IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PROSPECT CAPITAL MANAGEMENT L.P.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	C.A. No. 22-mc-89-MN-CJB
STRATERA HOLDINGS, LLC and DESTRA CAPITAL MANAGERS LLC,	)	
	)	
Respondents.	)	

RESPONDENTS ANSWERING BRIEF IN OPPOSITION TO PROSPECT'S MOTION TO ENFORCE INTERIM AWARD AND VACATE FINAL AWARD

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Dated: May 19, 2022

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Respondents Stratera Holdings, LLC ("Stratera") and Destra Capital Managers LLC ("Destra") (collectively, "Respondents") hereby submit their Answering Brief in Opposition to Prospect's Motion to Enforce Interim Award and Vacate Final Award:

I. Summary of Argument

Prospect Capital Management L.P. ("Prospect") attempts to avoid justice by seeking to escape an arbitration panel's (the "Panel") conclusion that Prospect owes millions of dollars to Stratera and Destra. Prospect insists that the Panel was bound by an interim award that the Panel has explained contained an ambiguity about the treatment of a subset of DRIP fees owed. Prospect asks the Court to disbelieve the Panel's explanation of how it made a mistake in not clearly addressing that subset and instead to adopt Prospect's speculation that the failure to fully describe the categories containing the millions of dollars in fees owed was a baby-splitting exercise that the Panel later decided to abandon. The preliminary award that the Panel labeled "Interim Award" was just that—interim—despite Prospect omitting the term "Interim" throughout its brief by its using the defined term "Award." The Panel did not fully decide the issues before the Panel, leaving out not only that category of fees but also deferring its award on a remedy until the parties submitted additional evidence. The Panel retained jurisdiction, and neither AAA Rule 50 nor the doctrine of *functus officio* deprived the Panel of its authority to remove the ambiguity and clarify its award. Even had those limits applied (and they do not), the Panel's revision to address the ambiguity was within its power to clarify ambiguities or address issues that were submitted to the Panel but not addressed. Additionally, AAA Rule 50 does not—contrary to Prospect's claim—prevent the Panel from making changes to the award other than for clerical, typographical, or computational errors since those categories only apply to requests by parties that are expressly permitted, and arbitrators are free to revise an interim award as long as they do not redetermine a claim already decided, which the Panel expressly stated it did not (and actually did not) do here.

Moreover, given Prospect specifically requested its own modification of the Interim Award (and Revised Interim Award)—that the Panel change its determination of which party was the prevailing party entitled to attorneys' fees—all parties submitted the issue of modification or clarification to the Panel, and the Panel's decision that it was entitled to clarify the Interim Award cannot be overturned unless it manifestly disregarded the law, which it does not. While this case also raises whether the doctrine of *functus officio* should ever bar revision of an award that does not fully decide all issues before an arbitration panel, it is clear in this case that the doctrine does not apply or is subject to exceptions to the same.

Thus, Respondents request the Court deny Prospect's request that the Interim Award be confirmed as a final award and the "Final Award" be discarded. Rather, it should confirm the Final Award as requested in Respondent's Counter-Petition and Motion to Enforce Arbitration Award.

II. Factual Background[1]

A. The Underlying Dispute

The Panel made determinations regarding what it considered the facts regarding the dispute between the parties. Ex. 1-F, 5-9; Ex. 1-M, 6-9. Prospect and Stratera together set up the Priority Income Fund (the "Fund"). Ex. 1-F, 5; Ex. 1-M, 6. Priority Senior Secured Income Management, LLC (the "LLC") is the advisor that manages the Fund's investments. Ex. 1-F, 5; Ex. 1-M, 6. Within the LLC, Prospect provides the advisory services, managing the investments, and Stratera put up the money to start the Fund and funded the initial expenses of the Fund. Ex 1-F, 5-6; Ex. 1-M, 6. The Fund compensates the LLC through Base Management and Incentive Fees based upon an Investment Advisory Agreement between the Fund and the LLC. Ex. 1-F, 6; Ex. 1-M, 6.

The Second Agreement governed the relationship between Prospect and Stratera when

[1] Stratera and Destra also incorporate by reference for the Court's consideration the facts set forth in their Counter-Petition and Motion to Enforce Arbitration Award.

those were the only two members of the LLC. Ex. 1-F, 5; Ex. 1-M, 6. Under the terms of the Second Agreement, the Base Management and Incentive Fees, representing all of the LLC's income stream, were split 50/50. Ex. 1-F, 6; Ex. 1-M, 6. The Fund also hired Provasi Capital Partners LP ("Provasi"), a Stratera subsidiary, to act as the Dealer Manager to distribute the Fund's shares, and the Fund signed a separate agreement called a Dealer Manager Agreement ("DMA") with Provasi. Ex. 1-F, 6; Ex. 1-M, 6. As the Dealer Manager, Provasi was responsible for marketing and selling shares of the Fund through its network of dealers. Ex. 1-F, 6; Ex. 1-M, 6-7. The 50/50 revenue split under the Second Agreement was not conditioned on any further action by Stratera or distribution by Provasi. Ex. 1-F, 6; Ex. 1-M, 6.

In March 2018, Provasi provided the Fund notice that it would terminate the DMA. Ex. 1-F, 6; Ex.1-M, 6. Prospect approached Provasi asking that it continue as Dealer Manager. Ex. 1-F, 6; Ex. 1-M, 6-7. Provasi, in turn, approached Destra about the possibility of its subsidiary Destra Capital Investments, LLC ("DCI") acting as a sub-wholesaler under Provasi. Ex. 1-F, 6; Ex. 1-M, 7. The parties kept Provasi as the Dealer Manager instead of signing a new DMA with Destra so the agreements Provasi signed with its selling group could be kept. Ex. 1-F, 6; Ex. 1-M, 7.

Stratera and Destra told Prospect that they wanted Destra to receive a portion of the fees paid to Stratera under the Second Agreement, with the overall fee split between Prospect, on the one hand, and Stratera and Destra, on the other, remaining the same as under the Second Agreement—50/50—and confirmed this in a term sheet. Ex. 1-F, 7; Ex. 1-M, 7-8. In the parties' negotiation of the Third Amended and Restated Limited Liability Company Agreement of Priority Senior Secured Income Management, LLC (the "Third Agreement") that would replace the Second Agreement and govern the relationship between Prospect, Stratera, and Destra, Prospect inserted language that would determine the division of the fees based upon shares sold, categorizing certain

shares as Stratera Fee Party Shares and Destra Fee Party Shares. Ex. 1-F, 8; Ex. 1-M, 8. Stratera Fee Party Shares included 50% of shares issued in the Offering before the Third Agreement adding Destra to the LLC and 12.5% of Fund Shares issued in the Offering after the Third Agreement for shares which DCI acted as a sub-wholesaler. Ex. 1-A, 34. To confirm that the basis for distribution of fees was unchanged from the Second Agreement, Destra insisted that Prospect provide a schedule showing the methodology of dividing fees. Ex. 1-F, 8; Ex. 1-M, 8. Prospect provided such a schedule, which is incorporated into the Third Agreement as Schedule 11.18. Ex. 1-F, 8; Ex. 1-M, 8. The parties added language to the Third Agreement itself requiring that the calculation of the fee percentages be performed in accordance with that schedule. Ex. 1-F, 8; Ex.1-M, 8.

