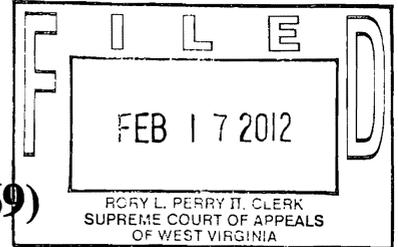

**IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**CASE NO. 11-1613
(CIRCUIT COURT NO. 10-C-1269)**



RYAN CUNNINGHAM,

Petitioner,

v.

RONALD F. LEGRAND, *et al.*

Respondents.

BRIEF OF PETITIONER

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No.: 11-1613

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

Civil Action No.: 10-C-1269

RYAN CUNNINGHAM

Petitioner

v.

RONALD F. LEGRAND and

MOUNTAIN COUNTRY PARTNERS, LLC

Respondents

PETITIONER'S OPENING BRIEF

ASSIGNMENTS OF ERROR

The Circuit Court erred when he failed to vacate the arbitration award on the following grounds:

(1) The arbitrator disregarded the clear law of West Virginia in denying the Plaintiff access to all the books and records of Mountain Country Partners, LLC as is expressly provided in the West Virginia statute. This action on the part of the arbitrator is evidence of "evident partiality" on the part of the arbitrator because no trained lawyer or judge could possibly interpret the West Virginia Limited Liability Company Act in such a way as to deny members access to the company's books and records.

(2) The Arbitrator failed to follow the published arbitration rules that were referenced in the arbitration clause of the contract in that those rules provided that the Arbitrator was to follow the law referenced in the contract and that law was the law of the State of West Virginia.

(3) The arbitrator refused to hear evidence pertinent and material to the controversy in that the arbitrator's decision was based on rank hearsay evidence that was not refuted at the initial hearing because undersigned counsel did not

believe that a hearsay slug fest was appropriate. In general good lawyers do not offer inadmissible evidence, and although the arbitration rules allow some deviation from the rules of evidence, giving hundreds of thousands of dollars based on nothing but hearsay evidence is hardly appropriate.

(4) The arbitrator refused to reopen the proceedings to allow rebuttal testimony when it became obvious from medical records that Mr. Cunningham had been unable to attend the final day of the arbitration because of a recurrence of “heat prostration” that he had first suffered the previous summer.

STATEMENT OF THE CASE

I. *The History of the Case*

Mountain Country Partners, L.L.C. is a West Virginia limited liability company formed in 2006 for the purpose of acquiring both land and mineral rights, particularly oil and gas leases, in West Virginia and Kentucky. The assets of Mountain Country Partners (hereinafter “MCP”) were acquired in bankruptcy for roughly \$7 million from Buffalo Properties. JA, pp. 306-307

The Respondent in this case, Ronald F. LeGrand, was an all-purpose deal maker whose broad acquaintanceship with prospective investors arose through Mr. LeGrand’s business of giving seminars on how to invest in real estate. Mr. LeGrand heard of the Buffalo Properties bankruptcy through Ken Gwynn, a friend of Mr. LeGrand and an acquaintance of the Petitioner, Ryan Cunningham. Mr. LeGrand thereupon organized investors to purchase the old Buffalo properties and operate a new oil and gas exploration and production company. JA, pp. 269-271.

Because Ronald LeGrand, by his own admission, knew nothing about running an oil and gas company, Mr. LeGrand recruited Ryan Cunningham to run MCP and Mr. Cunningham ended up owning roughly 17.57 percent of the equity of the Company. JA, pp. 26-27. The MCP Operating Agreement was drafted in such a way that Mr. LeGrand was in perpetual control of the company regardless of his percentage of ownership. JA, pp. 85-109. Mr. LeGrand insisted

on being in total control of the company, but was unable to make the company work because he had engaged in fraud in the initial funding of the Company. *See*, SEC documents, including Mr. LeGrand's consent to a \$150,000 fine, JA, pp. 555-576. The details of Mr. LeGrand's fraud, however, came to light only after the arbitration action had been begun, although Mr. Cunningham suspected fraud all along and sought the books and records in order to prove such fraud.

