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No. 11-17369 and 11-17460

In the United States Court of Appeals
for the Ninth Circuit

ZEV LAGSTEIN, M.D.,

Plaintiff - Appellant, Cross-Appellee,

v.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, a foreign insuring entity,

Defendant - Appellee, Cross-Appellant.

On Appeal from the United States District Court
for the District of Nevada
Cause No. 2:03-cv-01075-GMN-LRL

PLAINTIFF/APPELLANT'S REPLY BRIEF ON APPEAL AND RESPONSE BRIEF TO CROSS APPEAL (THIRD BRIEF ON APPEAL/CROSS APPEAL)

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INTRODUCTION

Lloyd's F.R.A.P. 28(c)(2) answering brief on appeal/opening brief on cross appeal (titled "Stage II Brief of Defendants/Appellee/Cross-Appellant") (hereinafter "**Answering Brief**" or "**AB**") is a paradigm example of advocacy through obfuscation. Recognizing that precise language undermines its position, the Answering Brief resorts to using ambiguous terms – "prejudgment" and "post-judgment" – and places far too much significance on those imprecise terms. The fact is, numerous cases – in both federal and state courts – have held when a judgment is entered confirming an arbitration award, that judgment must include interest commencing from the date of the arbitration award (Period II interest). As a matter of common sense, such an award of interest for the time ***after*** an arbitration award through entry of a federal judgment no more "modifies" the award than does an award of Period III interest. Such interest merely compensates for delay, and provides the losing party a disincentive to delay payment. Tellingly, Lloyd's has cited no authority that says otherwise, and this Court has previously rejected the logic of its argument in the context of another arbitration statute that shares with the FAA the very features Lloyd's claims are significant. *See Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1102 (9th Cir. 2011) (rejecting arguments that governing foreign arbitration awards precluded district court from including Period

II interest in the judgment because the arbitration act provided only for limited review, did not say anything about prejudgment interest, and merely gave district court power to confirm "the arbitral award.").

Lloyd's argument concerning attorneys' fees fares no better. As explained in Argument Section II, and contrary to Lloyd's assertion, the only case that arguably supports its position is *Menke v. Monchecourt*, 17 F.3d 1007 (7th Cir. 1994). But that case rests on demonstrably flawed reasoning, and the remaining authority not only supports Lagstein's view, but better comports with the Ninth Circuit law requiring courts to apply diversity jurisdiction principles to collateral issues (like interest and fees) when entering a judgment in a case like this one. Accordingly, the Court should reverse with instructions to include Period II interest and fees in the Judgment.

F.R.A.P. 28.1(c)(3) REPLY BRIEF ON APPEAL

CLARIFICATION OF FACTS AND RECORD ON APPEAL

In a blatant attempt to distract the Court from the legal issues presented on appeal, Lloyd's begins its Answering Brief with a slanted version of the facts – the version rejected by the Panel (*see* ECF-45), and contrary to the facts set forth in the Court's opinion, *see Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634 (9th Cir. 2010). At this stage, however, Lloyd's must live with the actual findings made by the Panel – findings that are now law of the case. Those findings

demonstrate this case involved a paradigm example of egregious insurance bad faith warranting significant damages. Indeed, two experienced jurists described in painstaking detail Lloyd's three-and-a-half year "intentional scheme . . . to wrongfully deny [Lagstein's] claim" (ECF-45 at 21), finding that:

- Lloyd's forced Lagstein back to work by denying benefits "placing him[] at great risk of another cardiac incident," (*Id.* at 17);
- "the evidence overwhelmingly demonstrated that Lloyd's breached the implied covenant of good faith and fair dealing when it unreasonably denied Lagstein's claim, took over three years and seven months to deny it, engaged in acts of dishonesty and delay tactics and *repeatedly* acted unreasonably and with knowledge that it had no reasonable basis for its conduct," (*Id.* at 20);
- Lloyd's "tortured Lagstein in [a] . . . kind of malicious, oppressive, and overpowering 'cat-and-mouse' game," (*Id.* at 21);
- When Lagstein "was in one of the most vulnerable states of his life, Lloyd's delayed and delayed the 'finalization' of his claim, with the clear intent of either forcing him back to work, or arguably, allowing him to die before his benefits were paid." (*Id.* at 47); and
- "Lloyd's conduct in this case was outrageous" and the "evidence . . . very disturbing." (*Id.*).[1]

[1] Although at various times Lloyd's has suggested otherwise, this was not a close case. Even Lloyd's own hand-picked doctor concluded that "[g]iven the overall complexity of this man's history, his numerous alarming responses to stressful situations such as severe headaches, light-headedness, tachycardia, etc., and his polypharmacy . . . , ***this patient cannot be expected to perform regularly in any medical capacity***. Would you want this man working on your heart, or making medical decisions and providing your medical care?" (ECF-81 Ex. 1 Part 2 at 2; *see also* ECF-45 at 28.)

Stuck with these facts, Lloyd's seems to suggest it should have been able to delay paying the Awards for years – in effect forcing upon Lagstein an interest free loan – because "[u]pon returning to work, Lagstein was soon earning millions of dollars a year performing tasks that he described as equivalent in arduousness to reading a newspaper." (AB1.) But the record shows that Lagstein's "so-called return to work was against the advice of his doctors," and "in doing what he did he was placing himself at great risk of another cardiac incident," and in fact became "hospitalized." (ECF-45 at 17.) Moreover, this limited work did not, in fact, "bring [in] much money . . . ." (Defendant's Excerpts of Record ("**DER**") 51.)[2] Although irrelevant to the legal issues in this appeal, Lloyd's scheme to force Lagstein back to work by delaying his claim for three years was at the crux of its bad faith, and it cannot now provide a reason to reward Lloyd's further delay in paying the Awards. In sum, the Court should not be distracted with Lloyd's mischaracterization of the facts.

[2] Lloyd's false proposition otherwise does not come from the extensive financial information Lagstein provided at Lloyd's request, but instead comes ***solely*** from a misleading document that the dissenting arbitrator discussed in connection with the emotional distress award. (DER105.) Although the document purports to enumerate ***gross*** (not net) earnings from "Zev Lagstein M.D. Practice," there is no evidence concerning who created the document, the purpose for which it was created, the accuracy of the information, or even the source of the income it purportedly describes (Lagstein, for example, had rental property). Moreover, Dr. Lagstein never earned the amount Lloyd's claims, and it knows that from his tax returns.

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REPLY ARGUMENT ON APPEAL

I. Contrary to Lloyd's Contention, Including Period II Interest in the Judgment Does Not Require Any "Modification" of the Awards

A. Lloyd's Contention That the District Court Had No Power to Include Period II Interest in the Judgment – Interest to Which Lagstein Is Entitled Under Nevada Law – Grossly Mischaracterizes the FAA and Ignores Existing Law

Lloyd's first argues (at 21-29) that awarding Period II interest requires "modifying" the arbitration award in violation of the FAA. The Court may quickly dispose of that argument for the reasons set forth in the Opening Brief ("**OB**") (at 31-33), the logic of which Lloyd's simply ignores. Simply put, Lloyd's "modification" argument erroneously collapses the distinction between (1) the arbitration award itself, and (2) the process for having the award confirmed and reduced to judgment in federal court. Confirming an award under the FAA requires a federal action (it is not a "dispute" resolved by the arbitrators), and including interest to which a party is entitled as a matter of law in the judgment entered in that action involves no modification of the underlying award.

