UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

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December 18, 2014

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Appeal Number: 14-15631-DD
Case Style: Dalton Johnson, et al v. Directory Assistants Inc.
District Court Docket No: 5:14-cv-01358-IPJ

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The referenced case has been docketed in this court. Please use the appellate docket number noted above when making inquiries.

Eleventh Circuit Rule 31-1 requires that APPELLANT'S BRIEF BE SERVED AND FILED ON OR BEFORE January 27, 2015. APPELLANT'S APPENDIX MUST BE SERVED AND FILED NO LATER THAN 7 DAYS AFTER FILING OF THE APPELLANT'S BRIEF.

This is the only notice you will receive concerning the due date for filing briefs and appendices. See Fed.R.App.P. 28, 30, 31, 32, the corresponding circuit rules, General Order 39 and the Guide to Electronic Filing for further information. Pro se parties who are incarcerated are not required to file an appendix. (In cross-appeals pursuant to Fed.R.App.P. 28(h), the party who first files a notice of appeal is the appellant unless the parties otherwise agree.)

FRAP 26.1 and the accompanying circuit rules provide that the Certificate of Interested Persons and Corporate Disclosure Statement (CIP) must be filed with the court by every appellant, appellee, intervenor and amicus curiae, including governmental parties. Appellants (and cross-appellants) must file their CIP within 14 days of the date this appeal has been docketed, or along

with the filing in this court of any motion, petition, or pleading, whichever occurs first. The time for filing the opposing party's CIP or notice is set by 11th Cir. R. 26.1-2(c). In the case of publicly traded corporations, counsel must include the stock ticker symbol after the corporate name. See 11th Cir.R. 26.1-3(c).

On the same day the CIP is served, the party filing it must also complete the court's web-based certificate at the Web-Based CIP link of the court's website. Pro se parties are **not required or authorized** to complete the web-based certificate.

Attorneys who wish to participate in this appeal must be properly admitted either to the bar of this court or for this particular proceeding pursuant to 11th Cir. R. 46-1. In addition, all attorneys (except court-appointed counsel) who wish to participate in this appeal must complete and return an appearance form within fourteen (14) days. Application for Admission to the Bar and Appearance of Counsel Form are available on the Internet at www.ca11.uscourts.gov. The clerk may not process filings from an attorney until that attorney files an appearance form. See 11th Cir. R. 46-6.

11th Cir. R. 33-1(a) requires appellant to file a Civil Appeal Statement in most civil appeals. You must file a completed Civil Appeal Statement, with service on all other parties, within 14 days from the date of this letter. Civil Appeal Statement forms are available on the Internet at www.ca11.uscourts.gov, and as provided by 11th Cir. R. 33-1(a).

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Elora Jackson, DD
Phone #: 404 335 6173

DKT-7CIV Civil Early Briefing

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

DALTON JOHNSON, individually, and ALABAMA WOMEN'S CENTER FOR REPRODUCTIVE ALTERNATIVES, LLC,	)	
Plaintiffs,	)	
v.	)	CASE NO.: CV-14-J-1358-NE
DIRECTORY ASSISTANTS, INC.,	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Directory Assistants, Inc., Defendant in the above named case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment and order entered in this action on the 19th day of November, 2014.

Respectfully submitted,

/s/ Edward T. Rowe
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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kimberly A. Ford
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P.O. Box 18054
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/s/ Edward T. Rowe

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

DALTON JOHNSON and
ALABAMA WOMEN'S CENTER
FOR REPRODUCTIVE
ALTERNATIVES, L.L.C.,

PLAINTIFFS,

v. CASE NO.: CV-14-J-1358-NE

DIRECTORY ASSISTANTS, INC.,

DEFENDANT.

MEMORANDUM OPINION and ORDER

The court previously found that the plaintiffs had properly placed before this court their challenge to the arbitration award obtained by the defendant. *See* Order of October 3, 2014 (doc. 14). Based on that finding, the court allowed additional briefing on the motion to vacate the arbitration award and now takes the same under consideration.[1]

FACTUAL BACKGROUND

The following are the undisputed facts before the court:

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[1]After this action was instituted and the undersigned held a hearing at which she opined that the arbitration award at issue here might be set aside in a future ruling, the defendant ran to a Connecticut state court to confirm the arbitration award. The court is of the opinion such actions are a violation of the good faith certification of Rule 11, as well as an attempt to make a mockery of this court. The undersigned would consider a well-pleaded motion for sanctions, should the plaintiffs choose to file one.

Defendant provides consulting services to yellow page advertisers by identifying options and strategies to help businesses save money on advertising expenses. *See* Consulting Contract, submitted as doc. 7-1. Plaintiff Dalton Johnson entered a contract with defendant on August 21, 2009. *Id*. He signed the contract on behalf of "Alabama Women's Center L.L.C.," although the parties agree that no such legal entity exists.[2] The plaintiffs selected a four year contract term, the cost of which was based on a percentage of savings on advertising realized by the plaintiffs. *Id*. Defendant included a guarantee in its contract that clients would receive at least 40% savings on yellow page advertising, or the client could terminate the contract. *Id.* The contract further provided that "[y]ou may avoid any fee in any year by implementing your baseline program at the full renewal cost. We will even help you do that." *Id.* The plaintiffs allege that DAI misrepresented its ability to reduce advertising costs while maintaining business growth. Doc. 15, ¶ 14.

Although neither party has offered the court a concrete explanation of the "baseline program costs" from which the contract fees were to be calculated, defendants claimed that amount as $58,970.05 during the arbitration. Doc. 7-2, p. 25. The fee due, based on a percentage of the savings of this amount, was $13,011.98,

[2]Who was the actual party agreeing to be bound by the contract is disputed by the parties, and the court discusses the same below. For the sake of clarity, the court, for now, uses the label "plaintiffs" to refer to the various entities found liable by the arbitrator.

which was paid by the plaintiffs.[3] Doc. 7-2, p. 22. According to the plaintiffs, defendant removed the advertising plaintiffs had been using and replaced it with small ads, fraught with errors. Complaint, ¶ 11. The plaintiffs claim that they communicated their dissatisfaction with DAI's services, but the defendant refused to provide an acceptable solution. Doc. 15, ¶¶ 6-7.

At this point, the relationship between the parties went sour, and the plaintiffs stopped payments to defendant. *See e.g.*, doc. 15, ¶ 7. The following payments had been made by plaintiffs:

4/21/10:	$1,586.25
6/18/10:	2,846.48
7/22/10:	54.75
9/18/10:	1000.00
11/23/10:	1040.98
1/7/11:	707.96
2/4/11:	640.46
2/25/11:	640.46
4/20/11:	640.46
5/21/11:	640.46
7/9/11:	1280.92
8/9/11:	1280.92
10/6/11:	1280.92
12/6/11:	1280.92
1/28/12:	1280.92
3/22/12:	1280.92

[3]Since the fee due was equivalent to 37.5% of the savings from the baseline costs, the savings to plaintiffs had to have been calculated as $34,698.61 for Year One. In its response, defendant represents the fees owed for Year One to have been $13,994.19 (doc. 18, p. 5, n. 2). However, in the arbitration decision, $13,994.19 was stated as the amount due in Year Two of the contract. *See* doc. 7-2, p. 22.

