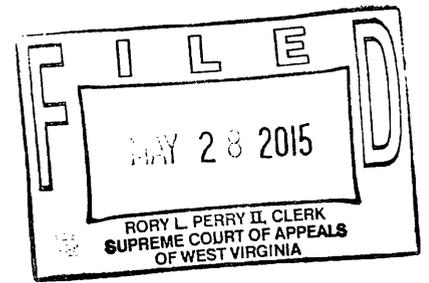


**IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

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**Docket No. 11-1613**

**ON APPEAL FROM THE  
CIRCUIT COURT OF KANAWHA COUNTY**

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**RYAN CUNNINGHAM**  
*Petitioner*

v.

**RONALD F. LEGRAND and  
MOUNTAIN COUNTRY PARTNERS, LLC**  
*Respondents*

**BRIEF OF RESPONDENT ROBERT L. JOHNS AS THE  
CHAPTER 11 TRUSTEE OF THE BANKRUPTCY ESTATE OF  
MOUNTAIN COUNTRY PARTNERS, LLC**

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May 28, 2015

## TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT .....	1
II.	STATEMENT OF THE CASE.....	2
II.	SUMMARY OF ARGUMENT .....	8
III.	STANDARD OF REVIEW .....	10
IV.	ARGUMENT.....	14
A.	The Arbitrator’s Interpretation of Law in the Discovery Order Is Not Grounds for Vacatur of the Award.....	17
B.	The Arbitrator’s Consideration of Hearsay Evidence is Not Grounds for Vacatur of the Award.....	20
C.	An Arbitrator Has Complete Discretion Whether to Reopen a Hearing, and the Arbitrator’s Refusal to Reopen a Hearing Is Not Grounds for Vacatur. ....	21
III.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	22
IV.	CONCLUSION.....	23

## TABLE OF AUTHORITIES

### *Federal and State Statutes*

Federal Arbitration Act, 9 U.S.C. § 10 .....	8, 14
West Virginia Limited Liability Act, W. Va. Code § 31B-4-408.....	4–6, 17
W. Va. Rev. R. App. P. 18.....	22

### *Pending Legislation*

S.B. 37 (82nd Leg, 1st Sess. (W.Va. 2015)).....	13
---	----

### *Federal and State Judicial Decisions (Other than West Virginia)*

<i>Hall St. Assoc., L.L.C., v. Mattel, Inc.</i> , 552 U.S. 576, 128 S.Ct. 1396 (2008).....	8, 15–16
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.</i> , 559 U.S. 662, 130 S. Ct. 1758 (2010).....	16
<i>Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.</i> , 142 F.3d 188 (4th Cir. 1998).....	11
<i>PNGI Charles Town Gaming, L.L.C. v. Mawing</i> , 2015 WL 898559 (4th Cir., March 4, 2015)...	16
<i>Remmey v. PaineWebber, Inc.</i> , 32 F.3d 143 (4th Cir. 1994).....	16, 19
<i>Three S. Del., Inc. v. DataQuick Info. Sys., Inc.</i> , 492 F.3d 520 (4th Cir. 2007).....	11
<i>Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31</i> , 933 F.2d 225 (4th Cir. 1991) ...	10
<i>Applied Indus. Materials Corp. v. Ovalar Makine Ticaret VeSanayi, A.S.</i> , 492 F.3d 132 (2d Cir. 2007) .....	18
<i>Local Union 978, Beckley Bargaining Unit of the Intern. Broth. of Elec. Workers v. Appalachian Power Co.</i> , 2012 WL 3864016 (S.D.W.Va. September 5, 2012).....	11
<i>Sheet Metal Workers Intern. Ass'n, Local Union No. 33 v. Beckley Mechanical, Inc.</i> , 803 F.Supp.2d 511 (S.D.W.Va. 2011).....	16
<i>ARMA, S.R.O. v. BAE Sys. Overseas, Inc.</i> , 961 F. Supp. 2d 245 (D.D.C. 2013).....	21
<i>Fairchild Corp. v. Alcoa, Inc.</i> , 510 F.Supp.2d 280 (S.D.N.Y. 2007).....	21

**West Virginia Judicial Decisions**

*CDS Family Trust, LLC v. ICG, Inc.*, No. 13-0375, 2014 WL 18441 (W.Va. January 15, 2014) (memorandum decision).....10, 19

*Barber v. Union Carbide Corp.*, 172 W. Va. 199, 304 S.E.2d 353 (1983).....14, 19–20

*Bd. of Ed. of Berkeley Cnty. v. W. Harley Miller, Inc.*, 159 W.Va. 120, 221 S.E.2d 882 (1974)..12

*Bd. of Ed. of Berkeley Cnty. v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977).....11–12

*Diversified Enters., Inc. v. CIT Tech. Fin. Servs., Inc.*, No. 101516 (W. Va. April 18, 2011) (memorandum decision).....13

## I. PRELIMINARY STATEMENT

Following the filing of Petitioner's Brief, an involuntary bankruptcy case was commenced in the U.S. Bankruptcy Court for the Southern District of West Virginia against Mountain Country Partners ("MCP"). Robert L. Johns serves as Chapter 11 Trustee of MCP's bankruptcy estate ("Trustee"), and the Trustee, as Respondent, files this brief to permit resolution of this appeal on the merits. The Trustee seeks to recover the arbitration award entered against Petitioner on MCP's behalf on September 30, 2011 [JA, pp. 479-494 ("Award")] for the benefit of MCP's creditors.