1. Under Ninth Circuit Precedent, Including Period II Interest in a Judgment Confirming an Arbitration Award Involves No Modification of the Award

In the context of including Period II interest in a judgment confirming an arbitration award, the Ninth Circuit has explained that the arbitrators, not the court, determine "in the first instance" the amount due. *See Lundgren v. Freeman*, 307 F.2d 104, 112 (9th Cir. 1962) ("The parties selected arbitrators, rather than a court,

as the body that would, ***in the first instance***, determine the amount due" subject to the confirmation process that follows) (emphasis added). If the parties do not comply with the award, the dispute over the enforceability of the award does not return to the arbitration panel (notwithstanding the breadth of any arbitration provision), but rather results in "court proceedings" to enforce the award. *See id.*

Although Lloyd's may wish otherwise, any judgment entered as part of the confirmation process in the FAA is governed by the settled law governing entry of other judgments, pursuant to which "the date of the award, ***unless the award be modified by the court***, should be the latest date when interest begins." *Id.* (emphasis added). As *Lundgren* teaches, that act of entering a judgment confirming an award under the FAA, and including in the judgment the Period II and Period III interest required by law, involves no modification of the award. *See id.* ("***unless*** the award be modified by the court" the judgment should include interest) (emphasis added). And neither the breadth of an arbitration provision, nor the limited role courts play under the FAA changes that fact. *See id.* at 110 (noting in that case that the "original arbitration agreement [wa]s broadly framed; it provide[d] that 'all disputes, claims or questions subject to arbitration under this contract shall be submitted' to arbitration under the Federal Arbitration Act, and further that courts play a highly "limited" role under the FAA.).

Significantly, the Ninth Circuit recently reached these same conclusions – and explicitly rejected the argument Lloyd's advances on appeal – in a case involving the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention" (or "**Convention**"). *See Cubic Defense*, 665 F.3d at 1095. Like the FAA, the Convention requires a court to confirm an arbitration award unless one of the specified "grounds for refusing to confirm an award" is met. *Id*. at 1095-96 (citing 9 U.S.C. § 207).[3] Before the district court, the Ministry moved "for post-award, prejudgment interest covering the period following" the arbitration award. *Id*. at 1102. The district court denied the request, concluding that it lacked authority to award prejudgment interest because (1) a district court's "review of a foreign arbitration award is quite circumscribed," (2) "[t]he Convention does not provide for the award of interest by a district court, but rather only provides for the confirmation of the arbitral award," and (3) "[i]n this case, the [arbitration] Award does provide for some pre-judgment interest, and it is that which this Court confirmed." *Id*. (internal quotation marks and citation omitted).

[3] Section 207 provides that "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." *Cf.* 9 U.S.C. § 9 (specifying that a "court must grant such an order [confirming an arbitration award] unless the award is vacated, modified, or corrected as prescribed in" the FAA).

The Ninth Circuit held "that the district court erred" for four reasons that apply equally to this case. *Id.* First, the Court noted that when a district court exercises federal question jurisdiction, the law generally leaves whether to award prejudgment interest to "the sound discretion of the district courts" in furtherance of "the widely accepted, remedial purpose of pre-judgment interest – which is to compensat[e] the injured party for the loss of the use of money he would otherwise have had." *Id.* (internal quotation marks and citation omitted); *see also id.* at 1103 (concluding that "as in other federal question cases, whether to award prejudgment interest [in a Convention case] falls within the district court's discretion.").

In this case, the district court exercised diversity jurisdiction, meaning the law leaves whether to award prejudgment/Period II interest to the law of the forum state. (*See* OB at 17-18; AB at 23.) In this context too, precisely the same "compensat[e] the injured party," *id.* at 1102, rationale applies. *See AT&T v. United Computer Sys., Inc.*, 98 F.3d 1206, 1211 (9th Cir. 1996) (holding that under the FAA, "the award of prejudgment interest under state law more fully compensates [the prevailing party] . . . for the loss of use of its money due to the delay occasioned by [the challenger's] . . . actions.").

"Second," the Court explained, "nothing in the federal statutes implementing the Convention, or in the Convention itself, reveals any intention on the part of Congress or the contracting states to preclude post-award, prejudgment interest."

Cubic Defense, 665 F.3d at 1102-03. Instead, "the Convention," just like the FAA, "is silent on the question of pre-judgment interest." *Id*. at 1103 (internal quotation marks and citation omitted).

Third, the Court explained that although review of the arbitration award itself is limited, that question is distinct from the "collateral issue[]" of whether a judgment confirming the award may include interest:

> Third, ***although a court's review of an arbitration award is limited, nothing in the Convention or the implementing statutes restricts the court's jurisdiction over collateral issues such as prejudgment interest.*** To be sure, a court's review of the award itself is minimal: the Convention requires a court to "confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. Judicial review *of the award* is therefore "quite circumscribed" – "[r]ather than review the merits of the underlying arbitration, we review de novo only whether the party established a defense under the Convention."

Id. (first emphasis added) (citations omitted). Consequently, the Court concluded, because actions under the Convention "arise under the laws and treaties of the United States," just "as in other federal question cases, whether to award prejudgment interest falls within the district court's discretion." *Id*. (internal quotation marks and citation omitted). Again, this action arose under the substantive law of Nevada, and accordingly just as in other diversity jurisdiction cases whether to award interest depends on the law of the forum state. *See Northrop Corp. v. Triad Int'l Mktg., S.A.*, 842 F.2d 1154, 1155 (9th Cir. 1988) (in

"diversity actions seeking enforcement of arbitration awards under the Federal Arbitration Act," state law determines a party's right to prejudgment (Period II) interest); *Lund v. Albrecht*, 936 F.2d 459, 464-65 (9th Cir. 1991) ("In diversity cases, state law governs the award[s] of prejudgment interest.").

Lastly, the Court emphasized, "in the absence of authority to grant post-award, pre-judgment interest, the losing party in the arbitration has 'an incentive . . . to withhold payment' a result contrary to the purposes of the Convention" ***and the FAA***. *Cubic Defense*, 665 F.3d at 1103. Indeed, the Ninth Circuit has explicitly adopted this rationale in the context of awarding Period II interest under the FAA. *See AT&T*, 98 F.3d at 1211 ("Any other result would penalize the prevailing party, and in certain circumstances might also encourage losing parties to instigate postjudgment litigation so they can reap the benefits of a low interest rate."). In this case Lloyd's delayed paying the award for approximately four years, and has now delayed paying the interest due for nearly two years. *Lundgren* and *Cubic Defense* put to rest Lloyd's contention that the FAA precluded the district court from including Period II interest in the judgment.

2. Lloyd's "Prohibited Modification" Arguments Are Unsupported by Any Precedent and Logically Flawed as Is Its Contention That the Panel Resolved the Period II Interest Issue

In light of the above, the Court need not dwell on Lloyd's contention that the district court had no power to award Period II interest. In any event, Lloyd's

discussion of the topic not only glosses over the distinction between modifying the award and including interest in the judgment confirming the award, but is otherwise misleading and without merit.

Although unable to cite any case that has adopted its position, Lloyd's first asks the Court (at 35) to simply ignore the settled Ninth Circuit precedent holding that a judgment confirming an arbitration award should include Period II interest. Lloyd's reason: "none identifies the source of a federal court's power to award such interest following an arbitration governed by the FAA in which all substantive issues are committed to the arbitrator for resolution." (AB27.) But, as *Northrop* explained, in "diversity actions seeking enforcement of arbitration awards under the Federal Arbitration Act," state law determines a party's right to prejudgment (Period II) interest. 842 F.2d at 1155. In other words, the "source" of power comes from the FAA and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983) (explaining that the FAA "is something of an anomaly in the field of federal-court jurisdiction" in that "it does not create any independent federal-question jurisdiction," thereby requiring "diversity of citizenship or some other independent basis for federal jurisdiction"); *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir. 1980) ("In this diversity action, the court must apply the substantive law of the forum state . . . .") (citing *Erie R.R. Co.*, 304 U.S.

