No. 08-1446

IN THE

Supreme Court of the United States

PETER G. GRAIN, *et ux.*,

Petitioners,

v.

TRINITY HEALTH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether an arbitration award governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, may be modified based on the arbitrators' alleged manifest disregard of the law where it is undisputed that the grounds for modification set forth in FAA § 11 are not met and where the district court properly found that petitioners had not established manifest disregard in any event.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The proper name for Respondent "Trinity Health" is Trinity Health-Michigan, which is a Michigan, non-profit corporation and a wholly controlled subsidiary of Trinity Health Corporation, which is an Indiana, non-profit corporation. There is no publicly held company that owns 10% or more of the stock of either corporate entity.

Mercy Hospital Port Huron is an unincorporated division of Trinity Health-Michigan.

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INTRODUCTION

This case, governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, concerns petitioners' efforts to double a $1.6 million arbitration award that was confirmed by the district court on petitioners' motion and satisfied in full by respondents. Petitioners seek modification of the award despite the fact that they cannot meet—and, in fact, no longer even contend that they meet—the exclusive and narrow grounds enumerated in FAA § 11 for modification of arbitration awards. The district court and the Sixth Circuit properly rejected petitioners' arguments, and petitioners demonstrate no compelling reason to grant their Petition for a Writ of *Certiorari.*

In 1997, petitioners entered into contracts that each contained a predispute arbitration agreement providing that "any disputes involving the interpretation, breach or enforcement" of the underlying contract were to be resolved by "binding arbitration pursuant to the rules of the American Arbitration Association." Petitioners filed suit in the district court on federal statutory claims as well as state law claims that were plainly subject to the arbitration agreement. Respondents then moved to compel arbitration of the breach of contract and related claims pursuant to the FAA. The district court ordered arbitration.

After three years of arbitration proceedings and 45 days of hearing, the three-person arbitration panel issued its unanimous 21-page award, in which petitioner Peter Grain was awarded damages of $518,625 and net attorney fees and costs of $1,123,245, for a total award

of $1,641,870. Petitioners then moved for confirmation of the award, but asked the district court to "adjust" the amount of attorney fees and costs by awarding them an additional $1,539,219, and to increase the award further by providing for additional interest. Petitioners' requested modification, if granted, would have more than doubled the arbitration panel's total award and reversed its meticulous rulings on attorney fees, costs and interest.

The district court correctly refused to modify the award, holding that (1) petitioners had not satisfied the grounds set forth in FAA § 11 that permit modification of an arbitration award; (2) alleged "manifest disregard" of the law is not a basis on which an arbitration award can be modified under the FAA; and (3) petitioners had not demonstrated that the arbitrators had manifestly disregarded the law in any event. The Sixth Circuit affirmed, holding that a court's power to modify an arbitration award is confined to the grounds set forth in FAA § 11 and petitioners had not demonstrated that they were entitled to modification under § 11.

Petitioners now seek review by this Court. Abandoning their futile efforts to demonstrate that they are entitled to modification of the award under the narrow and exclusive grounds set forth in FAA § 11, petitioners change tack and attempt to present new issues never before presented in the case. Petitioners claim this Court's recent decision in *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1406 (2008), empowered the district court to modify the award due to the arbitration panel's supposed manifest disregard of Michigan common law. Petitioners further claim that

the generic choice of law provision contained in the parties' underlying contract converts the predispute arbitration agreement into a "restricted submission" to the arbitrators, and that this so-called "restricted submission" required the district court to review their motion under the manifest disregard standard rather than under the narrow and exclusive grounds set forth in FAA § 11. Finally, petitioners claim that the Sixth Circuit's refusal to recognize manifest disregard as a basis on which to modify an award under FAA § 11 creates a split of authority with the Second Circuit.

Petitioners' arguments are baseless. As an initial matter, petitioners' efforts to inject new issues into the case are plainly improper under this Court's precedents. More fundamentally, their efforts are legally futile. First, this Court's recent decision in *Hall Street* confirms that FAA § 11 provides the "*exclusive*" grounds for modifying an arbitration award. *Hall Street*, 128 S.Ct. at 1403 (emphasis supplied). While this Court acknowledged in *dicta* that in a proper case parties might seek enforcement of an arbitration award under state statutory or common law, this is not and never was such a case. Here, arbitration was sought and ordered under the FAA, the award was confirmed by the district court under the FAA, petitioners appealed to the Sixth Circuit under the FAA, and the Sixth Circuit affirmed under the FAA. In short, the FAA applies the substantive law for review of the arbitration award. Second, settled authority from both this Court and circuit courts establishes that a generic choice of law provision supplies only the law that governs the parties' substantive rights and obligations, and does not supplant the statutory grounds set forth in the FAA for review of arbitration

awards. Petitioners' efforts to avoid this result through characterizing the choice of law provision as constituting a "restricted submission" to the arbitrators is simply wrong. Third, petitioners cannot demonstrate a split of circuit authority that warrants issuance of a writ of *certiorari*. Finally, as the district court properly found, petitioners cannot demonstrate that the arbitrators manifestly disregarded the law in any event.

Petitioners plainly have not established any compelling reason for this Court to grant their petition. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

A. Factual Background of Dispute

On June 27, 1997, petitioners Peter Grain, M.D. and his wife, Annette Barnes, M.D. each entered into independent Income Guarantee Agreements ("IGA") with Mercy Health Services, Inc. ("Mercy Hospital"), an unincorporated division of Defendant Trinity Health. The IGA between Dr. Grain and Mercy Hospital was terminated by notice on January 28, 1999, which was memorialized in a Termination and Release Agreement on February 2, 1999.

