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 REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

SUMMARY OF THE ARGUMENT

The district court correctly enforced the Final Award of the arbitration panel (the "Panel") by upholding the Panel's conclusion that its clarification of its Interim Award was not prevented by *functus officio* or the then-applicable AAA Commercial Arbitration Rule 50 ("Rule 50"). This Court should affirm on that basis but, in the alternative, should also affirm on grounds the district court did not reach.

When Prospect Capital Management L.P. ("Prospect") requested that the Panel modify its ruling in the Interim Award that Stratera Holdings, LLC ("Stratera") and Destra Capital Managers LLC ("Destra") were the prevailing parties and entitled to attorneys' fees, Prospect submitted the issue of the modification of the Interim Award to the Panel, conferring jurisdiction on it. The record does not support Prospect's protests that it only sought to adjust the amount of fees and that the Panel ordered it to request the modification. And even if the parties sought different changes in the Interim Award, all parties' submission of the modification issue cloaked the Panel with jurisdiction.

Even without such submission, the Panel was entitled to modify its award (even though it only clarified it) because the original Interim Award had not addressed the issue submitted to the Panel regarding the Claimants'[1] entitlement to

[1] "Claimants" refers to Stratera and Destra collectively in their role as joint beneficiaries of the arbitration award.

fees on DRIP shares ("Provasi DRIP") issued on shares sold by Provasi Capital Partners LP ("Provasi"). This Court is required to defer to the Panel's determination given the deference the Supreme Court requires courts to give to arbitrator determinations under the Federal Arbitration Act ("FAA").

Functus officio also did not prevent the Panel's clarification that Claimants were entitled to Provasi DRIP because the Interim Award was not final. The finality standard applied to determine courts' jurisdiction to enforce awards is equally applicable in the context of *functus officio*. And the Panel's determination that the Interim Award was not final is entitled to deference.

Finally, the district court's judgment should be upheld because Prospect's arguments for allowing courts to apply a common law *functus officio* threshold to the narrowly-circumscribed statutory review of arbitration awards under the FAA are prohibited by that statute, and, to the extent courts applying the FAA have applied such a threshold, they have been abrogated by *Morgan v. Sundance*, 596 U.S. 411, 417 (2022), which prohibits the application of such judge-made, arbitration-specific procedural rules. Prospect's inconsistent characterization of the rule as a contractual "default rule" emphasizes the extent to which the judicial application of the rule is inconsistent with the FAA, which vests arbitrators with authority to interpret arbitration agreements that provide such authority, and the FAA requires that courts defer to such interpretations.

ARGUMENT AND AUTHORITIES

I. Prospect's submission of the issue of the modification of the Interim Award gave the Panel jurisdiction to modify the award

While Prospect opposed modifying the Interim Award to clarify the Panel's ruling on Provasi DRIP fees, Prospect's request to the Panel to modify the Interim Award's liability decision as to the prevailing parties acknowledged and conferred continuing jurisdiction on the Panel to modify the Interim Award. Thus, even if this Court were to reject the district court's finding that the Revised Interim Award permissibly clarified an ambiguity and find instead that the Panel changed its ruling, the Panel was nonetheless permitted to do so because all parties gave the Panel jurisdiction to modify the award.

A. Prospect did not seek to adjust the amount of the award but to reverse the Panel's determination on liability for attorneys' fees

Prospect repeatedly attempts to mischaracterize the relief it sought in changing the Interim Award's determination that Claimants were the prevailing parties as instead seeking only an adjustment of the amount of fees. Prospect's Response, 33-35. This mischaracterization is belied by the language of the Interim Award, the arbitration agreement at issue (the "Third Agreement"), the direction from the Panel, and Prospect's request. The Interim Award provides:

> In accordance with Section 11.15(b)B of the Third Agreement, Claimants' costs, fees and expenses of the arbitration including, but not limited to, the fees and expenses of the American Arbitration Association and the

> arbitrators' and Claimants' legal fees and expenses, which shall be included in the final award. . . .

Appx0175. Accordingly, the Interim Award determined that Claimants would be awarded their attorneys' fees. *Id.* Section 11.15(b)B of the Third Agreement, specifically referenced by the Interim Award, makes it clear that the Panel decided the issue of who prevailed:

> The losing party shall pay the costs, fees and expenses of the arbitration including, but not limited to, the fees and expenses of the AAA and the arbitrators and the legal fees and expenses of the prevailing party, which shall be included in the final award. For the purposes of this Agreement, the **"prevailing party" includes** the party who agrees to dismiss an action upon the other party's payment of all or a portion of the sums allegedly due or performance of the covenants allegedly breached, **or who obtains substantially the relief sought by it**.

