Case Nos. 24-3291 and 24-3374

In The
United States Court of Appeals
For the Third Circuit

PROSPECT CAPITAL MANAGEMENT L.P.,

Petitioner-Appellant, Cross-Appellee,

v.

STRATERA HOLDINGS, LLC AND DESTRA CAPITAL MANAGERS LLC

Respondent-Appellees, Cross-Appellant.

On Appeal from the United States District Court for the District of Delaware, C.A. No. 1:22-mc-00089-JLH-CJB, Hon. Jennifer L. Hall, *United States District Judge*

APPELLEE AND CROSS-APPELLANT STRATERA HOLDINGS, LLC'S BRIEF

Of Counsel:

Timothy R. Dudderar (#3890)
POTTER ANDERSON &
CORROON LLP
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899-0951
(302) 984-6000
tdudderar@potteranderson.com

Bobby G. Pryor
Dana G. Bruce
Matthew D. Hill
PRYOR & BRUCE
302 N. San Jacinto
Rockwall, Texas 75087
(972) 771-3933
bpryor@pryorandbruce.com
dbruce@pryorandbruce.com
mhill@pryorandbruce.com
Counsel for Appellee and Cross-Appellant Stratera Holdings, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned Counsel states as follows:

1. Stratera Holdings, LLC ("Stratera") is a non-governmental corporate party. It does not have any parent corporations.

2. No publicly held company owns ten percent (10%) or more of its ownership interests.

3. There is no publicly held corporation that is not a party to the proceeding before this Court but that has a financial interest in the outcome of the proceeding.

SUBJECT MATTER AND APPELLATE JURISDICTION

The district court exercised diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332. This Court has jurisdiction under the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(D) ("An appeal may be taken from . . . an order . . . confirming or denying confirmation of an award or partial award."). *See Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 218 (3d Cir. 2012), as amended (Apr. 4, 2012), aff'd, 569 U.S. 564 (2013).

ISSUES

1. Whether *functus officio* barred the arbitration panel (the "Panel") from clarifying the effect of its Interim Award.

2. Whether the Interim Award, read as a whole, was ambiguous as to the types of shares on which it awarded fees so as to fall within the ambiguity exception to *functus officio*.

3. Whether the Interim Award fell within the exception to *functus officio* regarding the failure to fully adjudicate submitted issues.

4. Whether the Interim Award was a final award such that it was subject to *functus officio*.

5. Whether Prospect Capital Management L.P. ("Prospect") consented to the Panel's jurisdiction by submitting to it the issue of modifying the Interim Award by requesting a modification as to whether Prospect was the prevailing party.

6. Whether the Panel manifestly disregarded the law in ruling that the Interim Award was final or that either of those exceptions to *functus officio* applied such that its Final Award can be vacated.

7. Whether the judge-made doctrine of *functus officio* remains good law after the United States Supreme Court's decision in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022) struck down judge-made, arbitration-specific procedural rules.

Issues 3 through 7 are asserted as conditional cross-appeals and offer alternative grounds for affirming the district court's judgment.

RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court, and Stratera is not aware of the existence of any related cases or proceedings.

STATEMENT OF THE CASE

I. Underlying Dispute

Prospect's Statement of the Case strays wildly from the factual determinations of the Panel, which the magistrate's Report and Recommendation (the "Report") and district court's opinion dutifully follow, and much of Prospect's statement is argumentative and unsupported by the record. Appx0171-0188, 0190-208; Brief of Appellant ("Prospect Brief"), 4-13. Initially, Prospect mischaracterizes the parties' functions. Although Prospect and Stratera, through Priority Senior Secured Income Fund Management, LLC (the "LLC"), together set up the Priority Income Fund (the

"Fund") with the LLC as its financial advisor, and as a member Prospect provided advisory decisions for the Fund, Prospect omits that Stratera put up the money to start the Fund and funded the Fund's initial expenses. Appx0175-0176, 0195; Prospect Brief, 4.

The Fund "[s]eparately" hired Provasi Capital Partners LP ("Provasi"), a Stratera subsidiary, as Dealer Manager to distribute the Fund's shares, a relationship governed by separate agreement between the Fund and Provasi called a Dealer Manager Agreement ("DMA"). Appx0176, 0195. The Panel found that the division of payments within the LLC "was not conditioned on any further action by Stratera or distribution by Provasi," such that Prospect's inaccurate effort to minimize Stratera's importance to the LLC and the Fund is irrelevant. Appx0176, 0195; Prospect Brief, 4-5.

Prospect's claims that Provasi missed sales targets, "resigned and shut down," and left the Fund without a means of distribution are without support in the record cited and not part of the facts found by the Panel. Prospect Brief, 4. Instead, the Panel found that after Provasi provided the notice of termination contemplated by the DMA and, at Prospect's request for Provasi to continue as Dealer Manager despite its notice of termination, Provasi engaged Destra Capital Managers LLC's ("Destra")affiliate, Destra Capital Investments, LLC ("DCI"), as a sub-wholesaler "under Provasi." Appx0176, 0195-0196, 0007. Provasi's continued role as the wholesaler over DCI belies Prospect's contention that Provasi provided no services after May 2018. Prospect Brief, 4. Rather, the Panel found Provasi's continued role allowed "dealer agreements [to be kept in place] with the broker-dealers in [Provasi's] selling group. . . ." Appx0176, 0195-0196.

Before DCI's involvement as sub-wholesaler, the Base Management Fees and Incentive Fees ("Fees") paid to the LLC were split 50/50 between Stratera and Prospect under the Second Agreement, but contrary to Prospect's uncited contention that the split was on shares, the split was based on revenues received by the LLC. Appx0176, 0195; Prospect Brief, 5. Prospect discusses the addition of Destra to this fee split in the Third Agreement but omits the Panel's finding that 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. Appx0176-0177, 0196-0197. The Panel also found that Prospect was aware the "Claimants expected to receive, under the Third Agreement, fees on all assets, including DRIP shares." Appx0177, 0197.

Despite this, in the parties' negotiation of the Third Agreement, 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. Appx0178, 0197, 0144, 0188. While Prospect argues repeatedly that "in the Offering" means DRIP shares were not included, the Panel found, based upon testimony at the hearing from multiple witnesses, including securities law counsel and two expert witnesses, and testimony concerning Stratera and Destra's requirement that Prospect prepare Schedule 11.18 and incorporate it into the agreement, that the phrase was ambiguous as to whether it included DRIP shares. Appx0180-0184, 0200-0203; *see* Prospect Brief 5-7. To confirm that the basis for distribution of Fees was unchanged from the approach taken in the Second Agreement, Destra insisted that Prospect provide a schedule showing the methodology of dividing Fees. Appx0178, 0197. Prospect provided such a schedule, which is incorporated into the Third Agreement as Schedule 11.18. Appx0166, 0155-0156, 0178, 0197. The parties added language to the Third Agreement, in Section 11.18, requiring that the calculation of the fee percentages be performed "in accordance with" that schedule, refuting Prospect's contention that Schedule 11.18 was an "addendum." Appx0156, *see* Prospect Brief, 6. Further, that schedule stated that the "number of shares" listed in the schedule were "examples and are for discussion purposes only," not, as Prospect claims, that the entire schedule (including the variables showing the correct calculation) was an example and for discussion purposes. Appx0166.

When investors purchase shares, they have an opportunity to elect whether they prefer to receive periodic distributions in the form of cash or distributions instead be used to purchase additional shares through the dividend reinvestment program ("DRIP"). Appx0175-0176, 0178, 0195-0196, 0198. Accordingly, DRIP shares on shares sold during DCI's tenure as sub-wholesaler were through DCI acting as sub-wholesaler. Appx0178, 0198. Likewise, for shares sold before DCI became the sub-wholesaler, the issuance of such DRIP shares was on shares issued through Provasi acting as Dealer Manager. Appx0175-0176, 0195-0196.

Nonetheless, Prospect excluded DRIP shares issued on both Provasi-sold and DCI-sold shares from the shares credited to Stratera and Destra in its calculation of Fees, contending that such shares were not issued "in the Offering" and, utilizing its self-serving "interpretation," instead paid all such Fees to itself. Appx0178, 0198. Thus, Prospect did not pay as required by Schedule 11.18. Appx0155-0156, 0166, 0194-0195, 0202-0203.

II. Arbitration

Stratera and Destra alleged in the arbitration (the "Arbitration") that Prospect 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 or DCI. Appx0173-0174, 0192-0193. Stratera and Destra requested that the Panel award them the Fees collected and improperly retained by Prospect and not distributed to Stratera and Destra. Appx0173-0174, 0192-0193. Stratera and

Destra also requested that the Panel require that future Fees be distributed in accordance with Schedule 11.18, which included DRIP shares. Appx0173-0174, 0182-0184, 0192, 0201-0203.

At the arbitration hearing, with the parties' consent, the Panel issued an order establishing the issues being submitted and those which would be bifurcated and addressed separately. Appx0169, 0171-0188, 0190-0208. The issue of prevailing party, and therefore entitlement to attorney's fees, was not bifurcated: that order stated, "Proceedings with respect to attorneys' fees will be conducted after the Panel issues an Order on liability and damages, if any." Appx0169. Thus, only the issue of the amount of attorneys' fees was bifurcated, and the parties' submission to the Panel was on both liability and damages. *Id.*, *see* Appx0171-0188, 0190-0208.