When investors purchase shares through their broker-dealers, they have an opportunity to elect whether they prefer to receive their periodic distributions from the Fund in the form of cash or whether they would prefer that the distribution money instead be used to purchase additional shares of the Fund through the Fund's dividend reinvestment program ("DRIP"). Ex. 1-F, 4-5, 8; Ex. 1-M, 5, 9. When DCI became the sub-wholesaler to Provasi, performing the role in interacting with dealers that Provasi had performed before it, it assisted investors regarding the decision to choose DRIP instead of a cash dividend, such that the issuance of DRIP shares on shares sold during DCI's tenure as sub-wholesaler was through DCI acting as sub-wholesaler. Ex. 1-F, 8; Ex. 1-M, 9. In the same way, for shares sold before DCI became the sub-wholesaler, the issuance of such DRIP shares on shares were issued through Provasi acting as Dealer Manager. Ex. 1-F, 4-5; Ex. 1-M, 5. Nonetheless, when Prospect calculated the first payment of fees to be made after the execution of the Third Agreement, Prospect excluded DRIP shares issued on both Provasi-sold shares and DCI-sold shares from the shares credited to Stratera and Destra in the calculation, contending that such shares were not issued "in the Offering." Ex. 1-F, 8; Ex. 1-M, 9. Thus,

Prospect did not pay as required by Schedule 11.18. Ex. 1-A, 41-42, § 11.18, and Schedule 11.18.

B. The Arbitration

Stratera and Destra alleged in the arbitration against Prospect (the "Arbitration") that Prospect had breached the Third Agreement by failing to credit Stratera and Destra in its calculation of fees for shares issued through the DRIP program on shares originally sold by Provasi and DCI. Ex. 1-F, 3; Ex. 1-M, 3. Stratera and Destra requested that the Panel award them the Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to Stratera and Destra. Ex. 1-F, 3; Ex. 1-M, 3. Stratera and Destra also requested that the Panel require that future Management and Incentive Fees be distributed in accordance with Schedule 11.18, which included DRIP shares flowing from those sold by Provasi or DCI among those credited toward Stratera and Destra's percentages. Ex. 1-F, 3, 12-13; Ex. 1-M, 3, 13.

The Panel conducted an evidentiary hearing over eight days. Ex. 1-F, 1; Ex. 1-M, 2. At the outset of the hearing, at the parties' request, the Panel issued an order establishing what issues were being submitted to the Panel and which would be bifurcated and addressed separately. Ex. 1-E. That order stated, "Proceedings with respect to attorneys' fees will be conducted after the Panel issues an Order on liability and damages, if any." *Id.* Thus, only the issue of attorneys' fees was bifurcated, and the parties' submission to the Panel was on both liability and damages. *See id.* The parties submitted closing briefs on September 15, 2021. Ex. 1-F, 2; Ex. 1-M, 2.

C. The Interim Award

The Panel issued what it labeled an "Interim Award of Arbitrators" (the "Interim Award") that described its conclusion on the DRIP issue, stating, after finding that the Third Agreement is ambiguous,[2] "We find that parol evidence supports **Claimants' [i.e., Stratera and Destra's]**

[2] Prospect inaccurately states that the Panel said the award was "possibly ambiguous." D.I. 1, p. 9. The actual language from the Interim Award is, "The Third Agreement is ambiguous." Ex. 1-F, 9. Prospect's contention that the Interim Award said "neither the text of the Agreement nor Schedule

position that the calculation of the Applicable Fee Party Percentages must include fees on DRIP shares." Ex. 1-F, 13 (emphasis added).

Importantly, the defined term "Applicable Fee Party Percentages" includes not only Destra Fee Party Percentage but also Stratera Fee Party Percentage (and Prospect Fee Party Percentage). Ex. 1-A, 28. Further, by referring to the conclusion that it supported "**Claimants' position,**" the Interim Award also could only be referring to DRIP flowing from both DCI-sold shares and Provasi-sold ones, which was Stratera and Destra's (referred to by the Panel as "Claimants'") position. *See* Ex. 1-D, 1, ¶ 1; Ex. 1-C, 2, ¶ 1 (neither of which differentiates between DRIP flowing from DCI-sold shares and Provasi-sold shares). The Panel's finding, therefore, clearly included DRIP shares in both the Stratera Fee Party Percentage and Destra Fee Party Percentage.

Further, the Interim Award described the Panel's conclusion in more detail as follows, referring to "DRIP shares" without differentiating between DRIP shares flowing from Provasi-sold shares and DCI-sold shares, demonstrating the Panel's understanding that there was no distinction between them:

> The parties' negotiations demonstrate that Claimants [i.e., Stratera and Destra] expected to be paid on DRIP shares and that Prospect knew of their expectation. Because Prospect created Schedule 11.18 in such a manner as to confirm [Stratera and Destra's] expectation concerning the allocation of fees, which included fees on DRIP shares, Prospect is deemed to have accepted the inclusion of DRIP shares notwithstanding the provisions in the Third Agreement that might otherwise be interpreted to exclude DRIP shares because they were not "issued in the Offering".

Ex. 1-F, 13. By finding "Claimants" expected to be paid on DRIP shares, the Panel, again, was referring to Stratera and Destra as opposed to Prospect's argument that somehow the Panel was

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11.18 should be applied literally" is also incorrect. D.I. 1, p. 9. Instead, the Interim Award held that "Prospect cannot disclaim the application of the schedule… that, on its face confirmed the Claimants' understanding. . . ." Ex. 1-F, 11.

only referring to Destra receiving DRIP. *See id.*

But when the Panel described its holding in the portion of the Interim Award labeled as its holding, it did not specifically refer to Provasi-sold shares (which would result in Stratera receiving fees on DRIP shares flowing from shares sold by its subsidiary, Provasi), instead stating, in relevant part:

> Based on the findings of fact and conclusions of law stated below, we hold that [Prospect] has breached the Third Agreement by not calculating the fees such that the Stratera Fee Party Shares and Destra Fee Party Shares included DRIP shares in lieu of cash dividends that would have otherwise been due on the shares for which [DCI] served as sub-wholesaler. . . .

Id. at 4-5.

The Interim Award made clear it was not a final award. Most obviously, the label, "Interim Award," signaled the Panel's intention that it was not a final award. *Id.* at 1. The only actions ordered are limited to the provision of information necessary to allow the Panel to issue its final award. *Id.* Indeed, the last paragraph of the Interim Award, contained in this section, states, "This Interim Award shall remain in full force and effect until such time as a final Award is rendered." *Id.* at 18. This sentence conclusively reflected the Panel's intent that the Interim Award was not a final award and that a final award would come later—the Panel knew what a final award would look like (addressing all of the issues submitted), and this was not it. *See id.*

D. Stratera and Destra Sought Clarification of Award After Prospect Provided Information Only on DCI-Sold Shares

To obtain information necessary to issue a final award, the Panel ordered Prospect to provide Stratera and Destra with a calculation of their share of Management and Incentive Fees collected and improperly retained by Prospect to date on "the above-described DRIP shares" so that the parties could submit a joint submission concerning such information. Ex. 1-F, 17-18. When Prospect provided that information, it was apparent to Stratera and Destra that Prospect had

gratuitously interpreted the Panel's Interim Award to exclude from the calculation DRIP shares flowing from Provasi-sold shares.