Appx0153-0154 (emphasis added). Nonetheless, after the entry of the Interim Award, which Prospect argues the Panel had no authority to even clarify, Prospect requested that the Panel reverse its decision that Claimants were the prevailing parties. Appx0920-0924.

The heading of the leading section of Prospect's submission to the Panel on attorneys' fees—submitted on October 29, 2021, the day after Prospect submitted its letter opposing Stratera and Destra's request for clarification (Appx0461-0468)—was entitled, "Claimants Are Not the Prevailing Party." Appx0920. Prospect then specifically quoted the Third Agreement's definition of prevailing party as including the party that obtains substantially the relief sought by it. Appx0920. Prospect concluded that section with a statement leaving no question that the relief it sought was to overturn the Panel's decision on the prevailing party:

> Claimants' latest attempt to significantly amend the [Interim] Award also demonstrates that Claimants are not the prevailing party under the Award as written. **Because Claimants are not the prevailing party, none of their fees and costs should be shifted to be paid by Respondent.**

Appx0924 (emphasis added). Prospect's conclusion to its attorney fee submission further proves that Prospect's submission did not seek just to reduce fees but to change the Interim Award's determination of the prevailing party:

> Claimants are not the prevailing party under controlling Delaware law. Therefore, Respondent should not be ordered to pay any of Claimants' fees and expenses.

Appx0932.

Prospect did not only seek to "adjust[]" the amount of fees, as it now contends. Prospect's Response, 35. It also did not address some "yet-undecided issue of fees." *Id*. It did, contrary to Prospect's contention, "seek to modify" what Prospect characterizes as the Panel's "already-final decision on liability" because it sought to modify the Panel's liability determination on attorneys' fees. Prospect's Response, 35; Appx0153-0154. Prospect directly made the connection between the clarification Stratera and Destra requested and Prospect's own request that the Panel's determination on liability be changed, arguing that Stratera and Destra's request for clarification was evidence that they were "not the prevailing party [sic]. . . ." Appx0924.

Prospect now cites cases establishing attorneys' fee awards may be adjusted, but that is not the relief Prospect sought from the Panel. Prospect's Response, 35. Although Prospect's Response cites *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, No. CV 12201-CB, 2018 WL 300454, at *4 (Del. Ch. Jan. 5, 2018) for the proposition that fees may be "adjusted" based upon mixed success in the litigation, in Prospect's attorney fee submission to the Panel, Prospect cited that case for the proposition that "there is no prevailing party" in such circumstances. Appx0920. Yet *Mrs. Fields* did not hold that attorneys' fees may be reduced, as Prospect now argues, but rather that "neither [party] predominated in the litigation and thus neither is entitled to an award of attorneys' fees or expenses as the 'prevailing party'. . . ." Prospect also now cites *Relax Ltd. v. ANIP Acquisition Co.*, No. CIV.A.N10C-06-032JRS, 2011 WL 4954174, at *4 (Del. Super. Ct. Oct. 17, 2011) (Prospect's Response, 35) for the proposition that fees may be adjusted if a party did not prevail in all aspects of the litigation, but *Relax* was not one of the cases Prospect cited to the Panel in its submission seeking to reverse the Panel's prevailing party determination. Appx0461-0468. Instead, other than *Mrs. Fields,* Prospect cited only two other cases in the section of its submission regarding the prevailing party. Appx0920-0924. In each case, the court held that there was no prevailing party, and

that is the proposition for which Prospect cited the cases to the Panel. Appx0920, citing *Vianix Delaware LLC v. Nuance Communications, Inc.*, No. CIV.A. 3801-VCP, 2010 WL 3221898, at *28 (Del. Ch. Aug. 13, 2010) (holding neither party achieved "predominance in the litigation") and *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, No. CV 7906-VCG, 2020 WL 7861336, at *6 (Del. Ch. Dec. 31, 2020).

