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IN THE SUPREME COURT OF THE STATE OF IDAHO

T3 ENTERPRISES, INC., an Idaho corporation,

Plaintiff-Respondent,

vs.

SAFEGUARD BUSINESS SYSTEMS, INC., a Delaware corporation,

Defendant-Appellant.

Supreme Court Docket No. 45093-2017

Ada County No. CV-OC-2014-16400

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Steven Hippler, District Judge, Presiding

Thomas E. Dvorak, ISB No. 5043
Jeffrey W. Bower, ISB No. 8938
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
ted@givenspursley.com
jeffbower@givenspursley.com

James M. Mulcahy (*pro hac vice*)
Kevin A. Adams (*pro hac vice*)
Douglas R. Luther (*pro hac vice*)
MULCAHY LLP
Four Park Plaza, Suite 1230
Irvine, California 92614
jmulcahy@mulcahyllp.com
kadams@mulcahyllp.com
dluther@mulcahyllp.com

Attorneys for Plaintiff/Respondent

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
Dane Bolinger, ISB No. 9104
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, Idaho 83701-1617
mclark@hawleytroxell.com
jashby@hawleytroxell.com
dbolinger@hawleytroxell.com

Paul R. Genender (*pro hac vice*)
Jason E. Wright (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201
paul.genender@weil.com
jason.wright@weil.com

Attorneys for Defendant/Appellant

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PRELIMINARY STATEMENT IN REPLY

In its response brief, T3[1] asks this Court to overlook the unambiguous requirements of the parties' contract that all disputes be arbitrated in a Dallas proceeding and that neither party could recover more than "actual damages for commercial loss" in any dispute. Such a request is contrary to well-established federal arbitration law, would set a bad precedent that encourages litigants to forum shop and, in this case in particular, illegitimately compensates T3 (in the amount of $4.3 million) far beyond the contract limitations, basic rationality, and controlling Texas law given the irrefutable fact that T3 continues as a Safeguard distributor to this day and never lost a single dollar of its own historical profits as a result of the alleged breaches.

First, to be clear, it was T3 who approached SBS in 2006 seeking to be a distributor (not the other way around) knowing full well it would have to sign a contract to do so [*see* R. 792], and T3 who voluntarily went to Dallas to execute a Distributor Agreement stating in prominent ALL-CAPITAL terms that all disputes must be arbitrated in Dallas. After nearly a decade of accepting that contract's benefits—including receipt of approximately $200,000 in yearly profits as a commissioned sales agent of a Dallas-based enterprise—it was T3 who in bad faith flouted the arbitration requirement and filed suit in Idaho. That is what necessitated SBS's motion to compel arbitration. The District Court's errors as to its own subject matter jurisdiction and T3's forum objection negated SBS's right and caused irreparable prejudice because, as T3's <u>own lead counsel</u> strenuously affirmed on the record, a Dallas-administered proceeding would have resulted in *different* Texas-based arbitrators.[2] Further, SBS has not waived any rights simply by doing as it

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[1] All capitalized terms not defined herein are defined in Appellant's Brief.

[2] T3's counsel effectively offered himself as an expert on AAA arbitrations when arguing against a Dallas forum, stating: "MR. MULCAHY: … But I have dealt with the Triple A on [this] issue and here is the practical problem, and this will happen … they send it down to the Texas

was ordered and arbitrating in Idaho to a final judgment. Rather, due to the jurisdictional error and violation of FAA § 5's mandate that the process for arbitration stated in the parties' contract "shall" be followed, the Arbitration Award must be vacated and this dispute submitted—as T3 easily could (and should) have done in the first place—to a Dallas-administered proceeding in strict compliance with "the terms of the agreement." *See* 9 U.S.C. §§ 4-5. Anything less not only sanctions the nullification of SBS's fundamental right to a Dallas arbitration, but invites parties to file suit in Idaho in an attempt to use I.C. § 29-110 to avoid an arbitration forum they do not like.

Second, T3 pressed the District Court into abusing its discretion by overruling SBS's attorney-client privilege on patently incorrect grounds, thereby infecting the improper Idaho arbitration with violations of public policy that can be remedied only by invalidating the Arbitration Award. Idaho law requires the attorney-client privilege to be preserved "inviolate." *See* I.C. § 9-203. Such a dominant pronouncement is defiled by confirming an award that *facially* quotes privileged materials. As a result, this error, which is also not waived given the District Court definitively ruled on privilege outside of the Arbitration, independently requires vacating the Arbitration Award. Indeed, when considered with the other Issues appealed, it only further demonstrates an impermissibly flawed process throughout.

Finally, in a decisive confirmation that SBS did not get the type of arbitration for which it bargained (a Dallas proceeding with Texas-based arbitrators), the Panel appointed by the Denver administrator in this case snubbed Texas law and plain contract limitations to grant T3 more than <u>*20 years' worth*</u> of its own ever-growing historical profits, which is far beyond any reasonable understanding of "actual" loss. As shown below, T3's arguments for turning an alleged 1.8%

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administrator and they pull arbitrators from Texas …. So you don't want a Texas arbitrator deciding whether it should be in Texas." [*See* Tr. Vol. III at 48:12-49:19.]

organizational overlap[3] into a *$4.3 million* award in the face of the indisputable fact that T3 lost nothing it had before relies on nonsensical reasoning and distorted assertions of law, which is reflective of the Panel's irrationality in fabricating a "constructive" (*i.e.*, implied) termination theory out of Connecticut/New Jersey statutes and awarding duplicative and excessive future damages, doubled attorneys' fees, and improper litigation expenses. Notably, T3 does not (and cannot) disagree that it remains a distributor to this day and has continually made more in profits since the alleged breaches. Rather, T3 merely contends the Panel's abuses should be confirmed out of complete deference to arbitrator authority. The key legal principle to keep in mind, however, is that arbitration arises *solely* from the consent of the parties. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("… an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution"). As a result, the parties' contract takes on the role of a constitution and any violation of its constraints is subject to no deference any more than when a court acts without jurisdiction. That is the fundamental error that permeates all Issues, including the Panel's excessive Award.

REPLY ON STANDARDS OF REVIEW

At the outset, T3 mistakenly argues that SBS's appeal "addresses judicial standards of review that go beyond the limited grounds set forth in the FAA." [Respondent's Brief "<u>Resp. Br.</u>" at 16.] To be clear, the standards which T3 contests are those for reviewing an *arbitrator's* actions (*i.e.*, FAA § 10), which applies only to Issue 3. Issues 1-2 are based on the District Court's errors.

As to Issue 3, SBS's brief provides the legal benchmarks by which federal courts implement FAA § 10(a)(4). Specifically, Section 10(a)(4) states an award must be vacated when the arbitrators "… exceeded their powers." That begs the question: how do arbitrators exceed their

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[3] [*See* Tr. Vol. II at 1346:3-4 (T3 has 1,800 total customers); Ex. 533 (33 overlaps).]

powers? Federal courts have found that arbitrators do so by, among other things: (i) violating an express contract limitation; (ii) failing to apply a choice of law; (iii) exhibiting "manifest disregard" of the applicable law (including disregard of undisputed facts of legal significance); (iv) granting relief that is "completely irrational"; or (v) granting an award contrary to public policy. [*See* Appellant's Brief ("App. Br.") at 9-10.] There is nothing controversial about these standards, which are all reasonable interpretations of the statute.

A minority of federal circuits, however, developed some *nonstatutory* standards that they viewed as not based on the FAA's language, particularly in regard to "manifest disregard." Consequently, although labeled the same, there effectively were *two* different bodies of federal case law called "manifest disregard" – one derived from the statutory language and one that was not. In the opening brief, SBS relies on the statutory versions of "manifest disregard" and "irrationality" [*see, e.g.*, App. Br. at 9 n.3], as well as the longstanding common law rule that no court can confirm an award if it would sanction a violation of public policy.[4]

As T3 notes, the U.S. Supreme Court in 2008 ruled in *Hall Street Assocs., LLC v. Mattel, Inc.* that the "exclusive" grounds for vacating or modifying an award are listed in FAA §§ 10-11 and, as such, *parties* could not expand those by agreement.[5] *See* 552 U.S. 576, 583-84 (2008). A distinction was noted, however, between parties agreeing to expand review and "judicial expansion

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[4] *See, e.g.*, *Aramark Facility Servs. v. Serv. Emps. Int'l Union*, 530 F.3d 817, 823 (9th Cir. 2008) ("However, one narrow exception to this generally deferential review is the now-settled rule that a court need not, in fact cannot, enforce an award which violates public policy."); *see also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42-44 (1987) (recognizing "common law" basis to vacate arbitration awards when violating a public policy "that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents").

[5] In *Hall Street*, the parties expanded on FAA §§ 10-11 by agreeing a court "shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." 552 U.S. at 579.

by interpretation." *Id.* at 585. *Hall Street* thus refuted the contention that "manifest disregard" was beyond the statute by noting federal courts—specifically the Ninth Circuit—developed the doctrine as a "shorthand" for how arbitrators exceed their power under FAA § 10(a)(4). *See id.* (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003)).

Nonetheless, after *Hall Street*, commentators questioned whether "manifest disregard" remained viable. The majority of circuits to expressly rule since then,[6] including the Second, Fourth, Sixth, Ninth, and Federal Circuits, have held the doctrine is appropriate under FAA § 10(a)(4).[7] A minority rejected their own versions of "manifest disregard" because it was always interpreted as a nonstatutory ground for vacatur (while leaving open use of a statutory version).[8]

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[6] Several circuits—the First, Third, Tenth, and D.C.—have declined to address the issue, but done so in terms aligned with the majority viewpoint. *See, e.g.*, *Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc.*, 852 F.3d 36, 46 (1st Cir. 2017) ("We need not and do not decide now whether manifest disregard remains as an available basis for vacatur. However, if it does survive, we agree with the courts that have held that *Hall Street* compels the conclusion that it does so only as a judicial gloss on § 10."); *see also Raymond James Fin. Servs., Inc. v. Fenyk*, 780 F.3d 59, 64 (1st Cir. 2015) (noting statements in the *Ramos–Santiago v. United Parcel Service* case cited by T3 regarding manifest disregard were dicta and the issue remains undecided in the First Circuit).

[7] *See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94–95 (2d Cir. 2008*), rev'd on other grounds*, 559 U.S. 662 (2010) ("… parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law. Put another way, the arbitrators have thereby exceeded their powers"); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (finding U.S. Supreme Court in 2010 recognized manifest disregard); *Marshall v. SSC Nashville Operating Co., LLC*, 686 F. App'x 348, 353 (6th Cir. 2017) (confirming manifest disregard remains); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (reaffirming standard as shorthand for statute); *Bayer CropScience AG v. Dow Agrosciences LLC*, 680 F. App'x 985, 993 (Fed. Cir.) (endorsing Fourth Circuit view that manifest disregard is appropriate).

