Case No. 98-00268A

Dept. No. II

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

BIONIC BUFFALO CORPORATION,

Plaintiff,

vs.

INTEGRATED SYSTEMS, INC. and WIND RIVER SYSTEMS, INC.,

Defendants.

_____/

MOTION TO VACATE ARBITRATION AWARD (NRS 38.241) AND RESPONSE AND OPPOSITION TO MOTION TO CONFIRM ARBITRATION AWARD (NRS 38.239)

COMES NOW Plaintiff BIONIC BUFFALO CORPORATION, (hereinafter BIONIC BUFFALO or Plaintiff) by and through its counsel, WILLIAM M. O'MARA, ESQ. and THE O'MARA LAW FIRM, and provides its Motion to Vacate Arbitration Award (NRS 38.241) and Response and Opposition to Motion to Confirm Arbitration Award (NRS 38.239).

This Motion and Opposition is based upon the accompanying Point and Authorities, the accompanying exhibits MV1 – MV12, the entire record of the American Arbitration Association in Matter No. 79 117 00112 99 JEMO entitled "BIONIC BUFFALO CORPORATION, Claimant vs. INTEGRATED SYSTEMS, INC. / WIND RIVER SYSTEMS, INC., Respondent" and all other pleadings and paperwork on file herein as well as any other or additional records which

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may be made a part of the record before the First Judicial District Court in this cause.

Dated this _____ day of July, 2008.

_____

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POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE ARBITRATION AWARD AND RESPONSE AND OPPOSITION TO MOTION TO CONFIRM ARBITRATION AWARD

I. FACTS AND HISTORY OF THE MATTER

A. OVERVIEW

An arbitration was ordered by this Court (see , *Points & Authorities*, below at page 4); and the arbitration was conducted and an award was made. (see , *P&A*, page 7).

The arbitration and award were and are defective:

(a) The proceeding was conducted in a manner prejudicial to Claimant (see , *P&A*, page 8);

(b) The arbitrators refused to consider evidence material to the controversy (see , *P&A*, page 11);

(c) The arbitrators exceeded their powers (see , *P&A*, page 14);

(d) The arbitrators acted in manifest disregard of the law (see , *P&A*, page 18);

(e) The award was irrational (see , *P&A*, page 21);

(f) The award does not finally and definitively dispose of all of the claims (see , *P&A*, page 23); and

(g) There was evident partiality by the arbitrators (see , *P&A*, page 25);

The Law allows this Motion to Vacate under the aforementioned circumstances.

Defendants and Respondents have before this Court its *Defendants' Motion to Confirm Arbitration Award and for Entry of Judgment Thereon*; and,

Claimant is requesting that the American Arbitration Association forward the official record of the arbitration to this Court for this Court's review (such review being required as held in *Graber v. Comstock Bank*, 111 Nev. 1421 at 1427-1428, 905 P.2d 1112 at 1115-1116, Nev. 1995)

THEREFORE, Plaintiff asks this Honorable Court to

(1) Review the pleadings, transcripts, and exhibits from the official record, in conjunction with the record before this Court; and then

(2) Vacate said award;

(3) Deny Respondent's Motion to Confirm;

(4) Order a rehearing before a different panel of arbitrators, of the same claims, without conducting additional discovery or other pre-hearing activity, but relying on the existing record to the extent that said record does not include adjudication on any of the claims.

In support of the Plaintiff's Motion to Vacate and Response in Opposition to Motion to Confirm Award, the Plaintiff has included his *Points & Authorities*, below, and Exhibits as listed in the *Index of Exhibits (MV -1 through MV-12)*.

A Summary of the Contents of These Points and Authorities is as follows:

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II. LAW AND FACTUAL ARGUMENT

The provisions of I. above are incorporated herein at this point by specific reference as if more fully stated in their entirety at this point.

1.**Brief History of this Dispute.** The parties to this dispute entered into an agreement (*Software License Agreement*, 1996.09.20, Exh.MV-11 Pgs.45-56) in September 1996.

2.Among other things, the *Agreement* allowed Defendant to relicense certain of Plaintiff's software ("The Porting Kit") to Defendants' customers. The first such customer was the Korea Electronics Technology Institute (KETI).

3.The *Agreement* contained an arbitration clause, as follows:

> "Arbitration. Any dispute relating to the terms, interpretation, or performance of this Agreement (other than claims for preliminary injunctive relief or other pre-judgment remedies) shall be resolved at the request of either party through binding arbitration. Arbitration shall be conducted in Carson City, Nevada under the rules and procedures of the American Arbitration Association ('AAA'). The parties shall request that the AAA appoint a panel of three arbitrators and, if feasible, include one arbitrator of the three who shall possess knowledge of computer software and its distribution; however the arbitration shall proceed even if such a person is unavailable."

(Exh.MV-11 Pg.55)

5.There were disagreements regarding the relationship, which was terminated by Plaintiff in April 1997 (*Termination of Agreement, Demand for Payment, and Change of Address*, 1997.04.19, Exh.MV-11 Pgs.88-92).

4.The disagreements continued after the April 1997 termination. Among other things, Defendants contested Plaintiff's right to terminate. Defendants filed two arbitration claims against Plaintiff and its officer Michael Marking in 1997, only to withdraw them before prosecuting them to completion.

5.Lacking a resolution, Plaintiff filed its Complaint (Exh.MV-11 Pgs.139-142) in this Court in February 1998. In June 1998, this Court ordered the parties to arbitration.

6.Plaintiff filed its arbitration claim, after the abandonment by Defendants of its prior arbitration claims. Thereafter, Defendants filed two more arbitration claims, one against Plaintiff and one against Plaintiff's officer. The appointed Arbitrators ordered that the claims by Plaintiff and the claims by the Defendants be heard separately. Defendants thereafter abandoned their fourth claim, originally filed against Plaintiff's officer. The Plaintiff's arbitration claim was dismissed without prejudice when Plaintiff was unable to pay the arbitrators' fees.