Stratera and Destra sent the Panel a letter explaining Prospect's misreading of the order and requesting that the Panel amend the language of the Interim Award to clarify that DRIP shares flowing from Provasi-sold shares must be included in the calculation of fees due to Stratera and Destra.[3] Ex. 1-G, 13-14. Stratera and Destra also submitted to the Panel and AAA a Request for Clarification, or, in the Alternative, Modification of Interim Award explaining Rule 50 was inapplicable to the Interim Award because it was not a final award, but, in the alternative, that the Panel was permitted to modify or clarify the award under the exceptions to Rule 50. Ex. 1-I, 1-4.

In its response, Prospect argued that the Panel was prohibited from correcting or clarifying the Interim Award by the doctrine of *functus officio*, failing to offer a substantive explanation for why DRIP shares flowing from DCI-sold shares should be treated differently from those flowing from Provasi-sold shares. Ex. 1-K, 1-11. This position by Prospect contrasted sharply with its own later request that the Panel modify both the Interim Award and Revised Interim Award to conclude that Prospect was actually the prevailing party in the litigation such that Prospect should recover fees instead of Stratera and Destra, as the Interim Award had provided (Prospect also argued, alternatively, that there was no prevailing party such that no fees should be awarded). Ex. 1-O, 3-4 and 13. By seeking to change the Interim Award and Revised Interim Award, Prospect took a position in the Arbitration that the interim awards were not final awards and were subject to

[3] Prospect's Opening Brief argues that the Panel only clarified the Interim Award two months after its issuance. D.I. 3, p. 1. But Respondents first raised the issue with Prospect in a conference on October 25, 2021, the Monday after Prospect's provision on Friday, October 22, 2021, of its damage calculation that revealed its intent to interpret the Interim Award to exclude most of the damages the Panel intended. Ex. 1, 1, ¶ 4. After such conference, Respondents submitted their request for the Panel to clarify the award two days later, on October 27, 2021, which was only 19 days after the Panel issued the Interim Award. Ex. 1-G, 13-14.

modification. *See id.* Notably, the Panel would later "reject Prospect's invitation to revisit the award of attorneys' fees in the Revised Interim Award," not because of *functus officio* but because Stratera and Destra were prevailing parties. Ex. 1-Q, 2.

E. Panel Rejected Rule 50 and *Functus Officio* Arguments

When the Panel ruled on Stratera and Destra's motion, it offered a detailed explanation of the mistake it had made in describing its holding in the Interim Award and the inapplicability of the *functus officio* doctrine. Ex. 1-L, 1. As to its mistake, the Panel explained that it failed to make clear in the Interim Award its conclusion that the DRIP shares to be included in the calculation were those flowing from both DCI-sold and Provasi-sold shares:

> The essence of the Panel's conclusion was that fees on DRIP shares should be included in the applicable Fee Party Percentage, a conclusion that necessarily applies to DRIP shares flowing from shares issued by Provasi. The Panel's holding did not make this latter point clear, but rather referred specifically only to fees on DRIP shares flowing from shares issued through DCI as sub-wholesaler.

Id. at 1-2. The Panel explained the basis for its conclusion that Stratera and Provasi were entitled to be paid on DRIP shares:

> In its Interim Award, the Panel reached its conclusion based upon the ambiguity created by the inconsistency between the text of the parties' Third Agreement and Schedule 11.18 to that Agreement. Because the last sentence of Section 11.18 stated that calculation of the Fee Party Percentages *must* be performed on the basis of Schedule 11.18, and [Prospect] prepared Schedule 11.18, we concluded that [Prospect] is deemed to have accepted the inclusion of DRIP shares in the calculation of the Applicable Fee Party Percentages, notwithstanding provisions in the Third Agreement that might otherwise be interpreted to exclude DRIP shares.

Id. at 2. Thus, the Panel explained, "The essence of the Panel's ruling on the merits is that Schedule 11.18 requires the inclusion of *all* DRIP shares, and not just those issued on shares issued through DCI acting as subwholesaler, in the calculation of Destra and Stratera Fee Party Percentages." *Id.* The Panel summarized its resolution of the dispute in the Interim Award as follows:

> • [Stratera and Destra] contended that they were entitled, by virtue of the terms of Schedule 11.18, to calculation of fees based on *all* issued and outstanding shares.
>
> • [Prospect] argued that [Stratera and Destra] were not entitled to include *any* DRIP shares in the calculation of fees.
>
> • In its Interim Award, the Panel concluded that fees should be calculated on the basis of *all* non-Stira DRIP shares.

Id.. The Panel explained how it misdescribed its intent in the Interim Award:

> In its Interim Award, however, the Panel failed to make clear that full effectuation of its intent required a clear statement to the effect that the calculation must be based not only on DRIP on shares issued through DCI, but also DRIP on shares issued through Stratera's subsidiary, Provasi.

Id. The Panel stated that it would now "correct[] that oversight" and that, "**Doing so does not, however, require re-visiting the Panel's conclusion on the merits**." *Id.* (emphasis added).

The Panel explained that Rule 50 did not prohibit its clarification because it was not redetermining the merits of an issue specifically addressed in the Interim Award. *Id.* Instead, the Panel explained, "**Here, the Panel is simply clarifying the effect - at most, correcting its earlier characterization of the effect — of its determination of [Stratera and Destra's] claim for inclusion of DRIP shares in the calculation of their fees**." *Id.* at 2-3 (emphasis added).

The Panel further found that, even if the award were not an interim award and *functus officio* applied, exceptions to the *functus officio* doctrine applied. *Id.* at 4. One exception allows modification of an award when "the award does not adjudicate an issue which has been submitted." *Id.* at 3 (internal quotations omitted). The Panel explained that the Interim Award did not completely adjudicate the issues presented:

> That exception presumably includes cases in which the award does not *completely* adjudicate an issue that has been submitted. Here, by failing to address adequately in the Panel's holding the effect of its determination of the issue of entitlement to inclusion of the DRIP shares in the calculation of [Stratera and Destra's] fees, the Panel failed to adjudicate the issue completely.

Id. at 4. Another exception allows modification of an award "[w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed" such that "an ambiguity arises which the arbitrator is entitled to clarify." *Id.* at 3 (internal quotations omitted). The Panel explained that this exception was applicable because the Interim Award required clarification:

> Although not a model of clarity, this exception appears to apply to circumstances in which a mistake is not apparent on the face of the award, but the award leaves doubt as to whether it is complete, and requires clarification. For the reasons discussed above, the Interim Award requires clarification.

Id. at 4. The Panel explained that the only possible conclusion from its analysis of DRIP shares required Stratera and Destra's fee calculations to include both Provasi- and DCI-sold shares:

> **[T]he logical - indeed, inevitable - conclusion of our analysis with respect to [Stratera and Destra's] entitlement to inclusion of DRIP shares in the calculation of their fees is that Schedule 11.18 *requires* that DRIP shares issued and outstanding on the shares issued through DCI and Provasi be included in the calculation of [Stratera and Destra's] fees. This was the core of the Panel's conclusion, and that conclusion has not been re-visited or changed.**

Id. at 3 (emphasis added; italics in original). Based upon all of this analysis, the Panel concluded that it retained jurisdiction and was authorized to enter a Revised Interim Award. *Id.* at 4.

