IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

BAJIO, LLC, Petitioner, vs. BRAD WOODWARD, SANFORD WOODWARD, and BAJIO MOUNTAIN WEST, Respondents	**RULING ON MOTION TO VACATE ARBITRATION AWARD**
BAJIO MOUNTAIN WEST, LLC, a Utah limited liability company, Petitioner and Plaintiff vs. BRAD WOODWARD and SANFORD WOODWARD, Respondents and Defendants	Date: November 13, 2012 Case Number: 110402877 Judge David N. Mortensen

This matter is before the court in the context of a petitions/motions to vacate an arbitration award, a counter-petition seeking to confirm the award, as well as a complaint for declaratory relief. The matter has been extensively briefed and multiple hearings have been held and arguments made. Additional issues have been raised, the last being a motion to strike a letter from a non-party, Ronald Madson, which was addressed at the last oral argument and submitted for decision October 2, 2012. This ruling addresses all issues which have been presented to the

court. The issues presented can be encapsulated into three broad categories: (1) procedural issues in the presentation of the current petitions; (2) the merits of the petitions on the question of whether the arbitration award should be vacated or affirmed; and (3) the merits of Bajio Mountain West, LLC's motion for default on its declaratory judgment action. Upon review of the totality of the circumstances here and for the reasons that follow, this court determines that the arbitration award must be VACATED. The issues will be addressed in turn.

This court passes no judgment upon the propriety of the actions that the Woodwards claim Bajio, LLC, or entities connected with Bajio, LLC may have undertaken. Further, the court does not wish its decision herein to be wrongly construed as an endorsement of the approach taken by Bajio, LLC and Bajio Mountain West. Simply ignoring an arbitration proceeding is an approach fraught with danger and rightly susceptible too later assertions of indifference or manipulation. Had the court not found a fundamental issue the court could not otherwise rectify, or could the court have found a way to reasonably salvage the arbitration result, the court would have done so.[1] This court finds no fault with the arbitrator proceeding in the absence of parties which choose to not participate in proceedings. The courts frequently strike pleadings and enter default in similar circumstances.

---

[1]Courts can attempt to salvage an arbitrator's determination under appropriate circumstances. *See Allstate Ins. Co. v. Wong,* 2005 UT 51, 122 P.3d 589. The court does not find the circumstances here appropriate for such a result.

Background

Bajio LLC (Bajio), the national owner and franchisor of Bajio Mexican Grill restaurants, entered into a franchise agreement with Brad Woodward and Sanford Woodward (the Woodwards) in December 2006. The franchise agreement included an arbitration clause which required the parties to submit any claims to arbitration.[2] The franchise agreement also limited Bajio's liability for damages in a number of ways. Paragraph 16 of the Franchise Agreement provided that:

> Each party hereby waives, without limitation, any right it might otherwise have to assert a claim for and/or to recover lost profits and other forms of consequential, incidental, contingent, punitive and exemplary damages from the other except as provided herein. Each party's liability shall be limited to actual compensatory damages. Actual compensatory damages shall be the greater of (1) $100,000.00 or (2) at your sole option, all amounts paid to us for franchise fees and royalties for this agreement for up to three years preceding the date of any award herein. If you choose option (2), we will also repurchase your equipment, purchased from or through us, at depreciated value using the five year, straight line method of calculation. Each party acknowledges that it has had a full opportunity

[2]The Franchise Agreement provides: "Any dispute, controversy or claim arising out of or relating to this Agreement of the breach thereof shall be settled by arbitration. The arbitration shall be administered by an arbitration agency, such as the American Arbitration Association ("AAA") or the American Dispute Resolution Center, in accordance with its administrative rules including, as applicable, the Commercial Rules of the AAA and under the Expedited Procedures of such rules or under the Optional Rules For Emergency Measures of Protection of the AAA. Judgment rendered by the Arbitrator may be entered in any court having jurisdiction thereof. The costs of the arbitration will be borne equally by the parties. The parties agree that Utah shall be the site for all hearings held under this paragraph 10, unless otherwise required by law, and that such hearings shall be before a single arbitrator, not a panel, and neither party shall pursue claims and/or consolidate the arbitration with any other proceedings to which we are a party We will honor validly served subpoenas, warrants, and court orders."

> to consult with counsel concerning this waiver, and that this waiver is informed, voluntary, intentional, and not the result of unequal bargaining power.

The Woodwards also signed a separate disclosure questionnaire, initialing paragraph "Yes" to question 12(B) which stated:

> Do you understand the Franchise Agreement provides you can only collect compensatory damages on any claim under or relating to the Franchise Agreement, and not any consequential or punitive damages in the greater amount of 1) $100,000 or 2) at your option, all amounts you paid us for franchise fees and royalties for up to three years preceding any award of damages? (See Paragraph 16 of the Franchise Agreement).

In August 2009, Bajio Mountain West (BMW) entered into an Asset Purchase Agreement with Bajio and in October 2009, BMW assumed all rights/obligations of Bajio under the Franchise Agreement and agreed to indemnify Bajio against any claims made by the Woodwards. The Woodwards made a claim in arbitration against Bajio and BMW hired an attorney, Mr. Sabin.