7.Plaintiff thereafter filed a new arbitration claim after its original claim was dismissed without prejudice. Defendants, despite having filed four claims previously, did not file a counter-claim against the Plaintiff.

8.The Parties agreed to a reasoned award. (*Report of Preliminary Hearing and Scheduling Order No.2*, at Exh.MV-11 Pg.179)

9.Eventually, in addition to telephone conferences, there were two hearings in a bifurcated proceeding. (See Exh.MV-1 identifying Exh.MV-5 and MV-6, and MV-8 and MV-9, *Transcripts*)

10.This contested arbitration resulted in an award, the vacatur of which is sought by this Motion.

11.Hereinafter, unqualified references to "the arbitration" or to "the arbitrators" pertain to the contested, American Arbitration Association (AAA) Case No. 79 117 00112 99 JEMO.

12.Also note that the designation "Plaintiff" in the instant case is interchangeable with the designation "claimant" in the arbitration.

13.**The Claims.** When the *Complaint* (Exh.MV-11 Pgs.139-142) was filed in this Court, Plaintiff sought a preliminary injunction and an order for arbitration. The *Complaint* sought declaratory and injunctive relief and a claim for breach of contract, necessarily including a claim for breach of the implied covenant of good faith and fair dealing and bad faith as well as other legally cognizable claims.

14.Early in the arbitration, before discovery commenced, Claimant submitted its *Bionic Buffalo Corp.'s Case Disclosure Statement* (2001.01.18, Exh.MV-11 Pgs.181-197). In this *Case Disclosure Statement*, Claimant set forth the claims for which it had evidence at the time. Additional claims would not be made until after discovery.

15.The claims ultimately raised in the arbitration are described in *Claimant's Prehearing Brief*, (2002.05.13, Exh.MV-11, Pgs.249-266). These include:

(a)Seven pre-termination breaches of the *Software License Agreement*, designated as the first through the seventh breaches; and

(b)Two post-termination breaches of the Software License Agreement, designated as the eighth and ninth breaches; and

(c)Nine acts of misappropriation.

16.There are three bodies of software code relevant to the following discussion:

(a)The Porting Kit, also called the Bionic Buffalo Corp. (BBC) code, also called the "Marking" code (after its primary developer), which was delivered to Respondent by Claimant from September to December 1996, pursuant to the *Agreement*;

(b)The "Fahy" code, also called the "Demo code", developed in 1996 and 1997 primarily by Ben Fahy, who worked for Respondent; and

(c)The "Dolan" code, developed primarily by Michael Dolan beginning March 1998.

17.The fourth claim of misappropriation involves the Fahy code; the seventh misappropriation claim involves the Fahy and Dolan code. The other seven misappropriation claims involve improper use or disclosure of the Porting Kit, or Bionic Buffalo, code.

18.It is notable, and relevant to the ensuing arguments, that the breaches of contract and acts of misappropriation occurred at various times, from the time the *Software License Agreement* was entered until after the *Complaint* was filed. Some breaches of the *Agreement* continue to this day. Indeed, not all of the acts were known to Claimant until after discovery. It is also significant that the acts, though related, were not all predicated upon one another. In other words, it would be possible for a tribunal to decide that certain claims were valid, and not others, or vice versa.

19.The Panel of Arbitrators in its Final Award, dated April 21, 2008 and in its Reasoned Interim Award, dated December 5, 2007, granted relief to Claimant in the form of an order calling for the destruction of Claimant's software in Respondent's possession, and a certification to Claimant of said destruction. That certification was made. (Exh.MV-12, Pgs. 80-81) Claimant seeks the Court's Order granting an audit, as is its right under the *Software License Agreement*, to confirm this and other representations of Respondent.

20.As further described in the *Prehearing Brief* (Exh.MV-11 Pgs.264-265) Claimant sought, as relief,

(a)Declaratory relief in the form of findings that the claims of breach and misappropriation are justified;

(b)An order for specific performance of the contract term requiring software destruction and certification after termination;

(c)An order for specific performance of the contract term obligating Respondent to allow Claimant to enter the premises of Respondent and conduct an audit;

(d)Contract or consequential money damages;

(e)Punitive damages;

(f)A permanent injunction, as allowed by the *Software License Agreement*; and

(g)Costs and attorneys' fees.

21.**The Award.** On 23 April 2008, the American Arbitration Association transmitted (Exh.MV-12 Pgs.79) the Panel's Final Award (Exh.MV-12 Pgs.70-79) to the Parties.

22.Although Claimant made nine claims of breach of contract, the Award dismissed eight of those claims and was silent on the ninth. Nevertheless, the Award granted relief to Claimant on the ninth claim, by ordering that Respondent destroy any copies it had of Claimant's software (the "Porting Kit") in Respondent's possession. Thus, the Award allowed the specific relief the Plaintiff had requested in its ninth claim for breach of contract and provided affirmative injunctive relief.

23.The Award explicitly dismissed all nine misappropriation claims.

24.As there were no claims by Respondent, none were addressed by the Award.

25.Then, perversely, although Claimant was the only party to have been awarded relief, the Award declared that Respondent was prevailing party, and awarded costs and fees to Respondent.

26.The errors and flaws of the Award are discussed below, alongside law applicable to vacatur of an arbitration award.

27.**Prejudicial Conduct of Proceeding.** Nevada's arbitration statutes require that a party be given a fair hearing. "Upon motion [...], the court shall vacate an award [...] if: [...] (c) An arbitrator [...] conducted the hearing contrary to NRS 38.231, so as to prejudice substantially the rights of a party to the arbitral proceeding; [...]" (NRS 38.241(1)) "At a hearing held [...], a party to the arbitral proceeding has a right to be heard, to present evidence material to the controversy [...]" (NRS 38.231(4)).

28.The AAA rules are more specific: "The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." (AAA Rule R-30(a)).

