

Nos. 06-10260 & 06-10261

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN LASER VISION, P.A.,

Plaintiff-Counter Defendant-Appellee,

v.

THE LASER VISION INSTITUTE, L.L.C. a/k/a THE LASIK VISION
INSTITUTE,

Defendant-Counter Claimant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

**BRIEF OF APPELLANT THE LASER VISION INSTITUTE, L.L.C.
a/k/a THE LASIK VISION INSTITUTE**

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LIST OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. American Laser Vision, P.A.
2. Dr. Robert Selkin
3. Randy McClanahan, Robert H. Espey II, McClanahan & Clearman, L.L.P., attorneys for American Laser Vision, P.A.
4. The Laser Vision Institute, L.L.C. a/k/a The Lasik Vision Institute
5. David J. Schenck, David L. Horan, Jones Day, attorneys for The Laser Vision Institute, L.L.C. a/k/a The Lasik Vision Institute
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7. Paul Lopez, Lisa MacCluggage, Tripp Scott, P.A., attorneys for The Laser Vision Institute, L.L.C. a/k/a The Lasik Vision Institute
8. Marco Musa, Max Musa, and Marc Andrea Musa, former owners of The Laser Vision Institute, L.L.C. a/k/a The Lasik Vision Institute

David J. Schenck

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary and appropriate for proper disposition of this appeal.

TABLE OF CONTENTS

	Page
LIST OF INTERESTED PERSONS	i
STATEMENT REGARDING ORAL ARGUMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	4
SUMMARY OF THE ARGUMENT	14
ARGUMENT.....	16
I. STANDARDS OF REVIEW	16
II. THE ARBITRATOR DISREGARDED THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE CONTRACT	17
III. THE ARBITRATOR’S AWARD OF DAMAGES FOR SELKIN’S CLAIMED PERSONAL LOSSES OR ALV’S CLAIMED LOST INCOME DOES NOT DRAW ITS ESSENCE FROM THE PARTIES’ CONTRACT AND MANIFESTLY DISREGARDS THE LAW	22
A. Any Award For Personal Losses To Selkin, A Non-Party To The Contract, In The Name Of ALV Manifestly Disregards The Law And The Terms Of The Contract	22
1. The Damages Awarded Cannot Be Explained Arithmetically Without Including The Claims For Selkin’s Lost Surgical Income	23
2. Selkin Did Not Suffer Damages Under The Contract	25
3. The Award Of Damages For Selkin’s Personal Losses Manifestly Disregards The Law Of Parties.....	26
B. The Award Of Damages For Selkin’s Personal Losses Also Manifestly Disregards The Law Governing Mitigation.....	28
C. Alternatively, The Award Of Damages To ALV For Its Lost Income Based On Selkin’s Failure To Perform Surgeries Manifestly Disregards The Law Governing Mitigation.....	32

TABLE OF CONTENTS
(continued)

	Page
IV. THE ARBITRATOR’S DISREGARD OF THE LAW RESULTED IN SIGNIFICANT INJUSTICE.....	34
V. THE COURT SHOULD, AT A MINIMUM, REMAND THE AWARD TO THE ARBITRATOR FOR CLARIFICATION TO PERMIT MEANINGFUL, STATUTORILY-MANDATED REVIEW	35
CONCLUSION	37
CERTIFICATE OF SERVICE.....	39
CERTIFICATE OF COMPLIANCE	39

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Antwine v. Prudential Bache Sec., Inc.</i> , 899 F.2d 410 (5th Cir. 1990)	16
<i>Brabham v. A.G. Edwards & Sons, Inc.</i> , 376 F.3d 377 (5th Cir. 2004).....	<i>passim</i>
<i>Eljer Manufacturing, Inc. v. Kowin Development Corp.</i> , 14 F.3d 1250 (7th Cir. 1994).....	25
<i>Glover v. IBP, Inc.</i> , 334 F.3d 471 (5th Cir. 2003).....	26
<i>Hardy v. Walsh Manning Sec., L.L.C.</i> , 341 F.3d 126 (2d Cir. 2003).....	36
<i>Kergosien v. Ocean Energy, Inc.</i> , 390 F.3d 346 (5th Cir. 2004).....	18
<i>McIlroy v. PaineWebber, Inc.</i> , 989 F.2d 817 (5th Cir. 1993)	16
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	16
<i>Nationwide Mutual Insurance Co. v. Home Insurance Co.</i> , 330 F.3d 843 (6th Cir. 2003).....	28
<i>NCR Corp. v. Sac-Co., Inc.</i> , 43 F.3d 1076 (6th Cir. 1995)	28
<i>Patten v. Signator Insurance Agency, Inc.</i> , 441 F.3d 230 (4th Cir. 2006).....	21
<i>Prestige Ford v. Ford Dealer Computer Services, Inc.</i> , 324 F.3d 391 (5th Cir. 2003).....	24
<i>Siegel v. Titan Industrial Corp.</i> , 779 F.2d 891 (2d Cir. 1985).....	37
<i>Tripi v. Prudential Sec.</i> , 303 F. Supp. 2d 349 (S.D.N.Y. 2003).....	36
<i>Williams v. Eggleston</i> , 170 U.S. 304 (1898)	27

STATE CASES

<i>Cantrell v. Broadnax</i> , 306 S.W.2d 429 (Tex. App.—Dallas 1957, no writ).....	27
<i>Carson Energy, Inc. v. Riverway Bank</i> , 100 S.W.3d 591 (Tex. App.—Texarkana 2003, pet denied).....	27

<i>Durham Clinic, P.A. v. Barrett</i> , 107 S.W.3d 761 (Tex. App.—Waco 2003, pet. denied)	27
<i>Grain Dealers Mutual Insurance Co. v. McKee</i> , 943 S.W.2d 455 (Tex. 1997)	27
<i>Great America Insurance Co. v. North Austin Municipal Utility District No. 1</i> , 908 S.W.2d 415 (Tex. 1995)	29, 33
<i>Grigsby v. Reib</i> , 153 S.W. 1124 (Tex. 1913)	27
<i>Grinnell v. Munson</i> , 137 S.W.3d 706 (Tex. App.—San Antonio 2004, no pet.)	27
<i>Gunn Infiniti, Inc. v. O’Byrne</i> , 996 S.W.2d 854 (Tex. 1999)	29
<i>Kenneth B. Hughes Interests, Inc. v. Westrup</i> , 879 S.W.2d 229 (Tex. App.—Houston [1st Dist.] 1994, writ denied)	27
<i>Merrimack Mutual Fire Insurance Co. v. Allied Fairbanks Bank</i> , 678 S.W.2d 574 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.)	27
<i>Southern Pac. Co. v. Porter</i> , 331 S.W.2d 42 (Tex. 1960)	27
<i>Walker v. Salt Flat Water Co.</i> , 96 S.W.2d 231 (Tex. 1936)	29
<i>Wynne v. Adcock Pipe & Supply</i> , 761 S.W.2d 67 (Tex. App.—San Antonio 1988, writ denied)	27

FEDERAL STATUTES

9 U.S.C. § 6	3
9 U.S.C. § 9	3
9 U.S.C. § 10	3
9 U.S.C. § 11	24
9 U.S.C. § 12	3
28 U.S.C. § 1291	1

28 U.S.C. § 1332 1

STATE STATUTES

TEX. BUS. CORP. ACT art. 2.02 28
TEX. CIV. PRAC. & REM. CODE § 5.001 27
TEX. REV. CIV. STAT. art. 1528f, § 25 27

MISCELLANEOUS

AM. JUR. 2D *Parties* § 32 (2002) 27
9 FLETCHER CYCLOPEDIA OF THE LAW
OF PRIVATE CORPORATIONS § 4231 (1999) 27, 28
RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 350 (1979) 29
TEX. JUR. 2D *Contracts* § 279 (1997) 27
TEX. JUR. 2D *Contracts* § 337 (1997) 27

JURISDICTIONAL STATEMENT

This is an appeal from a final decision pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction over the action under 28 U.S.C. § 1332(a).