III. Interim Award

The Panel issued an "Interim Award of Arbitrators" ("Interim Award") that described its conclusion on the DRIP issue, stating, after finding that the Third Agreement was ambiguous, "We find that parol evidence supports **Claimants' [i.e., Stratera and Destra's] position** that the calculation of the Applicable Fee Party Percentages must include Fees on DRIP shares." Appx0183-0184 (emphasis added), 0173-0174, 0171-0188. The Interim Award held "Prospect cannot disclaim the application of the schedule. . . that, on its face confirmed the Claimants' understanding. . . ." Appx0181.

Importantly, the Third Agreement's defined term "Applicable Fee Party Percentages" includes not only Destra Fee Party Percentage but also Stratera Fee Party Percentage (and PCM (Prospect) Fee Party Percentage). Appx0142, 0148, 0144, 0147. By referring to the conclusion that it supported "**Claimants' position,**" the Interim Award could only be referring to DRIP flowing from both Provasi-sold and DCI-sold shares, which was Stratera and Destra's (referred to by the Panel as "Claimants'") position. Appx0423-0424, ¶¶ 1, 2, 0365, ¶¶ 1, 2 (neither of which differentiates between DRIP flowing from Provasi-sold and DCI-sold shares), 0173-0174, 0177-0184. The Panel's finding, therefore, clearly included DRIP shares in both the Stratera Fee Party Percentage and Destra Fee Party Percentage.

Contrary to Prospect's contention, the Panel *did* include a comprehensive explanation of its analysis and reasoning, including four pages of "Findings of Fact" and a nine-page, detailed discussion of its "Conclusions of Law." Appx0175-0187, 0194-0207; *see* Prospect's Brief, 8, 35. It provided complete details of the Panel's legal conclusion, referring to "DRIP shares" without differentiating between DRIP shares flowing from Provasi-sold and DCI-sold shares, demonstrating the Panel's understanding that there was no distinction between them in terms of Prospect's obligation to pay:

> 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".

Appx0183, 0203. By finding "Claimants" expected to be paid on DRIP shares, the Panel, again, is referring to Stratera and Destra as opposed to Prospect's argument that somehow the Panel only directed that Destra receives Fees on DRIP shares. *Id.*

Prospect claims the Interim Award denied relief for Provasi DRIP shares as well as two other classes of shares issued as a result of a merger, Stira shares and Stira DRIP shares, but the Panel's Interim Award included a specific explanation of why Stira Shares and Stira DRIP shares were not included as Stratera Fee Party Shares or Destra Fee Party Shares, yet includes no such explanation (and there could be none) as to why DRIP on Provasi-sold shares should not be included. Appx0184-0185, 0202-0203.

But in the portion of its opinion under the "Holding" heading, the Panel 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. . . .

Appx0174-0175.[1]

The Interim Award made clear it was not a final award. Appx0171-0172, 0187-0188. Most obviously, the label, "Interim Award," signaled the Panel's intention that it was not a final award. Appx0171. Indeed, the last paragraph states, "This Interim Award shall remain in full force and effect until such time as a final Award is rendered." Appx0188. The Panel knew what a final award would look like (addressing all of the issues submitted), and this was not it, and they reserved jurisdiction of the case until the issuance of the Final Award. *Id.,* Appx0175, n.1.

IV. Stratera and Destra sought clarification of award after Prospect provided information only on DCI-sold shares

To obtain the information necessary to issue a final award, the Panel ordered Prospect to provide Stratera and Destra with a calculation of their share of Fees collected and improperly retained by Prospect so the parties could make a joint submission concerning such information. Appx0187-0188. When Prospect provided

[1] This is a complicated case, as stated and demonstrated by the Report. Appx0020. And, in fact, even as careful and detailed as the Report was, the Report had to be clarified. Appx0055. The Report stated: "And we now know that in that award, what those arbitrators *thought they had conveyed* and what they *meant to be conveying* was that **Prospect** should prevail on the Provasi DRIP issue….," (emphasis added) (italics in original) which was clearly at odds with the recommendations as set forth in the Report. Appx050, 0055. As a result, the magistrate entered an Errata Order clarifying he meant to say "**Stratera** should prevail. . . ." *Id.* A crucial correction.

that information, it was apparent Prospect had gratuitously interpreted the Panel's Interim Award to exclude from the calculation DRIP shares flowing from Provasi-sold shares and shifted multiple millions of dollars in Fees from Stratera to itself, contrary to Prospect's answers to Interrogatory No. 15, now contending the amount owed was only $266,067, an amount without support in the record. Appx0475-0488; *see* Appx0078.

Stratera and Destra sent the Panel a letter explaining Prospect's misreading of the Interim Award 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. Appx0869-0882. They also submitted 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. Appx0469-0496.

Prospect argues that the Panel "only" clarified the Interim Award two months after its issuance. Prospect Brief, 20. But Stratera and Destra 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. Appx0727, ¶ 4. After such conference, Stratera and Destra submitted their request for the Panel to clarify the award two days later, on October 27, 2021, only 19 days after the Panel issued the Interim Award. Appx0459-0460.

In its response, Prospect argued that the Panel was prohibited from clarifying the Interim Award by *functus officio* but failed 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. Appx0497-0508. This position by Prospect contrasted sharply ***with Prospect's own request*** that the Panel modify the Interim Award, and again the Revised Interim Award, to conclude that Prospect, not Stratera and Destra, was the prevailing party. Appx0920-0932, 0554-0564, 0987-1010. By doing so, Prospect vested jurisdiction in the Panel to modify its awards and therefore waived any application of *functus officio*. *Id.* Notably, the Panel would later "reject Prospect's invitation to revisit the award of attorneys' fees," not because of *functus officio* but because Stratera and Destra were prevailing parties. Appx0224.

V. 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 *functus officio*. Appx0211-0214. While Prospect contends the Panel admits to making a mistake, Prospect omits the context in which the Panel described its ambiguous wording as one where 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." Appx0214. Prospect's contention that the Panel "did not contest that its original decision had *denied* fees on Provasi DRIP shares" is unsupported by the record given that the import of the Panel's entire order was that the Interim Award did not deny such Fees. Appx0211-0214, Prospect Brief, 9 (italics in original). 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 Provasi-sold and DCI-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.

Appx0211-0212. 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." Appx0212 (italics in original). 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).

Prospect misleadingly states the arbitrators found their clarification "fell outside the scope of Rule 50." Prospect Brief, 9-10. 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. Appx0212. 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**." Appx0212-0213 (emphasis added).

The Panel further found, even if the award were not an interim award and *functus officio* applied (which Prospect mischaracterizes as a suggestion by the Panel that "it might not be bound by [*functus officio*]"), exceptions to the *functus officio* doctrine applied. Appx0214; Prospect Brief, p. 10. One exception allows modification of an award when "the award does not adjudicate an issue which has been submitted." Appx0214 (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.

Appx0214 (italics in original). Thus, the Panel's explanation (which Prospect claims does not exist) of how its clarification could be squared with the Interim Award's clause dismissing other claims and relief sought, it addressed the relief sought but did not do so completely. Appx0214; *see* Prospect Brief, 10. 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." Appx0213 (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.

Appx0214. 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-sold 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.**

Appx0213 (emphasis added; italics in original). Accordingly, the Panel concluded that it retained jurisdiction and was authorized to enter a Revised Interim Award. Appx0214.

VI. Panel issued Revised Interim 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 Provasi-sold and DCI-sold shares would be included in the calculation of Fees owed to Stratera and Destra. Appx0538, 0513-0531. 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. Appx0223-0229. 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. . . .

Appx0224-0227. In addition, the Final Award required Prospect to continue to pay Fees to Stratera and Destra for future quarters, in a manner described in the Revised Interim Award. Appx0227. Unlike the Interim Award, the Final Award contained explicit instructions regarding when such payments would be due and how they would be calculated. *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. Appx0175. Thus, what was in the Final Award was an award—the actual relief awarded—and what was in the Interim Award was a description of the Panel's conclusions. *Id.,* Appx0224. The Final Award also awards attorneys' fees, costs, and expenses to Stratera and Destra. Appx0224. Prospect does not challenge that portion of the Final Award. Appx0063-0087.

VII. Report found Panel properly clarified ambiguity

After Prospect filed the underlying lawsuit to vacate the Revised Interim Award and the Final Award and confirm the Interim Award (Appx0063-0087) and Stratera and Destra filed a counter-petition to enforce the Final Award (Appx0274-0294), Magistrate Judge Burke issued the Report that found "the Panel properly clarified an ambiguity in its prior Interim Award—a clarification that did not run afoul of the *functus officio* doctrine nor Rule 50." Appx0052-0053; *see, generally*, Appx0019-0054, 0055. The Report further explained that "Prospect has not met its heavy burden to demonstrate that pursuant to Section 10(a)(4), the Panel's Revised Interim Award and Final Award should not be enforced. Nor has it overcome the extremely deferential 'manifest disregard of the law' standard by demonstrating that the Panel's decision flies in the face of clearly established legal precedent." Appx0052.