29.The arbitrators ordered a bifurcation of the proceeding. "The initial hearing [...] will only address the issues of substantial similarity and independent development." (*Prehearing*

Order No.2, 2001.02.20, Exh.MV-11 Pgs.198-199). This was prejudicial, in that Claimant had never asserted there was any similarity between Respondent's code and Claimant's own code. Claimant's Case Disclosure Statement (2001.01.18, Exh.MV-11 Pgs.181-197) had made no such assertion. Neither Claimant nor Claimant's expert had seen Respondent's code at the time of the telephone hearing (2001.02.16) giving rise to *Prehearing Order No.2*, so such a claim could not have been made.

30.Only the fourth and seventh misappropriation claims alleged improper use of the Porting Kit in developing the Fahy and Dolan code bodies. Effectively, the first hearing was to be only about these two claims. Worse, it was to be about an assertion which had never been made, that the newly-developed code was "similar" to the Porting Kit code.

31.The arbitrators, in their *Partial Decision, First Hearing* (2002.03.18, Exh.MV-11 Pgs 241-245) reached a conclusion that the Dolan code was not similar, and was independently developed. Basically, this was a ruling against Claimant on the seventh misappropriation claim, ignoring the fourth misappropriation claim. (While Claimant maintains below that this ruling on the seventh misappropriation claim, and how that decision was made, by themselves warrant vacatur of the *Final Award*, those arguments are deferred and continued below.)

32.Claimant protested, since there had been no hearing on the other eight misappropriation claims. Claimant sought additional hearing time to present the case, but it was denied. "Claimant requested a decision by the Panel of Arbitrators to [further] bifurcate the hearings and allow two more hearings, one for remaining breach of contract issues, if any, and the final hearing for damages. [...] the Panel of Arbitrators denies this request." (*Partial Decision, First Hearing*, 2002.03.18, Exh.MV-11 Pgs.241-245 at Pg.242) (In reading these words of the arbitrators, note that, incorrectly and in clear disregard of the law, the arbitrators considered "misappropriation of trade secrets" to be a form of "breach of contract", as when they wrote in their *Prehearing Order No.2*, "...the hearing will go forward... as to whether there was a misappropriation constituting a breach of contract..." In fact, the tort of misappropriation is different from breach of contract; see below for more discussion.)

33.The arbitrators previously were aware that the seventh misappropriation claim was not a major part of Claimant's case. They acknowledged this by noting, "Mr. Marking stated that claimant's primary claim was with regard to actions taken prior to supposed independent development." (*Prehearing Order No.4*, 2001.10.22, Exh.MV-11 Pg.232)

34.Nevertheless, near the beginning of the second hearing, the arbitrators dismissed the other misappropriation claims. "The Panel dismissed all misappropriation claims [...]" (*Final Award*, 2008.04.23, Exh.MV-12 Pg.70-78, at ¶9) The end result was that Claimant has not had a hearing on eight of nine misappropriation claims.

35.Since the first hearing was limited to a single misappropriation claim (the seventh), none of the breach of contract claims was allowed to be presented, although the background discussion necessarily mentioned some of the issues. However, near the beginning of the second hearing, the panel dismissed most of the breach of contract claims: "The Panel allowed the Final Hearing to go forward on the Fourth and Sixth [breach of contract] claims [...]." (*Final Award*, 2008.04.23, Exh.MV-12 Pgs.70-78, at ¶10) In spite of this, the Panel also allowed consideration of the eighth claim, regarding an audit, which was hard to avoid since Claimant had brought a forensic auditor as a witness. The result was that Claimant has not had a proper hearing on six of nine breach of contract claims. (It is noted, however, that the *Final Award* granted relief to Claimant on one of those breach of contract claims, the ninth.)

36.Logically, the trade secret statutes, NRS Chapter 600, require that the breach of contract claims should also have been heard as well as the misappropriation claims. The definition of misappropriation depends on "improper means", which includes "Willful breach or willful inducement of a breach of a duty imposed by [...] common law, [...] contract, [or] license [...]" (NRS 600A.030) It is difficult to show misappropriation without first considering the underlying contract which gives rise to the contractual and legal duties. Accordingly, the Panel's deviation of the hearing sequence from that described by AAA Rule R-30(a) was prejudicial in that it effectively preemptively denied the Plaintiff the opportunity to present its case.

37.Moreover, the Arbitrators' decision to spend a large portion of the inadequate hearing time allowed on a claim which had never been made in the first instance was a major factor in precluding Claimant from having a hearing on most of its claims. The arbitrators were obligated to give Claimant a hearing on its claims. The Arbitrators failed to do this, and even caused the time that was allotted to be used to debate an assertion that was never made by the parties in the first instance.

38.Therefore, since Claimant was denied a fair hearing, the *Final Award* must be vacated.

39.**Refusal to Consider Evidence.** Nevada law requires that an arbitrator consider the evidence. "Upon motion [...], the court shall vacate an award [...] if: [...] (c) An arbitrator [...] refused to consider evidence material to the controversy [...]" (NRS 38.241(1).

40.In this arbitration, the Panel accepted all proffered documents as exhibits. The exhibits in this case consist of thousands of pages in around seven hundred paper documents, as well as hundreds of computer programs.

41.The question here is not whether evidence was admitted, but rather, "After admission was it, in fact, considered?" If "refusal to consider the evidence" were to hinge only on whether the documents were formally admitted, then the standard would be hollow, indeed, hinging only on a procedure or formality.

42.It is acknowledged by Claimant that an arbitrator may assign the weight to be given to each piece of evidence. Again, that is not the question here. In this case, the arbitrators apparently ignored and refused to consider the evidence submitted by Claimant.