The Award denied Petitioner's sole claim that the Operating Agreement should be reformed, and granted MCP's counterclaims against Petitioner, ordering Petitioner to compensate MCP as follows:

\$ 56,717.50 for converting oil,

\$ 29,700.00 for converting equipment, and

\$ 13,300.00 for converting MCP funds to pay improper expenses; and

\$ 14,000.00 for converting MCP funds to pay improper legal fees.

JA, pp. 491–493. In total, Petitioner owes MCP **\$113,717.50** in damages, plus **\$162,442.00** in legal fees and expenses. *Id.*, pp. 493–494. Because the Award granted these amounts solely to MCP, the Trustee does not expect the other respondent, Ronald F. LeGrand, to take part in this appeal.

Petitioner's appeal of the Award is baseless. The standard to vacate an arbitration award is "the narrowest [standard] known at law," permitting vacatur only in cases where an award results from fraudulent or illegal conduct. Applying this standard, the Circuit Court of Kanawha

County upheld the Award. *See* JA, pp. 8–22. Instead of “manifest disregard for the law,” the Circuit Court found “no factual or legal basis for overturning” the arbitrator’s determination that Petitioner is not entitled to MCP’s investor list under state law. JA, p. 17. The Circuit Court also denied Petitioner’s other baseless and merely procedural challenges to the Award — that the Arbitrator (defined below) relied on hearsay evidence and refused to reopen the hearing after an award had been issued. JA, pp. 19–21. Instead, the Circuit Court held that (1) “[i]t is not this Court’s task on a motion to confirm or vacate an arbitration award to draw an arbitrary line between acceptable and unacceptable forms of evidence allowed,” and (2) “[a]s a procedural issue, the Arbitrator’s decision not to reopen the hearing after having issued his award is beyond the ken of this Court on review.” JA, p. 19, 21. This Court should affirm the Circuit Court’s decision to uphold the Award.

## II. STATEMENT OF THE CASE

Petitioner’s Statement of the Case gives the history of this case in a very selective way. It is misleading and confusing.

MCP was formed as a West Virginia limited liability company in January 2007 to develop oil and gas properties in West Virginia and Kentucky that were purchased from the bankruptcy estate of Buffalo Properties at public auction for \$7.1 million. JA, p. 482. Petitioner Ryan Cunningham, a savvy entrepreneur with Wall Street, real estate, and oil and gas experience, first became aware of the Buffalo Properties bankruptcy package of assets in 2005 and shared this information with Ken Gwynn, a real estate investor and acquaintance of Defendant Ronald F. LeGrand (“**LeGrand**”). JA, pp. 480–481. Gwynn informed LeGrand of the project, who reviewed it and determined that the project looked like a good and profitable

venture, resulting in LeGrand's bid to purchase the assets. JA, pp. 481–482. On October 10, 2006, Petitioner, LeGrand, Gwynn, and others executed the Operating Agreement of Mountain Country Partners, LLC (“**Operating Agreement**”). See JA, p. 483. Petitioner managed the day-to-day operations of MCP for a salary. JA, p. 482.

Petitioner sued Legrand and MCP in the Circuit Court of Kanawha County (“**Circuit Court**”) on July 14 2010, Civil Action No. 10-C-1269, seeking an injunction granting “access to MCP’s books and records including all investor contact information . . . and . . . operating control of [MCP]”, and MCP and LeGrand sought to dismiss Petitioner’s complaint as unripe since Petitioner had not submitted his claims to arbitration as required by the Operating Agreement. See JA, pp. 25, 76–77. The Operating Agreement’s arbitration clause (“**Arbitration Clause**”) provided as follows:

If the parties are unable to resolve the Grievance by the preceding steps, then either party may initiate arbitration proceedings by providing notice of the same to the Company, Manager, and Members. The matter shall be resolved by arbitration in accordance with the CPR Non-Administered Arbitration Rules in effect on the date of this Agreement, by a sole arbitrator. . . . The arbitration shall be governed by the Federal Arbitration Act (9 U.S.C. § 1-16), and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. All Members, by their execution of this Agreement, agree the place of arbitration shall be Duval County, Florida. The arbitrator shall be a qualified arbitrator and lawyer licensed in any state of the United States with at least fifteen (15) years [sic] experience in the areas of corporations, partnerships, and taxation selected by the parties to the dispute. If they cannot agree on an arbitrator, then they shall direct lawyers who regularly provide legal services to them to select a single arbitrator with the qualifications above. The arbitrator’s fees shall be his normal hourly rate for rendering legal services. The arbitrator is not empowered to award damages in excess of compensatory damages and each party hereby irrevocably waives any right to recover such damages with respect to any dispute resolved by arbitration. The Members agree, by their execution of this Agreement, that the

decision of the arbitrator shall be final and binding and enforceable  
in a court of law. . . .

JA, p. 105. The record indicates that Petitioner read and understood the Arbitration Clause when he signed the Operating Agreement. *See* JA, pp. 8, 933. There was no dispute over the arbitrability of Petitioner's claims. In an order dated November 5, 2010, the Circuit Court ordered that (1) MCP make certain books and records available to Petitioner and (2) that the case be stayed pending arbitration pursuant to the mandatory arbitration clause of the Operating Agreement. *See* JA, pp. 1–2.