F. Panel Issued Revised Award and Final Award

In conjunction with its order explaining its authority to clarify its Interim Award, the Panel issued a Revised Interim Award that clarified that both DRIP shares flowing from both DCI-sold shares and Provasi-sold shares would be included in the calculation of fees owed to Stratera and Destra. Ex. 1-M, 5. Then, once the Panel had the information it required the parties to provide in the Revised Interim Award, the Panel issued its Final Award, which incorporated the Revised Interim Award and stated, for the first time, the substantive relief awarded to Stratera and Destra. Ex. 1-Q, 1-6. The Final Award awarded Stratera and Destra the following:

> A. $6,103,866.00 for unpaid distributions through September 30, 2021. . . .
> B. $643,314.00 in pre-award interest, which represents interest on $6,103,866.00 through March 11, 2022.
> C. $3,492,790.66 in attorneys' fees, costs and expenses. . . . [and]
> D. Post-award interest at the rate of 5.25% on $9,596,656.66, which is the sum of $6,103,866.00 . . . and $3,492,790.66 in attorneys' fees, costs and expenses. . . .

Id. at 2-4. In addition, the Final Award required Prospect to continue to pay fees to Stratera and Destra for the most recently completed quarter (for which fees were not yet due) and for all future quarters, in a manner described in the Revised Interim Award, within 90 days following the end of each such quarter. *Id.* at 5. Unlike the Interim Award, the Final Award contained explicit instructions regarding when such payments would be due and how they would be calculated:

> Beginning with the quarter ending December 31, 2021, Prospect shall pay to [Stratera and Destra] the amounts due for each quarter no later than 90 days after the end of each such quarter, calculated according to the Revised Interim Award and in the same manner as Prospect's calculation of [Stratera and Destra's] share of all Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to [Stratera and Destra], as provided in "Calculations Spreadsheet 2," attached to the February 14 Joint Submission. If any such payment is not made within such 90 days, simple interest will accrue at the legal rate then in effect under 6 Del. C. §2301.

Id. By contrast, the Interim Award addressed future fees not in the award section but in the Holding section and only explained the Panel's conclusion:

> [Stratera and Destra's] respective share of all Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to [Stratera and Destra] to date on the above-described DRIP Shares[.]

Ex. 1-F, 5. Thus, what was in the Final Award was an award—the actual relief awarded—and what was in the Interim Award was simply a description of the Panel's conclusions. *See id.* The Final Award also awards attorneys' fees, costs, and expenses to Stratera and Destra. Ex. 1-Q, 2. Prospect does not challenge that portion of the Final Award. *See, generally,* D.I. 1.

III. Argument

A. The Interim Award Was Not a Final Award

Prospect seeks to vacate the Final Award because Prospect contends the Interim Award, despite its label, was a final award that the Panel was not entitled to modify under the doctrine of *functus officio*. *Functus officio* is the common law doctrine that prevents an arbitrator from revising a decision without the parties' consent. *Verizon Pennsylvania, LLC v. Communications Workers of Am., AFL-CIO, Local 13000*, 13 F.4th 300, 305 (3d Cir. 2021). But *functus officio* only applies to awards that are final awards. *Employers' Surplus Lines Ins. Co. v. Glob. Reinsurance Corp.-U.S. Branch, No. 07 civ. 2521 (HB)*, 2008 WL 337317, at *4 (S.D.N.Y. Feb. 6, 2008); *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967). The standard for determining if an award is a final award for the purpose of *functus officio* is the same as the one for determining whether an arbitration award is ripe for judicial enforcement. *Employers' Surplus Lines Ins.*, 2008 WL 337317, at *4; *Shore Point Distrib. Co. v. Int'l Bhd. of Teamsters Local 701*, No. 17-CV-01950 (PGS), 2017 WL 5473454, at *3 (D.N.J. Nov. 14, 2017) (applying the Third Circuit's standard for finality for purposes of ripeness in the context of *functus officio*). "An arbitration award is not final if it reveals that the arbitrators have yet to resolve each issue that the parties have empowered the arbitrators to decide." *PG Publ'g, Inc. v. Newspaper Guild of Pittsburgh*, 19 F.4th 308, 322 (3d Cir. 2021). To be final, an award must "evidence[] the arbitrators' intention to resolve all claims submitted in the demand for arbitration, and it resolve[s] them definitively enough so that the rights and obligations of the two parties, *with respect to the issues submitted*, do not stand in need of further adjudication." *Id.* (internal quotations and citations omitted. "[A]n award is not final if the arbitrators have decided liability but not the remedy when they are authorized to decide both issues." *Id.; see also Employers' Surplus Lines Ins.*, 2008 WL 337317, at *4, *quoting Michaels v. Mariforum Shipping, S.A.,* 624 F.2d 411, 414 (2d Cir. 1980) ("Generally, in order for

a claim to be completely determined, the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages.").

1. Panel Did Not Intend the Interim Award to Be a Final Award

The Interim Award was also not a final award as the Panel made clear in both the Interim Award and its subsequent order. The Third Circuit looks to the intent of the arbitrator, as expressed in the award at issue, to determine whether the award is final. *PG Publ'g, Inc.*, 19 F.4th at 321-22. Here, the Panel left no question of its intent that the Interim Award would not fully resolve the issues submitted to it. The Panel stated, "This Interim Award shall remain in full force and effect until such time as a final Award is rendered." Ex. 1-F, 18. The Interim Award could not be a final award because it explicitly says the final award is still to be resolved.

The situation is similar to the reasoning cited favorably by the Third Circuit last year in *PG Publishing*. Where nothing in an award indicates the arbitrators left any issue to be decided, the intent of the arbitrators is clear and the award is final. *See PG Publ'g, Inc.,* 19 F.4th at 321. Thus, an "award was final because it determined liability and the remedy" and "did not reserve jurisdiction." *Id., citing McKinney Restoration, Co., Inc. v. Illinois Dist. Council No. 1 of Intern. Union of Bricklayers & Allied Craftworkers,* 392 F.3d 867, 872 (7th Cir. 2004).

By contrast, the Panel here expressly reserved jurisdiction, did not determine a remedy, and contemplated the submission of additional evidence. Only after the Panel had reviewed the additional submission by the parties, asked any questions it had, or scheduled a hearing does the Panel state that "the Panel will issue a final award." Ex. 1-F, 18. Thus, the Interim Award (and the title gives it away) is, on its face, not a final award and is subject to modification.

"[A]n interim award may be deemed final for *functus officio* purposes if the award states it is final, and if the arbitrator intended the award to be final." *Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009). Thus, the Ninth Circuit upheld the refusal of the district court to apply the

functus officio doctrine to an award that was not made final. *Id.* at 1103. The court described the interim award at issue as "explicitly stat[ing] that Interim Awards 1, 2, 4, and 5 were not final" and that "the panel expressly reserved jurisdiction over all issues (with the exception of the accounting performed in Award 3) until issuance of the final award." *Id.* The district court opinion challenged in *Bosack* reveals that the language of interim award 2 at issue was similar to the ones contained in the Interim Award here. *See Bosack v. Soward*, No. C07-1663Z, 2008 WL 544877, at *2 (W.D. Wash. Feb. 25, 2008). According to the district court, "the panel also stated that Interim Award # 1 was 'not intended to be confirmable' until it was 'incorporated into and made part of the final award.'" *Id.*

2. Interim Award Did Not Fully Adjudicate the Issues Submitted

Here, the Interim Award did not resolve all of the issues submitted to the Panel and therefore was not a final award subject to *functus officio*. Third Circuit precedent is clear that "[a]n award is not final if the arbitrators have decided liability but not the remedy when they are authorized to decide both issues." *PG Publ'g,* 19 F.4th at 322.