Prospect mischaracterizes the Report's finding of ambiguity as based not on a finding of lack of clarity but that the Panel's reasoning should have led to a different result, but this is belied by the Report's extensive discussion of the basis for its finding. Appx0041-0051; Prospect's Brief, 12. There, the Report identifies six distinct bases supporting its conclusion regarding ambiguity:

- The Interim Award's discussion of what "Claimants" expected to be paid on "DRIP shares" without distinguishing between Provasi-related DRIP shares and DCI-related DRIP shares (Appx0041-0044);

- "[R]eplete" references in the Interim Award to "DRIP shares" without specifying whether they are related to Provasi or DCI (Appx0044-0045);

- The Panel's conclusion that the "calculation of the applicable Fee Party Percentages must include [F]ees on DRIP shares" and that such calculation should be made in accordance with Schedule 11.18, which "facially applies to Stratera Fee Party Shares that are made up of both DCI-sold and *Provasi-sold* DRIP shares" such that an award that distinguished between them would be inherently contradictory (Appx0044-0047, (italics in original));

- The conspicuous omission of discussion of Provasi-related DRIP shares in addressing the DCI DRIP issue given the arguments for inclusion of both were identical (Appx0047-0048);

- Although not dispositive, the Panel's own conclusion that the Interim Award was ambiguous and its rational clarification of that ambiguity (Appx0049); and

  The policy of judicial restraint in avoiding a decision that has the "opposite effect" of what the "arbitrators t<u>hought that they had conveyed</u> and what they <u>meant to be conveying</u>. . . . (Appx0049-0050 (italics in original))."

The Report also rejected Prospect's argument based on Rule 50 that the Panel could only correct "clerical, typographical, or computational errors" because that portion is permissive, not restrictive. Appx0051-0052. The only limitation of Rule 50 on the arbitrator's power is that the arbitrator may not redetermine the merits of a decided claim, which the Report determined the Panel did not do. Appx0052.

VIII. District court independently found ambiguity in Interim Award that the Panel clarified and found the Final Award instead of the Interim Award enforceable

The district court "[a]ssum[ed] for the purposes of the argument that the *functus officio* doctrine is still good law" and that the Report "was correct in its conclusion that the Interim Award was 'final' for purposes of applying that doctrine" (which [Stratera and Destra] dispute). Appx0058. The district court concluded that the Report did not err in determining the exception to *functus officio* for clarifications of ambiguities in a prior award bars the application of *functus officio* in this dispute. *Id*. The district court found that the arbitrators "both (i) rationally concluded there was an ambiguity in the Interim Decision and (ii) rationally clarified that ambiguity." *Id.* The court further found that it is "far from clear that it would be appropriate" not to give deference to the arbitrators' determination that their Interim Award contained an ambiguity but nonetheless the district court "independently concludes that there was an ambiguity." *Id.* And it found the case "wholly dissimilar" to the authority cited by Prospect (including *Verizon* [*Pennsylvania, LLC v. Communications Workers of Am., AFL-CIO, Local 13000,* 13 F.4th 300, 306 (3d Cir. 2021)]) and found that the other authorities cited by Prospect did not limit the district court to "only look at the 'Holding' section of the Interim Award to determine if there is an ambiguity." Appx0058-0059. Accordingly, the district court adopted the Report, overruled Prospect's objections, denied Prospect's request to enforce the Interim Award and granted Stratera and Destra's request to enforce the Final Award. The court dismissed Stratera and Destra's objections, finding that it need not address those alternative arguments for granting Stratera and Destra the relief they requested and denying Prospect its requested relief. Appx0056-0058.

SUMMARY OF THE ARGUMENT

After leaving an ambiguity in its Interim Award, the Panel issued a detailed ruling explaining how the award was ambiguous and clarifying that ambiguity, finding that neither *functus officio* nor the then-applicable AAA Commercial Arbitration Rule 50 ("Rule 50") prevented it from clarifying its award. Both the magistrate and the district court independently determined that the Interim Award was ambiguous such that the Panel was permitted to clarify it. This analysis and these determinations, and the district court's independent finding of ambiguity, were sufficient for the district court to confirm the Final Award and reject Prospect's request to confirm the Interim Award and vacate the Final Award.

There are additional bases on which the district court's judgment should be affirmed that the district court did not address because of its finding on *functus officio*:

- The Panel's rulings that *functus officio* and Rule 50 did not apply were entitled to deference under FAA § 10(a)(4), and they were well-supported and rational.

- The Panel was also entitled to clarify its Interim Award pursuant to the *functus officio* exception allowing clarification where an award does not address all submitted issues.

- By asking the Panel to alter the Interim Award to change its determination of the prevailing party entitled to attorney's fees, Prospect submitted the issue of the revision of the Interim Award to the Panel and consented to its continued jurisdiction such that *functus officio* and Rule 50 were inapplicable.

- Neither *functus officio* nor Rule 50 applies because the Interim Award was not final given it did not resolve all of the submitted issues, deferring a decision on the submitted issue of damages. *Functus officio* only applies to final awards.

- The United States Supreme Court effectively overruled *functus officio* in *Morgan v. Sundance*, 596 U.S. at 417. There, the Court held that courts could not apply judge-made, arbitration-specific procedural rules, and *functus officio* is such a rule.

This Court should affirm the district court's judgment and remand to the district court for a determination on attorney's fees.

STANDARD OF REVIEW

"On appeal from a district court's ruling on a motion to confirm or vacate an arbitration award," this Court reviews "its legal conclusions de novo and its factual findings for clear error." *Sutter*, 675 F.3d at 219. "A more deferential standard of review applies to the arbitration award itself." *Id.* The Court does "not entertain claims that an arbitrator has made factual or legal errors." *Id.* Instead, the Court "begin[s] with the presumption that the award is enforceable." *Id.*

"The basis for vacatur asserted in this case, § 10(a)(4) of the Federal Arbitration Act, permits district courts to vacate awards when arbitrators exceed their powers." *Id.* (citing 9 U.S.C. § 10(a)(4)). "An arbitrator oversteps these limits, and subjects his award to judicial vacatur under § 10(a)(4), when he decides an issue not submitted to him, grants relief in a form that cannot be rationally derived from the parties' agreement and submissions, or issues an award that is so completely irrational that it lacks support altogether." *Id.*

ARGUMENT AND AUTHORITIES

I. Panel's ruling falls within exceptions to *functus officio*

The Report and district court found that even if the Interim Award was a final award for purposes of *functus officio,*[2] the doctrine is inapplicable here because 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

[2] The district court assumed without deciding that the Interim Award was final. Appx0058-0059.

> (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 determined that its clarification of the Interim Award met both the second and third exceptions. Appx0214. Given the district court and Report's decisions that the third exception regarding ambiguity applied, neither addressed whether the second exception relating to the failure to adjudicate submitted issues applied. Appx0037, 0059.

A. Interim Award included an 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 left an ambiguity in its opinion regarding the treatment of Provasi-sold DRIP shares. Appx0214. 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." Appx0214.

This follows the standard set by the Third Circuit:

> 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, Inc. v. R. S. Noonan, Inc., 378 F.2d 569, 573 (3d Cir. 1967) (emphasis added). Instead, Third Circuit precedent provides that "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.*

1. Report and district court correctly found the Revised Interim Award clarified an ambiguity in the Interim Award

The Report accurately framed the applicable question on this third exception for ambiguity: "whether the Interim Award's language is ambiguous as to whether Prospect or Respondents prevailed on the Provasi-sold DRIP shares issue"—that is, "is the Interim Award reasonably 'susceptible to more than one interpretation' on that score?" Appx0039. *See also Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No. 24*, 357 F.3d 546, 554 (6th Cir. 2004); *Accuride Erie L.P. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local Union 1186*, Civil Action No. 05-169 Erie, 2009 WL 426661, at *3 (W.D. Pa. Feb. 20, 2009). To invoke *functus officio* to ignore the Panel's clarification, it is not sufficient that the interpretation of the Interim Award posited by Prospect is the best interpretation of the Interim Award (and it is not); instead, for something to be unambiguous, it must be susceptible to only one reasonable interpretation. *Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69, 76 (3d Cir. 2011) (addressing ambiguity under federal common law in the context of a contract). This was the crux of the reasoning in the Report: while it found there were some arguments that the Interim Award had not intended to award Fees on Provasi-based DRIP, it also found numerous persuasive arguments that it did; accordingly, the award, when read in full, did not establish the one preferred by Prospect as the only possible reading. Appx0038-0051.