The parties agreed on an Arbitrator who met the qualifications of the Arbitration Clause — Robert L. Cowles, Esq. (the “Arbitrator”) — to resolve Petitioner's single claim (control of MCP) and several counterclaims against Petitioner brought by MCP and LeGrand for conversion and other causes of action. JA, p. 9. The Arbitrator had jurisdiction over discovery pursuant to Rule 11 of the 2005 CPR Non-Administered Arbitration Rules (“Arbitration Rules”) that governed the arbitration pursuant to the Arbitration Clause [JA, p. 517], and the Circuit Court held that arbitration was the proper forum to resolve discovery disputes [JA, p. 4].

During discovery, a dispute arose whether Petitioner could receive, in addition to MCP's books and records that he had already received, access to MCP's investor list under W. Va. Code § 31B-4-408 [JA, p. 9], which provides that

(a) A limited liability company shall provide members and their agents and attorneys access to its records, if any, at the company's principal office or other reasonable locations specified in the operating agreement. The company shall provide former members and their agents and attorneys access for proper purposes to records pertaining to the period during which they were members. The right of access provides the opportunity to inspect and copy records during ordinary business hours. The company may impose a reasonable charge, limited to the costs of labor and material, for copies of records furnished.

(b) A limited liability company shall furnish to a member, and to the legal representative of a deceased member or member under legal disability:

(1) Without demand, information concerning the company's business or affairs reasonably required for the proper exercise of the member's rights and performance of the member's duties under the operating agreement or this chapter; and

(2) On demand, other information concerning the company's business or affairs, **except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.**

(c) A member has the right upon written demand given to the limited liability company to obtain at the company's expense a copy of any written operating agreement.

W. Va. Code § 31B-4-408 (emphasis added). After both parties provided their positions on the dispute, the Arbitrator determined in an order dated March 8, 2011 (the “**Discovery Order**”) that Petitioner’s request for the investor list was “unreasonable and improper under the circumstances” pursuant to § 31B-4-408(b)(2) and Arbitration Rule 11 because the information was irrelevant to the claims and counterclaims before him. JA, pp. 497–498.

The Arbitrator held a three-day hearing, April 18–20, 2011 (“**Hearing**”), to receive evidence on Petitioner’s single claim (control of MCP) and MCP/LeGrand’s several counterclaims. JA, p. 480. The evidence presented at the Hearing included argument from the parties, sworn live and deposition witness testimony (which the Arbitrator noted was subject only to a relevance standard), and documentary evidence. JA, p. 480. The Arbitrator instructed the parties that he would take all evidence “for what it’s worth and discard it if it’s not relevant.” JA, p. 474. The Arbitrator found all witness testimony to be credible, and all documents introduced into evidence were, by agreement of the parties, authentic and admissible. JA, p. 480.

Petitioner’s Statement of the Case would mislead a reader to believe that the sole issue Petitioner brought before the Arbitrator at Hearing was whether or not Mr. Cunningham, as

member of MCP, is entitled to access all of MCP's books and records under W. Va. Code § 31B-4-408, but that the Arbitrator held against him. *See* Petitioner's Brief, pp. 3–4. However, the only issue Petitioner raised at the Hearing was its request that the Arbitrator reform the Operating Agreement to remove LeGrand from control of MCP. *See* JA, p. 480. The Arbitrator found that there is no legal basis to reform the Operating Agreement and denied Petitioner's request. *See* JA, p. 490. Yet Petitioner does not even mention this issue in his brief.

Petitioner's Brief glosses over the Arbitrator's decision on the counterclaims brought by MCP, saying the decision "found against [Petitioner] on a frivolous counterclaim and awarded attorneys' fees." *See* Petitioner's Brief, p. 4. MCP brought five counterclaims against Petitioner for (1) converting 855 barrels of MCP oil for use by one of Petitioner's unrelated ventures, Cunningham Energy [JA, pp. 486–487]; (2) converting \$29,700 of MCP equipment for use by Cunningham's other ventures, Cunningham Energy and Raven Ridge [JA, pp. 487–488]; (3) converting MCP funds to pay his personal debts and expenses, including \$17,400 in personal air travel, \$7,150 in personal reimbursements to himself for excessive and inappropriate web site design fees, and \$14,000 in legal fees related to a separate, failed venture of Cunningham (called "ASHRO") [JA, pp. 488–489]; (4) falsifying MCP asset values for his personal benefit [JA, p. 490], and (5) spoliating evidence of his and his agents' malfeasance in regard to MCP [JA, p. 490].

Petitioner did not appear for the third day of hearing, but did not seek to postpone or continue the Hearing to present rebuttal evidence on the counterclaims against him because he tactically presumed that evidence presented against him would be summarily discounted by the Arbitrator. In Petitioner's Brief, Petitioner's counsel indicates that "there are no witnesses with admissible evidence" to defend Petitioner (but Petitioner himself could have denied any untruths)

and admits that he made the tactical mistake of believing that testimony of witnesses against Petitioner would appear preposterous and be disregarded. *See* Petitioner’s Brief, p. 14. For each of the counterclaims granted by the Arbitrator, Petitioner provided no evidence in his defense at the hearing:

1. The Arbitrator found that Petitioner converted oil on the basis of uncontroverted testimony – “no evidence was presented showing that Cunningham or his agents had any legal right to take this oil.” *See* JA, p. 491.
2. The Arbitrator found that Petitioner converted MCP’s equipment on the basis of uncontroverted testimony – “[t]here was no evidence presented that Cunningham had any legal right to take this equipment.” *See* JA, p. 491.
3. Also on the basis of uncontroverted testimony, the Arbitrator found that Petitioner converted MCP’s funds to pay personal legal fees. *See* JA, p. 491 (“Hill’s testimony, which was uncontroverted, establishes that Cunningham caused MCP to pay at least \$14,000 to the Bowles firm for the ASHRO documents. The Tribunal finds that Cunningham converted these funds by causing this payment, damaging MCP in the amount of \$14,000.”)

