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Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

WARK ENTERTAINMENT, INC., a California corporation, f/s/o Barry Josephson,

Plaintiff,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware corporation; FOX BROADCASTING COMPANY, a Delaware corporation; FOX ENTERTAINMENT GROUP, INC., a Delaware corporation; and DOES 1-20, inclusive,

Defendants.

TEMPERANCE BRENNAN, L.P. f/s/o KATHLEEN REICHS; SNOOKER DOODLE PRODUCTIONS, INC. f/s/o EMILY DESCHANEL; and BERTHA BLUE, INC. f/s/o DAVID BOREANAZ

Plaintiffs,

vs.

TWENTY-FIRST CENTURY FOX, INC., a Delaware corporation; FOX ENTERTAINMENT

Case No. BC 602287
Related to
Case No. BC 602548

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR ORDER VACATING OR CORRECTING ARBITRATION AWARD; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

[Declaration of Molly M. Lens and [Proposed] Order Filed Concurrently Herewith]

Judge: Hon. Richard E. Rico
Date: April 29, 2019
Time: 8:30 a.m.
Dept.: 17

Action Filed: November 25, 2015
Trial Date: None Set

Reservation ID: 451798693977

GROUP, INC., a Delaware corporation; TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware corporation; FOX BROADCASTING COMPANY, a Delaware corporation, and DOES 1-20, inclusive,

Defendants.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT:

On April 29, 2019, at 8:30 a.m. or as soon thereafter as the matter may be heard in Department 17 of the above-entitled court, located at 111 N. Hill St., Los Angeles, California, 90012, defendants Twenty-First Century Fox, Inc.; Fox Entertainment Group, Inc.; Twentieth Century Fox Film Corporation, and Fox Broadcasting Company will appear for a hearing on the Motion for Order Vacating or Correcting the Arbitration Award dated February 20, 2019, in the within matter. The Motion is and will be brought pursuant to California Code of Civil Procedure §§ 1285 et. seq., upon the grounds set forth in Code of Civil Procedure § 1286.2, including that the arbitrator exceeded his powers in rendering punitive damages as part of the Award. As set forth in greater detail in in the accompanying memorandum of points and authorities, defendants allege as follows:

1. This motion has been filed in the proper court because there is a pending action in this Court regarding the same dispute.

2. Plaintiff Wark Entertainment filed its complaint in this matter on November 25, 2015. Plaintiffs Temperance Brennan L.P., Snooker Doodle Productions, Inc., and Bertha Blue, Inc., filed a complaint on November 30, 2015. On December 21, 2015, this Court deemed the two actions related.

3. On April 8, 2016, this Court ordered most of plaintiffs' claims to arbitration pursuant to materially identical arbitration clauses in the contracts between each plaintiff and Twentieth Century Fox Television Studios (the "Studio"). A copy of the arbitration clause in one of those contracts is attached to the Declaration of Molly M. Lens ("Lens Decl."), filed concurrently herewith, as Exhibit A. A copy of the Court's April 8, 2016 Ruling is attached thereto as Exhibit B. The remaining claims were stayed. Exh. B at 8, 10.

3. On February 20, 2019, the arbitrator, Peter Lichtman, served a signed copy of the Amended Final Award (the "Award") on defendants. A true and correct copy of the Award is attached to the Lens Declaration as Exhibit C.

4. The parties agreed to file their respective motions—in defendants' case, a Motion to Vacate or Correct, in plaintiffs', a Motion to Confirm—on February 27, 2019.

5. Defendants are entitled to an Order vacating or correcting the Award because, as set forth herein and in the below Memorandum of Points & Authorities, the arbitrator exceeded his authority by awarding punitive damages in contravention of an express provision in the contract unambiguously prohibiting any award of punitive damages in arbitration. Cal. Code Civ. P. § 1286.2. This Motion and accompanying materials have been duly served and defendants have provided notice that they seek an Order vacating or correcting the Award. *Id.* § 1286.4. This Motion is based on the Notice of Motion and Motion; the attached Memorandum of Points and Authorities in support thereof; the concurrently filed Declaration of Molly M. Lens and exhibits attached thereto; the concurrently filed [Proposed] Order; and such additional submissions, evidence, and argument, including any reply briefing as may be presented at or before the hearing or that the Court may consider.