Appellant The Laser Vision Institute, L.L.C. a/k/a The Lasik Vision Institute (“LVI”) timely filed a notice of appeal on August 15, 2005, RE 2,¹ from the District Court’s July 15, 2005 Final Judgment, RE 4, and an amended notice of appeal on November 8, 2005, RE 3, from the District Court’s October 18, 2005 Memorandum Order denying LVI’s Motion to Alter or Amend Judgment. RE 5.

¹ Citations to the record on appeal that is consecutively paginated as “USCA5” will be denoted herein as “R.” Citations to the Transcript of the June 15, 2005 Hearing on Defendant’s Motion to Vacate the Arbitration Award will be denoted herein as “Hrg. Tr.” References to the Record Excerpts will be denoted as “RE.” The record on appeal includes LVI’s Appendix to its Motion to Vacate, which contains, *inter alia*, the entire arbitration hearing transcript and all of LVI’s and ALV’s hearing exhibits. The Appendix, however, was not consecutively paginated by the district court clerk when included in the record on appeal. LVI will therefore denote references to the Appendix with the appendix page reference “A.” (other than those excerpts from the Appendix attached to LVI’s Motion to Vacate as exhibits to the Motion and thereby included in the consecutively-paginated record on appeal and/or included in the Record Excerpts) and, where applicable, either a reference to the volume and page of the arbitration transcript—“Arb. Tr. [#] at”—or the LVI or ALV exhibit number—“ALV Ex.” or “LVI Ex.”

STATEMENT OF THE ISSUES

1. Whether the arbitration award failed to draw its essence from the parties' agreements or manifestly disregarded the controlling law where the arbitrator openly disregarded the plain, unambiguous language of the agreements, including the parties thereto and the requirement of notice and of an opportunity to cure any claim of breach.

2. Whether the arbitrator's award failed to draw its essence from the parties' agreements or manifestly disregarded the controlling law where the award either granted personal damages to a non-party to the agreements (Dr. Robert Selkin)—who in fact had no damages at all—or damages to a party to the agreement for a loss it did not sustain and was in all events obligated to mitigate.

3. Whether the arbitrator's award should, at a minimum, be remanded to the arbitrator for clarification to permit meaningful, statutorily-mandated review of the award.

STATEMENT OF THE CASE

This is an appeal from the denial of a motion to vacate an arbitration award pursuant to 9 U.S.C. §§ 6, 9, 10, and 12.

The arbitration award was issued in favor of American Laser Vision, P.A. (“ALV”) and against LVI. RE 6.

ALV filed the instant action on September 16, 2004, seeking to confirm the award. R. 10. LVI in turn timely filed a motion to vacate the award on November 18, 2004. R. 59.

The District Court heard oral argument on June 15, 2005, at which LVI urged the District Court to vacate or, at least, remand the award to the arbitrator for clarification of the damages award to ALV. Hrg. Tr. 1, 37-41. After calling for additional legal briefing, the District Court entered a Memorandum Order denying LVI’s Motion to Vacate and granting ALV’s Motion for Entry of Judgment to confirm the arbitration award on June 20, 2005. RE 5. On July 15, 2005, the District Court entered a Final Judgment “in accordance with the arbitrator’s award,” requiring LVI to pay ALV, *inter alia*, “actual damages of \$1,842,220.39.” RE 4.

STATEMENT OF THE FACTS

While this appeal presents only questions of law, the following review of the facts presented to the arbitrator is nonetheless highly instructive.

At all times relevant to this case, ALV was a professional association comprised of two eye surgeons—Dr. Lewis Frazee (“Frazee”) and Dr. Robert Selkin (“Selkin”)—each of whom were 50% shareholders. Arb. Tr. 1 at 198 (A. 62); R. 186. LVI is a company that is engaged in, *inter alia*, the management of laser eye surgery centers.

In 2002, LVI entered into several, incorporated Professional Services Agreements (collectively, the “Contract”) with ALV under which the parties would staff and run laser eye surgery centers in Texas facilities, along with corresponding sublease agreements covering each location.² LVI Ex. 14-15, 17-18, 23-25, 27 (A. 558-89, 605-36, 695-733, 744-52); Arb. Tr. 1 at 282, 285 (A. 83). The content of the Contract is not open to dispute.

Under the Contract, LVI would provide the equipment and staff, while ALV would provide the surgeons—in particular Frazee and Selkin. LVI Ex. 14-15, 17-18 (A. 558-89, 605-36). Specifically, the Contract required ALV “to cause [Selkin

² LVI and ALV also entered into a Professional Services Agreement and a sublease agreement for a center in Oklahoma City, Oklahoma, but the evidence was undisputed that no eye surgeries were actually performed at that center. LVI Ex. 16, 26 (A. 590-604, 734-43); Arb. Tr. 1 at 22, 46, 74 (A. 18, 24, 31); Arb. Tr. 3 at 762 (RE 7). Notably, as the arbitrator, Selkin, and other witnesses openly acknowledged throughout the course of the arbitration hearing, and as the District Court recognized, LVI never entered into agreements with Selkin personally. *E.g.*, Arb. Tr. 1 at 42, 83, 242-43 (RE 7); A. 23, 73); Arb. Tr. 2 at 596 (RE 7); Arb. Tr. 3 at 659-60, 722, 738 (A. 253, 269, 273); R. 187.

and Frazee] to perform Laser Procedures at the Center a minimum of eight (8) working hours per day (excluding lunch) or however long is necessary to satisfy LVI's daily patient load" and to "cause at least one (1) of the Surgeons [Selkin and Frazee] to work a minimum of two (2) days per week including Friday and Saturday." LVI Ex. 14-15, 17-18 (A. 560, 576, 607, 623). The Contract also provided that LVI "shall not interfere with the exercise of [Selkin's or Frazee's] professional judgment, nor ... interfere with, control, direct, or supervise the care or treatment of patients treated by [Selkin or Frazee] at the Center, except in furtherance of its obligation to ensure that Laser Procedures and other services are rendered in a quality manner." LVI Ex. 14-15, 17-18 (A. 562, 579, 610, 625).

Significantly, the Contract expressly required ALV and LVI to permit the other party to cure any alleged material breach:

Termination with Cause. This Agreement shall be terminated immediately upon the occurrence of any of the following events:

....

Upon written notice describing a material breach by either party of the terms of this Agreement or failure of [ALV] or any of the Surgeons [Selkin and Frazee] to abide by the Center Policies, unless such breach is for failure to pay monies due in which case the party in breach shall have five (5) days following the notice to cure such breach....

LVI Ex. 14-15, 17-18 (A. 563, 579-80, 610-11, 626). Moreover, the Contract also prohibited ALV from bringing an action against LVI for breach without first providing LVI with notice of, and a chance to cure, any alleged breach:

In the event LVI fails to comply with any of its obligations under this Agreement and such failure shall continue for more than fifteen (15) days following written notice thereof from [ALV] to LVI, [ALV] shall be permitted to exercise any and all rights and remedies provided under the laws of the State in which the Center is located.

LVI Ex. 14-15, 17-18 (A. 564, 580, 611, 627).³

1. Selkin Walks Off The Job In June 2002 And Never Returns To Perform Surgeries Under The Contract

Under the Contract, Selkin, as a surgeon for ALV, performed eye surgeries in the LVI centers without incident between February and May 2002. Arb. Tr. 1 at 282-85 (A. 83). At the same time, and unbeknownst to Frazee, Selkin had separately entered into a contract to perform surgeries in North Carolina and Tennessee for another management company, Double Eagle Holdings, for whom he continued to work and earned substantial surgical fees. LVI Ex. 10 (A. 527-41); Arb. Tr. 1 at 78-80, 85, 198-99, 219 (RE 7; A. 32, 62); Arb. Tr. 2 at 454-56, 468-69, 493-95 (A. 168, 171, 177-78); Arb. Tr. 3 at 709, 754 (RE 7; A. 265).