Prospect could have stopped at its objection to the modification to the Interim Award, but instead it went further, seeking to change the determination of the prevailing party under the Interim Order. Appx0920-0924. It did not condition its request upon the Panel's taking up the issue of modifying the Interim Award pursuant to Stratera and Destra's request. *Id.* Instead, Prospect unconditionally requested that the Panel modify its determination of the prevailing party, thereby submitting the issue of modification to the Panel. *Id.* Prospect cannot simultaneously invoke the Panel's jurisdiction to modify the part of the Interim Award it dislikes while denying the Panel has jurisdiction to even clarify another portion of the award. *See T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 344 (2d Cir. 2010).

B. Panel did not direct Prospect to petition to change its determination on the prevailing party attorney fee liability

Prospect attempts to escape the effect of its modification submission by arguing that the Panel invited such a request by ordering the parties to submit calculations of fees and objections to those calculations, but this mischaracterizes what the Panel ordered. Prospect's Response, 34; Appx0187-0188. The Panel ordered Stratera and Destra to provide Prospect "detailed records, including time and billing records, reflecting Claimants' costs, fees and expenses of the arbitration. . . ." Appx0187. Then, the parties were to submit to the Panel "their concurrence or objections to the information provided." Appx0188. Thus, the objections requested by the Panel were not to the Panel's determination of the prevailing party but instead to the *records* documenting the calculation of the fees sought by the prevailing party. Appx0187. The Panel had already issued its ruling in the Interim Award, holding that Claimants would be awarded their attorneys' fees under the section of the Third Agreement requiring such an award to the prevailing party. Appx0175. The Panel's request for objections to the records supporting the calculation of fees did not invite, much less order, Prospect to challenge its holding on Claimants being the prevailing parties, and, therefore, Prospect is not relieved from the consequences of having submitted the issue of modification of the Interim Award to the Panel. Appx0187-0188.

C. When all parties seek to change an award, they submit the issue of modification to the arbitrator even if the changes sought are different

The difference between the substance of the modification sought by Prospect and the clarification sought by Claimants does not provide Prospect with an escape from the effect of its submission requesting the modification of the Interim Award to the Panel. Prospect's Response ignores *T.Co Metals*, 592 F.3d at 344, where the court held that an arbitrator has the power to modify an award when both parties directly petition the arbitrator to amend the award, even where the amendments sought in that case related to different issues. The Second Circuit notes in its opinion that both parties submitted applications to the arbitrator to amend the original award, and the arbitrator rejected most of the challenges but agreed with some of T.Co Metals' requests to amend. *Id.* at 336. T.Co Metals requested a change in the value of a pipe as warranted. *Id.* at 337. While the decision does not specify the nature of the amended requests sought by Dempsey Pipe (the other party in the case), the challenged district court opinion reveals Dempsey Pipe had requested a change in the calculation of costs for straightening a pipe. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, No. 1:07-cv-07747-PAC, slip op. at 9 (S.D.N.Y. July 8, 2008). Despite these differences in the modifications requested, the Second Circuit held that both parties had "made [their] intention clear" to the arbitrator by "directly petitioning the arbitrator to amend" the original award. *T.Co Metals*, 592 F.3d at 344. The court held that it need not reach the question of whether the issue of whether the arbitrator or a court had the authority to determine the scope of the arbitrator's corrective powers under the applicable arbitration rule because, by both petitioning for a modification of the award, the parties "displayed clear and unmistakable intent to submit the question to the arbitrator." *Id.* Thus, it was the submissions of the parties that conferred jurisdiction on the arbitrator to modify the original award. *Id.*

The Third Circuit has similarly held that arbitrators' powers can be modified by the submissions of the parties. *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 112 (3d Cir. 1996). In *Matteson,* the court explained that "the authority of the arbitrator is defined not simply by the . . . agreement [containing the arbitration clause], but is determined in large measure by the parties' submissions." *Id.* "[O]nce the parties have gone beyond their promise to arbitrate and have supplemented the agreement by defining the issue to be submitted to an arbitrator, courts must look both to the contract and to the submission to determine his authority." *Mobil Oil Corp. v. Indep. Oil Workers Union*, 679 F.2d 299, 302 (3d Cir. 1982). Notably, as in *T.Co Metals,* the requests of the parties to modify the award need not mirror each other for an issue to be submitted: in *Trustees of University of Pennsylvania v. Teamster Union Local 115*, No. CIV.A. 11-4674, 2012 WL 1232993, at *3-4 (E.D. Pa. Apr. 12, 2012), the court addressed a contention that the arbitrator had, by considering evidence of treatment of employees outside the bargaining unit, exceeded her power in ordering an award not authorized by the agreement. But the court found each of the parties had submitted the consideration of such evidence to the arbitrator by each presenting different examples of treatment of employees outside the bargaining unit.