DATED: February 27, 2019

OMELVENY & MYERS LLP

By: */s/ Daniel M. Petrocelli*
DANIEL M. PETROCELLI
Attorney for Defendants

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MEMORANDUM OF POINTS & AUTHORITIES

This case involves alleged breaches of contracts between Twentieth Century Fox Television ("the Studio") and plaintiffs—producers and performers in the television industry—who contracted to provide services to the Studio in connection with the television show *Bones*. Ten years later, plaintiffs sued the Studio, claiming that it breached their contracts by licensing *Bones* to the Studio's affiliates on inadequate terms. Plaintiffs also asserted tort claims against the Studio's parent company, Twenty-First Century Fox ("21CF"), and two wholly owned subsidiaries of 21CF (collectively "Fox"), complaining that they facilitated the Studio's contract breaches in various ways. This Court ordered arbitration of most of their claims pursuant to the arbitration clause of their contracts, which—like many commercial agreements—expressly prohibits punitive remedies for any arbitral claims asserted in connection with alleged breaches.

The arbitrator, however, refused to apply that unambiguous limitation on his authority. He made many other errors, to be sure, but none so glaring and indefensible as his arrogation of power to award punitive damages in the face of a contractual provision explicitly denying him that power.

"[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). Because parties typically grant arbitrators broad "power to decide any question of contract interpretation, historical fact or general law," which inherently includes "the possibility the arbitrator may err in deciding some aspect of the case," courts generally defer even to erroneous arbitral awards. *Gueyffier v. Ann Summers, Ltd.*, 43 Cal. 4th 1179, 1184 (2008). But courts have consistently "acknowledge[d] exceptions to the general rules governing scope of review in cases where the parties have expressly restricted or limited the arbitrator's powers." *Cal. Faculty Ass'n v. Super. Ct.*, 63 Cal. App. 4th 935, 952 (1998); *see Gueyffier*, 43 Cal. 4th at 1185. In that situation, courts do not defer to an award that erroneously overrides the limitation—they instead *enforce the limitation*, and thus correct or vacate awards that include remedies "expressly forbidden by the parties' arbitration agreement." *Carbajal v. CWPSC, Inc.*, 245 Cal. App. 4th 227, 253 (2016); *see*, *e.g.*, *O'Flaherty v. Belgum*, 115 Cal. App.

4th 1044, 1061 (2004); *infra* at 16-18.

That rule controls here. The parties' contracts explicitly and unambiguously prohibited the arbitrator from awarding *any* punitive relief for *any* claims asserted in connection with the contractual provision at issue. The prohibition could not be any clearer. Yet the arbitrator refused to apply it, instead asserting the power to impose a punitive damages award of more than $128 million—five times the relevant compensatory damages awarded, vastly in excess of the legally permissible amount for the purely contract-based losses at issue here.[1]

The error challenged in this motion, however, is not the facially impermissible *size* of the punitive award. Nor is it the arbitrator's demonstrably flawed interpretation of the contract's substantive self-dealing provision, or his finding that the Studio breached that provision, or his many startling mischaracterizations of the evidentiary record.[2] While Fox vigorously disagrees with those aspects of his ruling, they unfortunately fall within the broad category of errors that courts generally must tolerate under the deferential standard that governs judicial review of arbitral decisions. Fox accepts that standard and thus is not challenging the underlying liability

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[1] Fox is unaware of any punitive damage award in California approaching $128 million in a case where the harm is purely economic, the compensatory damages are substantial, plaintiffs are wealthy and sophisticated, and attorneys' fees were awarded. To the contrary, California courts have consistently held that in these circumstances, punitive damages cannot lawfully exceed compensatory damages. *See Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159, 1179 (2005); *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 719 (2009); *Walker v. Farmers Ins. Exch.*, 153 Cal. App. 4th 965, 974 (2007); *Jet Source Charter, Inc. v. Doherty*, 148 Cal. App. 4th 1, 11, (2007); *see also State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 419 (2003). In fact, because tortious interference claims are essentially just contract-breach claims asserted against non-parties, punitive damages are rarely awarded for tortious interference claims, and when they are, they are typically *less* than compensatory damages. *See Asahi Kasei Pharma Corp. v. Acetelion Ltd.*, 222 Cal. App. 4th 945, 957-64 (2013); *Webber v. Inland Empire Investments*, 74 Cal. App. 4th 884, 911-12 (1999); *Duff v. Engelberg*, 237 Cal. App. 2d 505, 507-09 (1965).