The Woodwards served a complaint in arbitration against Bajio (not against BMW) for placing two franchises in one exclusive territory and for fraudulent representation of likely profit. Mr. Sabin, on behalf of BMW ***only,*** filed a "Reply and Counterclaim." Thereafter, the Woodwards and Bajio, LLC (not BMW) entered into a document designated: "THE PARTIES' APPOINTMENT OF JAMES R. HOLBROOK AND THEIR SUBMISSION OF THEIR DISPUTES TO ARBITRATOR HOLBROOK FOR DECISION IN BINDING ARBITRATION." The mystery thus begins as to whom Mr. Sabin represents. However, this

much is clear in the record. The Franchise Agreement is between the Woodwards and Bajio, LLC only. The Woodwards filed their Complaint in Arbitration against Bajio, LLC only. Mr. Sabin did file a response to the Complaint in Arbitration on behalf of BMW only. Mr. Sabin signed the appointment of Mr. Holbrook for Bajio, LLC only. The Withdrawal of Counsel filed by Mr. Sabin appears to be on behalf of Bajio, LLC only. Mr. Sabin has submitted a letter indicating he only ever represented BMW. Bajio claims Mr. Sabin was never their counsel. This fact raises a serious question whether Mr. Sabin had the authority to sign the appointment document on behalf of Bajio, LLC.

Regardless of who Mr. Sabin represents, the ***written*** record is clear that only Bajio, LLC was mentioned in the agreement which designated Mr.Holbrook as an arbitrator. Under any reading of these circumstances BMW was not a party to the agreement to submit this matter to a single arbitrator or Mr. Holbrook in particular. There is no assertion anywhere in the record of any written modification of the scope of the arbitration to include punitive damages or damages in excess of $100,000.

As stated, the Woodwards and Bajio, LLC signed an appointment of arbitration, appointing arbitrator Holbrook to arbitrate the dispute. Mr. Sabin signed the appointment of arbitration on behalf of Bajio. The appointment states in part:

> 4. The Woodwards' claims submitted to binding arbitration are as set forth in their Complaint in Arbitration dated September 15, 2010, which may be amended or supplemented upon order of the Arbitrator.

5. Bajio's defenses and counterclaims submitted to binding arbitration are as set forth in the its Reply and Counterclaim in Arbitration dated September 27, 2010, which may be amended or supplemented upon order of the Arbitrator.

Mr. Sabin withdrew, and was allowed to withdraw by Holbrook, in May 2011. In June, Woodwards's counsel sent Notice to Appear or Appoint to Bajio and BMW. Later in June, Woodwards's counsel sent notice of the arbitration hearing to Bajio, BMW and Sabin. The Notice states that the Notice was sent by counsel at the order of the arbitrator. The record contains no order of the arbitrator instructing anyone to send notice to anyone else. Neither Bajio nor BMW expressed or filed any objection to the noticed hearing. The arbitration hearing proceeded without Bajio, BMW, or any counsel representing either of them.

Arbitrator Holbrook held that Bajio had fraudulently induced Woodwards in entering into the Franchise Agreement and awarded Woodwards rescission of the contract, compensatory damages ($1,408,428), prejudgment interest ($120,777), consequential damages ($2,669,173), and punitive damages ($4,225,284)(triple the compensatory damages award). The 16 page Arbitrator's award only mentions the defense of a damage cap in passing (see Page 3, Paragraph 16), and provide no analysis or conclusion whatsoever that the cap or waiver of damages had been procured by fraud or that it should not otherwise be enforced. Both Bajio and BMW moved the arbitrator to reconsider the awards and the motions were denied.

I. PROCEDURAL ISSUES

The initial petition and motion to vacate the arbitration award in this matter was filed October 24, 2011. The two petitioners in this case filed separate actions seeking to vacate the award. Those actions were consolidated by stipulation. The matter then underwent significant briefing and ultimately the matter was heard at oral argument on May 31, 2012. At that time, the issue of whether a default judgment should enter had not been fully briefed, as the parties acknowledged at oral argument, and therefore the issue of the entry of default was set for subsequent oral argument. That oral argument was heard September 10, 2012. At the argument of September 10, the parties raised the issue of the letter from respondent's previous counsel Mr. Madson, which the court had not yet seen, the which the parties were moving to strike. As stated, an issue regarding the entry of a default judgment had been raised, briefed, and argued to the court. Finally, the motion to strike the letter from Mr. Madson has also now been fully briefed and submitted to the court for decision on October 2, 2012. Therefore, the court has considered October 2, 2012 as the date as which the matter has been submitted for decision.

a. Motions to Strike/Objection to Supplemental Exhibits. Although the briefing in this matter has been quite comprehensive, a number of issues have arisen outside of what the Utah Legislature likely intended when it provided for judicial review of arbitration awards. As this ruling will reflect, and as the parties acknowledged before the court, the scope of review a court has related to an arbitration proceeding is limited. In this case, in spite of the fact that the

briefing in connection with the petition and motion to vacate or confirm an arbitration award was already extensive, a number of pleadings outside the normal course have been filed and motions to strike have been filed as well. The court will address each motion to strike separately.

Supplemental Exhibits/Objection to Supplemental Exhibits/Motion to Strike Reply. As stated above, the initial oral arguments on this matter were heard May 31, 2012. The briefing on the petitions and counter-petition had long before closed, with the matters being submitted to the court on February 23, 2012. As stated, the matter was then set for oral argument, which was continued once, and ultimately held on May 31, 2012. It should be noted that the parties almost universally have sought ex parte leave to file over-length memoranda, which leave has been liberally granted. No party was limited in their ability to place any evidence or argument before the court prior to the May 31, 2012 hearing. The arguments were extensive and the court allowed each side to bear its positions fully. The matter was then taken under advisement, with the court indicating that a written ruling would be forthcoming.[3] The court did not solicit or indicate any intention to allow supplemental briefing, nor did the court indicate that it felt that in any way the record was insufficient. No party at the hearing on May 31, 2012 sought leave to file any supplementation whatsoever.