Both IGAs contained the following arbitration clause:

> **4. Dispute Resolution.** Any disputes involving the interpretation, breach or enforcement of this Agreement which cannot be resolved by Hospital and Physician shall be resolved by binding arbitration in

> accordance with the rules of the American Arbitration Association. The prevailing party shall be awarded his/its costs, including actual attorney fees. The arbitration panel or sole arbitrator, as may be applicable, shall consist of at least one certified public accountant. Decisions of the arbitration panel will be binding on both Hospital and the Physician. (J.A. 61).

The IGAs also contained the following separate, generic choice of law provision:

> **13. Governing Law.** The validity and interpretation of the Agreement shall be governed by the laws of the State of Michigan. (J.A. 65).

B. June 26, 2003: Suit Filed in Federal District Court

Petitioners filed a 16-Count Complaint in the district court on June 26, 2003, asserting both federal and state law claims. On November 7, 2003, respondents filed a motion for partial summary judgment, for partial stay and to compel arbitration pursuant to the FAA. While petitioners contended that certain of their claims should not be arbitrated, they never once challenged the applicability of the FAA to the arbitration provisions in the IGAs. On August 11, 2004, after dismissing several of petitioners' claims, the district court granted respondents' motion and referred six claims to arbitration: Dr. Grain's claims for rescission of the Release, breach of his IGA, misrepresentation, and extortion; and Dr. Barnes' claims for breach of her IGA

and misrepresentation. The Court stayed proceedings on the remaining claims pending arbitration. On October 28, 2004, over two months after the district court held that petitioners were required to arbitrate six of their claims, petitioners filed an arbitration demand with the American Arbitration Association (AAA).

C. October 2004 – December 2007: Arbitration of Six Claims

The arbitration proceedings were presided over by a three-member panel of attorneys, one of whom is also a licensed Certified Public Accountant. The arbitration proceedings lasted over three years, including 45 days of hearings that took place between September 11, 2006, and May 24, 2007. Thereafter, the parties submitted post-hearing briefs and petitions for attorney fees and costs and briefs in support.

On December 10, 2007, the arbitration panel issued its 21-page unanimous award. The panel granted Dr. Grain's rescission and breach of contract claims, but rejected his extortion and misrepresentation claims. The panel expressly denied Dr. Grain's claims for exemplary, emotional distress and extra-contractual damages. The panel ruled against Dr. Barnes on both of the claims she presented for arbitration. In the arbitration, Plaintiffs requested **$9,666,943.00** in damages for Dr. Grain and **$809,338.14** in damages for Dr. Barnes. The panel awarded **$518,625** to Dr. Grain, only 5% of the total amount claimed, and nothing to Dr. Barnes. (J.A. 274-75.)

D. Arbitration Panel's Resolution of Competing Claims for Attorney Fees and Costs

The arbitration panel next addressed the issue of attorney fees and costs. Petitioners sought $3,651,894.68 in attorney fees and costs in connection with the claims on which Dr. Grain prevailed, and respondents sought $1,712,225.50 in fees and costs in connection with the claims on which they prevailed. Notably, while petitioners now claim that the arbitration panel "manifestly disregarded" Michigan law pertaining to the award of interest, petitioners neither sought interest in connection with their petition for fees and costs nor briefed the issue in their submissions to the arbitration panel. The AAA rules governing the arbitration granted the panel the discretion to award interest, and, if so, to determine the appropriate rate and the date from which interest would be computed. AAA Commercial Arbitration Rule R-43(d)(1) (2005); *see infra* Argument IV.

Respondents opposed petitioners' astronomical petition for fees and costs, contending that (1) petitioners improperly sought fees and costs for periods of time prior to the date on which they demanded arbitration pursuant to the district court's order; (2) that petitioners were not entitled to fees and costs in connection with claims on which they had not prevailed; and (3) that their requested fees and costs were duplicative and excessive. The panel devoted seven pages of its 21-page award to the issues presented by the parties' competing petitions for attorney fees and costs, ultimately ruling in part in Dr. Grain's favor and to a lesser extent in respondents' favor.

The panel first held that August 11, 2004, the date on which the district court ordered arbitration, would be the commencement date for accruing fees and costs, rejecting petitioners' claim that they should be awarded fees and costs starting when respondents filed their motion to compel arbitration on November 7, 2003.

Next, the panel considered the parties' arguments regarding the construction of the term "prevailing party" as set forth in paragraph 4 of both IGAs. The panel ruled that respondents were the prevailing parties on all of Dr. Barnes' claims, allocating 10% of the petitioners' total fees and costs to her claims and discounting their total request by this amount, and awarding respondents 10% of their attorney fees and costs. The panel then determined how much of the balance of 90% of fees and costs should be awarded to Dr. Grain and how much should be awarded to respondents, as both prevailed in part with respect to his claims. Rejecting respondents' argument that Dr. Grain should be determined the prevailing party with respect to only 50% of his claims (because he prevailed on only two of his four claims), the panel ruled that three of Dr. Grain's claims – breach of contract, rescission, and civil extortion – arose out of the same common core of fact and constituted 75% of his claim; and that the misrepresentation claim was a separate claim and constituted 25% of his claim. Based on this 75/25 allocation, the panel awarded Dr. Grain 75% of the fees and costs attributable to him, *i.e.*, 75% of 90% of the total fees and costs. Defendants were awarded 25% of the 90% of their fees and costs that the panel attributed to the defense of Dr. Grain's claims. This allocation was properly grounded in Michigan law. *See infra* Argument IV.

