No. _____

In The
Supreme Court of the United States

PETER G. GRAIN, M.D., and ANNETTE BARNES, M.D.,
Petitioners,

v.

TRINITY HEALTH, MERCY HEALTH SERVICES, INC., d/b/a MERCY HOSPITAL-PORT HURON, and MARY R. TRIMMER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federal district court have the authority pursuant to *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), to modify an arbitration award based upon the "manifest disregard of the law" standard when the arbitrators, in a restricted submission, do not apply the particular law for resolving the dispute specified by the parties in their pre-dispute arbitration agreement?

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioners Peter G. Grain, M.D., and Annette Barnes, M.D., are individuals.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Grain v. Trinity Health, Mercy Health Services, Inc.*, 551 F.3d 374 (6th Cir. 2008). The Sixth Circuit affirmed the February 14, 2008 decision of the United States District Court for the Eastern District of Michigan, reported at 2008 WL 441060 (E.D. Mich. Feb 14, 2008). The District Court denied Petitioners' motion for reconsideration in an opinion and order on April 11, 2008. See Appendices A-C.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the district court's order denying Petitioners' motion to correct or modify the arbitration award was issued on December 24, 2008. A timely petition for a rehearing en banc was denied by the Sixth Circuit on February 25, 2009. See Appendix D. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Federal Arbitration Act, 9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or

> refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Federal Arbitration Act, 9 U.S.C. § 11:

> In either of the following cases the United States court in and for the district wherein the award was made may make an offer 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.

STATEMENT OF THE CASE

The present case involves an important issue regarding the nature and scope of judicial review of an

arbitration award in a "restricted submission" arising under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. The submission was restricted by the parties' arbitration agreement providing that the dispute "shall be governed by the laws of the State of Michigan." (J.A. 65). The arbitration agreement also provided that "[t]he prevailing party shall be awarded his/its costs including actual attorney fees . . ." (J.A. 61). At the close of the arbitration proceedings, the Panel determined that Petitioner Dr. Peter Grain, an African-American neurosurgeon, was the prevailing party. Notwithstanding, in calculating the costs, attorney fees and interest awarded to Dr. Grain, the Arbitration Panel, exceeding its authority under the parties' arbitration agreement, did not apply the well-established Michigan law of contract damages. Accordingly, Petitioners moved the District Court to correct or modify the Arbitration Award in this respect on the basis that the Arbitration Panel manifestly disregarded controlling Michigan law.

The District Court, however, denied Petitioners' motion to correct or modify the Award as to the costs, attorney fees and interest awarded to Dr. Grain. In pertinent part, the District Court found "manifest disregard of the law" may only be "a basis for *vacating* an arbitration award," not for the modification of an arbitration award. (Appendix B, 16a). In denying Petitioners' motion for reconsideration, the District Court also stated that, pursuant to Sixth Circuit precedent, "[a] court's power to *modify* an arbitration award is confined to the grounds specified in § 11 [of the FAA]." (Appendix C, 23a) (citing *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995)) (emphasis in original). Agreeing with the District Court, the Sixth Circuit affirmed the order, holding

that "*NCR* remains the law of this circuit and prohibits modifying an award based on an alleged 'manifest disregard' of law." (Appendix A, 11a). The Sixth Circuit denied Petitioners' petition for en banc rehearing on February 25, 2009. (Appendix D).

The Sixth Circuit's decision undermines the parties' autonomous common-law contractual rights to determine the law binding the Panel concerning the resolution of their dispute through the arbitration process. Specifically, it is contrary to *Wilko v. Swan,* 346 U.S. 427 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express Inc.,* 490 U.S. 477 (1989), and longstanding case law subsisting alongside the FAA, which has recognized judicial review of arbitration awards under the manifest disregard of the law standard. The Sixth Circuit's decision also creates a split with other circuits, particularly the Second Circuit, which recognizes the manifest disregard of the law standard as a proper ground for modifying an arbitral award.