[2] The self-dealing provision self-evidently establishes an objective standard for evaluating the Studio's affiliate transactions *post hoc* by comparing their terms to those of comparable non-affiliate transactions. The arbitrator misread the provision as requiring the Studio to actually review its existing non-affiliate transactions in real time and compare them to any proposed affiliate transaction—an impractical approach neither the Studio nor any other industry actor would ever take to license negotiations. The arbitrator then criticized Fox witnesses in exceedingly harsh terms simply because none of them read the provision his way and thus admittedly did not review non-affiliate transactions before making affiliate deals, as he thought they should have. Exh. C at 12-19, 57 & n.11.

findings or the award of more than $50 million in compensatory damages, prejudgment interest, and attorneys' fees. Fox instead has limited its challenge to the one major error that implicates an "acknowledge[d] exception[] to the general rules governing scope of review" in arbitration, *Cal. Faculty Ass'n*, 63 Cal. App. 4th at 952: the arbitrator's failure to apply the express contractual prohibition against arbitral punitive remedies. For that error, a different rule applies: "[I]f the contract says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-57 (1995). Because the contract here says just that—in broad and unambiguous terms—the California Arbitration Act ("CAA") requires the Court to vacate the award, or correct it by excising its $128 million punitive damages component. Cal. Code Civ. P. § 1286.2(a)(4).

STATEMENT OF FACTS

Wark Entertainment, Inc., Temperance Brennan, L.P., Snooker Doodle Productions, Inc., and Bertha Blue, Inc. (collectively, "plaintiffs") are creators, producers, and actors involved in the television series *Bones*. In late 2004 and early 2005, plaintiffs each entered contracts with the Studio, under which they licensed their rights in *Bones* to the Studio, in exchange for certain guaranteed and contingent compensation.

Each contract contains a materially identical "Distribution Controls" paragraph. *See*, *e.g.*, Exh. A at ¶ 10.[3] That paragraph includes three components relevant here. First, it provides that the Studio's "transactions with [Fox] Affiliated Companies will be on monetary terms comparable to the terms on which the Affiliated Company enters into similar transactions with unrelated third party distributors for comparable programs." *Id.* Second, it requires that "[a]ny dispute arising under the provisions of this Paragraph … shall be arbitrated by, and under the rules of, J.A.M.S. ('JAMS') in binding arbitration." *Id.* Third, it states that each plaintiff's "sole remedy against Fox for any alleged failure by Fox to comply with the terms of this paragraph shall be actual

[3] All referenced Exhibits are attached to the accompanying Lens Declaration.

damages," and that each plaintiff "hereby waive[s] any right to seek or obtain … punitive relief in connection with any such alleged failure." *Id.*

In 2015, plaintiffs, claiming dissatisfaction with their contract revenues, sued the Studio and three Fox affiliates: FBC, FEG, and 21CF. Plaintiffs asserted claims for (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) inducing breach of contract; (4) intentional interference with contract; (5) unfair competition; and (6) fraudulent inducement. Each claim was based on the Studio's alleged breaches of the Distribution Controls paragraph: the contract claims asserted that the Studio gave licenses to affiliates on terms lower than those affiliates would have paid to a non-affiliate, and the tort claims asserted that FBC, FEG, and 21CF facilitated or induced the same breaches.

Fox moved to compel arbitration of plaintiffs' claims under the Distribution Controls paragraph's arbitration clause. This Court granted the motion in part and denied it in part, sorting the claims into "three main categories." Exh. B at 2. The first category, the "Self-Dealing Claim[s]," alleged that the Studio breached the contracts by failing to "make transactions with affiliated entities on monetary terms comparable to the terms on which the affiliated entities enter into similar transactions with unrelated third party distributors for comparable programs." *Id.* The second category, the "2009 Release Claim[s]," asserted that the Fox entities in 2009 improperly obtained a release from plaintiffs concerning the "license fee for seasons 5 and 6." *Id.* And the third category, the "Contingency Compensation Claim[s]," alleged that the Studio made improper "calculations of contingency compensation based on [the Studio's definition of] Modified Adjusted Gross Receipts ("MAGR")." *Id.*

The Court held that the Self-Dealing Claims and 2009 Release Claims had to be arbitrated because they constituted "dispute[s] arising under the provisions of" the Distribution Controls paragraph. *Id.* at 4, 6-7. The Self-Dealing Claims tracked that paragraph's language, the Court observed, alleging that Fox violated the Studio's "contractual obligation" to "make transactions with affiliated entities on monetary terms comparable to the terms on which the affiliated entities enter into similar transactions with unrelated third party distributors for comparable programs." *Id.* at 3 (emphasis omitted). The Court held that the 2009 Release Claims likewise arose under the

Distribution Controls paragraph, even though they sounded in tort and were asserted against non-signatory Fox affiliates, because the allegedly tortious conduct was facilitating the self-dealing breach, e.g., "forcing profit participants to sign releases setting the license fees for series … airing on Fox-affiliated networks at unfairly low levels." *Id.* at 6 (quoting Wark Compl. ¶ 54(B)). The tort claims, in other words, were "inextricably intertwined with" the contract claims. *Id.* at 7.