43.In the Panel's own words, "This matter has been through extensive discovery over a number of years, and Claimant has utterly failed to produce a scintilla of evidence suggesting any improper action by Respondent. Claimant failed to show any direct or indirect evidence demonstrating improper use of the Claimant's intellectual property or improper profiteering from use of Claimant's intellectual property." (*Final Award*, 2007.12.05, Exh.MV-12 Pgs.70-78 ¶12)

44.Such evidence was, in fact, produced. For example, with respect to the fourth and seventh claims of misappropriation, the following documents were among those produced:

(a)An e-mail from Fahy, saying he had combined the stream state machine from the Porting Kit code with his own download code [resulting in a program called "export" in the Fahy code body] (Exh.MV-11 Pg.59)

(b)An e-mail from Fahy to Dolan, responding to some questions, mentioning the xport program and state machine, showing that Dolan had studied the state machine which was partly made from the Porting Kit (Exh.MV-11 Pg.156); in other words, Dolan, had access to the Claimant's intellectual property, and apparently studied the same.

45.The arbitrators could not have simply overlooked this evidence; it had been presented to them at least three times:

(a)During the first hearing (Claimant's exhibits from first hearing, Exh.MV-15 Pgs.12&37); even though one of the arbitrators, Dr. Hollaar, slept through much of the first morning, the other two were awake; and

(b)In the joint exhibit binders provided to the Panel of Arbitrators pursuant to its Order (joint exhibit binders, CJE 189 and CJE 406); and

(c)In *Claimant's Motion for Change of Award*... (Exh.MV-12), which was also incorporated by reference into *Claimant's Response in Opposition to Respondents' Memorandum of Costs* (Exh.MV-12 Pgs.12-31)

46.Having evidence presented to the Panel on three separate occasions, the only reasonable conclusion is that they refused to consider it. The Panel did not weigh the evidence. They did not say it was meaningless, they did not refute it, they did not question it, and they did not ask questions about it. They did not mention it. The Panel simply ignored it.

47.There are numerous similar examples. Another such refusal to consider the evidence occurred when the Panel wrote, "[...] this Panel finds that there was no evidence adduced or testimony heard that supported a finding that Respondents breached such an implied covenant of good faith and fair dealing." (*Final Award*, Exh.MV-12 Pg.70-78 ¶15)

48.Regarding Claimant's allegations of breach of the implied covenant of good faith and fair dealing, these documents were submitted among those as relevant to the first and second claims for breach of contract:

(a)An invoice (Exh.MV-11 Pg.58) from ISI to KETI; this triggered a payment obligation from Respondent to Claimant; and

(b)A letter (Exh.MV-11 Pg.60) from ISI to KETI, one month later, reminding KETI that payment was due under the invoice; and

(c)An internal ISI e-mail discussing the invoice (Joint exhibit binders, CJE 411); and

(d)A letter (Joint exhibit binders, CJE 421) denying that ISI had invoiced KETI, thus denying the payment obligation from Respondent to Claimant; the writer, a vice president, wrote the previous e-mail, and so was fully aware of the invoice and therefore was lying to Claimant

49.The above letters show fraud by Respondent, yet the arbitrators said there was "no evidence" of bad faith. They did not find any mitigating factors, or question the intent. They simply ignored and refused to consider the evidence.

50.Out of consideration for the Court's time, only two examples are given here, since such refusal to consider the evidence is already abundant in the record. In fact, an examination of the record will show that the Panel refused to consider almost all of Claimant's evidence, while taking Respondent's evidence without question. Two ways to see this are:

(a)Compare the "Findings of Fact" from the *Partial Decision, First Hearing* (Exh.MV-11, Pgs.241-245 at 242-244) with the transcript and exhibits; almost all of the "facts" are recited from Respondent's testimony and exhibits, and almost none from Claimant's.

(b)Although a corresponding exercise for the second hearing is more difficult because the Final Award had no separate "facts" recitation, the same conclusion will be reached: the Panel relied almost entirely on evidence from Respondent, ignoring almost all of what was produced by Claimant.

51.It is noted that Claimant did not take issue with most of Respondent's evidence, nor did Respondent protest any of Claimant's. There are few contradictions of facts in the record. The Panel simply ignored Claimant's side of the story.

52.Therefore, since the arbitrators refused to consider material evidence regarding the claims, the *Final Award* must be vacated.

53.**Arbitrators Exceeded Their Powers.** Nevada law prohibits an arbitrator from exceeding his contractual powers. "Upon motion [...], the court shall vacate an award [...] if: [...] (d) An arbitrator exceeded his powers; [...]" (NRS 38.241(1).

54."Arbitrators exceed their powers when they address issues or make awards outside the scope of the governing contract." (*Health Plan of Nevada, Inc. v. Rainbow Medical, LLC*, 120 Nev. 689 at 697, 100 P.3d 172 at 178 (2004)).

55."[...] a court may conclude that an arbitrator exceeded his or her authority when it is obvious from the written opinion." (*Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001), cert. denied, 122 S.Ct. 545, 151 L. Ed. 2d 423 (U.S. 2001)).

56."[A]n arbitrator is confined to interpretation and application of the [...] agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the [...] agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (*United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 80 S.Ct. 1358 at 1361, 363 U.S. 593 at 597, 4 L.Ed.2d 1424 (1960))

57."In determining a question under an arbitration agreement, an arbitrator enjoys a broad discretion, but that discretion is not without limits. He is confined to interpreting and applying the agreement, and his award need not be enforced if it is arbitrary, capricious, or unsupported by the agreement." (*Exber, Inc. v. Sletten Const. Co.*, 92 Nev. 721 at 731, 558 P.2d 517 at 523 (1976).

