERE ARE NO GROUNDS FOR VACATING THE ARBITRATION AWARD

The Arbitration Panel found Safeguard liable for breach of contract, intentional interference with business relations and for violation of the Texas Deceptive Trade Practices Act, each in the amount of $1,475,707.53. R. 8143 at 34:12-14. Safeguard argues that the Panel manifestly disregarded Texas law, violated public policy, exceeded their power and/or acted completely irrational. As set forth above, these largely are not proper grounds for vacating an arbitration award. However, even if they were, Safeguard presents no valid arguments.

### A. The Arbitration Panel Did Not Act Irrationally or Manifestly Disregard Texas Law in Finding a Constructive Termination

T3's damages for the value of the distributorship ($566,143.61) were submitted to the Panel for a decision and the Panel properly awarded them pursuant to Texas law.

The scope of an arbitrator's authority is determined in part by the demand for arbitration and the arbitration provision itself. *Schoenduve Corp. v. Lucent Techs., Inc.*, 442 F.3d 727, 732 (9th Cir. 2006). In paragraphs 128-129 of T3's Demand, T3 specifically stated that Safeguard's conduct has caused T3's distributorship "severe damage" and "destroy[ed]" the Safeguard distributorship. R. 7779. Further, T3 provided a request for all "relief as may be available and as justice requires." *Id.* T3 continued to argue for these damages before, during and after the arbitration.[11] Consequently, T3 put the value of the distributorship and the impairment/termination thereto specifically at issue.

Further, T3's arbitration provision is broad, encompassing "all controversies, disputes or

[11] T3's Pre-Hearing Brief. *See* R. 7838; T3's Proposed Findings of Fact and Conclusions of Law, R. 7998, 8005-06, 8019 at ¶¶ 122, 159, 212.

claims arising between" Safeguard and T3 related to the T3 Distributor Agreement, validity thereto and relationship of the parties. R. 7718 at ¶ 21(B). Where parties intend to resolve all aspects of their relationship or agreement by arbitration, arbitrators have the authority to decide any issues between the parties, even if not expressly sought by a party. *See Schoenduve.*, 442 F.3d at 732 (agreement requiring arbitration of any dispute arising out of or relating to manufacturer's representative agreement was broad enough to permit consideration of claims for commissions based on quasi-contract or estoppel in addition to claims based on agreement).[12]

Here, the Panel's authority to award value of the distributorship damages by way of constructive termination was authorized by both the demand and the arbitration clause. The arbitrators' "interpretation of the scope of [their] powers is entitled to the same level of deference as [their] determination of the merits". *Schoenduve.*, 442 F.3d at 733. Thus, the Panel's finding that it had authority need only be a possible interpretation of the arbitration clause and demand. Here, the Panel's finding was not only a possible interpretation, it was the sole one.

The fact that the Panel substituted T3's impairment of value theory with a constructive termination theory – which covered the same item of damages – was not in error. It has long been recognized that arbitrators have considerable discretion in fashioning a remedy. *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). To this end, an

[12] *See also Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 (5th Cir. 1993) (rejecting the argument that the arbitrator exceeded his authority when the parties submitted everything related to the dispute to the arbitration panel and there was no contractual provision removing the issue from the arbitrator's jurisdiction); *Management & Tech. Consultants v. Parsons–Jurden,* 820 F.2d 1531, 1534–35 (9th Cir.1987) ("An agreement to arbitrate 'any dispute' without strong limiting or excepting language immediately following it logically includes not only the dispute, but the consequences naturally flowing from it...")

arbitrator may apply a different theory of recovery of damages than are advanced by the aggrieved party and not run afoul of Section 11(b) of the FAA. *See e.g. Cal-Circuit ABCO, Inc. v. Solbourne Computer, Inc.*, 848 F.Supp. 1506, 1509 (D. Colo. 1994) (holding that arbitrator did not exceed his authority by applying a different means of assessing damages for breach of contract under the UCC than that specified by the seller in its claim).

Safeguard also argues that the Panel disregarded Texas law and instead followed Connecticut/New Jersey law. The only possible ground to vacate based upon improper choice of law is where the arbitrators are clearly applying another state's law despite the choice of law clause. *See e.g. Barnes v. Logan*, 122 F.3d 820, 823 (9th Cir. 1997) (applying Section 3294 of the California Civil Code despite the Minnesota choice of law clause).

Here, however, the Panel applied Texas law. The Panel specifically noted that "[e]ach of T3's damages categories [including value of the distributorship] are recoverable under Texas law because they are actual damages for commercial loss that naturally flow and were reasonably foreseeable consequences of SBS's breach." R. 8133 at ¶ 90. The Panel only looked to out-of-state caselaw to ascertain how a Texas court may rule on the issue of constructive termination. R. 8116 at 7:13-17, R. 8129-30 at ¶ 73, R. 8133-35 at ¶¶ 90, 97-98. The fact that the Panel cited to cases outside of Texas does not mean that it did not apply Texas law in accordance with the T3 Distributor Agreement. As the District Court recognized, "[i]it is a widely accepted practice for a court to look to other jurisdictions for guidance in determining how to apply the forum state's law especially where, as here, the forum state has not yet addressed the application of a particular theory." R. 12746.