---

[3]Prior to the court issuing the ruling, the court issued a minute entry indicating that it needed to hear and decide the issues raised by the motion to strike, as well as the issues regarding a default judgment, at the same time it ruled on the issue of confirmation versus vacation of the award. Therefore, the ruling was deferred until further oral argument.

Nevertheless, apparently in response to the questions of the court at the May 31, 2012 hearing, the Woodwards submitted to the court supplemental exhibits and asked the court to take judicial notice thereof. Included in the exhibits is an unverified document that purports to be an e-mail, as well as an unverified letter from Ronald Madson, the Woodwards' prior counsel, both of which are dated after the May 31, 2012 oral argument.[4] Petitioners objected to the submission of these exhibits.

The objection noted that the court did not request any additional briefing or supplemental exhibits. The objection is well taken. The court had already taken the matter under advisement and briefing had been completed. The exhibits submitted after the May 31, 2012 hearing have not been properly authenticated and a proper foundation for them has not been provided or introduced into the record. The court lacks a sufficient basis to take judicial notice of the information alleged in the exhibits. Accordingly, the objection is sustained and the supplemental exhibits are stricken.

The filing of a supplemental memorandum without leave violates Utah Rule of Civil Procedure 7(c)(1) which provides that additional memoranda will not be considered without leave of court. On this basis alone the supplemental exhibit should be stricken. Additionally, looking at the merits of the request that the court take judicial notice of the exhibits likewise leads to the conclusion that they should be stricken. Utah Rule of Evidence 201 does in fact

---

[4]The documents are both dated June 5, 2012.

allow a court to take judicial notice of certain facts, but rule 201 is limited to judicially noticing facts that are not subject to reasonable dispute and that are generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Such circumstances do not exist here. The facts asserted in the supplemental exhibits are subject to significant dispute. The facts contained in these communications are not generally known, and they are not capable of accurate and ready determination through other sources. Instead, they constitute rank hearsay at best and raise the specter of improper ex parte communication with the arbitrator at worst. Statutorily an arbitrator is not competent to testify about anything in connection with the arbitration proceedings. *See* Utah Code Ann. §78B-11-115(4). Therefore, the objection is sustained on its merits as well.

The Woodwards responded to the objection with a "Reply to Petitioners' Objection to Respondents, Defendants and Counter Petitioners Brad Woodward and Sanford Woodward's Notice and Supplemental Exhibits Confirming Arbitrator Holbrook's Issuance of Arbitration Proceedings Notices As Reflected in the Arbitration Award." This pleading, although styled in a way which indicates it is responding to the objection, goes far afield of being responsive. Instead, the pleading attaches, again, exhibits and contains substantial argument going to the merits of the issue of confirmation of the award. BMW then filed a motion to strike this reply memorandum. The motion to strike is well-founded in that the pleading filed by the

Woodwards is not responsive in large measure to the objection. To the extent that the reply memorandum addresses any issues other than the grounds for objection, it is stricken.

Letter of Ron Madson. Mr. Ron Madson was counsel for the Woodwards in the underlying arbitration proceedings. Contemporaneous with the September 10, 2012 hearing, Mr. Madson sent a letter directly to the court, apparently copying all counsel on this case. The petitioners herein have moved to strike Mr. Madson's letter. The grounds for the motion to strike are that the matter has already been fully briefed and no further briefing has been expressly allowed by the court, the letter has no bearing on petitioner's motion for default judgment which was the only issue before the court in September 2012, and that ultimately submission of a letter by a nonparty attorney is not provided for under the rules and is improper.

The court agrees with the position of the petitioners. Obviously, Mr. Madson is at liberty to discuss this matter with counsel for the Woodwards at any time. Should the Woodward's counsel feel it necessary to submit any information that Mr. Madson might have, that information could have been timely supplied to the court by way of an affidavit. In the event that briefing had closed, the rules would require that respondent's counsel seek leave of the court to submit a supplemental brief or a supplemental affidavit. However, simply filing pleadings, affidavits, or letters with the court without leave is not acceptable under the rules. When courts act otherwise they essentially invite litigants and their attorneys to engage in an undisciplined free-for-all without any the structure which the rules provide. Because leave of

the court was not granted for the filing of any supplementary pleadings, and because no party in this action has moved for such leave,[5] the motion to strike is well taken and is granted.

b. Motion for Entry of Default. BMW has filed a motion seeking a default judgment. BMW acknowledges that on December 27, 2012 the Woodwards filed a consolidated response, memorandum and counter-petition in opposition to the petition and motion to vacate arbitration award. BMW asserts, "However, the Woodwards have not responded to the Complaint; nor, incidentally, have they filed a Motion to Confirm the Arbitration Award." It does appear that the Woodwards have failed to address paragraph by paragraph the cause of action for declaratory relief in their responsive pleading. However, the pleading that the Woodwards have filed could not be more clear that they are challenging both the legal and factual assertions of the petitions which have been brought, including the declaratory judgment action. Moreover, the pleadings of the Woodwards do contain general denials sufficient to constitute an answer to the petition. For example, in paragraph 17 of the Woodwards' consolidated response, memorandum and counter-petition the Woodwards state: "to the extent that petitioner Bajio, LLC alleged that ¶ ¶1-24 of their petition and motion to vacate arbitration award support such action, the Woodwards deny the same." The court concludes that this general denial is sufficient to constitute a general denial of the declaratory judgment action. Paragraph 46 of BMW's complaint for declaratory relief incorporates all of the preceding paragraphs which are

[5]No party should construe this statement as an invitation to seek leave at this time. This court views this ruling as determinative of all issues before the court.

then expressly denied in the Woodwards' response.[6] Most importantly, in order to grant a default judgment in this case this court would have to conclude that the Woodwards' 24 page consolidated response failed to reasonably apprise BMW that its complaint for declaratory relief was in dispute. To so conclude would require this Court to excessively promote form over substance and to ignore the intended import of the Woodwards' pleading. Upon review of the totality of the Woodwards' response, they clearly deny and oppose the conclusions the declaratory judgment cause of action seeks to establish.