The panel then turned to the parties' arguments regarding duplicative and excessive fees. Throughout the arbitration, petitioners were represented by two law firms, Choate, Hall & Stewart, L.L.P. based in Boston, and Hertz, Schram & Saretsky, P.C. based in Bloomfield Hills, Michigan. Their services were in many instances duplicative, and Michigan counsel Elmer Roller in particular was culpable of excessive and duplicative billings.[1] The arbitration panel ruled that Mr. Roller charged for excessive hours and reduced the Plaintiffs' fees by $10,000.00. Respondents also contended in the arbitration that petitioners' counsel's hourly rates must reflect the rates charged in the Detroit area and that petitioners were not entitled to recover fees and costs attributable to travel by their Boston counsel. The arbitration panel granted respondents partial relief on these issues, reducing the hourly rates of certain Choate attorneys, reducing travel fees by 35%, and disallowing certain travel expenses.

Ultimately, the panel awarded petitioner Grain $1,635,770 in attorney fees and costs and awarded respondents $512,525 in fees and costs. After subtracting the fees and costs awarded to respondents from those awarded petitioners, the panel's net award to petitioners for attorney fees and costs was $1,123,245. Dr. Grain's combined total award of damages ($518,625) and fees and costs was thus $1,641,870. Although petitioners did not even request an award of interest from the panel or provide the panel with what they

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1. *E.g.*, Mr. Roller recorded billable hours on several occasion of 18 to 28.5 hours of service per day and repeated cost items verbatim from invoice to invoice.

deemed to be the legal principles governing an award of interest, the panel awarded interest on the damage portion of the award from October 28, 2004, the date on which petitioners filed their arbitration demand. (J.A. 280-84.)

E. Respondents Fully Satisfy Arbitration Award on January 30, 2008

At a conference with the district court on January 30, 2008, respondents' counsel delivered a check in the amount of $1,700,930.08 to petitioners' counsel, reflecting payment in full of the arbitration award together with all accrued interest on the damage award as ordered by the arbitration panel.

F. Post-Arbitration Award Motions and Rulings

On December 21, 2007, petitioners filed their Motion for "(i) Confirmation of Arbitration Award and (ii) Adjustment of Award of Attorneys' Fees and Costs and Interest." Petitioners asked that the panel's award be confirmed, but that the court modify it to increase their award of attorney fees and costs by an additional $1,539,219, and to calculate additional interest. If granted, this "modification" would have more than doubled the arbitration award. Respondents filed a brief in support of confirmation of the award and in opposition to modification, demonstrating that modification was not available under FAA § 11 and that the panel's decision regarding attorney fees, costs and interest was correct in any event.

The district court agreed with respondents, holding pursuant to governing precedent in the Sixth Circuit that "a request to vacate an arbitration award 'in part' 'is synonymous with modifying an award.'" Pet. for Cert. App. 14a (*citing NCR Corp. v. Sac-Co, Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995)). The district court held that petitioners' motion was governed by FAA § 11, which permits modification under only limited enumerated circumstances and that petitioners had not demonstrated that they met those statutory grounds. The district court further held that the panel's alleged errors of law did not permit modification of the arbitration award because alleged "manifest disregard of the law" does not permit modifying an award. The Court thus granted petitioners' motion for confirmation of the arbitration award and denied their motion for adjustment of the award of attorney fees and costs. Pet. for Cert. App. 17a.

Petitioners then filed a motion for reconsideration, arguing that the arbitration panel's alleged "manifest disregard of the law" provided grounds to modify the arbitration award, and that the district court should modify the award under FAA § 11(c), which permits modification where "the award is imperfect in matter of form not affecting the merits of the controversy." The district court denied petitioners' motion, rejecting all of the arguments they advanced. First, the court adhered to its prior ruling under *NCR Corp.* that "a court's power to *modify* an arbitration award is *confined to* the grounds specified in § 11," and that it could not modify the award due to the panel's alleged manifest disregard of law. Pet. for Cert. App. 23a (emphasis in original). The district court also held that petitioners

had not established that the arbitration panel had manifestly disregarded the law, and that modification of the award was not necessary to effect the intent of the award. *Id.* n. 2. Finally, the court held that FAA § 11(c) did not provide a basis for modification of the award in this case, because that section applies only where the award is "imperfect in matter of form," a phrase that "does not refer to allegedly inaccurate legal conclusions by the arbitrator." Pet. for Cert. App. 24a.

G. The Sixth Circuit Properly Affirms the District Court's Rulings and Denies Rehearing and Rehearing *En Banc*

Petitioners appealed to the Sixth Circuit pursuant to FAA § 16, contending that they had demonstrated grounds for modification of the award under FAA § 11 and alternatively that the FAA permitted modification on the judicially-created ground of manifest disregard of the law. The Sixth Circuit correctly rejected both arguments. Pet. for Cert. App. 7a. The court first held that petitioners had not demonstrated that modification of the award could be justified under FAA § 11(a) because that subsection is available only to correct "an evident material miscalculation of figures" and there was no such error in the award. The court held that petitioners fared no better under § 11(c), as that provision permits modification only where the award is "imperfect in a matter of form not affecting the merits of the controversy," and there was no such "technical error" in the award. Pet. for Cert. App. 8a-9a. Finally, the court rejected petitioners' argument that the FAA

permitted modification of the award based on the arbitrators' alleged manifest disregard of the law. The court pointed out that "manifest disregard" appears nowhere in FAA § 11, and that the enumerated grounds set forth in FAA § 11 provide the "'exclusive' grounds for obtaining relief from an arbitration decision."

> To the extent that "manifest disregard" is "shorthand" for the grounds enumerated in § 11, as the Supreme Court suggested might be the case for some of the grounds listed in § 10, *id.* at 1404, that does Grain and Barnes no good. As we have shown, the enumerated grounds upon which they rely simply do not apply to their merits-based complaints about the award.