Even when an arbitrator intends for an interim award to be a final determination on liability, it is not legally final if it does not "resolve issues definitely enough so that the rights and obligations of the two parties . . . do not stand in need of further adjudication." *Employers' Surplus Lines,* 2008 WL 337317, at *8 (internal quotations omitted). Some courts even require that for *functus officio* to apply, the award must have already been confirmed by a district court. *Martel v. Ensco Offshore Co*., 449 Fed. Appx. 351, 354 (5th Cir. 2011).

a. *Verizon* disallowed reconsideration because first award resolved submitted issues

The fact that the parties had submitted both the issues of liability and damages to the Panel and the Panel only resolved liability in the Interim Award also prevents *functus officio* from applying. "[T]he submission by the parties determines the scope of the arbitrators' authority."

Trade & Transp., Inc. v. Nat. Petroleum Charterers Inc., 931 F.2d 191, 195 (2d Cir. 1991). The Panel described what issues were being submitted in its Order #21, in response to the parties' agreement to bifurcate the proceedings to initially submit the issues of liability and damages and then, if necessary, address the issue of the amount of attorneys' fees, costs, and expenses once damages and liability had been determined. Ex. 1-E. The Panel stated, "Proceedings with respect to attorneys' fees will be conducted after the Panel issues an Order on liability and damages, if any." *Id.* But, critically, the parties did ***not*** agree to bifurcate liability from damages in their submission. Order #21 makes clear that both the liability and damages issues were submitted to the Panel, and the only bifurcation was as to the amount of attorneys' fees. *Id*.

This explains why Prospect's incorrect interpretation of *Verizon* conflicts with binding Third Circuit cases, issued both before and after the *Verizon* decision was decided, as well as cases from courts outside the Third Circuit. Prospect argues that *Verizon* stands for the proposition that an award can be final without addressing damages, but in *Verizon,* the arbitration award that the court found was final did address a remedy in a way that immediately had collateral effects, unlike the Interim Award. In *Verizon*, the arbitration panel's award had not only decided the issue of liability, but it also ordered Verizon "to cease and desist from delivery of set top boxes by anyone other than Union employees." 13 F.4th at 305 (internal quotations omitted). It was this issue of whether non-union personnel could continue to deliver the boxes that was the core issue of the arbitration. *Id.* It was against this backdrop that the determination of back pay was an "ancillary issue[]" that could be left unaddressed without affecting the finality of the award. *Id.* at 309. The court stated that even the party contending the first award was not final conceded that the core issue there – "the scope of the work assignment as settled by the Merits Award," - had been resolved by the first award, given they had stated that "the cornerstone of a remedy is the Panel's

Award on the merits." *Verizon*, 13 F.4th at 309 (internal quotations omitted). By contrast, here, the Interim Award cannot be final because it did not resolve the core issue of what fees Prospect owed Stratera and Destra. *Compare id.* and Interim Award, *generally.*

b. *Verizon is* only consistent with other binding precedent if it requires a remedy for finality only if remedy issue is submitted

Viewed in this light, *Verizon* can only be read consistently with the Third Circuit's decision in *Robinson* that held—in an arbitration where both liability and damages were submitted to the arbitrator—that "the arbitrator must have decided not only the issue of liability of a party on the claim, but also the issue of damages." *Robinson v. Littlefield*, 626 Fed. Appx. 370, 374 (3d Cir. 2015). *See also Xenium S.A. DE C.V. v. Regent Hotels Worldwide, Inc., No. 3:07-CV-1094-P,* 2007 WL 9717504, at *3 (N.D. Tex. Nov. 8, 2007) (limiting the application of *functus officio* where a court has determined liability but not damages to those situations where the parties have agreed to bifurcation of issues and separate final liability and damages awards).

Likewise, reading the *Verizon* court's statement that an award can be final without awarding damages when that issue was submitted would also make the decision inconsistent with the Third Circuit's decision in *PG Publishing*, 19 F.4th at 322-23, where the court held that an award is not final unless it resolves all issues submitted definitively enough that they do not stand in need of further adjudication. 19 F.4th at 322-23. As was the case in *PG Publishing* but not in *Verizon*, the arbitration panel's interim award did not definitively resolve the submitted issue of the remedy definitively enough that it did not need further adjudication. *See id.* The reading of the Third Circuit's *Verizon* decision to condition finality on whether an award resolves all submitted issues would also render it consistent with a leading Eighth Circuit *functus officio* decision. *See Legion Ins. Co. v. VCW, Inc.,* 198 F.3d 718, 720 (8th Cir. 1999). That court held, "An award cannot be final if significant issues still need to be determined." *Id.*

The situation is similar to one addressed by the Third Circuit. *See Pub. Serv. Elec. & Gas Co. v. Sys. Council U-2, Intern. Broth. of Elec. Workers, AFL-CIO*, 703 F.2d 68, 70 (3d Cir. 1983). In *Public Service Electric & Gas*, the arbitration panel made a determination on liability but did not announce a remedy. *Id.* Instead, the panel directed the parties to try to reach a resolution on the remedy and, if a solution could not be reached, an additional hearing could be scheduled to resolve the issues. *Id.* Instead of attempting to reach such a resolution, one of the parties went to the district court, as Prospect did,[4] to attempt to confirm the award. *Id.* The Third Circuit held that considering an award that does not fully dispose of a dispute as final would result in piecemeal litigation, with the parties seeking to confirm each piece of the arbitrators' awards:

> The present arbitration decision partakes of all the attributes of an interim order. Review of the decision at this stage would disrupt and delay the arbitration process and could result in piecemeal litigation. If this court should reverse the district court's determination and uphold the panel's liability determination and the parties did not thereafter agree upon a remedy, the panel would be required to impose one. The company could then repetition the district court to review that remedy. We see no legitimate reason for allowing such piecemeal litigation.

Id. The arbitrator's instruction to coordinate on a remedy was not sufficient to resolve all the issues submitted to the arbitrator. *Id.*

c. Complete arbitration rule requires remedy for finality

Indeed, this is why the Third Circuit has adopted the "complete arbitration rule." *Union Switch & Signal Div. Am. Standard Inc. v. United Elec., Radio & Mach. Workers of Am., Local 610*, 900 F.2d 608, 611 (3d Cir. 1990). Under that rule, an arbitration award that postpones the

[4] The Panel issued the Interim Award on October 8, 2021, and the Revised Interim Award on December 15, 2021. Ex. 1-F and Ex. 1-M. The Revised Interim Award required Prospect to provide its position on damages to Stratera and Destra no later than January 14, 2022. Ex. 1-M, 18. Prospect filed this lawsuit on February 15, 2022, although it did not inform the Panel or Stratera and Destra until Prospect served Stratera and Destra on March 8, 2022. D.I. 1, D.I. 12, and D.I. 13.

determination of a remedy is not a "final and binding award." *Id.* When a district court entertains a motion to vacate or enforce such a partial award, it "commit[s] serious error" and "act[s] contrary to the consistent teachings of [the Third Circuit] and, so far as we are aware, every other Court of Appeals that has considered a similar issue." *Id.* Courts in this circuit have applied the complete arbitration rule in the context of *functus officio* as well as in the enforcement of awards. *Shore Point Distrib.*, 2017 WL 5473454, at *3. This only makes sense. Where, as here, damages are the remedy sought (as opposed to *Verizon,* where the primary relief sought was injunctive), there is "no arbitration award to enforce until damages were determined." *Local 36, Sheet Metal Workers Intern. Ass'n, AFL-CIO v. Pevely Sheet Metal Co., Inc.*, 951 F.2d 947, 949 (8th Cir. 1992). In *Verizon*, by contrast, where a court was enforcing an award that would require that the set-top boxes be delivered by union members—there was an injunctive remedy in the award that the district court could enforce.