5/10/12: 1280.92

Doc. 13-2. Thus, the total sum paid by plaintiffs to DAI was $18,764.70. The defendant alleges it billed the plaintiffs over this same time period the sum of $27,006.17, leaving an outstanding balance of $8,241.47. Doc. 18, p, 6.

According to the arbitration award, plaintiffs did not continue the use of defendant's services for years three and four of the contract. Doc. 7-2, p. 22. The defendant does not allege that it performed any services for the plaintiffs in Years Three and Four.[4] Thus, at the time plaintiffs ceased payments and defendant ceased services, the total sum for work performed owed by the plaintiffs to the defendant was $8,241.47. The arbitrator concluded that plaintiffs "have breached the Contract by their failure to pay timely DAI its fees due and earned based upon the directory advertised savings that Respondents achieved over their baseline program over the four years of the contract."[5] *Id*.

On February 27, 2013, plaintiff Dalton Johnson received an email from David

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[4]In its supplemental brief (doc. 18), the defendant raises for the first time that it is owed fees for services in Year Three of the contract. As defendant failed to raise any such contention at arbitration, or in its original opposition to the motion to vacate, the court declines to consider the same now.

[5]The court notes the inherent contradiction in the arbitrator's conclusion. The arbitrator recognizes that plaintiff **did not use** defendant's services in years three and four, but then finds plaintiffs breached the contract by failing to pay fees owed for years three and four. *See* doc. 7-2, p. 22.

Ford, president of Directory Assistants, Inc., asserting the contract between the parties had been breached, that defendant sought to arbitrate the claims according to the contract in Connecticut, under Connecticut law, but would consider arbitration at an equidistant location. Doc. 12-3.

On February 28, 2013, Plaintiffs' counsel received a further email from Mr. Ford. Doc. 9-2. This email included an offer to settle and detailed information about another company which defendant took to arbitration, including the language

> Please feel free to look up Cooke, Cameron vs. Directory Assistance, Inc. Cooke thought suing us in Alabama would be a good idea. They paid us over $160,000.00 when the amount they originally owed was less than $10,000.000. I have included a case study of the Cooke case.

Doc. 9-2. Defendant, through Mr. Ford, included documentation demonstrating that the same arbitration service in question here issued the award in that case. Docs. 7-2 and 9-2.

The February 28, 2013, email was followed by one dated March 11, 2013 (doc. 13-8), asking plaintiffs' counsel if she intended to respond. She stated a response would be forthcoming (doc. 13-9). Again on April 1, 2013, David Ford, President of DAI, again sought a response (doc. 13-10). Plaintiffs' counsel informed Mr. Ford she was waiting on documentation from her client, and "medical emergencies" had prevented this from happening. Doc. 13-11. David Ford wrote plaintiffs' counsel

again on April 17, 2013, stating that if they did not "have a resolution of this by April 25, 2013, we will file a demand for arbitration per the terms of the contract." Doc. 13-12. Again on April 22, 2013, David Ford sent an email to plaintiffs' counsel stating they would be filing a demand for arbitration that week. Doc. 13-13. If any further communication occurred between David Ford and plaintiffs' counsel, no evidence of the same has been provided to the court.

On November 1, 2013, the defendant filed a demand for arbitration with the Alternative Dispute Resolution Center ("ADR Center"). Doc. 7-2, p. 1; doc. 18, p. 6. Although plaintiffs contested the impartiality of Mark V. Connolly, the assigned arbitrator, the ADR Center "reaffirmed" his appointment as arbitrator, noting that although Mr. Connolly "has served on other matters involving the Claimant, he does not believe, nor do we, that his disclosure is of a material nature or would affect his impartiality or judgment in the impartiality in the instant case."[6] Doc. 13-16.

In his decision, the arbitrator noted the plaintiffs' objection to the use of the ADR Center for arbitration, noted the plaintiffs' objection to arbitration in Connecticut, noted the plaintiffs' objection to the application of Connecticut law, and noted the plaintiffs' allegation that the defendant failed to engage in good faith

[6]The defendant alleges for the first time in its response that the plaintiffs chose Mr. Connolly as the arbitrator from a list of ten names. *See* doc. 18, p. 6 The court has no evidence of the same before it.

attempts to mutually make these decision. Doc. 7-2, p. 3. Furthermore, the arbitrator noted the plaintiffs' arguments that neither Dalton Johnson nor Alabama Women's Center, LLC, were proper parties, and that plaintiffs alleged Mr. Johnson had signed in a representative capacity for AWCRA, LLC. *Id*., at 4.

On January 17, 2014, Arbitrator Connolly held that, although the contract entered by the parties specified that "the arbitration service's expedited rules will govern any dispute regardless of its size or nature..." (doc. 7-1, at 2), those rules were inapplicable to the dispute over "75K" and hence the "Commercial Rules" would apply.[7] Doc. 7-3, at 1. On February 4, 2014, the arbitrator determined in a preliminary ruling that defendant had engaged in good faith attempts to come to a mutual agreement. *Id.*, at 5.

At the second preliminary conference call, the plaintiffs again stressed that AWCRA, LLC, was the proper party to the contract, and that Alabama Women's Center, LLC, was merely a "doing business as" name for AWCRA, LLC. Recognizing that Alabama Women's Center LLC was not a registered corporate entity, the defendant insisted that Alabama Women's Center, LLC, was a "doing business as" name for Mr. Johnson, and thus he should be held personally liable on

[7]The arbitrator noted defendant's demand was $150,000.00. Doc. 7-3, at 2. This court has not been provided with a copy of defendant's original claim in the arbitration proceeding.

the contract.[8] *See e.g.*, doc. 7-2, at 6.

Meanwhile, the arbitration hearing was scheduled for March 3 and 4, 2014. Doc. 7-2, at 6. However, due to the forecast a snow storm on those dates, the hearing was rescheduled for April 14 and 15, 2014. *Id.*, at 8.

The plaintiffs then informed the ADR Center "due to extraordinary circumstances and the current state of affairs surrounding his industry in the state of Alabama, my clients, Mr. Dalton Johnson and Alabama Women's Center for Reproductive Alternatives, LLC have determined that they are not able to continue with the arbitration of this matter...." Doc. 13-18. The arbitrator determined that, in accordance with the "Commercial Rules" and Section 52-414(b), Conn Gen. Stat., the arbitration could proceed ex parte.[9] Doc. 7-3, p. 18.

Based on self-described "back-of-the-napkin" math (doc. 7-2, p. 26), the arbitrator entered an award in favor of DAI on the total sum of $99,672.41 (doc. 7-2, p. 31), despite the defendant's admission that less than $9,000.00 was actually outstanding for work performed.