On July 5, 2011, the Arbitrator issued a final award (the “Award”) denying Petitioner’s claim and ordering Petitioner to pay MCP \$113,717.50 in damages and \$162,442.00 in attorneys’ fees and costs. JA, pp. 479-494. The Arbitrator sustained three of MCP’s five counterclaims. JA, pp. 490-491. The Arbitrator awarded MCP \$56,717.50 for Petitioner’s conversion of 855 barrels of MCP oil, \$29,700 for Petitioner’s conversion of MCP equipment, \$14,000 for converting MCP funds to pay personal legal fees, and \$13,300 for converting MCP funds for other personal expenses. JA, pp. 491–493.

Only after the Award was rendered in MCP's favor did Petitioner request to reopen the proceedings to submit rebuttal evidence, in which Petitioner's counsel admitted that he "would have been more astute simply to have asked for an adjournment of the proceedings." *See*, JA, pp. 528–534. The Arbitrator denied Petitioner's motion to re-open the proceeding June 23, 2011. JA, pp. 550–551.

When Defendants filed their motion to confirm the Award, Petitioner filed a motion to vacate, and Defendants responded. JA, pp. 320, 329, 401. The Circuit Court denied Petitioner's arguments and confirmed the Award on November 5, 2011. JA, pp. 6–22. In this appeal, Petitioner asks this Court to overturn the Circuit Court's confirmation and vacate the Award. Petitioner's Brief, p. 5.

## II. SUMMARY OF ARGUMENT

Petitioner's Brief stretches both the facts and the law beyond the breaking point and must be rejected.<sup>1</sup> The well-settled standard for vacating an Arbitration Award is "among the narrowest known at law." Under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (the "**FAA**"), vacatur is granted only in extreme cases where the award is procured by (1) "corruption, fraud, or undue means;" (2) "evident partiality or corruption in the arbitrators;" (3) an arbitrator's "misconduct in refusing to postpone the hearing ..., or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior" that prejudices a party's rights; or (4) an arbitrator exceeding his powers. *See* 9 U.S.C. § 10(a). Under precedent of this Court (much

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<sup>1</sup> Petitioner's Brief completely ignores the "narrowest known at law" standard of review for arbitration awards [*see infra.*, pp. 10–13]; wrongly interprets the U.S. Supreme Court's holding in *Hall St. Assoc., L.L.C., v. Mattel, Inc.*, 552 U.S. 576, 585–589, 128 S.Ct. 1396, 1404–1406 (2008) that the four grounds for vacatur enumerated by the Federal Arbitration Act are "exclusive" to somehow support the existence of an additional, non-statutory basis for vacatur [*see infra.*, pp. 15–16]; and relies upon an opinion article authored by Petitioner's Counsel and published in a July 2011 edition of the *West Virginia Lawyer*, listing it as a "treatise" on his list of authorities. Petitioner's Brief, p. 8 n. 2.

of which was authored by Petitioner's counsel), arbitration awards cannot be set aside unless they are "founded on grounds clearly illegal." Even greater deference is paid to arbitrators' procedural decisions.

Petitioner has not shown any of these grounds for vacatur. He does not contend the Award was procured by corruption, fraud, or undue means, or that the Arbitrator exceeded his powers by entering the Award. Oddly, Petitioner spends little time criticizing the Award itself. Instead, Petitioner seeks to vacate the Award because

1. The Arbitrator's "manifest disregard for the law" (in Petitioner's opinion) because his procedural order denying Petitioner's discovery request for MCP's investor list reveals the Arbitrator's "evident partiality," and
2. The Arbitrator refused to hear relevant evidence by denying Petitioner's post-award request to reopen the hearing to present rebuttal evidence he failed to present at hearing.

*See* Petitioner's Brief, pp. 1–2. Both of these procedural decisions were lawfully and completely within the Arbitrator's discretion, and neither decision constitutes grounds for vacatur. The Arbitrator did not disregard the Operating Agreement or West Virginia law. He thoroughly considered the West Virginia Limited Liability Act and applied it. Even if Petitioner is correct that the Arbitrator misapplied the law, misapplication of the law is not grounds for vacatur. Moreover, the Arbitrator never refused to hear Petitioner's evidence at hearing — Petitioner failed to present it. As disappointed and regretful as Petitioner may be upon receiving an adverse award, failure to present your case during an arbitration hearing is not grounds to vacate the resulting award.

Petitioner's only criticism of the Award itself is that the Award "was based on rank hearsay that was not refuted at the initial hearing." *See* Petitioner's Brief, p. 1. The record

shows that the Arbitrator, who is not bound by rules of evidence, gave due consideration to all evidence presented at the hearing and found the evidence against Petitioner to be relevant, credible, and persuasive. Petitioner failed to rebut or even object to the evidence against him, and, when he purportedly became ill, failed to request that the third day of hearing be rescheduled or postponed. Petitioner did not request that the hearing be reopened until after the Award was issued.