58.In this instance, the agreement to arbitrate, and the *Software License Agreement*, are one and the same. The arbitrators' powers are limited to what is described in the *Software*

License Agreement. The principle here is consistent with the principle of manifest disregard (discussed more, below) when the latter is applied to contract law: "This court may vacate an arbitration award when an arbitrator manifestly disregards the law. *Wichinsky v. Mosa*, 109 Nev. 84, 89-90, 847 P.2d 727, 731 (1993). The law in regard to interpretation of contracts [...] is clear. 'We should not interpret the contract so as to render its provisions meaningless. If at all possible, we should give effect to every word in the contract.' *Caldwell v. Consolidated Realty*, 99 Nev. 635, 639, 668 P.2d 284, 287 (1983) (citation omitted)." (*Coblentz v. Hotel Employees & Restaurant Employees Union Welfare Fund*, 112 Nev. 1161 at 1169, 925 P.2d 496 at 501 (1996))

59. Repeatedly, as shown by the following examples, the Panel exceeded their powers by modifying or ignoring portions of the *Software License Agreement*.

60. First example of exceeding powers: software support.

61. In *Health Plan of Nevada*, **supra**, the Court sustained the arbitrator's award because, in part, "[...] the arbitrator's decision reflects that he did not [...] impose burdens outside of the contract." (*Health Plan of Nevada*, at 699) In the present case, by ignoring portions of the *Software License Agreement* which limited the support obligations of Claimant, the Panel imposed significant new burdens on Claimant.

62. "If ISI is not using a currently supported version of the a [sic] Program as listed in BBC's Supported Products List, BBC may suspend provision of Software Support for the Program until ISI cures this condition without refunding the Software Support Fee. (*Software License Agreement*, Exh.MV-11 Pgs.45-56 at Pg.53) This clause reasonably avoids requiring Claimant to support a large amount of code which is obsolete, outdated, or known to contain errors. Respondent was, admittedly, not using a current version of the product: "ISI shipped the incomplete Marking Code to KETI on or about December 18, 1996" (*Partial Decision*, First Hearing, Exh.MV-11 Pgs.241-245 at Pg.243) The record shows that the version shipped was "incomplete" because it was derived from an earlier, interim release which was not yet complete and was no longer supported.

63.Claimant was expected to support KETI directly, without going through Respondent. "BBC is under no obligation to provide direct support except to ISI itself and to KETI." (*Software License Agreement*, Exh.MV-11 Pgs.45-56 at Pg.53)

64.Subsequently, KETI found some problems and Claimant sent KETI some fixes. The record shows the fixes could not be installed because KETI was using the obsolete version of the code sent by Respondent. The record further shows that the use of the obsolete version was found to be the cause of the problems seen by KETI. Claimant tried to help KETI which was only the victim of Respondent's actions, but Claimant refused to help Respondent until Respondent converted to the latest version of the code; the latest version had been shipped in December 1996 to Respondent as shown above.

65.Notwithstanding the foregoing, the Panel decided "[...] the evidence in this case would support a finding that Michael Marking and Claimant acted in bad faith in a variety of actions and inactions in the termination process as in part evidenced by the failure to provide current versions of software when requested by Respondents and in turn giving it to Respondents' Customer KETI directly." (*Final Award*, Exh.MV-12 Pgs.70-78 ¶16) The Panel was effectively rewriting the Software License Agreement to place a new burden on Claimant: to support an obsolete code despite Respondents' negligence.

66.The Panel had no power to rewrite the agreement. They exceeded their power and thus the award must be vacated.

Second example of exceeding powers: exclusive remedy.

67.The Software License Agreement provides, in part,

> "EXCLUSIVE REMEDY: ISI'S EXCLUSIVE REMEDY AGAINST ANY PARTY FOR BREACH OF THIS AGREEMENT SHALL BE, AT BBC'S CHOICE, (A) CORRECTION OF ANY ERROR OR DEFECT IN THE PROGRAM AS TO WHICH ISI HAS GIVEN NOTICE (B) REPLACEMENT OF THE PROGRAM INVOLVED."

Software License Agreement, Exh.MV-11 Pgs.45-56 at Pg.51)

68.The seventh claim for breach of contract was that, in lieu of using the above exclusive remedy, Respondent withheld payment due to Claimant. Respondent attempted to justify this by

asserting that the software contained errors, that Claimant should not have dealt directly with KETI, and various other things; all of these assertions were subsequently abandoned.

69.“The Panel dismissed the Claimant‘s Seventh Claim for withholding payment, since there was no cognizable claim pleaded and additionally it was cured by the payment in full, plus interest.” (*Final Award*, Exh.MV-12 Pgs.70-78 ¶8). This was error. The Claimant was denied payment to which it was entitled from the Respondent for a substantial period. The Claimant suffered substantial contract damage as a result of the delay in payment and mere payment, even with interest, did not cure the contract breach or make the Claimant whole. The remedy for contract breach was contract termination as well as the payment of outstanding contractual obligations.

The withholding of payment by the Respondent was a breach of contract, a breach of the implied covenant of good faith and fair dealing and in bad faith. Mere payment of overdue monies does not satisfy the damages caused by the Respondent’s actionable misconduct.

70.In maintaining that there was “no cognizable claim pleaded”, the arbitrators ignored the arbitration clause itself (quoted in full above in , on Page 4), which calls for the resolution of “any dispute” through arbitration. The arbitrators exceeded their powers to reduce their powers!

71.Then the arbitrators invented a new clause which allowed “payment with interest” to cure the breach. The *Software License Agreement* contains nothing of the sort. In fact, failure to make timely payment is grounds for termination, and the Agreement holds that the money is still owed, notwithstanding the termination. (See *Software License Agreement*, Exh.MV-11 Pgs. 45-56 at Pg.54).

72.Thus the arbitrators effectively rewrote and misinterpreted the *Software License Agreement*, and in so doing, exceeded their powers. They failed to give meaning to the exclusive remedy and termination clauses, and even ignored the phrase “any dispute” in the arbitration clause itself. Accordingly, the award must be vacated.

73.Further examples are in the record before the Court. It is clear from the record that the arbitrators exceeded their powers, by fashioning remedies not found either in the *Software*

License Agreement or in law; and by concluding that large portions of the contract are simply meaningless, in defiance of the dictum, from *Coblentz*, **supra**, to give meaning to every word.