3. Panel's Statement Dismissing "Other Claims and Relief Sought" Does Not Change Whether the Panel Addressed Provasi DRIP

Prospect relies heavily on an argument that the Panel was foreclosed from clarifying the Interim Award because the Interim Award contained a statement that, "All other claims and relief sought are dismissed." *See, e.g.,* D.I. 3, p. 1 and 11-12, *quoting* Ex. 1-F, 5. But, as discussed, the question is the intent of the Panel as reflected in the award. *PG Publ'g, Inc.*, 19 F.4th at 321-22. The Panel has explained that the "inevitable" conclusion from its analysis in the Interim Award and the only way to read that Interim Award consistent with the evidence presented in the case was to treat Provasi DRIP the same as DCI DRIP and award fees on both types of shares to Stratera and Destra. Ex. 1-L, 3. Thus, when the Panel stated that other claims were dismissed, it did not refer to claims it believed it had addressed in the Interim Award. The statement dismissing such claims—none of which would be relevant here since the Panel included all DRIP in what it

understood the Interim Award to do—thus does not affect whether the Interim Award was final.

B. Rule 50 Permits Modifications Beyond Clerical, Typographical, and Computational Errors If Modification Does Not Redetermine Decided Claim

AAA Commercial Arbitration Rule 50 states:

> Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.

1. Clerical, Typographical, and Computational Error Limitation Only Applies to Party Requests

Prospect conveniently misreads the rule to only allow **arbitrators** to correct clerical, typographical, or computational errors is inconsistent with its text. D.I. 3, p. 10. Yet the sentence containing that requirement deals only with what **parties** may request and, even at that, is permissive, using the word "may." *See id.* It thus does not limit parties from requesting other changes of arbitrators. The second sentence, by contrast, contains the only limitations in the rule on what an arbitrator can correct: the arbitrator cannot "redetermine the merits of any claim already decided." Thus, Rule 50 permits any change to an interim award made by an arbitrator as long as it does not redetermine the merits of a claim decided.

This reading is the only one consistent with the cases cited by Prospect, including the Third Circuit's *Verizon* decision. *Verizon*, 13 F.4th at 307. There, the Third Circuit noted the different standards in a nearly identical rule applying to requests by a party and limits on an arbitrator:

> Rule 40 allows "any party" to "request the arbitrator ... to correct any clerical, typographical, technical, or computational errors in the award," but prohibits the arbitrator from "redetermin[ing] the merits of any claim already decided."

Verizon, 13 F.4th at 307. As importantly, when *Verizon* and the other cases cited by Prospect identify the three exceptions to *functus officio* (*see* Section II.C, *infra*), they identify not only the power to correct a mistake apparent on the face of the award but two other categories that are

unrelated to "clerical, typographical, or computational errors." *See Verizon*, 13 F.4th at 307. If the rule only permitted changes of such errors, the exceptions to *functus officio* permitting clarifications where an award does not adjudicate a submitted issue or where there is an ambiguity regarding whether a submission is fully executed would not make sense. Thus, the only consistent reading of AAA Rule 50 with *Verizon* and the other cases cited by Prospect analyzing *functus officio* and related rules allows modification beyond the narrow categories Prospect identifies.

2. Arbitrator Modifications Permitted If Not Redetermining Decided Claim

Given that those narrow exceptions do not apply, Rule 50's only limitation on whether an arbitrator can clarify or modify an award is the prohibition on redetermining a claim already decided. As Prospect concedes (D.I. 3, p. 10), the Third Circuit analyzes the question of whether a decision is redetermining a claim that has been decided under Rule 50 using the framework of *functus officio*, requiring that the original award have been a final award and examining the question of whether the merits are being redetermined in light of the exceptions. *See Robinson,* 626 Fed. Appx. at 373-74 (applying the finality analysis to determine whether Rule 50 was violated); *Verizon,* 13 F.4th at 307 (applying *functus officio,* including its exceptions, to interpret a nearly identical rule). Once the rule is properly understood, there is no question that Rule 50 does not preclude the clarification the Panel made in this case because, as discussed in depth in Section II.A, *supra*, and II.C, *infra,* the Panel did not redetermine the merits of any claim already decided.

C. Panel's Ruling Falls Within Exceptions to *Functus Officio*

While *functus officio* is inapplicable here because the Interim Award was not a final award, even if it did apply, the Panel's clarification in the Revised Interim Award falls within the exceptions to *functus officio.* In the Third Circuit, there are three exceptions:

> (1) an arbitrator can correct a mistake which is apparent on the face of his award; (2) where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not

> exhausted his function and it remains open to him for subsequent determination; and (3) where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.

Verizon, 13 F.4th at 307 (internal quotation and notations omitted). The Panel correctly determined that its clarification of the Interim Award met both the second and third exceptions.

1. Interim Award Included Ambiguity That Panel Was Entitled to Clarify

The Panel's clarification would be permitted even if *functus officio* applied because, as the Panel explained in Order #22, the Panel had left an ambiguity in its opinion regarding the treatment of Provasi-sold DRIP. Ex. 1-L, 4. The Panel explained, "Although not a model of clarity, this exception appears to apply to circumstances in which a mistake is not apparent on the face of the award, but the award leaves doubt as to whether it is complete and requires clarification. For the reasons discussed above, the Interim Award requires clarification." Ex. 1-L, 4.

While the *Verizon* court found that there was no ambiguity in the arbitration award analyzed there, it explained, "Where an arbitrator has actually decided an issue but the ruling is ambiguous, **we defer to the arbitrator's *post hoc* interpretation of his award** only **if it is a *rational* clarification of the ambiguity**. . . . *Verizon*, 13 F.4th at 309 (emphasis added; italics in original). The question in determining ambiguity, then, is whether the Panel's explanation of why its Interim Award was ambiguous was rational. *See id.* This Court issued an opinion last month explaining the limits of a court's authority to second-guess arbitrators. *See QAD, Inc. v. Block & Co., Inc.*, No. CV 21-MC-370-MN, 2022 WL 1211302, at *2 (D. Del. Apr. 25, 2022). The court explained, "The question for the court in applying § 10(a)(4) is whether the arbitrator's award is 'irrational,' meaning that the award fails to draw its essence from the agreement and cannot be rationally derived from the agreement, or that **the record contains no support for the arbitrator's determination**." *Id.* (emphasis added). The question is therefore whether "the

arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.* at *3 (internal quotations omitted). The court is not permitted to "review the merits of an arbitration award, even in the case of serious legal error." *Id.* (internal quotations omitted). This is the standard for reviewing the Panel's conclusion that the Interim Award was ambiguous.