[8] *See, e.g.*, *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) ("Our case law defines manifest disregard of the law as a *nonstatutory* ground for vacatur.") (emphasis in original); *but see McKool Smith, P.C. v. Curtis Int'l, Ltd.*, 650 F. App'x 208, 212 (5th Cir. 2016) ("While we have yet to explicitly decide whether [manifest disregard] can be statutory grounds for vacatur, we need not decide this issue today.").

Most importantly, however, the U.S. Supreme Court has never rejected the statutory-based standards cited in SBS's opening brief and, indeed, ruled in 2010 that "manifest disregard" would apply to vacate an award when an arbitrator fails to follow the law governing a dispute and "proceed[s] as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation." *See Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672-74 & 672 n. 3 (2010) (in footnote declining to decide all that remains after *Hall Street* while stating that, assuming manifest disregard does, "we find it satisfied").

As a result, the statutory versions of "manifest disregard" (as well as "irrationality" and "public policy") cited by SBS in the opening brief apply to this appeal. That conclusion is only bolstered by the fact this Court has repeatedly, even after *Hall Street*, recognized those standards are applicable to arbitrations governed by the FAA. *See Carroll v. MBNA Am. Bank*, 148 Idaho 261, 265, 220 P.3d 1080, 1084 (2009) (recognizing "manifest disregard" after 2008); *Moore v. Omnicare, Inc.*, 141 Idaho 809, 819, 118 P.3d 141, 151 (2005); *Hecla Mining Co. v. Bunker Hill Co.*, 101 Idaho 557, 564, 617 P.2d 861, 868 (1980) ("manifest disregard" and "irrationality").

REPLY ARGUMENT

I. THE DISTRICT COURT'S ERROR IN ORDERING THE ARBITRATION TO OCCUR IN IDAHO NEGATED A FUNDAMENTAL RIGHT BELONGING TO SBS.

In the opening brief, SBS detailed the errors that resulted in the District Court improperly ordering the arbitration to be submitted in Idaho. [*See* App. Br. at 10-13.] The threshold aspect of that error involves subject matter jurisdiction. Federal law and the unambiguous contract language removed the District Court's power to decide the "validity" of the contract or any portion thereof—including the forum—and placed it in the hands of a Dallas-administered arbitration. Regardless, even if the District Court had jurisdiction, it again ignored the plain language of the arbitration agreement and incorrectly applied Texas law in a way that nullified SBS's contractual right to a

Dallas proceeding (which directly violates FAA § 5). In response, T3 offers a scattershot of misplaced arguments: (a) improper forum is not a ground listed in FAA § 10(a)(4) to vacate an award; (b) any error is "harmless" under I.R.C.P. 61; (c) SBS waived a right to appeal; (d) the contract is contradictory on whether the District Court or arbitrators were to decide forum; and (e) the District Court's analysis on the merits was correct. [*See* Resp. Br. at 20-28.] T3's first argument is facially irrelevant. FAA § 10(a)(4) does not apply to Issue 1 because the question is not whether the Panel exceeded its power,[9] but whether the *District Court* acted without jurisdiction to invalidate the process expressly stated in the parties' contract by which arbitration would occur. As a result, SBS's reply arguments start where the analysis should properly begin—on the threshold aspect of jurisdiction—and go from there to refute T3's contentions.

A. The Contract Unambiguously Requires Arbitration of All Disputes Concerning "Validity"; Therefore, the District Court Lacked Jurisdiction to Order an Idaho Arbitration.

T3 incorrectly asserts there was no "clear and unmistakable" delegation of arbitrability on the validity of the Dallas forum due to allegedly "contradictory provisions" in the contract

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[9] T3's cases in that regard are thus inapplicable. [*See* Resp. Br. at 20 (citing *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174(10th Cir. 2007) and *Richardson v. Citigroup, Inc.*, No. 12-CV-0485-WJM-KMT, 2014 WL 503203 (D. Colo. Feb. 7, 2014).] Furthermore, *Ridge* is distinguishable because it involved an arbitration prior to *Hall Street* where the parties contractually agreed a court could vacate only "if the *award is based* in whole or in part on an incorrect or erroneous ruling of law." 493 F.3d at 1177-78 (emphasis added). Ridge contended the award must be vacated because the <u>*arbitrator*</u> made an incorrect ruling of law on venue. The Tenth Circuit disagreed because, under the parties' contract, "an incorrect ruling of law that is *not* the basis for an award is insufficient," *id.* at 1178 (emphasis in original). T3 cites *Ridge* as if the Tenth Circuit were stating a proposition of law applicable to all arbitrations, whereas the Tenth Circuit was simply interpreting the provisions of the contract. Likewise, *Richardson* is inapposite. There was no ruling on venue in that case (by the court or arbitrator). Rather, the pro se plaintiff complained, only after arbitration was completed, about the venue set by the agreement. 2014 WL 503203, at *2. That is the opposite of the procedural background here.

regarding whether a court or arbitrator would decide such a dispute. [*See* Resp. Br. at 25.] No such inconsistency exists. Paragraph 21(B)(3) of the Distributor Agreement mandates that:

> … ALL CONTROVERSIES, DISPUTES, OR CLAIMS … ARISING OUT OF OR RELATED TO … (3) THE ***VALIDITY*** OF THIS AGREEMENT OR … ANY PROVISION THEREOF … ***SHALL*** BE SUBMITTED FOR ARBITRATION TO BE ADMINISTERED BY THE DALLAS, TEXAS OFFICE OF THE [AAA] ….

[R. 7718 (emphasis added).] T3's challenge to forum, or even the arbitration provision as a whole, was a dispute as to the "validity" of a portion of the Distributor Agreement. Due to federal preemption, the District Court lacked jurisdiction[10] to do anything other than order arbitration occur "… in accordance with the terms of the agreement." *See* 9 U.S.C. § 4.

That legal conclusion does not change under Paragraph 21(C), which states:

> … YOU AND WE AGREE THAT THE ISSUES THAT WILL BE RAISED IN SUCH DISPUTE WILL BE DIFFICULT AND COMPLEX SO THAT ***ANY LAWSUIT RESULTING FROM*** SUCH A CONTROVERSY WILL BE TRIED BEFORE A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY. …

[R. 7719-20 (emphasis added).] Unlike the arbitration mandate, nothing in Paragraph 21(C) *requires* a dispute as to "validity"[11] to be resolved in court.[12] The open-ended language merely

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[10] *See Preston v. Ferrer*, 552 U.S. 346, 359 (2008) ("When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."); *see also, e.g.*, *UBS Fin. Services, Inc. v. W. Virginia Univ. Hosps., Inc.*, 660 F.3d 643, 655 (2d Cir. 2011) ("… we hold that venue is a procedural issue that FINRA's arbitrators should address in the first instance, and that the District Court *lacked subject matter jurisdiction* to resolve it") (emphasis added).

[11] Further, Paragraph 21(C) does not refer to "validity" disputes. To the extent T3 is arguing a court is the exclusive forum for resolving disputes as to "interpretation," that argument fails in regard to Issue 1 (but supports arbitrator abuse as to Issue 3; see, *infra*, page 38) because T3's challenges went only to the "validity" of a Dallas forum, not interpretation of the contract.

[12] The California case T3 relies on—*Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 782 (Cal. Ct. App. 2012)— did not involve a provision delegating disputes as to "validity" of the contract (or any portion thereof), only that "all disputes" in general would be arbitrated, which the court viewed as meaning the parties did not address validity. *Id.* at 783. *Ajamian* distinguished

provides that, in a lawsuit between the parties, *if any*, there would be a bench trial. That applies only when the arbitration mandate in Paragraph 21(B) does not – such as if SBS did not compel arbitration or the arbitration clause was declared invalid (which only a Dallas-administered arbitration could decide). The provisions are not contradictory; they are harmonious. *See Morgan v. Firestone Tire & Rubber Co.*, 68 Idaho 506, 518, 201 P.2d 976, 983 (1948) (contract provisions must be "harmonized whenever possible" and specific language controls over general).

T3 next argues that its belated challenge to the validity of the "entire" arbitration provision was sufficient to dispute the delegation clause such that the District Court, not an arbitrator, had jurisdiction. [*See* Resp. Br. at 26.] The U.S. Supreme Court has considered and rejected that precise argument. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (finding challenge to entire arbitration clause insufficient; requiring express challenge to delegation provision). For support, T3 misstates the holding in *MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018). In *MacDonald*, the plaintiff "explicitly" challenged the delegation provision:

> [Plaintiffs'] brief opposing Defendants' motion to compel arbitration states that 'the delegation clause suffers from the same defect as the arbitration provision,' and includes a section discussing this challenge. … These *explicit references* to the delegation clause are sufficient to contest it.

Id. at 227 (emphasis added). Here, T3 made no reference to Paragraph 21(B)(3) in its briefing or at oral argument, and never explicitly argued the delegation clause was invalid on any basis (nor could it be). [*See generally* R. 771-90, 962-69.] Rather, as reflected by the single page of the Clerk's Record cited by T3 [*see* Resp. Br. at 26 (citing R. 963)], all T3 attempted to do was "re-

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cases where, like here, validity was specifically delegated. *Id.* As well, *Ajamian* is not followed by federal courts. *See Brennan v. Opus Bank*, No. 2:13-CV-00094-RSM, 2013 WL 2445430, at *6 (W.D. Wash. June 5, 2013), *aff'd*, 796 F.3d 1125 (9th Cir. 2015) (finding *Ajamian* based on California law and is preempted by the FAA).

articulate" its challenge to the Dallas forum as one that would also invalidate the entire "arbitration agreement itself." [R. 963.] That is not sufficient under *Rent-A-Center* or *MacDonald*.

B. No Law Supports the District Court's Ruling on the Merits.

Even if the District Court had jurisdiction (it did not), its forum analysis was incorrect. In opposition, T3 misconstrues the issue and offers no legal support for the District Court's error.

Contrary to T3's assertion, SBS has not requested this Court to "reverse its holding in *Cerami-Kote*." [Resp. Br. at 27.] SBS argued that *Cerami-Kote* does not apply because it is based on Florida law, not Texas law. [*See* App. Br. at 14 n.5.] T3 then immediately abandons the District Court's "excluded forum" analysis (which was borrowed from *Cerami-Kote*) to postulate that a Dallas arbitration would not be enforced by Texas law under *The Bremen's* framework because Idaho was the "forum in which suit is brought" and Idaho has a public policy against arbitrating out of state. [*See* Resp. Br. at 27-28.] To be clear, none of the Texas cases cited by T3 invalidate a forum selection on the basis of a public policy outside of Texas. As such, what T3 is asking this Court to do is take one out-of-context phrase from the Texas cases and apply it in a way no Texas court ever has (or would). That would be unprecedented and improper. Indeed, it would encourage litigants hoping to avoid their own arbitration agreements to forum-shop and bring suit in Idaho state court, simply to void a contractual venue based on the public policy of the "forum in which suit is brought." That is not a proper reading of Texas law or a prudent policy anywhere.