The cases that the Panel cited to presented a colorable legal basis upon which a Texas court may find a constructive termination. R. 8135 at ¶ 98. Indeed, the cases concerned whether the loss of exclusivity by a franchisee resulted in a termination and/or loss of value in the distributorship's contractual rights. *Id.* The Panel did not rely on any other states' statutes or in Texas having a franchise statute, in finding that a Texas court would award damages under a constructive termination theory. *Id.*; *see also Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 975 A.2d 510, 520 (N.J. App. Div. 2009) ("The doctrine of constructive termination is also part of contract law, rather than a statutory invention").

Safeguard concedes it cannot point to any case showing that Texas law does not allow for constructive termination. That is determinative. Indeed, Texas caselaw suggests the opposite. *See e.g. Kawasaki Motors Corp. U.S.A. v. Texas Motor Vehicle Comm'n*, 855 S.W.2d 792, 793 (Tex. App. 1993) (upholding the Texas Motor Vehicle Commission's finding that Kawasaki's actions resulted in a "de facto" (or constructive) termination of a franchise). Here, since the Panel applied Texas law and Safeguard cannot point to any Texas law to the contrary, there is no basis for vacatur under a manifest disregard standard.

Setting aside the constructive termination theory of recover, if there is a colorable basis under Texas law for the value of distributorship damages, the award is upheld.[13] The Panel's

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[13] *See Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) (the award "should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached."); *Coutee*, 336 F.3d at 1134–35 ("an arbitration award should be confirmed unless the arbitrators could not have rendered the same award without manifestly disregarding the governing law."); *Saleemi*, 292 P.3d at 114 ("an arbitrator's incorrect choice-of-law [is] not

ruling as to value of the distributorship damages could also have been made based on a lost business value theory. "Lost business value is an appropriate measure of damages when business value is completely or almost completely destroyed." *Wellogix, Inc. v. Accenture, LLP*, 823 F. Supp. 2d 555, 569 (S.D. Tex. 2011); *Vianet Grp. PLC v. Tap Acquisition, Inc.*, No. 3:14-CV-3601-B, 2016 WL 4368302, at *22 (N.D. Tex. Aug. 16, 2016).

The value of T3's distributorship was based on Account Protection. R. 8135 at ¶ 98 ("By giving the same 'exclusive' rights to DocuSource and IBF, [Safeguard] diluted the value of the Distributor Agreement Account Protection Rights.") The Panel concluded that T3's business lost its value due to Safeguard's failure to enforce Account Protection and the pricing advantages given to IBF and DocuSource. R. 8135 at ¶ 99. ("[Safeguard's] breach damaged T3's business to such an extent that the Distributor Agreement now fails its essential purpose.") "Under Texas law, 'the proper measure of damages for destruction of a business is measured by the difference between the value of the business before and after the injury or destruction.'" *Wellogix, Inc. v. Accenture, LLP*, 823 F. Supp. 2d at 569; *Sawyer v. Fitts*, 630 S.W.2d 872, 874 (Tex. App. 1982). The Panel computed the lost value as the difference between the value of the T3 business before and after Safeguard's actions. R. 8135 at ¶ 100. Thus, the loss of business value is a colorable basis for the damages and another basis for upholding the award.

### B. The Arbitration Panel Did Not Act Irrationally In Simultaneously Awarding Future Damages and Terminating The Distributorship

The Panel's decision to award T3 future lost commission damages and terminate T3's

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grounds for reversal unless the arbitrator could not have made the award under the properly chosen law.")

distributorship was neither contradictory or irrational.

Safeguard's caselaw stands for the proposition that if a contract is terminated a party cannot be required to perform according to its terms in the future. Texas law does prohibit that. *See e.g. Henry v. Masson*, 333 S.W.3d 825, 840 (Tex. App. 2010) ("when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance.") Safeguard's position ignores the fact that T3 is not receiving any future benefits or performance under the Agreement. R. 12747. The Panel unequivocally found that the Agreement was not continuing, contrary to Safeguard's arguments. R. 8151 at 17-18 ("Further performance by T3, its principals or its agents under the Distributor Agreement [was] excused by virtue of [Safeguard's] material breach.") Instead, T3's future Account Protection damages represent the lost asset value going forward – the value of the future commission stream based on IBF's sales to T3's Protected Customers.[14] R. 8134 at ¶ 94. This is not the same as Safeguard being required to perform in the future (e.g. rotate commissions to T3 going forward).