Myriad Utah courts have held that default judgments are disfavored in the law. *Lund v. Brown,* 2000 UT 75, ¶10, 11 P.3d 277; *Wright v. Wright*, 941 P.2d 646, 649 (Utah App. 1997). The reason default judgments are disfavored is because they take away from parties the opportunity to have matters heard on the merits. Where a party fails to respond or where a party engages in dilatory conduct, this court has no problem entering a default. However, where a party has taken part in literally hundreds of pages of briefing, and where the court has held separate hearings to entertain the arguments of counsel, it would be manifestly unjust to parse

---

[6]BMW asserts that the Woodwards have filed no counter petition. While it is true that a separate counter-petition to confirm the award was not filed, it is important to note that the Woodwards refer to themselves as counter petitioners. Also, the pleading they did file states the top of page 2: "Pursuant to sections 123 and 124(4) of the Act, the Woodwards also counter-petition the Court for confirmation of the Arbitration Award as final judgment in this Action." Perhaps most importantly, the Utah Code already provides that if the court denies a motion to vacate an arbitration award, the court must then confirm the award. A counter-petition is not required, but it has essentially been filed in this case.

the pleadings in this matter so as to conclude that the Woodwards have not opposed the declaratory judgment sought by BMW. Accordingly, the request to enter default is denied.

c. Motion to Amend Counter-petition and Answer. The respondent Woodwards moved in August of 2012 to file an amended answer to petitioner BMW's complaint for declaratory relief.

This motion is denied for a number of reasons. Most importantly a motion is made essentially on contingent basis; that is, if the court were to conclude that a separate answer were needed to rebut the assertion of BMW that its complaint for declaratory relief has gone unanswered, respondents sought leave to amend their answer. As decided above, the court does not so conclude and therefore the issue of the need to amend is essentially moot.

Further, the request to amend the answer is untimely. The motion to amend has been filed three months after a motion for entry of default judgment filed May 18, 2012, and some 10 months after the initial complaint for declaratory judgment was filed. In the present circumstances, respondents have failed to provide the court with any reasonable explanation for its delay for seeking an amendment.

For these reasons, the motion to amend is denied.[7]

II. MERITS OF THE PETITIONS TO VACATE OR CONFIRM

---

[7]The court has noted that BMW seeks attorneys fees in connection with the default judgment and the motion to amend. Those attorneys fees are denied since the court is not granting a default judgment as sought.

Fundamentally, this court ultimately concludes that the arbitrator in this matter exceeded his authority under the arbitration agreement and therefore the arbitration award must be vacated. Although the court will address many of the collateral issues raised by the parties in their briefs and in argument, at the end of the day many of the procedural issues raised herein become superfluous where the unavoidable conclusion is presented that the arbitrator went beyond the written arbitration agreement. This court's analysis follows.

Standard of Review – A trial court reviewing an arbitration award gives considerable leeway to the arbitrator, setting aside the arbitrator's decision only in certain narrow circumstances. When faced with a motion to vacate or modify an arbitration award, the court is limited to determining whether any of very limited grounds for modification or vacation exist, and the court may not substitute its judgment for that of the arbitrator or modify or vacate the award because the court disagrees with the arbitrator's assessment. *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941 (Utah 1996); *Hicks v. UBS Fin. Services, Inc.*, 2010 UT App 26, 226 P.3d 762, *cert. granted,* 238 P.3d 443 (Utah 2010), *overruled on other grounds, Westgate Resorts, Ltd., v. Consumer Protection Group, LLC,* 2012 UT 56, ¶ *21-22.* Arbitration "awards will not be disturbed on account of irregularities or informalities or because court does not agree with award, so long as proceeding has been fair and honest and substantial rights of parties have been respected." *Utility Trailer Sales of Salt Lake City, Inc., v. Flake* 740 P. 2d 1327 (Utah 1987).

Utah Code Ann. §78B-11-124(1) provides:

Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(a) the award was procured by corruption, fraud, or other undue means;

(b) there was:

(i) evident partiality by an arbitrator appointed as a neutral arbitrator;

(ii) corruption by an arbitrator; or

(iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) an arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78B-11-116, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(d) an arbitrator exceeded the arbitrator's authority;

(e) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under Subsection 78B-11-116(3) not later than the beginning of the arbitration hearing; or

(f) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 78B-11-110 so as to substantially prejudice the rights of a party to the arbitration proceeding.

Only in these limited circumstances can the court vacate an award. The parties raise a number of issues which remain outside the purview of this limited review.[8] Initially, the court concludes that subsections (1)(a),(b), and (c) do not apply in these circumstances. Although the petitions have argued that the "undue means" language of subsection (a) has application here, the court disagrees. Statutory terms should be construed in context and in light of surrounding

[8]For example, BMW argues that Bajio's attorney withdrew without being required to provide substitute counsel. It claims that the arbitrator should not have allowed Mr. Sabin to withdraw without requiring Bajio to appoint new counsel. While Sabin withdrew in close time proximity to the hearing, there was ample time for Bajio to appoint new counsel or object to the hearing because of a need to get new counsel up to speed. It did neither.

terms. In subsection (a), "undue means" in preceded by corruption and fraud, meaning the process as a whole appear to have been compromised. This conclusion is buttressed by the fact that subsection (3) requires that matters vacated pursuant to subsection (1)(a) be heard by an entirely new arbitrator. The court finds no undue means here.