Moreover, T3's circular approach is not a well-reasoned application of law. In particular, it requires entirely disregarding the parties' choice of law. That is not proper under *The Bremen* because, notably, no choice of law clause was at issue in that case, only a forum-selection clause that required disputes to be resolved in England. *See generally M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The "forum in which suit [was] brought" was a U.S. district court in Florida that had a public policy of refusing to enforce certain exculpatory clauses, *see id.* at 15 (citing

Bisso doctrine), whereas an English court would enforce them. *Id.* at 8 & n.8. Nonetheless, that public policy concern was ***insufficient*** to avoid the contracted forum. *Id.* at 15-16. It is only rational to conclude, therefore, that the U.S. Supreme Court would have viewed the English forum as unquestionably enforceable if the parties also selected English law to govern since, in that instance, the "public policy" against exculpatory clauses (*Bisso*) would not apply *even in Florida, the forum where suit was brought*. Indeed, that is the analysis this Court used in *Fisk v. Royal Caribbean Cruises* when it ruled that, because federal maritime law preempted Idaho law, I.C. § 29-110 did not apply. *See* 141 Idaho 290, 293-94, 108 P.3d 990, 993-94 (2005). The result is the same here because Texas law supplants Idaho law and Texas has no policy against arbitrating out of state. In fact, Texas has rejected the application of its own public policies that would otherwise void contract terms[13] when parties agree to a foreign forum (Ontario) and foreign choice of law (Canada). *See Young v. Valt.X Holdings, Inc.*, 336 S.W.3d 258, 265 (Tex. App. 2010) (explaining Texas has a stronger policy of enforcing forum-selection clauses).

Further, even if a Texas court were to do the unprecedented and rely on Idaho law in this situation, it is illogical to conclude the Idaho policy to be enforced is I.C. § 29-110 when there is an equally strong (stronger in this instance) policy in I.C. § 28-1-301(a) requiring enforcement of the choice of law. T3 agreed, and has never disputed, that FAA and Texas law govern its entire "*relationship*" with SBS. [*See* R. 7717 (¶ 18).] Subsection (b) of I.C. § 28-1-301 provides that, when another states' law is chosen to govern, then the only Idaho law that survives are limited statutory provisions that have no relevance here. To ignore that directive and revive I.C. § 29-110 for purposes of invalidating the Dallas forum—where T3 was physically present when executing

[13] Similar to I.C. § 29-110(1), the Texas Securities Act states: "A condition, stipulation, or provision binding a buyer or seller … to waive compliance with a provision of this Act or a rule or order or requirement hereunder is *void*." *See Young*, 336 S.W.3d at 264 n.7 (emphasis added).

the contract and has done business for years [*see* R. 986 (citing T3 affidavits)]—is the type of "parochial concept that all disputes must be resolved under our laws and in our courts" rejected by *The Bremen*, 407 U.S. at 9, and rejected by this Court in *Fisk*. *See* 141 Idaho at 294.[14] Simply put, I.C. § 29-110 does not apply here. Texas law governs and requires enforcing the choice of a Dallas forum. Texas law could support an Idaho arbitration only if the parties had chosen an Idaho forum or failed to pre-select a forum or governing law at all. That is clearly not the circumstance here.

T3 ends by noting Idaho's federal court has declined to enforce forum selection clauses based on I.C. § 29-110. [*See* Resp. Br. at 27 & n.4.] While it appears that may have occurred in the past (inconsistently),[15] that court is very consistent now in rejecting I.C. § 29-110 when the parties select non-Idaho law to govern their dispute. *See Oregon-Idaho Utils., Inc. v. Skitter Cable TV, Inc.*, No. 1:16-CV-00228-EJL, 2017 WL 3446290, at *7 (D. Idaho Aug. 10, 2017) (noting I.C. § 29-110 rejected in several recent cases and parties selected Georgia law). Further, at least one other state to consider a challenge to a Texas forum when there is also a Texas choice of law recognizes it is *Texas public policy* which controls in that instance, not the circular analysis proposed by T3 that would illogically lead back to a forum state's own law.[16]

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[14] *See also Epic Sys. Corp. v. Lewis*, No. 16-285, 584 U.S. ____ (2018), 2018 WL 2292444, at *8 (U.S. May 21, 2018) ("Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law is into policymakers choosing what the law should be.").

[15] *Compare, e.g.*, *Sizemore v. Gulf Stream Coach, Inc.*, No. 1:11-CV-00511-MHW, 2012 WL 13041446, at *4 (D. Idaho May 9, 2012) (rejecting I.C. § 29-110 when parties selected Indiana law), *with IDACORP, Inc. v. Am. Fiber Sys., Inc.*, No. 1:11-CV-00654-EJL, 2012 WL 4139925, at *2 (D. Idaho Sept. 19, 2012) (using I.C. § 29-110 as reason not to enforce New York forum).

[16] *See Vintage Travel Servs., Inc. v. White Heron Travel*, No. 16433, 1998 WL 257862, at *3 (Ohio Ct. App. May 22, 1998) ("Because the contract at issue was governed by Texas law under a choice of law clause that Vintage has not contested, the public policy of Ohio would hardly be implicated even in an Ohio forum. Moreover, the argument that Ohio has a public policy interest in providing a forum to Ohio parties, even if they have bargained away their right to sue in their home forum, is a <u>*circular*</u> one that conflicts with the mandate of *Kennecorp*.") (emphasis added).

Just as in *Fisk*, Texas law supplants Idaho law in this case. Nothing supports reviving I.C. § 29-110 to invalidate a Texas forum. The District Court erred in its analysis on the merits.

C. T3's Waiver Arguments Lack Merit.

T3 incorrectly contends that SBS waived the right to appeal Issue 1 on the alleged basis that: (i) SBS never argued forum should be decided by an arbitrator; (ii) SBS participated without objection in the Idaho proceeding; and (iii) SBS "stipulated" to the Panel's composition. [*See* Resp. Br. at 23-24.] There is no waiver shown in regard to any of those contentions.

As a matter of law, waiver occurs only when there is "a voluntary, intentional relinquishment of a known right or advantage." *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709, 719, 330 P.3d 1067, 1077 (2014); *Emscor Mfg., Inc. v. All. Ins. Grp.*, 879 S.W.2d 894, 917 (Tex. App. 1994) (same). As a result, waiver does not occur "absent a clear and unequivocal act manifesting an intent to waive …." 156 Idaho at 719. Further, a party asserting waiver "must also show that he acted in reasonable reliance upon the waiver and that he thereby has altered his position to his detriment." *Id.*

T3's first contention is entirely unsupported: SBS plainly argued to the District Court that forum is a procedural matter for an arbitrator to decide. [*See* R. 971; *see also* R. 978 (District Court order reciting same).] At the outset of suit (contemporaneous with its Answer), SBS moved to compel arbitration emphasizing the parties' contract required a Dallas-administered proceeding [*see* R. 762] for "*all* disputes" under Paragraph 21(B)'s four subsections. [*See* R. 767 (quoting delegation clause)]. In that regard, SBS urged the District Court to conclude the arbitration agreement was valid in order to compel arbitration in Dallas, specifically arguing that "challenges to the contract as a whole *are left to the arbitrator*." [R. 759, 766 (emphasis added).] T3 distorts those references to "validity" in the opening brief to mistakenly assert that SBS was requesting the District Court to rule on the validity of the Dallas forum. [*See* Resp. Br. at 24 (citing R. 759, 766).]

That is not at all accurate. No dispute about forum had been raised at that point. SBS was merely arguing the general validity of an agreement to arbitrate ***all disputes*** as necessary under FAA § 4 for the District Court to compel arbitration "in accordance with the terms of the agreement."

Notably, in response to SBS's motion to compel, T3 *agreed* the arbitration requirement as a whole was valid and raised a general contract defense only to the Dallas forum, stating:

> First, T3 Enterprises and SBS – but only SBS – have *agreed* that T3 Enterprises' claims against SBS alone should be submitted to the American Arbitration Association. *T3 Enterprises accepts this, and agrees that the Court may stay T3 Enterprises' claims against SBS alone pending the completion of those arbitration proceedings*. But, T3 Enterprises does not agree that Dawn Teply [] – the owner and operator of T3 Enterprises – should be required to travel to Dallas, Texas in order to arbitrate her claims against SBS.[17] …

[*See* R. 772 (emphasis added).] Consequently, at that point, the validity of the delegation provision—and all provisions of Paragraph 21(B) other than the Dallas forum—were *uncontested*. The FAA removed all jurisdiction of the District Court to do anything other than order the parties to a Dallas-administered arbitration in accordance with the terms of the agreement.

At oral argument, however, the District Court questioned, *sua sponte*, whether it had jurisdiction to consider T3's forum dispute. [*See* Tr. Vol. III at 47:6-14.] That was appropriate as the District Court had not yet ruled and every court has a continuing duty to investigate and determine its own jurisdiction, even if not raised by the parties.[18] Indeed, that is why a party can

[17] Notably, Ms. Teply had no hesitations about traveling to Dallas when she sought to enter a distributor agreement with SBS – an agreement that unambiguously provides all disputes will be resolved by arbitration in Dallas.

[18] *See Williams v. Sherman*, 36 Idaho 494, 212 P. 971, 974 (1922) ("… it is the *duty of the court* to recognize its want of jurisdiction over the subject–matter even when no objection is made") (emphasis added); *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("[F]ederal courts have an *independent obligation* to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.") (emphasis added).

never waive a lack of subject matter jurisdiction. *See State v. Manzanares*, 152 Idaho 410, 420, 272 P.3d 382, 392 (2012); *see also Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (jurisdictional defect "is not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal"). The District Court then requested supplemental briefing framed in terms of whether a forum dispute is a matter of "procedure" for an arbitrator or one of "substance" for a court. [*See* R. 978 (District Court recounting its request).] SBS submitted a brief on the issue as requested, explicitly arguing forum was a procedural matter for arbitration. [*See* R. 971.] T3's briefing argued the opposite and attempted to re-characterize its forum dispute as one that rendered the entire arbitration agreement invalid. [*See* R. 963 n.1.] The District Court, under a duty to examine and determine its own jurisdiction, failed to apply the delegation clause that SBS listed in its motion or appreciate the effect of *Rent-A-Center*. The District Court thus committed a jurisdictional error.