2. Portions of Interim Award not under "Holding" heading are relevant to determination of ambiguity

In evaluating ambiguity, Prospect seeks to interpret not the entire Interim Award but only the portion labeled as the "Holding." Prospect Brief, 23-24. But, the United States Supreme Court has explained, "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (evaluating ambiguity in statutory interpretation). In reviewing arbitration awards, the Third Circuit evaluates the entire award. *Newark Morning Ledger Co. v. Newark Typographical Union Local 103*, 797 F.2d 162, 165-167 (3d Cir. 1986) (finding no rational basis for an award when its award conflicted with the reasoning in the award's opinion); *see also Pittsburgh Metro Area Postal Workers' Union, AFL-CIO v. U.S. Postal Serv.*, No. CIV.A. 07-00781, 2008 WL 1775502, at *11 (W.D. Pa.

Apr. 16, 2008) ("The court is not obligated to ignore the opinion section of the arbitrator's award where it aids the interpretation of the damage award.") (cleaned up).

Prospect argues the Panel's clarification should be rejected because the Interim Award was "fundamentally inconsistent" with the Revised Interim Award. Prospect Brief, 24 (citing *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 992 (3d Cir. 1997)). The omission of language about Provasi-related DRIP shares in the Interim Award did not render it fundamentally inconsistent with the Revised Interim Award but fundamentally internally inconsistent. The Panel, the Report, and the district court all found that the Interim Award's explanation of what it was awarding in other parts of the Interim Award and its explanation of the basis of that award were inconsistent only with the omitted language in the "Holding" section and not inconsistent at all with the Revised Interim Award. Appx0211-214, 0041-0051, 0058-0059.

The Report's path to reaching this conclusion is instructive. The Report states that it "easily rejects" Prospect's argument that no portion of the Interim Award but the "Holding" section could be useful in determining whether it was ambiguous. Appx0042. The Report explains other sections of the Interim Award, particularly the section labeled "Conclusions of Law," also contain the Panel's legal reasoning and, as the name would suggest, legal conclusions, noting that some of the statements in the Conclusions of Law section "read[] like a statement of the of the Panel's legal holdings and its ultimate conclusions." Appx0042. The Interim Award's Conclusions of Law section interpreting the allocation of Fees under the Third Agreement reads as follows:

> b. Because of the ambiguity in the Third Agreement, parol evidence is admissible to determine the expectations that formed the basis of the contractual relationship. We find that parole evidence supports Claimants' [i.e., Stratera and Destra's] position that the calculation of the Applicable Fee Party Percentages must include fees on DRIP shares.
>
> i. 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 Claimants' 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".
>
> ii. For as long as DRIP shares are issued in lieu of a cash dividend to investors whose shares were issued through DCI as a sub-wholesaler, whether the DRIP shares are issued before or after November 2, 2019, we conclude that there is no reason to exclude such DRIP shares from being included in the calculation of the Applicable Fee Party Percentages.

Appx0183-0184. Critically, in the view of the Report, the Panel found that the "parol evidence supports *Claimants'* [i.e., Stratera and Destra's] position that the calculation of the Applicable Fee Party Percentages must include [F]ees *on DRIP* *shares*" and repeatedly discussed how "'*Claimants*" expected to be paid on '*DRIP shares*' and how Prospect was deemed to have accepted the inclusion of '*DRIP shares*.'" Appx0043 (emphasis in original) (quoting Appx0183). The Report found that the Interim Award in this section did not differentiate between DRIP shares sold by DCI and those sold by Provasi but rather "'DRIP shares' writ large" (Appx0043), consistent with Stratera's and Destra's demands in arbitration (that, as discussed, Prospect attempts to mischaracterize as seeking four categories of Fees) seeking DRIP shares without differentiating the seller. Appx0423-0424, 0365.

Indeed, in the arbitration, Prospect's own interrogatory response to a request to calculate Fees "[a]ssuming DRIP Shares are included in the formulas shown on Schedule 11.18" included shares sold by both Provasi and DCI. Appx00453-00457. Likewise, Prospect witnesses' testimony in the arbitration reflected that they understood that the shares for which Stratera was entitled to Fees under Schedule 11.18 included those sold by Provasi. Appx0457-0458. The Report also noted that Prospect's own briefing to the Panel "lumped together DCI-sold and Provasi-sold DRIP shares, referring to them simply as "DRIP shares[.]" Appx0044, 1203-1207, 1213-1214.

Prospect cites *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960), to argue that there is a dichotomy between the award and "the opinion accompanying an award" with respect to where an ambiguity in an arbitrator's ruling may be found. Prospect Brief, 35, n.4. But Prospect fails to include the remainder of the sentence containing the quoted language, which makes clear that it was referring only to an ambiguity in an opinion accompanying an award "which permits the inference that the arbitrator may have exceeded his authority." *Enterprise Wheel,* 363 U.S. at 598. There, the Supreme Court found that ambiguities in the arbitrator's explanation for the rationale behind his award could have supported a conclusion that the arbitrator relied upon something he was not permitted to rely upon, which, if proven, would establish that the arbitrator exceeded his authority. *Id.* at 597. The idea that an ambiguity cannot be used as evidence that an arbitrator exceeded the scope of a submission is far from the issue here, an ambiguity in what the Panel awarded that is informed by the entire Interim Award instead of just a selected section. *See id.*

Prospect also argues that looking beyond the "Holding" label to the rest of the award is inappropriate because, Prospect contends, the parties did not request a reasoned award. Prospect Brief, 36. But Prospect specifically agreed in the Third Agreement that "[t]he award of the arbitrators shall be in writing and shall briefly state the findings of fact and conclusions of law on which it is based." Appx0153. This is what the Panel did in the sections of the Interim Award that Prospect seeks to ignore.

3. Denial of unaddressed claims does not make Interim Award unambiguous because there was ambiguity in what claims were addressed

Prospect also places great emphasis on the Interim Award's statement that "claims not addressed herein are denied." Prospect Brief, 25 (citing Appx0188). But this ignores that the basis for the Panel's, Report's, and district court's conclusions on ambiguity was that the Interim Award was ambiguous as to whether it had addressed the claim as it related to Provasi-related DRIP shares. Prospect cites a New Jersey state court case addressing such a catch-all clause in the context of whether an arbitrator had violated an arbitration rule (not *functus officio*), but there was no argument in that case that the initial award was ambiguous as to whether it actually addressed the remedies later added in a subsequent award. *See* Prospect Brief, 24-25; *Wein v. Morris*, 194 N.J. 364, 385, 944 A.2d 642, 654 (2008). The situation here is not like the unreported Ninth Circuit case or the California district court cases Prospect cites for the proposition that an arbitrator may not issue a revised award changing a clear holding in the initial award ("shall stand" to "shall not stand" or a 5% interest rate changed to a 10% rate in certain circumstances). Prospect Brief, 24-25; *Mike Rose's Auto Body, Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.,* 389 F. Supp. 3d 687, 700-701 (N.D. Cal. 2019); *San Diego AFL-CIO Bus Drivers Local Div. 1309 of Amalgamated Transit Union v. San Diego Transit Corp.*, 972 F.2d 1342 (9th Cir. 1992).

4. Undifferentiated references to "DRIP shares" create ambiguity whether Interim Award addressed Provasi-related DRIP

The Interim Award's ambiguous references to "DRIP shares" are one factor in making the Interim Award susceptible to more than one interpretation. The Report emphasized that the entire Interim Award was "replete" with references to "DRIP shares" without differentiating between those based upon Provasi-sold shares and DCI-sold shares. Appx0044-0045. In describing the "Claims and Relief Sought," the Interim Award describes the Fees sought by Stratera and Destra as those attributable to "DRIP and Stira Shares," consistent with the undifferentiated requests in Stratera and Destra's demands. Appx0173. The Interim Award also quotes a Prospect witness as stating that he understood Stratera and Destra would receive Fees on all assets, "including DRIP Shares," again undifferentiated. Appx0177. *See also* Appx0181-0182, 0186-0187 (discussing undifferentiated "DRIP shares" in the Interim Award's "Conclusions of Law"). Given two different types of DRIP shares were at issue, the Report found that these undifferentiated references to DRIP shares could be understood to refer to both types of shares, including Provasi-sold DRIP shares. Appx0044. The Report analogized the situation to *Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, Local 631 v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409, 1411 (9th Cir. 1997), where the court addressed an arbitration award involving a challenged employment termination where the initial award found that a termination should instead have been a three-day suspension without pay. The Ninth Circuit found that the arbitrator's conclusion that there be no pay for the three days of the suspension raised the need to clarify whether the employee would also be entitled to recover back pay for the remaining time he had been terminated. *Silver State,* 109 F.3d at 1411. The portion of the arbitrator's award addressing only part of the relief sought made clear that the award had left ambiguous his decision on the other portion of the relief sought. *Id.* Similarly, here, when the Interim Award repeatedly referenced the claim for Fees on both types of DRIP shares, its silence in specifically addressing Provasi shares left an ambiguity allowing the Panel to clarify its award. Appx0044.