Pet. for Cert. App. 9a (*quoting Hall Street*, 128 S.Ct. at 1406). The court adhered to circuit precedent holding that a court's power to modify an arbitration award is confined to the grounds specified in FAA § 11, and that manifest disregard is not a basis on which modification is available. Pet. for Cert. App. 10a-11a. The court thus affirmed the district court's judgment. Petitioners' subsequent motion for rehearing and suggestion for rehearing *en banc* were denied.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with any decision of this Court or any court of appeals, nor do they implicate a federal question that has not been decided by this Court. Petitioners have not demonstrated compelling reasons for granting a writ of *certiorari*. Instead, petitioners attempt to inject new issues into the case that have never before been asserted, thereby seeking to sidestep this Court's recent pronouncements in *Hall Street*. Petitioners' efforts are aimed at avoiding the finality of the arbitration award that they themselves sought to confirm and which has been fully satisfied by Respondents. Petitioners' efforts are futile. This Court's precedents make clear that their attempt to inject new issues into the case is improper, and that their efforts to sidestep controlling case law are legally futile in any event. Their petition should be denied.

I. PETITIONERS' EFFORT TO INJECT NEW ISSUES INTO THIS CASE IN THEIR PETITION FOR *CERTIORARI* IS IMPROPER UNDER THIS COURT'S PRECEDENTS

Petitioners raise two issues never before raised in this case and not ruled upon by the Sixth Circuit or the district court. Petitioners assert pursuant to *dicta* in *Hall Street*, 128 S.Ct at 1406, that they may seek review of the arbitration award under Michigan common law, apart from the statutory criteria set forth in the FAA (Pet. for Cert. at 13, 15); and that the generic choice-of law provision in the parties' underlying agreements transformed the general demand for arbitration into a "restricted" submission to the arbitrators that requires

application of the manifest disregard standard (Pet. for Cert. at 17-18). While both issues are demonstrably meritless (see Argument II below), this Court should refrain from considering them because they were not raised in the court of appeals or ruled on by that court.

In numerous cases, this Court has declined to consider issues not asserted or passed upon by the court of appeals. In *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981), for example, this Court refused to consider whether the district court had abused its discretion under Fed. R. Civ. P. 54(d) in denying costs to the defendant where that issue had not been raised in the court of appeals, and limited its decision to the propriety of an award of costs under Fed. R. Civ. P. 68. Likewise, in *U.S. v. United Foods, Inc.*, 533 U.S. 405, 417 (2001), a First Amendment case, this Court refused to consider the government's claim that the speech in question was immune from scrutiny because the issue was not raised before the court of appeals or passed on by that court.

> Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, see, *e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 526, n. 11 (1998), it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.

United Foods, Inc., 533 U.S. at 417. *Accord Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

Like the petitioners in the cited cases, petitioners here attempt to attack the underlying judgment through injection of new grounds not pressed or passed on below. Petitioners' claims that *Hall Street* permits application of the manifest disregard standard apart from the FAA and that the generic choice-of-law provision in the parties' contract transformed the arbitration into a "restricted" submission of their claims to arbitration have never before been presented in this case. Petitioners may try to argue that this Court's March 2008 decision in *Hall Street* justifies injection of the first issue at this stage of the proceedings, but any such argument would be baseless in light of the fact that petitioners expressly addressed *Hall Street* before the Sixth Circuit, contending only that the case did not abrogate the manifest disregard standard *under* the FAA. Petitioners wholly failed to raise the issue that manifest disregard is justified on grounds *apart* from the FAA. Petitioners' failure to raise the so-called "restricted submission" issue prior to now plainly cannot be justified on the basis of new law, as the *Wilko* decision on which it is based was issued 56 years ago.

Petitioners cannot justify raising new issues in their effort to attack the judgment in this case. Respondents request that the Court decline to consider these issues.

II. FAA § 11 SETS FORTH THE EXCLUSIVE GROUNDS ON WHICH AN ARBITRATION AWARD MAY BE MODIFIED AND DOES NOT PERMIT MODIFICATION FOR ALLEGED MANIFEST DISREGARD OF STATE SUBSTANTIVE LAW

A. This Court has Expressly Held that the FAA Enumerates the Limited and Exclusive Grounds for Modifying an Arbitration Award

As recently stated by this Court, the FAA reflects a comprehensive statutory scheme that favors resolution of disputes pursuant to arbitration and supplies expedited bases for enforcing an arbitration award, "specifically, a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it." *Hall Street*, 128 S.Ct. at 1402.

> An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court. § 6. ***Under the terms of § 9, a court "must" confirm an arbitration award "unless" it is vacated, modified or corrected "as prescribed" in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.***

Id. (emphasis added).

As the FAA itself reveals, the grounds for seeking vacatur or modification of an arbitration award are not identical. Section 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> > **(a)** Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> >
> > **(b)** Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
> >
> > **(c)** Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11.

The grounds enumerated in FAA § 10 for vacating an arbitration award, in contrast, are much broader than those set forth in FAA § 11. Section 10 provides:

> **(a)** In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> > **(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. In recognition that the enumerated grounds in FAA § 11 for *modifying* an arbitration award

are specific and limited, the Sixth Circuit has long adhered to the principle that "a court's power to *modify* an arbitration award is confined to the grounds specified in § 11." *NCR Corp. v. Sac-Co, Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995).