Again, contrary to T3's assertions, it is black letter law that subject matter jurisdiction can never be waived by anything a party does or does not do. The Idaho case cited by T3 is distinguishable in that it did not involve subject matter jurisdiction. *See Kirkman v. Stoker*, 134 Idaho 541, 544, 6 P.3d 397, 400 (2000) (party waived right to jury trial by not objecting when court held bench trial). The federal cases cited by T3 in a footnote—*Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320 (11th Cir. 2016) and *In re Checking Account Overdraft Litig.*, 754 F.3d 1290 (11th Cir. 2014)—also do not involve subject matter jurisdiction and are distinguishable on their facts. Specifically, the defendant in *In re Checking* explicitly requested the court rule on the merits of a plaintiff's unconscionability defense. *See* 754 F.3d at 1293. Here, SBS argued the District Court had no authority to rule on forum [*see* R. 971-74], leaving its arguments on the merits as an alternative basis for denial. In addition, the Eleventh Circuit noted that waiver of a right to arbitrate applies only "when both: (1) the party seeking arbitration substantially participates in litigation to

a point inconsistent with an intent to arbitrate; and (2) this participation results in prejudice to the opposing party." 754 F.3d at 1294. SBS's participation in the litigation was exclusively to compel arbitration and have all issues submitted to the appropriate Dallas forum for determination, which is consistent with an intent to arbitrate. Further, as the party who disregarded the contractual requirement to arbitrate and filed suit in Idaho, T3 cannot show prejudice when the result was a motion to compel arbitration. There was no waiver under *In re Checking's* standards. The case of *Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320 (11th Cir. 2016) is even further inapposite because the defendant in that case asked the district court to rule on substantive issues and, on appeal, sought to *uphold* that ruling in its favor, which is inconsistent with later arguing a delegation clause applies. *Id.* at 1324-25. That is not the scenario here. There is no waiver.

Nevertheless, even if SBS could waive a lack of subject matter jurisdiction, it would still not affect SBS's right to appeal the District Court's error on the merits of its forum ruling.

Recognizing as much, T3 incorrectly contends SBS waived its right to appeal the District Court's order on the merits by participating in the Idaho Arbitration without objecting *to the Panel*. T3 ignores the obvious: the District Court ***overruled*** SBS's position that forum must be decided in a Dallas arbitration and ***ordered*** SBS to arbitrate in Idaho. [*See* R. 976-94.] T3 specifically averred as much in its arbitration demand. [*See* R. 7750 (lines 1-12).] It was thus known to all that SBS was involuntarily participating in the Idaho proceeding by court order. There is no law that requires a party to futilely ask an arbitration panel, improperly formed pursuant to court order, to overrule the very court that caused the panel to form in order to preserve a right to appeal. T3 certainly offers none. [*See* Resp. Br. at 23 (citing *Marino v. Writers Guild of Am., E., Inc.*, 992 F.2d 1480, 1483 (9th Cir. 1993) (suit brought only after arbitration finished) and *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 673 (5th Cir. 2002) (same)).] In fact, the *Brook* opinion directly contradicts T3's position because the Fifth Circuit ruled that, while objecting to an arbitrator is *one way* to preserve error,

an "alternative" is to seek "an order from the district court compelling arbitration before a properly selected arbitrator …." *Id.* at 674 (emphasis added). That is precisely what SBS did with its motion to compel arbitration in Dallas; yet SBS's request was denied and it was ordered to submit to an Idaho proceeding. In that procedural context, error is preserved without needing to further object. *Id.*; *see also Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 224-25 (4th Cir. 1994) (invalidating award where party asked court to compel arbitration in accordance with terms of contract and was denied, without requirement to object during the arbitration).

T3's final contention—that SBS waived appeal by stipulating to the Panel's "composition" [Resp. Br. at 23-24]—fails as well. SBS only stipulated to the Panel "in this matter *as constituted*." [*See* R. 7601 (¶ 10) (emphasis added).] That reflects, at most, that SBS did not object to arbitrator bias or conflict of interest under the District Court's order to proceed in Idaho, not that the District Court's ruling was correct and SBS was agreeing to waive all rights to appeal that order after a final judgment. Notably, T3 cites no law providing such a general stipulation—only inferred as pertaining to the Panel's *composition* as opposed to the propriety of the District Court's incorrect order to arbitrate in Idaho—acts to waive appeal of the order compelling arbitration. Such a consequential waiver would need to be clear and unequivocal in regard to the right to "appeal." There was no "voluntary, intentional relinquishment" of the right to appeal on Issue 1.

D. "Harmless Error" Doctrine Has No Application.

Likewise, T3's arguments on "harmless error" are off base. I.R.C.P. 61 does not apply to subject matter jurisdiction. *Taylor v. Riley*, 162 Idaho 692, 706, 403 P.3d 636, 650 (2017) ("Neither Rule 61 nor the failure to object can remedy the court's lack of jurisdiction."). If the District Court lacked jurisdiction to consider T3's forum challenge, its order to arbitrate and everything resulting from that order is null and void. *See Nalder v. Crest Corp.*, 93 Idaho 744, 749, 472 P.2d 310, 315 (1970) (stating that a "judgment rendered without jurisdiction is void and unenforceable," and it

"is also fundamental that a writ of execution based on an invalid or void judgment is itself invalid."). The same is true when an arbitration panel lacks power because it was not properly formed according to the process stated in the parties' contract. *See Avis*, 791 F.2d at 25 ("The defect in the method used to select [the arbitrator] left him ***powerless*** to implement the Avis Agreement.") (emphasis added); *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 21 (Tex. 2014) ("An arbitration panel selected contrary to the contract-specified method lacks jurisdiction over the dispute."). As a result, even if the District Court had jurisdiction, the error is the same because SBS had an express contract right—a ***fundamental*** right under FAA § 5—to a specific process by which the arbitration would occur: a Dallas-administered proceeding in Dallas.[19] *See Avis Rent A Car Sys., Inc. v. Garage Emps. Union, Local 272*, 791 F.2d 22, 24 (2d Cir. 1986) (failure to strictly follow process in contract is a "fundamental error," since the contract "is the source of the arbitrator's power to render an award") (emphasis added); *Epic Sys. Corp. v. Lewis*, No. 16-285, 584 U.S. ___ (2018), 2018 WL 2292444, at *5 (U.S. May 21, 2018) (reaffirming "the Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms …'"). There is no leeway in FAA § 5's mandate and, as such, the only "trivial departure" ever found is when an arbitration organization fails to follow its internal procedures, as opposed to those stated in the parties' contract. *See Bulko v. Morgan Stanley DW Inc.*, 450 F.3d 622, 625 (5th Cir. 2006) (failure of NASD to follow internal qualifications). SBS's fundamental right was negated.

Accordingly, T3's attempt to shift the focus to convenience factors—*i.e.*, the ability to do discovery or call witnesses [*see* Resp. Br. at 22]—or its speculation that the same arbitrators "could

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[19] T3's contention that FAA § 5 cannot be the basis for vacating an award [*see* Resp. Br. at 20-21] is plainly contrary to the law. *See Brook*, 294 F.3d at 673 ("Several courts, relying on § 5, have determined that arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated.") (editing and citations omitted).

have" been appointed in a Dallas proceeding [*see* Resp. Br. at 21], are meritless. There is no doubt the District Court's order to submit the dispute in Idaho resulted in the wrong administrator and, further, T3's own lead counsel asserted on the record that, based on his long experience with the AAA, a Dallas-administered proceeding absolutely would have resulted in *different* arbitrators and very likely a different result with Texas arbitrators following Texas law. To quote Mr. Mulcahy:

> MR. MULCAHY: But I have dealt with the Triple A on there [sic] issue and here is the practical problem, *and this will happen*. The Triple A, you pay the fee, you file the demand for arbitration, you are assigned an administrator, the administrator then checks to make sure that the fees are paid and looks at the contract to find out whether or not it says Triple A, whether it says how many arbitrators and where it should take place, *and if the arbitration is to take place in Texas,* ***then they send it down to the Texas administrator and they pull arbitrators from Texas***, and if it is to take place in Idaho, they pull arbitrators from Idaho. … So you don't want a Texas arbitrator deciding whether it should be in Texas."

[*See* Tr. Vol. III at 48:23-49-19 (emphasis added).] T3's claim to the contrary now is not credible.

The Washington case T3 offers—*Saleemi v. Doctor's Assocs., Inc.*, 292 P.3d 108 (Wa. 2013)—is inapplicable because: (i) the contract in *Saleemi* did not require submission to a particular AAA office that would have resulted in different arbitrators; (ii) the court's jurisdiction was not at issue; and (iii) *Saleemi* appeared to rely heavily on Washington arbitration law. No court applying FAA or Texas law has adopted *Saleemi's* approach of punishing a party for not seeking interlocutory review[20] (and, either way, prejudice is inherent in violating FAA § 5).

To the contrary, federal courts have ruled that, due to the strong federal policy mandating arbitration occur once an agreement in general is found to exist, FAA § 16 "forbids" interlocutory review of a forum error. *See Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 303 (5th Cir. 2016) (citing authorities to decline consideration of appeal when a "motion to compel was granted, albeit not in the first-choice forum"). As such, T3's conjecture is meritless. It is axiomatic that an

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[20] Westlaw's cite check feature shows only Washington courts have followed *Saleemi*.

award issued without jurisdiction is void no matter how supposedly fair the improper proceeding was or whether one speculates the result would be no different in a proper forum. In fact, the Fifth Circuit recently threw out an award when a district court did not have jurisdiction to compel arbitration, even though the jurisdictional error (ripeness) was cured at the time of appeal and the arbitration had occurred in the proper forum in the meantime. *See Lower Colo. River Auth. v. Papalote Creek II, LLC*, 858 F.3d 916, 926 (5th Cir. 2017), *cert denied*, 138 S. Ct. 747 (2018) (no harmless error analysis, noting "a new arbitration [in the same AAA forum] could conceivably result in a different outcome").[21] The Fifth Circuit determined nothing could retroactively fix the jurisdictional error. 858 F.3d at 927. The same deficiency exists here.

Accordingly, this Court should reverse the District Court's order striking the Dallas forum, vacate the Arbitration Award, and require this dispute to be submitted to the Dallas office of the AAA for a new arbitration in compliance with the terms of the Distributor Agreement.

II. THE ATTORNEY-CLIENT PRIVILEGE ERROR REQUIRES VACATUR.

As to Issue 2, SBS's opening brief details the District Court's abuse of discretion with its attorney-client privilege ruling and how that gave T3 access to privileged documents that T3 used in the Arbitration and upon which the Panel expressly relied for its award. That error further tainted and rendered the Idaho arbitration invalid, which separately justifies vacating the award on "public policy" grounds. As to this Issue, T3 offers only misplaced waiver arguments and no legal support

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[21] A different outcome is more than "conceivable" in this case because submitting the dispute to a Dallas-administered arbitration requires the Dallas administrator to appoint arbitrators for a Dallas forum as opposed to the Denver office doing it for an Idaho forum. [*See* R. 7576.] *See also, e.g., Papalote Creek II, LLC v. Lower Colo. River Auth.*, No. A-16-CA-1097-SS, 2017 WL 6403113, at *3 (W.D. Tex. Aug. 25, 2017) (district court on remand from Fifth Circuit's *Papalote* decision declining to order parties to arbitrate before the same arbitrator a second time, providing instead that the AAA's selection procedures must be followed anew).

for the District Court's departure from I.R.E. 502. None have merit, but SBS will nevertheless simplify the review in terms of the documents at issue as provided below.