5. Reliance on Schedule 11.18 to award DRIP Fees would render Interim Award internally contradictory if Provasi-related DRIP not included

The Report also found important in determining the Interim Award was ambiguous that the "Applicable Fee Party Percentages" of Schedule 11.18 included Fees for shares sold by both DCI and Provasi. Appx0043-0044. The Interim Award based its conclusion that Stratera and Destra were entitled to Fees on DRIP shares on the requirement that such Fees be calculated in accordance with Schedule 11.18. Appx0183. The Interim Award explained, "[i]n Schedule 11.18, one cannot calculate the Applicable Fee Party Percentages without calculating the Destra Fee Party Shares and Stratera Fee Party Share." Appx0183. Thus, the Interim Award made clear that, under its reasoning that Schedule 11.18 determined Fees, both Destra Fee Party Shares and Stratera Fee Party Shares were included. *See id.* Though the Panel went on to reference only DCI with respect to who sold the shares, the Report correctly noted that under Schedule 11.18, Stratera Fee Party Shares have "two different components: (1) shares sold by DCI, for which Stratera gets 12.5% credit; and (2) *shares sold by Provasi*, for which Stratera gets 50% credit." Appx0046 (italics in original) (citing Appx0148, 0166). Prospect misleadingly states that "Schedule 11.18 does not mention Provasi at all" (Prospect Brief, 39-40, n.6), but Schedule 11.18 creates a variable entirely devoted to such shares: "B" in its fee allocation formula is specifically defined as "Fund Shares Issued and Outstanding (Issued Prior to May 11, 2018)," which are the shares sold by Provasi. Appx0166. This is apparent in the definition of "C," shares sold through Destra, which is calculated as all shares issued and outstanding minus those included in "B." Appx0166. The Panel explained this understanding in Order #22. Appx0212, n.4. While Prospect argues that the Interim Award did not strictly follow Schedule 11.18 because it did not award Stira shares, which were created pursuant to a merger with another fund after the parties entered into the Third Agreement, the Interim Award was clear that the Schedule 11.18 formula that included Provasi-sold DRIP shares was the basis for its conclusion that Stratera and Destra were entitled to Fees on DRIP shares. Appx0183. As the Panel explained in its order on Stratera and Destra's request for clarification, "the essence of [its] 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." Appx0211-0212.

The Report explained that "the Court is not aware of any principled argument that the Panel's rationale as to why Prospect is liable for Fees on DCI-sold DRIP shares *would also not necessarily lead to the conclusion that Prospect should be liable for Fees on Provasi-sold DRIP share*." Appx0047 (emphasis in original). Prospect attempts to retrofit an argument that the Panel could have been basing a denial of Fees on Provasi-sold DRIP on some alleged concern for the quality of Provasi's sales, but Prospect mischaracterizes the record as establishing that Provasi resigned as the Fund's sub-wholesaler (as discussed, it did not—Provasi did not resign and remained the wholesaler (Appx 0176, 0195)) after struggling with sales, for which Prospect cites only its own unsupported allegation in its brief to the district court. Prospect Brief, 39-40, n. 6 (citing Appx0007, 0071). In fact, Prospect has not articulated any principled argument for why Provasi-sold DRIP shares should be treated differently than DCI-sold DRIP shares under the Interim Award's reasoning. The Report found that any reading of the Interim Award that treated such shares differently, then, could be understood to make the award internally contradictory. Appx0047. Courts have found awards that are internally contradictory to be ambiguous. *See Pittsburgh Metro*, 2008 WL 1775502, at *11 (rejecting *functus officio* where an award that was contradictory on its face was ambiguous). In addition to internal contradiction establishing ambiguity, courts will not enforce arbitration awards that are inherently contradictory. *Sheet Metal Workers Intern. Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745 (9th Cir. 1985); *United Steelworkers of Am., Local No. 12886 v. ICI Americas Inc., Atlas Point Plant.*, 545 F. Supp. 152, 154 (D. Del. 1982).

6. Absence of specific mention of core Provasi-related DRIP issue supports conclusion Panel intended its Interim Award to include such shares

In finding the Interim Award ambiguous, the Report also found that the conspicuous absence of discussion regarding Provasi-sold shares in the Interim Award, given that the DRIP on such shares was one of the core issues facing the Panel, leads to the conclusion that the Interim Award's references to DRIP shares included Provasi-related DRIP shares. Appx0047-0048. This is consistent with the Third Circuit's approach in *Transtech Indus. v. A&Z Septic Clean*, 270 Fed. Appx. 200, 210 (3d Cir. 2008), where the court found no violation of *functus officio* where the initial award contained little discussion of a tax liability issue that had been submitted, and the amended decision clarified an ambiguity about that issue.

7. Authorities cited by Prospect do not address whether award is ambiguous for purposes of *functus officio*

Faced with the ambiguity of the Interim Award, Prospect cites a series of cases that do not address the question of whether an award is ambiguous for the purposes of *functus officio*. Prospect cites *Enterprise Wheel* for the proposition that an ambiguity in an opinion is not a reason to enforce an award (Prospect Brief, 30), but *Enterprise Wheel* does not address whether an award is ambiguous for *functus officio* purposes but rather whether the basis for the award is ambiguous in a way that could lead to the conclusion the arbitrator exceeded his authority. 363 U.S. at 598. Prospect cites *Arco-Polymers, Inc. v. Loc. 8-74*, 671 F.2d 752, 755 (3d Cir. 1982) (per curiam) (Prospect Brief, 31), for the proposition that courts should not disturb ambiguous awards, but that case is a labor-specific case that, like *Enterprise Wheel*, was focused on whether the award could be interpreted in a way that would indicate the arbitrator exceeded his authority. Prospect then cites a series of cases that all deal with actions to enforce awards for the idea that courts must enforce awards even if the awards are ambiguous, silent, or wrong on the basis for the awards. *See* Prospect Brief, 31. But none of those cases address whether ambiguity renders unclear the substance, not the basis, of an award, as the Panel, Report, and district court did here. *See NF&M Corp. v. United Steelworkers,* 524 F.2d 756, 759 (3d Cir. 1975); *Exxon Shipping Co. v. Exxon Seamen's Union,* 73 F.3d 1287, 1297 (3d Cir. 1996); *Office & Prof'l Employees Intern. Union, Local No. 471 v. Brownsville Gen. Hosp.,* 186 F.3d 326, 333 (3d Cir. 1999); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros,* 70 F.3d 418, 422 (6th Cir. 1995).

8. Prospect incorrectly characterizes relief sought

Prospect's characterization of the Interim Award as unambiguously excluding Provasi-based DRIP shares depend in part on Prospect's false contention that Stratera and Destra sought Fees on "four categories of shares" in the arbitration: Provasi DRIP shares, DCI DRIP shares, Stira shares, and Stira DRIP shares. Prospect Brief, 20. But Stratera and Destra's demands in arbitration did not distinguish between the types of DRIP shares on which they sought to recover Fees, instead seeking that they be paid Fees on all DRIP shares and that future fee distributions "be distributed in accordance with Schedule 11.18" of the Third Agreement. Appx0423-0424, 0365. With that misunderstanding corrected, Prospect's "A+B" argument that the Interim Award only awarded Stratera and Destra Fees on two of the four categories of shares sought fails.

9. Prospect seeks to apply "too ambiguous to enforce" standard that is not applicable where an arbitrator clarifies an award

Prospect repeatedly and falsely contends that *Verizon* requires that an award be "too ambiguous to enforce" such that a court has no choice but to remand it for clarification. Prospect Brief, 18, 22, 23, 29, 30. Instead, as Prospect acknowledges elsewhere in its brief (Prospect Brief, 19-20), that language describes the ambiguity standard for requiring a court to remand an award to an arbitrator for clarification. *Verizon,* 13 F.4th at 309. *Verizon* never adopts that standard for cases addressing whether an award was ambiguous such that an arbitrator could clarify the award, instead finding that it "need not decide" whether the clarification award at issue was a rational clarification of ambiguities in an earlier award because it was "*obvious* from the written opinion" that the arbitrator exceeded his authority by reversing an explicit holding of the first award in the second. *Id.* at 310 (emphasis in original). While a requirement that an ambiguity render an award "too ambiguous to enforce" might make sense in deciding whether to remand a decision to an arbitrator, it would make no sense in determining whether an arbitrator—with knowledge of what it intended in its original award—could clarify the award to correct a misunderstanding, and *Verizon* does not require the application of such an incongruous standard. *Id*.

10. Panel's decision that Interim Award was ambiguous is entitled to deference given it is a rational interpretation

While the district court independently found the Interim Award ambiguous, and the Report explained that its deference to the Panel's determination that the Interim Award was ambiguous was not dispositive, both found to be rational the Panel's determination that the Interim Award was ambiguous and found that the Revised Interim Award provided a rational clarification. Appx0049, 0058. The district court correctly identified the standard for such deference:

> Courts are not supposed to give "unflagging deference" to an arbitrator's post-hoc "clarifications" of its earlier decision. However, "[w]here an arbitrator has actually

> decided an issue but the ruling is ambiguous," courts must "defer to the arbitrator's *post hoc* interpretation of his award [] if it is a rational clarification of the ambiguity."

Appx0058 (internal citations omitted) (citing *Verizon,* 13 F.4th at 309).