Selkin walked off the job for ALV on June 29, 2002, citing an incident in which a different cleaner than his preferred Palmolive dish detergent was used to clean the surgical instruments. Arb. Tr. 1 at 146, 216-18 (RE 7); Arb. Tr. 3 at 741 (A. 273). He never again performed surgery in the LVI centers under the Contract thereafter. *E.g.*, Arb. Tr. 1 at 215-18 (RE 7); Arb. Tr. 3 at 741 (A. 273).

³ The relevant Contract between LVI and ALV clearly provides, in the “Governing Law” section, that the substantive law of the State in which the center is located (here, Texas) governs the Contract. LVI Ex. 14-15, 17-18 (A. 558-89, 605-36).

According to Selkin, the use of a manufacturer-approved cleaning agent caused mild to severe eye irritation in the patients on whom he performed surgery on June 29, 2002, causing him to fear that patients might assert claims against him. *E.g.*, Arb. Tr. 1 at 123-29 (A. 43-44). In all events, no patient was permanently injured or asserted any complaint or claim of malpractice, and LVI did not stop any surgeon from resuming use of Palmolive to clean the instruments. Arb. Tr. 1 at 207 (A. 64); Arb. Tr. 3 at 947, 959 (A. 325, 328).

At this point, ALV was not producing two surgeons under the Contract. As explained more fully below, it is undeniably clear that Selkin—*qua* Selkin or ALV—was busy making money elsewhere. At the same time, only Frazee purported to speak on behalf of ALV itself or attempted (and accepted) a cure of potentially opposing claims of breach between ALV and LVI.

2. Selkin, Acting On His Own Behalf, Pursues A Lucrative Practice In Other States Throughout 2002

As Selkin turned to and continued his own lucrative practice in the Southeast, Selkin and his personal attorney (his father's wife) engaged in an extensive letter-writing campaign with LVI's attorneys and principals, in which Selkin several times represented that he would purportedly like to return to work as an ALV surgeon at the LVI centers if his concerns were addressed. *E.g.*, LVI Ex. 28-35, 37-38, 48 (A. 753-79, 785-92, 831-32); Arb. Tr. 1 at 363 (A. 103); Arb. Tr. 2 at 403-04, 437 (A. 155, 163). Selkin did not to purport to speak on behalf of

ALV. In fact, these letters were sent on behalf of Selkin “individually” and “not on the behalf of both Dr. [Lewis] Frazee and [Selkin].” Arb. Tr. 3 at 667 (RE 7). In the letters, Selkin, having ceased performing under the Contract calling for two ALV surgeons to work at the LVI centers, claimed that he had issues with LVI’s performance under the Contract. *E.g.*, Arb. Tr. 1 at 296-97 (A. 86); Arb. Tr. 3 at 667-68 (RE 7).⁴

Regardless of the cause, there is no dispute, however, that Selkin refused to return to or meet with LVI and discuss his complaints or how ALV might cure any alleged breaches. Rather, Selkin fully committed himself to his own lucrative practice in North Carolina and Tennessee, performing surgeries and reaping extensive earnings under contracts with other laser eye care centers, which income he did not turn over to ALV. Arb. Tr. 2 at 469-72, 548 (A. 171-72, 191); Arb. Tr. 3 at 688-90, 751-79, 785-87, 1022-38 (RE 7; A. 260-61).

3. Frazee Agrees To A Cure With LVI For Any Alleged Breaches And Continues To Perform Surgeries Under The Contract Through December 2002

All the while, ALV’s other co-equal shareholder, Frazee, continued to perform for ALV in connection with the Contract and shouldered the entire load of the surgeries for which ALV was contractually responsible to LVI. Arb. Tr. 1 at 193, 216-18 (RE 7); Arb. Tr. 2 at 585 (RE 7); Arb. Tr. 3 at 669, 671, 699, 702 (RE

⁴ These issues raised in Selkin’s letters to LVI form the basis for the alleged breaches of ALV’s “rights” and claims for lost income under the Contract that ALV pressed in the arbitration proceeding and to defend the award in the District Court. *E.g.*, R. 146-49.

7; A. 256, 264). As the District Court also acknowledged, R. 187, Frazee, on behalf of ALV, also sat down in the summer of 2002 with a principal of LVI to address the concerns raised in Selkin’s letters, and Frazee and LVI agreed upon solutions for those concerns, consistent with the notice and cure prerequisites for any breach claims by either party. *E.g.*, LVI Ex. 14-15, 17-18 (A. 564, 580, 611, 627); LVI Ex. 36 (A. 780-84); Arb. Tr. 1 at 149-53, 193, 220-23 (RE 7); Arb. Tr. 3 at 669-71, 725 (RE 7; A. 256, 269). Further, Frazee testified that, based on his own experience with LVI, “[i]f there were issues, they were minor and they were dealt with.” Arb. Tr. 1 at 221 (RE 7). Moreover, Frazee, as the arbitrator acknowledged, agrees that LVI also paid him everything he was owed under the Contract. Arb. Tr. 1 at 220-23 (RE 7); Arb. Tr. 3 at 667-69, 942, 1020 (RE 7; A. 324); *accord* ALV Ex. 81 (RE 8). Thus, Frazee (and ALV) arrested any claims related to ALV’s failure to product two surgeons, and Frazee was able to retain his lucrative employment.

Thus, through December 2002, ALV—as opposed to Selkin acting “individually” and “not on the behalf of both Dr. [Lewis] Frazee and [Selkin]”—never claimed or gave notice to LVI of a breach of the Contract, as the Contract would require before ALV could bring suit. LVI Ex. 14-15, 17-18 (A. 564, 580, 611, 627); Arb. Tr. 1 at 220-23, 296-97 (RE 7; A. 86); Arb. Tr. 3 at 667-69, 942 (RE 7; A. 324). Further, although LVI has since acknowledged that it might owe

some amount under the sublease agreements, ALV never formally advised LVI of any default under those agreements as the agreements themselves require. *E.g.*, Arb. Tr. 1 at 59-61 (A. 27); Arb. Tr. 3 at 795 (A. 287).

During this period and throughout the next year (2003), Selkin continued to perform surgeries in North Carolina and Tennessee, and to reap extensive earnings, under his contract with Double Eagle Holdings. Arb. Tr. 2 at 469-72, 548 (A. 171-72, 191); Arb. Tr. 3 at 688-90, 751-79, 785-87, 1022-38 (RE 7; A. 260-61). Only Frazee remained and performed under the Contract calling—in the absence of the cure negotiation—for both Selkin and Frazee to perform surgeries during a contractually-specified minimum number of days and hours. LVI Ex. 14-15, 17-18 (A. 560, 576, 607, 623).

It is also undisputed that, although ALV admits its “ability to obtain additional surgeons to perform the surgeries,” R. 143, ALV hired no additional surgeons to perform surgeries in the LVI centers.

It is further undisputed that, while “ALV” has now taken the position that Selkin could have performed his contractually-required surgeries under the Contract in Texas while also working full-time in the Southeast, Selkin never undertook any equivalent load of surgeries through any other management company while working for Double Eagle through the end of 2003.

4. ALV, Through Frazee, Terminates Its Contract With LVI In December 2002, And Frazee Enters Into New Contracts On His Own Behalf With LVI

In December 2002, LVI and ALV (acting through Frazee) terminated the Contract, as the District Court recognized. R. 187. Frazee then entered into new Professional Services Agreements in December 2002 with LVI in his own name—and not on behalf of ALV. LVI Ex. 19-22 (A. 637-94); Arb. Tr. 1 at 195-96, 270 (A. 61, 80). Those contracts expressly superseded the Contract.⁵

Notably, by December 2002, Selkin was so far out of touch with ALV and its operations that he did not even know until after he filed his arbitration claim that the Contract was terminated and that Frazee entered into individual contracts with LVI superseding the Contract. Arb. Tr. 3 at 700 (RE 7).