64). The "source" of the court's power to award Period II interest in this case is Nevada law.

Lloyd's further suggests (at 20) that *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), overruled, *sub silencio*, the settled body of law requiring the judgment in this case to include Period II interest. *Hall Street*, however, merely held that the FAA's "statutory grounds" for judicial review of an arbitration award are "exclusive," *id.* at 578, 583-84, which is the same limitation found in the New York Convention. *See* Argument § I(A)(1). *Hall Street* did not, in any way, call into question the principle that when ***confirming*** an arbitration award a court should award interest pursuant to state law from the date of the award through the entry of judgment (i.e., Period II interest). To the contrary, *Hall Street* confirmed the very principle on which this settled body of law rests: that the Act is "something of an anomaly in the field of federal-court jurisdiction" in that it requires "an independent jurisdictional basis." *Id.* at 581-82 (quoting *Moses H.*, 460 U.S. at 25 n.32); *accord AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1002 (11th Cir. 2007) (quoting this same portion of *Moses H.* to support its holding that Period II interest is available because "[a] judgment entered under the Federal Arbitration Act on an award has the force and effect of a judgment recovered in any other civil action, regardless whether the

court enters an order 'confirming, modifying, or correcting the award'.") (citation omitted).

Moreover, the Ninth Circuit has long recognized the "limited" review courts play in reviewing an arbitration award in the context of the very cases finding Period II interest appropriate in the judgment. *See, e.g.*, *Lundgren*, 307 F.2d at 110; *Northrop*, 842 F. 2d at 1156-57 & n.6 (holding that party that successfully confirms arbitration award under FAA diversity action is entitled to interest as allowed by state law and noting the "limited" review under the FAA). Consequently, the fact that "[j]udicial review *of the award* is . . . quite circumscribed" under the FAA has no bearing on whether the judgment should include Period II interest. *See Cubic Defense*, 665 F.3d at 1102-03 (internal quotation marks and citation omitted).

Lloyd's also suggests (at 24) that the parties "addressed pre-judgment [Period II] interest in the arbitration." Not so. As the very portions of the record Lloyd's cites demonstrate, the parties addressed the amount of Period I interest due on the contract damages, which interest continued to accrue until paid. (*See* DER45-46, 76-87.) Indeed, as noted in the Opening Brief (at 33-34), the Awards did not in any way purport to address ***post-award*** interest, and in no way suggested that the Panel intended to deprive Lagstein of the post-award interest he is due as a matter of right under applicable law in connection with ***confirming*** the award.

And the fact that the Awards include some Period I interest, which continued to accrue, is irrelevant to whether the judgment should include Period II interest on the other damages reduced to an award. *See Cubic Defense*, 665 F.3d at 1102 (rejecting argument that post-award, prejudgment interest is unavailable because "the Award does provide for some pre-judgment interest").

3. Lloyd's Discussion of the Pertinent Authority Is Misleading

Unable to point the Court to any case that has adopted its position, Lloyd's buries its discussion of controlling precedent in footnotes. But the Court should not be fooled by Lloyd's ostrich-like approach.

(a) Contrary to Lloyd's Contention, the Ninth Circuit Has Already Held Prejudgment/Period II Interest Is Appropriate in a Case Like This

Lloyd's relegates its discussion of *Lundgren* to footnote 10, where it concedes that "Lagstein does accurately describe" the case. Lloyd's further concedes (in footnote 10) that *Lundgren* held that Period II interest should "run from the date of an arbitral award" if permitted by the pertinent state law. Lloyd's offers only one reason for why the Court should not follow *Lundgren* in this case: that the Panel here addressed "the propriety" of awarding Period II interest. That assertion is false. (*See* OB at 33-34; Argument § I(A)(2).) Moreover, the Ninth Circuit has rejected the argument that inclusion of some prejudgment interest in an arbitration award precludes including Period II interest in the judgment confirming

the award when a party is entitled to that interest under the governing law. *See Cubic Defense*, 665 F.3d at 1102 (rejecting argument that post-award, prejudgment interest is unavailable because "the Award does provide for some pre-judgment interest").

In footnote 7, Lloyds asks the Court to disregard *Northrop Corp. v. Triad International Marketing, S.A.*, 842 F. 2d 1154 (9th Cir. 1988), because that case purportedly "involved only the question whether ***post-judgment*** interest should run from the date of the original judgment vacating the arbitral award instead of the date of the judgment confirming the award after remand." That is also false. In fact the case presented "[t]wo questions," including "whether ***prejudgment*** and postjudgment interest should be conducted at the rate fixed by federal law or state law." *Id.* at 1155 (emphasis added). In the context of discussing the first issue, the Ninth Circuit rejected creating an exception to "[t]he recognized general rule . . . that state law determines the rate of prejudgment interest in diversity actions." *Id.* Noting that the Ninth Circuit had previously "applied state law to the determination of prejudgment interest in a diversity suit under the Federal Arbitration Act," *id.*, *Northrop* emphasized that "[t]he district court's judgment should reflect what would have happened had the parties immediately complied with the awards instead of going to court." *Id.* at 1157 n.5 (citation omitted).

Lloyd's also asks the Court to disregard *AT&T*, claiming (at 32) that "[i]t said nothing about awarding post-award, pre-judgment interest," (i.e., Period II interest). That is misleading. In fact, *AT&T's* analysis of Period II interest vis-à-vis Period III interest presupposes, under existing Ninth Circuit precedent, the appropriateness of awarding Period II interest to a party who succeeds in confirming an arbitration award. Essentially, *AT&T* dealt with the "flip side" of the circumstances in *Northrop* and, as in *Northrop*, sided with the "equitable principles" of compensating the prevailing party and discouraging "losing parties [from] instigat[ing] postjudgment litigation so they can reap the benefits of a low interest rate." *AT&T*, 98 F.3d at 1210-11. There, in a prior appeal, the party who had successfully confirmed the arbitration award "cross-appealed, arguing that the district court erred by failing to calculate prejudgment interest according to California law." *Id.* at 1207-08. The Ninth Circuit "held that the district court erred in its calculation of interest and remanded with instructions that ***prejudgment interest*** be calculated under California law." *Id*. at 1208 (emphasis added). On remand, the district "court concluded that prejudgment interest should" run from "the date of entry of the first judgment, and postjudgment interest thereafter," even though the "California state prejudgment interest rate was" higher than the federal rate. *Id*. The Ninth Circuit found the district court erred, explaining that when an award has been vacated and reinstated under the FAA, the award of prejudgment

interest should run through the judgment that "more fully compensates . . . [the prevailing party] for the loss of use of its money due to the delay occasioned by . . . [the other party's] actions." *Id.* at 1211. Accordingly, the Court held "that prejudgment interest applies up until the . . . [later] judgment following remand, and that postjudgment interest applies after this date." *Id.*

(b) Cases Outside the Ninth Circuit Likewise Undercut Lloyd's "Prohibited Modification" Argument

With respect to cases outside the Ninth Circuit, Lloyd's ignores *Executone Information Systems, Inc. v. Davis*, 26 F.3d 1314, 1329-30 (5th Cir. 1994), which held that in an FAA diversity action governed by Texas law, the Texas prejudgment interest statute governs a party's right to Period II interest.