74.**Manifest Disregard of the Law.** Nevada recognizes manifest disregard of the law as grounds for vacatur of an arbitration award. "We have stated that '[t]he district court's power of review of an arbitration award is limited to the statutory grounds provided in the Uniform Arbitration Act.' [...] However, when an arbitrator manifestly disregards the law, a reviewing court may vacate an arbitration award." (*Wichinsky v. Mosa*, 109 Nev. 84 at 89-90, 847 P.2d 727 at 731, Nev. 1993)

75.Review for manifest disregard of the law by a district court is mandatory: "Accordingly, in this case the district court had the authority and obligation to review the arbitrator's award to determine whether the arbitrator manifestly disregarded the law." (*Graber v. Comstock Bank*, 111 Nev. 1421 at 1428, 905 P.2d 1112 at 1116 (1995).

76."[W]hen searching for a manifest disregard for the law, a court should attempt to locate arbitrators who appreciate the significance of clearly governing legal principles but decide to ignore or pay no attention to those principles. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). The governing law alleged to have been ignored must be well-defined, explicit, and clearly applicable. *Id.* at 934." (*Graber*, at same pages)

77."[T]o modify or vacate an award on this ground, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." (*Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 at 202, C.A.2 (N.Y.) 1998, cert. denied 526 U.S. 1034, 119 S.Ct. 1286, 143 L.Ed.2d 378 (1999).

78.The law having been presented to the arbitrators is a sufficient basis to conclude that they were aware of the law. "In view of the strong evidence [...] and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both." (*Halligan*, at 204)

79.In the present case, the arbitrators were briefed extensively on applicable law. Exhibit MV-4 is a table of citations of law which were presented to the arbitrators in the most important pleadings. It is notable that every one of these briefs was either ordered by the Panel, or was in response to a pleading ordered by the Panel, or was considered and ruled upon by the Panel. In other words, the arbitrators would have read the pleading or brief associated with every citation in Exhibit MV-4. Accordingly, the arbitrators were aware of the laws illustrated or explained by those citations.

80.Nevada, in *Graber*, **supra**, held that the arbitrators must "appreciate" the significance of the legal principles being disregarded. Even if the briefs referenced in Exhibit MV-4 were not to have explained the "significance" of the cited authorities, then surely the arbitrators were capable of apprehending that significance without such assistance. Two of the arbitrators are attorneys, and one is on the computer science faculty at a university. All three have training as arbitrators. (Exh.MV-12 Pgs.82-86) None of the laws pertinent to this matter, or certainly those pertinent to the main points, are unclear, vague, or ambiguous.

81.Some examples follow:

First example of manifest disregard: prevailing party.

82.Law: a prevailing party is one who has won relief or benefit from litigation.

83.Where briefed: *Claimant's Motion to Rescind Determination of Prevailing Party Status*, (Exh.MV-12 Pgs.1-11), *Claimant's Motion for Change of Award By Arbitrators Designating Claimant as Prevailing Party and for Other Relief [NRS 38.237]* (Exh.MV-10, Pgs.18-19, 39-44), *Claimant's Response in Opposition to Respondents' Memorandum of Costs* (Exh.MV-12 Pgs.12-31 at 19-20), *Claimant's Reply in Opposition to Respondent's Memorandum of Costs* (Exh.MV-12 Pgs.32-51 at 35)

84.The fact is that only the Claimant has won relief in this action (an order for destruction of software, and a partial audit).

85.Accordingly, the only proper conclusion is that Claimant is prevailing party.

86.The Panel's finding that the Respondent is the prevailing party is in manifest disregard of the law.

Second example of manifest disregard:

87. Law: In an audit, an appropriate sampling plan for detecting understatements involves selecting from a source in which the omitted items are included.

88.Where briefed: *Claimant's Prehearing Brief* (Exh.MV-11 Pgs.249-266 at 257)

89.Facts: The Panel granted an initial audit by discovery, but did not permit the necessary sampling by the auditor.

90.Proper conclusion: The audit is not yet complete.

91.Award: No further audit is allowed.

Third example of manifest disregard:

92.Law: Lack of likely benefit is not reason to deny a contractually-permitted audit.

93.Where briefed: *Claimant's Prehearing Brief* (Exh.MV-11 Pgs.249-266 at 256)

94.Proper conclusion: An audit as allowed by the contract should be permitted.

95.Award: There is no reason to conduct an audit.

Fourth example of manifest disregard:

96.Law: Lost profits are not necessary to sustain a claim of misappropriation of trade secrets.

97.Where briefed: *Claimant's Prehearing Brief* (Exh.MV-11 Pgs.249-266 at 259), *Claimant's Motion for Change of Award By Arbitrators Designating Claimant as Prevailing Party and for Other Relief* (Exh.MV-10 Pgs.10-11)

98.Proper conclusion: Claimant need not prove lost profits to support claim.

99.Award: Claimant had burden of proof to prove lost profits. (Note: The case cited by the Panel in its award, *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, involved a contract claim, not a tort, so the case was not relevant or on point.)

Fifth example of manifest disregard:

100.Law: the method for awarding fees and costs is at discretion of court

101.Where briefed: by Panel in its own Final Award (citing *Shuette v. Beazer Homes Holding Corp.*)

102.Proper conclusion: the Panel should have selected and employed a method for reviewing the memorandum of costs.

103.Award: the Panel dispensed with the method entirely, accepting the Respondent's memorandum without question, ignoring the opposition points of Claimant, then went on to apply the *Brunzell* factors.

104.The record is replete with additional examples of the arbitrators' manifest disregard of the law.

105.It is not necessary, under the manifest disregard standard, for the arbitrators to explicitly announce that they are going to disregard the law. In fact, it is not necessary for them to give any reasons whatsoever to conclude that their findings were in manifest disregard of the law. "[W]here a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard." (*Halligan*, at 204)

106.The *Final Award* is in manifest disregard of the law, and hence must be vacated.