These arbitrable claims were assigned to arbitrator Peter Lichtman. After discovery and a hearing, the arbitrator ruled in favor of plaintiffs on most of their breach of contract and tort claims. According to the arbitrator, the Studio's licenses with its Fox affiliates were made on terms less favorable than its licenses with non-affiliates, Exh. C at 13, 20, 35-36, and the Studio denied plaintiffs revenues from affiliate Hulu for digital streaming rights to *Bones*, *id.* at 41. The arbitrator also held that plaintiffs had proved that FEG, FBC, and 21CF committed fraud and tortious interference with contract by inducing certain plaintiffs to grant releases authorizing affiliate licenses at improperly low rates, *id.* at 28, 34, and by enabling the Studio to license *Bones* to its affiliate without sharing revenues with plaintiffs, *id.* at 44.

As to relief, the arbitrator awarded $32,769,473 in actual damages on plaintiffs' breach of contract claims, an additional $10,055,360 in prejudgment interest on those claims, and $7,401,551 in attorneys' fees. *Id.* at 65. For the tort claims, the arbitrator did not award separate compensatory relief, but held that the non-Studio entities would share in the Studio's liability for contract damages. *Id.* at 48 n.10, 52, 54. But over Fox's objection that the contract unambiguously denied him the power to award punitive damages, Exh. D at 24-25 (Fox Post-Hearing Damages Brief); Exh. E at 12, 14-15 (Fox Post-Hearing Arbitrability Brief), the arbitrator asserted the authority to impose punitive damages on the non-signatory entities for the tort claims, Exh. C at 9-11. Further declaring himself unconstrained by judicial authority over the amount of his award, *id.* at 58-59, the arbitrator imposed punitive damages in a ratio of five times the relevant compensatory damages,[4] for a total punitive award of $128,455,730, *id.* at 58-60.

[4] In applying the 5:1 ratio, the arbitrator excluded from the total $32.8 million in contract damages approximately $7.1 million in damages related to international license breaches that did not involve tortious conduct by the non-signatories. Exh. C at 34-36, 48-50.

SUMMARY OF ARGUMENT

The California Arbitration Act ("CAA") requires a court to vacate or correct an arbitration award when the arbitrator exceeds the powers granted to him by the parties' contract. The classic example of exceeding powers—one repeatedly recognized in California caselaw—is awarding a remedy the contract expressly forbids.

The arbitrator here did just that. The contract *twice* forbids the award of punitive damages for *any* claim connected to the Studio's performance under the Distribution Controls paragraph: it specifies that plaintiffs' "sole remedy against Fox" is "actual damages," and that plaintiffs "waive any right to seek or obtain … punitive relief." Yet the arbitrator awarded punitive relief of more than $128 million. It is difficult to imagine a clearer example of an arbitrator exceeding his contractual powers, necessitating judicial relief.

ARGUMENT

A. Courts Do Not Defer To Awards That Erroneously Include Remedies Expressly Forbidden By The Parties' Contract

The CAA sets forth six grounds on which a court must vacate or correct an arbitration award, including where "the arbitrators exceeded their powers." Cal. Code Civ. P. § 1286.2(a)(4).[5] Courts routinely apply that rule to overturn awards that contravene restrictions on arbitral power expressly imposed by the parties' contract. *See Hoso Foods, Inc. v. Columbus Club, Inc.*, 190 Cal. App. 4th 881, 890 (2010); *Gilbert St. Developers., LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1200 (2009); *Cal. Faculty Ass'n*, 63 Cal. App. 4th at 952; *Bonshire v. Thompson*, 52 Cal. App. 4th 803, 811 (1997); *DiMarco v. Chaney*, 31 Cal. App. 4th 1809, 1815 (1995); *Cobler v. Stanley, Barber, Southard, Brown & Assocs.*, 217 Cal. App. 3d 518, 532-33 (1990); *see also Aspic Eng'g v. ECC Centcom*, 913 F.3d 1162, 1168-69 (9th Cir. 2019) (vacating

[5] The CAA governs this motion because state law "provisions governing judicial review" apply in the absence of a contrary "choice-of-law provision," and there is no such provision here. *Mave Enters., Inc. v. Travelers Indem. Co.*, 219 Cal. App. 4th 1408, 1429 (2013). Federal cases under the Federal Arbitration Act ("FAA") may be persuasive authority in interpreting the CAA because the "statutory grounds for vacating and correcting an arbitration award are virtually identical under the FAA and the CAA." *Id.* at 1423 n.5 (emphasis omitted).

award where arbitrator "disregarded specific provisions of the plain text"). In particular, courts must and do reject awards that grant *remedies* "expressly forbidden by the parties' arbitration agreement." *Carbajal*, 245 Cal. App. 4th at 253; *see O'Flaherty*, 115 Cal. App. 4th at 1061; *Luster v. Collins*, 15 Cal. App. 4th 1338, 1350 (1993).