It is important to note the difference in circumstances between *Verizon* and this case in the arbitrators' justification for clarifying (here) or changing (*Verizon*) the awards. In *Verizon,* the first award ordered Verizon to "cease and desist from delivery of set top boxes by anyone other than Union employees" but left open the question of how much back pay should be awarded since there was no evidence on how often employees had performed such work in the past. *Verizon*, 13 F.4th at 304 (internal quotations omitted). That first award addressed the issue of the workers' entitlement to deliver the boxes but not whether they were entitled to pay for situations where a customer chooses to pick up the box and install it without Verizon's assistance. *Id.* at 304. The Third Circuit highlighted that the arbitration board had explicitly said in the first award that the issue of self-installation was not before it, and the workers had even conceded that the issue was not before the board in its brief. *Id.* at 308. Then, 18 months later, the arbitration board entered a second award that required Verizon to pay not only for delivery but also for self-installation. *Id.* at 305. While the Third Circuit conceded that an arbitrator is entitled to "clarify his initial decision," *id.* at 304, it would not allow arbitrators to label as clarifications changes that explicitly revise decided issues from the first award. *Id.* at 309.

Here, all of DRIP was before the Panel, as even Prospect concedes. D.I. 3, p. 4. Prospect prefers to speculate that the Panel's failure to specifically refer to Provasi DRIP in the Interim Award was an attempt to "split the baby" instead of believing the more plausible explanation that the Panel intended to award all DRIP fees to Stratera and Destra and simply failed to fully describe

that in its Interim Award. *See id.,* p. 5. Unlike the situation in *Verizon,* the Panel was within its authority to clarify that ambiguity in its award.

The First Circuit applied this principle in deferring to an arbitrator's explanation of the ambiguity of an interim award. There, the court found that if the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his decision." *E. Seaboard Const. Co., Inc. v. Gray Const., Inc*., 553 F.3d 1, 6 (1st Cir. 2008), *quoting United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 371, 98 L. Ed. 2d 286 (1987). In that case, the arbitrator had failed to include a contract balance in the interim award and later amended the award to include that amount. Like the Panel here, the arbitrator confirmed that the evidence was only consistent with the inclusion of that determination but, by mistake, had not been specifically included in the award. Despite the original award appearing to be complete, the court reasoned, "Given our deferential review of arbitration awards, it is not within the purview of this court to question such an assertion. Instead, we think the arbitrator's statement provides evidence adequate to show that he did not exceed his authority under Rule 47." *Id.* at 6. This is different from in *Verizon,* where the arbitration board explicitly discussed and rejected the relief that was later added to the revised award. *See Verizon,* 13 F.4th at 310-11.

Likewise, the Third Circuit has explained, "Where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify. The resolution of such an ambiguity is not within the policy which forbids an arbitrator to redetermine an issue which he has already decided, for **there is no opportunity for redetermination on the merits of what has already been decided**." *La Vale Plaza*, 378 F.2d at 573 (emphasis added). Instead, the Third Circuit held in a binding precedent,

"the clarification of an ambiguity closely resembles the correction of a mistake apparent on the face of the award and the determination of an issue which the arbitrators had failed to decide." *Id.*

Prospect cites an unreported District of New Jersey decision for the proposition that a court cannot clarify an ambiguity when there is no ambiguity to clarify. *See* D.I. 3, p. 18, *citing Int'l Broth. of Teamsters Local 177 v. United Parcel Serv. Of Am., Inc.,* No. CIV.A.09CV0903(DMC), 2009 WL 3234541, at *5 (D.N.J. Sept. 30, 2009). But in that case, the arbitrator explicitly considered in the first award the issue addressed in the subsequent award and found it beyond the scope of the arbitration. *Int'l Broth. of Teamsters,* 2009 WL 3234541, at *5. Here, the Panel did not specifically reference Provasi DRIP at all in the Interim Award. *See* Ex. 1-F, 1-4.

Here, the Panel confirmed that its clarification was not prohibited because it did not redetermine the merits of an issue specifically addressed in the Interim Award. Ex.1-L, 1. Instead, the Panel explained, "Here, the Panel is simply clarifying the effect – at most, correcting its earlier characterization of the effect – of its determination of [Stratera and Destra's] claim for inclusion of DRIP shares in the calculation of their fees." *Id.* at 2-3. It went on:

> In its Interim Award, however, the Panel failed to make clear that full effectuation of its intent required a clear statement to the effect that the calculation must be based not only on DRIP on shares issued through DCI, but also DRIP on shares issued through Stratera's subsidiary, Provasi.

Id., 2.[5] The Panel followed this statement about the ambiguity in its Interim Award by announcing that it would now "correct[] that oversight" and that, "Doing so does not, however, require re-visiting the Panel's conclusion on the merits." *Id.*

The Panel is explicitly saying that it intended to but did not specifically address the issue

[5] Remarkably, despite the Panel's language that the Interim Award failed to "make clear" its award, Prospect falsely claims in its introduction to its Opening Brief that "even the panel did not contend anything in the Award was unclear." D.I. 3, p. 2.

of Provasi DRIP in its Interim Award, and that this failure left an ambiguity on how such DRIP was to be treated. *Id.* Consistent with the instructions in *Verizon*, the Panel offered a "rational" explanation of how it had overlooked the specific inclusion of that determination in the Interim Award and clarified that ambiguity, and such explanation is entitled to be credited. *See Verizon,* 13 F.4th at 309. Thus, even if the Court does not agree with the Panel's conclusion that the Interim Award was ambiguous, it is required to defer to that determination. *See E. Seaboard Const. Co.*, 553 F.3d at 6. Accordingly, the ambiguity exception to *functus officio* applies, and the Interim Award was properly replaced by the Final Award and the Revised Interim Award.

2. Interim Award Did Not Adjudicate Submitted Issue

The exception to *functus officio* allowing revision of an award when the interim award does not address a submitted issue also applies. As Prospect concedes, "To be sure, the [Interim] Award did not discuss Provasi DRIP. . . ." D.I. 3, p. 17. Prospect does not dispute that the issue of Provasi DRIP was submitted to the Panel or that the Interim Award did not specifically adjudicate that issue. *Id*. Instead, Prospect relies upon the Panel's broad statements that it had fully considered all arguments raised and that claims for relief sought not addressed in the Interim Award are dismissed, relying on a parenthetical quote in an unreported District of Pennsylvania decision that does not even address *functus officio*. D.I. 3, p. 17, citing *Forest Elec. Corp. v. HCB Contractors*, No. CIV. A. 91-1732, 1995 WL 37586, at *6 (E.D. Pa. Jan. 30, 1995). Prospect's argument ignores, though, the Panel's explanation that it believed it had addressed all contested DRIP in its award and intended for it all to be awarded to Stratera and Destra. Ex. 1-L, 2. As the Panel explained:

> The essence of the Panel's ruling on the merits is that Schedule 11.18 requires the inclusion of *all* DRIP shares, and not just those issued on shares issued through DCI acting as subwholesaler, in the calculation of Destra and Stratera Fee Party Percentages.

Id.. Thus, when the Panel stated all issues had been addressed, it was based upon this assumption

that the Interim Award included Provasi DRIP. When Prospect calculated its fees to exclude that DRIP and the issue was raised to the Panel, the Panel saw that the Interim Award had not explicitly addressed all issues submitted and clarified it. *See id.* The Panel explained its reasoning as follows:

> That exception presumably includes cases in which the award does not *completely* adjudicate an issue that has been submitted. Here, by failing to address adequately in the Panel's holding the effect of its determination of the issue of entitlement to inclusion of the DRIP shares in the calculation of [Stratera and Destra's] fees, the Panel failed to adjudicate the issue completely.