Critically, Safeguard does not provide any legal authority showing that a contractual termination acts as an absolute prohibition on future damages. Termination and future damages go hand in hand.[15] Future damages are proper as T3 was entitled to be put "in the same economic

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[14] Safeguard also misstates Robert Taylor's testimony. Taylor testified that if IBF stopped selling to T3's Protected Customers, there would be no future damages. R. 7900 at 1666:9-1667:1. He did not testify that if the contract terminated that there would be no future damages. *Id.*

[15] *See e.g. Texas Dep't of Family & Protective Servs. v. Parra*, 503 S.W.3d 646, 662 (Tex. App. 2016) (allowing for future lost earnings after termination); *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 459 (Tex. App. 1989), writ denied (Oct. 25, 1989) (employee wrongfully terminated may recover loss of future wages); *Boston Pizza Restaurants, L.P. v. Bay Three Ltd.,*

position [it] would have been had the contract not been breached." *Armendariz v. Mora*, 553 S.W.2d 400, 406 (Tex. Civ. App. 1977); *see also Am. Speedy Printing Centers, Inc. v. AM Mktg., Inc.*, 69 F. App'x 692, 699 (6th Cir. 2003) (party was entitled to all damages necessary to put itself in a position equivalent to that in which it would have found itself if the franchise agreement had continued in effect for the full twenty-year term.)

Safeguard's argument is also frivolous for the following reasons. First, this issue is confined to breach of contract damages. It cannot be grounds for vacating the future damages as to the tortious interference and DTPA claims. Second, Safeguard sought and agreed to the termination in light of the future damages. R. 8150 at 1:16-18; *see also* R. 8151 at 1 ("The parties agree that Distributor Agreement is terminated.") By failing to object and indeed stipulating that the Agreement was terminated, Safeguard waived the issue as a basis for appeal.

Third, to satisfy the "completely irrational" standard, Safeguard must show that the Panel's decision was not "derived from the agreement, viewed in light of the agreement's language and context, as well as other indications of the parties' intentions." *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 364, 641 (9th Cir. 2010). The United States Supreme Court has instructed that an award should be upheld "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority". *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Here, the Panel construed the Agreement in awarding future damages and finding a constructive termination.

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*Inc.*, No. 3:12-CV-00426-O, 2013 WL 12123894, at *10 (N.D. Tex. June 28, 2013) (breach of franchise agreement made Plaintiff unable to collect future profits resulting in damages in the value of the future profits),

Indeed, the District Court found that "[t]hese elements of damages are clearly derived from the parties' agreement." R. 12747. Thus, the Panel's finding of termination and award of future lost commissions is not grounds for vacatur.

**C. The Arbitration Panel Did Not Issue A Double Recovery**

Safeguard argues that the Panel granted a duplicative double recovery by awarding both future lost profits and the value of the distributorship. However, as explained by T3's expert Robert Taylor, the future lost commission damages are based on IBF's sales to T3's Protected Customers. R. 8527 at 1562:17-21. The value of the distributorship damages are based on T3's sales to T3's Protected Customers. There is no overlap between these two categories. *See* R. 8529-30 at 1590:21-1591:21. Safeguard is simply misrepresenting the damages to this Court.

The cases Safeguard has relied upon hold that an award of future lost profits and "going concern" value may be duplicative. *See e.g. Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 664 (5th Cir. 1974). However, it is only duplicative where "future profits are a principal element in going concern value." *Id.* That is not the case here as the commissions from IBF's sales are not taken into account in valuing T3's distributorship. *See* R. 8541-42, 8554-8607, 8719. As there is no overlap in damages, there can be no irrationality or violation of public policy and thus no grounds for vacatur. R. 12747.

**D. The Arbitration Panel Did Not Manifestly Disregard Texas Law in Awarding Damages for Past Lost Commissions**

T3's past lost commission damages of $321,657.77 represent the benefit of the bargain and consequential damages for T3's claims of breach of contract, intentional interference with

business relations and for violation of the Texas Deceptive Trade Practices Act. T3's damages are based on a specifically identifiable loss, Safeguard's failure to pay T3 the commissions for sales made by IBF and DocuSource to T3's Protected Customers. Thus, the damages are in accord with Texas law. *See e.g. Sw. Recreational Indus. v. FieldTurf*, No. 01-50073, 2002 WL 32783971, *4-5 (5th Cir. 2002) (damages upheld where plaintiff showed lost sales to twenty-nine prospective customers and what the typical profit margin was on those sales).

If T3's Distributor Agreement had been complied with, T3 would have received all the commissions on sales to its Protected Customers made by Safeguard, IBF and DocuSource sales agents. In arriving at the net commissions amount of $321,657.77, T3's expert Robert Taylor deducted for all expenses and costs that would pertain to the calculation of commissions.[16] These lost commissions or gross profits represent the net commissions that would have been rotated to T3 had Safeguard fully performed. *See* R. 7900 at 1668:17-19 (arbitrator noting that "[d]espite what [Safeguard's counsel] is saying between commissions and gross profits, they are the same guy.") T3 did not need to incur any additional fixed expenses for commissions to be rotated. R. 8505 at p. 1160:8-14 (commissions simply rotated). Thus, T3's damages, the lost commissions, were the benefit of the bargain. They are also the damages proximately caused by Safeguard.