The law on review of arbitration awards is clear and well-settled in spite of Petitioner's best attempts to muddy the waters. The parties bargained for and agreed to a process that placed their claims and defenses in the hands of a single arbitrator. Only the most extreme circumstances of illegality (not present here) could justify revoking that bargain and the resulting decision by the Arbitrator. Petitioner has failed to meet its steep burden necessary to vacate the decision of the Arbitrator under the standards established by the Court and set forth in the FAA, which the parties agreed would govern arbitration between them. The Court must reject the Petitioner's arguments and the relief sought without need for oral argument.

### **III. STANDARD OF REVIEW**

Arbitration awards are "entitled to a special degree of deference on judicial review." *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31*, 933 F.2d 225, 228 (4th Cir. 1991). As this Court has explained, "the scope of judicial review for an arbitrator's decision is among the narrowest known at law." See *CDS Family Trust, LLC v. ICG, Inc.*, 2014 WL 18441, \*3 (W.Va. January 15, 2014) (citing *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 89, 857 (4th Cir. 2010)). "Awards by arbitration are to be favorably and liberally construed and are not to be set aside unless they appear to be founded on grounds clearly illegal." *Bd. of Ed. of*

*Berkeley Cnty. v. W. Harley Miller, Inc.*, 160 W.Va. 473, 489, 236 S.E.2d 439, 450 n. 7 (1977) (Neely, J.) (endorsing Syl. Pt. 3, *Hughes Nat'l Fuel Co.*, 121 W.Va. 392, S.E.2d 621 (1939)). “In reviewing such an award, a district or appellate court is limited to determine whether the arbitrators did the job they were told to do — not whether they did it well, or correctly, or reasonably, but simply whether they did it.” *Three S. Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007) (citing *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994)). “As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” See *Local Union 978, Beckley Bargaining Unit of the Intern. Broth. of Elec. Workers v. Appalachian Power Co.*, 2012 WL 3864016, \*2 (S.D.W.Va. September 5, 2012) (internal citations omitted).

As Petitioner’s counsel well knows, the reason for this narrow scope of judicial review is that “to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all – the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.” *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 193 (4th Cir. 1998). As he, himself, explained:

Implicitly, one of the things for which contracting parties covenant in providing for arbitration is finality; that is to say the elimination of the expense and annoyance of appeals. Nothing brings to a halt or precipitates bankruptcy upon the under-capitalized like litigation. Litigation is always a curse; it is never a blessing except to the iniquitous and the law’s delay will always exert pressure upon parties who are both needy and righteous to accept far less than their just entitlement.

It should be self-evident to anyone who has even practiced the least bit of law that common law rules with regard to damages, legal defenses, and evidence do not necessarily promote justice in any individual case — they are merely more just in more cases than any other rules yet devised which must be broadly applied. Most American households are reasonably well run and decision

making within the family is reasonably just without anyone ever having heard of the common law. Compromise, consideration for one's fellow man, gentlemanly conduct, and a firm desire to minimize loss for both parties in a dispute are the real qualities which make a reasonable business community. Reluctantly I confess that these values are better severed through a wise arbitration than in a court of law.

*Bd. of Ed. of Berkeley Cnty. v. W. Harley Miller, Inc.*, 159 W.Va. 120, 136, 221 S.E.2d 882, 890 (1974) (Neely, J., concurring) (emphasis added).

Even greater deference is paid to arbitrators' decisions on issues of procedure. "[F]raud and corruption are far different animals from procedural irregularity." *See id.*, 159 W.Va. at 132, 221 S.E.2d at 888 (Neely, J., concurring). As Petitioner's counsel again explained in *Board of Education of Berkeley County v. W. Harley Miller, Inc.*, in situations where parties have bargained for and agreed to arbitrate disputes,

The parties contract for an arbitrator, not a procedure. Due process does not necessarily mean Anglo-American rules of evidence, nor winner-take-all substantive rules. Furthermore, once the parties have agreed to arbitrate, they ought not to be allowed to re-litigate the same issues in the courts. The system of review of arbitration awards should be set up to avoid delay caused by the losing party in arbitration challenging the award of the arbitrators, especially on mere procedural grounds! The strict rules governing an action at law have never been applicable to an arbitration proceeding. *Boomer Coal & Coke Co. v. Osenton*, 101 W.Va. 683, 133 S.E. 381 (1926). The parties should know this when they agree to arbitrate, and they should not be heard later to complain on an issue of procedure. Arbitration can, and almost inevitably does, decide the substance of the controversy with substantial justice regardless of procedure.

*See Bd. of Educ. of Berkeley County v. Harley Miller, Inc.*, 160 W.Va. 473, 485–486, 236 S.E.2d 439, 446–447 (1975) (Neely, J.) (emphasis added, exclamation point in original) (holding that agreement to arbitrate must have been "bargained for;" if so, arbitration requirement is presumptively binding and specifically enforceable). Justice Neely could have been writing about this case!

The *de novo* standard recited on page 5 of Petitioner’s Brief is incorrect and not supported by the memorandum decision Petitioner cites. Petitioner cites *Diversified Enterprises, Inc. v. CIT Technology Financing Services, Inc.*, which states that:

“Awards by arbitration are to be favorably and liberally construed and are not to be set aside unless they appear to be founded on grounds clearly illegal.” Syl. Pt. 3, *Hughes v. National Fuel Company*, 121 W.Va. 392, 3 S.E.2d 621 (1939), *overruled on other grounds by The Board of Education of the County of Berkeley v. Harley Miller, Inc.*, 160 W.Va. 473, 489 n. 7, 236 S.E.2d 439 (1977). As this Court recognized in *Clinton Water Association v. Farmers Construction Company*, 163 W.Va. 85, 87, 254 S.E.2d 692 (1979), “It has long been the rule in this State that where parties have undertaken arbitration, their award is binding and may only be attacked in the courts on the basis of fraud or on those grounds set out in W. Va. Code, 55-10-4.”