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[8]The fact that such a conclusion is an impossibility under Alabama law was not considered by either the defendant or the arbitrator.

[9]The court is mindful that the "expedited rules," and not the "Commercial Rules" were, pursuant to the contract, applicable to this dispute.

STANDARD OF REVIEW

The Federal Arbitration Act ("FAA") makes the presumption that arbitration awards will be confirmed, and "federal courts should defer to an arbitrator's decision whenever possible." *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1321 (11th Cir.2010) (*quoting B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 909 (11th Cir.2006)). Accordingly, "judicial review of arbitration decisions is among the narrowest known to the law." *AIG Baker Sterling Heights, LLC v. Am. Multi–Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir.2007) (quotation omitted).

Section 10 of the FAA permits a federal court to vacate an award on four narrow grounds:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

"It is not enough ... to show that the panel committed an error-or even a serious

error." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 671 (2010). "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Id*. (quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509, 1015, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (per curiam) (quoting *Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). "Arbitrators 'exceed their powers' ... not when they merely interpret or apply the governing law incorrectly, but when the award is 'completely irrational,' or exhibits a 'manifest disregard of law.'" *Kyocera Corp. v. Prudential- Bache Trade Servs., Inc.,* 341 F.3d 987, 997 (9th Cir.2003) (en banc)*), cert. denied,* 540 U.S. 1098 (2010)(citations omitted). A showing that the arbitrator merely misinterpreted, misstated, or misapplied the law is insufficient. *B.L. Harbert Intern., LLC v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir.2006). However,

> An arbitration award ... is not "utterly impregnable." *Cytyc Corp. v. DEKA Prods. Ltd. P'ship*, 439 F.3d 27, 32 (1st Cir.2006); *Georgia–Pacific Corp. v. Local 27*, *United Paperworkers Int'l Union*, 864 F.2d 940, 944 (1st Cir.1988) ("[C]oncluding that our role is limited is not the equivalent to granting limitless power to the arbitrator."). Although we "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts," *United Paperworkers Int'l Union AFL–CIO, v. Misco, Inc*., 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987), there are limited

> "exceptions to the general rule that arbitrators have the last word," *Cytyc*, 439 F.3d at 33. Specifically, we must ensure that arbitration decisions comply with section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, and certain common law principles. *See id.*
>
> "[S]ection 10 authorizes vacatur of an award in cases of specified misconduct or misbehavior on the arbitrators' part, actions in excess of arbitral powers, or failures to consummate the award." *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir.1990). The common law requires vacatur if the party opposing confirmation of an award can show that the "award is '(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.' " *Id*. at 8–9 (quoting *Local 1445, United Food & Commercial Workers v. Stop & Shop Cos*., 776 F.2d 19, 21 (1st Cir.1985)). We have subsumed these common law grounds into a general evaluation of whether a panel has acted in "manifest disregard of the law." *See McCarthy*, 463 F.3d at 91; Advest, 914 F.2d at 9....

Kashner Davidson Securities Corp. v. Mscisz, 531 F.3d 68, 74 (1st Cir.2008).

LEGAL ANALYSIS

The court has reviewed the evidence and arguments before it. The plaintiffs[10] allege that the arbitration award is due to be vacated based on "evident partiality or corruption in the arbitrators...." Doc. 15, p. 9-10, (quoting 9 U.S.C. § 10(a)(2)). The "evident partiality" exception is strictly construed. *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs*., 146 F.3d 1309, 1312 (11th Cir.1998). A party challenging an arbitration award on this ground must show that the alleged partiality

[10]Plaintiffs here are "respondents" in the arbitration proceedings.

is "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Id*. (internal quotation and citation omitted). "[A]n arbitration award may be vacated due to the 'evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Univ. Commons–Urbana, Ltd. v. Universal Constructors, Inc*., 304 F.3d 1331, 1339 (11th Cir.2002) (quotation marks omitted). Partiality as used in the FAA is synonymous with bias in favor of or against a party. *Aviles v. Charles Schwab & Co., Inc*., 435 Fed.Appx. 824, 829 (11th Cir. 2011).

> The "evident partiality" question necessarily entails a fact intensive inquiry. This is one area of the law which is highly dependent on the unique factual settings of each particular case. The black letter rules of law are sparse and analogous case law is difficult to locate. In most cases, the courts have little guidance when confronted with an issue in this area of the law.

Lifecare Intern., Inc. v. CD Medical, Inc., 68 F.3d 429, 435 (11th Cir.1995).

A. Lack of Good Faith

Here the arbitrator ignored all claims of Alabama Women's Center for Reproductive Alternatives, LLC ("AWCRA"), and conducted the hearing completely *ex parte*, while allowing his opinion to suggest that the plaintiffs were present but

simply failed to object to defendant's evidence.[11] He determined that AWCRA was not a party to the contract, held plaintiff Johnson individually and a non-existent limited liability corporation liable for the alleged breach of contract, and then held that AWCRA was perhaps also liable, entering an award against it.

Despite the contract language requiring that the parties "agree to try to mutually choose the arbitration service, the location and which state's law will govern (doc. 7-1), the arbitrator's opinion states that DAI[12] "selected the ... "ADR Center" as the arbitration service, Connecticut as the forum, and the application of Connecticut law to this dispute." Doc. 7-2, p. 2. The arbitrator noted plaintiffs' prior objections to using the ADR Center to resolve the parties' dispute, to arbitrating anywhere but Madison County, Alabama, and to the use of Connecticut over Alabama law. *Id.,* p. 3. The arbitrator considered plaintiffs' contention that DAI failed to engage in good faith efforts to reach a mutual agreement with regard to each of these items, and that plaintiffs alleged claims for misrepresentation, breach of contract, and bad faith against DAI, but dismissed each of these contentions finding that DAI did engage in good faith efforts by stating in February 2013 that it wanted to arbitrate in

[11]For example, the arbitrator comments, "[n]o documentary submissions or testimony from Respondents or from their counsel Attorney Kimberly A. Ford were submitted into evidence." Doc. 7-2, p. 10. "Respondents presented no evidence at hearing to demonstrate that the amount assessed by DAI was unreasonable or penal in nature." *Id*., p. 24.

[12]Defendant is referred to as "claimant" in the arbitration proceedings.

Connecticut, but would consider other locations, and finding the counterclaims waived on the basis that plaintiffs did not pay the ADR Center fees required to assert a counterclaim.[13] *Id*., p. 3, 5.

The court is of the opinion that the February 27, 2013, email to Dalton Johnson, and the February 28, 2013, emails to plaintiffs' counsel fall far short of being considered "good faith efforts." In particular, the February 28, 2013, email to counsel is simply a threat that if plaintiffs do not settle the matter with DAI, they will incur huge costs. (Doc. 9-2). Particularly disturbing is DAI's use of documentation demonstrating that the same arbitration service in question here issued a vastly favorable award in another case as well. Docs. 7-2 and 9-2. Particularly enlightening as to Mr. Ford's "good faith efforts" are cases such as *Healthmart USA, LLC v. Directory Assistants, Inc.*, 2013 WL 1804292 (Tenn.Ct.App. 2013).[14] With facts

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[13]The decision makes no reference to the cost of filing a counterclaim. The plaintiffs represented to the court that the fee for filing was approximately $1,500.00.