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[16] At the hearing, Robert Taylor was specifically asked the following:
"Q: In fact, under paragraph 6B of T3's distributor agreement in calculating commissions payable, net sales of Safeguard systems means the amount actually received by Safeguard credited to the distributor less all taxes, all transportation and freight costs, all handling costs, all returns and allowances, and also a deduction for some of these source fees that you've looked at. Were you aware of that?"
"A. Yes. But those amounts that are shown on Exhibit 2A are the amounts that – the net commissions that went to IBF". R. 7900 at 1668:2-13.

Safeguard erroneously argues (1) that the Panel used the wrong standard of gross rather than net profits; and (2) that the commissions were not properly calculated. Safeguard's argument is a *red herring*. What is legally relevant is that all applicable expenses have been accounted for. Texas courts and courts applying Texas law have repeatedly held that gross profits is the proper standard of damages where obtaining the benefit of the bargain would have no effect on overhead or operating expenses. *See Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 888 (Tex. App. 2006) ("gross profits are an appropriate measure of lost-profit damages.").[17] The Texas Supreme Court, in a 2010 ruling, specifically rejected the appellant's argument regarding a purported failure to deduct overhead and other expenses. *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 879 (Tex. 2010). The court explained that certain expenses do not need to be deducted where the amounts would not fluctuate. *Id.*

Safeguard does not show that any applicable expenses were not accounted for in calculating commissions. At the hearing, Safeguard made no argument and provided no evidence that additional expenses or fees should be applied. Further, even if Taylor did not account for all expenses (he did), this is a factual issue and thus is not a proper basis to challenge an arbitration

[17] *See also DP Sols., Inc. v. Rollins, Inc.*, 353 F.3d 421, 429 (5th Cir. 2003) ("the gross amount the non-breaching party would have received if the contract had been fulfilled should normally be reduced by any unpaid costs the non-breaching party would have to incur to complete performance of the contract."); *Digital Generation, Inc. v. Boring*, No. 12-15271, 2013 WL 4483497 at *2 (E.D. Mich. Aug. 20, 2013) (applying Texas law the court held that there was no manifest disregard of the law in that there are "multiple Texas authorities recognizing that all expenses need not be deducted in certain instances."); *Johnson Indus. Sales, Inc. v. Strema Sales Corp.*, 224 Fed. Appx. 709 (9th Cir. 2007) (Ninth Circuit reversed lower court noting that a jury could find that the lost commissions equaled lost profits).

award. *See e.g. Kenneth H. Hughes, Inc. v. Aloha Tower Dev., Corp.*, 654 F. Supp. 2d 1142, 1152 (D. Haw. 2009) (discussing damages amounts, the court noted that "the burden to modify an arbitration award is high, and not even an erroneous finding of fact is enough.")

Nor would the omissions of some expenses be an error of law, let alone manifest disregard. *See O & B Farms, Inc. v. Black*, 300 S.W.3d 418, 422 (Tex. App. 2009) ("If the best available evidence affords a reasonable basis for the jury to calculate damages, then recovery cannot be denied because the exact amount of damages cannot be ascertained."); *Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 890 (Tex. App. 2004) ("When the fact of damages is clear, the plaintiff is required to prove his damages with only 'reasonable certainty.'"); *Phan*, 137 S.W.3d at 772 (there must only be "some showing that expenses were deducted"). Safeguard's authority is distinguishable as it solely concerns damages where there was no evidence of specific loss and instead a party was attempting to establish damages through a party's *own* year over year revenue numbers or where a party did not deduct for any expenses in arriving at damages.

Safeguard also cannot argue that the Arbitration Panel's holding contradicts the language of the Agreement. As noted by the District Court, the Agreement did not specifically set forth "how rotated commissions are calculated" and thus "Safeguard cannot establish that the Panel was ignoring the plain language of the contract in awarding unpaid past commission." R. 12744. For these reasons, the Panel did not manifestly disregard the law or act irrationally in awarding damages for past lost commissions.

### E. The Arbitration Panel Did Not Manifestly Disregard Texas Law in Awarding Damages for the Value of Future Lost Commissions

T3 was awarded damages for future lost commissions for IBF's sales to T3's Protected Customers. The Panel set forth both the legal and factual basis for these damages:

> T3's lost commissions for future sales made to T3's Protected Customers are also recoverable. Even if these future lost commissions could be deemed consequential damages, they are nevertheless recoverable because they were reasonably contemplated by the parties.
>
> SBS uses a metric of approximately "one times annual revenue" when it acquires distributors and when SBS distributors acquire other distributors. This was the same metric used when Teply purchased part of Thurston's business. Thus, SBS itself considers the present value of future commissions to be equated to approximately one times the annual revenue of the company.
>
> The Panel finds that T3 and Taylor's use of a "one times annual revenue" metric fairly represents the present value of future commission rights. See *AZZ, Inc. v. Morgan*, 462 S.W.3d 284, 289-90 (Tex. App. 2015). The present value of the future commissions for IBF's sales to T3's Protected Customers is $373,473.76. This amount is based on the last full year of IBF's sales to T3's Protected Customers. The Panel concludes that T3 is entitled to $373,473.76 in lost future commissions...