*Id.*, No. 101516, p. 3 (W. Va. April 18, 2011) (memorandum decision). Effective July 1, 2015, that statute will be repealed and replaced with W. Va. Code § 55-10-25, which provides for vacatur only on the following grounds:

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

(1) The award was procured by corruption, fraud or other undue means;

(2) There was:

(A) Evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) Corruption by an arbitrator; or

(C) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

S.B. 37 (82nd Leg, 1st Sess. (W.Va. 2015).

#### IV. ARGUMENT

As this Court has explained, “[o]nce arbitration is established as the bargained-for remedial procedure for resolving grievances of sophisticated commercial parties, it must be an exclusive remedy, enforceable through summary judgment.” *Barber v. Union Carbide Corp.*, 172 W.Va. 199, 202, 304 S.E.2d 353, 356 (1983) (Neely, J.). Before Petitioner signed the Operating Agreement, he read and understood the Arbitration Clause (JA, p. 463), which required that any disputes not capable of informal resolution be “resolved by arbitration in accordance with the [Arbitration Rules], by a sole arbitrator” and “shall be governed by the Federal Arbitration Act (9 U.S.C. §1–16).” JA, p. 105.

The FAA has established only four grounds to vacate an arbitration award:

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

9 U.S.C. § 10. Moreover, “courts of this State will not review an arbitration award rendered pursuant to the terms of a commercial contract except for actual fraud.” *Barber*, 172 W.Va. at 203, 304 S.E.2d at 357 (Neely, J.). “Actual fraud” means “willful, deliberate, malicious corruption emanating from an intentional desire to defeat a known, legitimate claim.” *Id.*, 172 W.Va. at 204, 304 S.E.2d at 357.

Petitioner asserts that an additional non-statutory ground exists — “manifest disregard for the law.” *See* Petitioner’s Brief, p. 6. This is unsustainable, not only because the parties expressly agreed that arbitration would be governed by the FAA in this case, but because the U.S. Supreme Court held in 2008 that the four grounds to vacate an arbitration award under § 10 of the FAA were “exclusive;” thus, the Court held that parties to an arbitration agreement could not contract around these exclusive grounds by adding a right to judicial review for legal error in their arbitration clause. *See Hall St. Assoc., L.L.C., v. Mattel, Inc.*, 552 U.S. 576, 585–589, 128 S.Ct. 1396, 1404–1406 (2008). Yet Petitioner relies upon the following out-of-context excerpt from *Hall* as his sole legal basis for a non-statutory “manifest disregard for the law” ground for vacatur:

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

*Hall St.*, 552 U.S. at 590, 128 S.Ct. at 1406. In this excerpt, the Supreme Court is saying that, while the FAA’s grounds for review of an arbitration award are exclusive, there may also be other bases for review under state law or common law. However, Petitioner has not pointed to a single non-FAA source to support “manifest disregard for the law” as a ground for vacatur, and the Operating Agreement explicitly that the FAA governs arbitration between the parties. *See* JA, p. 105.

Since *Hall*, the U.S. Supreme Court has declined to revisit whether ““manifest disregard survives our decision in *Hall Street*. . . , as an independent ground for review or as a judicial gloss

on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.” See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 672, 130 S. Ct. 1758, 1768 n.3 (2010). The Fourth Circuit Court of Appeals has also declined to answer this question — “In the wake of the Supreme Court’s decision in *Hall Street* . . ., this court has recognized that considerable uncertainty exists as to the continuing viability of extra-statutory grounds for vacating arbitration awards.” See *PNGI Charles Town Gaming, L.L.C. v. Mawing*, 2015 WL 898559 n. 1 (4th Cir., March 4, 2015) (internal citations omitted). The District Court for the Southern District of West Virginia cites *Hall* as limiting grounds for vacatur to those prescribed by the FAA. See *Sheet Metal Workers Intern. Ass’n, Local Union No. 33 v. Beckley Mechanical, Inc.*, 803 F.Supp.2d 511, 516 (S.D.W.Va. 2011) (“On application for an order confirming the arbitration award, the court must grant the order unless the award is vacated, modified, or corrected as prescribed in [9 U.S.C. §§ 10–11].”)

The Court should affirm the Circuit Court’s holding that “manifest disregard for the law” is not a legal basis for vacatur. See JA, pp. 14, 16. But even if this Court finds that “manifest disregard for the law” is a valid non-statutory ground for vacatur, Petitioner cannot meet the extremely difficult standard to prove it as recited in 1997 (pre-*Hall*) by the Fourth Circuit Court:

[A] court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award. Rather, appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision. See *National Wrecking*, 990 F.2d at 961; *Folkways Music*, 989 F.2d at 111–12.

*Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149–150 (4th Cir. 1994) (emphasis added).