I. The Arbitration Proceedings

This case arises from Respondent Mercy Hospital's breach of an Income Guarantee Agreement ("IGA") with Petitioner Dr. Peter Grain in June 1998 (at the earliest) or January 28, 1999 (at the latest), and Respondents' wrongful conduct in compelling Dr. Grain to sign a Release rescinding the IGA.[1] The

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[1] As stated by the District Court in its August 11, 2004 opinion, Respondent Mercy recruited Dr. Grain to its service area in Port Huron, Michigan, and the parties entered into an IGA with an arbitration provision. (J.A. 153). Subsequently, Respondents threatened not to renew Dr. Grain's hospital privileges, which

parties' arbitration agreement is set forth at Paragraph 4 of the IGA, which provides in pertinent part:

> 4. Dispute Resolution. Any disputes involving the interpretation, breach or enforcement of this Agreement which cannot be resolved by the 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. . . . (J.A. 61)

Paragraph 13 of the IGA specifies the law governing the IGA:

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

In an order issued on August 11, 2004, the District Court granted Respondents' motion to compel arbitration of the parties' dispute. (J.A. 106-111). The Demand for Arbitration was filed on October 28, 2004. The arbitration proceedings commenced on September 11, 2006 and concluded on May 24, 2007 after forty-five hearing days. On December 22, 2007, the Panel entered an Award against the Respondents, jointly and

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would have effectively ended his career as a neurosurgeon, if he did not sign a Release. (J.A. 153). Confronted with this pressure, Dr. Grain signed a Release on February 2, 1999, and his privileges were extended. (J.A. 153-154). On June 26, 2003, Petitioners filed a sixteen-count Verified Complaint, including a race discrimination under 42 U.S.C. § 1981. (J.A. 18-56).

severally. (J.A. 194-231). Specifically, the Panel found that (i) the Respondents forced Dr. Grain to sign the Release under duress, and (ii) that their conduct was overreaching and wrongful. Accordingly, the Panel rescinded the Release and awarded Dr. Grain damages for Respondent Mercy Hospital's breach of contract in the amount of $518,625, attorneys' fees of $1,145,294.35, costs of $490,476.20, less Respondents' attorneys' fees and costs of $512,525.11 for a net Award of $1,641,870.44, plus interest on the contract damages from October 28, 2004, the date of the Demand for Arbitration. The Panel rejected Dr. Grain's claims of misrepresentation and civil extortion.

II. The Panel's Determination Of The Costs, Attorney Fees And Interest Awarded To Dr. Grain As The Prevailing Party In The Arbitration Proceedings Was Manifestly Contrary To Well-Established Michigan Statutory And Case Law.

Although the Panel found that Respondents' wrongful conduct interfered with Dr. Grain's contract with Mercy Hospital and that Mercy Hospital breached the contract with Dr. Grain, the Panel manifestly disregarded applicable Michigan statutory and case law in three ways when calculating the costs, attorneys' fees and interest awarded to Dr. Grain.

First, the Panel manifestly disregarded well-settled Michigan law of damages when it awarded interest on Dr. Grain's contract damages in the amount of $518,625.00 only from the date of the Demand for Arbitration (October 28, 2004) until the satisfaction of the judgment (January 30, 2008). (J.A. 214-216). As a result, the Panel did not award any interest on the

contract damages portion of the Arbitration Award for the "gap period" running from the date of the breach of contract (June 1998 or January 28, 1999) until the date of the Demand for Arbitration (October 28, 2004).[2] Pursuant to clearly established Michigan law of damages, the Panel was required to calculate interest on Dr. Grain's contract damages in the amount of $518,625.00 for the "gap period" running from the date of the breach of contract (June 1998 or January 28, 1999) until the date of the Demand for Arbitration (October 28, 2004).