5. Selkin Buys Out Frazee's Interest In the ALV Shell in 2004 And Brings Claims In Arbitration Against LVI For Alleged Breaches Of The Contract

Notwithstanding Selkin's own departure, Frazee's intervening negotiations under the original Contract, or the Contract's termination in December 2002, Selkin bought out Frazee's interest in ALV in 2004 and brought claims for breach of the Contract, as well as the sublease agreements, invoking the arbitration clauses

⁵ Each of the new contracts between Frazee and LVI contains a merger clause: Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to [Frazee and Frazee's] use of the Center and supersedes previous negotiations, communications or agreements, whether oral or written, between the parties hereto with respect to the subject matter hereof.

LVI Ex. 19-22 (A. 649, 663, 677, 691).

in those agreements. Selkin sought to recover “damages” that undeniably included, at least in significant part, the income Selkin would have earned had he not left. LVI Ex. 2 (A. 404-09).⁶

6. The Arbitrator Acknowledges That The Contract Was Between ALV And LVI And That Selkin Would Have A Duty To, And Successfully Did, Mitigate Any Alleged Losses

During the hearing, the arbitrator recognized that it is “true” that LVI’s “contract was with” ALV. Arb. Tr. 1 at 42 (A. 23); Arb. Tr. 3 at 953-55 (RE 7; A. 326). The arbitrator nonetheless openly stated that he would treat the Contract as if it were between LVI and Selkin because LVI paid Selkin and Frazee directly under the Contract. Arb. Tr. 1 at 242-43 (A. 73); Arb. Tr. 3 at 955, 976-77, 1014-15 (RE 7).

Having disregarded the contract’s designation of the parties, the arbitrator separately (and correctly) recognized that Selkin—if he were a party, or treated as a party—would have “an obligation to mitigate his damages to the extent that he suffers a loss from ... the contract on the LVI side, and ... there is a financial effect,” where “the loss here is basically financial benefits flowing to Dr. Selkin,” *i.e.*, “the loss that we’ve heard evidence on is money flowing to Dr. Selkin in the

⁶ ALV’s requested damages included \$3,524,966.67 for the years 2002-2005 (comprising, minus credits, \$2,949,874.06 for “new eye surgeries” and \$1,247,915.81 “tear plug revenue”), relating primarily to surgeries never performed due to Selkin’s departure. ALV Ex. 81-84 (RE 8; A. 1457-62). (The Contract provided for ALV to receive 50% of the income from the sale of a product known as “ocular tear plugs” at the LVI centers. *E.g.*, LVI Ex. 17 (A. 613). ALV claimed only \$34,226.84 for surgeries allegedly “performed but not paid” in 2002. ALV Ex. 81 (RE 8). The remaining damages requested by ALV, for “sublease payments,” “missing equipment,” and “damaged equipment” amounted to less than \$500,000. ALV Ex. 81 (RE 8).

form of compensation.” Arb. Tr. 3 at 1023 (RE 7). The arbitrator further noted that, “given [Selkin’s] obligation to mitigate and replace lost income with new income, if he has the ability to do that, which he clearly did, where are the damages that he would be entitled to recover on that theory of breach?” Arb. Tr. 3 at 1026 (RE 7). Indeed, the arbitrator himself observed that Selkin “did a good job of mitigating,” Arb. Tr. 3 at 1027 (RE 7), recognizing that

- (1) *Selkin’s income was “relatively stable at \$2 million a year before the association with LVI, during the association with LVI, [and] after the association with LVI,”* Arb. Tr. 3 at 1025 (RE 7) (emphasis added);
- (2) the arbitrator “invited [Selkin] to offer some tax returns or documentation that would show there was a huge dip in his income for year to year ... [b]ut [the arbitrator had] not seen any of that,” Arb. Tr. 3 at 1026 (RE 7); and
- (3) Selkin’s damage model assumed that he would perform surgeries “one day in Tennessee, one day in North Carolina, one day in Dallas, one day in Houston” and it was unclear how Selkin “could practically have handled more procedures,” Arb. Tr. 3 at 1034-35 (RE 7).

Further, although “ALV” sought more than \$3.5 million in total lost income damages for 2002-2005, at the hearing, the arbitrator sustained LVI’s objection to ALV’s lost earnings figures for new eye surgeries and tear plug revenue for 2004-2005. Arb. Tr. 2 at 600 (A. 204). The arbitrator found that Selkin was not qualified to make projections for 2004 and 2005 lost earnings where he “had no real empirical basis for making those kind of projections.” Arb. Tr. 2 at 598-99 (A. 204).

7. The Arbitrator Awards Almost \$2 Million In Damages Against LVI On Selkin's Claims In ALV's Name

In a two-page memorandum, the arbitrator awarded ALV damages of \$1,842,220.39, as well as its attorneys' fees and arbitration fees and expenses. (A. 1502-03) The arbitrator found that LVI "breached the various [Professional Services Agreements] and Sublease Agreements which were then existing between [ALV and LVI]" and awarded "actual damages for breach of contract in the aggregate sum of \$1,842,220.39," without further explanation or itemization.⁷ RE 6. The arbitrator declined LVI's request to explain either the basis for the award or the amount, RE 6, though it is clear, as explained *supra* at 12 & n.6 and *infra* at 23-25, that at least \$1,335,945.51 of the award to ALV in "lost income" to Selkin.

SUMMARY OF THE ARGUMENT

The plain and unambiguous language of the Contract established that (1) the parties to the Contract were LVI and ALV, not Selkin individually, and (2) two prerequisites to any claim of breach were notice of the claimed breach and an opportunity to cure. However, the arbitrator openly refused to adhere to the Contract's undisputed terms, ignoring the law of parties and thereby producing a

⁷ The arbitrator's original award was delivered to LVI on August 20, 2004. The original award awarded ALV "actual damages for breach of contract in the aggregate sum of \$1,842,220.39" but appeared to award prejudgment interest on an award of attorneys' fees in "the sum of \$148,940.00." A. 1502-03. LVI then filed a Request to Arbitrator to Modify Arbitration Award, A. 1505-09, and, in response, the arbitrator issued the Amended Arbitrator's Award, signed on October 15, 2004 but delivered to LVI on October 22, 2004, that made clear that the award of prejudgment interest did not apply to the award of attorneys' fees. RE 6.

bizarre and improper result whereby Selkin recovered for alleged personal losses he never actually sustained.

There are only two ways to view ALV's breach of contract claim, for legal reasons that derive from facts that cannot be contested here. First, the claim is either Selkin's personally—in which case the award to ALV violates the essence of the Contract between ALV (and not Selkin) and LVI and manifestly disregards the controlling law by awarding damages to a non-party for losses he either did not suffer or successfully mitigated. Or the claim is ALV's—in which case the award also violates the essence of the Contract and manifestly disregards the controlling law because, among other things, the arbitrator ignored both the notice and cure provisions of the Contract. Only by variously and inconsistently viewing the claim as belonging to ALV *and* Selkin can one conclude that there was any loss at all and also avoid any consequence of mitigation.

The question presented by LVI's legal challenge to the arbitrator's award is really quite simple: Can Selkin, on the one hand, retroactively clothe himself as ALV and claim personal damages after he walked off the job—despite the cure provision in the Contract that ALV either (through Selkin) ignored or (through Frazee) agreed that LVI had satisfied—and, at the same time, avoid any offset for either Selkin's own non-ALV income or for the income that would have been

generated had ALV replaced Selkin's surgical services under the Contract? To ask the question is to answer it.

As a matter of law, because ALV has no viable corporate claim against LVI and no recoverable lost income to the corporation, the arbitrator's award should be vacated as manifestly disregarding the law and/or failing to draw its essence from the governing Contract between LVI and ALV.