A. SBS Limits its Appeal to the Documents Identified by T3.

T3 incorrectly claims that SBS's privilege as to fourteen documents identified in the opening brief were waived by production because only seven match up by Bates label to the District Court's order. [*See* Resp. Br. at 24 n.10 (identifying Exhibits 157, 245, 267, 327, 336, 352, and 356 as matching).] The privilege was not voluntarily waived as T3 contends (and SBS reserves the right to litigate the matter further on remand or otherwise). In any event, to simplify the review at this point, SBS agrees to limit its arguments on Issue 2 to the seven documents identified by T3. Each were used by T3 in the Arbitration and alone require vacating the Arbitration Award. As such, the term "Privileged Documents" for the opening brief and this reply is hereby redefined to encompass only Exhibits 157, 245, 267, 327, 336, 352, and 356.

B. The Arbitration Award Can be Vacated on Public Policy Grounds.

T3 incorrectly asserts SBS "has not provided any legal basis" for vacating the Arbitration Award even if the District Court erred. [*See* Resp. Br. at 30.] As clearly stated in the opening brief, however, the legal basis is the strong public policy in Idaho (and everywhere) of protecting the sanctity of attorney-client privilege, which can be upheld in this instance only by vacating the award. [*See* App. Br. at 24-25.] Again, no court can enforce an award that would sanction a violation of public policy. *See Aramark Facility Servs. v. Serv. Emps. Int'l Union*, 530 F.3d 817, 823 (9th Cir. 2008); *see also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42-44 (1987). Since the District Court erred in requiring disclosure of the Privileged Documents, all fruits of that error—*i.e.*, the Arbitration Award—are likewise negatively affected and should be rendered invalid. Upholding the Arbitration Award when the proceeding was tainted by the District Court's

erroneous attorney-client privilege ruling would sanction a violation of the dominant Idaho policy expressed in I.R.E. 502 and I.C. § 9-203 that mandates preserving the privilege "inviolate."

Rather than address the legal basis presented by SBS, T3 improperly tries to re-frame the issue as involving an *arbitrator's* "discovery decisions" under FAA § 10(a)(4). [Resp. Br. at 30.] That is not the issue appealed and T3's cases are on that topic are thus irrelevant. The Panel did not make the discovery ruling. The District Court made the ruling, thereby subjecting the propriety of its order to ordinary standards of review on appeal and the resulting Award to vacatur on public policy grounds, no less than an improper disclosure of attorney-client privilege at trial demands vacating a judgment. *See State v. Iwakiri*, 106 Idaho 618, 621, 682 P.2d 571, 574 (1984); *Cribbee v. McDermott*, 95 Idaho 844, 845, 521 P.2d 1023, 1024 (1974). T3 cannot complain if that is the result, as it was T3 itself that brought the issue to the District Court for a ruling.

C. SBS Did Not Waive a Right to Appeal the Privilege Error.

As throughout its brief, T3 urges waiver and, again, the argument misses the mark. This time T3 asserts waiver based on: (i) SBS not objecting to documents in the Arbitration on privilege grounds; (ii) SBS not arguing to the District Court that the Arbitration Award should be vacated under FAA § 10 due to the attorney-client privilege error; and (iii) broad "subject matter" waiver otherwise. As explained below, none of these arguments are meritorious.

First, SBS was not required to object on privilege grounds during the Arbitration because the issue was already foreclosed. The District Court ruled (incorrectly) that the documents were not privileged. Making an objection during the Arbitration would only have subjected SBS to antagonizing the Panel. Upon such an objection, T3's counsel would have set the District Court's order in front of the Panel, who then would view SBS's counsel with mistrust and suspicion for trying to get the Panel to rule contrary to the District Court. As such, due to the principle which provides a party in court need not object further after a pre-trial ruling, there was also no need for

SBS to object in the Arbitration on privilege grounds (as opposed to relevance, hearsay, etc.) in order to preserve error. *See, e.g.*, *Kirk v. Ford Motor Co.*, 141 Idaho 697, 702, 116 P.3d 27, 32 (2005) ("If, however, the trial court unqualifiedly rules on the admissibility of evidence prior to trial no further objection is required to preserve the issue for appeal."); *State v. Hester*, 114 Idaho 688, 699, 760 P.2d 27, 38 (1988) (party must object as evidence is presented only "[w]here no advance ruling has been obtained"); *see also Davidson v. Beco Corp.*, 112 Idaho 560, 564, 733 P.2d 781, 785 (Ct. App. 1986) (listing rationales for why repeated objections may be prejudicial), *modified on other grounds*, 114 Idaho 107, 753 P.3d 1253 (1987).

Second, SBS did not need to (and could not) raise Issue 2 to the District Court by a motion to vacate. The error stems solely from the District Court's interlocutory order on attorney-client privilege, not anything the Panel did. FAA § 10 provides the "exclusive" grounds for vacating an award due to an arbitrator's abuse of authority, *see Hall Street*, 552 U.S. at 583-84, which, as T3 itself argues in its brief, does not include attorney-client privilege. [*See* Resp. Br. at 30 (no basis under FAA § 10 to vacate award).] Thus, asking the District Court to vacate the Award based on the court's own attorney-client privilege error would have been tantamount to asking the District Court to overrule itself. That is not required to preserve appeal rights. *See In re Guardianship of Doe*, 157 Idaho 750, 758, 339 P.3d 1154, 1162 (2014) (party not required to seek reconsideration to preserve appeal). T3's flip-flop on what can be vacated under FAA § 10 demonstrates there is no waiver. SBS had no right to appeal the District Court's attorney-client privilege ruling until after a final judgment for T3. *See* I.A.R. 11(a)(1) (no right to appeal interlocutory orders), 17(e)(1)(A) (interlocutory orders properly appealed with final judgment). Once the District Court confirmed the Award and entered judgment for T3 [*see* R. 12934-36], then SBS had a right to appeal and, assuming this Court agrees the District Court erred as to I.R.E. 502, SBS can seek to overturn the District Court's confirmation on public policy grounds.

Finally, T3's request for this Court to make a factual finding now of broad "subject matter" waiver is not based on Idaho law. The rule T3 cites—I.R.E. 510—pertains to whether a partial disclosure waives privilege as to a particular communication, not entire subject matters. *See, e.g.*, *State v. Wilkins*, 125 Idaho 215, 220, 868 P.2d 1231, 1236 (1994) (disclosure by defendant's psychiatrist, made without naming defendant, not "a significant part" of privileged communication sufficient to constitute waiver under I.R.E. 510).[22] Rather, as demonstrated by T3's citation to a federal Eighth Circuit case [*see* Resp. Br. at 31], T3 bases its argument on ***Federal*** Rule of Evidence 502(a), which expressly allows for a waiver of nondisclosed additional communications on the same "subject matter" when "they ought in fairness to be considered together." Idaho has no identical rule and so T3 cannot rely on federal precedent.[23] Furthermore, a subject matter waiver would not occur here even under federal law. That results only when a party attempts to use privilege as both a sword and shield. *See Goss Int'l Americas, Inc. v. MAN Roland, Inc.*, No. 03-CV-513-SM, 2006 WL 1575546, at *2 (D.N.H. June 2, 2006) (explaining rule and citing federal authority). SBS did not seek to use its privilege as a sword in any regard and, further, the record shows that any intentional de-designation of documents was done only after a close second-level review to ensure they were *not privileged*, in a good faith effort to narrow the dispute for the

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[22] The Comment to I.R.E. 510 further demonstrates the rule is not meant to be used for subject matter waivers, stating: "Rule 510 recognized the rule at common law that the privilege of confidentiality terminates when the holder by his own act destroys that confidentiality. The rule must be read and applied with reference to what the privilege protects. For example, the attorney-client privilege protects only confidential communications. However, the underlying fact may still be discovered and testimony regarding the underlying facts does not waive the privilege as to the communications." M. CLARK, REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE, C510, p.1 (Dec. 16, 1983, Supp. 1985).

[23] See, *infra*, page 26 at footnote 24 for legal cite regarding inability of Idaho district courts to rely on federal cases unless the Idaho and federal versions of a rule are "identical."

District Court. [*See* R. 10272 (¶ 31) (SBS's former counsel explaining reasons).] There was no subject matter waiver—or waiver of any kind—in regard to SBS's privilege.

D. The District Court Abused its Discretion.

As to the substance of the District Court's ruling on attorney-client privilege, there is no dispute by T3 that I.R.E. 502 does not state a presumption against in-house lawyers (or make any distinction among "lawyers"). Rather, T3 justifies the District Court's order primarily on the basis of federal cases. [*See* Resp. Br. at 32.] Idaho law does not support doing so in this instance.

Indeed, it is well recognized that, while district courts in Idaho have discretion in their evidentiary rulings, the power to exercise such discretion does not include altering or disregarding specific rules and standards. In 2009, this Court quoted with approval the following by Judge Burnett regarding the type of "broad discretion" asserted by T3:

> The law of evidence is structured by rules, forged by centuries of experience and continually tested against evolving notions of fairness and truth-seeking. Our Supreme Court recently has adopted a detailed and painstakingly drafted formulation of such rules. *See* Idaho Rules of Evidence (effective July 1, 1985). These rules are not mere precatory guides to discretion; they are standards controlling the outcome of evidentiary questions. A trial judge possesses no 'discretionary' authority to alter or to disregard specific standards—particularly in criminal trials, where these standards impart real meaning to an accused's right to a fair trial. Discretion is properly exercised only when a rule of evidence calls for it.

State v. Watkins, 148 Idaho 418, 421, 224 P.3d 485, 488 (2009) (quoting *State v. Maylett*, 108 Idaho 671, 674, 701 P.2d 291, 294 (Ct. App. 1985)). The principle articulated by Judge Burnett should be equally applicable to protect a person's right to a fair trial in a civil case or arbitration. Contrary to the rule of *Watkins*, however, the District Court here improperly modified I.R.E. 502 to overrule SBS's privilege by incorporating a presumption against in-house counsel that is recognized by only a small number of federal district courts. [*See* R. 2221.] Those courts, however, are expressly allowed to do so under Federal Rule of Evidence 501, which provides that:

> The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court … [or state law when it supplies the rule.]"

The Idaho Rules of Evidence do not grant such power to Idaho courts. Thus, the District Court had no authority to rely on federal cases to create a new presumption not stated in I.R.E. 502.[24]

There is no justification for such a presumption either. The reason I.R.E. 502 does not make a distinction between in-house and outside lawyers is because the rule was drafted to incorporate the concepts of protecting attorney-client privilege articulated by I.C. § 9-203, which states:

> There are particular relations in which it is the policy of the law to encourage confidence and to *preserve it inviolate*; therefore … [a]n attorney cannot, without the consent of his client, be examined *as to any communication* made by the client to him, or his advice given thereon in the course of professional employment. The word client used herein shall be deemed to include a person, a corporation or an association.