Id. at 5. Even though one party's evidence involved treatment of employees from another bargaining unit and the other's involved an arbitration award involving yet another unit, the arbitrator's authority had been expanded to include such out-of-unit evidence by the parties' submissions. *Id.*

Importantly, the Third Circuit has held, in the context of determining whether the parties had agreed to arbitrate a dispute, that what issues have been submitted to the arbitrator "need not be express; [they] may be implied from the conduct of the parties." *Teamsters Local Union No. 764 v. J.H. Merritt & Co.*, 770 F.2d 40, 42 (3d Cir. 1985). When the parties submit an issue to the arbitrator, that submission defines the arbitrator's authority without regard to whether the arbitrator would otherwise have such authority under the party's agreement. *See id.* quoting *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980).

Here, Prospect submitted the issue of the modification of the Interim Award to the Panel by requesting that its prevailing party determination be reversed. If Stratera and Destra's request to clarify the Interim Award were considered a request for a substantive modification, all parties would have submitted the issue of modification of the Interim Award to the Panel and thereby conferred jurisdiction on the Panel to modify the award, even if the Panel would otherwise have been prohibited from doing so by *functus officio* (and it would not have been). *See T.Co Metals*, 592 F.3d at 344.

II. Interim Award did not resolve a submitted issue

A. Interim Award does not address the submitted issue of Provasi DRIP[2]

There is an exception to *functus officio* allowing arbitrators to submit amended awards where the initial award does not resolve a submitted issue. *See Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 332 (3d Cir. 1991). Prospect relies on generic statements in the Interim Award that the Panel had considered all issues raised and denied those not addressed despite not addressing the submitted issue of Provasi DRIP. Prospect's Response, 30. Prospect cites (Prospect's Response, 31) two inapplicable New Jersey state court cases, *Wein v. Morris*, 944 A.2d 642, 654 (2008) and *Merion Construction Management., LLC v. Kemron Environmental Services, Inc.*, 2014 WL 958506, at *3 (N.J. App. Div. Mar. 13, 2014) (per curiam), for the proposition that when an award states that it denies all claims not addressed, it precludes the arbitrator from adding additional relief, but, critically, those cases address whether the arbitrator could correct clerical errors in the award and do not address whether a submitted issue could be disposed of by such a generic statement: nowhere does either opinion indicate that the categories of

[2] Stratera contends the Interim Award was ambiguous as to Provasi DRIP but asserts this argument in the alternative.

damages the arbitrator sought to add in an amended award had been submitted to the arbitrator before the initial award. By contrast, Prospect concedes that "the issue of Provasi DRIP was squarely presented to the [P]anel." Prospect's Response, 30; *see also* Appx0423-0425, Appx0365-0366.

But in determining whether an arbitration award has addressed a submitted issue under the FAA, this court does not rely on broad, generic statements as to the issues addressed but instead looks at the substance of the arbitrator's award to determine whether a submitted issue was addressed. *See Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 301 (3d Cir. 2001), abrogated on other grounds by *Hall St. Assoc., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 583-84 (2008). In *Roadway*, the Third Circuit found that, under the FAA § 10 vacatur standard, an arbitration award improperly failed to consider the only submitted issue of whether an employee termination violated an operating agreement. 257 F.3d at 300-302. The award stated that the arbitrator's authority in the case derived from the provision of the agreement that stated, in relevant part, "The arbitrator shall have the authority only to conclude whether the termination of [the employee] was within the terms of this Agreement. . . ." *Id.* at 289-90. In the next sentence, the award framed the question as whether the termination was wrongful or proper. *Id.* at 290. But instead of evaluating whether the employer violated the agreement, the entire four paragraphs of substantive discussion in the arbitrator's award focused on the employer's communication of its dissatisfaction with the employee's performance, which the arbitrator found showed the employer's system lacked due process. *Id.* at 301. The Third Circuit found that, despite the broad statement that the award was interpreting the provision of the agreement limiting the arbitrator's authority to whether the contract was breached, the substance of the award revealed that the arbitrator was not addressing that submitted issue. *Id.*

B. Prospect is wrong that the Panel's findings on the applicability of the exception to *functus officio* may not be considered

While Prospect argues that the court may not consider the Panel's order addressing the applicability of the exception to *functus officio* for awards that do not resolve submitted issues (Prospect's Response, 32-33, citing *Colonial Penn,* 943 F.2d at 332), the court not only ***can*** consider that order; it ***must*** defer to it. *Oxford Health Plans LLC v. Sutter,* 569 U.S. 564, 569 (2013). And Order #22 found the exception applies because the Interim Award did not adequately or completely address Provasi DRIP. Appx0214.