107.**Award Was Irrational.** Irrationality is grounds for vacatur. "[A]n arbitrator's decision must be upheld unless it is 'completely irrational' [...]" (*Wichinsky v. Mosa*, 109 Nev. 84 at 90, 847 P.2d 727 at 731, Nev. 1993)

108.The Final Award exhibits numerous examples of irrational thinking. Two are given here, though more appear in the record.

First example of irrational thinking:

109.The Panel recognized repeatedly, as a finding of fact, that Claimant was paid late, with interest. Late payment is a breach of the agreement, justifying the subsequent termination, and the allegation for that is the second claim for breach of contract.

110.Even if the interest were to have cured that specific breach, Claimant asked for and received an award of an order for post-termination destruction of the software.

111.In spite of this, the arbitrators concluded that Respondent was the prevailing party. Where is the logic in this?

112.Why did they grant the order to destroy the software if (they concluded) there was no evidence of malfeasance by Respondent?

Second example of irrational thinking:

113.As explained previously, Claimant made nine claims of misappropriation of trade secrets. One of these claims, the seventh, was basically that Dolan studied the Fahy code to make his own code, the Fahy code having been developed earlier using Claimant's Porting Kit. This seventh claim was added after discovery, because at the time of the original Complaint, the Dolan code didn't exist.

114.The record shows that the Dolan code was developed beginning in the spring of 1998. Respondent did not even hire Dolan for this project until then, after the Complaint was filed in this Court. Accordingly, the allegation in the seventh misappropriation claim is based on events which took place in 1998. All of the other misappropriation claims involve actions which took place prior to the Complaint, which is prior to February 1998.

115."The Panel dismissed all Misappropriation Claims on the basis (1) that this Panel found independent development of the Dolan Code in the First Hearing, (2) that an oral license was granted by Claimant to KETI, (3) that Respondents were not obligated to police KETI from disclosing Claimant's software to its constituent members, (4) that there was no evidence proffered that KETI did in fact disclose Claimant's software to its constituent members, and (5) that, in part, the Eights and Ninth Claims were against KETI and not Respondents." (*Final Award*, Exh.MV-12 Pgs.70-78 ¶9)

116.Consider each of these reasons in turn:

"(1) That this Panel found independent development of the Dolan Code in the First Hearing" Since Dolan's actions took place after all of the others, the Panel is saying here that the

previous actions were somehow erased by what Dolan did. Absent some kind of mechanism for time travel, there is no way for an action taken in 1998 to erase actions taken in 1996 and 1997, yet somehow the arbitrators believe this. For example, they do not see how Fahy's use of the state machine to create "xport" in December 1996 was unaffected by Dolan's work a year and a half later.

"(2) That an oral license was granted by Claimant to KETI" The Panel has concluded that, because Claimant granted KETI a temporary oral license, which somehow excused Respondent's behavior. If you let a friend borrow your car, does that allow everyone else to use it, also?

"(3) That Respondents were not obligated to police KETI from disclosing Claimant's software to its constituent members" The ninth claim for misappropriation was that Respondent, in an attempt to sell the software to KETI members, told KETI it could (in violation of the confidentiality provisions of the *Software License Agreement*) show the software to KETI members; this was an inducement to misappropriate. The arbitrators are saying that it was acceptable to violate the confidentiality provisions because Respondent had no obligation to deal with the consequences of anyone else violating those provisions.

"(4) That there was no evidence proffered that KETI did in fact disclose Claimant's software to its constituent members" (This portion is not a logical error, but rather a disregard of the law; the Panel had been shown in Claimant's *Prehearing Brief* that an attempted sale, even if not successful, was a misappropriation.)

"(5) That, in part, the Eights and Ninth Claims were against KETI and not Respondents" The Panel is excusing ISI for misappropriation, because they found a customer for the misappropriated property. That is like saying a thief cannot be prosecuted if he fences the goods.

117. The *Final Award* is irrational, and must be vacated.

118. **No Final Disposition of All Claims.** The claims made involve issues which are not severable. The underlying facts and issues are intertwined.

119.The panel failed to rule on all of the claims. Although it implicitly acknowledged the breach of contract claims by granting relief in the form of an order for destruction of the Porting Kit (as requested in *Claimant's Prehearing Brief*, Exh.MV-11 Pgs.249-266 ¶97), it did not continue by also ruling on the request for a permanent injunction (*ibid.* ¶104). Furthermore, Claimant is entitled to a clear finding, an explicit decision, regarding the breach itself, as requested in ¶94.

120.An incomplete award cannot result in a prevailing party, and cannot be confirmed, because to do so would foreclose further litigation to resolve the remaining issues. NRCP Rule 54(b) states, "any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time".

121.However, to separate claims requires that the claims be properly separable, and also an express determination that "there is no just reason for delay" in hearing one of the claims. In related contract and tort claims, even if the "claims are separate, and require proof of separate elements, [and] the factual underpinnings and many of the issues related to damages to be awarded are the same", a decision on part of the claims could not be certified as final. If the outcome of some issues depends on another issue, then "there can be no finding that there is not just reason for delay, and certification of an order deciding some but not all of those claims as final is an abuse of the court's discretion." (*Hallicrafters Co. V. Moore*, 102 Nev. 526, 728 P. 2d 441, (1986).

122.Furthermore, the Parties bargained for a reasoned award.

123.Although nominally, the *Final Award* is "reasoned", it does not in fact, explain the thinking of the Panel in making its decisions. For example,

(a)Relief was granted to Claimant, but there was no explanation why this was done.

(b)Respondent was designated prevailing party, in contradiction to all cited authorities, without an explanation of why.

(c)Panel decided that cited authorities in the areas of contract law and misappropriation of trade secrets could be disregarded, and Respondent cited no contrary authorities, yet the Panel failed to cite any authorities of its own to explain its reasons.

(d)The arbitrators gave no reason for refusing to consider Claimant's evidence, while unquestioningly accepting testimony proffered by Respondent.