R. 8133-34 at ¶¶ 92-94.

Safeguard argues that the Panel's use of the market value theory of damages was in manifest disregard of the law in that it doesn't account for all expenses. First, Safeguard's contention that the valuation metric does not account for expenses is factually wrong. T3's expert, Robert Taylor testified that a valuation metric accounts for not only projected revenue but also projected expenses. R. 8531-33 at pp. 1662:8-1664:23. A valuation metric is simply a way of valuing the future net profits through a present value calculation.

Second, valuation metrics are commonly used and are an accepted legal standard for

valuing future damages. The Fifth Circuit in *Fluorine on Call Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 860 (5th Cir. 2004), went into significant detail in describing these damages:

> The lost value measure of damages is the "market value of the asset at the time of breach—not the lost profits that the asset could have produced in the future." This amount is connected to "a buyer's projections of what income he could derive from the asset in the future." In describing the measure, the Second Circuit quoted Dobbs Law of Remedies: "Market value damages are 'based on future profits as estimated by potential buyers who form the "market" and "reflect the buyer's discount for the fact that the profits would be postponed and ... uncertain."''"

*Id.* at 860 (citations omitted); *see also Schonfeld v. Hillard*, 218 F.3d 164 (2d Cir. 2000). As noted by the Fifth Circuit, these "market value" damages are not only sufficient but are "the best evidence" of future loss. *Fluorine on Call*, 380 F.3d at 860. In Texas, a plaintiff need only show that "[a]t a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained." *AZZ Inc.*, 462 S.W.3d at 290.[18] Safeguard's own valuation metric more than meets this requirement.

Safeguard's second argument is that future damages are not obtainable since T3's distributorship could be terminated at any time. However, this argument is completely irrelevant to future damages for the tortious interference and DTPA claims. *See e.g. Exxon Corp. v. Allsup*, 808 S.W.2d 648, 660 (Tex. App. – Corpus Christi 1991) (tortious interference claim); *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992) (DTPA claim). Thus, the argument is not grounds for vacating these damages.

The argument also is not viable as to the breach of contract action. Safeguard never

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[18] *See also Vogler v. Blackmore*, 352 F.3d 150, 157 (5th Cir. 2003); *Wellogix, Inc.*, 823 F.Supp.2d at 569-570.

argued to the Panel that the Agreement was terminable at-will or month-to-month. *See e.g.* R. 8098-8104. As such, there cannot be a manifest disregard of the law. *See Mich. Mut. Ins.*, 44 F.3d at 832 ("[i]t must be clear from the record that the arbitrator recognized the applicable law and then ignored it."); *Bosack*, 586 F.3d at 1104 ("[T]o demonstrate manifest disregard, the moving party must show that the arbitrator 'underst[oo]d and correctly state[d] the law, but proceed[ed] to disregard the same.'") To that point, the Panel does not even mention the issue.

Even if the issue had been considered, there was no error of law. Safeguard argues that there is a manifest disregard of the law because it was undisputed that T3's Distributor Agreement was terminable at will. However, the Agreement defines the parameters for termination within section 10(B) and 10(E). R. 7708-7711. These sections would have stayed operative regardless of whether the Agreement was ongoing, renewing under 5 year terms or month-to-month. Under section 10(B) and 10(E), Safeguard would need specific cause defined therein, which it did not have, to terminate the Agreement. *Id.* Whereas, like here, "a contract limits duration by the happening of any one of several ascertainable contingencies it is not terminable at will." *Rolling Lands Invests., L.C. v. Nw. Airport Mgmt., L.P.*, 111 S.W.3d 187, 197 (Tex. App. 2003).[19] Further, the Agreement cannot be terminable at will under Texas law because it's a franchise agreement. *See Clear Lake City Water Auth. v. Clear Lake Utilities Co.*, 549 S.W.2d 385, 391 (Tex. 1977); *Fluorine on Call*, 380 F.3d at 857. Thus, there was no error of law, let alone manifest disregard.

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[19] *See also City of Big Spring v. Board of Control*, 404 S.W.2d 810, 815 (Tex. 1966); *Brittian v. Gen. Tel. Co. of Sw.*, 533 S.W.2d 886, 891 (Tex. App. 1976).