As these cases illustrate, the deference courts normally afford to arbitral awards does not apply to awards erroneously granting expressly forbidden remedies. California cases consistently hold that the deferential standard—an arbitral remedy must merely bear a "rational relationship" to the contract and breach—applies *only* "[a]bsent more specific restrictions in the arbitration agreement." *S.F. Hous. Auth. v. Serv. Emps. Int'l Union, Local 790*, 182 Cal. App. 4th 933, 944 (2010); *see Moshonov v. Walsh*, 22 Cal. 4th 771, 777 (2000) ("*unless the contract, the submission, or the rules of arbitration provide otherwise*, an arbitrator's choice of relief does not exceed his or her powers so long as it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of contract found, expressly or impliedly, by the arbitrator" (emphasis added) (quotation omitted)); *Hightower v. Super. Ct.*, 86 Cal. App. 4th 1415, 1437 (2001) ("*Unless expressly restricted by the parties' agreement*, an arbitrator has the authority to fashion such relief as he or she considers just and fair under the circumstances existing at the time of the arbitration, so long as the remedy may be rationally derived from the contract and the breach." (emphasis added) (quotation omitted)).

The California Supreme Court in *Gueyffier* explained why courts do not defer to awards that erroneously violate express contractual restrictions on arbitral power. As a general matter, the court observed, an arbitration agreement "ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law," which necessarily includes "the possibility the arbitrator may err in deciding some aspect of the case." 43 Cal. 4th at 1184. An arbitral award thus "may not ordinarily be vacated" merely because of such error, because the "arbitrator's resolution of these issues"—right or wrong—"is what the parties bargained for in the arbitration agreement." *Id.*

That premise does not apply, however, when there is "an express and unambiguous limitation [on an arbitrator's power] in the contract or the submission to arbitration." *Id.* at 1182.

To the contrary, the same essential principle of respect for the parties' consensual choice requires courts to ensure that arbitrators do *not* erroneously exercise powers the parties expressly and unambiguously denied them. Because the "powers of an arbitrator derive from, and are limited by, the agreement to arbitrate," the arbitrator's power necessarily cannot encompass "an award of remedies expressly forbidden by the arbitration agreement or submission." *Id.* at 1185. There is accordingly an "exception to the general rule assigning broad powers to the arbitrators," which applies "when the parties have, in either the contract or an agreed submission to arbitration, explicitly and unambiguously limited those powers." *Id.* In that situation, "the limitations on judicial power over arbitration awards are not applicable." *O'Flaherty*, 115 Cal. App. 4th at 1061. Courts thus do not defer to an award that erroneously "contravene[s] an express, unambiguous limitation in the contract itself"—rather, they enforce the limitation and overturn the award. *Gueyffier*, 43 Cal. 4th at 1187; *see S.F. Hous. Auth.*, 182 Cal. App. 4th at 943-44 (explaining same distinction); *Cal. Faculty Ass'n*, 63 Cal. App. 4th at 952 (noting "exception[] to the general rules governing scope of review in cases where the parties have expressly restricted or limited the arbitrator's powers").

In *O'Flaherty*, for instance, the contract expressly required "a return of capital" to a "wrongfully withdrawing partner." 115 Cal. App. 4th at 1057. The arbitrator nevertheless erroneously required a wrongfully withdrawing partner to forfeit his capital. *Id.* at 1056. The court did not defer to the erroneous award, but vacated it as "inconsistent" with the agreement's express prohibition against capital forfeiture. *Id.* at 1061. Likewise, in *Luster*, the arbitration agreement barred the arbitrator from imposing "monetary sanctions" for "future violations" of the underlying contract. 15 Cal. App. 4th at 1350. When the arbitrator erroneously imposed such sanctions, the court did not defer, but held that "the arbitrator acted outside his authority" and vacated that portion of the award. *Id.* And in *Stolt-Nielsen*, the U.S. Supreme Court applied an identical provision of the FAA to invalidate an arbitral class action remedy, erroneously imposed where the parties "had not reached any agreement on the issue of class arbitration." 559 U.S. at 673. Rather than defer to the classwide remedy, the Court held that the arbitrators exceeded their powers by imposing the remedy absent a "contractual basis" for finding that the parties agreed to

allow such a remedy. *Id.* at 684; *see also Pac. Motor Trucking v. Auto. Machinists Union*, 702 F.2d 176, 177 (9th Cir. 1983) (arbitrator exceeded powers by awarding remedy that "conflict[ed] directly with the contract").