As for *AIG Baker*, Lloyd's says (in footnote 7) that "[t]he Eleventh Circuit did not address whether the issue of pre-judgment interest was one for the arbitrator . . . ." But the Eleventh Circuit's holding and rationale foreclosed that issue:

- "We join our sister circuits that have addressed this question and hold that state law governs the availability and amount of prejudgment interest in diversity cases involving the Federal Arbitration Act." *AIG Baker*, 508 F.3d at 1002.
- "The availability and amount of prejudgment interest does not depend on whether the district court confirms or modifies the award." *Id.*
- "A judgment entered under the Federal Arbitration Act on an award has the force and effect of a judgment recovered in any other civil

action, regardless whether the court enters an order 'confirming, modifying, or correcting the award'." *Id*. (citation omitted).

- "As in any other civil action based on diversity of citizenship, the district court must look to state law to determine the availability and amount of prejudgment interest when it enters a judgment, regardless whether that judgment confirms or modifies an award under the Federal Arbitration Act." *Id*.

Also in footnote 7, Lloyds dismisses *InterDigital Communications Corp. v. Federal Insurance Co.*, 607 F. Supp. 2d 718 (E.D. Pa. 2009), because it "did not involve the FAA." True, but it did involve the Pennsylvania Uniform Arbitration Act which is "virtually identical" to the FAA "with respect to the[] provisions regarding vacating arbitration awards." *InterDigital Commc'ns Corp. v. Fed. Ins. Co.*, No. 03-6082, 2008 WL 783560, at *2 n.2 (E.D. Pa. March 24, 2008). Moreover, the rationale for its holding – that Period II interest is available from the date of the award regardless of whether "the underlying arbitration award specifically provided for the statutory interest entitlement," applies equally to the FAA (*InterDigital*, 607 F. Supp. 2d at 722).

Lastly, with the exception of *Sansone v. Metropolitan Property & Liability Insurance Co.*, 572 N.E.2d 588 (Mass. App. Ct. 1991), Lloyd's simply ignores the various state cases involving equally rigorous arbitration acts – including *Creative Builders* upon which *Mausbach* relies – all holding that an award of Period II interest, unlike an award of Period I interest, involves no modification of the arbitration award. *See Creative Builders v. Ave. Devs., Inc.*, 715 P.2d 308, 313

(Ariz. Ct. App. 1986) (holding that in confirming an arbitration award, a trial court may not award any additional "pre-award interest," but may award "interest from the date of entry of the award itself"); *Nat'l Ave. Bldg. Co. v. Stewart*, 972 S.W.2d 649, 651 (Mo. Ct. App. 1998) ("There are a number of reported cases holding that a party obtaining an arbitration award is entitled to interest from the date of the award to the date of the judgment confirming it."); *Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312, 1318 (Alaska 1997) (a court may award post-award interest, and such a rule is "consistent with the holdings of many courts which have considered the question" (citing cases)).

In the end, therefore, Lloyd's contention that the district court could not include Period II interest in the judgment ***confirming*** the award without ***modifying*** the award in violation of the FAA goes nowhere.

B. Lloyd's New Argument on Appeal That the Prior Mandate Precluded Any Award of Prejudgment/Period II Interest Ignores Settled Law

Lloyd's contention (at 33) that the mandate precluded the district court from including Period II interest in the judgment – a contention raised for the first time on appeal – is nonsense and contrary to settled law.

1. A Mandate Only Precludes a District Court from Reconsidering Matters Determined on Appeal

"[A]lthough lower courts are obliged to execute the terms of a mandate, they are free as to anything not foreclosed by the mandate, and, under certain

circumstances, an order issued after remand may deviate from the mandate . . . if it is not counter to the spirit of the circuit court's decision." *Cassett v. Stewart*, 406 F.3d 614, 621 (9th Cir. 2005) (citation omitted). "[I]n construing a mandate, . . . the ultimate task is to distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not." *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000); *see also* *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) ("[A]lthough the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it 'leaves to the district court any issue not expressly or impliedly disposed of on appeal.'" (citation omitted)); *cf.* *Mortimer v. Baca*, 594 F.3d 714, 720 (9th Cir. 2010) (law of the case doctrine only precludes consideration of issues "actually decided by the first court" (citation omitted)).

2. The Court in Lagstein I Did Not Decide the Issue of Prejudgment/Period II Interest, but Instead Left That Issue for the District Court to Address in the First Instance

In this case, the issue of post-award/prejudgment interest was not "decided on appeal," and therefore was not "beyond the jurisdiction of the lower court . . . ." *Kellington*, 217 F.3d at 1093. To the contrary, the Court "remand[ed] for confirmation of all of the awards," *Lagstein*, 607 F.3d at 647, which is a directive to take the ***first step*** toward entry of judgment and proceed accordingly – not a

directive to deny Lagstein interest. The mandate, therefore, in no way "foreclosed" including the Period II interest due Lagstein as a matter of law in the judgment. *Cassett*, 406 F.3d at 621.

Indeed, in this case, the Ninth Circuit dismissed as moot Lagstein's motion specifying that "if the [Ninth Circuit] . . . is inclined to have the district court consider the interest issue in the first instance and is inclined to agree that the state rates should apply until the awards are confirmed on remand, it need not specify anything about interest in the mandate . . . ." (9th Cir. ECF-66 at 11 n.7; ECF-161.) Given that context, the mandate can only be construed as leaving the issue of Period II interest open; otherwise the motion could not have been dismissed as moot. *Cf. New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 352 F.3d 599, 606 (2d Cir. 2003) (on remand, district court could properly include in judgment prejudgment interest under state law even though the opinion addressed post-judgment interest because it "did not say or imply that interest called for by New York law should *not* have been awarded for the period before the federal jury verdict."); *Nguyen*, 792 F.2d at 1502 (holding that mandate ordering entry of summary judgment in favor of defendant required district court to enter summary judgment but did not preclude court from allowing plaintiff to amend complaint immediately thereafter); *Edlin v. M/V Truthseeker*, 69 F.3d 392, 393 (9th Cir. 1995) ("Arguably, our mandate here did not foreclose the district court's

consideration of" prevailing party's motion, one year after mandate issued, for costs incurred during the appeal.); *Caldwell v. Puget Sound Elec. Apprenticeship & Training Trust*, 824 F.2d 765, 767 (9th Cir. 1987) (where mandate stated that "judgment for . . . [plaintiffs], including back pay, costs, and attorney's fees, is REVERSED," without remanding or mentioning front pay award, district court acted "consistent with the mandate" by assuming jurisdiction after entry of judgment and granting defendants restitution of front pay (internal quotation marks and citation omitted).

Moreover, Lloyd's apparently did not view the mandate as foreclosing an award of Period II interest ***when it issued*** because it made no such argument about the mandate below. To the contrary, the parties and the district court all indicated through their conduct that they believed the mandate ***allowed*** the district court to consider the issue of Period II interest (along with attorneys' fees). Lloyd's suggestion that the Ninth Circuit should now (several years later) construe its prior mandate to have a different meaning from the one ascribed to it by everyone below should fall on deaf ears.

3. Contrary to Lloyd's Suggestion, F.R.A.P. 37 Is Irrelevant to the Prior Remand in This Case

For good reasons, Lloyd's also never suggested below that Federal Rule of Appellate Procedure 37, which codified *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1948), precluded the district court from including Period II interest in the

judgment. First, by its plain terms, Rule 37(b) only applies when the appellate court directs "that a money judgment be entered by the district court . . . ." F.R.A.P. 37(b). Accordingly, to apply, "there must be at least some indication that the mandate is directing entry of a *particular* money judgment." *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 103-104 (2nd Cir. 2004); *cf. Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F. 3d 691, 703 (9th Cir. 1996) ("Rule 37 is inapposite because we never directed that a money judgment be entered in the district court.").