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[2] Michigan recognizes a distinction between (1) common-law or judicially-determined interest as an element of damages and (2) statutorily determined interest on a money judgment in a civil action. *Gordon Sel-Way, Inc. v. Spence Bros.*, 475 N.W.2d 704, 711 n. 9 (Mich. 1991). Both forms of interest are intended to compensate the plaintiff for loss of the use of funds. Common-law or judicially determined interest is considered an element of damages, awardable in contract actions from the date of the breach. *McCreery v. Green*, 38 Mich. 172, 185 (1878); *Snow v. Nowlin*, 5 N.W. 443, 445 (Mich. 1880); Hon. P. McMillen, 2 *Michigan Law of Damages and Other Remedies* (3rd ed.) (ICLE, 2008), *Interest*, § 28.8. Michigan also recognizes a statutory form of interest on a money judgment. Specifically, Michigan Compiled Laws (M.C.L.) § 600.6013 provides for interest on a "money judgment recovered in a civil action." Accordingly, common-law interest on the contract damages awarded to Dr. Grain had to be calculated from the date that Mercy Hospital breached the IGA with Dr. Grain (either June 1998 or January 28, 1999) until the date the Arbitration Award was satisfied (January 30, 2008). The Panel was also required by the judgment interest statute to calculate interest from the date the complaint was filed (June 26, 2003) until the satisfaction of the judgment. See *R.D. Mgmt. Corp. v. Philadelphia Indem. Ins. Co.*, 302 F.Supp.2d 728, 737-38 (E.D. Mich. 2004).

Second, because clear and controlling Michigan law (statutory, case law and public policy) treats costs and attorneys' fees as contract damages, the Panel was required to calculate the interest on costs and attorneys' fees in the amount of $1,635,770.55 running from the date of the breach of contract (June 1998 or January 28, 1999) until the satisfaction of the judgment.[3] However, the Panel manifestly disregarded Michigan law and public policy in this respect when it did not award any interest on Dr. Grain's costs and attorneys' fees from the date of the breach of contract and/or the date of the filing of the complaint until the satisfaction of the judgment.

Third, under well-established Michigan contract law, Dr. Grain was the "prevailing party" in the arbitration proceedings.[4] Consequently, Dr. Grain was

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[3] Under Michigan law, attorney fees are recoverable as an element of damages if provided for by contract. *Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641, 652 n. 13 (Mich. 1998). Attorney fees awardable under a contractual provision are considered damages, not costs. *Fleet Bus. Credit, LLC v. Krapohl Ford Lincoln Mercury Co.*, 735 N.W.2d 644, 647 (Mich. Ct. App. 2007); M. Kalmink, 2 *Michigan Law of Damages and Other Remedies* (3rd ed) (ICLE, 2008), *Attorney Fees*, § 29.2. In addition, under M.C.L. 600.6013(1)-(8), interest is awardable on costs and attorney fees as an element of contract damages. See *Everett v. Nikola*, 599 N.W.2d 732, 735-736 (Mich. Ct. App. 1999).

[4] Pursuant to the plain and ordinary meaning of "prevailing party" as found in the contract, the Panel was compelled by controlling Michigan law to award Dr. Grain all his costs and actual attorneys' fees as the prevailing party in the arbitration proceedings. See *Forest City Enters., Inc. v. Leemon Oil Co.*, 577 N.W.2d 150, 161-162 (Mich. Ct. App. 1998); *H.J. Tucker & Assocs., Inc. v. Allied Chucker and Eng'g Co*, 595 N.W.2d 176, 182 (Mich. Ct. App. 1999) (quoting *Van Zanten v. H. Vander Laan Co., Inc.*,

entitled to all his costs and actual attorneys' fees, as provided by the plain and unambiguous language of Paragraph 4 of the IGA.[5] Moreover, the Panel manifestly disregarded Michigan law and public policy by ruling that Dr. Grain was only entitled to 75% of his costs and attorneys' fees and that he was responsible for 25% of Respondents' costs and attorneys' fees. (J.A. 214-216).[6] Consequently, the

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503 N.W.2d 713, 714 (Mich. Ct. App. 1993)); see also *South Davison Cmty. Center, Inc. v. Township of Davison*, No. 232346, 2002 WL 31421770, at *4 n. 6 (Mich. Ct. App. Oct. 25, 2002) (noting that "[t]he United States Supreme Court recently defined a 'prevailing party' as one who has received a favorable judgment on the merits of his claim or an enforceable consent judgment; either of which create the necessary 'material alteration of the parties' legal relationship'") (quoting *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't. of Health & Human Res.*, 532 U.S. 598, 603-604 (2001)).