In *Hall Street*, this Court granted *certiorari* to answer the question whether the parties to an arbitration agreement governed by the FAA could contract for a standard of judicial review that varied from the grounds set forth in FAA §§ 10 and 11. The parties had entered into an arbitration agreement that provided that the reviewing court "shall ***vacate, modify or correct*** any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." *Hall Street*, 128 S.Ct at 1400-1401 (emphasis added). The district court had modified the award to provide for additional interest, expressly invoking the standard of review chosen by the parties. The Ninth Circuit reversed this decision, holding that the parties' attempt to modify the standard of judicial review that applied under the FAA was unenforceable. This Court affirmed the Ninth Circuit, holding that ***"§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."*** *Id.* at 1403 (emphasis added).

In reaching this decision, this Court rejected petitioner Hall Street Associates' argument that expanded judicial review was justified under *Wilko v. Swan*, 346 U.S. 427 (1953), a decision that, as this Court noted, has since been overruled. *Hall Street*, 128 S.Ct. at 1403. Petitioner Hall Street Associates seized upon *dicta* in *Wilko* that arbitrators' interpretations of the

law, "'in contrast to manifest disregard [of the law] are not subject . . . to judicial review for error in interpretation.'" *Id.* (*citing Wilko*, 346 U.S. at 436-37). Hall Street Associates pointed out that lower courts interpreted this language as providing a basis independent of the grounds set forth in § 10 on which an arbitration award could be vacated, arguing that if judges had the power to expand judicial review beyond the categories listed in § 10, private parties should be similarly free to do so. "Hall Street [Associates] sees this supposed addition to § 10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties." *Id.*

This Court rejected petitioner Hall Street Associates' arguments, noting that the language relied upon in *Wilko* was at best vague *dicta*. While acknowledging that "some Circuits" had read *Wilko* as providing for review for "manifest disregard" as a ground for vacatur on top of those listed in § 10, this Court refused to endorse a "supposed judicial expansion" in the statutory grounds for judicial review. *Id.* at 1403-04.

Similarly, petitioners here seek modification of an arbitration award subject to the FAA on grounds not itemized in FAA § 11. This Court's decision in *Hall Street* makes clear that this is impermissible as a matter of law. Alleged "manifest disregard" of the law by the arbitrators is not a ground enumerated in § 11 for modifying an arbitration award, and this Court has made clear that the enumerated grounds are *exclusive*. Given that petitioners do not even contend that they have met the statutory grounds enumerated in FAA § 11, they have demonstrated no basis for their petition for a writ of *certiorari*.

B. This Court's *Dicta* in *Hall Street* that Parties May Seek Enforcement of Arbitration Awards Under a State's Statutory or Common Law Has No Application to this Case

Petitioners seek to avoid the constraints of FAA § 11, as well as this Court's unequivocal statement that the narrow grounds enumerated in § 11 provide the exclusive grounds for modification of an arbitration award, through reliance on the Court's *dicta* in *Hall Street* that in a proper case, parties might provide for enforcement of an arbitration award under state statutory or common law.

> In holding that §§ 10 and 11 provide the exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious juridical review under §§ 9, 10 and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

Hall Street, 128 S.Ct at 1406.

But this is not such a case and never has been. There is no question but that this case is governed by the FAA,[2] and petitioners have never advanced an argument to the contrary until now. Respondents moved to compel arbitration under the FAA, the district court ordered arbitration under the FAA, the award was confirmed under the FAA, petitioners appealed under the FAA, and the Sixth Circuit affirmed under the FAA. Even now, as petitioners assert that review for manifest disregard is necessary to effectuate the parties' choice of Michigan

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2. Section 2 of the FAA makes arbitration provisions in any contract evidencing a transaction "involving commerce" enforceable. This Court has interpreted the term "'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (citing *Allied-Bruce Terminix Cos.*, 513 U.S. 265, 273-74 (1995)). Thus, "the FAA encompasses a wider range of transactions than those actually 'in commerce'—that is, 'within the flow of interstate commerce[.]'" *Id.* The IGAs between Mercy Hospital and each of the Petitioners called for them to relocate and establish medical practices in St. Clair County, Michigan to fill Mercy Hospital's need to provide neurosurgical and pediatric services in its service area. The IGAs required each Petitioner to be a participant for reimbursement purposes in Medicare and Medicaid and other third party payors and managed health plans. (J.A. 58-62, 87-91.) The IGAs plainly "involved commerce," and Petitioners have never advanced a claim to the contrary. *Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 285 n. 3 (M.D.N.C. 2005) (holding FAA governed arbitration agreement because the medical treatment services offered was part of an economic activity, in the aggregate, which involved interstate commerce) (*citing Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (holding the effect of a particular type of activity on commerce should be considered in the aggregate)).

substantive law to questions regarding the "validity and interpretation" of the underlying contract, they do so based on the assertion that this case presents questions arising under the FAA. Pet. for Cert. App. 12.

Petitioners have no basis whatsoever to contend that review of the arbitration award is proper under any standard other than the FAA, and this Court's *dicta* in *Hall Street* that parties might seek enforcement of an arbitration award under a state statutory or common law scheme has no application to this case. As shown below, the governing standard for modification under the FAA does not allow for review for manifest disregard. The Sixth Circuit's decision was correct, and petitioners have demonstrated no grounds for seeking *certiorari.*

C. The Generic Choice of Law Provision in the Parties' Underlying Contract Neither Constituted a "Restricted" Submission to the Arbitrators Nor Supplanted the FAA Substantive Law Governing a Court's Review of the Arbitration Award

Petitioners' argument that the arbitration award can be modified—actually, doubled—due to the arbitration panel's alleged manifest disregard of Michigan law is based on their fundamental confusion regarding two separate and independent issues: the substantive law that applies to disputes arising out of the parties' contract and the substantive law that applies to modification of arbitration awards. That the former is governed by Michigan law is undisputed. The latter, however, is governed by the federal substantive law

developed under the FAA, which does not permit modification based on alleged manifest disregard of the law.