[14]The Tennessee court found

> ... the email correspondence, account summary statements, and testimonies of Messrs. Staggers and Lawrence support the trial court's findings. From the totality of the circumstances, we conclude that the evidence does not preponderate against the trial court's finding that DAI failed to show good faith when: (1) DAI unilaterally chose the arbitration particulars and filed for arbitration without first giving Mr. Lawrence the courtesy of a returned phone call; (2) Mr. Cassin failed to speak with Mr. Lawrence concerning the matter, and further failed to inform his coworkers of previous conversations Mr. Cassin had with Mr. Lawrence regarding the disputed October 2008 invoice. Furthermore, the evidence does not preponderate against the trial court's finding that DAI's action, in arbitrarily and

strikingly similar to the facts before this court, the Tennessee court found Mr. Ford's heavy handed threats and unilateral deadlines simply did not amount to good faith efforts. This court is inclined to agree. The plaintiffs here make reference to numerous attempts to resolve their differences with defendant prior to defendant demanding arbitration, but, like the facts in Tennessee, those efforts were apparently met by defendant's refusal to engage in "good faith" discussions.

Because the lack of good faith is condition precedent to choosing an arbitrator, the court finds the contract terms for arbitration were never met. Even if the defendant could somehow salvage its actions into a showing of "good faith," its remedy for plaintiff's failure to concede to arbitration in Connecticut is not found in the procedures of the ADR Center, but rather the Federal Arbitration Act. It states:

> A party aggrieved by the alleged failure, neglect, or refusal to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action ... for an order directing that such arbitration proceed in the manner provided for in such agreement.... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in

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> unilaterally setting a deadline of March 1, is not in keeping with notions of fair play. Finally, the evidence supports the lower court's finding that DAI failed to comply with its own stated deadline, and instead went ahead and filed the arbitration demand on February 27.

Healthmart, USA, 2013 WL 1804292, *9.

> issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default ... the court shall hear and determine such issue.

9. U.S.C. § 4.

Thus, this court now considers the question of the authority of an arbitrator, to whom a party objects, to enter an award against the objecting party, *ex parte.*[15] Faced with a similar fact situation, the Eighth Circuit Court of Appeals held:

> In the case before us, appellants only consented to arbitration where both sides negotiated in good faith regarding the choice of arbitrator. Since there is nothing to indicate that appellants consented to arbitration where Hugs & Kisses unilaterally chose the arbitrator, the award in favor of Hugs & Kisses is also void. *Food Handlers* teaches that upon Aguirre's failure to select an arbitrator, Hugs & Kisses' proper course was to attempt to reach agreement with appellants as to the arbitrator, and, that failing, to move the district court to compel arbitration under 9 U.S.C. § 4 (1994). *See Food Handlers*, 260 F.2d at 837-38. Section 5 requires the court, upon application of either party, to "designate and appoint an arbitrator" where a party has failed to adhere to the method provided in the parties' agreement. 9 U.S.C. § 5 (1994).
>
> More recent cases are fully in accord with *Food Handlers* and our decision. In *Val-U Construction Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 575 (8th Cir.1998), we upheld an arbitration award even though one party did not participate in the arbitration. We distinguished *Food*

[15]Defendant argues that the arbitrator's decision on whether there was a breach of contract was not erroneous because "there is no actual discrepancy between the arbitrator's findings and the allegations of DAI's primary brief as regards the duration of the Consulting Contract." Doc. 18, pp. 21-22. In other words, the defendant asserts the arbitrator is correct because the defendant says he is.

Handlers, finding that the parties' arbitration agreement incorporated American Arbitration Association rules that allowed an arbitration hearing to proceed in a party's absence if that party is given notice of the hearing and an opportunity to have it postponed. *See Val-U Constr.*, 146 F.3d at 579. Here, the parties adopted no such rules, so the case before us cannot be distinguished from *Food Handlers*, on that ground. Similarly, other circuits have held that arbitrators are without authority where they are not chosen as provided in the parties' arbitration agreement. *See R.J. O'Brien & Assocs., Inc. v. Pipkin*, 64 F.3d 257, 263 (7th Cir.1995) (arbitrator must be chosen in conformance with procedure in parties' agreement to arbitrate, as arbitrator's powers are derived from that agreement; here, selection conformed to agreement); *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 225-26 (4th Cir.1994) (if parties' method of choosing arbitrators not followed, award must be vacated); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir.1991) (power and authority of arbitrators is dependent on provisions of arbitration agreement); *Avis Rent A Car Sys., Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22, 25-26 (2d Cir.1986) (arbitrator not appointed as arbitration agreement required had no authority). Because the arbitrator in the present case exceeded his authority, his decision must be vacated under 9 U.S.C. § 10(a)(4).

Regardless of whether Aguirre breached the agreement with Hugs & Kisses by failing to make a good faith effort to agree with Hugs & Kisses on the arbitrator who would preside over their arbitration, appellants did not consent to arbitration before an arbitrator unilaterally chosen by Hugs & Kisses.

....

"[A]rbitration is a matter of consent, not of coercion." *Keymer v. Management Recruiters Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir.1999). Because appellants did not agree on the arbitrator or give Hugs & Kisses the power to unilaterally choose one, the award must fall. Hugs & Kisses' cross appeal is therefore moot. The district court is ordered to vacate the award and conduct further proceedings consistent with this

opinion.

Hugs & Kisses, Inc. v. Aguirre. 220 F.3d 890, 893-894 (8th Cir.2000).

The arbitration clause before this court states:

> If we are unable to come to a mutual agreement, or if one of us refuses to participate in choosing, the party filing the demand will have the right to make the choices unilaterally, as long as the filing party made a good faith attempt to come to a mutual agreement. The non-filing party expressly consents to and waives any and all objections to the choices made.
>
> ...
>
> If we did not disclose any information, you should not have to pay us anything. If you make any changes to your baseline program, we should not be paid any less than you agreed.

Doc. 7-1, at 2.