Petitioners have provided no basis for the court to vacate the award under subsections (b) and (c).

Accordingly, the court determines that the question to be answered here is whether the award should be vacated under subsections (d) and/or (e) and/or (f). Ultimately this court concludes that the award in this matter must be vacated and the matter is ordered to be reheard by the arbitrator.

It is important to note that subsection (d) which provides for vacatur of the award where the arbitrator exceeds the arbitrator's authority has also been construed by case law to include circumstances where an arbitrator has manifestly disregarded the law. As the court in *Pacific Dev., L.C. v. Orton*, 2001 UT 36, ¶7 n.3, 23 P.3d 1035 explained:

> The contention that an arbitrator has manifestly disregarded the law is a judicially created doctrine derived from the statutory provision that an arbitrator's decision may be challenged if an arbitrator has exceeded his or her authority. *See Buzas Baseball,* 925 P.2d at 951. An arbitrator is bound to apply governing law and may not simply disregard it; hence, manifest disregard constitutes an abuse of the authority conferred upon the arbitrator by the parties. *See id.* Similar in nature is the claim, considered in other cases but not presented here, that an arbitrator's decision lacks any basis in reason or fact and is therefore "completely irrational."

Arbitrability Determinations – According to § 78B-11-107(1), an arbitration agreement must be in writing to be valid and enforceable under the Utah Arbitration Act. *Pacific Dev., L.C. v. Orton*, 2001 UT 36, 23 P.3d 1035. This requirement is of no little import. The argument that the scope of the arbitrator's jurisdiction can be expanded by a course of conduct has been expressly rejected by the Utah Supreme Court. *See id.* As the court in *Orton* explained:

> Further, the written agreement defines the scope of the arbitrator's authority. "An arbitration award purporting to resolve questions beyond [the] jurisdictional boundary [of the agreement] is not valid. For a court to find that an arbitrator has exceeded his or her delegated authority, the court must determine that 'the arbitrators award covers areas not contemplated by the submission agreement.'" *Intermountain Power v. Union Pacific R.R.*, 961 P.2d 320, 323 (Utah 1998)(quoting *Buzas Baseball,* 925 P.2d at 949).

The court in *Orton* then noted in paragraph 10:

> The court of appeals held that the initial written agreement could be modified by implication, that is, by the conduct of the parties and presenting evidence relating to a dispute outside the scope of the initial agreement.

The *Orton* court disagreed. The Woodwards similarly contend here that the course of conduct of the parties simultaneously voided the agreement altogether and provided a basis for the arbitrator to ignore all of the arbitration agreement's terms which might limit the arbitrator's authority as to remedies which might be sought. This court rejects that position. As the *Orton*

court explained in discussing the reasons that written arbitration agreements are required:

> This requirement at once enhances predictability and seeks to insure the parties are deliberately waiving their substantial rights to judicial review. It also seeks to relieve the parties and the judiciary of the burden of revisiting disputes that have been submitted to binding arbitration.

Id. at 11.

The *Orton* court acknowledged the stated goal of encouraging extrajudicial settlement of legal disputes and favoring alternative dispute resolution, but cautioned:

> That policy, however, would not be furthered by a doctrine that simply seeks to affirm the maximum possible number of arbitration awards. Parties contemplating arbitration must be assured that the arbitration will proceed according to establish standards that both sides deemed to be fair and just.

Id. at ¶12. The *Orton* court further stated:

> The scope of the arbitration is a governing standard that is fundamental to the expectations of the parties to the arbitration. The parties must know the boundaries of the subject matter of the dispute submitted and ***the potential liabilities flowing therefrom*** before they are able to intelligently waive their rights to submit their disputes to formal litigation.

Id. at ¶13 (emphasis added). In the present case, the express agreement limited potential liabilities flowing from arbitration, but the arbitrator ignored these limits. As previously pointed out, the arbitrator only make a single passing mention of the affirmative defense of the cap on damages, but provided no analysis. This is particularly telling in this case because while the provision does provide a cap as to compensatory damages, the provision provides a complete bar to consequential and punitive damages which make up a significant portion of the award

here. In sum, the potential liabilities flowing from the agreement is exactly the problem in this case.

Separability of agreements – Bajio and BMW claim that the arbitrator exceeded his scope of authority under the franchise agreement because he awarded damages to the Woodwards specifically disallowed by the Agreement, ignoring contractual limitations on his jurisdiction. In the franchise agreement, Bajio and the Woodwards waived the right to recover consequential and punitive damages, and agreed that any liability would be limited to either rescission and return of investment or compensatory damages not over $100,000. Arbitrator Holbrook determined that the franchise agreement was void and rescinded from the beginning since it was procured by fraud. From that point on the arbitrator ignored the arbitration agreement.

Federal law embraces the doctrine of "separability," under which an arbitration clause is considered an agreement apart from the principal contract. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). State courts have recognized that an alleged breach, repudiation, or termination of an underlying agreement does not invalidate the arbitration clause contained in that agreement. *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 440 S.E.2d 877 (1994). Therefore, an arbitration clause can be avoided only where there are valid grounds to challenge the clause itself. *Id.*

"The characterization of the arbitration clause as separate from the other provisions of a

contract will defeat the argument that when the arbitrator is permitted to decide on the validity of a contract, he is deciding on the existence of the contract from which his jurisdiction stems. Nevertheless, it can be shown that the arbitration clause is invalid because there was no "meeting of the minds" with respect to arbitration." 1 *Domke on Com. Arb.* § 11:1.