Most pertinent here, courts have applied the foregoing principle specifically to the allegedly erroneous imposition of punitive damages awards. In *Mastrobuono*, the U.S. Supreme Court addressed a challenge to an arbitral award as erroneously including a punitive damages remedy. Rather than simply enforce the award despite the alleged error, or even apply a deferential "rational relationship" standard, the Court upheld the award only after analyzing the contract de novo and concluding that it did *not* include an "unequivocal exclusion of punitive damages claims." 514 U.S. at 60. Importantly, the Court accepted the basic premise of the challenge: "[I]if the contract says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration." *Id.* at 56-57. Applying the same principle, the court in *Davey v. First Command Fin. Servs., Inc.*, 2012 WL 277968 (N.D. Tex. Jan. 31, 2012), vacated an arbitral award that erroneously included a punitive damages component. Rather than defer to the erroneous award, the court addressed the contract provision itself and rejected the award because of a "plain and unambiguous provision in the agreement that prohibits punitive damages." *Id.* at *4-*5. And in *Shahinian v. Cedars-Sinai Med. Ctr.*, 194 Cal. App. 4th 987 (2011), the court confirmed an award including punitive damages, but only because they were *not* "expressly forbidden by the arbitration agreement," which instead "gave the arbitrator broad authority to grant remedies available in court." *Id.* at 1006 (quotation omitted).

Applying the foregoing principle here, the award must be vacated or corrected because, as the next section shows, the contract *does* include an "unequivocal exclusion of punitive damages claims." *Mastrobuono*, 514 U.S. at 60. For the reasons just explained, the arbitrator's erroneous failure to apply that prohibition is not subject to the ostrich-like deference generally afforded to most other errors in arbitral awards—including the many other errors that infect this award. The punitive damages component of the award exceeds the arbitrator's power and must be excised.

B. The Parties' Contract Expressly And Unambiguously Forbids Punitive Damages For The Claims At Issue Here

The California Supreme Court has admonished "parties entering into commercial contracts with arbitration clauses" that, "if they wish the arbitrator's remedial authority to be specially restricted," they "would be well advised to set out such limitations explicitly and unambiguously in the arbitration clause." *AMD, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 383 (1994). It is difficult to see what more the parties here could have done to heed that admonition—the Distribution Controls paragraph could not more clearly prohibit *any* punitive damages award for *any* claim made in connection with Fox's performance under the paragraph.

The Distribution Controls paragraph actually prohibits punitive damages in *two* clauses. One states that the plaintiffs' "sole remedy against Fox … shall be actual damages." Exh. A at ¶ 10. The phrase "actual damages" is a term of art "separate and distinct" from punitive damages—whereas "actual damages" refers to damages "to compensate for any loss suffered by the plaintiff," punitive damages "are assessed to punish the defendant." *McLaughlin v. Nat'l Union Fire Ins. Co.*, 23 Cal. App. 4th 1132, 1134 (1994); *see Mother Cobb's Chicken Turnovers v. Fox*, 10 Cal. 2d 203, 205 (1937) (requiring "[a]ctual damages" as "predicate" for *separate* award of punitive damages).

If there is any doubt about the intended scope of "actual damages," a second clause erases it, stating explicitly that plaintiffs "hereby waive any right to seek or obtain … punitive relief." Exh. A at ¶ 10. That waiver is maximally broad: the Distribution Controls paragraph makes punitive damages *categorically* unavailable for "any" claim made "in connection with" "any" failure by Fox to comply with the Paragraph.

There is no ambiguity in that language or in its application here. Plaintiffs have argued otherwise, insisting that the prohibition applies only to contract claims, and that it does not apply to the tort claims asserted against Fox affiliates who did not sign the agreement. The arbitrator agreed with those arguments, *see* Exh. C at 10, but they are frivolous. First, both ignore the broad prohibition against any punitive relief "in connection with" alleged breaches of the Paragraph. The phrase "in connection with" encompasses "every dispute between the parties having a

significant relationship to the contract." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999). The tort claims asserted against the non-Studio entities obviously have a "significant relationship to" the Distribution Controls paragraph: the tortious conduct they allege is nothing more than *facilitating the Studio's alleged breaches of the Paragraph*, as conclusively demonstrated by the fact that plaintiffs claimed the *same damages* for both contract and tort claims. *See supra* at 13-14. Indeed, this Court *already* concluded that the tort claims are "inextricably intertwined with" the contract claims and thus "aris[e] under" the Distribution Controls paragraph. Exh. B at 6-7. Especially given that the phrase "arising hereunder" is "considerably more narrow in scope" than the phrase "in connection with," *Simula*, 175 F.3d at 720 n.3, it is impossible to conclude that tort claims "arising under" under the Paragraph are not made "in connection with" the alleged breaches of the Paragraph. *See Davey*, 2012 WL 277968, at *5 (rejecting similar argument).