I.C. § 9-203(2) (emphasis added). Accordingly, I.R.E. 502(5) provides the privilege applies to *any* confidential communication between lawyer and client regardless of whether it contains facts, so long as it is made in "furtherance of the rendition of professional legal services." Notably, I.R.E. 502 does not define "professional legal services," instead leaving it to the Idaho Rules of Professional Conduct ("IRPC"). Under the IRPC, professional legal services include far more than "pure legal advice," stating in the preamble that "a lawyer performs various functions" before going on to list a few of those as advisor, advocate, negotiator, and evaluator of a client's legal affairs. *See* IRPC, Preamble at [2]. The rendition of professional legal services thus expressly

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[24] An Idaho district court may follow federal cases when interpreting Idaho rules only when the applicable versions contain identical language. *See Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 796, 41 P.3d 220, 224 (2001) ("The above-quoted language in *Chacon* stated our preference for interpreting the Idaho Rules of Civil Procedure in conformance with the interpretation placed upon the same language in the federal rules. That preference is obviously limited to situations in which our rules and the federal rules contain identical language.").

includes communications between lawyer and client that may not appear on their face to be requesting or providing legal advice. The full context of the communication matters and the scope of privilege is far broader than T3 (or the District Court) recognized. In particular, a lawyer acting as a negotiator for their client—as Dunlap did for SBS in trying to resolve account protection—is expressly rendering a professional legal service. Accordingly, the District Court abused its discretion by construing I.R.E. 502 to contain a presumption against in-house counsel and limiting the privilege to "pure legal advice."

T3 argues as well that none of the documents cited in the Arbitration Award are privileged [*see* Resp. Br. 32-35], based on its own narrow view of I.R.E. 502. However, it is clear that both documents cited by T3 fall well within the privilege. Exhibit 157 is a communication related entirely to Dunlap's negotiations with T3—expressly a "professional legal service" under the IRPCs—and his efforts to get information for those negotiations. It matters not how one parses the words in the email, Dunlap was making a confidential internal communication in furtherance of a professional legal service. Further, in what T3 characterizes as a moment of "frustration," Dunlap makes a statement about an account protection "rule" that T3 relied on to ascribe bad faith to SBS globally as to some unstated interpretation of account protection. That is exactly the type of broad prejudice the Tenth Circuit found exists with improper disclosure of attorney-client privileged communications. *See Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 706 (10th Cir. 1998) (finding "[t]here is too great a risk that a jury would accord significant or undue weight to the *testimony and admissions of a party's own lawyers*") (emphasis added). Further, such a narrow view discourages full and frank internal communication, which is the entire purpose of the privilege. As to Exhibit 327, Dunlap is plainly expressing his views as an attorney about a potential legal "risk" he foresaw. T3's description of that as being a communication of facts is contrary to the legal sense that is illustrated when Dunlap states what he thought "Ms. Teply *may* claim or

request" in the future. Regardless, Idaho law provides that *any* communication—even facts alone[25]—are privileged if the overall purpose and context relates to a professional legal service.

Notably, T3 does not offer any argument against the other five Privileged Documents, which as shown in the opening brief, are all internal communications made in the context of an overall legal service provide by Dunlap to his client, SBS. [*See* App. Br. at 22-23.] Accordingly, T3 fails to refute that the District Court abused its discretion.

E. The Award Facially Demonstrates Prejudice Against SBS.

T3 ends with the rote claim that the District Court's error was "harmless" in regard to attorney-client privilege [*see* Resp. Br. at 36], yet that is contradicted by the Award itself. All seven of the re-defined Privilege Documents were submitted to the Panel, which demonstrates that T3 considered the Privilege Documents material to prove its claims. That alone improperly and materially taints the proceeding with violations of public policy. Furthermore, at least two of the seven redefined Privileged Documents are still directly *quoted* by the Panel throughout its Award:

- Exhibit 157 is quoted at Paragraphs 32, 111, and 129 of the Interim Award [R. 8122, 8137-38, 8141-42]; and
- Exhibit 327 is quoted at Paragraphs 32 and 111 [R. 8122, 8137-38].

That demonstrates the Panel was expressly relying on those documents for a link in the chain of its decision-making, or else there would be no need to cite them. As this Court has noted, the prejudice caused by forced disclosure of attorney-client privilege is "obvious" without undertaking a speculative analysis of whether a decision maker needed to rely on the privileged information. *See State v. Iwakiri*, 106 Idaho 618, 621, 682 P.2d 571, 574 (1984). In any case, the prejudice here is far more than a possibility – it is evident on the face of the Panel's award.

[25] See, *supra*, page 24 at footnote 22 quoting Comment to Rule 510 on communication of facts.

The Arbitration Award must be vacated to vindicate Idaho's well-established dominant public policy of preserving the attorney-client privilege "inviolate." *See* I.C. § 9-203; I.R.E. 502.

III. THE PANEL EXCEEDED ITS CONTRACTUAL POWER UNDER FAA § 10(A)(4).

As noted previously, SBS specifically bargained for a Dallas-administered arbitration that T3's own counsel acknowledged would have resulted in different Texas-based arbitrators. The Panel appointed by the Denver administrator had no prior experience with Texas law. That lack of experience led the arbitrators to disregard or otherwise misconstrue Texas law. That is not the type of proceeding for which SBS bargained. Nevertheless, even if there was no error by the District Court in regard to Issues 1-2, the Panel's disregard of express limitations on its power—as reflected by (i) the contractual mandate to apply Texas law and limit monetary relief to "actual damages for commercial loss" and (ii) the FAA's further mandate to not act irrationally or violate public policy—separately require vacating the Award. T3's responses do little more than seek to muddy the water with nonsensical propositions and misstatements of law, and should be rejected.

A. The Panel's "Constructive Termination" Ruling Violates the FAA.

Before addressing the substance of T3's misplaced response on "constructive termination," it is noteworthy to point out that T3 avers in that section of its brief that the arbitration clause encompasses all disputes "related to the T3 Distributor Agreement, *validity thereto* and relationship to the parties." [Resp. Br. at 38 (emphasis added).] T3 thus acknowledges that Issue 1 was subject to arbitration, which renders the Idaho proceeding void without any need to consider the improper "constructive termination" ruling (or, in fact, Issues 2-3 at all).

Nevertheless, as to the substance, T3's description of the Panel as having broad all-encompassing power to rule on any issue is not accurate. The Panel's power was specifically limited by the contract to deciding only what is actually "*submitted*." [*See* R. 7717-19 (¶ 21(B)).] If the Panel had any power then, it was only to decide T3's revocation of acceptance theory within

the further limits of Texas law and "actual damages for commercial loss." Further, although T3's initial arbitration demand was broad, that was scaled back in the pre-hearing brief to only a "revoke acceptance" theory [*see* R. 7838], which defined what was at issue for the actual arbitral hearings. The Panel considered and rejected T3's theory. [*See* R. 8134-35 (¶¶ 97-98).] Its job was then "functus officio" in that regard. Allowing arbitrators to award based upon a new theory never presented by a party deprives the other side of an opportunity to refute that theory – particularly when the new theory is not even grounded in the parties' choice of law, which FAA § 10(a)(4) mandates an arbitrator to apply. The cases cited by T3 [*see* Resp. Br. at 38-39] do not support extending arbitrator power *that* far, and the AAA rules do not allow a party to seek reconsideration of the merits of a ruling. [*See* R. 8272 (Rule 50).] The only recourse is asking a court to vacate.

Even if the Panel could go searching for a replacement theory on T3's behalf, the Panel indisputably was constrained to doing that within the confines of Texas law. The Panel violated that clear limit on its power by declaring a "constructive termination" based on Connecticut/New Jersey statutes. In response, T3 speculates the Panel was "looking to out-of-state case law to ascertain how a Texas court may rule on the issue of constructive termination." [Resp. Br. at 39.] There is no record support for that explanation. Regardless, arbitrators clearly do not have such authority as a matter of law. *See Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672-74 (2010) (rejecting ability of arbitrator to act as "a common-law court to develop what it viewed as the best rule to be applied" to a dispute). Indeed, it is expressly a "manifest disregard" of the law and exceeds arbitrator power under FAA § 10(a)(4). *See id.* at 672 n.3.

T3 further offers—for the first time ever—that Texas law "suggests" a constructive termination theory is possible based on a Texas case referring to a de facto termination. [*See* Resp. Br. at 40 (citing *Kawasaki Motors Corp. U.S.A. v. Texas Motor Vehicle Comm'n*, 855 S.W.2d 792 (Tex. App. 1993).] That case, however, involved statutory violations of the Texas Motor Vehicle

Code, which do not apply here. Further, T3's "suggestion" fails because a de facto termination (one occurring "in fact," such as the complete seizure of a motorcycle dealership in *Kawasaki*)[26] is far removed from the notion of a constructive (or "implied")[27] termination. An *implied* termination directly conflicts with the limitation of "*ACTUAL* DAMAGES FOR COMMERCIAL LOSS." [R. 7717 (¶¶ 17(C)) (emphasis added).] In addition, T3's business undisputedly generated more profits after the alleged termination than before (and still does today). [*See* R. 8128-29 (¶ 68), 19632 (graph illustrating commission growth).] As such, even if a "constructive termination" were possible under Texas's contract law (it is not) or the Panel could create new Texas law (it clearly cannot), the Award would still violate FAA § 10(a)(4) for disregarding undisputed facts of legal significance. *See Coutee v. Barington Capital Grp., L.P.*, 336 F.3d 1128, 1133 (9th Cir. 2003) (courts may not confirm an award that is legally irreconcilable with undisputed facts).

T3's final contention—that a constructive termination ruling could have alternatively been made on a "lost business value theory" [Resp. Br. at 41]—fails as well because it confuses a measure of damages with the Panel's theory of implied loss. The case T3 cites, *Wellogix, Inc. v. Accenture, LLP*, 823 F. Supp. 2d 555 (S.D. Tex. 2011), recites that:

> Lost business value is an appropriate *measure of damages* *when* *business value is completely or almost completely destroyed*. … If future profits are included within

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[26] In *Kawasaki*, after the motorcycle dealer (D.K.D.) defaulted on its loan, the manufacturer sent agents to physically seize and remove D.K.D.'s entire inventory, computer systems, and dealership files. 855 S.W.2d at 793. In an administrative proceeding, the Texas Motor Vehicle Commission found such a seizure was a "de facto" termination of the dealership that violated notice provisions of the Motor Vehicle Code. *Id.* at 796. That statute does not apply to a commissioned sales agent soliciting orders for business checks and forms. Further, nothing was physically seized from T3's business and T3 continued operating the same as it always had before.