[5] The Panel paid no heed to the clear and unambiguous language of the contractual provision that "[t]he prevailing party" is entitled to his/its actual attorneys' fees when it found that Dr. Grain was not entitled to his "actual attorney fees" on the ground that his attorneys' fees were "excessive." The Panel based this clearly erroneous ruling upon Michigan Rule of Professional Conduct (M.R.P.C.) 1.5 presumably on the ground that his attorneys' fees were "in excess of a 'reasonable fee.'"(J.A. 210). M.R.P.C. 1.5, however, does not apply when there is a contractual provision that clearly and unambiguously provides for the recovery of "actual attorney fees." See *Cargas v. Bednarsh*, No. 239421, 2003 WL 21716463, at *1 (Mich. Ct. App. July 24, 2003) (citing *Mahnick v. Bell Co,* 662 N.W.2d 830, 832-833 (Mich. Ct. App. 2003)).

[6] The Panel found that Dr. Grain failed to prevail on his misrepresentation claim, which the Panel concluded was unrelated to his claims of rescission and breach of contract. (J.A. 155-163). As a result, the Panel reduced Dr. Grain's award of his costs and attorneys' fees by 25% and charged him with 25% of

Panel manifestly erred by subtracting $545,256.00 in costs and attorneys' fees from Dr. Grain's total damages award; by failing to calculate interest on the costs and attorneys' fees as contract damages in the amount of $545,256.00 running from the date of the breach of contract and/or the date of the filing of the complaint until the satisfaction of the judgment; by requiring Dr. Grain to pay Respondents' costs and attorneys' fees in the amount of $512,525; and by failing to calculate interest on the costs and attorneys' fees as contract damages in the amount of $512,525.00 running from the date of the breach of contract and/or the date of the filing of the complaint until the satisfaction of the judgment.

III. The District Court Denied Petitioners' Motion To Modify The Award On The Ground That The Manifest Disregard Of The Law Standard Does Not Apply To Modify An Arbitration Award.

In response to the Panel's manifest disregard of the law in calculating the Award with respect to the costs, attorney fees and interest awarded to Dr. Grain as the

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Respondents' costs and attorneys' fees. There was, however, no rational basis in Michigan law for the Panel to award Dr. Grain only 75% of his costs and attorneys' fees and make him responsible for 25% of Respondents' costs and attorneys' fees when he was prevailing party in the arbitration proceedings. Moreover, as a matter of collateral estoppel and/or res judicata, the Panel was bound by the District Court's determination that Dr. Grain's misrepresentation claim arose out of the same core of facts as his claims for rescission and breach of contract. *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace & Agric. Implement Workers, UAW*, 97 F.3d 155, 160-161 (6th Cir. 1996).

prevailing party in the arbitration proceeding, Petitioners moved the District Court on December 22, 2007 to confirm the Panel's decision on liability and contract damages, but to correct or modify the Award as to the calculation of the costs, attorneys' fees and interest due to Dr. Grain. (J.A. 172-231). On February 14, 2008, the District Court issued an opinion and order granting Petitioners' motion to confirm the Award as to damages and liability, but denying Petitioners' motion to modify the Award as to the costs, attorneys' fees and interest awarded to Dr. Grain. (Appendix B). In pertinent part, the District Court reasoned that it had no authority to modify an award for a "manifest disregard of the law," and that it could only vacate the award under that standard. (Appendix B, 16a-17a).

Petitioners then moved the District Court under Fed. R. Civ. P. 59(e) to reconsider its decision on the grounds that case law of the Sixth Circuit, and other federal case law, allows for the modification of an arbitration award for "manifest disregard of the law." (J.A. 417-686). On April 11, 2008, the District Court entered an opinion and order denying Petitioners' motion for reconsideration. (Appendix C). In pertinent part, the District Court observed that, under Sixth Circuit precedent, "[a] court's power to *modify* an arbitration award *is confined to* the grounds specified in § 11." (Appendix C, 23a)(citing *NCR Corp., supra.*, 43 F.3d at 1080) (second emphasis added in original).