In finding that there was no ambiguity in the arbitration award analyzed there, *Verizon* explained that "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. *Id.* In applying the rationality standard to an arbitrator's determination and clarification of an ambiguity, the Third Circuit in *Verizon* was applying the standard under §10(a)(4) of the FAA, whereby the court's role is to "determine if the form of the arbitrators' award can be rationally derived either from the agreement between the parties or from the parties' submissions to the arbitrators, and we do not revise the terms of the award unless they are completely irrational." *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 295 (3d Cir. 2010) (cleaned up). To overturn the arbitrator's decision, "[T]here must be absolutely no support at all in the record justifying the arbitrator's determinations for a court to deny enforcement of an award." *Id.* "Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (cleaned up). This is the standard for reviewing the Panel's conclusion that the Interim Award was ambiguous.

The Panel's justification for clarifying its award differed from the *Verizon* arbitration board's justification for changing the award. 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. This clear difference in the facts between *Verizon* and the instant case led the district court to state:

> The facts here are wholly dissimilar from *Verizon*, where it was "obvious" that the arbitrators had revised an earlier decision when their later decision permitted recovery for a particular issue despite having previously "explicitly stated" in the earlier decision that recovery should be denied because that issue was already "settled."

Appx0058-0059 (citing *Verizon,* 13 F.4th at 310-311). Prospect's protestations to the contrary do not change these fundamental differences with this matter.

The First Circuit applied the same 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 clearly different from *Verizon,* where the arbitration board explicitly discussed and rejected the relief that was later added to the revised award. *Verizon,* 13 F.4th at 310-11.

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. Appx0211. The Panel explained that the "essence of the Panel's conclusion [in the Interim Award] 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." Appx0211-0212. In the Revised Interim Award, the Panel explained, "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." Appx0212-0213. 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.

Appx0212. 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." Appx0212.

The Panel is explicitly saying that it intended to but did not completely address the issue of Provasi DRIP in its Interim Award, and that this failure left an ambiguity on how such DRIP was to be treated. Appx0212. 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 this Court, unlike the district court and Report, does not independently conclude that the Interim Award was ambiguous, it is required to defer to the Panel's rational determination. *See E. Seaboard Const. Co.*, 553 F.3d at 6; *see also Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.,* 909 F.3d 544, 549 (2d Cir. 2018) (deferring to the arbitrators' determination of ambiguity); *Sterling China*, 357 F.3d at 557 (deferring to the arbitrator's determination that an additional remedy not included in the initial award was a clarification of an ambiguity); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1272 (10th Cir. 1999) (deferring to an arbitrator's clarification to include a back pay remedy). Accordingly, the ambiguity exception to *functus officio* applies, and the Interim Award was properly replaced by the Final Award and the Revised Interim Award.

B. Interim Award did not adjudicate submitted issue

While neither the Report nor the district court addressed whether the second exception to *functus officio* applied because of their conclusion on ambiguity, the second exception does apply and is an independent and alternative basis for affirming the district court. Appx0038, n.14, 0059. Under Third Circuit precedent, *functus officio* does not apply "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." *Verizon*, 13 F.4th at 307.

Here, this exception is the other side of the ambiguity coin: if the court concludes the Interim Award did address Provasi-related DRIP, it did so ambiguously, but if the Interim Award did not address Provasi-related DRIP, it failed to address a submitted issue. Stratera and Destra's demands in arbitration sought that they be paid Fees on all DRIP shares and that future fee distributions "be distributed in accordance with Schedule 11.18" of the Third Agreement. Appx0423-0424, 0365. As discussed, Prospect mischaracterizes Stratera and Destra's demands but acknowledges that the issue of Provasi DRIP was submitted to the Panel. Prospect Brief, 20.

In Order #22, the Panel concludes that, even were *functus officio* applicable to the Interim Award and the Provasi DRIP issue, exception (2) to *functus officio*, as discussed in *Verizon*, applied because "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." Appx0214. The Panel interpreted the Interim Award to indicate that it failed to adjudicate all issues presented and failed to fully adjudicate "the issue of entitlement to inclusion of the DRIP shares in the calculation of Claimants' [Stratera and Destra's] fees." *Id.* The Panel notes:

> 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 sub-wholesaler, in the calculation of Destra and Stratera Fee party Percentages.

Appx0212 (italics in original). But the Panel then explains that the Interim Award was subject to clarification because it did not decide all issues submitted:

> 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.

Appx0214 (italics in original).

As with the Panel's ambiguity finding, to ignore this finding of the Panel regarding its own authority and vacate its resulting Final Award would require this court to find that the Panel exceeded its powers under Section 10(a)(4). Appx0019 (citing *Oxford Health Plans,* 569 U.S. at 569). As the Report explained, the conclusion would need to be not that the Panel was wrong or "even seriously wrong" but rather that the arbitrators acted outside their authority and did so by reflecting their "own notions of [economic] justice." Appx0019. Order #22 and the Revised Interim Award reflect that the Panel did not impose its "own notions of economic justice"—instead, the Panel considered the authorities governing *functus officio* submitted to it by Prospect, Stratera, and Destra and made a reasoned determination that the Interim Award had not adjudicated the issue completely. And, as with ambiguity, even if this Court does not independently conclude that the Interim Award failed to address a submitted issue, it is required to defer to the Panel's rational determination. *See E. Seaboard Const. Co.*, 553 F.3d at 6. As such, this exception to *functus officio* provides an alternative basis for affirming the district court.

II. Rule 50 did not preclude Panel from clarifying Interim Award

Prospect incorrectly argues that the Rule 50[3] barred the Panel from clarifying the Interim Award by misinterpreting Rule 50. Prospect Brief, 38-39.

A. Rule 50's arbitrator clarifications are not limited to clerical, typographical, or computational errors

Rule 50 states:

> Within 20 calendar days after the transmittal of an award,

[3] The version of the AAA Commercial Arbitration Rules in effect at the time of the arbitration can be found at https://www.adr.org/media/r1bgkegp/commercialrules_web-final.pdf.

> 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.

Prospect conveniently misreads the rule to only allow **arbitrators** to correct clerical, typographical, or computational errors which is inconsistent with its text. Prospect Brief, 38. The sentence containing that requirement deals only with what **parties** may request and, even at that, is permissive, using the word "may." It thus does not limit parties from requesting other changes of arbitrators beyond the specific procedure provided by Rule 50. 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.

Given that those narrow categories 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. 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 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, the Panel did not redetermine the merits of any claim already decided.

B. Panel's determinations permitted by AAA rules

The Panel's detailed analysis in its Order #22, correctly interpreted Rule 50 and *functus officio* as **not** preventing the clarifying of the Interim Award in the Final Award. Appx0211-0214. In construing its authority, the Panel noted that the AAA Commercial Arbitration Rule 7(a) empowered the Panel to determine its own jurisdiction. Appx0211, n.1. And Rule 8 provides, "The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties." The Third Agreement governing the relationship between the parties and the arbitration specifically calls for the application of the AAA Commercial Arbitration Rules and delegates the question of the arbitrators' jurisdiction ("arbitrability") to the Panel:

> "[T]he Asserting Parties agree to submit any persisting claim (whether or not permitted by this Agreement**)** including but not limited to any issue regarding arbitrability, not to a court but only to binding arbitration in Wilmington, Delaware in accordance with the Commercial Arbitration Rules of the American Arbitration Association. . . ."

Appx0152. Thus, given the Third Agreement, Rule 8, Rule 7(a), and Rule 50, codifying *functus officio*, the application of the doctrine is exclusively in the hands of the Panel, and Order #22 controls. These rules that the parties agreed to follow bind them to the arbitrator's interpretation as long as it is "within reasonable limits." *Communications Workers of Am., AFL-CIO v. Sw. Bell Tel. Co.*, 953 F.3d 822, 827 (5th Cir. 2020). Thus, the Panel's interpretation of the rules must be followed even where "reasonable judges and arbitrators could interpret the AAA rules differently from the way" the Panel did here. *Id.* (quoting *Lagstein v. Certain Underwriters at Lloyd's, London,* 607 F.3d 634, 645 (9th Cir. 2010)). Relying on that deferential standard, the Fifth Circuit confirmed an arbitrator's award where the arbitrator had issued a revised award with a substantively different remedy because of his "technical error" in relying upon an incorrect collective bargaining agreement in issuing the first award. *Sw. Bell,* 953 F.3d at 825-830.

Order #22 discusses, analyzes, and concludes that Rule 50, prohibiting redetermining "the merits of any claim already decided," did not prevent the Panel's clarification of the Interim Award because the Panel was not redetermining any claim already decided, distinguished *Verizon,* 13 F.4th at 307, and concluded that neither Rule 50 nor *functus officio* precluded clarification of the Interim Award. Appx0211-0214. Given the deference under FAA § 10(a)(4) to decisions of arbitrators if they are "even arguably construing or applying the contract," the Panel's decision that Rule 50 did not preclude it from clarifying the Interim Award is binding. *See Oxford Health Plans,* 569 U.S. at 569.

III. *Functus officio* does not apply because Interim Award was not a final award

While the exceptions to *functus officio* discussed above are sufficient to affirm the district court and confirm the Final Award, affirmance and confirmation are also appropriate because the Interim Award was not a final award.[4] *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*, 378 F.2d at 572. 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

[4] The district court found that it need not address this argument, contained in Stratera and Destra's objections to the Report. Appx0059, 1265-1267.