Arguing that alleged manifest disregard of the law permits modification of arbitration awards, petitioners rely on the well-worn *dicta* in *Wilko v. Swan*, 346 U.S. 427 (1953), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which stated that "in *unrestricted* submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in federal courts, to judicial review for error in interpretation." *Wilko*, 346 U.S. at 436-37 (emphasis added). Petitioners contend that this language creates a basis apart from the grounds enumerated in FAA § 11 to modify an arbitration award. They assert that the manifest disregard standard applies with even greater force because the parties included a generic choice of law provision in their underlying contract which transformed their agreement to arbitrate "any disputes involving the interpretation, breach or enforcement" of the contract into a supposed "restricted" submission to the arbitrators. According to petitioners, if manifest disregard is an available basis on which to review an arbitration award in an "unrestricted" submission, it is even more justified in a restricted submission.

The one-sentence generic choice-of-law provision contained in the parties' contract is simply too slender a reed to support the weight of petitioners' contention. As an initial matter, inclusion of a generic choice of law provision in a commercial contract that also contains an

arbitration provision does not transform the arbitration agreement into a "restricted" submission to arbitration. As the Third Circuit has observed, choice-of-law clauses "are ubiquitous in commercial agreements" for the simple reason that contract law is "mostly state law and it varies from state to state." *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001). A choice-of-law provision simply does not transform the arbitration agreement into a "restricted" submission to arbitration. This point is no clearer than in the *Wilko* case itself, a case in which this Court characterized the arbitration as an "unrestricted submission." In *Wilko*, however, the parties included *two* choice-of-law provisions, one calling for application of New York law to the arbitration, and another calling for application of federal securities law to the underlying transactions. *Wilko*, 346 U.S. at 432 n.15; 434 n. 18. These two choice-of-law provisions were plainly insufficient in this Court's eyes to characterize arbitration under the agreement as a "restricted" submission.

Both this Court and the courts of appeals that have considered the issue have concluded that a generic choice of law provision does not supplant the standard of review applicable to an arbitration award under the FAA. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the parties entered into a contract that contained an arbitration provision stating that controversies "shall be settled by arbitration" in accordance with the rules of the National Association of Securities Dealers, and a choice of law provision stating that the contract "shall be governed by the laws of the State of New York." While the FAA, along with the NASD rules, permit arbitrators to award punitive

damages, New York law does not. This Court held that the contract's choice-of-law provision meant only that the substantive law of New York would apply to the dispute, but not New York's special rules limiting the authority of the arbitrators. "Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration[.]" *Mastrobuono*, 514 U.S. at 64.

The courts of appeals that have considered the issue have similarly concluded that a generic choice-of-law provision contained in a contract that also calls for arbitration of disputes does not displace the FAA's standard of review. In *Jacada v. International Marketing Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005), for example, the court held that a generic choice-of-law provision that stated that the parties' agreement "will be governed by the laws of the state of Michigan" did not displace the federal standard for vacating an arbitration award. In so holding, the Sixth Circuit relied on this Court's directive that due regard be given not only to the federal policy favoring arbitrability, but also the federal policy favoring arbitrator discretion.

> This federal policy favoring protection of arbitrator authority is implicated by standards of vacatur. While we hesitate to characterize Michigan's standard for vacatur as a "special rule," applying that standard instead of the more liberal federal standard limits the authority of arbitrators by applying greater judicial scrutiny to their decisions. We

> must therefore interpret the present agreement giving due regard to this policy.

Jacada, 401 F.3d at 711. Citing *Mastrobuono*, the Sixth Circuit held that the choice-of-law provision covered the rights and duties of the parties, but that the arbitration clause covered judicial review of the arbitration award. *Jacada*, 401 F.3d at 711; *accord Fidelity Federal Bank, FSB v. Durga MA Corp.*, 386 F.3d 1306, 1311-12 (9th Cir. 2004); *Action Ind., Inc. v. U.S. Fidelity & Guaranty Co.*, 358 F.3d 337, 342-43 (5th Cir. 2004); *Roadway Package Sys.*, 257 F.3d at 293-98 (3d Cir. 2001); *UHC Management Co., Inc., v. Computer Sciences Corp.*, 148 F.3d 992, 995-98 (8th Cir. 1998).[3]

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3. *See also, Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 965-66 (10th Cir. 2001) (federal law applied to vacatur rather than state law, despite choice-of-law provision requiring application of state law to agreement), *rev'd on other grounds*, 537 U.S. 79 (2002); *Gallus Investments, L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 233 (4th Cir. 1998) (choice-of-law provision did not require application of state evidentiary standards to arbitration proceedings; vacatur governed by federal law); *National Union Fire Ins. Co. of Pittsburgh v. Belco Petroleum Co.*, 88 F.3d 133, 134-35 (2d Cir. 1996) (federal law, not state law, applied to question regarding preclusive effect of prior arbitration award, despite inclusion of choice-of-law provision requiring application of state law to issues concerning the construction, validity and performance of the insurance policy at issue); *PaineWebber, Inc. v. Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) (federal law, not state law, governed whether arbitrator or court decided whether arbitration demand was timely, despite inclusion of a choice-of-law provision requiring application of state law to the construction and enforcement of the agreement); *Gingiss International, Inc. v. Bormet*, 58 F.3d 328, 332-33 (7th Cir. 1995) (state law requiring notice of arbitration proceeding inapplicable despite generic choice-of-law provision); *Schooley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 107 F.3d 21 (10th Cir. 1997) (FAA applied despite choice-of-law provision requiring application of Oklahoma law).