IV. The Sixth Circuit Affirmed The District Court's Order On The Ground That The Manifest Disregard Of The Law Standard Does Not Apply To Modify An Arbitration Award.

In an opinion issued for publication on December 24, 2008, the Sixth Circuit affirmed the District Court's order denying Petitioners' motion to adjust the Award as to the costs, attorneys' fees and interest awarded to Dr. Grain as the prevailing party in the arbitration proceedings. (Appendix A). In pertinent part, the Sixth Circuit held that its decision in *NCR Corp.* "remains the law of this circuit and prohibits modifying an [arbitration] award based on an alleged 'manifest disregard' of law." (Appendix A, 11a).

REASONS FOR GRANTING THE PETITION

Whether a federal district court may modify an arbitration award based upon the "manifest disregard of the law" standard when arbitrators set aside the parties' pre-dispute arbitration agreement requiring the application of a particular law is a question of paramount importance arising under the FAA, 9 U.S.C. § 1 *et seq*. It is a question that was left open by this Court's decision in *Hall Street Assoc., L.L.C. v. Mattel, Inc.,* 128 S. Ct. 1396 (2008). In rejecting the parties' post-dispute arbitration agreement in that case providing for "a private expansion by contract" of the statutory grounds set forth in the FAA for the vacation or modification of an arbitration award, *Hall Street* did not address whether an arbitration award, in a submission restricted by a pre-dispute arbitration agreement mandating the application of a particular law, may be modified on the basis of the manifest

disregard of the law or the nature and scope of that standard. Thus, this Court's guidance is urgently needed on this issue since the circuit courts are deeply split as to whether a court may modify an arbitration award based upon the manifest disregard of the law standard. Further, in view of the increasing importance of arbitration as a preferred mode of dispute resolution in this country, as recently reflected by this Court's decision in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), it is jurisprudentially necessary to subject arbitration awards to judicial review under the manifest disregard of the law standard in order to ensure the protection of important rights, particularly federal civil rights, in the arbitral forum.

In concluding that § 10 and § 11 of the FAA provide the exclusive regime for judicial review of an arbitration award, the majority in *Hall Street* acknowledged that "the FAA is not the only way into court for parties wanting review of arbitration awards." 128 S. Ct. at 1406. Among the non-statutory ways, the majority in *Hall Street* indicated that parties may seek judicial review based upon their common-law rights under contract law. The present case seeks review upon this ground. Specifically, Petitioners contend that, apart from statutory criteria specified at § 11 of the FAA, a court may modify an arbitration award for the manifest disregard of the law when arbitrators in a "restricted submission" defy the express terms of the parties' pre-dispute arbitration agreement mandating the application of the state law governing their dispute.

I. REVIEW IS NECESSARY TO ENFORCE THE PARTIES' COMMON-LAW CONTRACTUAL RIGHTS TO ARBITRATE THEIR DISPUTE IN ACCORDANCE WITH WELL-ESTABLISHED MICHIGAN LAW, SUBJECT TO JUDICIAL REVIEW BASED UPON THE MANIFEST DISREGARD OF THE LAW STANDARD.

At the root of this action is the common-law principle of party autonomy to enter into an agreement to determine the legal rules governing the resolution of a dispute through arbitration.[7] From this principle flows the legal consequence that the parties' agreement in the present action to arbitrate their dispute in accordance with well-settled Michigan law is subject to judicial review under the manifest disregard of the law standard.

Section 2 of the FAA provides that a written agreement to arbitrate any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The "preeminent concern" of Congress in enacting the FAA was "the enforcement . . . of privately negotiated arbitration agreements." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, 221 (1985). It was to place such

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[7] See Kirgis, *The Contractarian Model of Arbitration and its Implications for Judicial Review of Arbitral Awards*, 85 Or. L. Rev. 1 (2006); Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 Duke L.J. 547 (2005); Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39 (1999); Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703 (1999).

agreements "upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1980)(quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)(quoting H.R. Rep. No. 96, 68th Cong., Ist Sess., 1, 2 (1924)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Thus, the federal policy is to ensure the enforcement of parties' private agreements to arbitrate in accordance with the terms of these agreements. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (noting that "as with any other contract, the parties' intentions control"); *Volt, supra*. 489 U.S. at 478 ("It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.").