Prospect is incorrect about *Colonial Penn:* the only *functus officio* exception at issue was whether there was a mistake evident on the face of the award; the court explicitly states that the exceptions for failure to adjudicate a submitted issue and ambiguity were not before it. 943 F.2d at 332. Thus, 1) *Colonial Penn's* comment that it is "generally improper"[3] to consider the arbitrator's impeachment in addressing exceptions to *functus officio*, 2) its parenthetical statement quoting a district court case on the purported "very narrow" scope of the exceptions, and 3) its comment on the consideration of extraneous facts would be *dicta* to the extent they apply to exceptions other than mistakes on the face of an award, including the exception for awards that do not address a submitted issue (as well as the ambiguity exception). *See id.* at 333. Indeed, *Colonial Penn's* comment on considering extraneous facts is necessarily limited to mistakes on the face of the award because it could not apply to the third exception, for ambiguity, which only applies when awards are "seemingly complete" on their face. *Id.* at 332. In every case where the award is "seemingly complete," the court would need to consider something other than the face of the award to determine that it left doubt whether it had resolved a submitted issue. *See id.* at 332. The *Colonial Penn* court recognized this necessity to consider extraneous facts not on the face of the award in its determination of whether the award was ambiguous so as to permit remand. *Id.* at 334.

The other cases cited by Prospect for the proposition that only the original award can be considered in evaluating whether the submitted issues were resolved do not support that proposition. *See* Prospect's Response, 33, citing *Int'l Broth. of*

[3] Prospect repeatedly omits the important modifier, "generally," when it describes this statement. Prospect Response, 5 and 33.

Elec. Workers, Local Union 824 v. Verizon Fla., LLC, 803 F.3d 1241, 1247 (11th Cir. 2015) and *Loal 825 v. Tuckahoe Sand & Gravel*, No. CIV.A.06 4784 JAG, 2007 WL 1797657, at *7 (D.N.J. June 20, 2007). In each case, the submitted issues were clear and the original award clearly resolved them; the opinions say nothing about excluding consideration of other facts. *See Verizon Fla.*, 803 F.3d at 1247; *Tuckahoe Sand*, 2007 WL 1797657, at *7. Notably, in *Tuckahoe Sand,* the submitted issues were whether there was just cause for a termination and what the remedy would be, and the arbitrator found there was no just cause and the remedy was back pay. 2007 WL 1797657, at *7. While the court found that the award resolved the submitted issues, it found ambiguity because the award was unclear whether the back pay awarded included pension and welfare contributions. *Id.* There, the pension and welfare contributions were not part of a submitted issue (*see id.*), unlike here, where Prospect concedes that the issue of Provasi DRIP was submitted to the Panel. Prospect's Response, 30.

III. *Functus officio* is inapplicable because the Interim Award was not a final award

A. Courts, including the Third Circuit, consistently find finality only when an award is coextensive with the submission under both the complete arbitration rule and *functus officio*

Binding Third Circuit precedent requires that "[a]n 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). Prospect seeks to escape this precedent by arguing that this finality standard is only applicable in the context of the complete arbitration rule and not *functus officio*. Prospect's Response, 27. Prospect's argument ignores that this court has articulated that standard in the context of *functus officio* and not just regarding the complete arbitration rule. *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967) (for *functus officio* to apply, an "award must be final, complete, and coextensive with the terms of the submission."). It ignores that the very Third Circuit case that Stratera cites for the proposition relies on authority interpreting finality in the context of *functus officio* for its own analysis of finality. *See PG Publ'g,* 19 F.4th at 321 n.15, citing *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 719-720 (8th Cir. 1999). Prospect cites *Teamsters Union Local No. 115 v. DeSoto, Inc.*, 725 F.2d 931, 940 (3d Cir. 1984), for the proposition that the Third Circuit recognizes a need for the distinction between finality under the complete arbitration rule and *functus officio*, but that case only discusses *functus officio* in *dicta* and, contrary to Prospect's parenthetical description of its holding, did not find that a partial award is *functus officio*. Prospect's Response, 28.