In the case, the Court did not direct the district court to enter any particular money judgment, but rather "remand[ed] for confirmation of all of the awards." *Lagstein*, 607 F.3d at 647. This Court accordingly contemplated that any further proceedings following confirmation under 9 U.S.C. § 10 (such as resolution of interest and attorneys' fees) would occur on remand. *Cf. Westinghouse*, 371 F.3d at 104 (although it was "clear that the effect of the mandate and opinion was to ensure that the district court would ultimately enter a money judgment in favor of Westinghouse, neither document suggested what the amount of the judgment should be or that the judgment could be entered by the district court without further proceedings"); *Adrian v. Town of Yorktown*, 620 F.3d 104, 107 (2d Cir. 2010) (although appellate court "specified the dollar amount of a reinstated jury verdict . . . [it] did *not* order that a money judgment be entered in that amount," and

instead remanded for further proceedings, Rule 37 left the district court free to include prejudgment interest in the judgment).

Second, in the Ninth Circuit "[t]he general rule is that when an appellate court reverses a judgment of the district court and directs that a money judgment in favor of a claimant be entered upon remand, ***prejudgment interest runs through the date of the newly-entered judgment***." *AT&T*, 98 F.3d at 1209 (emphasis added). Rule 37 comes into play only if a party believes that ***post-judgment*** interest should run "from a date other than the date of entry of judgment on remand . . . ." *Planned Parenthood of the Columbia/Williamette Inc. v. Am. Coal. of Life Activists*, 518 F.3d 1013, 1022 (9th Cir. 2008). And, the Panel had been made aware of this rule when it denied Lagstein's Motion as moot. *Cf. New England*, 352 F.3d at 604 ("In light of the scope of *Briggs* and the apparent purpose of Rule 37(b), we read the rule to speak solely to the matter of post-federal-verdict interest.").

Third, "[a]lthough Rule 37 provides the general rule for an award of interest on judgments, Rule 37 does recognize that exceptions to the general rule may be 'otherwise provided by law.'" *United States v. Fed. Ins. Co.*, 857 F.2d 1457, 1459 (Fed. Cir. 1988). Consequently, when a statute entitles a party to prejudgment interest as a matter of right, "the rule set forth by that exception must be applied." *Id.* In this case, therefore, the district court should have included in the judgment

the prejudgment interest to which Lagstein was entitled under Nevada law. *See id.* at 1460 (holding that on remand party was entitled to prejudgment interest even though mandate made no provision for such interest because that interest was specifically provided for by statute).[4]

4. In Any Event, and Given the Record in This Case, the Court Could and Should Clarify the Mandate If It Somehow Precluded Period II Interest

In any event, the Court always may clarify or change its mandate for "good cause" or to "prevent injustice." *Graham v. Balcor Co.*, 241 F.3d 1246, 1248 (9th Cir. 2001) ("Our authority to clarify or change our mandate is clear."). In this case, the prior Panel intended the district court to consider the issue of Period II interest in the first instance. Moreover, the law should not encourage parties to stay silent when they believe another party has asked the district court to act beyond the scope of the mandate, as Lloyd's suggests occurred in this case. Accordingly, if as a technical matter and notwithstanding the above, the mandate somehow precluded the judgment from including Period II interest, the mandate should now be corrected.

[4] Although Rule 37 was subsequently amended, the changes were "intended to be stylistic only." F.R.A.P. 37 cmt. to 1998 amendments.

C. Lloyd's Contention That Nevada Law Does Not Authorize Period II Interest Mischaracterizes *Mausbach*

The Opening Brief demonstrated (1) that Period II interest is available as a matter of right under Nevada law (OB19-21), and (2) that the district court erred in concluding that Nevada law "strictly precluded" it from granting post-award (pre-judgment) interest," (ECF-74 at 5) (OB25-30). In its Answering Brief, Lloyd's largely ignores this analysis, but nevertheless attempts to defend the superior court by relying exclusively on *Mausbach v. Lemke*, 866 P.2d 1146 (Nev. 1994). (AB29-32.) Its analysis, however, likewise relies on the demonstrably false premise that *Mausbach* used the term "postjudgment" to refer to Period III interest.

In particular, Lloyd's ignores and cannot dispute that

- The issue in *Mausbach* concerned "prejudgment interest ***from the date the lawsuit was filed***," i.e., Period I interest, *id*. at 1148 (emphasis added), and the opinion repeatedly used the term "prejudgment interest" synonymously with "pre-award interest";
- *Mausbach* followed "the weight of authority" and relied on *Creative Builders*, both of which prove the judgment should have included interest "commencing from the date of entry of the award itself," i.e., Period II interest. *Mausbach*, 866 P.2d at 1150 (citing *Creative Builders*, 715 P.2d at 313);
- Neither Nev. Rev. Stat. § 17.130 nor Nev. Rev. Stat. § 99.040 use the term "postjudgment" or "prejudgment," and it is impossible to construe the language of these statutes as precluding Period II interest.

Lloyd's also cannot dispute that the plain language of the pertinent statutes required the district court to include Period II interest in the judgment. (Compare

OB28-29 with AB36-38.) Accordingly, Lloyd's argument for disregarding Nevada's interest statutes goes nowhere.

D. Contrary to Lloyd' Contention, Interest Should Be Calculated on All Components of the Awards at the Rate of 10.25%, or Alternatively 9.75%

Recognizing that the judgment should have included some Period II interest, Lloyd's alternatively argues (at 36-38) that Lagstein requested too much. But that argument misconstrues Nevada law.

1. There Is No Basis for Excluding the Punitive Damages Component of the Awards

Relying on *Ramada Inns v. Sharp*, 711 P.2d 1, 2 (Nev. 1985), Lloyd's contends (at 36) that the judgment may not include Period II interest on the punitive damages portion of the Award. Tellingly, however, Lloyd's has cited no authority, let alone any Nevada authority, indicating that a court may exclude certain components of an arbitration award when calculating such interest. Moreover, its response simply ignores that the very distinction relied upon by *Ramada Inns* – allowing interest to accrue once the ***amount*** of punitive damages is "known" – supports including Period II interest in the judgment. Lloyd's further ignores *Powers v. USAA*, 962 P.2d 596, 605 (Nev. 1998), which explained that once the amount of punitive damages is determined, Nevada's interest statutes require interest on all components of a judgment to compensate the plaintiff for

delay in payment, and avoid creating an incentive for the defendant to delay. (*See* OB38-39.)

Tellingly, this Court has applied that same logic to 28 U.S.C. § 1961, and held that "once a judgment is obtained, interest thereon is mandatory ***without regard to the elements of which that judgment is composed***." *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290 (9th Cir. 1994) (internal quotation marks and citation omitted) (emphasis added). Lloyd's has provided no reason to believe that prejudgment interest under the pertinent Nevada statutes would operate differently. Accordingly, just as the judgment should include Period III interest, the judgment should include Period II interest "without regard to the elements" comprising the award. *Id.*

2. Lloyd's Is Wrong About the Applicable Interest Rate

Lloyd's contention (at 37-38) that the Court should apply interest at a rate of 5.25%, rather than 10.25% or 9.75% is mistaken. As a threshold matter, Lloyd's does not dispute that under controlling Ninth Circuit precedent Lagstein's interest award should be calculated in the manner that "more fully compensates" Lagstein "due to the delay occasioned by" Lloyd's actions. *AT&T*, 98 F.3d at 1211. Nevertheless, Lloyd's asks the Court to allow it to benefit from its incessant litigation that ultimately delayed entry of the judgment in this case by five years. In other words, Lloyd's asks the Court to adopt the very rule the Court has

criticized: one that would "encourage losing parties to instigate postjudgment litigation so they can reap the benefits of a low interest rate." *Id.*

Contrary to Lloyd's contention, however, the very purpose of Nev. Rev. Stat. § 17.130 is to set the interest rate close in time to when the parties' rights have been determined. In an arbitration, as *Mausbach* suggests, 866 P.2d at 1148 n.2, the first "date of judgment" under § 17.130(2) is the date of the arbitration award, not some later judgment confirming the arbitration award. *Cf. Northrop*, 842 F.2d at 1156 (when an arbitration award is entered, "liability has been determined and the amount due has been fixed by a neutral factfinder"). In any event, under *AT&T*, 98 F.3d at 1211, the rate could not be determined by any date later than the date when the arbitration award should have been confirmed, which leads to precisely the same result. (*See* OB35-36.) And if using that date requires amending the prior mandate, so be it.