Ex. 1-L, 4.

Prospect's argument that the Interim Award addressed the issue of Provasi DRIP depends upon the Court accepting Prospect's unsupported theory that the Panel's specific inclusion of DCI DRIP in its award while not specifically mentioning Provasi DRIP was some kind of baby-splitting compromise because the arbitrators did not believe either party's position. *See* D.I. 3, p. 15. But the Court need not, and cannot, accept Prospect's wild speculation when the Panel has explained exactly what it intended and how the omission was made. Ex. 1-L, 2. The Panel's explanation was a rational one subject to deference. *See Verizon*, 13 F.4th at 309.

Prospect also points to the Panel's language that the Interim "Award stated that the only remaining issues were 'attorney's fees and an updated damages calculation.'" D.I. 3, p. 17. But this mischaracterizes the Panel's Interim Award. Instead, the Panel's statements about what issues remained described those remaining at the close of testimony, not after the issuance of the Interim Award. Ex. 1-F, 2. Thus, the Panel was describing the issues that had been **submitted**, not those **decided**. When the Panel then failed to address Provasi DRIP specifically in the Interim Award, it was entitled to address that submitted issue in its Revised Interim Award and Final Award.

D. Panel Determined It Was Permitted to Clarify Interim Award and Cannot Be Overturned Even if Incorrect Unless It Manifestly Disregarded the Law

When both parties submit to the arbitration panel the issue of whether the panel has the

authority to modify its award, the panel's resolution of that issue may only be overturned if it manifestly disregarded the law. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc*., 592 F.3d 329, 344 (2d Cir. 2010). In such a case, "If the arbitrator is 'even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his decision.'" *E. Seaboard Const. Co., Inc*, 553 F.3d at 6, *quoting A*, 484 U.S. at 38. "In other words, once we determine that the parties intended for the arbitration panel to decide a given issue, it follows that the arbitration panel did not exceed its authority in deciding that issue—irrespective of whether it decided the issue correctly." *T.Co Metals*, 592 F.3d at 346 (internal quotations omitted). Such an intention is made clear when both parties "directly petition[] the arbitrator to amend the Original Award." *Id.* at 344. Then, there is no indication that the issue of the arbitrators' authority is preserved for review by a court. *Id.*.

Here, both parties directly petitioned the Panel to modify the Interim Award. Stratera and Destra filed their Rule 50 motion, and Prospect requested that the Interim Award be modified to change its conclusion on who was the prevailing party entitled to attorneys' fees. *See* Ex. 1-J. Prospect requested such a modification of the award by telling the Panel in the ordered submission on attorneys' fees, "Claimants are not the prevailing party under controlling Delaware law. Therefore, Respondent should not be ordered to pay any of Claimants' fees and expenses." Prospect's Attorney Fee Submission dated October 29, 2021. *See also* Ex. 1-J, 3 and 13 (arguing, alternatively, that Prospect was the prevailing party or no fees should be awarded). This was a clear request to modify the Interim Award given the Interim Award had explicitly held that Stratera and Destra were entitled to recover their attorneys' fees under the Third Agreement's prevailing party provision. Ex. 1-F, 5 and n.1. With both parties requesting that the Panel decide the issue of whether the Interim Award should be amended, the Panel's conclusion that it was entitled to issue

the Revised Interim Award was entitled to deference. *See T.Co Metals*, 592 F.3d at 346.

In a similar situation, the Second Circuit found that "even assuming that we viewed the arbitrator's construction [a AAA Rule 50 equivalent] to be erroneous—and we reach no such conclusion here—the Amended Award cannot be vacated under [FAA] § 10(a)(4) merely on that ground." *See T.Co Metals*, 592 F.3d at 346. The Fifth Circuit similarly found that, where parties both addressed the issue of an amended judgment to the arbitrator and requested that the arbitrator delay such a decision, they had implicitly consented to the arbitrator's continuing jurisdiction over the matter. *Martel*, 449 Fed. Appx. at 355.

The *Verizon* court noted that a court must not unflaggingly defer to an arbitrator's characterization of an amendment as a clarification, but there is nothing in *Verizon* indicating that both parties had submitted to the arbitrators the question of whether the original award could be modified. *See Verizon*, 13 F.4th at 309. Thus, the *Verizon* opinion does not obviate the need to determine here, where all parties submitted to the Panel the issue of whether the Interim Award could be modified, that the Panel's determination manifestly disregarded the law or whether it was "even arguably acting within the scope of [its] authority." *E. Seaboard Const.*, 553 F.3d at 6; *T.Co Metals*, 592 F.3d at 344. Given the Panel's rational explanation for its authority to clarify the Interim Award in Order #22, Prospect cannot meet the manifest disregard standard, and the Panel's decision that the Interim Award was not a final award and was subject to revision must be upheld.

E. Third Circuit *En Banc* Panel or United States Supreme Court Should Abolish *Functus Officio* Doctrine

While acknowledging that the law in the Third Circuit currently recognizes *functus officio,* Stratera and Destra contend that the doctrine is based upon faulty and outdated assumptions and is inconsistent with the Supreme Court's instructions on arbitration and should therefore be abandoned. Stratera and Destra recognize that this Court must follow precedent but assert this

argument here to preserve it for appeal. As Judge Posner has observed, the doctrine of functus officio has outlived its usefulness. *Glass, Molders, Pottery, Plastics & Allied Workers Intern. Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co*., 56 F.3d 844, 846 (7th Cir. 1995). Judge Posner explained that it originated in the bad old days when judges were hostile to arbitration and ingenious in hamstringing it. *Id.* It is based on the fear that arbitrators would be subject to ex parte communications that would cause them to change their award. *Id.* at 847. But "[c]oncern about ex parte communications with arbitrators strikes us as a better reason for barring such communications than for denying arbitrators all power to revisit their awards." *Id.* In this case, the Panel explicitly stated that the rationale of *functus officio* to avoid inappropriate communications was not implicated:

> It is also worth noting, as did the court in *Employers Surplus Lines*, that "[t]he rationale underlying [*functus officio*] is to prevent re-examination of an issue by a nonjudicial officer potentially subject to outside communication and unilateral influence". There has been no outside communication or unilateral influence in this matter, and no party is suggesting that there has been. Thus, the underlying rationale of the *functus officio* doctrine is inapplicable here.

Ex. 1-L, 3. Accordingly, the justification for *functus officio* has eroded, and the doctrine should be discarded. Just like courts, arbitrators can make mistakes, and they should be permitted to correct them as courts do. *Glass, Molders*, 56 F.3d at 847.

IV. Conclusion

The Court should find that *functus officio* is inapplicable because the Interim Award was not a final award subject to the *functus officio* doctrine or AAA Rule 50 and, in any event, the clarification in the Revised Interim Award falls within the exceptions to *functus officio* for awards that contain ambiguities or do not address all issues submitted and did not redetermine any claim decided and does not redetermine a decided claim. Accordingly, Prospect's request that the Interim Award should be confirmed must be denied, and the Court should confirm the Final Award.

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Dated: May 19, 2022
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