The court finds these contract clauses to be of questionable enforceability, at best. DAI prepared the contract, and included language that "the party filing the demand" for arbitration has the right to chose the forum, arbitrator, and location unilaterally, as long as it first makes a "good faith attempt" to come to a mutual agreement. In essence, as long as DAI always asks, "where do you want to arbitrate?" first, it may then make any choices it wants.[16]

[16]This is particularly disturbing given that, the way the contract is written, DAI can never breach the contract. A party contracting with DAI would be in breach for failing to pay fees due. But what could DAI possibly do in breach of the contract? It offers a consulting service, for which a contracting party is free to use DAI's suggestions or not, as long as it pays DAI's calculated fee. Should DAI not perform, no fee is due. As the contract provides, "If we did not

B. Ex parte Hearing and Proper Plaintiff(s):

Another facet weighing on the issue of enforceability of the arbitration award is the question of who was the proper party to the contract. The defendant asserts it is entitled to enforce its award against Mr. Dalton Johnson, as he may have been doing business under the trade name "Alabama Women's Center, LLC," against Alabama Women's Center, LLC, which is the name which appears on the contract, and against Alabama Women's Center for Reproductive Alternatives, LLC, although that name appears nowhere on the contract. Although plaintiff Dalton Johnson has represented AWCRA, LLC, was the proper party to the contract, defendant did not seek arbitration against just that legal entity, opting rather to hold Mr. Johnson and a non-existent corporation liable as well. Thus, the court considers not only the propriety of holding an ex parte arbitration hearing, but further attempting to hold a non-existent corporation and a non-signatory corporation liable based on a contract.

Turning first to the plaintiffs' pronouncement they could not proceed with the

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disclose any information, you should not have to pay us anything," there is no means by which DAI would ever be in breach.

Under Alabama law, unconscionability is an affirmative defense to the enforcement of a contract, and the party asserting that defense bears the burden of proving it by substantial evidence." *Bess v. Check Express*, 294 F.3d 1298, 1306–07 (11th Cir.2002) (citing *Green Tree Fin. Corp. v. Wampler*, 749 So.2d 409, 415, 417 (Ala.1999)). The plaintiffs here have failed to raise unconscionability as a defense to enforcement of the arbitration clause, so the court considers the same no further.

arbitration, the proper course of action was not an *ex parte* hearing. Rather, after the plaintiffs objected to the forum, the arbitrator, and the choice of law, the proper legal course was simple: Obtain a court order enforcing the arbitration clause. As the Ninth Circuit held:

> The court held that once Jerry Witcher and Just Electric challenged the arbitrators' jurisdiction and refused to attend the hearing, the Union was obliged to move the court to compel arbitration rather than proceed ex parte. We agree. If the party who refuses to arbitrate is not a signatory to the agreement, there is no contractual basis for binding that party to an arbitration award absent some clear indication of an intent upon the part of that party to be bound by the arbitration or a judicial determination that the non-signatory is an alter-ego of the signatory. Therefore, the party seeking arbitration must move the court to order the balking party to arbitrate. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). As we stated in *George Day Construction Co. v. United Brotherhood of Carpenters*, 722 F.2d 1471, 1476 (9th Cir.1984) in the usual case, an employer who objects to arbitration on jurisdictional grounds may refuse to arbitrate the case. The union is then put to the task of petitioning the court to compel arbitration.
>
> ....
>
> As a general matter, the court rather than the arbitrator should resolve disputes over arbitrability, including questions of whether a party is bound by the arbitration agreement. *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643 (1986).

International Broth. of Elec. Workers, Local No. 234 v. Witcher Elec., Inc., 1990 WL 89315, *3-4 (9th Cir.1990).

> If an agreement provides that the parties shall jointly select an arbitrator,

> however, a court may refuse to enforce an award made following an ex parte hearing before an arbitrator selected without the defaulting party's cooperation, on the grounds that the party not in default should have sued to compel arbitration. *Sam Kane Packing Co. v. Amalgamated Meat Cutters*, 477 F.2d 1128, 1135-36 (5th Cir.), cert. denied, 414 U.S. 1001, 94 S.Ct. 355, 38 L.Ed.2d 237 (1973); F. Elkouri & E. Elkouri, How Arbitration Works 247-48 (4th ed. 1985). If the parties did cooperate in selecting an arbitrator as specified by the agreement, and the defaulting party has adequate notice of the hearing, the failure to attend does not nullify the award. *See Sam Kane*, 477 F.2d at 1136 ("we would be faced with a strong case for the award"); American Arbitration Association Voluntary Labor Arbitration Rule 27, 3 Lab.Rel.Rep. (BNA) (88 Lab.Arb.) 3 (June 17, 1987) ("Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment.").

Toyota of Berkeley v. Automobile Salesman's Union, Local 1095, United Food and Commercial Workers Union, 834 F.2d 751, 754 (9th Cir.1987). *See also The Tamarkin Co. v. Chauffeurs, Teamsters, Warehousemen and Helpers*, 2010 WL 1434320 (N.D.Ohio 2010).

The court finds the above logic perfectly fitting to the facts here. DAI sought a judgment against AWCRA, but did not want to give up the possibility for a judgment against Mr. Johnson, individually. The only means by which it could obtain a judgment against Dalton Johnson individually was to argue that AWCRA was not a signatory to the contract. Indeed, the arbitrator even found that AWCRA was not mentioned anywhere in the contract. At that point, to clarify what entities were bound by the contract, DAI was obligated to pursue assistance from the courts,

and not engage in home-cooking remedies with its own arbitrator.

Despite repeated representations from AWCRA that Alabama Women's Center, LLC, was merely a d/b/a name for AWCRA, DAI claimed, and the arbitrator decided, that Alabama Women's Center, LLC, was not a legal entity and thus it was a d/b/a for Mr. Dalton Johnson as an individual. Doc. 7-2, p. 6. During the *ex parte* hearing, the arbitrator stated he performed an on-line search through the Alabama Secretary of State's office for an entity titled "Alabama Women's Center, LLC," and agreed that no such entity existed.[17] *Id.*, p. 9.

As noted previously, the arbitrator, in an effort to establish personal liability against Mr. Johnson, determined that because Alabama Women's Center, LLC, did not exist, it was merely a name under which Dalton Johnson individually conducted business. However, when Alabama Women's Center LLC and Mr. Johnson individually were deemed to be the proper parties to the contract, then no basis in logic existed for the arbitrator including AWCRA within his award to DAI. Specifically, the arbitrator found

> I ... find that Mr. Johnson executed the consulting agreement with DAI on the terms expressed therein for an entity that he identified as "Alabama Women's Center, LLC" as the Company/Advertiser.

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[17]Given this determination, the arbitrator's entry of an award against Alabama Women's Center, LLC, is nothing short of outlandish.

Doc. 7-2, at 14. The arbitrator even determined that "Alabama Women's Center, LLC paid DAI on its billed fees..." although the checks were drawn on the account of "Alabama Women's Center for Reproductive Alternatives." Doc. 7-2, at 15. Later in his opinion, the arbitrator determined that

> Respondents Answer admits that Dalton Johnson executed the DAI Contract and that he had the authority to enter into the agreement with DAI on behalf of AWCRA, and that "Alabama Women's Center" was merely an a/k/a or d/b/a name for AWCRA. That might be so, but it is not expressed and not found in the language used in the Contract itself. It would only be Mr. Johnson's "subject intent." ***The Contract language did not refer to AWCRA at all***...."

Doc. 7-2, at 18 (emphasis added). However, the arbitrator next decided that, "At best, 'Alabama Women's Center, LLC' was a trade name or a d/b/a name, either for Mr. Johnson individually, or for AWCRA.[18] *Id*., at 19.