ARGUMENT

I. STANDARDS OF REVIEW

The Court reviews the district court's decision *de novo*. *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 819 (5th Cir. 1993). It is well-established, and LVI does not dispute, that vacatur of an award is available "only on very narrow grounds" and that a federal court must "defer to the arbitrator's decision when possible." *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 380, 385 (5th Cir. 2004); *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990). But, as the Supreme Court has noted in other contexts, "deference does not imply abandonment or abdication of judicial review" and "does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

Parties to an arbitration agreement are entitled to the benefit of, and are obliged to adhere to, their bargain. That includes an outcome derived from the very agreement itself and the substantive law that the parties chose. *See Brabham*,

376 F.3d at 385. While judicial review is not generally available to resolve ambiguous contract terms or conflicts in evidence, it is undeniably available and Congressionally mandated to assure that an arbitrated outcome flows from the parties' actual agreement and does not manifestly depart from the chosen substantive law. *Id.* at 381-82, 384, 385.

Thus, under the manifest disregard standard, “[i]f, based on the facts before the arbitrator, an award indisputably runs contrary to clearly applicable law known to the arbitrators,” the district court must vacate the award as manifestly disregarding the law. *Id.* at 385. Separate and apart from the “manifest disregard” inquiry, an award must be remedied or rejected under “the essence test” if it “clearly and indisputably runs contrary to the parties’ contract, such as when the panel invalidates the very contract from which it derives its authority or acts contrary to an express contractual provision.” *Id.* at 384-85.

II. THE ARBITRATOR DISREGARDED THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE CONTRACT.

The unambiguous language of the Contract between the parties leads to only one possible conclusion: ALV has no claim against LVI for breach of contract as a matter of law. In order to reach the opposite conclusion and award damages to ALV, the arbitrator necessarily disregarded the plain language of the Contract by allowing “ALV” to pursue a claim notwithstanding the notice and cure provisions. Because the award of damages to ALV for breach of contract is not “rationally

inferable from the contract,” and the Contract “indisputably dictates a contrary result,” and manifestly disregarded clear, governing law, it must be vacated.

Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 353-54 (5th Cir. 2004); *Brabham*, 376 F.3d at 384-85.

The arbitrator here recognized, but disregarded, fundamental terms of the Contract. These departures resulted in an improper award.

First, the arbitrator’s award ignores that the parties to the Contract are LVI and ALV, not Selkin or Frazee. Although the arbitrator himself recognized that it is “true” that LVI’s “contract was with” ALV (Arb. Tr. 1 at 42 (A. 23); Arb. Tr. 3 at 953-55 (RE 7; A. 326), he nevertheless found a breach of contract based on the individual claims of Selkin (who only took sole control of ALV in 2004, two years after any alleged breach he claimed on ALV’s behalf), as if there had been a contract between LVI and Selkin himself. Amended Arbitrator’s Award at 1-2 [A. 1513-14] (Ex. 3). While this approach allowed the arbitrator to avoid the obvious complications associated with Frazee’s having cured and accepted performance on behalf of ALV and Selkin’s having distanced himself from ALV in the interim, it resulted in a grossly erroneous award to ALV. The arbitrator’s error in finding a breach alleged by Selkin and awarding damages based on Selkin’s individual losses was thus clearly obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.

In addition, the arbitrator disregarded the Contract's unambiguous requirement that ALV give LVI notice of, and an opportunity to cure, any alleged breach of LVI's obligations under the Contract. LVI Ex. 14-15, 17-18 (A. 563-64, 579-80, 610-11, 626, 627). The undisputed facts are that Selkin walked away from performing for ALV under the Contract and failed to give LVI an opportunity to cure any claimed breach. Arb. Tr. 1 at 146, 216-18 (RE 7; A. 49); Arb. Tr. 3 at 741 (A. 273). As a result, LVI had no choice but to treat the last man standing (Frazee) as ALV and did so by meeting with Frazee to discuss the concerns Selkin raised. Frazee testified that, so far as he was concerned, "[i]f there were issues, they were minor and they were dealt with." Arb. Tr. 1 at 221 (RE 7). Indeed, Frazee and LVI, consistent with the notice and cure prerequisites for any breach claims by ALV, agreed upon solutions for the very concerns that Selkin raised in his letters. *E.g.*, LVI Ex. 14-15, 17-18 (A. 564, 580, 611, 627); LVI Ex. 36 (A. 780-84); Arb. Tr. 1 at 149-53, 193, 220-23 (RE 7); Arb. Tr. 3 at 669-71, 725 (RE 7; A. 256, 269).

After LVI's meeting with Frazee, LVI and ALV continued to perform under the Contract until ALV, through Frazee, terminated it in December 2002. LVI Ex. 19-22 (A. 637-94); Arb. Tr. 1 at 195-96, 270 (A. 61, 80). Notably, Selkin never raised any protest at the time to the cure upon which LVI and ALV agreed and never argued that Frazee's actions were somehow *ultra vires*.

Similarly, ALV never complained or gave notice to LVI that LVI materially breached the Contract during the relevant time between Frazee's agreeing to fixes for the complaints Selkin raised through the time the Contract was terminated in December 2002. ALV, the actual party to the Contract, treated the Contract as ongoing and accepted benefits under it after Selkin walked off the job in June 2002. As a result, Frazee was able to continue in his own lucrative employment, and ALV avoided any claim arising from Selkin's willful absence.

In sum, at the time of the claimed breach, ALV, rather than claiming a material breach, actually affirmed the Contract by (1) failing to allege any breach of the Contract in 2002, (2) continuing to perform (through Frazee) under the Contract, (3) accepting LVI's performance under the Contract, and (4) affirmatively representing to LVI (through Frazee) that all issues had been resolved and that no money was owed under the Contract. Thus, as of December 2002, each of the two surgeon-shareholders who comprised ALV had gone his own way, each reaping lucrative earnings for himself and each performing surgeries under different contracts (and, in Selkin's case, in other states hundreds of miles from Texas). After December 26, 2002, ALV remained nothing by an empty corporate shell. No one performed any services under it. Its only Contract had been superseded with no surviving claim having been asserted under the notice and cure provisions.

Nevertheless, many months later, Selkin resurrected ALV, donned its skin, and asked for damages consisting of income that Selkin purports *he* would have earned had *he* continued to perform under the Contract. In permitting Selkin to do so in 2004, the arbitrator necessarily disregards the Contract's requirement that ALV as Selkin could not pursue any claim of breach, much less one dating back to 2002, unless ALV gave prior notice and an opportunity to cure. Thus, even if one ignores Frazee's actions and treats them as anything but a cure as between ALV and LVI in 2002, then "ALV" is pursuing a claim (and in the absence of loss) having never complied with the Contract's notice and cure requirements. This was manifestly not what the Contract provided under any conceivable reading.⁸

In this Circuit and elsewhere, an arbitrator exceeds his authority and reversal is mandated where his award "clearly and indisputably runs contrary to the parties' contract" or when he "acts contrary to an express contractual provision." *Brabham*, 376 F.3d at 384. An arbitrator simply may not "disregard[] the plain and unambiguous language ... [or] ... revise[] [the agreement] on the basis of his own 'personal notions of right and wrong.'" *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235-36 (4th Cir. 2006) (vacating award).

⁸ The District Court erroneously analyzed this argument under the manifest disregard standard, requiring extra-contractual "legal authority that would support [LVI's] position that Frazee's actions bound ALV and cured the breaches" and finding no grounds for vacatur "absent clear legal authority presented both to this Court and the arbitrator that Frazee's actions were binding on ALV." R. 189-90. That, however, is not the test for vacatur under the "essence" test, a complete basis for vacating the award based on this error. *Brabham*, 376 F.3d at 384-85.

III. THE ARBITRATOR’S AWARD OF DAMAGES FOR SELKIN’S CLAIMED PERSONAL LOSSES OR ALV’S CLAIMED LOST INCOME DOES NOT DRAW ITS ESSENCE FROM THE PARTIES’ CONTRACT AND MANIFESTLY DISREGARDS THE LAW.