Lloyd's effort to avoid Nev. Rev. Stat. § 99.040 (at page 30, note 8 and page 38) likewise fails. As a threshold matter, although Lloyd's correctly notes (at page 30, note 8) that Lagstein first raised the argument concerning Section 99.040 in his reply brief below, he raised the ***issue*** of interest due in his motion, and there is no bar to "raising new *arguments* on appeal if those arguments are purely legal," like here. *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1502 n.8 (9th Cir. 1995) (noting that "[a] court of appeals has the discretion to consider those new theories" if

purely legal). Moreover, the issue has been fully briefed, and Lloyd's cannot claim any prejudice. Indeed, Lloyd's moved to strike and objected to other points Lagstein made during the reply briefing below (*see, e.g.*, ECF-170), yet Lloyd's raised no objection to the Section 99.040 argument. Accordingly, the Court should consider the issue on appeal if it concludes the 10.25% rate under Section 17.130 does not apply. *Cf. Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2010) ("It is well-established that a party can waive waiver implicitly by failing to assert it" (internal quotation marks and citation omitted)).

Lloyd's further contends (at page 30, note 8) that Section 99.040 cannot apply because this is not a contract action, and seeks to distinguish *United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 919 (9th Cir. 2009), on the ground that *Park Place* involved an action to ***vacate*** an arbitration award (rather than one to enforce in the context of a breach of contract action initiated in federal court). (AB30, n.8.) That distinction is irrelevant under *Park Place*, "***[a]n action under the FAA***" – whether to enforce or vacate – "is an action in contract to enforce the arbitration provision." *Id.* (emphasis added). Moreover, Lloyd's misconstrues *Hall Street's* observation that FAA obviates the need for the "***separate*** contract action that would usually be necessary . . . ." (AB30, n.8 (quoting 552 U.S. at 582) (emphasis added).) As the context of that quotation makes clear, the Supreme Court was making the point that the FAA provides an expedited procedure, thereby

making a new "***separate*** contract action" unnecessary; it did not suggest that an action under the FAA was not ***also*** a contract action. In any event, as the Complaint makes clear, this case is an action in contract (*see* ECF-5 ¶¶ 33-38 (alleging breach of contract)), in which Lagstein ultimately sought to confirm the award that resulted from the arbitration Lloyd's insisted upon.

Lastly, Lloyd's contends (at 38) that even if Section 99.040 applies, the interest rate under the statute "is 0%" because "[n]o monies ever 'came due' under the arbitration provision (as distinct from the insurance contract) . . . ." As a threshold matter, Lloyd's does not dispute that money "came due" under the insurance contract, so its argument goes nowhere. And, if Lloyd's is correct, prejudgment (Period II) interest would never be available in any contract action that went to arbitration, notwithstanding Section 99.040's purpose to compensate for delay in payment. Moreover, Lloyd's misconstrues the nature of an arbitration award in this context. As the Ninth Circuit has emphasized, an arbitration award determines the rights of the parties by fixing "the amount due" between them. *Northrop*, 842 F.2d at 1156. Lloyd's contention that nothing is due until the awards are reduced to a judgment gets it backwards: "Until . . . [such] awards are vacated, they are conclusive as to the rights of the parties." *Id.* at 1156-57 n.5 (explaining also that "[i]t should be the rule, rather than the exception, that when

arbitrators hand down an award the parties will comply with it, without the necessity of court proceedings").

E. Summary of Argument Regarding Period II Interest

In sum, the Court previously found the district court erred by declining to confirm the Awards, and remanded for the confirmation process to be completed – leaving the issue of the amount of interest to include in the final judgment to the district court. Including such interest in the judgment does not involve modifying the Awards, and merely compensates Lagstein for the delay caused by Lloyd's. As for the amount, the law is clear that interest should be calculated in the manner that most benefits Lagstein; Lloyd's should not benefit from the significant delays it has caused.

II. Contrary to Lloyd's Contention, the District Court Erred by Concluding It Lacked the Power to Award Lagstein the Fees He Is Entitled to Under Nevada Law

The Opening Brief demonstrated (at 40-46) that the district court erred in failing to award Lagstein the fees incurred in defending and confirming the Award. In particular, the Opening Brief demonstrated the district court erred by relying on *Kim-C1, LLC v. Valent Biosciences Corp.*, 756 F. Supp. 2d 1258 (E.D. Cal. 2010), to conclude that "federal procedural rules apply to the issue . . . [of] attorney fees" (ECF-174 at 13). (*See* OB42-44.)

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In its Answering Brief, Lloyd's does not defend the district court's analysis. Instead, it insists that the issue of attorneys' fees is arbitrable, and that the Panel already addressed the issue. Lloyd's further contends that federal courts have no power to award fees related to the confirmation proceedings that occur in federal court. (AB38-45.) These contentions are without merit.

A. Lloyd's Contention That the Panel Resolved the Issue of Post-Award Fees Is False

As a threshold matter, Lloyd's contention (at 38-39) "that the issue of attorneys' fees was submitted to the arbitrators" and "the arbitrators in fact exercised their authority to award such fees" is, at best, misleading. Before the arbitrators, Lagstein only requested the fees incurred in connection ***with the arbitration***. There is nothing in the record that in any way suggests that Lagstein asked the arbitrators to award him the ***future*** fees he would subsequently incur over the next five-plus years in federal court, and there is nothing suggesting the arbitrators considered that issue. Indeed, such a request for future fees would have been bizarre, is not supported by any authority, and undoubtedly would have been vehemently opposed by Lloyd's.[5] Moreover, that the Panel found Nevada law entitled Lagstein to attorneys' fees helps Lagstein not Lloyd's. That finding means

[5] Although Lloyd's speculates (at 39) that the arbitrators intended the punitive damages award to allow Lloyd's to cause Lagstein to incur ongoing future fees without any future compensation, that is not what the arbitrators said in their decision. (*See* ECF-63.)

the Panel found the fee statute applicable, meaning the Court should likewise apply the Nevada fee statute to the additional fees Lagstein has incurred in federal court since the Awards.

B. Lloyd's Contention That a Federal Court Lacks the Power to Award a Party Who Successfully Confirms an Arbitration Award the Fees Incurred in the Federal Action Does Not Withstand Scrutiny

Lloyd's further contention – that a federal court has no power to award a party the fees incurred in confirming an award in federal court – is legally and logically flawed. For starters, and contrary to Lloyd's suggestion, the only pertinent Ninth Circuit authority, albeit not precedential, has applied state law to determine the availability of fees when a party successfully confirms an arbitration award. *See Kyocera v. Prudential-Bache Trade Servs., Inc.*, 299 F.3d 769, 793 (9th Cir. 2002) (en banc); *SCIE LLC v. XL Reinsurance Am. Inc.*, 397 Fed. App'x 348, 351 (9th Cir. 2010). Lloyd's effort to distinguish the authority fails.