***A. The Arbitrator's Interpretation of Law in the Discovery Order Is Not Grounds for Vacatur of the Award.***

Petitioner argues that the Award is the result of “evident partiality” because, when the Arbitrator resolved a discovery dispute between the parties over whether or not Petitioner is entitled to MCP’s investor list, he misinterpreted W. Va. Code § 31B-4-408 so severely that he “manifestly disregarded the law” in disregard of the terms of the Operating Agreement. *See* Petitioner’s Brief, p. 11. In Petitioner’s opinion, “no trained lawyer or judge could possibly interpret the West Virginia Limited Liability Act in such a way as to deny members access to the company’s books and records.” Petitioner’s Brief, p. 1. Petitioner inflammatorily claims that “[t]he refusal to follow the law was willful and shows partiality if not outright corruption.” Petitioner’s Brief, p. 11.

The Arbitrator had jurisdiction over discovery pursuant to Arbitration Rule 11, which empowered the Arbitrator to facilitate “such discovery as [he] determine[s] is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and effective.” JA, p. 517. The Circuit Court expressly agreed that arbitration was the proper forum to resolve this discovery disputes. JA, p. 4.

The Arbitrator did not “manifestly disregard the law,” and there is no evidence of partiality or corruption in his decision to justify vacatur. Petitioner had been given access to all of MCP’s books and records except for a list of investors. The Arbitrator’s carefully consideration and analysis of Petitioner’s request for the investor list under W. Va. Code § 31B-4-408 is demonstrated in his findings:

1. Claimant Cunningham has engaged in a variety of efforts outside this arbitration to obtain the investor list his Motion requests.
2. Cunningham’s reported reason for requesting this investor list is so that he can explore whether investors received payouts of MCP

income; however, this information is readily ascertainable from the financial books and records of MCP, all of which have already been provided to Cunningham.

3. West Virginia law, which governs the contract at issue, holds that a limited liability company such as MCP must provide, upon request to a member, “information concerning the company’s business or affairs, except to the extent the demand of the information demanded is unreasonable or otherwise improper under the circumstances.” W. Va. Code §31B-4-408(b).

4. Cunningham’s request for an investor list is unreasonable and improper under the circumstances confronting this tribunal.

5. The identities of the additional investors in MCP are irrelevant to the claims and counterclaims advanced in this arbitration.

6. Rule 11 of the CPR Non-Administered Arbitration rules empowers this arbitrator to facilitate “such discovery as [he] determine[s] is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost effective.

7. Cunningham’s request for a list of investors is not appropriate as it will not further the needs of the parties and will not make discovery in this matter expeditious and cost effective.

JA., pp. 497–498. It is apparent from the Discovery Order that the Arbitrator did not “manifestly disregard” the law. He thoughtfully considered and applied the law to the case before him, disagreeing with Petitioner’s interpretation. The Circuit Court agreed — “[e]ven if ‘manifest disregard for the law’ were a basis for vacatur, there was no such disregard in the instant case.” JA, p. 16. No reasonable person, considering all of the circumstances, could conclude that the Arbitrator was partial to one side. *See Applied Indus. Materials Corp. v. Ovalar Makine Ticaret VeSanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (an Arbitrator is disqualified under the “evident partiality” standard of the Federal Arbitration Act “only when a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator was partial to one side”).

Even if the Arbitrator had misapplied the law, legal error alone is not grounds for vacatur. A reviewing court cannot examine whether the arbitrator “did it well” or even “correctly,” or even “reasonably.” *See Remmey*, 32 F.3d at 146. “Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts.”

*Id.*

[C]onvincing a court of an arbitrator's error — even his grave error—is not enough. So long as the arbitrator was “arguably construing” the contract — which this one was — court may not correct his mistakes under § 10(a)(4). The potential for those mistakes is the price of agreeing to arbitration. As we have held before, we hold again: “It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.” The arbitrator's construction holds, however good, bad, or ugly.

*CDS Family Trust*, No. 13-0375, 2014 WL 184441, \*3 (W. Va. Jan. 15, 2014 (*citing Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2070–2071 (2013))) (internal citations omitted). Once arbitration is chosen, the parties “must live with that choice.” *See id.* at \*4 (*citing Oxford*, 133 S.Ct. at 2071).

Moreover, Petitioner fails to show how the Arbitrator’s decision to protect the investor list against discovery affected the decisions made in the Arbitrator’s Award to justify its vacatur. The investor list had no bearing on the Arbitrator’s decisions whether or not the Operating Agreement could be reformed under West Virginia law or whether Petitioner damaged MCP. It’s nonsensical to seek to vacate a final award on the basis of a prior procedural order resolving an unrelated discovery dispute.

Courts in West Virginia must decline to review the merits of an arbitrator’s decision, and yet that is exactly what Petitioner asks the Court to do. *See Barber*, 172 W.Va. at 202, 304 S.E.2d at 356 (1983) (Neely, J.). If all it took to permit review of the merits of an arbitrator’s

decision was vehement disagreement, the well-established presumption in favor of arbitration awards would be meaningless. Petitioner's argument runs afoul of the law as succinctly stated by this Court:

If arbitration awards can be challenged in court on any theory other than actual fraud or failure to follow the procedures that were bargained for in the arbitration clause, then the goals of speed, parsimony, and flexibility are all entirely defeated; the process then becomes more expensive and less flexible than it would have been if the parties went to court in the first instance.

*Barber*, 172 W.Va. at 203 (Neely, J.).