The award must also be vacated based on the damages it awards. There are only two possible methods by which the arbitrator calculated damages, even when crediting the portion of ALV’s request for damages for items other than lost income new surgeries and tear plug revenues and excluding the requested damages that the arbitrator rejected for 2004 and 2005. The first possible method is that the arbitrator awarded amounts attributable to *Selkin’s* personal lost income for surgeries he claims he would have performed at ALV had he not left. The second possible method is that the arbitrator sought to calculate *ALV’s* lost income for Selkin’s failure to perform surgeries. As discussed below, both methods manifestly disregard both the law and the terms of the Contract.

A. Any Award For Personal Losses To Selkin, A Non-Party To The Contract, In The Name Of ALV Manifestly Disregards The Law And The Terms Of The Contract.

As discussed above, the Contract is clear, and the arbitrator recognized that the contracting parties are LVI and ALV, not Selkin or his fellow shareholder Frazee. LVI Ex. 14-15, 17-18 (A. 558-89, 605-36); Arb. Tr. 1 at 42 (A. 23); Arb. Tr. 3 at 953-55 (RE 7; A. 326). However, Selkin, nominally on behalf of ALV, sought personal “damages” under the Contract for tear plugs revenues and lost earnings from new eye surgeries and “transition patients” that he alleges that he

personally would have earned had he continued to perform surgeries for ALV. *See* ALV Ex. 81 (RE 8). Specifically, the damages requested at trial by Selkin in the name of ALV included more than \$3.5 million for “new eye surgeries” and “tear plug revenue.” ALV Ex. 81 (RE 8). These requested damages represent Selkin’s claimed lost income, not net losses of ALV. This is plainly so in that Frazee, as the arbitrator acknowledged, agrees that LVI also paid him everything he was owed under the Contract. Arb. Tr. 1 at 220-23 (RE 7); Arb. Tr. 3 at 667-69, 942, 1020 (RE 7; A. 324); *accord* ALV Ex. 81 (RE 8).

1. The Damages Awarded Cannot Be Explained Arithmetically Without Including The Claims For Selkin’s Lost Surgical Income

The arbitrator awarded \$1,842,220.39 in aggregate damages to ALV without explanation. As suggested by the arbitrator’s decision to disregard the parties, these damages are necessarily and in large part for the purported losses of its shareholder (Selkin) stemming from surgeries that were not performed by Selkin after he stopped performing for ALV. RE 6.

While the arbitrator did not explain his reasoning, the aggregate award must include at least \$1,335,945.51 in “lost income,” as the award for ALV’s remaining claims under the sublease agreements or “transition patients” cannot be more than the full \$506,274.88 that Selkin requested.⁹ ALV Ex. 81-84 (RE 8; A. 1457-62).

⁹ Of course, because the arbitrator did not explain the damages awarded, the arbitrator may have awarded even more for “lost income.”

Furthermore, the “lost income” award is limited to alleged lost income for 2002-2003, because, as discussed above, *supra* at 13, the arbitrator sustained LVI’s objection to Selkin’s lost earnings figures for new eye surgeries and tear plug revenue for 2004-2005. Arb. Tr. 2 at 600 (A. 204). Excluding ALV’s damage claims for 2004-2005 of \$2,052,268.21 for new eye surgeries and tear plug revenue (as the arbitrator evidently did), the total lost earnings for new eye surgeries and tear plug revenue for 2002-2003 requested by Selkin are reduced to \$1,472,698.46, and ALV’s total damage claim, including \$506,274.88 in claimed damages under the sublease agreements and for “transition patients,” is \$1,978,973.34. ALV Ex. 81-84 (RE 8; A. 1457-62).

The arbitrator accordingly must have awarded ALV virtually all of its claimed damages for 2002-2003.¹⁰ *See* Arb. Tr. 3 at 1027 (RE 7). Thus, even if the arbitrator entirely accepted ALV’s calculation of its damages from the sublease agreements and equipment, at the very least, more than \$1.3 million of the total award is attributable to Selkin’s individual losses and is therefore not recoverable by ALV.¹¹

¹⁰ If it were otherwise, the award would have to be modified or corrected pursuant to 9 U.S.C. § 11(a) based on an “evident material miscalculation.” *See generally Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 396-97 (5th Cir.), *cert. denied*, 540 U.S. 878 (2003).

¹¹ Further, although LVI acknowledged that it might owe some amount under the sublease agreements, ALV never formally advised LVI of any default under those agreements as the agreements themselves required. *E.g.*, Arb. Tr. Vol 1, pp. 59-61 (A. 27); Arb. Tr. 3 at 795 (A. 287). Thus, the arbitrator’s award on ALV’s claims under the sublease agreements, insofar as they order the recovery of claimed individual losses by Selkin under sublease agreements to

2. Selkin Did Not Suffer Damages Under The Contract

Insofar as the arbitrator awarded damages for the alleged personal losses of Selkin—who was not a party to the Contract and who in fact had no damages at all because he fully mitigated any loss—the arbitrator manifestly disregarded both the law of parties and basic mitigation principles, of which the arbitrator was fully aware—as discussed more fully below—and entered an award that fails to draw its essence from the Contract that was *between ALV and LVI*, not between Selkin and LVI. *See Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1256-57 (7th Cir. 1994) (affirming district court’s partial vacatur of damages award and vacating additional damages outside of the contract and to a party “for a loss it did not suffer”).

By essentially awarding individual damages to Selkin, in the name of ALV, for a breach of contract alleged by Selkin, the arbitrator acted contrary to an express contractual provision in the Contract and sublease agreements at issue: the express designation of the contracting parties and the concomitant assignment of duties among them. Indeed, as noted, the arbitrator stated that he understood that the Contract and sublease agreements were between LVI and ALV but that he nonetheless would effectively treat them as between LVI and Selkin because LVI

(continued...)

which he was not a party, also manifestly disregard the law. *E.g.*, LVI Ex. 23-27 (A. 695-752); Arb. Tr. 1 at 242-43 (A. 73).

paid Selkin and Frazee directly under the Contract. Arb. Tr. 1 at 242-43 (A. 73); Arb. Tr. 3 at 955, 976-77, 1014-15 (RE 7).¹²

The award of damages, based on Selkin’s claimed personal losses, thus has no rationally inferable basis, and certainly not obviously drawn, from the letter and purpose of the Contract, which provides for contracted-for risks and obligations between the contracting parties (ALV and LVI). The award to Selkin in the name of ALV is not, in any logical way, derived from the wording or purpose of the Contract or sublease agreements and should be vacated. *See Glover v. IBP, Inc.*, 334 F.3d 471, 475 (5th Cir. 2003). This requires vacatur. *See Brabham*, 376 F.3d at 384.

3. The Award Of Damages For Selkin’s Personal Losses Manifestly Disregards The Law Of Parties

By ignoring the parties to the Contract and awarding damages to a non-party to the Contract, the arbitrator issued an award that also indisputably runs contrary to the well-settled and clearly applicable law of parties known to the arbitrator.

Contracts, by their nature, assign risks and obligations to parties who are in privity with one another through the contract. Only “[t]he parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to

¹² Notably, the District Court did not disagree that treating the contract as only between LVI and Selkin himself would not be in complete, *i.e.*, “manifest,” disregard of the law of parties or would not violate the essence of the actual parties’ agreement. R. 190-91.

insist that it has been broken.” *Williams v. Eggleston*, 170 U.S. 304, 309 (1898).

This principle has long been the well-established common law throughout the United States. *E.g.*, 59 AM. JUR. 2D *Parties* § 32 (2002).¹³ It is no surprise, then, that Texas law has long consistently applied this well-settled principle of contract law.¹⁴

Correspondingly, an individual shareholder of a corporation cannot use a corporation to bring suit to recover alleged individual damages under a contract to which the corporation, but not the individual shareholder, was a party. The legal concept that a corporation is a distinct entity separate from its shareholders, officers, and directors is fundamental to the law of corporations.¹⁵ *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997); *Wynne v. Adcock Pipe & Supply*, 761 S.W.2d 67, 69 (Tex. App.—San Antonio 1988, writ denied); *Kenneth B. Hughes Interests, Inc. v. Westrup*, 879 S.W.2d 229, 234 (Tex. App.—Houston [1st Dist.] 1994, writ denied); 9 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4231 (1999).