Safeguard cites to paragraph 10(F) of the T3 Distributor Agreement for its position that the contract could be terminated at any time. R. 7771 at § 10(F). However, that section states, instead, that the contract continues to be in force as long as T3 is in compliance with all terms and conditions. *Id.* It does state that if T3 failed to timely sign the then-current agreement, the Agreement would continue on a month-to-month basis. *Id.* However, there was no evidence that T3 was ever offered a then-current agreement and refused to sign it. Instead, the only evidence was that Safeguard did not offer a then-current agreement once the first 5 years passed.[20] Whether the agreement was month to month was consequently a disputed fact. *See* R. 8512.

Further, even if the T3 Distributor Agreement was terminable at will, T3 had a right to future damages. Under section 12(B) of the Agreement, T3 was entitled to 50% of commissions going forward 4 years after termination. R. 7714. Thus, even if the Agreement was at will (it was not), T3 had a colorable basis for future commissions. As there was always some future damages that could be awarded to T3 and the amount thereof is a factual dispute, Safeguard's argument is not grounds for vacating the future damages.

There is also no viable argument that the Panel acted outside the scope of the T3 Distributor Agreement in awarding future damages for breach of contract. As the Supreme Court stated in *Oxford Health Plans,* 569 U.S. at 569, the "sole question" for the court on motions to vacate under § 10(a)(4) is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Safeguard presents no argument that

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[20] "Q: It's your position that there was no renewal five-year period after the first five years ended; is that right?" "A: According to what Kevin Skipper told me, that's correct. I didn't have to renew – write a new agreement, I should say. It was ongoing." R. 7877-78 at 1261:18-1262:2.

the Panel was not interpreting the Agreement when awarding future damages.

### F. The Arbitration Panel Did Not Manifestly Disregard Texas Law in Awarding Attorneys' Fees and Expenses

The Panel's award of $2,449,208.14 in attorneys' fees and $437.126.28 in costs conforms to both Texas law and the T3 Distributor Agreement. The Panel found that T3 had a right under Texas law to attorneys' fees and expenses. R. 8258 at p. 2:19-20. T3 had a right to its attorneys' fees under Texas law for both its breach of contract and DTPA claims. *See* TEX. CIV. PRAC. & REM. CODE § 38.001 (for breach of contract); TEX. BUS. & COMM. CODE § 17.50 (DTPA).

Safeguard argues attorneys' fees are barred by T3's purported failure to present the claim to Safeguard prior to the lawsuit. That is wrong both factually and legally. First, T3 has a right to attorneys' fees under the DTPA claim which the presentment requirement does not apply to. *See Melson v. Stemma Expl. & Prod. Co.*, 801 S.W.2d 601, 604 (Tex. App. 1990) (noting presentment requirement applies to Section 38.001 of the Texas Civil Practice and Remedies Code). Safeguard does not specifically address the attorneys' fees issue under the DTPA. Second, as to the breach of contract claim, T3 provided evidence of presentment, e.g. that it demanded payment.[21] Thus, there was a factual dispute as to presentment. It cannot be grounds for a manifest disregard of the law.[22]

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[21] For an entire year prior to filing the lawsuit, Dawn Teply repeatedly requested to Safeguard's general counsel Michael Dunlap that Safeguard enforce Account Protection and pay the owed commissions. *See* R. 8472-79, 8481, 8486-88, 8494-8504, 8506-11, 8515-22.

[22] "The term 'presentment' means 'simply a demand or request for payment or performance[.]'" *Note Inv. Grp., Inc. v. Assocs. First Capital Corp.,* 476 S.W.3d 463, 485 (Tex. App. 2015). A simple verbal assertion of a claim or request for payment suffices. *See Karol v. Presidio Enters., Inc.*, 622 S.W.2d 638, 640 (Tex. App. 1981).

Safeguard also argues that the Panel disregarded Texas law in awarding attorneys' fees for unsegregated services performed on both T3 and Thurston's behalf. However, the Texas Supreme Court has made it clear that a party can recover for work done on behalf of multiple parties, what is called "unsegregated fees." *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (2006). In *Chapa*, the Texas Supreme Court held that "when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Id.* at 314. Safeguard cites to no caselaw[23] for the proposition that this rule set forth by the Texas Supreme Court would not apply where there are multiple proceedings. Instead, other Texas courts have followed *Chapa* and applied it in situations where work was conducted on behalf of multiple parties. *See E.J. Du Pont Dc Nernours & Co. v. Shell Oil Co.*, 259 S.W.3d 800, 807-809 (Tex. App.—Houston [1st Dist. 2007, pet. denied)). There is not an error of law, let alone manifest disregard in awarding unsegregated fees.