Federal courts have consistently applied the same analysis to finality in both contexts. *See Legion Ins. Co.,* 198 F.3d at 720 (citing authorities analyzing finality under the complete arbitration rule in its analysis of finality for *functus officio* purposes); *Berkowitz v. Republic of Costa Rica*, 288 F. Supp. 3d 166, 174 (D.D.C.

2018) (discussing an arbitrator's conclusion that he was not *functus officio* in finding that an award that did not decide damages was not final). Indeed, the Fourth Circuit recently directly answered the question, relying, in addressing the complete arbitration rule, on a *functus officio* precedent for the proposition that courts look to an arbitrator's intent in determining the finality of an arbitration award. *Wheeling Power Co. - Mitchell Plant v. Local 492, Util. Workers Union of Am., AFL-CIO*, 145 F.4th 468, 474 (4th Cir. 2025). Commenting on the *functus officio* standard, the court said, "We see no reason the same inquiry wouldn't govern when applying the complete arbitration rule." *Id.* at 474.

Prospect cites *Verizon Pennsylvania, LLC v. Communications Workers of Am., AFL-CIO, Local 13000,* 13 F.4th 300, 309 (3d Cir. 2021), for the proposition that a different standard on finality applies to *functus officio* (Prospect's Response, 26), but *Verizon* did not reach the issue of whether the initial award in the case was final, instead resting its decision on its conclusion that the parties had narrowed the scope of their submission such that the initial award did fully decide the submitted issue. Accordingly, any statement about the finality standard in *Verizon,* is *dicta* (to the extent *Verizon* applies at all given it was decided under federal common law developed under the Labor Management Relations Act, not the FAA). *See id.; Verizon Pennsylvania LLC. v. Communications Workers of Am., AFL-CIO, Local 1300*, No. CV 18-394, 2020 WL 1508463, at *1 (E.D. Pa. Mar. 30, 2020).

. Moreover, instead of rejecting that statement, *Verizon* merely notes that the second exception to *functus officio* (whereby an arbitrator is not *functus officio* as to a submitted issue where an award does not adjudicate that issue) "***implies*** that the doctrine applies to partial decisions that finally resolve some, but not all, of the submitted issues." 13 F.4th at 308 (emphasis added). Even were *Verizon* correct about such an implication (it is not, given the third exception to *functus officio* allowing clarification where there is even doubt regarding "whether the submission has been fully executed"), referencing such an ***implication*** is far from a rejection of the Third Circuit's previous articulation of the principle. *See id.*

Notably, as Prospect concedes (Prospect's Response, 26) the only remaining issue on which the arbitrator in *Verizon* retained jurisdiction was the monetary remedy, which the *Verizon* court characterized as an "ancillary issue[]" to the core injunctive relief remedy sought in the case. *Verizon*, 13 F.4th at 309. By contrast, here, the Panel's Order #21 explicitly states that both liability and damages were submitted to the Panel following the arbitration hearing, Appx0169, and the Panel reserved determinations on damages for the Final Award. Appx0187-0188. Accordingly, the Interim Award was not a final one that triggered *functus officio*.

B. The Panel's intention and determination on finality is entitled to deference

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; *Legion Ins. Co.*, 198 F.3d at 719-720 (holding in the context of *functus officio* that "[w]hether the award indicates that [it] is final and whether the arbitrator intended the award to be final are factors in determining if an arbitration award is final.") (internal quotations omitted); *see also Wheeling Power,* 145 F.4th at 474 (identifying this as the applicable standard for determining finality for the purpose of *functus officio*). While Prospect unconvincingly addresses the Panel's label of the award as an "Interim Award," it does not address the statement in the Interim Award that its "jurisdiction ends at the time of our issuance of a Final Award." Appx0175 n.1. Courts, including this one, have relied on such language in interim awards to conclude they are not final. *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); *Pittsburgh Metro Area Postal Workers' Union, AFL-CIO v. U.S. Postal Serv.*, No. CIV.A. 07-00781, 2008 WL 1775502, at *9 (W.D. Pa. Apr. 16, 2008) (italics in original) (relying upon a determination that the "[a]rbitrator explicitly retained jurisdiction over the interpretation and implementation of the remedy of the *award*…" to find the award not final); *Local 36, Sheet Metal Workers Intern. Ass'n, AFL-CIO v. Pevely Sheet Metal Co., Inc.*, 951 F.2d 947, 949 (8th Cir. 1992). Prospect also does not address that the Panel instructed in Order #21 that both liability and damages were to be submitted to the Panel with attorneys' fees to be decided later, and then, in the Interim Award, ordered further briefing on damages. Appx0169. In *New United Motor Mfg., Inc. v. United Auto Workers Local 2244*, 617 F. Supp. 2d 948, 957 (N.D. Cal. 2008), the court found an award addressing liability but not damages to be final because the parties had bifurcated liability and damages. But here, liability and damages were both submitted to the Panel, and there is no question that the Panel retained jurisdiction over the damages portion. Appx0169.