A. The Panel Was Bound By The Parties' Arbitration Agreement To Calculate The Costs, Attorney Fees And Interest Awarded To Dr. Grain In Accordance With Well-Established Michigan Law.

Because arbitration is strictly a matter of contract, parties to an arbitration agreement are at liberty to choose the particular substantive law that governs the resolution of their dispute. *Mastrobuono v. Shearson Lehnman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (noting that "parties are generally free to structure their arbitration agreements as they see fit") (quoting *Volt, supra.*, 489 U.S. at 479). In light of the broad purpose of the FAA to enforce arbitration agreements as written, it thus defies the legitimate expectations of the parties if arbitrators decide a dispute in a manner that egregiously departs from the established legal principles agreed upon by the parties to govern their

dispute. Based upon this principle, the parties to the present action should not be bound by the Panel's manifestly erroneous rulings that clearly depart from well-established principles of Michigan law governing their dispute, and the Award should be modified accordingly.[8]

In this case, under the IGA, the parties agreed that any contractual dispute "***shall*** be governed by the laws of the State of Michigan." (J.A. 65) (emphasis added). Notwithstanding the clear terms of the parties' contract, the Panel set aside the parties' bargained-for expectations to resolve their dispute in accordance with well-settled Michigan law of contract damages when it calculated the costs, attorney fees and interest awarded to Dr. Grain as the prevailing party in the arbitration proceedings. Exceeding the powers provided by the parties' arbitration agreement, the Panel calculated the costs, attorney fees and interest in accordance with its own unknown version of the law. However, as a matter of the common-law of contracts and agency, the Panel was not free to determine the dispute between the parties without applying the well-established Michigan law of contract damages in calculating the costs, attorney fees and

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[8] As indicated by its history and structure, the FAA was intended to enforce party autonomy by effectuating private agreements to arbitrate. However, the paramount interests of private autonomy and the public interest in fostering private agreements to arbitrate are thwarted when arbitrators are allowed to operate arbitrarily and capriciously, unchecked by judicial review. Thus, judicial review of arbitration agreements under the manifest disregard of the law standard is vital to ensure that arbitrators effectuate the parties' contractual agreement to arbitrate based upon the parties' own terms.

interest awarded to Dr. Grain.[9] Consequently, the Panel's decision in this respect should not bind the parties, nor be enforceable under § 2 of the FAA.

B. The Manifest Disregard Of The Law Standard Stated In *Wilko* Reflects Longstanding Common Law Predating The Enactment Of The FAA.

In *Wilko*, *supra.*, 346 U.S. at 436-437, this Court introduced the "manifest disregard" language against a backdrop of well-established arbitration law and practice. See also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (reaffirming the existence of the manifest disregard test).[10] Specifically, in *Wilko*, this Court stated: "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

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[9] See *George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (citing *Eastern Associated Coal v. United Mine Workers*, 531 U.S. 57, 62 (2000); *E.I. DuPont de Nemours & Co. v. Grasselli Employees Ind. Ass'n of E. Chicago, Inc.*, 790 F.2d 611, 619 (7th Cir. 1986) (Easterbrook, J. concurring); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 Mich. L. Rev. 1137, 1140 (1977).