Nor is the Panel's decision to multiple the attorneys' fees by 2 in manifest disregard of Texas law. The Panel found that 2x multiplier was "appropriate in this matter given the Mulcahy Firm's contingency arrangement, the nature of the case and the difficulties is presented." R. 8263. This is entirely consistent with Texas law. "Texas courts consistently allow the use of a multiplier based upon the contingent nature of a fee under Texas statutes allowing recovery of

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[23] *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997) is distinguishable. It stands for the proposition that a factfinder must evaluate the reasonableness of attorneys' fees under the multiple factor test before simply awarding the contingent fee amount. *Id.* at 818-819. The statement that attorneys' fees must be decided in "light of the worked performed in the very case for which the fee is sought" relates to considering whether the fees are reasonable and necessary based on the worked performed to advance the winning party's case. *Id.* It is not a comment on multiple proceedings effecting an attorneys' fees award.

attorney's fees." *Dillard Dept. Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 413 (Tex. App. 2002) (upholding a multiplier of 2 based on the novelty and difficulty of the issues, the contingent fee, the time limitations imposed by the circumstances, and the preclusion of other employment).[24]

Texas courts uphold the application of an attorneys' fees multiplier where the multiplier results in the fees being significantly higher than the contingent fee amount[25] or actual damages.[26] Regardless, the amount of the multiplier and fees as compared to the damages is a factual question and not an error of law. The only apparent rule in Texas is that a multiplier should generally not be more than 4 times the lodestar, which it was not here. *See El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 764 (Tex. 2012).

The Panel did not err as to costs either. The Panel embarked on an interpretation of the Agreement and its interpretation cannot be grounds for vacatur. *See* R. 8258 ("The arbitration clause in the Distributor Agreement authorizes the Panel to award attorneys' fees and expenses

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[24] *See also Stratton v. STO Energy Inc.,* No. 02–10–004830CV, 2012 WL 407385 (Tex. App. Feb. 9, 2012) (2.17 multiplier of a lodestar of $3,968,277.25 was appropriate because, among other things, "the high risk borne by its contingent nature" and the "undesirability of the litigation"); *Edwards v. Aaron Rents, Inc*., 482 F. Supp. 2d 803, 813 (W.D. Tex. 2006) (granting "an upward adjustment" in fees as "Plaintiff's counsel should be compensated for the risk he took in advocating this case on a contingent basis and for the delay in his compensation").

[25] *See e.g. Haggar Apparel Co. v. Leal*, 100 S.W.3d 303, 308 (Tex. App. 2002), reversed on other grounds, 154 S.W.3d 98 (Tex. 2004) (although the defendant objected that the multiplier slightly below 2 resulted in attorneys' fees exceeded the amount recovered by 300% (and contingent amount by 500-700%), the fees were affirmed); *see also Dillard Dept. Stores,* 72 S.W.3d at 412-413; *E.F. Johnson Co. v. Infinity Glob. Tech.*, No. 05-14-01209-CV, 2016 WL 4254496, at *12 (Tex. App. Aug. 11, 2016).

[26] *See e.g. Northwinds Abatement, Inc. v. Emp'rs Ins. of Wausau*, 258 F.3d 345, 355 (5th Cir. 2001) (affirming $712,000 in attorneys' fees on recovery of $74,570 in actual damages); *Bencon Mgmt. & Gen. Contracting, Inc. v. Boyer, Inc.*, 178 S.W.3d 198, 209 (Tex. App. 2005); *see Gorman v. Countrywood Property Owners Assoc.*, 1 S.W.3d 915, 920-921 (Tex. App.— 1999).

in this matter. Section 21(B) of the Distributor Agreement provides that…") It was certainly a possible interpretation for the Panel to find that Section 21(B)[27], either alone, or in conjunction with AAA Rule 47(a) gave the Panel authority to award additional costs beyond those available under Texas statutory law. *See Hoffman*, 236 F.3d at 462; R. 12748-49 (District Court's finding).

As both parties submitted a request for costs (R. 7787, 7810), the issue was properly before the Panel. *See e.g. Thomas v. Prudential Sec., Inc.*, 921 S.W.2d 847, 851 (Tex. App. 1996) (affirming AAA Panel's award of fees and costs as allowed based on separate contractual provision); *Saqer v. Ghanem*, No. 09-07-519 CV, 2008 WL 5263359, at *5-6 (Tex. App. Dec. 18, 2008) (broad language of arbitration agreement and parties demands allowed for attorneys' fees). In addition to Section 21(B), the incorporation of the AAA rules also gave the Panel authority to award costs. *See Black v. Shor*, 443 S.W.3d 154, 169-170 (Tex. App. 2013); *Kvaerner Oilfield Prod., Inc. v. Cooper Cameron Corp.*, No. CIV.A. H-05-0992, 2007 WL 1850014, at *7 (S.D. Tex. June 26, 2007) (AAA rules provided authority for arbitrators to award attorneys' fees and costs). Thus, the Panel did not exceed its authority or act irrationally.