[27] *Compare Eaves v. Denton Cty.*, 667 S.W.2d 628, 629 (Tex. App. 1984) (de facto defined as "… existing in fact and in opposition to an assumed or fictious state of affairs"), *with Daniels v. State*, 674 S.W.2d 388, 392 (Tex. Crim. App. 1988) (defining constructive as generally meaning "… inferred, implied, made out by legal interpretation").

> the calculation of lost business value, it is impermissible to obtain damages awards for both lost business value and lost future profits.

Id. at 569 (emphasis added). As a result, Texas law requires a business to be "completely or almost completely destroyed" before lost business value damages are considered. Given the undisputed fact that T3 remained a Safeguard distributor (as it does today) making substantially more after the alleged breaches, the only way the Panel could get to a lost business value measure of damages is by using a theory of constructive (or "implied") termination that explicitly was not founded on Texas law. The measure of damages awarded for such a presumed total loss of T3's entire business (*i.e.*, $566,143.61) is *dependent* on the Panel's abuse of power, not a substitute for it.

Accordingly, the Panel exceeded its authority under FAA § 10(a)(4) by declaring a "constructive termination" and the District Court should have vacated the Arbitration Award.

B. Awarding Both Lost Business Value and Future Losses is Impossible under Texas Law, Public Policy, the Contract, and Basic Rationality.

The Panel's award is also completely irrational because T3 was granted not only past lost profits and its entire business value based on the implied termination theory, but also speculative losses for 8-12 years into the future. The *Wellogix* case quoted in the previous section holds that is not possible under Texas law, nor is it rationally possible as a matter of logic. *See* 823 F. Supp. 2d at 569 ("If future profits are included within the calculation of lost business value, it is impermissible to obtain damages awards for both lost business value and lost future profits.").[28]

T3's response seeks to sow confusion on this point in the hopes that it may sustain the Award. Specifically, T3 asserts the $373,473.76 amount—expressly awarded as "<u>lost future commissions</u>" for IBF future sales [*see* R. 8134 (¶ 94)]—is "not the same as Safeguard being

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[28] Indeed, T3 avers in a later section of its response brief that the valuation metric used by Taylor to calculate lost business value damages of $566,143.61 is "simply a way of valuing the *future net profits* through a present value calculation." [Resp. Br. at 48 (emphasis added).]

required to perform in the future (e.g. rotate commissions to T3 going forward)." [*See* Resp. Br. at 42.] That is entirely nonsensical. The present value of a "future commission stream" on IBF sales in the future, as T3 explicitly labels it [*see id.*], is merely the payment now of what is speculated to be due under the contract's account protection rights in the future. If, however, there are no rights remaining because T3 elected a discharge and is paid the full value of its entire contract—no different than SBS buying out all of T3's account protection rights—then the addition of a "future commission stream" that would exist *only because of those account protection rights* is an irrational double recovery that plainly exceeds "actual damages" for commercial loss. Under the FAA, no arbitrator has power to: (i) violate an express contract limit; (ii) grant a double recovery against public policy; or (iii) issue an award that is "completely irrational." [*See* App. Br. at 9-10.] That is what occurred here, however, by the Panel's award of:

1. $321,657.77 in "*past* commissions that SBS failed to pay";
2. $566,143.61 as "the *current value* of the Distributor Agreement"; and
3. $373,473.76 as "the present value of the *future commissions* for IBF's sales."

[R. 8135 (¶ 101) (emphasis added).] Numbers 2 and 3 plainly violate *Wellogix* and rationality. Indeed, not a single case cited by T3 involved a business recovering all three categories. Each awarded only past and/or future losses under a contract with a stated term (or employment arrangement).[29] When the third category is added, future losses become unavoidably duplicative.

As well, T3 cannot cure that impropriety by asserting the amounts are not "duplicative" in the sense that future losses are based on *IBF* sales and market value is based on *T3* sales. [*See* Resp. Br. at 44.] First, T3 points to nothing in the record showing Taylor's market value was so limited. Regardless, such a distinction would be meaningless because all damages are still based

[29] [*See* Resp. Br. at 42-43 & n.15 (citing only cases that lack all three damage categories).]

on *T3's* account protection rights, upon which T3 asserts its entire business is founded. [Resp. Br. at 41.] A broad interpretation of T3's rights, therefore, is the *only* means by which T3 could be entitled to commissions on IBF sales at any time – past, present, or future. The Panel ruled (and it was undisputed) that the value of T3's entire "Distributor Agreement" was $566,143.61. T3 cannot re-characterize the additional $373,473.76 awarded by the Panel expressly as "future" lost commissions to be a "lost asset value" without running afoul of the rule it cites against re-weighing facts. [*See* Resp. Br. at 30 ("courts have 'no authority to re-weigh the evidence'") (citing *Coutee*, 336 F.3d at 1134).] T3 is ***bound*** by the Panel's finding as to the market value of its contract. So was the District Court, which erred in re-characterizing the damages. [*See* R. 12747.]

T3's final points—that there are three different theories of liability and there was an alleged "stipulation" to damages by SBS [*see* Resp. Br. at 43]—are empty contentions. First, the damages are *exactly* the same for all theories.[30] T3 itself argued there are no "factual allegations asserted as part of the tortious interference claim that were also not asserted as part of the breach of contract and [DTPA] claims" to get fees for unsegregated claims. [R. 8179.] T3 is estopped from claiming differently now. Further, Texas law rejects the contention that damages awarded on different theories (tort or statute) are immune from contract challenges. *See 1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 387 (Tex. 2011) (statutory claim sounds in contract when only injury is "economic loss" to subject of contract); *Palla v. Bio-One, Inc.*, 424 S.W.3d 722, 726 (Tex. App. 2014) (damages for tortious interference same as for contract interfered with). As T3 asserts, the sole alleged economic loss under all theories was to T3's contractual account

[30] [*See* R. 8138 (¶ 112) ("T3's actual damages for tortious interference are identical to those recoverable under its breach of contract claim …."), 8142 (¶ 133) ("T3 seeks the same categories of damages for [DTPA] as it seeks in contract damages …."), 8143 at 34:12-14 (finding SBS liable for all three claims in the same precise amount of $1,475,707.53).]

protection. Accordingly, the damages are subject to the same deficiencies regardless of the theory of liability. Second, the "stipulation" claimed by T3 is a blatant misrepresentation of the record. The quote cited by T3 goes on to state: "… *The parties disagree, however, what T3's obligations are by virtue of the termination.*" [R. 8151 (emphasis added).] Further, SBS "stipulated" to nothing when it communicated with the Panel on the issue. [*See* R. 8148.]

Accordingly, the Arbitration Award must be vacated for the fundamentally irrational and duplicative nature of an award that grants both constructive termination damages and future commissions, which is a violation of the Panel's authority under FAA § 10(a)(4).

C. The Gross Profits Issue is a Matter of Texas Law, Not a Factual Dispute.

All the cases T3 cites in opposition to the gross profits matter are tangential and unrelated to SBS's argument. At best, T3's cases stand for the proposition that there is an exception to the "net profit" rule when a breach caused a party to lose business for which it had already incurred overhead costs.[31] In that instance, a party is made whole by gross profits since it already suffered the expense that otherwise reduces a gross profit to a net profit. The opposite exists here. T3 claimed lost profits based on a right to receive commissions for doing nothing itself – *i.e.*, on sales made by IBF/DocuSource. Further, a commissioned sales agent like T3 pays nothing out-of-pocket. A "commission" is simply remitted by SBS to T3 after the necessary deductions. By

[31] *See, e.g.*, *Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 888 (Tex. App. 2006) ("However, Hicks testified that Blind Maker's net profits could be determined by subtracting overhead from gross margins. When a defendant's actions cause a reduction in the extent of business done by the injured party, but does not create any reasonable opportunity for the injured party to reduce its expenses, the defendant is entitled to no reduction in the damages awarded against him with respect to overhead costs. … Here, the jury found that Springs committed fraud, and that fraud left Blind Maker with no way to reduce its expenses—Blind Maker's operating costs remained basically the same but Springs refused to sell Blind Maker more material, to buy back Blind Maker's unsold inventory, or to provide Blind Maker with service. Under these circumstances, gross profits are an appropriate measure of lost-profit damages.").

awarding gross profits on IBF/DocuSource's sales instead of calculating a commission that would be due, T3 is plainly overcompensated.

The disregard by the Panel was not a mere factual error, but one of Texas law. Indeed, the testimony T3 relies upon supports SBS's position, as the witness further explained:

> ARBITRATOR KATO: Despite what Mr. Schossberger is saying between commissions and gross profits, they are the same guy.
>
> THE WITNESS: *They are the same in my report*. I'm treating the -- I'm not sure, but if our question is equating commissions to gross profit, then I can give you probably more specific answer. But I didn't think that was where you were focusing.
>
> Q. BY MR. SCHOSSBERGER: I'm saying *gross profit is not the same as net profit*.
>
> A. *Of course not*.
>
> Q. And gross profit, the number up there, is not the net profit of IBF, is it?
>
> A. No. IBF, I'm assuming, would have their other -- whatever their ongoing costs are. They have rent for their facility, they are going to have their fixed overhead just like any company would have. *That's the gross profit that went to IBF on the sale of the -- to the T3 protected accounts*.

[R. 7900 at 1668:14-1669:12 (emphasis added).] Clearly, as Arbitrator Kato inquired and Taylor confirmed, Taylor was simply equating gross profits to a commission under the contract. [*See also* R. 7895 at 1603:11-12 (Taylor referring to "… the $315,000 on IBF's gross profit on sales to protected customers"), 1604:5-6 ("the net commission or gross profit" of IBF), at 1605:5-6 ("… and the gross profit to the three customers").] Further, Taylor acknowledged he did not "know the mechanics" of how a commission is paid to distributors under the contract [R. 7895 at 1667:24], and thus could not have been purporting to offer a number for "commissions" due under the contract. He used gross profits instead. The only question is whether the Panel could award Taylor's gross profit figures in the face of clear legal authority provided by SBS that Texas law

allows only a net profit to be awarded in this situation. The Panel could not do so without manifestly disregarding the Texas law. [*See* App. Br. at 35 (citing *Duferco* standard).]

Accordingly, the Panel exceeded its powers and Arbitration Award should be vacated.

D. Future Damages Remain Unsupportable Given the Monthly Term.

The additional reason SBS argued that future damages should be rejected is based on the contract having an undisputed "month-to-month" term. Under the FAA, such an undisputed fact is another substantive limitation on arbitrator power. *See Coutee*, 336 F.3d at 1133.