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

A. Interim Award did not resolve both liability and damage issues submitted to it and reserved jurisdiction

Here, the Panel’s Order #21 explicitly states that both liability and damages were submitted to the Panel following the arbitration hearing. Appx0169. Even if the Interim Award arguably resolved questions of liability, it reserved determinations on damages for the Final Award. Appx0187-0188. The Interim Award stated that the Panel’s jurisdiction would not end until its issuance of such a Final Award. Appx0175, n.1. The Interim Award also stated, “This Interim Award shall remain in full force and effect until such time as a final Award is rendered.” Appx0188. Only after the Panel had reviewed the additional submission by the parties, asked any questions it had, or scheduled a hearing does the Interim Award state that “the Panel will issue a final award.” Appx0188. The Third Circuit, discussing favorably a decision from another circuit, explained that an “award was final because it determined liability and the remedy” and “did not reserve jurisdiction.” *PG Publ’g,* 19 F.4th at 321 (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)). Here, by contrast, the Interim Award did not determine the remedy and did reserve jurisdiction. Appx0175, n.1, 0188.

B. *Verizon* did not change that the standard for determining finality of an award is the same in *functus officio* cases as in the complete arbitration rule

Under the "complete arbitration rule," an arbitration award that postpones the determination of a remedy is not a "final and binding award." *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). The Report incorrectly determined that the Interim Award was a final award by applying the wrong standard to assess finality and to the Panel's decision that the Interim Award was not final. Appx0021-0036. 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. 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). 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 cease-and-desist remedy in the award that the district court could enforce. *Verizon,* 13 F.4th at 309.

The Report reads *Verizon* to dictate that any award that determines all liability issues without determining damages issues is a final award. Appx0026. This ignores, though, that the only issue before the *Verizon* court was whether an arbitrator's award addressing liability but not damages was final when **only** liability issues had been submitted to the arbitrator. *Verizon,* 13 F.4th at 305, 309. The *Verizon* court, understandably, found that since all submitted issues had been decided, and the award was final despite not resolving the unsubmitted damages issue. *Id.* at 309. A reading of *Verizon* suggesting that all awards that address all liability issues but not damages are final is inconsistent with Third Circuit precedent and constitutes *dicta* given that damages issues were not submitted to the arbitrator before its merits award. *See La Vale,* 378 F.2d at 573 (holding that finality depends upon whether all submitted issues are decided). Here, of course, both liability and damages were submitted to the Panel, such that the Panel's determination only of certain liability issues did not determine the submitted issues and was therefore not final.

The Report incorrectly concludes that "finality" means something different in the context of the complete arbitration rule versus *functus officio.* In both circumstances, the question is whether submitted issues have been decided. *See PG Publ'g*, 19 F.4th at 322; *La Vale,* 378 F.2d at 573. It is counterintuitive to have separate finality standards, using the same word, to evaluate whether an arbitrator has resolved submitted issues so that they can be reviewed by a court and whether the arbitrator has resolved submitted issues so the arbitrator may not complete its award to address all submitted issues.

C. Panel's intention that Interim Award not be final is dispositive

Moreover, 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. Even if the Panel's conclusions in Order #22 were not dispositive of its intent, the Panel made clear in the Interim Award that only after the Panel had reviewed the additional submissions by the parties, asked any questions it had, or scheduled a hearing does the Panel state that "the Panel will issue a final award." Appx0188. The Report notes other language by the Panel that vaguely and in a conclusory manner states that all arguments had been considered (Appx0035), but the fact remains that the Panel failed in its Interim Award not only to fully address the issue of Provasi-sold DRIP shares but also did not address the issue of damages, which, unlike in *Verizon*, was an issue submitted to the Panel at the time of the Interim Award. The Panel further made clear its intention that the Interim Award not be final when it said in Order #21 that both liability and damages were to be submitted to the Panel with attorney's fees to be decided later, and then, in the Interim Award, ordered further briefing on damages. Appx0169.

D. Panel's decision that Interim Award was not final is entitled to deference

In any event, the issue of whether the Panel's award was final has already been decided by the Panel. In Order #22, the Panel concluded, "our analysis could stop here, as the Interim Award was labeled as such and clearly did not decide all issues including damages." Appx0213. The Panel went further, in its analysis of the exceptions to *functus officio*, prefacing its conclusion that exceptions apply with the phrase, "Even if the Panel's Interim Award were not considered 'interim', despite its title and effect . . . ." *Id.* This language makes clear that the Panel found that the Interim Award was not a final award, such that *functus officio* does not apply. As discussed, a court may not second-guess a panel's decision on such issues unless the Panel acted outside its authority under Section 10(a)(4) or manifestly disregarded the law, which Prospect cannot show.

IV. Prospect consented to Panel's continued jurisdiction and waived objection to such jurisdiction by requesting modification of award, rendering *functus officio* inapplicable

The district court's decision confirming the Final Award should also be affirmed because Prospect's request to the Panel to modify the Interim Award extended the Panel's jurisdiction and rendered *functus officio* inapplicable. (The Report found that it need not address this argument considering its decisions in Stratera and Destra's favor on the other issues.) When each party submits 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); *see also Brown v. Witco Corp.,* 340 F.3d 209, 219 (5th Cir. 2003) ("an arbitrator may exercise his power to clarify the terms of an award when he is asked to do so by parties mutually and without any party's objection. . . ."). Third Circuit authority confirms that when a party voluntarily submits an issue to arbitration, it waives any objection to such consideration and cannot later argue the arbitrator had no authority to resolve it. *Teamsters Local Union No. 764 v. J.H. Merritt & Co.*, 770 F.2d 40, 43 (3d Cir. 1985). The Second Circuit explained, "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. *Functus officio* may only deprive arbitrators of authority to proceed further in the absence of the parties' consent. *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 333 (3d Cir. 1991); *Locals 2222, 2320-2327, Intern. Broth. of Elec. Workers, AFL-CIO v. New England Tel. & Tel. Co.*, 628 F.2d 644, 647 n.5 (1st Cir. 1980).

Here, each party directly petitioned the Panel to modify the Panel's Interim Award: Stratera and Destra sent a letter to the arbitrators (Appx0447-0460) and filed their Rule 50 motion (Appx0469-0488), and Prospect requested that the Interim Award be modified to change its conclusion on who was the prevailing party entitled to attorneys' fees. Appx0920-0924, 0171-0188. In the "Holding" section of the Interim Award, the Panel ordered Prospect to pay attorney's fees to Stratera and Destra based upon the provision of the Third Agreement requiring a losing party to pay the fees of the prevailing party. Appx0175 and n.1 (the Panel decided similarly in the Revised Interim Award. Appx0194 and n.1). On October 31, 2021, four days after Stratera and Destra's letter requesting clarification, three days after their Rule 50 motion, and a month-and-a-half before the Panel ruled on the request in Order #22 and issued the Revised Interim Award, Prospect submitted a lengthy argument requesting that the Panel reverse its decision that Stratera and Destra were the prevailing parties headlined, "Claimants are not the Prevailing Party." Appx0920-0924. Prospect doubled down on this request for modification even after the Panel issued the Revised Interim Award, continuing to submit to the Panel's jurisdiction by submitting a similar request that the Revised Interim Award also be modified as to its determination of the prevailing party. Appx0554-0564.

Prospect recognized the import of the timing of this request when it **incorrectly** told the district court that the reason to reject the argument that Prospect had submitted to the Panel's jurisdiction to modify the award was that the decision had already been made:

> Prospect's arguments, submitted in compliance with the Award's order that "the parties shall jointly submit to the Panel their concurrence *or objections* to the information provided" regarding the **yet-undecided issue of fees** (D.I. 15-1 at 17–18 (emphasis added)), did not relate to, much less seek to modify, the Panel's already-final decision on liability. Furthermore, Prospect made an additional request for fee shifting to Prospect as the prevailing party **only *after* the arbitrators had already improperly modified the Award** (and renewed their order to provide "concurrence or objections" regarding attorney's fees (*id*. at 18)); that **later submission** cannot somehow **retroactively** justify the arbitrators' impermissible modification.

Appx1314-1315 (italics in original)(emphasis added). Contrary to Prospect's contentions, the Panel had already decided that Stratera and Destra were the prevailing parties and Prospect's request was made before the Panel issued Order #22 and the Revised Interim Award clarifying the Interim Award. Appx0175 and n.1, 0211-0214, 0190-0208. With both parties requesting that the Panel decide the issue of whether the Panel's Interim Award should be amended, the Panel's conclusion that it was entitled to clarify the Interim Award was entitled to deference. *See T.Co Metals*, 592 F.3d at 346. Indeed, when the Panel eventually ruled on Prospect's requests to modify the awards to change the prevailing party, the Panel accepted Prospect's invocation of its continuing jurisdiction to reconsider the award, "reject[ing] 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 the prevailing parties. Appx0224. Where the parties request a modification of an award, courts have found that they have consented to the arbitrators' jurisdiction such that *functus officio* is inapplicable. *T.Co Metals*, 592 F.3d at 344; *Martel v. Ensco Offshore Co.*, 449 Fed. Appx0351, 0354 (5th Cir. 2011); *Brown v. Witco Corp.*, 340 F.3d 209, 219 (5th Cir. 2003). Moreover, where the arbitrator's award states that the arbitrator retains jurisdiction in the arbitration and the parties do not dispute this jurisdiction or seek to vacate the award, they consent to the arbitrator's retention of jurisdiction such that the *functus officio* doctrine is inapplicable to later decisions. *Chicago Ins. Co. v. Gen. Reinsurance Corp.*, No. 18-CV-10450 (JPO), 2019 WL 5387819, at *2 (S.D.N.Y. Oct. 22, 2019).