¹³ Governing Texas law has long held that the “common law” as “declared by the courts of the different States of the United States” provides the rule of decision in Texas where the common law is not inconsistent with Texas’ constitutional and legislative enactments. TEX. CIV. PRAC. & REM. CODE § 5.001; *Southern Pac. Co. v. Porter*, 331 S.W.2d 42, 45 (Tex. 1960); *Grigsby v. Reib*, 153 S.W. 1124, 1125 (Tex. 1913).

¹⁴ *E.g.*, *Grinnell v. Munson*, 137 S.W.3d 706, 712 (Tex. App.—San Antonio 2004, no pet.); *Carson Energy, Inc. v. Riverway Bank*, 100 S.W.3d 591, 600 (Tex. App.—Texarkana 2003, pet denied); *Merrimack Mut. Fire Ins. Co. v. Allied Fairbanks Bank*, 678 S.W.2d 574, 577 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.); *Cantrrell v. Broadnax*, 306 S.W.2d 429, 433 (Tex. App.—Dallas 1957, no writ); 14 TEX. JUR. 2D *Contracts* §§ 279, 337 (1997).

¹⁵ While ALV has been variously established as a Texas corporation and a Texas professional association (A. 1515-20), Texas law provides that professional associations are generally subject to the law of corporations. TEX. REV. CIV. STAT. art. 1528f, § 25; *Durham Clinic, P.A. v. Barrett*, 107 S.W.3d 761, 763 (Tex. App.—Waco 2003, pet. denied).

Just as a shareholder cannot sue in his own name to recover for damages to a corporation, a corporation can sue only on its own behalf to recover damages and may not sue to recover damages owed to an individual shareholder. *See, e.g.*, 9 FLETCHER, *supra*, § 4231; *accord* TEX. BUS. CORP. ACT art. 2.02(A)(2). The corporation that is a party to a contract is only entitled to claim and recover damages suffered by the corporation. *See* 9 FLETCHER, *supra*, § 4231.

In the face of this controlling law, the arbitrator's error in finding a breach alleged by Selkin and awarding damages based on Selkin's individual losses was clearly obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. *See Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 847 (6th Cir. 2003) (citing *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995)) (affirming vacatur of award where arbitration panel exceeded its powers and acted in manifest disregard of law by ordering payment directly to a non-party to the arbitration). Indeed, the arbitrator understood that ALV was seeking to recover for Dr. Selkin's alleged personal losses. LVI Ex. 3 (A. 410-16); Arb. Tr. 3 at 955, 1019-21, 1026-32 (RE 7). By awarding such damages, the award manifestly disregards the law.

B. *The Award Of Damages For Selkin's Personal Losses Also Manifestly Disregards The Law Governing Mitigation*

Furthermore, even assuming that the parties to the contract could be substituted and that Selkin could pursue a claim for his losses under the ALV

banner, the award to ALV of damages for Selkin's personal losses manifestly disregarded the law governing a plaintiff's duty to mitigate damages.

The law is well-established that a party may not recover damages in the absence of an actual loss, nor may it receive a double recovery. This governing law is also well defined, explicit, and clearly applicable to the case at hand. *E.g.*, RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 350 (1979); *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 857 (Tex. 1999); *Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995); *Walker v. Salt Flat Water Co.*, 96 S.W.2d 231, 232 (Tex. 1936).

Again, this law was presented to and recognized by—but then ignored by—the arbitrator. Arb. Tr. 1 at 53, 58 (A. 25, 27); Arb. Tr. 3 at 1022-38 (RE 7).

ALV's damage claim was based in large part on the earnings that Selkin purportedly would have received from new eye surgeries in 2002, 2003, 2004, and 2005, as well as on revenues he expected from the sale of tear plugs, allegedly as the benefit of ALV's bargain with LVI in the Contract had Selkin not been so unilaterally disappointed as to leave. ALV Ex. 81 (RE 8).

However, the arbitrator's own questioning of Selkin effectively demonstrated, as did undisputed evidence, that Selkin's income and work history (performing surgeries three days a week) remained steady with annual gross earnings of approximately \$2 million across 2002, 2003, and 2004, and that Selkin

earned as much from the surgical procedures that he performed for Double Eagle Holdings, LASIK Plus, and Selkin Eye Center in 2002, 2003, and 2004 as he would have had he continued to perform under the Contract in those years. Arb. Tr. 3 at 749-79, 785-87, 1022-38 (RE 7). Thus, even assuming *he* or *ALV* had any claim to pursue, Selkin mitigated his own losses regardless. Indeed, as the arbitrator himself recognized, Selkin “has an obligation to mitigate his damages to the extent that he suffers a loss from ... the contract on the LVI side, and ... there is a financial effect,” where “the loss here is basically financial benefits flowing to Dr. Selkin.” Arb. Tr. 3 at 1023 (RE 7).

Successful mitigation of damages necessarily reduces or precludes an award based on the benefit-of-the-bargain theory of recovery that Selkin advanced before the arbitrator. *E.g.*, Arb. Tr. 1 at 17, 38-39 (A. 16, 22); Arb. Tr. 3 at 1019-20 (RE 7). As the arbitrator himself noted, “given [Selkin’s] obligation to mitigate and replace lost income with new income, if he has the ability to do that, which he clearly did, where are the damages that he would be entitled to recover on that theory of breach?” Arb. Tr. 3 at 1026 (RE 7).

Thus, even if Selkin could somehow properly now be considered interchangeable with ALV, Selkin’s earnings elsewhere must be credited against any recovery here because Selkin could have performed all available eye surgeries in Texas under the Contract with LVI *and* for other companies in North Carolina

and Tennessee. If Selkin could do so, Selkin should have done additional surgeries beyond those he was already performing in North Carolina and Tennessee, through some other third company, as he would be obligated to do under basic mitigation principles. In short, either Selkin himself (or as ALV) completely mitigated because he did as many surgeries as he could, or Selkin himself (or as ALV) could have done more and failed his duty to mitigate by not doing so through someone other than LVI.

Based on the arbitrator's own statements at the hearing noted above, *supra* at 12-13, there can be no doubt that the arbitrator understood the well-settled, black-letter legal principle of mitigation and that it clearly applied to govern ALV's damage claims. Arb. Tr. 3 at 751-79, 785-87, 1022-38 (RE 7). Nevertheless, the arbitrator's damages award (although unspecified) clearly includes a substantial award of damages to Selkin, in the name of ALV, under the Contract for tear plugs revenues and lost earnings from new eye surgeries, RE 6, which the arbitrator himself recognized were "the big money in the case," Arb. Tr. 3 at 1031 (RE 7). Thus, the arbitrator, though nominally awarding damages to ALV, in fact awarded Selkin a legally unjustifiable windfall of (at least) \$1,335,945.51 for "lost" income for 2002 and 2003, which represents a recovery *in addition to* the \$4 million he earned during those years while working in other states. ALV Ex. 81-84 (RE 8; A. 1457-62); Arb. Tr. 3 at 773-76 (RE 7).

In fact, Selkin himself admitted that he personally maintained his \$2 million per year income in 2002 and 2003 and, as noted by the arbitrator, “did a good job of mitigating.” Arb. Tr. 3 at 773-76, 1027 (RE 7). The award of lost earnings of (at least) more than \$1.3 million for 2002 and 2003 amounts to at least a 33.3% jump in Selkin’s typical two-year income of \$4 million and more than he has ever earned.¹⁶ ALV Ex. 81-84 (RE 8; A. 1457-62).

Selkin’s income and successful mitigation efforts clearly apply to bar the arbitrator’s damages award. ALV and Selkin are thus precluded from recovering in the absence of a loss as a result of his successful mitigation efforts, but the award manifestly disregarded this well defined, explicit, and clearly applicable governing legal principle.