In response, T3 makes similar arguments as before. First, the existence of three different liability theories is irrelevant when, as here, the damages all compensate the same "economic loss." [See, *supra*, pages 34-35]. Second, the cases T3 offers to suggest a contract of indefinite duration is not subject to at-will termination do not actually support that proposition.[32] Third, the condition precedent to renewal in Paragraph 10(F) of the Distributor Agreement could be initiated only by T3 providing "written notice at least sixty (60) days prior to the end of the current term," not by SBS. [*See* R. 7711 (¶ 10(F)).] T3's own testimony conclusively establishes there was no dispute that T3 never provided notice such that, as a result, the Distributor Agreement had a monthly term and either side could terminate at will. [*See* R. 7877-78 at 1261:18-1262:2 (Teply's testimony).] As a matter of law, that renders future damages for 8-12 years legally impossible. [*See* App. Br. at 37-38 (citing Texas cases presented to the Panel in SBS's post-hearing briefing).] Finally, the right

[32] The cases T3 relies on [*see* Resp. Br. at 50 & n.19] involved rights relative to the existence of a physical item, such as an airport or hospital, or an event that could be measured (like the expiration of a Yellow Pages directory), rather than "continuing performance" as here. Further, the Fifth Circuit opinion cited by T3 distinguishes those cases on the ground that ordinary "default and breach provisions 'are not the kind of determinable events that transform a contract of indefinite duration into one of definite duration,' in part because they simply state a fundamental principle of contract law: a material breach may terminate a contract." *Fluorine On Call, Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 856 & n.6 (5th Cir. 2004). That is controlling here as well.

to four years of post-termination "repeat" commissions at 50%—which, notably, the word "repeat" plainly reflects it was limited to T3's *own* sales only—is conditioned on T3: (a) not competing against SBS; and (b) returning all trade secrets, confidential information, and customer accounts. [*See* R. 7714 (¶ 14(B)).] T3 elected a *discharge* from all such obligations (while being allowed to misappropriate SBS's intellectual property). No post-termination benefits could rationally follow.

T3 then offers that, notwithstanding a failure of all its arguments, the Panel's award still must be confirmed because the Panel was "arguably" interpreting the contract. [*See* Resp. Br. at 51.] What that ignores, however, is the fact that arbitrators have no power to interpret unambiguous provisions or disregard undisputed facts that have legal significance. *See Coutee v. Barington Capital Grp., L.P.*, 336 F.3d 1128, 1133 (9th Cir. 2003); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988). Moreover, T3 argues for purposes of Issue 1 that Paragraph 21(C) allows a court alone, not an arbitrator, to "interpret" the contract (as opposed to ruling on "validity"). [*See* Resp. Br. at 25; see also, *supra*, page 8 at footnote 11.] T3 cannot have it both ways. It must concede either that Issue 1 was subject to arbitration or that the Panel could not disregard unambiguous provisions under the supposed guise of "interpreting" them.

The month-to-month term in Paragraph 10(E) is plain and was undisputed. Accordingly, the future damages must be vacated on this ground as well.

E. Awarding Doubled Attorneys' Fees and Litigation Expenses Exceeded the Arbitrators' Power Regardless of Incorporated AAA Rules.

Contrary to T3's response in support of the Fee Order, SBS does *not* argue the Panel had no authority to award costs or fees,[33] only that its authority was constrained to Texas law with the further limitation of "actual damages for commercial loss." Notably, T3 does not dispute the Panel

[33] T3's cases cited at page 55 of the Respondent's Brief are irrelevant for that reason.

went beyond Texas law in awarding litigation costs or that the attorneys' fees were doubled beyond anything actually "incurred" by T3. [*See* Resp. Br. 55.] That requires vacating the Fee Order.

T3 nevertheless seeks to uphold the Fee Order through a misplaced contention that the Panel could rely on AAA Rule 47. That is not supported by the AAA rules or well-established arbitration law. First, incorporated AAA Rule 47 explicitly defers back to the parties' contractual limitations by stating in subsection (a), before addressing fees and costs, that:

> The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and *within the scope of the agreement of the parties*, including ….

[R. 8272 (emphasis added).] Second, as a matter of law, the express limitations stated in a contract control over any procedural rules incorporated by reference. This Court has concluded as much regarding the same AAA rule at issue here, *see Moore v. Omnicare, Inc.*, 141 Idaho 809, 817-18, 118 P.3d 141, 149-50 (2005) (holding arbitrators could not use former version of Rule 47 to award fees), as has the Texas Supreme Court in even more stringent terms. *See Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 24 (Tex. 2014) (ruling AAA rules incorporated by reference do not apply as "gap-filler"). Indeed, the Texas Supreme Court in *Americo Life* held that, when a contract speaks to a subject, it controls the entire issue even if incorporated AAA rules do not conflict. *Id.* As a result, the Panel could not rely on AAA Rule 47 to go beyond the contractual mandate to apply Texas law to all substantive matters[34] or to exceed the limit of "actual damages for commercial loss."

[34] Attorneys' fees are a substantive matter governed by the Texas choice of law [*see* App. Br. at 39 (citing authority)] and, further, Texas law applies a contract's limitations on remedies to attorneys' fees no less than any other amounts that can be awarded. *See, e.g.*, *City of Sealy v. Town Park Ctr., LLC*, No. 01-15-00929-CV, 2016 WL 1590302, at *2 (Tex. App. Apr. 19, 2016) (ruling contract with city that limited remedies to injunctive relief and specific performance barred attorneys' fees since those are a "remedy") (citing *1/2 Price Checks Cashed v. United Auto Ins. Co.*, 344 S.W.3d 378, 389 (Tex. 2011) and *Daly v. River Oaks Place Council of Co–Owners*, 59 S.W.3d 416, 423 (Tex. App.–Houston [1st Dist.] 2001, no pet.)).

Therefore, at a minimum, the Panel exceeded its authority in granting expert costs not allowed by Texas law and doubled attorneys' fees. The Fee Order must be vacated.

IV. T3 IS NOT ENTITLED TO RECOVER ATTORNEYS' FEES FOR THIS APPEAL.

T3 claims attorneys' fees incurred on this appeal based on two Texas statutes related to the underlying claims in arbitration. [*See* Resp. Br. at 56.] However, neither statute allows for fees in post-arbitration proceedings.[35] Rather, Texas law deems a motion to confirm or vacate an arbitration award to be separate from the underlying claims. *See Kermacy v. First Unitarian Church of Austin*, 361 S.W.2d 734, 736 (Tex. Civ. App. 1962) (underlying claims "merge[] in the award"; no attorneys' fees for confirming award); *see also D.R. Horton-Texas, Ltd. v. Bernhard*, 423 S.W.3d 532, 536 (Tex. App. 2014) (no attorney's fees on "appeal" of award allowed); *Int'l Bank of Commerce-Brownsville v. Int'l Energy Dev. Corp.*, 981 S.W.2d 38, 54 (Tex. App. 1998) (CPRC § 38.001 provides "no basis for recovery of attorneys' fees in a successful defense against an action to vacate an arbitration award"). As such, the FAA is the only statute that could allow attorneys' fees to be granted for confirming or vacating an award, but it does not. *See* 9 U.S.C. §§ 1-16; *see also Pure Line Seeds, Inc. v. Gallatin Valley Seed Co.*, No. 1:14-CV-00015-EJL, 2014 WL 6673921, at *5 (D. Idaho Nov. 24, 2014) (citing authority to conclude, "absent an express provision in the contract, the FAA does not authorize an award of attorney fees").

T3 also incorrectly relies on I.C. § 12-121 in requesting fees on appeal. In regard to that statute, this Court has recently recited:

> An award of attorney fees under [I.C. § 12-121] is not a matter of right to the prevailing party, but is appropriate only when this Court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. … Moreover, when deciding whether attorney fees should be awarded under I.C. § 12–121, the entire course of the

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[35] None of the Texas cases offered by T3 [*see* Resp. Br. at 56] awarded attorneys' fees during the appeal of an arbitration award. They are plainly inapplicable for that reason.

> litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation. … Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the trial court incorrectly applied well-established law. … Generally, attorney fees will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented. …

In Re SRBA Case No. 39576 Subcase No. 37-00864, No. 44716, 2018 WL 1124264, at *11 (Idaho Mar. 2, 2018) (citations and editing omitted). Further, an appeal is not frivolous simply because the appellant presents arguments that are ultimately rejected. *See Garner v. Povey*, 151 Idaho 462, 259 P.3d 608, (2011) ("Rather, the question is whether the position adopted was not only incorrect, but so plainly fallacious that it could be deemed frivolous, unreasonable, or without foundation"); *see also Hammer v. City of Sun Valley*, 163 Idaho 439, 414 P.3d 1178, (2016) (denying award of attorney fees under § 12-121 because law was not settled).

This Court is not being invited to "reweigh the evidence" or overrule anything the Panel had authority to do. Rather, SBS presents good faith arguments in Issues 1-2 for how the District Court's errors resulted in an invalid proceeding and, for Issue 3, that the Panel otherwise exceeded its powers under the Distributor Agreement and FAA law. T3 fails to establish, and the record does not indicate, that SBS brought or pursued this appeal in any form of unreasonable or frivolous manner. Attorney's fees are not warranted under I.C. § 12-121 or on any other basis.

CONCLUSION

SBS requests this Court grant the relief requested in the opening brief and further deny T3's requests for attorney's fees on appeal.

DATED THIS 15th day of June, 2018

HAWLEY TROXELL ENNIS & HAWLEY LLP

By ______________________________

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
Dane Bolinger, ISB No. 9104
Attorneys for Appellant

WEIL, GOTSHAL & MANGES LLP

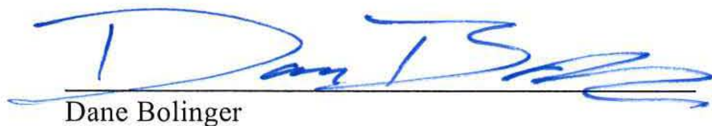
By ______________________________

Paul R. Genender (*pro hac vice*)
Jason E. Wright (*pro hac vice)*
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June, 2018, I caused to be served a true copy of the foregoing APPELLANT'S BRIEF by the method indicated below, and addressed to each of the following:

Paul R. Genender (*pro hac vice*) Jason E. Wright (*pro hac vice*) WEIL, GOTSHAL & MANGES LLP 200 Crescent Court, Suite 300 Dallas, Texas 75201 Facsimile: (214) 746-7777	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail ☑ E-mail: paul.genender@weil.com jason.wright@weil.com ☐ Telecopy: 214.746.7777
Thomas E. Dvorak Jeffrey W. Bower GIVENS PURSLEY LLP 601 W. Bannock St. P.O. Box 2720 Boise, Idaho 83701-2720 *[Attorneys for Respondent]*	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail ☑ E-mail: ted@givenspursley.com jeffbower@givenspursley.com ☐ Telecopy: 208.388.1300
James M. Mulcahy (*pro hac vice*) Kevin A. Adams (*pro hac vice*) Douglas R. Luther (*pro hac vice*) MULCAHY LLP 4 Park Plaza, Ste. 1230 Irvine, California, 92614 *[Attorneys for Respondent]*	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail ☑ E-mail: jmulcahy@mulcahyllp.com kadams@mulcahyllp.com dluther@mulcahyllp.com ☐ Telecopy: 949.252.0090



Dane Bolinger