With respect to the Panel's intent as expressed in its ruling on *functus officio*, Prospect concedes that the Panel found it "did not decide all issues including damages." Prospect's Response, 29. Prospect argues that the Interim Award was final despite that finding, relying again on the *dicta* in *Verizon* stating that the award in that case was final despite not addressing the ancillary damages issue. *Id.*, citing *Verizon,* 13 F.4th at 309. But, as discussed, the missing damages determination here, as well as the failure to adjudicate the issue of Provasi DRIP, left no final award subject to *functus officio*. Moreover, despite Prospect's contention to the contrary, the Panel's determination on finality is subject to deference. *Oxford Health,* 569 U.S. at 569. The Interim Award was not final, and *functus officio* is therefore inapplicable. *See PG Publ'g, Inc.*, 19 F.4th at 321-22.

IV. Judicial application of *functus officio* is inconsistent with the FAA under *Morgan*

A. Prospect's argument that *functus officio* creates a threshold question where arbitrators receive no deference is inconsistent with the FAA under *Morgan*

Prospect seeks to apply a procedure, inconsistent with the FAA, whereby "arbitrators receive no special deference on the threshold question of whether the doctrine of *functus officio* applies." Prospect's Opening Brief, 16. In *Morgan,* the Supreme Court explains that courts may not go beyond the text of the FAA to "invent special" arbitration-specific rules. 596 U.S. at 418. *Morgan* requires that courts in FAA cases follow the statutory requirements of the FAA without creating new rules that are not based upon an interpretation of the statute. *Id.; see also Hall St.,* 552 U.S. at 587 (requiring that courts are limited to applying the FAA's text). Prospect attempts to escape the effect of *Morgan* by arguing that *functus officio* is not a procedural rule but a "substantive rule defining the power of arbitrators. . . ." Prospect's Response, 37. This ignores that the version of *functus officio* pushed by Prospect requires a judicial procedure—making *functus officio* a "threshold question" decided by courts—in reviewing an arbitration award that is separate and apart from the one contemplated by the FAA in §§ 9 and 10. *Compare* Prospect's Opening Brief, 15-16 *with Sutter v. Oxford Health Plans LLC,* 675 F.3d 215, 219 (3d Cir. 2012), aff'd, 569 U.S. 564 (2013). In evaluating claims under FAA § 10(a)(4), when an arbitrator "makes a good faith attempt" to perform the task of "interpret[ing] and enforc[ing] a contract," "even serious errors of law or fact will not subject his award to vacatur." *Sutter,* 675 F.3d at 219. Imposing a common law threshold question before reaching that inquiry is exactly the type of deviation from the procedures required by the FAA that *Morgan* prohibits. *See Morgan,* 596 U.S. at 419.

Such a procedure is therefore "obviously in conflict with Supreme Court precedent," which Prospect concedes is the standard for rejecting a holding of a panel in this circuit without the necessity of an *en banc* hearing. Prospect's Response, 36, quoting *Rubin v. Buckman*, 727 F.2d 71, 74 (3d Cir. 1984) (Garth, J., concurring). Though *Colonial Penn* and *Verizon* have not been specifically overruled, any reading of those cases allowing a court not to defer to arbitrators' determinations of whether they are *functus officio* cannot be supported under the text of the FAA after *Morgan*. *See Morgan,* 596 U.S. at 418; *see also Hall St.,* 552 U.S. at 587.