There is nothing before the court that would so much as suggest that the parties did not reach a meeting of the minds with respect to arbitrating any future disputes that stem from the franchise agreement. While Holbrook found the franchise agreement to have been obtained by fraud and declared it void, the agreement to arbitrate survives under the doctrine of separability. Holbrook therefore retained jurisdiction even though the contract from which his jurisdiction stemmed was ruled to be invalid. However, without a determination that the provisions of the arbitration agreement limiting remedies had been procured by fraud, all the terms and limitations found in the Franchise Agreement remain in full force and effect.

Scope of arbitration – For a dispute to be subject to arbitration, an agreement to arbitrate must exist that binds the party whose submission to arbitration is sought. *Ellsworth v. Am. Arbitration Ass'n*, 2006 UT 77, 148 P.3d 983, 987. The dispute to be arbitrated must fall within the scope of the arbitration agreement. *Buckner v. Kennard*, 2004 UT 78, 99 P.3d 842, 848. A written agreement to arbitrate defines the scope of an arbitrator's authority as well as the scope of the dispute to be arbitrated.

An arbitrator's authority stems from the agreement to arbitrate between the parties.

Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941 (Utah 1996) "An arbitration award purporting to resolve questions beyond the jurisdictional boundary of the agreement is not valid. For a court to find that an arbitrator has exceeded his delegated authority, the court must determine that the arbitrator's award covers areas not contemplated by the arbitration agreement." *Intermountain Power v. Union Pacific R.R.*, 961 P.2d 320, 323 (Utah 1998) (quoting *Buzas Baseball,* 925 P.2d at 949: holding arbitrator's authority limited by scope of arbitration agreement).

Repeatedly, Utah's appellate courts have stated that arbitration is a matter of contract. *Central Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 10, 40 P.3d 599. The parties to the arbitration agreement determine the scope and the questions to be resolved by the arbitration and the arbitrator cannot exceed the scope defined in the written agreement. *Intermountain Power Agency v. Union Pac. R.R.*, 961 P.2d 320, 323 (Utah 1998). Courts also enforce arbitration agreements which limit remedies which may be available to the parties. For example, in *Central Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 10, 40 P.3d 599, an arbitration agreement provided for very narrow remedies to be exercised within very short time frames. The Utah Supreme Court noted:

> As the trial court observed, the arbitration provision agreed upon by the parties provides for an extremely narrow range of options: the parties must agree to a solution within 60 days, or the contract is cancelled, and CFI gets its earnest money back. While in retrospect this may include all of the options CFI now desires, the provision is completely consistent with the parties' intent at the outset to bring a prompt and sure resolution

> to disputes that arose. While CFI now argues, in effect, that such a narrow choice of remedies is so foolish as to be no remedy at all, it is the bargain they struck with PWA, and it is not for the courts to save them from it.

Id. at ¶ 18, n. 4. Likewise in the present case, the parties contractually agreed to specific limitations on damages in connection with the agreement to arbitrate. To find that an agreement to arbitrate exists, but to read the limitations on remedies out of the agreement, as the arbitrator did here, is to impermissibly re-write the arbitration agreement. Such action is outside the power of the arbitrator.

As established in *Orton*, "the requirement that an arbitration agreement be contained in a written document setting forth the scope of the dispute to be arbitrated ensures that the parties are deliberately waiving their substantial rights to judicial review." *Id.* at 1039. At most, Bajio expected that the franchise agreement could either be rescinded or they could be liable for compensatory damages up to a maximum of $100,000. They never contemplated being responsible for punitive or consequential damages or an $8 million award. Therefore, because the arbitration scope is clear and Bajio's expectations for potential liabilities were far below the amount of the arbitrator's award, Bajio's motion to vacate the award must be granted upon the basis that the arbitrator exceeded his authority.[9]

---

[9]It would appear that if the Woodwards desire to achieve the result they obtained with arbitrator Holbrook, the proper course of action would be to seek a judicial determination that the franchise agreement was procured by fraud or is otherwise not enforceable, and then seek the remedies in excess of those allowed by the franchise agreement through the courts. However, if

As stated above, an arbitrator can also be found to have exceeded his authority where an arbitrator manifestly disregards the law. Bajio and BMW argue the arbitrator exceeded his authority by considering Bajio and BMW as one in the same for all purposes. This court agrees. Besides the legal significance of simply co-mingling the result of the arbitration award against both Bajio LLC and BMW, the arbitrator's analysis also results in punitive damages being assessed on a joint and several liability basis. This court concludes that the arbitrator's approach shows a manifest disregard for the law. Both Bajio and BMW assert that the arbitrator failed to act fairly in simply co-joining Bajio and BMW interchangeably it the arbitrator's ruling. This court agrees and concludes that doing so, particularly as it pertains to punitive damages, exhibits a manifest disregard for the law. In *Smith v. Lighting Bolt Prod., Inc.*, 861 F.2d 363, 374 (2nd Cir. 1988), the court stated:

> The effect of joint liability in a tort context is to excuse one defendant from paying any portion of the judgment if the plaintiff collects the full amount from the other. *See Velazquez v. Water Taxi, Inc.*, 49 N.Y.2d 762, 764, 426 N.Y.S.2d 467, 468, 403 N.E.2d 172 (1980). While this possibility is not necessarily undesirable with respect to a judgment awarding compensatory damages, it is contrary to the policies underlying an award of punitive damages. The latter award is intended in part as a penalty against a defendant who has exhibited a high degree of moral culpability and as a deterrence against further similar conduct by that defendant. Those interests are disserved if the judgment gives such a defendant an opportunity to escape payment of the penalty assessed. Thus imposition of joint liability for a punitive damage award is improper.