[10] For a lucid analysis of the federal and state case law pre-existing the enactment of the FAA and the *Wilko* decision, see Gaitis, *Unraveling the mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 Pepp. Disp. Resol. L.J. 1 (2007).

error in interpretation."(Emphasis added.)[11] Under *Wilko*, then, the manifest disregard of the law standard applies with even greater force in a ***restricted*** submission requiring the application of a particular law as mandated by the parties' arbitration agreement.[12] Thus, when an arbitration proceeding is governed by a "restricted submission" mandating that arbitrators apply a particular law, the resulting arbitration award should be subject to modification by

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[11] Footnote 24 in *Wilko* attached to this passage cites to *Burchell v. Marsh*, 58 U.S. 344 (1854), *United States v. Farragut*, 89 U.S. 406 (1874), *Kleine v. Catara*, 14 F.Cas. 732 (1814), *Texas & P. Ry. Co. v. St. Louis Southwestern Ry. Co.*, 158 F.2d 251, 256 (8th Cir. 1946); *The Hartbridge (North England S.S. Co. v. Munson S.S. Line)*, 62 F.2d 72, 73 (2d Cir. 1932), *Mutual Benefit Health & Health & Acc. Ass'n v. United Cas. C.*, 142 F.2d 390, 393 (1st Cir. 1944), and Note, *Judicial Review of Arbitration Awards on the Merits*, 63 Harv. L. Rev. 681, 685 (1950).

[12] Under *Wilko* and predecessor case law, submissions to arbitrators may be restricted or unrestricted. As explained by Justice Story in *Kleine, supra.*, 14 F.Cas. at 735:

> If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please. If no such reservation is made in the submission, the parties are presumed to agree, that every thing, both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the referees.

Unlike an unrestricted submission, a restricted submission limits the arbitrators' authority in some respect.

a reviewing court for a manifest disregard of the law when the arbitrators clearly fail to apply that law.[13]

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[13] *Wilko* and the predecessor case law effectively stand for the proposition that when a submission is restricted by the parties' arbitration agreement so as to compel arbitrators to apply a particular law in resolving the dispute, the parties are contractually entitled to have the chosen law so applied, and the arbitrators are obligated to apply the law in that manner. Further, this Court's formulation of the manifest disregard of the law standard in *Wilko* subsists alongside the FAA. See McNeil, *American Arbitration Law* at 104 (1992) ("Sections [10 and 11] constitute limitations on the basic principle enunciated in section 2 in the form of specified grounds for vacation and modification of arbitral awards. They do not, however, constitute a significant departure from common law or statutory arbitration as it existed before modern arbitration statutes."). Thus, at § 11, the FAA states: "The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties." Finally, there is no indication that the Congress, in enacting the FAA, intended to displace the common-law basis for reviewing an arbitration award in a restricted submission based upon a manifest mistake or error in the application of the law governing the parties' dispute. See *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315, n. 8 (1981) ("[T]he question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law"). See also Gaitis, *supra.* note 10, at 57-58; Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 518 (1998).

II. REVIEW IS WARRANTED TO RESOLVE A CIRCUIT CONFLICT CONCERNING THE MODIFICATION OF ARBITRATION AWARDS BASED UPON THE MANIFEST DISREGARD OF THE LAW STANDARD.

A. The Sixth Circuit Inconsistently Applies The Manifest Disregard Of The Law Standard To Vacate But Not Modify Arbitration Awards.

In accord with virtually every circuit court, the Sixth Circuit has recognized the manifest disregard of the law standard as a non-statutory ground for vacating arbitration awards.[14] Specifically, in *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Jaros,* 70 F.3d 418, 421 (6th Cir. 1995), the Sixth Circuit, relying upon *Wilko*, found that arbitrators manifestly disregard the law if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2)

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[14] With one exception, every circuit court has followed *Wilko* by recognizing some version of the "manifest disregard of the law" standard. *See Prudential-Bache Sec., Inc. v. Tanner,* 72 F.3d 234 (1st Cir. 1995); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.,* 103 F.3d 9 (2d Cir. 1997); *United Transp. Union Local 1589 v. Suburban Transit Corp.,* 51 F.3d 376 (3d Cir. 1995); *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31,* 933 F.2d 225 (4th Cir.1991); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-396 (5th Cir. 2003); *Lee v. Chica,* 983 F.2d 883 (8th Cir. 1993); *Barnes v. Logan,* 122 F.3d 820 (9th Cir. 1997); *Jenkins v. Prudential-Bache Sec., Inc.,* 847 F.2d 631 (10th Cir. 1988); *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456 (11th Cir. 1997); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175 (D.C. Cir. 1991). The only exception is the Seventh Circuit. See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

the arbitrators refused to heed that legal principle."[15] While the Sixth Circuit recognizes that the manifest disregard of the law standard applies to vacate an arbitration award, it nonetheless denies that arbitration awards may be modified on this ground. In so doing, the Sixth Circuit offers no principled basis for this demarcation, simply declaring in *NCR Corp.* that "[a] court's power to *modify* an arbitration award is confined to the grounds specified in § 11." 43 F.3d at 1080 (emphasis in original).[16]