***B. The Arbitrator's Consideration of Hearsay Evidence is Not Grounds for Vacatur of the Award.***

Rule 12.2 of the Arbitration Rules selected and agreed to by the parties Operating Agreement governed the Arbitrator's consideration of evidence at the Hearing. It provides:

12.2 If either party so requests or the [Arbitrator] so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the [Arbitrator] may determine is appropriate. The tribunal is not required to apply the rules of evidence used in judicial proceedings, provided, however, that the [Arbitrator] shall apply the lawyer-client privilege and the work product immunity. The [Arbitrator] shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.

J.A., p. 518 (emphasis added). Petitioner should have been well aware during the Hearing that, under the Arbitration Rules, decisions about the admissibility, relevance, materiality, and weight of evidence are within the sole discretion of the Arbitrator. According to Petitioner, the Arbitrator explained at hearing that he would "take [testimony evidence] in for what it's worth and discard it if it is not relevant." JA, p. 346.

Petitioner acknowledges that the rules of evidence do not apply to arbitration, but argues that the Arbitrator's "flagrant disregard" for those rules "is simply beyond the Pale." *See*

Petitioner’s Brief, pp. 15-16. Petitioner’s counsel “assumed that because the testimony against [Petitioner] was outrageous and preposterous in its legitimacy, that it would be disregarded.” Petitioner’s Brief, p. 14. For this reason, he claims, he made the tactical decision not to present evidence to rebut allegations against Petitioner “concerning such things as the theft of oil, improper use of private air travel, improper billing for attorneys’ fees and theft of equipment” because “there were no witnesses with admissible evidence under even the most liberal interpretation of the rules of evidence.” Petitioner’s Brief, pp. 14, 17 (emphasis in original).

The Arbitration Clause empowered the Arbitrator with discretion to admit and weigh evidence, including hearsay evidence. The Circuit Court held that “there was nothing improper in the [Arbitrator’s] admission of hearsay evidence.” JA, p. 20. Petitioner had every opportunity to present his own evidence, hearsay and otherwise, but he decided not to. “If parties wish to rely on such technical [evidentiary] objections, they should not include arbitration clauses in their contracts.” See *ARMA, S.R.O. v. BAE Sys. Overseas, Inc.*, 961 F. Supp. 2d 245, 266 (D.D.C. 2013) (holding, in part, that “In general, it is not enough for the party seeking vacatur to complain that the arbitrator made procedural missteps. An arbitrator has substantial leeway to admit any evidence that it finds useful — even hearsay evidence.”).

***C. An Arbitrator Has Complete Discretion Whether to Reopen a Hearing, and the Arbitrator’s Refusal to Reopen a Hearing Is Not Grounds for Vacatur.***

While Section 10(a)(3) of the FAA “applies to cases where an arbitrator, to the prejudice of one of the parties, rejects consideration of relevant evidence essential to the adjudication of a fundamental issue in dispute, and the party would otherwise be deprived of sufficient opportunity to present proof of a claim or defense,” the facts of this case do not present such a situation. See *Fairchild Corp. v. Alcoa, Inc.*, 510 F.Supp.2d 280, 287 (S.D.N.Y. 2007). “Petitioner had three days to present testimony — he was not deprived of the ability to present evidence at that time.”

JA, p. 21. Petitioner did not only fail to present rebuttal evidence at the Hearing, but, when Petitioner purportedly became ill and unable to attend the final day of Hearing, Petitioner's counsel made the conscious, strategic decision not to seek an extension or continuance of the hearing before it was closed, which he later acknowledged was a "tactical mistake." JA, p. 21. After the Award was rendered in Defendants' favor, Petitioner sought to reopen the proceedings to submit rebuttal evidence, in which Petitioner's counsel admitted that the failure to present any evidence to rebut the hearsay about which he complains is a problem of his own making:

It is important that Mr. Cunningham be permitted to offer rebuttal testimony with regard to the allegations against him concerning theft of oil, improper use of private air travel, improper billing for attorneys' fees and theft of equipment. At the time, counsel made the tactical mistake of believing that Mr. Burgess' testimony would appear preposterous . . . . Here counsel would have been more astute simply to have asked for an adjournment of the proceedings for as long as it took Mr. Cunningham to read the transcript and present rebuttal evidence.

*See*, JA, pp. 528–534 (emphasis added).

The Arbitrator's decision not to reopen a hearing to allow Petitioner a second bite at the apple was not fraudulent, corrupt, partial, or in excess of his powers. As the Circuit Court concluded, "[i]t was well within the Arbitrator's discretion to deny that request. Indeed, had the Arbitrator reopened the hearing, it would have eliminated the efficiency and finality that parties to an arbitration bargain for in the first place." JA, p. 21. The Circuit Court correctly concluded that, "[a]s a procedural issue, the Arbitrator's decision not to reopen the hearing after having issued his award is beyond the ken of this Court on review." JA, p. 21.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is unnecessary in this case because "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be

significantly aided by oral argument.” W. Va. Rev. R. App. P. 18(a)(4). Petitioner has shown no grounds for vacatur, and nothing Petitioner could say during oral argument would change the outcome required by the well-settled, binding authority governing vacatur of arbitration awards.

#### IV. CONCLUSION

Petitioner’s Brief fails to show that any grounds exist to vacate the Award. This Court must uphold the Award, affirm the decision of the District Court, and deny the relief sought in Petitioner’s Brief.

Respectfully submitted this 28<sup>th</sup> day of May, 2015.

MOUNTAIN COUNTRY PARTNERS, LLC

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**CERTIFICATE OF SERVICE**

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