C. *Alternatively, The Award Of Damages To ALV For Its Lost Income Based On Selkin’s Failure To Perform Surgeries Manifestly Disregards The Law Governing Mitigation*

As discussed above, *supra* at 22, the other explanation arithmetically for the arbitrator’s damage award is that the award in fact includes *ALV*’s lost income for Selkin’s failure to perform surgeries. However, such an award would manifestly

¹⁶ Dr. Selkin tried to argue that he was entitled to unprecedented earnings, asserting that there was no limit to the number of surgeries he could have performed in multiple states. Arb. Tr. 3 at 1030 (RE 7). ALV has likewise lately asserted that “Dr. Selkin would have performed substantially more surgeries at the LVI centers if LVI had not breached the agreements.” R. 143. The arbitrator flatly rejected this argument, stating that “common sense tells you there is [a limit to the number of surgeries Dr. Selkin could have performed] because there’s just so many hours in a day.” Arb. Tr. 3 at 1030 (RE 7). Moreover, the arbitrator noted that “[Dr. Selkin’s] work habits seem to be three or four days a week” and questioned “to what extent [does] a fellow who is already making 2 million bucks a year really need or want to handle more procedures?” Arb. Tr. 3 at 1034-35 (RE 7).

disregard the controlling, substantive law where, if the damages are to be paid to ALV as the party to the Contract, there is no dispute that ALV was obligated to mitigate and (admittedly) could have mitigated any loss by employing other surgeons but did not do so. Thus, such an award is likewise prohibited by clear mitigation principles of which the arbitrator was fully aware.

Specifically, even if ALV had its own losses caused by “Selkin’s absence, caused by the breach of contract” (*i.e.*, “that ALV’s income decreased due to Selkin’s absence resulting from LVI’s breach”), as the District Court concluded, R. 191-92, ALV had a duty to mitigate and admits it could have hired more surgeons to fulfill its contractual obligations but simply did not do so. Thus, even if Selkin’s non-ALV income were somehow legally irrelevant, ALV does not deny that, under well-settled, clearly governing law, ALV was itself required to mitigate damages, which it failed to do. *E.g.*, *Great Am.*, 908 S.W.2d at 426. ALV in fact admits “that it was well within the capacity of [ALV] to provide surgeons to perform [the] surgeries at the LVI centers” that Selkin allegedly would have performed had he not walked off the job. R. 143. However, it is undisputed that, though ALV admits its “ability to obtain additional surgeons to perform the surgeries,” R. 143, ALV hired no additional surgeons to perform surgeries in the LVI centers.

Thus, the doctrine of mitigation bars ALV’s recovery no matter whose claims ALV asserts that it is pursuing because: (1) Selkin completely mitigated

any claimed losses and (2) ALV's wholesale failure to mitigate on a corporate level bars any damage claim.¹⁷ Any award of damages to ALV manifestly disregards the well defined, explicit, and clearly applicable legal principle of mitigation of damages known to but ignored by the arbitrator. *See Brabham*, 376 F.3d at 381-82 & n.5.

IV. THE ARBITRATOR'S DISREGARD OF THE LAW RESULTED IN SIGNIFICANT INJUSTICE

The arbitrator's manifest disregard of the law resulted in substantial injustice because, but for his disregard of well defined, explicit, and clearly applicable governing legal principles, the outcome of the arbitration would have been manifestly different. *See Brabham*, 376 F.3d at 382 n.5. In particular, ALV seeks a windfall of almost \$2 million in damages despite the fact that ALV (1) never alleged a breach of contract by LVI, (2) continued to perform under its Contract with LVI after meeting with LVI and accepting a cure under the Contract, (3) continued to accept performance and compensation from LVI pursuant to the Contract, and (4) now admits it could have mitigated any losses it suffered as a result of its now controlling shareholder walking off the job. This windfall award is based on claims of breach by one of ALV's shareholders who (1) was not a party to the Contract, (2) walked off the job to earn substantial income elsewhere, and

¹⁷ The District Court erroneously understood LVI's argument too narrowly, focusing only on the mitigation principles as they apply to Selkin's own losses as the basis for the damages award. R. 192.

(3) suffered no individual loss in income from his cessation of performance for ALV under the Contract where his income and work history (performing three days of surgery each week with annual gross earnings of approximately \$2 million) remained the same across the three-year period at issue.

Essentially, the arbitrator ordered LVI to pay Selkin, a non-party to the Contract that allegedly was breached—or, alternatively, ALV, which now admits it could have mitigated any losses but did not—no less than \$1.3 million for claimed personal lost earnings and revenues. Issuing such an award by disregarding basic law of parties and damages cannot be anything but substantial injustice.

V. THE COURT SHOULD, AT A MINIMUM, REMAND THE AWARD TO THE ARBITRATOR FOR CLARIFICATION TO PERMIT MEANINGFUL, STATUTORILY-MANDATED REVIEW.

Alternatively, and at a minimum, where it is unclear precisely for what the arbitrator awarded damages but clear that at least some significant portion of the damages were awarded in contravention of the express terms of the Contract and in manifest disregard of clearly applicable, governing law, the Court should at least remand for clarification of the award.

While arbitrators are not normally required to give reasons for an award, neither may they preclude meaningful review:

Although arbitrators may render a lump sum award without disclosing their rationale for it, courts may inquire into the basis of such award where there appears to be no legal or factual support for it. Recognizing that if there is to be any meaningful judicial review, an

arbitrator's award cannot be absolutely immune from scrutiny, courts sometimes remand awards to arbitrators for clarification.

Tripi v. Prudential Sec., 303 F. Supp. 2d 349, 353 (S.D.N.Y. 2003) (internal quotation marks omitted). As the Second Circuit recently noted: "Although certainly not the normal course of things, we do have the authority to remand to the Panel for purposes broader than a clarification of the terms of a specific remedy." *Hardy v. Walsh Manning Sec., L.L.C.*, 341 F.3d 126, 134 (2d Cir. 2003). That is, "we have the authority to seek a clarification of whether an arbitration panel's intent in making an award evidence[s] a manifest disregard of the law." *Id.* (internal quotation marks omitted).

Thus, where it is clear on a *prima facie* basis that there has been reversible error in the award, and it is clear that the award at least in part runs afoul of manifest disregard standards for judicial review, at a minimum the Court must remand to the arbitrator for clarification to allow meaningful judicial review of the award as mandated by the FAA.

Unlike many and perhaps most arbitration awards, the award here includes a clear, particularized damages figure, which, as established above, cannot be justified by controlling law. Thus, the general observation of the Second Circuit is fully applicable here:

Where, as here, an arbitrator's award appears to have been reached on the basis of a precise mathematical calculation, it is desirable, and in some cases may be necessary, to know the basis for the calculations

underlying the award. A remand for clarification in such circumstances would not improperly require arbitrators to reveal their reasons, but would instead simply require them to fulfill their obligation to explain the award sufficiently to permit effective judicial review.

Siegel v. Titan Indus. Corp., 779 F.2d 891, 894 (2d Cir. 1985). Thus, as an alternative to outright vacatur, the Court should at least remand to permit the arbitrator to clarify the basis for the calculations underlying the award and thereby permit the Court to determine whether the award must be vacated in whole or only in part.

CONCLUSION

The Court should reverse the District Court's order and final judgment denying LVI's Motion to Vacate the arbitration award and confirming the award against LVI and should remand with instructions to the District Court to vacate the award and enter judgment for LVI. Alternatively, the Court should remand to the arbitrator for clarification of the award.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2006, two true and correct copies of the foregoing Brief of Appellant and a computer diskette with a copy of the foregoing Brief of Appellant in Portable Document File (PDF) format were served upon the following via Federal Express:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,256 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft[®] Office Word 2003 in 14-point font Times New Roman type (with the exception of footnotes, which pursuant to Local Rule 32.1, are in a proportionally spaced typeface in 12 point Times Roman).

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