After examining various corporate liability aspects of Connecticut law,[19] the

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[18]The arbitrator failed to consider Alabama law which allows piercing the corporate veil when an individual treats a corporation, including a limited liability corporation, as an alter ego of the individual. *See e.g., Steward v. Bureaus Inv. Group No 1, LLC*, – F.Supp. 2d – , 2014 WL 2462883 (M.D.Ala. 2014); *Ex parte AmSouth Bank of Ala*., 669 So.2d 154, 156 (Ala.1995) ("Whether the separate legal entity of a corporation may be 'pierced' and personal liability imposed is ' a question of fact treated as an evidentiary matter to be determined on a case by case basis.' ") (emphasis in original) (quoting *Messick v. Moring*, 514 So.2d 892, 893 (Ala.1987)).

[19]Bizarrely, the arbitrator held that

> Nor was there any evidence submitted to establish that "Alabama Women's Center" or "Alabama Women's Center, LLC" was a registered trade name with any state, city or county in Alabama. Connecticut law requires that entities doing business under an assumed or fictitious name register that name in the town where they do business....

arbitrator determined: "Mr. Dalton Johnson may have been acting in an individual or in a d/b/a capacity, and not solely on behalf of the Alabama Women's Center for Reproductive Alternatives, LLC when he executed the contract."[20]

> In summary, the credible evidence supports the conclusion that Mr. Johnson individually d/b/a "Alabama Women's Center, LLC" and "Alabama Women's Center for Reproductive Alternatives, LLC" are both parties to the Contract with DAI and that each of them are potentially jointly and severally liable under the Contract....

Id., at 20.

Thus, in the space of five pages the arbitrator ruled that AWCRA was both not a party to the contract and was liable for a breach of the contract. The arbitrator provides no rational basis, legal or otherwise, for his determination that Dalton

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Doc. 7-2, at 19. Given that there is no allegation that plaintiffs, under an assumed name or otherwise, has ever attempted to conduct any business in Connecticut, the reference to Connecticut law containing a registration provision is at best dicta, and more likely the result of an over-eager arbitrator to find some basis (where none existed) to hold a corporation both a non-party to a contract, and liable for the breach of that contract.

[20]The court notes Mr. Dalton "may have been acting in an individual or in a d/b/a capacity, and not solely on behalf of the Alabama Women's Center for Reproductive Alternatives, LLC when he executed the contract" places this finding on equal ground with one that "Mr. Dalton may have been acting solely on behalf of the Alabama Women's Center for Reproductive Alternatives" or "may have been acting solely on behalf of blue striped giraffes." The court is not interested in what Mr. Dalton "may" have been doing, but solely what he is legally liable for doing. The court can find no legal support for individual liability based on what one "may" have been doing. Rather, the standard in Alabama for imposing personal liability on an agent is much more objective. The critical inquiry in determining whether the principal was disclosed for the purpose of avoiding personal liability of the purported agent was whether, at the time of the agreement, "[DAI] had such notice of the corporation's existence and of its identity that [it] knew, would have had reason to know, or should have known that [Dalton Johnson] was not contracting as an individual." *Hilburn v. Fletcher Oil Co.*, 495 So.2d 613 (Ala.1986).

Johnson should be individually liable on the contract, should be liable as an individual "d/b/a" an LLC, which is a legal impossibility in this state, and that AWCRA, LLC, which was not a party to the contract, should also be liable on the off chance this was what Dalton Johnson intended. When, as here, "the arbitrator act[s] outside the scope of his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"— ... a court [may] overturn his determination. *Oxford Health Plans LLC v. Sutter,* 133 S.Ct. 2064, 2068 (2013) (quoting *Eastern Associated Coal*, 531 U.S., at 62, 121 S.Ct. 462 (quoting in turn *Misco*, 484 U.S., at 38, 108 S.Ct. 364). The Supreme Court further explained that arbitrators' decisions should not be set aside for misinterpreted the contract, but the opposite outcome results when the arbitrators "abandoned their interpretive role." *Oxford Health Plans LLC*, 133 S.Ct. at 2070.

For the reasons set forth above, and in accordance with the above legal precedent, the court therefore finds that the arbitration award entered against AWCRA, a non-party to that contract, must be set aside. The court therefore finds, at a minimum, the entry of the award against AWCRA is due to be vacated.

In an attempt to coalesce the two issues above, the court finds that the arbitrator here, in his zeal to rule on behalf of the defendant, entered an *ex parte* award against

a party he has found to be a non-signatory to the contract. Adding to the myriad issues already identified was the arbitrator's basis for proceeding *ex parte* in the first place. The parties' contract clearly stated

> To keep costs down, we both agree that the arbitration service's expedited rules will govern any dispute regardless of its size or nature...

Doc. 7-1, p. 2. The arbitrator included in his decision the background facts that on November 13, 2013, he was notified of his "appointment as the single arbitrator for this dispute to be held in New Britain, Connecticut pursuant to the parties' Contract and the ADR Center's Rules for Commercial Arbitration." Doc. 7-2, p. 2. Indeed, the ADR Center's Rules for Commercial Arbitration, and specifically "Rule 18" were cited by the arbitrator as the basis to proceed ex parte with the hearing. Doc. 7-3, p. 18.

However, the plaintiffs did not contract for application of the ADR Center's "Commercial Rules." Rather, they agreed to the "expedited" rules of whatever arbitration service was chosen. The "expedited commercial rules" contain no provision for ex parte hearings. Although the arbitrator cited the amount in controversy exceeding the limits of the expedited rules, the rules themselves specifically state that the "parties may agree to use these rules in cases that exceed $75,000, with the consent of the ADR Center." *See doc*. 13-15, pp. 11-12. Yet the

arbitrator unilaterally decided that he and "ADR Center Case Manager do not believe this case can be properly administered under Expedited Rules and that the ADR Center Commercial Rules shall therefore apply." Doc. 7-3, p. 2. Even more puzzling is the next sentence in the "Report and Preliminary Hearing" which states that the Respondent (plaintiffs here) maintains its objection to the ADR Center serving as the arbitration service, but agrees to the ADR Center's Commercial Rules. *Id*.

C. Is the Award Compensatory, or Punitive in Nature?

The court finds the arbitrator's award is wholly punitive in nature. The arbitrator obviously was aware that the award appeared more penal than compensatory, as he devotes pages of his opinion to this issue. He wrote:

> In this case, Respondents did not allege that the liquidated damages provision in the contract was invalid and unenforceable as a penalty. Respondents presented no evidence at the hearing to demonstrate that the amount assessed by DAI was unreasonable or penal in nature. Indeed, Respondents were specifically advised of the leading Connecticut case law on liquidated damages following the First Preliminary Hearing and were invited to submit any Alabama leading case law on the topic, just to assess whether the two state's laws differed to any significant degree...
>
> Finally, as to the reasonableness of the provision, the court must examine whether the liquidated damages clause was disproportionate to the amount of damages that could be caused by an advertiser breach....
>
> ....
>
> Here, the Respondents have offered no evidence to carry this burden and

> have failed to establish that this liquidated damages clause so far exceeds and actual damages as to be in the nature of a penalty.