Second, if plaintiffs were right that the punitive damages prohibition applied only to contract claims, it would have literally no meaning—California law *already* prohibits punitive damages awards for contract breaches. *See Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 960 (1993). To serve any purpose, the prohibition *must* encompass tort claims asserted "in connection with" an alleged contract breach, just as the clause plainly says. *See In re Marriage of Nassimi*, 3 Cal. App. 5th 667, 688 (2016) ("Courts must interpret contractual language in a manner which gives force and effect to every provision.").

Third, plaintiffs' argument that the non-signatory entities are not subject to the contractual prohibition on punitive damage remedies runs headlong into this Court's prior ruling—consistent with a wealth of caselaw—that the same entities *are* subject to arbitration under the *same paragraph of the contract*. Exh. B at 7; *see Suh v. Super. Ct.*, 181 Cal. App. 4th 1504, 1513 (2010); *RN Sol., Inc. v. Catholic Healthcare W.*, 165 Cal. App. 4th 1511, 1520 (2008). It likewise runs headlong into the arbitrator's own holding that the attorneys' fees provision of the same paragraph applies against the non-signatories. Exh. C at 63. Plaintiffs obviously cannot invoke one remedial provision of the paragraph against non-signatories while simultaneously avoiding the same paragraph's restrictions on other remedies. *See JSM Tuscany, LLC v. Super. Ct.*, 193 Cal.

App. 4th 1222, 1240 (2011) ("no person can be permitted to adopt that part of a contract which is beneficial to him or her and simultaneously reject its burdens").

Beyond these indefensible contract arguments, plaintiffs also urged the arbitrator to simply invalidate the punitive damages prohibition outright as a matter of public policy. The arbitrator agreed (Exh. C at 10-11), citing California Civil Code § 1668, but that provision merely states that contracts "exempt[ing] anyone from responsibility for his own fraud" are "against the policy of the law." Cal. Civ. Code § 1668. It thus "applies to contractual exemptions from *liability*," *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 767 (2001); *see Fritelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35, 43 (2011)—not to contractual exemptions from *punitive remedies*. Because a punitive damages waiver is merely a "remedy limitation" that does *not* "exempt [a defendant] from responsibility for its own fraud or violation of law," *James River Holdings Corp. v. Anton & Chia LLP*, 2014 WL 12696367, at *7 (C.D. Cal. Jan. 17, 2014), § 1668 has no application. *See also Farnham v. Super. Ct.*, 60 Cal. App. 4th 69, 74, 78 (1997) (§ 1668 "is not strictly applied" and even partial *liability* waivers "do[] not conflict with any public interest"). Neither plaintiffs nor the arbitrator cited any precedent applying § 1668—or any other valid "public policy"—to hold that sophisticated parties are prohibited from entering agreements that waive punitive remedies for their private commercial disputes.[6] In fact, commercial contracts expressly waiving punitive damages are enforceable under California law. *See J. Alexander Secs., Inc. v. Mendez*, 17 Cal. App. 4th 1083, 1094-95 (1993).

Because the parties here freely chose to enter into such an agreement, and freely chose to prohibit any award of punitive damages for any arbitral claim connected to breach of the Distribution Controls paragraph, the arbitrator had no contractual power to award such damages. The most basic premise of arbitration—and of judicial review of arbitral awards—is that the parties' consensual choices must control. The CAA enshrines that foundational premise by

[6] The arbitrator cited *Ting v. AT & T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), but *Ting* addressed only whether a contract could prohibit any award of "*compensatory* damages for intentional conduct." *Id.* at 925. It did not invalidate a waiver of *punitive* remedies, and it was reversed on appeal in any event. 319 F.3d 1126 (9th Cir. 2003).

requiring courts to vacate or correct awards that exceed arbitrators' powers. To enforce that premise, and to respect the parties' consensual choices here, the award must be vacated or corrected by excising the punitive damages remedy unambiguously forbidden by the parties' agreement.