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[15] In *Jaros*, the Sixth Circuit made it abundantly clear that "a blatant disregard of the applicable rule of law will not be tolerated." *Id.* at 421; see also *Dewahare v. Spencer,* 210 F.3d 666, 669 (6th Cir. 2000) ("Thus, to find manifest disregard a court must find two things: the relevant law must be clearly defined and the arbitrator must have consciously chosen not to apply it.").

[16] Petitioners contend that judicial review of arbitration awards based upon the manifest disregard of the law standard is not an all or nothing affair under the FAA. Indeed, the manifest disregard of the law standard logically applies to the modification of an arbitration award, which is nothing more than the partial vacation of an award. Even the Sixth Circuit in *NCR Corp.* recognizes this point, noting that "[v]acating an award "in-part" . . . is synonymous with modifying an award." *Id.* at 1080. Thus, pursuant to the principle that the greater power contains the lesser, *NCR Corp.* warrants the conclusion that the modification of an arbitral award should be subject to judicial review under the manifest disregard of the law standard, See *O'Connell v. Shalala*, 79 F.3d 170, 177 (1st Cir. 1996) (citing *United States v. O'Neil,* 11 F.3d 292, 296 (1st Cir. 1993)) (describing this principle as "a bit of common sense that has been recognized in virtually every legal code from time immemorial").

B. The Second Circuit Recognizes The Manifest Disregard Of The Law Standard As A Non-Statutory Basis For Modifying Arbitration Awards.

The Sixth Circuit's decision also creates an unnecessary circuit split since the leading circuit court reviewing arbitration awards – the Second Circuit – recognizes the manifest disregard of the law as a judicially-created ground for modifying an arbitration award. See *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998). This circuit split occurs despite the fact that both the Sixth Circuit and Second Circuit define the manifest disregard of the law standard in similar terms.[17]

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[17] In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986), the Second Circuit, relying upon *Wilko*, defined the manifest disregard of the law standard as follows:

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. . . . To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an Panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it.

III. REVIEW IS NEEDED BECAUSE THIS CASE IS THE PERFECT VEHICLE TO RECOGNIZE JUDICIAL REVIEW OF ARBITRATION AWARDS BASED UPON THE MANIFEST DISREGARD OF THE LAW STANDARD AS CONSISTENT WITH THE NATIONAL POLICY FAVORING ARBITRATION.

Judicial review of the arbitration award in this case based upon the Panel's manifest disregard of the law is fully consistent with the national policy favoring arbitration since it is necessary to preserve the parties' contractual expectations to have their dispute decided in accordance with the particular law that the parties themselves have chosen. *Hall Street, supra.*, 128 S. Ct. at 1405. Moreover, in seeking to modify the Award, Petitioners are not asking this Court to "open[] the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . . and bring arbitration theory to grief in the post-arbitration process." *Id.* (quoting *Kyocera Corp. v. Prudential-Bache Trade Serv.*, 341 F.3d 987, 998 (9th Cir. 2003)). Because the proper adjustments in the Award will not engender a cumbersome or time-consuming process, reversal of the Sixth Circuit's decision affirming the District Court's order denying Petitioners' motion to modify the Award on the basis of the Panel's manifest disregard of Michigan law is

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At least one other circuit court has explicitly recognized the manifest disregard of the law standard applies to the modification of an arbitration award. See *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001).

fully consistent with the current "national policy favoring arbitration with . . . limited review." *Hall Street, supra.*, 128 S. Ct. at 1405.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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