(Doc. 7-2, p. 24-25, 27). Setting aside the ridiculous tenor of the arbitrator's discussion given that the absent party at *ex parte* hearings rarely, if ever, submit evidence of anything during such hearings, this court finds that damages three times greater than compensation realistically due under full performance of a contract are in the nature of a penalty. Looked at through a different lens, the award assessed by the arbitrator was more than ten times greater than the outstanding balance for work actually performed under the contract.

Under no definition can such an award fall within the "fundamentally fair hearing" standard applied by the various Courts of Appeal for judicial review of arbitration proceedings. *See e.g., Rosensweig v. Morgan Stanley & Co.*, 494 F.3d 1328, 1333 (11th Cir.2007); *Howard University v. Metropolitan Campus Police Officer''s Union,* 512 F.3d 716, 721 (D.C. Cir. 2008) ("The arbitrator need only grant the parties a fundamentally fair hearing ...."); *Glencore Ltd. v. Agrogen, S.A. de C.V.,* 36 Fed.Appx. 28, 29, (2nd Cir.2002) ("We conclude that the grounds raised by Agrogen, taken individually or collectively, do not demonstrate misconduct by the arbitrators or the deprivation to Agrogen of a fundamentally fair hearing, and thus do not meet the standards set out in either the FAA ... for vacating an arbitral award.");

Sherrock Bros., Inc. v. DaimlerChrysler Motors Co., LLC, 260 Fed.Appx. 497, 501 (3rd Cir.2008) ("As one federal court has articulated, misconduct under § 10(a)(3) will not be found 'unless the aggrieved party was denied a "fundamentally fair hearing."'"); *Wachovia Securities, LLC v. Brand,* 671 F.3d 472, 480 (4th Cir.2012) (a federal court is entitled to vacate an arbitration award only if the arbitrator's refusal to hear pertinent and material evidence deprives a party to the proceeding of a "fundamentally fair hearing."); *Laws v. Morgan Stanley Dean Witter,* 452 F.3d 398, 399-400 (5th Cir.2006) ("Under Federal law, misconduct apart from corruption, fraud, or partiality in the arbitrators justifies reversal only if it so prejudices the rights of a party that it denies the party a fundamentally fair hearing." (citation omitted)); *Dobson Indus. Inc. v. Iron Workers Local Union No. 25,* 237 Fed.Appx. 39, 48 (6th Cir.2007) ("the standard for judicial review of arbitration proceedings is merely whether a party to arbitration has been denied a fundamentally fair hearing"); *Mical v. Glick* 2014 WL 5439960, *2 (7th Cir. 2014) ("the arbitrators' failure to consider pertinent evidence must have deprived the Micals of a fundamentally fair hearing"); *Morgan Keegan & Co., Inc. v. Grant,* 497 Fed.Appx. 715, 717 (9th Cir.2012) (the district court was correct that the parties received a "fundamentally fair hearing"); *Adviser Dealer Services, Inc. v. Icon Advisers, Inc.*, 557 Fed.Appx. 714, 717 (10th Cir. 2014) (judicially created reasons [for vacating an arbitration award] "include

violations of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing").

At most, had defendant performed satisfactorily and plaintiffs paid in accordance with the described fees for all four years, the defendant would have received approximately $56,000.00. The arbitrator acknowledges this. *See* doc. 7-2, p. 26. Of that potential $56,000.00, the plaintiffs paid $18,000.00 of those fees over the first years of the contract. Thus, had both parties fully performed the contract, the most defendant could have hoped to have earned in addition to what it had already received would have been approximately $38,000.00. The arbitrator's determination that liquidated damages, as he calculated them, of $70,000 was only "16% more" than his estimate of full performance under the contract fails to consider that the full amount was no longer due under the contract. The arbitrator's other mathematical calculations are even further afield from actual damages.

Under Alabama law, penalty provisions are void as against public policy. The Supreme Court of Alabama set out the relevant law in *Camelot Music, Inc. v. Marx Realty & Improv. Co.*, 514 So.2d 987 (Ala.1987).

> It is true in Alabama that, because penalty provisions are void as against public policy, "Courts ... are disposed to lean against any interpretation of a contract which will make the provision one for liquidated damages and, in all cases of doubtful intention, will pronounce the stipulated sum a penalty." In Alabama, liquidated damages are a sum to be paid in lieu

> of performance, while a penalty is characterized as a security for the performance of the agreement or as a punishment for default. The courts generally identify three criteria by which a valid liquidated damages clause may be distinguished from a penalty. First, the injury caused by the breach must be difficult or impossible to accurately estimate; second, the parties must intend to provide for damages rather than for a penalty; and, third, the sum stipulated must be a reasonable pre-breach estimate of the probable loss. Determining whether a liquidated damages provision is valid is a question of law to be determined by the trial court based on the facts of each case.

Id. at 990 (alteration in original; citations omitted). The Eleventh Circuit has similarly ruled that:

> A liquidated damages provision is an amount to be paid for breach of contract, which the parties agree is an adequate assessment of damages which would result from the breach. *Cook v. Brown*, 408 So.2d 143, 144 (Ala.Civ.App.1981). In determining whether a liquidated damages provision is enforceable, courts in Alabama discern: (1) whether the injury caused by the breach is difficult or impossible to discern; (2) whether the parties intended to provide for damages rather than a penalty, and (3) whether the stipulated sum is a reasonable pre-breach estimate of probable loss. *Sutton v. Epperson*, 631 So.2d 832, 835 (Ala.1993). "If one of these three criteria is not met, the clause must fail as a penalty." *Milton Constr. Co. v. State Highway Dep't*, 568 So.2d 784, 790 (Ala.1990).

Robbins v. Sheppard, 134 Fed.Appx. 270, 273-274 (11th Cir.2005).[21]

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[21]Connecticut law is substantially similar:

> "A contractual provision for a penalty is one the prime purpose of which is to prevent a breach of the contract by holding over the head of a contracting party the threat of punishment for a breach.... A provision for liquidated damages, on the other hand, is one the real purpose of which is to fix fair compensation to the injured party for a breach of the contract. In determining whether any particular provision is for liquidated damages or for a penalty, the courts are not controlled

The court notes that claiming the amount of damages caused by a breach is within the "difficult or impossible to discern" category as required for liquidated damages is rebutted by the defendant's and the arbitrator's calculation of damages caused by the breach, and comparing that number to the amount of liquidated damages calculated. Additionally, the formula applied here will always result in an amount far in excess of the cost of contract completion for several reasons. Nonsensically, it is based on a percentage of "the full renewal cost of year one's base line program multiplied by three..." Doc. 7-1 p. 2. Thus, even if the plaintiffs had paid in full for all 4 years, using the numbers applicable in this case, they would still owe (40% of $58,970.05) times 3 years, minus payments received. However, payments received were based on 37.5% of the savings amount from the baseline

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> by the fact that the phrase liquidated damages or the word penalty is used. Rather, that which is determinative of the question is the intention of the parties to the contract. Accordingly, such a provision is ordinarily to be construed as one for liquidated damages if three conditions are satisfied: (1) The damage which was to be expected as a result of a breach of the contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable in the sense that it was not greatly disproportionate to the amount of the damage which, as the parties looked forward, seemed to be the presumable loss which would be sustained by the contractee in the event of a breach of the contract." (Internal quotation marks omitted.) *American Car Rental, Inc. v. Commissioner of Consumer Protection*, 273 Conn. 296, 306–307, 869 A.2d 1198 (2005).