C. Even Under A Deferential Standard of Review, The Award Must Be Vacated Or Corrected Because The Punitive Damages Remedy Bears No "Rational Relationship" To The Contract

Even under the deferential standard that applies to review of most arbitral rulings, the punitive damages component of the award here could not stand. As noted above, when parties do *not* specifically restrict an arbitrator's remedial authority, his exercise of authority is still not unfettered, but must be "rationally derived from the contract and the breach." *Hightower*, 86 Cal. App. 4th at 1437; *see supra* at 16. That deferential standard recognizes that when parties delegate general authority to arbitrators, they necessarily anticipate—and hence must live with—certain errors in the exercise of that authority. *Pacific Gas & Elec. v. Super. Ct.*, 15 Cal. App. 4th 576, 591 (1993). But not *all* errors: where "the error of law involves an application of the contract that is so bizarre as to be unforeseeable there is a basis for complaint by the disadvantaged party and a warrant for judicial protection." *Id.* An arbitrator thus "cannot shield his decision from scrutiny simply by making the right noises—noises of contract interpretation." *Cal. Faculty Ass'n*, 63 Cal. App. 4th at 953 (quotation omitted). Rather, where an arbitrator's interpretation is "completely irrational" or amounts to an "arbitrary remaking" of the parties' agreement, respect for the parties' consensual choices requires judicial correction of the award. *Santa Monica Coll. Faculty Ass'n v. Santa Monica Cmty. Coll. Dist.*, 243 Cal. App. 4th 538, 550 (2015) (quotation omitted); *see Cal. Dep't of Human Res. v. SEIU, Local 1000*, 209 Cal. App. 4th 1420, 1430 (2012).

The arbitrator's award here cannot survive even this highly deferential standard. It is "difficult to see how the violation of an express and explicit restriction on the arbitrator's powers could be considered rationally related to a plausible interpretation of the agreement." *Cal. Faculty Ass'n*, 63 Cal. App. 4th at 953 (quotation omitted). Hewing closely to *AMD*'s admonition to speak clearly when seeking to prohibit certain arbitral remedies, the parties chose the clearest and

broadest possible language to categorically forbid any arbitrator from imposing punitive remedies. There is no rational basis whatsoever for construing that broad prohibition as limited only to contract claims, especially given that punitive damages are already prohibited for contract claims. *See supra* at 20. Nor is there any rational basis for refusing to apply the prohibition to all parties subject to the arbitrator's contractually defined authority. *See supra* at 20-21. These assertions are, at best, meaningless "noises of contract interpretation" that do nothing to immunize the decision from judicial correction. *AMD*, 9 Cal. 4th at 380; *see Stolt-Nielsen*, 559 U.S. at 676 (arbitrators' references to contractual intent did not "show that the panel did anything other than impose its own policy preference"). As the Ninth Circuit recently observed in analogous circumstances: "The Award disregarded specific provisions of the plain text in an effort to prevent what the Arbitrator deemed an unfair result. Such an award is 'irrational.'" *Aspic Eng'g*, 913 F.3d at 1169.

The arbitrator's specious invocation of nonexistent "public policy" to justify overriding the contractual punitive damages waiver only underscores the point. Nothing in California law denies sophisticated private parties the freedom to enter agreements waiving punitive remedies for their private business disputes. *See supra* at 21. The arbitrator's resort to such a bizarre and indefensible rule exposes his decision for what it is: an award "so *outré* that we can infer that it was driven by a desire to do justice beyond the limits of the contract." *AMD*, 9 Cal. 4th at 380. It is beyond any serious doubt that the arbitrator here was seeking to dole out "his own brand of industrial justice," *Stolt-Nielsen*, 559 U.S. at 671, rather than simply enforce the contract the parties wrote, *see id.* at 675 n.7 ("[T]he arbitrators need not have said they were relying on policy to make it so."). Even under the highest standard of arbitral deference, that result cannot stand.

CONCLUSION

For the foregoing reasons, the arbitrator's decision must be vacated or corrected by voiding the $128,455,730 punitive damages award.

DATED: February 27, 2019

OMELVENY & MYERS LLP

By: */s/ Daniel M. Petrocelli*
DANIEL M. PETROCELLI
Attorney for Defendants

Journal Technologies Court Portal

Court Reservation Receipt

Reservation

Reservation ID: 451798693977	Status: RESERVED
Reservation Type: Motion to Vacate (Arbitration Award)	Number of Motions: 1
Case Number: BC602287	Case Title: WARK ENTERTAINMENT INC VS TWENTIETH CENTURY FOX FILM CORP
Filing Party: Twentieth Century Fox Film Corporation (Defendant)	Location: Stanley Mosk Courthouse - Department 17
Date/Time: April 29th 2019, 8:30AM	Confirmation Code: CR-FCLFJMUG9W5DC8CXS

Fees

Description	Fee	Qty	Amount
Motion to Vacate (name extension)	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			**$61.65**

Payment

Amount: $61.65	Type: Visa
Account Number: XXXX5357	Authorization: 025145

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