With respect to *Kyocera*, 299 F.3d at 793, Lloyd first contends (at 28-29) that the agreement in that case "necessarily contemplated that . . . the court could award the attorney fees incurred in the judicial proceedings." In fact, however, as the Court emphasized, "[t]he Definitive Agreement arbitration clause broadly provides that *all questions, disputes or differences* arising out of the agreement shall be settled by arbitration." *Kyocera*, 299 F.3d at 794. The Court further noted that the specific attorneys' fees provision "does not limit recovery of attorney fees

to arbitration proceedings" (i.e. that fees could be recovered in the confirmation proceeding). *Id*. Addressing that latter issue – and notwithstanding the broad language in the arbitration clause – the Court held that because the arbitrators had not specifically addressed the issue of fees incurred in confirming the award, the district court had the power to do so:

> The Tribunal, however, did *not* determine that attorney fees were unavailable, so the district court cannot be said to be impinging on the arbitrators' decision. ***That the Tribunal may have had the power to award attorney fees does not necessarily preclude the district court from exercising its power to do so***.

Id. at 794-95 (emphasis added). And of even more significance, this discussion occurred after the Court concluded that "[i]n reviewing an arbitration award, a district court may award attorney fees on the contract at issue" if permitted under state law, *id.* at 793, and in the context of ***rejecting*** the very argument Lloyd's advances here: "Kyocera maintains that any award of fees or costs over the amount already awarded by the Tribunal would be inconsistent with federal arbitration policy. We determine that this argument lacks merit." *Id.* at 794.

Lloyd's next contends (at 43-44) that both *Kyocera* and *SCIE LLC*, 397 Fed. App'x at 351 are irreconcilable with *Hall Street*. Setting aside that the Ninth Circuit decided *SCIE LLC* ***after*** *Hall Street*, that argument fails for reasons set forth in Argument Section I(A)(2), and ignores that settled Supreme Court and

Ninth Circuit precedent make clear that diversity jurisdiction principles apply in this case. (*See* OB17-19, 40-41.)

That leaves Lloyd's with only out-of-circuit cases. But with respect to *Menke v. Monchecourt*, Lloyd's is simply wrong that the Seventh Circuit recognized the applicability of diversity principles to the FAA; it found conclusive that "there is nothing in the Federal Arbitration Act ***itself*** that" provides a basis to "independently award additional attorneys' fees," 17 F.3d at 1009 (emphasis added), which misses the point. Moreover, as this case demonstrates, *Menke* rests on a demonstrably false premise: that the post-award proceeding in federal court will merely be "a summary" one. *Id.* Lastly, the statute in *Menke* only provided for fees on "appeal," which the Court found inapplicable to arbitration. *Id. Menke* cannot be stretched to apply to this case.

Lloyd's concedes (at 42) that *Schlobohm v. Pepperidge Farm, Inc.*, 806 F.2d 578 (5th Cir. 1986), involved only ***pre-award*** fees (rather than fees incurred in federal court to confirm the arbitration award). Nevertheless, Lloyd's insists that its rationale applies to both pre-award fees and any fees incurred during the federal confirmation process. Given the actual context of the dispute, however, *Schlobohm's* dicta that "a strong case could be made that any award of attorney's fees, interest, and costs was necessarily submitted to the arbitrators," 806 F.2d at 581, can only be read as referring to the dispute over ***pre-award*** fees. Indeed, to

support its rationale, *Schlobohm* cited *Kermacy v. First Unitarian Church*, 361 S.W.2d 734, 735 (Tex. Civ. App. 1962) for the proposition that "[i]t is our opinion that appellant's claim for interest ***prior to the date of the award*** of the arbitrators was merged in the award." (Emphasis added). *See* 806 F.2d at 581. Moreover, its rationale that it would be "inconsistent with the language and policy of the Federal Arbitration Act" to allow a court to award fees "where the parties made an agreement intended to avoid court litigation by resolving the entire dispute through arbitration," *id*., only applies in the context of pre-award fees; regardless of any agreement to resolve "the entire dispute through arbitration," *id*., any fight over confirmation will occur in federal court. Having the federal court address the fees incurred before it is not "inconsistent with the language and policy of the Federal Arbitration Act." *Id.*

Lloyd's is dead wrong that *Burlington Northern & Santa Fe Railway Co. v. Public Service Co. of Oklahoma*, 636 F.3d 562, 571 (10th Cir. 2010), supports its theory. That case correctly applied diversity principles, and concluded that "[b]ecause the district court's jurisdiction was based on diversity jurisdiction, Oklahoma law on attorney fees governs." *Id.* at 571. After doing so, the Tenth Circuit ***rejected*** BNSF's argument that the arbitration agreement's provision specifying that each party "shall pay all costs of its . . . legal counsel" precluded the district court from awarding "the post-arbitral expense of defending the board's

final decision in court" as required under state law. *Id*. at 571-72 (citation omitted).

Within this context, the Tenth Circuit made the comment quoted by Lloyd's: that BNSF did not argue "that the ***scope*** of attorney fees is arbitrable" (i.e. BNSF did not argue that only the arbitration panel could decide ***whether*** the fee provision precluded the district court from awarding post-award fees). *Id*. at 572 (emphasis added). The Tenth Circuit concluded that it had the power to decide that issue, noting that "the agreement could have made arbitrable all aspects of the ***arbitration procedures***" set forth in the agreement (i.e., the agreement could have given the arbitrators the exclusive power to determine the scope of the attorneys' fee provision), but it did not. *Id*. (emphasis added). Here, Lagstein's entitlement to fees comes from Nevada law, which the Panel has already determined entitles Lagstein to fees. Accordingly, whether only the Panel may determine if Nevada law entitles Lagstein to fees is a non-issue.

Lastly, Lloyd's position is illogical. According to Lloyd's, an arbitration panel should decide the issue of post-award fees before the post-award proceedings have been completed, even though they will occur in another forum. Alternatively, Lloyd's seems to suggest that after completing the confirmation process (which in this case took five years), the case should be remanded to the arbitrators to resolve the issue of fees incurred in federal court. Neither alternative makes sense. The

far more logical conclusion – and the one endorsed by the Ninth and Tenth Circuits – is that the federal courts should resolve the issue of post-award fees incurred in their courts pursuant to the applicable substantive law (just as they resolve the issue of post-award interest). In sum, cases from the Ninth and Tenth Circuits, the implicit rationale from the Fifth Circuit, and cold hard logic all support Lagstein's contention that the district court should have applied Nevada law and awarded Lagstein all post-award fees.[6]

F.R.A.P. 28.1(c)(3) RESPONSE BRIEF TO CROSS-APPEAL

In its cross-appeal, Lloyd's raises one issue: "[w]hether the district court erred in construing the arbitrators' awards to allow for post-award, prejudgment interest on the contract damages." (AB3, 46.) The district court, however, correctly rejected Lloyd's outrageous effort to take back from Lagstein monies it ***agreed*** in a stipulation were due and owing. This Court should affirm that ruling.[7]

FACTS PERTINENT TO CROSS-APPEAL

I. The Panel Awarded Interest on the Claim Under N.R.S. § 689A.410(1), Which Accrues Until "the Claim Is Paid"

Under Nevada law, an insurance company must pay interest on any claim not timely approved and paid with interest "calculated from 30 days after the date

[6] Notably, Lloyd's did not dispute below that Nevada law entitled Lagstein to these fees, nor did it dispute the reasonableness of the amount requested.