In sum, the generic choice-of-law provision in the underlying contract does not displace the federal substantive law that governs review of the arbitration award, does not transform the arbitration into a so-called "restricted submission," and provides no basis whatsoever for expanding on the exclusive and limited grounds enumerated in FAA § 11 for modifying arbitration awards.

D. Petitioners' Persistent Efforts to Seek Modification of the Arbitration Award are Contrary to the National Policy Favoring Arbitration

In *Hall Street*, this Court recognized that expanding the detailed categories in §§ 10 and 11 for review of arbitration awards would "rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility." *Hall Street*, 128 S.Ct. at 1405. This Court therefore concluded that FAA §§ 9-11 substantiate a "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to more cumbersome and time-consuming judicial review process,' and bring arbitration theory to grief in post-arbitration process." *Id.* (internal citation omitted).

Petitioners' contention that reviewing courts should be permitted to modify arbitration awards based on the arbitrators' claimed manifest disregard of the law would defeat the purposes of the FAA as articulated by this

Court and irreparably damage the finality of arbitration awards. The instant case serves as a ready example. Here, the arbitrators carefully considered nearly 100 pages of briefs on the issue of attorney fees and costs, and hundreds of pages of exhibits. The arbitrators carefully considered the parties' competing arguments on the issues presented and entered an award based on a painstaking analysis of the law. The arbitrators' meticulous findings and calculations are entitled to finality.

III. THERE IS NO CIRCUIT CONFLICT CONCERNING THE PROPER STANDARD FOR MODIFYING AN ARBITRATION AWARD THAT JUSTIFIES GRANTING THE PETITION FOR *CERTIORARI*

This Court made clear in *Hall Street* that FAA §§ 10 and 11 provide the exclusive grounds on which a court may vacate or modify an arbitration award. The Court said so not just once but five times in its short and decisive opinion. *Hall Street*, 128 S.Ct. at 1400, 1401, 1403, 1404, 1406. "We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification." *Id.* at 1403. There can be no question but that *Hall Street* states the principle governing this case.

Petitioners cite no post-*Hall Street* cases addressing whether alleged manifest disregard of the law is a basis on which a court may modify an arbitration award. Other than the Sixth Circuit's decision in this case, there is none. There is no circuit conflict to resolve.

Instead petitioners engage in a legal sleight of hand to create a circuit conflict where there is none. Petitioners cite two cases from the Second Circuit as "recognize[ing] manifest disregard of the law as a judicially-created ground for modifying an arbitration award." Pet. for Cert. at 22. But the Second Circuit's reference to manifest disregard as a basis to modify an arbitration award was at best *dicta* in each of the cases cited, and has been repudiated by the Second Circuit in light of *Hall Street.*

The principal case cited by petitioners is *DiRussa v. Dean Witter Reynnolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1998),[4] a case decided ten years prior to *Hall Street*, where the plaintiff sought modification of an arbitration award arguing that the arbitrator had manifestly disregarded the law by failing to include attorney fees in his monetary award. In *dicta*, the court referred to manifest disregard as a "judicially-created" ground for modifying or vacating an arbitration award, but found that the plaintiff could not meet the exacting manifest disregard standard. *DiRussa*, 121 F.3d at 822-23.

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4. The second case cited by Petitioners is *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), where the question before the court was whether the award should be vacated. The court's reference to modification is simply *dicta. Halligan*, 148 F.3d at 202. Petitioners also cite *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702 (D.C.Cir. 2001) as an example of another circuit that recognizes manifest disregard as a basis on which to modify an arbitration award. (Pet. at 23 n.17.) But *LaPrade* was decided on cross motions to confirm or vacate the award, and there is no indication in the opinion that application of the manifest disregard standard was challenged by the party opposing vacatur. In any event, the court held that the plaintiff did not demonstrate that the panel had manifestly disregarded the law.

Petitioners do not disclose that the Second Circuit has repudiated *DiRussa*, holding that its reference to manifest disregard as a separate "judicially-created" ground on which an arbitration award could be disturbed is "undeniably inconsistent" with this Court's decision in *Hall Street. Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

In *Stolt-Nielsen*, the Second Circuit discussed whether "manifest disregard" survives *Hall Street* as a basis on which to vacate an arbitration award. As the Second Circuit noted, the courts of appeals that have addressed this issue have concluded either that manifest disregard simply does not survive *Hall Street* as a basis to vacate an arbitration award, or that it is judicial shorthand for the grounds enumerated in FAA § 10 for vacating an award. *Stolt-Nielsen*, 548 F.3d at 94 (collecting cases). The Second Circuit opted to follow the latter approach, holding that "manifest disregard" is a "judicial gloss" or shorthand for the grounds set forth in FAA § 10(a)(4). Thus, manifest disregard exists when 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.'" *Id.* at 95 (*quoting* FAA § 10(a)(4)).

The Second Circuit's analysis of manifest disregard simply is not in conflict with the Sixth Circuit's decision in this case. Under the Second Circuit's approach in *Stolt-Nielsen*, alleged manifest disregard serves only as a judicial shorthand for the grounds enumerated in the FAA. The Sixth Circuit's decision below specifically considered this possible interpretation of the post-*Hall*

Street status of manifest disregard, expressly concluding that it provided petitioners no assistance in this case:

> To the extent that "manifest disregard" is "shorthand" for the grounds enumerated in § 11, as the Supreme Court suggested might be the case for some of the grounds listed in § 10, *id.* at 1404, that does Grain and Barnes no good. As we have shown, the enumerated grounds upon which they rely simply do not apply to their merits-based complaints about the award.