See also Felice v. Delporte, 136 A.D.2d 913, 914, 524 N.Y.S.2d 919, 920 (4th Dep't).

---

the Woodwards seek their remedy through the arbitration provision of the franchise agreement, then they are limited in their remedy by that agreement.

In *Loughman v. Consul Penn*, 6F.3d 88, 100 (3rd Cir. 1993), the court affirmed the trial court's decision not to award punitive damages jointly and severally against the defendant co-conspirators and stated:

> It is one thing to hold a conspirator liable for all harm (compensatory damages) done by the conspiracy. It is quite another, substantial step to impose joint and several liability for the award of punitive damages, which serve a very different purpose. "Unlike compensatory damages, which have as their purpose the desire to make the plaintiff whole, the purpose of imposing punitive damages is to punish the wrongdoers and deter future conduct." [citations omitted].

Cases that have actually undertaken an analysis of the issue have correctly noted that awarding punitive damages jointly and severally against joint tortfeasors contradicts the very policy underlying punitive damages. *York v. Intrust Bank, N.A.*, 962 P.2d 405, 433 (Kan. 1998). *See also, Smith v. Lighting Bolt Prod., Inc.,* 861 F.2d 363 (2nd Cir. 1988); *Loughman v. Consul Penn*, 6 F.3d 88 (3rd Cir. 1993); *16 Am. Jur. 2d Conspiracy*, §71 (1998) ("Punitive damages may be assessed against the various co-conspirators individually, based on their respective guilt, rather than jointly and severally.").

Further, awarding punitive damages jointly and severally is impossible given the statutory law on punitive damages in Utah. Under Utah's Punitive Damages statute, Utah Code Ann. §78b-8-201, and Utah case law, not only must the individual conduct of the defendant be considered when assessing punitive damages, but the financial condition of the individual defendant as well.

> Our cases have determined that a defendant's wealth can be either an aggravating or a mitigating factor in determining the size of a punitive damage award, since punitive damages should be tailored to what is necessary to deter the particular defendant, as well as others similarly situated, from repeating the prohibited conduct.

Smith v. Fairfax Realty, Inc., 82 P.3d 1064, 1072, ¶33 (Utah 2003). Assessing joint and several liability to multiple parties makes the application of this factor in determining punitive damages impossible. Individual conduct and relative wealth in the analysis as mandated by Utah law is found nowhere in the arbitrator's decision. For this independent reason, this court concludes that the arbitrator here exceeded his authority in showing a manifest disregard for the law.

Notice of the Hearing – Bajio and BMW claim that the arbitration was procedurally improper and lacked jurisdiction because the arbitrator did not personally give notice of the hearing. Utah Code Annotated § 78B-11-116(3) states: "If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear." Bajio claims it was not on proper notice of the hearing, did not attend the hearing, and did not have an opportunity to argue as to the arbitrator's limitations or present evidence on its own behalf because Woodward's counsel sent notice of the hearing, not the arbitrator.

The Notice of Hearing sent by Woodward's counsel states that it was sent "As ordered by the Arbitrator." While the court would likely allow an arbitrator the deference to order a party to give notice of the hearing, there is no proof or evidence that Holbrook actually gave such an order. The Woodwards have not provided the order or an affidavit that substantiates their claim that Holbrook ordered them to give notice. Notice of the hearing was therefore arguably deficient.

Bajio and BMW claim they were prejudiced because they were not present at the arbitration to present their arguments and that such prejudice is grounds to vacate the award. The Arbitration Act authorizes the arbitrator to conduct hearings in the absence of one of the parties, so long as the party was duly notified. The arbitrator made a finding that Bajio and BMW were duly notified and proceeded with the hearing despite their absence. This issue of the arbitration hearing being conducted in Bajio's and BMW's absence is separate and distinct from a determination of whether notice was proper under the statute. The arbitrator's finding that Bajio and BMW were duly notified does not necessarily support that notice was proper under the statute, but that Bajio and BMW were sufficiently aware of the hearing. This court gives deference to the arbitrator that the parties were duly notified and in holding the hearing in their absence.

Most importantly, however, is the fact that improper notice under § 78B-11-116 is not a basis under which this court can vacate an award. Subsection (f) of §78B-11-124 provides that a

court may vacate an award for failing to give notice as required by §78B-11-110. This subsection involves the initial notice that the matter is going to be decided by arbitration, not the notice provisions for the hearing itself.

In its petition and motion to vacate Bajio asserts that it was served with the complaint in arbitration. *See* Bajio's Memorandum in Support of Petition, pg. 5, ¶ 15. Thus, the record reflects that Bajio was given notice under 78B-11-110. However, as to BMW there was no notice under 78B-11-110. There is no evidence that BMW was served at all. Having not attended the hearing, this court cannot find a waiver of notice under subsection (2) of § 78B-11-110. Therefore, failure to comply with § 78B-11-110 does provide a basis to vacate the award as against BMW, but not as against Bajio.

Arbitration not conducted by an arbitration agency – The Franchise Agreement says that any arbitration should be conducted by an arbitration agency according to its agency rules. Bajio and BMW claim the arbitration here ran afoul of Utah Code Ann. § 78B-11-112(1) which says that "If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails."