[7] Because this is the only issue on cross-appeal (i.e. the only issue pursuant to which Lloyd's seeks to expand its rights under the judgment), it is the only issue Lloyd's may address in its last brief. *See* F.R.A.P. 28.1(c)(4).

on which the claim is approved ***until the date on which the claim is paid***." Nev. Rev. Stat. § 689A.410 (1) (emphasis added). The Panel "award[ed] to Lagstein interest on his contract damages, as set forth in NRS 689A.410 (1)." (ECF-45 at 50.) The Panel further found "that the '30 days after the claim is approved' shall constitute 30 days after January 17, 2002, the date Lloyd's had to accept the claim," and asked Lagstein to "submit an appropriate accounting of said interest . . . ." (*Id.*) In its subsequent award of punitive damages, the Panel then noted that "[t]he Panel is in agreement that the interest due under the contract damage award ***as of*** November 22, 2006 is ONE HUNDRED NINETY-THREE THOUSAND NINE HUNDRED FIFTY and 17/100 DOLLARS ($193,950.17)." (ECF-63 at 11) (emphasis added). At no time did the Panel conclude or suggest that its award of interest "as set forth in NRS 689A.410 (1)," (ECF-45 at 50), should not, as specified therein, continue to accrue "until the date on which the claim is paid." Nev. Rev. Stat. § 689A.410 (1).

II. The Parties' Stipulation

After the Ninth Circuit issued its opinion, the Parties entered into a stipulation (the "**Stipulation**") pursuant to which Lagstein agreed to a stay of the mandate and Lloyd's agreed to deposit security totaling $7.4 million. (ECF-146 at 10.) The parties further agreed to a specific amount that would be due and owing to Lagstein in the event the Supreme Court denied certiorari. In particular, Lloyd's

agreed that if the Supreme Court denied certiorari, any "***undisputed portion to which he is entitled under the Awards will be distributed to his attorneys' trust account from the security following the certiorari process***." (*Id.* at 9 (emphasis added).) The parties agreed on the amount of the undisputed portion due Lagstein, setting forth in the Stipulation the precise method for calculating the amount to which Lagstein would be entitled if the Supreme Court denied certiorari. (*Id.* at 10-11.) In addition, it provided a short time frame for Lloyd's to object if it had any basis to do so. (*Id.* at 10.) Lastly, the Stipulation reserved to Lagstein the "right to ask the court to award him any additional amounts or relief to which he may be entitled under applicable law (including but not limited to additional interest, attorneys' fees, costs, interest and sanctions)." (*Id.*) The Stipulation did not give Lloyd's any right to later "claw back" the agreed-upon undisputed amount to be distributed to Lagstein.

III. Pertinent Proceedings Before the District Court

On December 14, 2010, after the Supreme Court denied Lloyd's petition for certiorari, Lagstein filed the Notice of Denial of Petition for Writ of Certiorari and Request for Release of Funds contemplated by the Stipulation. (ECF-147.) On December 16, 2010, the district court released the amount required by the Stipulation. (*See* ECF-149.) At that time, Lloyd's said nothing.

Instead, two months later, after Lagstein filed his motion seeking additional interest, Lloyd's filed a Cross-Motion for Return of Overpayment, contending the district court should not have released the stipulated amount. (ECF-164.) The district court denied the Cross-Motion, and found that "Plaintiff is entitled to post-award (prejudgment) interest on his contract damages of $900,000.00 under N.R.S. at a rate of 10.75% from November 23, 2006 until the date the award was paid, December 20, 2010." (ECF-174 at 10.)

ARGUMENT ON CROSS-APPEAL

In its cross-appeal, Lloyd's does not dispute that if the Awards provided for interest on the contract damages until paid, the district court awarded the correct amount of interest on that component. Instead, Lloyd's argues (at 46) that the district court erred because the Panel never said "that interest should run continuously until the payment of the award." That contention is frivolous for at least three reasons. First, the Panel explicitly said interest shall run "as set forth in NRS 689A.410(1)," (ECF-45 at 50), which requires interest to accrue "until the date on which the claim is paid," Nev. Rev. Stat. § 689A.410(1). The arbitrators never suggested Lloyd's could ignore the interest statute's plain language.

Second, Lloyd's agreed that the amount paid Lagstein was the "undisputed" amount due him: (1) the Parties stipulated that "any undisputed portion to which [Lagstein] is entitled under the Awards will be distributed to his attorneys' trust

account from the security following the certiorari process," and (2) the stipulation set forth precisely how to calculate the undisputed portion to be released to Lagstein. (ECF-146 at 9.) Moreover, the Stipulation reserved only to Lagstein the right to claim an amount different from that set forth in the Stipulation was due. (*Id.* at 10.) Accordingly, Lloyd's must live with the stipulation. *See CDN Inc. v. Kapes*, 197 F.3d 1256, 1258 (9th Cir. 1999) (Courts will enforce stipulations among parties "absent indications of involuntary or uninformed consent").

Third, the Stipulation built into it a five-day window within which Lloyd's could object to the release of any funds to Lagstein. (*See* ECF-146 at 10 (providing that "within five days after (1) . . . the denial of the petition for a writ of certiorari by the Supreme Court . . . , and (2) a request for release of the funds by Lagstein, the Court will release from the Security" the amount agreed to by the parties).) Although the district court did not wait the full five days, by failing to make any timely objection to the district court's release of the undisputed monies, Lloyd's waived any objection that Lagstein was owed less than the amount released.[8]

Accordingly, the district court correctly denied Lloyd's Cross-Motion for Return of Overpayment.

[8] In its brief, and without explanation, Lloyd's claims Lagstein asked the district court to release "***disputed***" funds, but the notice used the calculation the parties agreed represented the undisputed monies due. (Compare ECF-146 at 9-11 with ECF-147.)

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REQUEST FOR INSTRUCTIONS CONCERNING POST-JUDGMENT INTEREST ON REMAND

Because the district court should have included Period II interest and fees in the judgment entered on September 23, 2011, which judgment awarded Plaintiff "post-judgment interest . . . at the federal rate" (ECF-177), the Court should instruct the district court on remand to enter the money judgment noted below with post-judgment interest to commence as of September 23, 2011. *See* F.R.A.P. 37(b).

CONCLUSION

For the above reasons and those in the Opening Brief, Lagstein is entitled to interest on $1,871,520.90 (consisting of $1,500,000 in damages for breach of the covenant of good faith and fair dealing, $350,000 in attorneys' fees, and $21,520.94 for the additional arbitrator fees awarded) from August 31, 2006, through December 20, 2010. Lagstein is also entitled to interest on $4,000,000 (consisting of punitive damages) from December 14, 2006, through December 20, 2010. The interest rate on all of these amounts should be the fixed rate of 10.75%, or alternatively no less than 9.75%. The Court should reverse and remand with instructions for the district court to amend the Judgment to include this interest, which totals $2,474,049.78 at the 10.75% rate, and $2,353,364.42 at the 9.75% rate.

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Lagstein is also entitled to recover the attorneys' fees he has been forced to incur to force Lloyd's to pay the full Awards plus interest. Accordingly, the Court should instruct the district court to award Lagstein all fees incurred through the date of the filing of the second notice of appeal.

Pursuant to F.R.A.P. 37(b) governing post-judgment interest, the Court should instruct the district court to include post-judgment interest at the federal rate on the amended judgment commencing as of September 23, 2011.

Lastly, this Court should award Lagstein his fees (and costs) incurred in connection with this appeal.

RESPECTFULLY SUBMITTED this 9th day of July, 2012.

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s/ Thomas L. Hudson
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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 9, 2012.

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