The Panel's decision to find that Section 21(B) expanded and/or gave independent grounds for expenses was not in manifest disregard of the law. As the Panel stated, the statutory costs allowed under Texas Civil Practice and Remedy Code, Tex. Civ. Prac. & Rem. Code Ann. §§22.001(c) & 31.007(b), "are only a limited subset of the larger category of "expenses" authorized under AAA Rule 47(c)." R. 8258-59. "[P]arties are free to contract for a fee-recovery

[27] "THE ARBITRATORS SHALL HAVE THE RIGHT TO AWARD OR INCLUDE IN THEIR AWARD ANY RELIEF WHICH THEY DEEM PROPER IN THE CIRCUMSTANCES […]" R. 7719.

standard either looser or stricter than [Texas Statutes]". *Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 60 (Tex. App. 2013). "When parties include such a provision in a contract, the language of the contract controls, rather than the language of the statute." *Id.*

For these reasons, Safeguard has not shown that the Panel acted irrationally or manifestly disregarded Texas law in its award of attorneys' fees and expenses.

## V. T3 IS ENTITLED TO ATTORNEYS' FEES AND COSTS FOR THE APPEAL

Under Texas law, "once a right to attorney's fees is established, the award may include attorney's fees for any appeal." *Cap Rock Elec. Co-op., Inc. v. Texas Utilities Elec. Co.*, 874 S.W.2d 92, 102 (Tex. App. 1994). T3 had a right to its attorneys' fees under Texas substantive law for both its breach of contract and DTPA claims. *See* TEX. CIV. PRAC. & REM. CODE § 38.001 (for breach of contract); TEX. BUS. & COMM. CODE § 17.50 (DTPA). Both statutes authorize T3 to be awarded attorneys' fees for appeal.[28] For these reasons, T3 may be awarded attorneys' fees under substantive Texas law upon a remand back to the Arbitration Panel.

This Court may also award T3 its attorneys' fees as Safeguard's appeal was frivolous. Idaho Code Section 12-121 allows an award of attorney fees to a prevailing party where "the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Idaho Military Historical Soc'y v. Maslen*, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014). Section 12-121 is discretionary and therefore is considered to be procedural requiring application

[28] *See Cap Rock*, 874 S.W.2d at 102 ("find[ing] the award of appellate attorney's fees to be proper" for section 38.001); *Cont'l Dredging, Inc. v. De-Kaizered, Inc.*, 120 S.W.3d 380, 397 (Tex. App. 2003) (attorneys' fees proper for appeal of DTPA claim).

of Idaho's law.[29] *See Carroll v. MBNA Am. Bank*, 148 Idaho 261, 270, 220 P.3d 1080, 1089 (2009); *see also Houston v. Whittier*, 147 Idaho 900, 911, 216 P.3d 1272, 1283 (2009).

Here, Safeguard had no reasonable basis for bringing an appeal. Attorneys' fees should be awarded under Section 12-121 in that Safeguard has failed to show that either that the District Court or the Panel incorrectly applied the law in any way. *See Burns v. Baldwin*, 138 Idaho 480, 487, 65 P.3d 502, 509 (2003); *Wagner v. Wagner*, 160 Idaho 294, 302, 371 P.3d 807, 815 (2016). Instead, Safeguard largely asks this Court to second-guess the District Court and Panel without regard to whether its arguments even present proper grounds for appeal under the FAA. *Chicoine v. Bignall*, 127 Idaho 225, 899 P.2d 438 (1995) is instructive. After rejecting the arguments for vacatur, the court noted "when the parties bargain for the binding decision of an arbitrator, they necessarily accept the fact that his interpretation of the facts, the law, and the equities of the situation may not be entirely satisfactory." *Id.* at 228. "The mere fact that an arbitrator's interpretation of a prior case is unsatisfactory to a party is not, of itself, a valid basis for appeal." *Id.* This Court similarly held in *Mumford v. Miller*, 143 Idaho 99, 101, 137 P.3d 1021, 1023 (2006), that where an appeal does not present proper grounds for vacating an arbitration award, attorneys' fees should be awarded under I.C. § 12-121. *Id.* at 101.

There is a strong public policy in Idaho "encouraging early payment of valid arbitration awards and the discouragement of nomeritorious protracted confirmation challenges." *Driver v. SI Corp.*, 139 Idaho 423, 80 P.3d 1024, 1031 (2003). Safeguard's frivolous motion and appeal

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[29] Even if Texas law was applicable, Tex. R. App. P. 45 similarly authorizes an appellate court to award a prevailing party "just damages" where an appeal is frivolous. *See e.g. Njuku v. Middleton*, 20 S.W.3d 176, 178 (Tex. App. 2000).

has extended the payment of a valid arbitration award for almost 2 years. Under such circumstances, an award of attorneys' fees and costs for appellate proceedings is appropriate.

**CONCLUSION**

Safeguard's failure to even attempt to argue the statutory grounds for vacatur under the FAA means its appeal should be summarily denied. Safeguard has brought an appeal that needlessly repeats the same arguments the District Court and the Arbitration Panel properly rejected. There was no basis for bringing an appeal in light of those judicial bodies' well-reasoned opinions. For these reasons, T3 respectfully requests that this Court affirm the District Court's holdings and award T3 its reasonable costs and attorneys' fees on appeal.

DATED this 3rd day of May, 2018.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3rd day of May, 2018, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served by the method indicated below, and addressed to the following:

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