Pet. App. 9a (*citing Hall Street*, 128 S.Ct. at 1406).

In sum, there is no circuit court conflict to resolve in this case, and petitioners have presented no basis on which their petition should be granted.

IV. PETITIONERS FAILED TO ESTABLISH THAT THE ARBITRATORS MANIFESTLY DISREGARDED THE LAW

Finally, petitioners' claims of alleged manifest disregard are meritless in any event, as the district court found. The manifest disregard standard as developed prior to *Hall Street* is extremely narrow.

> An arbitration decision 'must fly in the face of established legal precedent' for us to find manifest disregard of the law. . . . If a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. **Only where no judge or group**

of judges could conceivably come to the same determination as the arbitrators must the award be set aside.

Electronic Data Systems Corp. v. Donelson, 473 F.3d 684, 691 (6th Cir. 2007) (internal citations omitted; emphasis supplied). As the Second Circuit has stated, an arbitration award "'should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached.'" *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) (*quoting Banco de Seguros del Estado*, 344 F.3d 255, 260 (2d Cir. 2003)). Petitioners simply cannot establish that the arbitrators manifestly disregarded the law in crafting their unanimous award.

Significantly, of the three purported errors petitioners point to as evidence of supposed manifest disregard of the law, two issues concern the amount of interest awarded by the arbitration panel. But petitioners never even requested an award of interest from the arbitrators and did not brief the issue in the memoranda of law they submitted to the arbitrators. Moreover, the arbitration clause in the IGAs required that arbitration proceed in accordance with the rules of the American Arbitration Association. The AAA rule governing interest states that "[t]he award of the arbitrator(s) *may* include . . . *interest at such rate and from such date as the arbitrator(s) may deem appropriate*[.]" Commercial Arbitration Rules, R-43(d)(I) (2005) (emphasis added). The arbitration panel was authorized to award whatever (or no) interest it deemed appropriate. Petitioners have no basis to contend that the arbitrators manifestly disregarded law

that was not presented to them and which was supplanted by the AAA rule on interest in any event.[5]

Petitioners fare no better with their third instance of supposed disregard of the law. Petitioners claim that because Dr. Grain prevailed on two of the four claims that he arbitrated, he was entitled to all of his attorney fees and costs, rather than the portion of the fees and costs attributable to only the claims on which he actually prevailed. This argument, presented to and rejected by the arbitration panel, flies in the face of established law that Michigan's Rule of Professional Conduct 1.5 is imported into every fee agreement in Michigan,[6] that

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5. *See e.g., Pri-fit Worldwide Fitness, Inc. v. Flanders Corp.*, No. 2:00CV0985, 2006 WL 1073556 at *4 (D. Utah 2006) (denying modification of arbitration award based on allegedly erroneous award of interest; "Those who choose to resolve a dispute by arbitration can expect no more than they have agreed.") (*quoting Jeppsen v. Piper, Jeffray & Hopwood Inc.*, 879 F.Supp. 1130, 1137 (D. Utah 1995)).

6. MRPC 1.5 states that a "lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Under Rule 1.5, a fee is excessive when it is in excess of a "reasonable fee." MRPC 1.5. Thus, a reasonableness standard is imported into any fee agreement and into any fee petition. Notwithstanding the IGAs' reference to "actual attorney fees," it is clear that fee awards must be consistent with the MRPC 1.5 prohibiting excessive fees. *See Redfern v. R.E. Dailey & Co.*, 146 Mich. App. 8, 21-22 (1986) ("[a]lthough we have construed the parties' indemnity agreement to include attorney fees, we will stop short of a construction condoning unreasonable attorney fees. See Code of Professional Responsibility, DR 2-106 [the precursor to MRPC 1.5].") *See, Papo v Anglo Restaurants of San Jose, Inc.*, 149 Mich. App. 285, 299 (1986) ("when a contract specifies that a breaching party is required to pay the other side's attorney fees, only reasonable, not actual, attorney fees should be awarded.").

MRPC 1.5 prohibits excessive fees, that fees must be reviewed for reasonableness in light of "the amount involved and the results obtained."[7] MRPC 1.5(a)(4).

Petitioners sought $3,651,894 in attorney fees and costs in connection with damage claims totaling over $10 million. The arbitration panel awarded Dr. Barnes nothing on her claims and awarded Dr. Grain 5% of the amount he sought. The arbitration panel followed Michigan law and reached the correct result in apportioning the fees and costs to the parties based upon "the amount involved and the results obtained."

There was plainly no manifest disregard of the law. It is time, once and for all, to close the door on the arbitration award and give it the finality it deserves.

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7. Michigan courts award and deny fees in relation to claims won and claims lost. *See, Schellenberg v. Rochester, Mich. Lodge No. 2225*, 228 Mich. App. 20, 44-48 (1998) (affirming award of 90% of fees due to 90% success); *Collister v. Sunshine Food Stores, Inc.*, 166 Mich. App. 272, 274 (1988) (affirming denial of fees based in part on plaintiff's loss on six out of seven claims); *Kissinger, Inc. v. Singh*, 304 F.Supp.2d 944, 955-56 (W.D. Mich. 2003) (reducing plaintiff's attorney fees and costs by 50% in light of the plaintiff's loss on five out of eleven claims); *Relational Funding Corp. v. TCIM Services, Inc.*, No. 01-821, 2004 WL 1192683 (D.Del. 2004) (applying Michigan law, and holding that the plaintiff's demand for full attorney fees was "plainly unreasonable" in light of its recovery of only 17% of the total amount sought, and awarded only 39% of plaintiff's fees and costs).

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the petition. Respondents request that the petition be denied.

Respectfully submitted,

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