(e)The Panel said, "The numerous and complex exhibits and witness testimony presented to the Panel required much time and attention in preparation. This was particularly true given the bad faith nature of the manner in which Claimant and Mr. Marking conducted themselves throughout the arbitration." What was the basis for this "bad faith" accusation? Where does this "bad faith" conduct appear in the record? Especially since this was not a ruling on any manner submitted to the arbitrators, it should be explained, or, better, stricken.

(f)At the conclusion of the second and final hearing, the arbitrators said, "[...] it is the inclination of the panel at this time to allow a limited-scope audit." (Second Hearing Transcript, Exh.MV-14, Pgs.188-189) Yet, with no intervening pleadings, conferences, or hearings, the panel reversed this, presumably based on something found in their review of the record. Claimant is entitled to have some reason or explanation in the reasoned award.

124.Furthermore, the arbitrators ruled that certain of the misappropriation claims were "against KETI". That is not what Claimant has asserted. While Claimant has maintained that KETI has acted improperly, that was not the substance of any of Claimant's claims in this arbitration. The Panel has apparently ruled on some different claims, ignoring those made by Claimant.

125.The arbitration is a matter of contract. Claimant is entitled to the reasoned award for which it bargained and paid. Accordingly, the award is not what was agreed, is an imperfect execution of the arbitrators' powers, and should be vacated.

126.**Partiality by Arbitrators.** Evident partiality by a neutral arbitrator is grounds for vacating an award. "Upon motion to the court by a party to an arbitral proceeding, the court shall

vacate an award made in the arbitral proceeding if: [...] (b) There was: (1) Evident partiality by an arbitrator appointed as a neutral arbitrator [...]" (NRS 38.241(1)).

127.The total picture from the foregoing is one of bias by the arbitrators against Claimant.

(a)The Panel rearranged the hearing to make it more favorable to Respondent by hearing an "easy to refute" allegation which was never made.

(b)They used the decision on the unmade allegation based on actions in 1998 to dismiss without a hearing the allegations of actions in previous years.

(c)The Panel ignored almost every legal authority cited by Claimant. (The exception was the prevailing party law, which, in the end, was disregarded also.)

(d)Claimant was not given a hearing on most of his claims.

(e)In thousands of pages of documents and hours of testimony, the Panel saw no evidence whatsoever supporting Claimant's claims; at the same time, they accepted Respondent's testimony and documents without question.

(f)The Panel in utter disregard for the law and fairness made Respondent the prevailing party.

(g)Then, when Claimant pointed out that Respondent's memorandum of costs was contrary to law, even to the point of billing for attorneys apparently engaged in the unauthorized practice of law, the arbitrators ignored Claimant's Opposition, and proceeded to agree with Respondent's attorneys as if the arbitrators has no independent judgment.

128.In summary, it is evident that the arbitrators were partial to Respondent, and so the award must be vacated.

CONCLUSION

As stated above, an arbitration was ordered by this Court. The arbitration was conducted and an award was made. The arbitration and award were and are defective in that:

(a)The proceeding was conducted in a manner prejudicial to Claimant;

(b)The arbitrators refused to consider evidence material to the controversy;

(c)The arbitrators exceeded their powers;

(d)The arbitrators acted in manifest disregard of the law;

(e)The award was irrational;

(f)The award does not finally and definitively dispose of all of the claims; and

(g)There was evident partiality by the arbitrators.

The provisions of NRS 38.241 clearly provide the Court with the discretion to vacate the Arbitrators' Award in this matter. The facts and evidence provided for the Court's attention clearly establish the Arbitrators' complete failure to follow the law in the matter, including, but not limited to finding and holding that the Respondent was the prevailing party when in fact, the Claimant / Plaintiff was the prevailing party and was provided with requested relief.

It should also be noted that the Claimant's Motion to Change Award in accordance with NRS 38.237 (Exh.MV-10 and MV-11) filed with the American Arbitration Association on December 26, 2007 was never addressed by the Arbitrators and ignored before the Arbitrators filed their entry of the Final Award on April 21, 2008. This refusal to address the motion by itself constitutes a manifest disregard for the law and shows the Arbitrators exceeded their powers.

The Plaintiff respectfully submits that the Defendants' Motion to Confirm Arbitration Award be denied and that the Plaintiff's Motion to Vacate the Award be granted.

The Plaintiff further requests, as a preliminary matter, that this Honorable Court issue its Order to the American Arbitration Association to forward the official record of the arbitration to this Court for this Court's review in accordance with the holding n *Graber v. Comstock Bank*,

111 Nev. 1421 at 1427-1428, 905 P.2d 1112 at 1115-1116, (1995) and review the pleadings, transcripts, and exhibits from the official record, in conjunction with the record before this Court; and then Vacate the Arbitrators' Award; deny Respondent's Motion to Confirm; and Order a rehearing before a different panel of arbitrators, of the same claims, without conducting additional discovery or other pre-hearing activity, but relying on the existing record to the extent that said record does not include adjudication on any of the claims.

Respectfully Submitted this 18th day of July, 2008.

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CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury that on this date I served a true and correct copy of the foregoing document by:

_____ Depositing for mailing, in a sealed envelope, U.S. Postage prepaid, at Reno, Nevada

_____ Personal delivery

_____ Facsimile

_____ Federal Express or other overnight delivery

_____ Messenger Service

addressed as follows:

Barry L. Breslow, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

DATED: _____, 2008._

_____

AFFIRMATION
(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document filed in the above-entitled matter

_X_ Document does not contain the social security number of any person

-OR-

___ Document contains the social security number of a person as required by:

____ A specific state or federal law, to wit:
_____

-or-

____ For the administration of a public program

-or-

____ For an application for a federal or state grant

-or-

____ Confidential Family Court Information Sheet (NRS 125.130, NRS 125.230 and NRS 125B.055)

DATED: _____, 2008.

THE O=MARA LAW FIRM, PC

BY:_____
WILLIAM M. O=MARA, ESQ.