Here, the Panel's Interim Award retained jurisdiction through the issuance of the Final Award, stating, "our jurisdiction ends at the time of our issuance of a Final Award." Appx0175, n.1. When Prospect proceeded to request that the Panel reverse its decisions in the Interim Award and Revised Interim Award that Stratera and Destra were the prevailing parties, Prospect not only failed to dispute the Panel's statement of its jurisdiction but sought to invoke that jurisdiction. *See* Appx0920-0924, 0554-0563.

V. Judge-made *functus officio* doctrine should be abandoned

A. *Morgan v. Sundance* is irreconcilable with the judge-made doctrine of *functus officio*

While, as discussed, the arbitrators' clarification of the Interim Award falls within the exceptions to *functus officio*, the entire doctrine of *functus officio*, whereby a common law, judge-made rule allows courts to second-guess decisions of arbitrators the parties contracted to decide their disputes, is irreconcilable with the U.S. Supreme Court's 2022 holding in *Morgan v. Sundance*, 596 U.S. at 417. *Morgan* considered only a single issue responsive to the Court of Appeals' predominant analysis:

> [whether courts] may create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's 'policy favoring arbitration.' They cannot. For that reason, the Eighth Circuit was wrong to condition a waiver of the right to arbitrate on a showing of prejudice.

Morgan, 596 U.S. at 417 (omitting cited cases). The Court stated that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Id.* at 418 (citation omitted). Put another way, "a court may not devise novel rules to favor arbitration over litigation." *Id.* (internal citations omitted). The Court held "the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules, like the one we address [in *Morgan*]." *Id.* at 419. Thus, to state it "conversely, it is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration." *Id.*

The judge-made addition of a federal common law prejudice requirement to contractual waiver law that *Morgan* rejected is analogous to the judge-made addition of a federal common law *functus officio* limitation on the enforcement of arbitration awards under FAA §10(a)(4). *See* 9 U.S.C. §10(a)(4); *Morgan,* 596 U.S. at 418. That statute allows a court to vacate an arbitration award only in specific circumstances, with the relevant one to *functus officio* being that the arbitrators exceed their powers. *Id.* The Third Circuit has explained that the "powers" referred to are those that can be "rationally derived either from the agreement between the parties or from the parties' submissions to the arbitrators." *Ario*, 618 F.3d at 295 (cleaned up). Just as one cannot overlay a prejudice requirement on a contractual waiver standard because of a policy favoring arbitration, they may not overlay a *functus officio* rule on the powers conferred on arbitrators by parties' agreements and submissions. *See Morgan,* 596 U.S. at 418.

The Supreme Court's holding in *Morgan* is clearly irreconcilable with Third Circuit precedent requiring the application of the *functus officio* doctrine, which is an arbitration-specific procedural rule. *See Verizon*, 13 F.4th at 305-306. The *functus officio* doctrine "is judge-made; it can be judge-unmade." *Glass, Molders, Pottery, Plastics and Allied Workers International Union, AFL-CIO, CLC, Local 182B, v. Excelsior Foundry Co.,* 56 F.3d, 844, 847 (7th Cir. 1995). As in *Morgan,* the doctrine creates a unique judge-made rule applicable only to arbitrations, treating arbitrations differently than contract cases outside of arbitration. *See Morgan,* 596 U.S. at 418. Prospect, Stratera, and Destra agreed in the Third Agreement to submit their disagreements to binding arbitration using the AAA Commercial Rules of Arbitration. Appx0152. By their agreement to such rules, the Parties agreed that the arbitrators, not the court, would decide *functus officio,* which doctrine is embodied in Rule 50. The Panel decided all Rule 50 and *functus officio* issues (Appx0211-0214), and courts are without authority under the Third Agreement to overturn their decision.

Finally, the Report argues that *Morgan* need not extend to *functus officio* because it does not prohibit every legal rule that only applies in the arbitration context. Appx0034, n.11. But *Morgan* is not limited to waiver and extends to all rules superimposed upon arbitration agreements, stating "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan,* 596 U.S. at 418. Given that court-made *functus officio* doctrine treats arbitration contracts differently from those outside the context of arbitration, and, specifically in this case, the agreement to apply the AAA Commercial Arbitration Rules and Rule 50, the court-made *functus officio* doctrine vitiates the parties' contract, and *Morgan* requires it come to an end.

B. Alternatively, *En banc* Third Circuit panel or Supreme Court should abandon judge-made *functus officio* doctrine

Alternatively, should this panel find *Verizon* (and the *functus officio* doctrine) not clearly irreconcilable with *Morgan,* Stratera asserts that *Verizon* and the Third Circuit jurisprudence on *functus officio* should be overruled. Stratera recognizes that this Court must follow Third Circuit precedent but assert this argument here to preserve it for consideration by an *en banc* panel of the Third Circuit or the Supreme Court.

CONCLUSION

The Court should affirm the decision below and remand to the district court for determination of the attorney's fees award to Stratera and Destra.

July 24, 2025

Respectfully Submitted,

PRYOR & BRUCE

By: /s/ Bobby G. Pryor__________
Bobby G. Pryor
Dana G. Bruce
Matthew D. Hill
PRYOR & BRUCE
302 N. San Jacinto
Rockwall, Texas 75087
(972) 771-3933
bpryor@pryorandbruce.com
dbruce@pryorandbruce.com
mhill@pryorandbruce.com

Counsel for Appellee and Cross-Appellant Stratera Holdings, LLC

OF COUNSEL

Timothy R. Dudderar (#3890)
POTTER ANDERSON & CORROON LLP
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899-0951
(302) 984-6000
tdudderar@potteranderson.com

COMBINED CERTIFICATIONS

I, Matthew D. Hill, hereby certify that:

1. This brief complies with the type-volume requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 15,243 words (excluding the parts of the brief exempted by Appellate Rule 32(f)), as counted using the word-count function on Word for Microsoft Office 365.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Appellate Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word for Microsoft Office 365 in 14-point Times New Roman font.

3. Moreover, I further certify pursuant to this Court's Local Appellate Rules 28.3(d) and 46.1(e), that I, Matthew D. Hill, as the signatory on the foregoing document, was admitted to the Bar of this Court on December 19, 2024, and am a member in good standing with the Bar of this Court.

4. The text of the electronic brief is identical to the text in the paper copies.

5. A virus detection program, Microsoft Safety Scanner, version 1.433.35.0, has been run on the file, and no virus was detected.

Dated: July 24, 2025

s/Matthew D. Hill
Matthew D. Hill
Counsel for Stratera Holdings, LLC

CERTIFICATE OF SERVICE

I, Bobby G. Pryor, hereby certify that on July 24, 2025, the foregoing Appellee and Cross-Appellant Stratera Holdings, LLC's Brief was filed with the Clerk of this Court using the CM/ECF system, which will send notification of such filing to all counsel of record, and is being sent via commercial carrier for delivery to the Clerk of this Court within three days.

Dated: July 24, 2025

Respectfully Submitted,

*s/Bobby G. Pryor*____________
Counsel for Stratera Holdings, LLC

ADDENDUM REGARDING STATUTES AND RULES

Pursuant to Federal Rule of Appellate Procedure, Appellee-Cross-Appellant Stratera Holdings, LLC submits this Addendum Regarding Statutes and Rules with the following statutes and rules:

1. 9 U.S.C. § 9
2. 9 U.S.C. § 10

5. AAA Commercial Arbitration Rule 7 (effective October 1, 2013)
6. AAA Commercial Arbitration Rule 8 (effective October 1, 2013)
7. AAA Commercial Rule 50 (effective October 1, 2013)

United States Code Annotated
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

9 U.S.C.A. § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

Currentness

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 672.)

9 U.S.C.A. § 9, 9 USCA § 9
Current through P.L. 119-18. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

9 U.S.C.A. § 10

§ 10. Same; vacation; grounds; rehearing

Currentness

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 672; Pub.L. 101-552, § 5, Nov. 15, 1990, 104 Stat. 2745; Pub.L. 102-354, § 5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub.L. 107-169, § 1, May 7, 2002, 116 Stat. 132.)

9 U.S.C.A. § 10, 9 USCA § 10
Current through P.L. 119-18. Some statute sections may be more current, see credits for details.

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Rules Amended and Effective October 1, 2013
Fee Schedule Amended and Effective July 1, 2016

(b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

(c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

(d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

- **i.** interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
- **ii.** an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement—Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

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. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and