B. If Prospect were correct that *functus officio* were a "default rule" of contract, arbitrators' determination of the issue would be subject to review only under the FAA's deferential standards

In seeking to defeat Stratera's argument that applying *functus officio* without deference to the Panel is incompatible with the FAA and the Supreme Court's textualist ruling on the FAA in *Morgan*, Prospect argues for the first time in its Response that *functus officio* is not a judge-made rule but rather a "default rule" of contract. Prospect's Response, 37. While it is incorrect that the doctrine is a "default rule," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 674 (2010), Prospect's position, if accepted, concedes the larger point that the only extent to which *functus officio* remains in effect in FAA cases, if at all, is based upon rules incorporated by parties into contracts, and the review of such interpretations is extremely deferential to the decision of the arbitrators. *See Oxford Health,* 569 U.S. at 569.

To begin with, Prospect is wrong that *functus officio* is automatically incorporated as a default rule in arbitration agreements governed by the FAA. *See Stolt-Nielsen*, 559 U.S. at 674. The Supreme Court has explicitly rejected the notion that "default rules" can be read into arbitration agreements. *Stolt-Nielsen*, 559 U.S. at 673–74. In *Stolt-Nielsen,* the Court addressed whether the FAA, maritime law, or New York law imposes a default rule allowing class arbitrations. *Id.* There, an arbitration panel had "proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation," "simply impos[ing] its own conception of sound policy." *Id.* The Court rejected the panel's imposition of such a default rule, citing FAA § 2, which provides that agreements requiring arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and FAA § 4, which directs that "arbitration proceed in the manner provided for in such agreement." *Stolt-Nielsen*, 559 U.S. at 682, citing 9 U.S.C. §§ 2 and 4. Based upon these provisions, the Court held that "the central or 'primary' purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen*, 559 U.S. at 682 (cleaned up). Thus, "unless there is a contractual basis for concluding that the party *agreed* to" submit to class arbitration, the party cannot be compelled under the FAA to do so. *Id.* at 684 (italics in original). Likewise, a party cannot be considered to have consented to a "default rule" of *functus officio* unless the party agreed to such a rule. *See id.*

Even if such a rule were incorporated into the contract consistently with Prospect's argument, and it was not, it would be a contractual rule, s*ee* Prospect's Response, 37, and the Panel's interpretation of the rule would be subject to the deference courts give under the FAA to arbitrators' interpretations of contracts. *Oxford Health*, 569 U.S. at 569. Here, as Prospect correctly notes, the parties agreed in the Third Agreement to submit their disagreements to binding arbitration using the AAA Commercial Rules of Arbitration. Prospect's Response, 37; Appx0152.

Where "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*, 569 U.S. at 569 (cleaned up). Indeed, when courts have addressed arbitrator findings of *functus officio* under the FAA, they have evaluated them in the context of contractually agreed rules and have given the arbitrators' interpretation of the rules incorporating *functus officio* deference. *See Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.,* 909 F.3d 544, 549 (2d Cir. 2018); *E. Seaboard Const. Co., Inc. v. Gray Const., Inc*., 553 F.3d 1, 6 (1st Cir. 2008); *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No. 24*, 357 F.3d 546, 557 (6th Cir. 2004); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1272 (10th Cir. 1999); *T.Co Metals,* 592 F.3d at 344.

Here, the Third Agreement specifically requires the application of the AAA Commercial Arbitration Rules and delegates the question of the arbitrators' jurisdiction ("arbitrability") to the Panel. Appx0152. Those rules gave the Panel the power to determine its own jurisdiction and interpret the rules as they relate to the arbitrator's power and duties. AAA Commercial Arbitration Rules 7(a) and 8. In Order #22, the Panel conducted a detailed analysis of Rule 50, which governs the Panel's authority to clarify an ambiguity in the Interim Award and concluded that neither Rule 50 nor *functus officio* precluded clarification of the Interim Award. Appx0211-0214. Given that, as Prospect concedes (*see* Prospect's Response, 37) the application of *functus officio* is a matter of applying rules the parties contracted for, the Panel's conclusion that it was entitled to issue the Revised Interim Award is entitled to deference if it even arguably construed those rules. *See Oxford Health*, 569 U.S. at 569.

CONCLUSION

The Court should affirm the decision below and remand to the district court for determination of the attorneys' fees award to Claimants and updating the judgment to reflect damages due to Claimants through the date of that judgment.

November 26, 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 6,500 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: November 26, 2025

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

CERTIFICATE OF SERVICE

I, Bobby G. Pryor, hereby certify that on November 26, 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 by commercial carrier for delivery to the Clerk of this Court within three days.

Dated: November 26, 2025

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