Federal Nat. Mortg. Ass'n v. Bridgeport Portfolio, LLC, 150 Conn.App. 610, 621, 92 A.3d 966, 974 (Conn.App.2014). *See also Syncsort, Inc. v. Indata Services*, 541 A.2d 543, 545-546 (Conn.App.1988)

program. Plaintiffs' real fees were approximately $13,000 to $14,000 per year. The liquidated damages provision results in $23,588.02 per year, times three years, for a sum of $70,764.06. Full payment, with no breach, under the contract would have only been approximately $56,000.00.[22]

The liquidated damages provision is further identified as a penalty because it is addition to "late fees" of 1.5% "from the date the first book in your baseline program closed." Doc. 7-1, p. 2. Those late fees are incurred "from the date the first book ... closed" even if payments were made for that full year, and the following year. In other words, the contract language applies a late fee to sums already paid indistinguishably from sums not yet paid. This too, is a penalty which serves no purpose other than to coerce payments over the life of the contract. The arbitrator, without explanation, applied the 1.5% late fee calculation to the $51,999.36 in liquidated damages he calculated owing under that provision. Doc. 7-2, p. 28. However, nothing in the contract itself suggests that the late fees are applied to liquidated damages, as opposed to the actual fees occurred. Not to be deterred, the arbitrator calculated a late fee of "$51,999.36 times 1.5% per month or $780 per month. There have been 50 months from February 10, 2010 to April 10, 2014, so a

[22]Of course, the amount of difference between these numbers is actually greater, as plaintiffs did not use defendant's services in years three and four of the contract. As such, the defendant lost only potential income, and no costs of actually providing its services.

late fee of $39,000 is due to DAI under the terms of the Contract...." *Id.* Thus, the total sum of $90,999.36 was found owing the defendant for plaintiffs' breach. Again, the total sum possibly recoverable from plaintiffs had they fulfilled the contract was an additional $38,000.00. On top of this, the arbitrator also awarded DAI $877.75 for the cost of copying exhibits for the hearing, plus the costs of the ADR Center of $1.859.09, of which $1,779.55 was to be paid by the respondent, plus the arbitrator's compensation of $6,015.75, plus any future legal fees DAI might incur, for a grand total of $99,672.41.[23]

Given the difference between the cost of full performance and the cost of default, the court is of the opinion that the liquidated damages provision is a penalty, intended to secure full performance under the contract, and not to compensate DAI. *See e.g., Camelot Music, Inc*., 514 So.2d at 990. Alabama cases have found liquidated damages proportions of 8.1% over the actual loss, and 6% over the possible loss to be too great to sustain as damages and not penalties. *See Robbins v Sheppard,* 134 Fed.Appx. 270, 274 n. 5 (11th Cir.2005) (citing *Cook v. Brown*, 408 So.2d 143, 143-144 (Ala.Civ.App.1981); and *Southpace Properties, Inc. v. Acquisition Group*, 5 F.3d 500, 505–06 (11th Cir.1993) (finding that compensating

[23]The court notes this amount is 3 times greater (or 300 percent more) than the contract performance amount.

real estate broker in amount greater than if the contract was performed was a penalty)). The provision here results in penalties more than 12% higher than the "best case scenario" actual damages calculation.[24]

The court finds the final award by the arbitrator is in the very nature of a penalty, and in fact the same penalty threatened by David Ford in his February 28, 2013, email to plaintiffs' counsel. Stronger evidence of collusion between an arbitrator and a party to the arbitration is difficult to imagine.

CONCLUSION

The court has before it a motion to vacate an arbitration award. Having carefully examined the award, the evidence submitted by the parties, and the pleadings filed to date, the court finds the arbitration was held over the objection of plaintiffs, based on the unilateral decisions of the defendant, held *ex parte*, in violation of the FAA, with an award entered in violation of Alabama law, Connecticut

[24]The arbitrator somehow determined this to be a 16% difference between actual damages and the "liquidated damages" provision. The court is unable to replicate that math. However, even more striking is that given that both the arbitrator and the undersigned were able to calculate the cost of full performance of the contract and compare it to the contractually created liquid damages calculation counsels strongly against a finding that "the injury caused by the breach is difficult or impossible to discern..." *Sutton*, 631 So.2d at 835. In its supplemental brief, the defendant argues in favor of the arbitrator's math, adding that "estimated actual damages" would equal four years fees of $54,012.34, minus the amount paid by plaintiffs of $18,764.70, or the amount of $35,247.64. Doc. 18, p. 21, n. 10. Defendant continues that when comparing the actual damages calculation to the liquidated damages amount minus the unpaid balance, the difference is only $8,510.73. *Id.* Again, the fact that multiple entities have been able to compare actual damages to liquidated damages strongly suggests liquidated damages are capable of calculation.

law and the FAA, against a corporation found not to be a party to the contract, in violation of the arbitration rules specified by the contract, and greatly enabled by collusion between the defendant and the arbitrator. The law requires "the alleged partiality must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative.'" *Lifecare Intern., Inc.v CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995). The court finds this standard met here. The evident partiality undermines all confidence that the decision was based on a "fundamentally fair" hearing.

For all of the above reasons, the arbitration award previously entered (doc. 7-2) is hereby **VACATED**.

In accordance with the parties' contract, the parties are **ORDERED** to mutually agree to an arbitrator, a location for arbitration, and the law to be applied within thirty (30) days of today's date. The parties are **ORDERED** to jointly submit the name and location of the arbitrator, and the law to be applied, to this court within thirty (30) days of today's date. Should the parties be unable to reach an agreement as to the above, the parties shall certify the same to this court.

It is further **ORDERED** that, as a non-existent entity, Alabama Women's Center, LLC, is not a party to the arbitration.

It is further **ORDERED** that the liquidated damages provision of the contract

is found to be a penalty provision and thus **VOID** as against public policy.

It is further **ORDERED** by the court that the defendant's motion to compel arbitration (doc. 7) be and hereby is **GRANTED.** The plaintiffs' claims in the complaint here shall be arbitrated contemporaneously with defendant's claim for breach of contract.

This case is administratively closed, subject to reopening should any issues remain after the conclusion of the arbitration.

DONE and **ORDERED** this the 19th day of November, 2014.

INGE PRYTZ JOHNSON
SENIOR U.S. DISTRICT JUDGE