In this case, Bajio is prevented from now arguing that the arbitration was not conducted according to the method that the parties agreed upon in the franchise agreement because they affirmatively agreed to Mr. Holbrook as the arbitrator and by so doing effectively waived the right to have the arbitration conducted as prescribed in the arbitration agreement. Bajio should

have addressed the issue of where to arbitrate and exercised their right to have an agency arbitrate the claims before it signed the appointment. BMW, however, was not a signatory to the document establishing Mr. Holbrook as the arbitrator. As such, this court can only conclude that BMW should not have been included in the proceedings and on that additional basis the arbitration award must be vacated.

The Utah Supreme Court in *Peterson & Simpson v. IHC Health Services,* 2009 UT 54, 217 P.3d 716 reviewed circumstances where a district court order a process for the selection of arbitrators different than the arbitration agreement provided for. The *Peterson* court reversed holding that the district court had no choice but to enforce the selection provision as written. The court stated:

> If the party seeking to bring a claim chooses not to follow the agreed upon method, that party has no avenue available in court; the method agreed upon between the parties in the arbitration agreement is the only option for addressing the claim.

Id. at ¶ 24. Here, BMW was not a party to the agreement electing arbitrator Holbrook. Therefore, the Woodwards cannot now claim that BMW has waived its right to expect compliance with the arbitration agreement as to the provisions that the arbitration be conducted through an arbitration agency.

Bajio was a party to an arbitration agreement – The arbitration agreement as found in the Franchise Agreement is expressly between Bajio and the Woodwards. Mr. Sabin signed the appointment agreement on behalf of Bajio, although there exists a substantial question as to

whether he had the capacity to so act. Mr. Sabin was allegedly hired by BMW to represent Bajio's interests. Bajio claims that Sabin did not represent it and therefore Bajio is not bound to the agreement selecting Holbrook as an arbitrator and that the arbitrator failed to distinguish among the various legal entities involved in the transactions at issue. Bajio admits that through the arbitration process, it thought Sabin was representing it, but now claims that Sabin has since taken the position that he was only representing BMW. The record before this court clearly indicates that Bajio was a party to the Franchise Agreement which contains the arbitration agreement. Bajio also appears to be a party to the agreement to arbitrate with arbitrator Holbrook. This court cannot conclude based upon the record here that there was not arbitration agreement between Bajio and the Woodwards. Since the arbitration award is being vacated on other grounds, this issue can be clarified at the arbitration.

BMW was not a party to any arbitration agreement – BMW claims it should not be a party to the arbitration agreement because the agreement is actually only between the Woodwards and Bajio. BMW agreed to defend and indemnify Bajio, but that does not necessarily make it a party to the arbitration agreement.

The "minimum threshold for ... enforcement[of an arbitration agreement is] direct and specific evidence of an agreement between the parties." *McCoy v. Blue Cross & Blue Shield of Utah*, 2001 UT 31, ¶ 17, 20 P.3d 901. Direct and specific evidence requires non-inferential evidence. *Id.* Furthermore, it requires an agreement between the *particular* parties regarding

arbitration of future disputes. *Id.* The court in *Ellsworth v. Am. Arbitration Ass'n,* 2006 UT 77, 148 P.3d 983 did provide that there were circumstances where a non-signatory to an arbotration agreement could be found to be bound by the agreement, but none of those circumstances apply here. The closest applicable exception to the general rule requiring a written assent would be estoppel. However, the record here is insufficient for the court to conclude the estoppel applies. Instead, the court is left with a record where BMW is neither a party to the original agreement to arbitrate, nor is it a party to the agreement which designates Mr. Holbrook as an arbitrator. Even though this court cannot find that any agreement exists between the Woodwards and BMW to arbitrate any claims, BMW did file a response to the Complaint in Arbitration. By so acting, BMW participated in the arbitration proceeding, without apparent objection, and therefore subsection (e) of Utah Code Ann. §78B-11-124(1) does not appear to provide a basis to vacate the award. Since the arbitration award is being vacated on other grounds, this issue can be clarified at the arbitration.

CONCLUSION

As more fully set forth above, the arbitration award is vacated because notice of the hearing was deficient as to BMW, and more importantly, the arbitrator exceeded his authority. Thus, the petitions and motions filed by Bajio and BMW are granted and the petition to confirm the award filed by the Woodwards is denied. Pursuant to Utah Code Ann. §78B-11-124(3) the court orders that the issues between Bajio, LLC and the Woodwards be subject to rehearing.

The objection to the supplemental exhibits is sustained and those exhibits are stricken.

The motion to strike the reply to the objection is granted in so far as it contains any argument related to the merits of the respective petitions.

The motion to enter default is denied. The declaratory judgment cause of action remains pending,[10] although it appears this ruling has rendered a majority of the declaratory judgment issues moot. The parties should submit a case management order related to the declaratory judgment action within 30 days of this ruling.

The motion to amend the Woodwards' response and counter-petition is denied.

Counsel for petitioner Bajio will submit an order consistent with this ruling.

Dated this 13th day of November 2012.

BY THE COURT:

Judge David N. Mortensen
Fourth Judicial District Court

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT • UTAH COUNTY •

[10]There is no pending motion to enter the declaratory judgment other than the motion to enter default.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 110402877 by the method and on the date specified.

MAIL: BRAD WOODWARD 2897 CHALK CREEK WAY SOUTH JORDAN, UT 84095
MAIL: SANFORD WOODWARD 13474 PALAWAN WAY SOUTH JORDAN UT 84065

EMAIL: ROBERT K REYNARD
EMAIL: KENDRA L SHIREY

Date: 11/13/2012

/s/ GEORGIA R SNYDER

Deputy Court Clerk