Originally this case was filed in Circuit Court for the express purpose of giving Mr. Cunningham access to the books and records of MCP. JA, pp. 25-31. *West Virginia Code* 31B-4-408 gives all members of an LLC the explicit right to inspect all of the books and records and is specific and unequivocal in its mandate.

The MCP Operating Agreement has an arbitration clause, but Mr. Cunningham was unable to begin an arbitration until he had access to the books and records of the Company. Therefore, Mr. Cunningham began this action in circuit court for the express purpose of seeing the records to determine exactly what his case was, if any, in arbitration. Judge John Hrko ordered that Mr. Cunningham be given access to all the books and records, JA pp. 1-3, but then Mr. LeGrand made a motion for a protective order, and that motion was heard by Judge James Stucky, who referred the matter of whether Mr. Cunningham could see all the records to the arbitrator.

The arbitrator refused to follow the West Virginia law—law that had already been properly interpreted by Judge Hrko—which meant that Mr. Cunningham was unable to make his case.

II. *The Arbitration case*

During the prosecution of the arbitration case, it came to light that the reason that Mr. Legrand was unable to make MCP successful was that he had been prohibited from raising money by the Securities and Exchange Commission pending an investigation into his activities. Mr. LeGrand maintained that this was a “voluntary” agreement, but subsequent facts showed this to be entirely untrue. In the event, the SEC found Mr. LeGrand guilty of civil fraud and fined him \$150,000, which he agreed to pay in a consent decree. JA, pp. 343-344, 573-576.

Although Mr. Cunningham showed that: (1) Mr. LeGrand had refused to allow him access to books and records as required by West Virginia law so that he could determine why a company of which he owned 17 percent was failing; (2) Mr. LeGrand had committed fraud of sufficient magnitude to warrant an SEC investigation taking several years culminating in a \$150,000 fine; and (3) Mr. LeGrand was prohibited by the SEC from raising equity funds and, therefore, would never be able to make MCP successful, the arbitrator not only held against Mr. Cunningham but also found against him on a frivolous counterclaim and awarded attorneys’ fees. JA, pp. 591-606.

SUMMARY OF THE ARGUMENT

The facts of this case show that: (1) the Arbitrator disregarded the clear West Virginia law by refusing to give Petitioner the books and records of a company of which he was a substantial part owner; (2) as suspected by Petitioner the Respondent was guilty of civil fraud by the Securities and Exchange Commission in the operation of the company; (3) the Arbitrator gave a substantial award against the Petitioner based on rank hearsay evidence after assuring the parties that objection to hearsay were unnecessary because he would disregard unreliable

hearsay; and, (4) the Arbitrator refused to reopen the case for rebuttal evidence when a substantial award was given based entirely on unreliable hearsay and Petitioner had been absent from the last day of the hearings for medical reasons. Therefore, the arbitration award should be vacated.

STATEMENT REGARDING ORAL ARGUMENT

In this appeal, this Honorable Court is asked once again to wrestle with the arbitration bear. *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 2011 W. Va. LEXIS 334 (W. Va. Nov. 21, 2011). In light of this Honorable Court's recent decisions concerning the use and abuse of arbitration clauses, this case presents a case of first impression because this case implicates the unbridled discretion arbitrators take unto themselves. This is an issue of fundamental public importance because, with the pervasiveness of arbitration clauses that are in no way "voluntary" in contracts of adhesion, the ability of arbitrators to disregard the law under the guise of "discretion" fundamentally affects tens of millions more people than were affected by arbitration among commercial parties at the time this Honorable Court wrote *Board of Education v. W. Harley Miller*, 160 W. Va. 473, 236 S.E.2d 439 (1977). Therefore, Petitioner's requests oral argument under Rule 20 of the *Rules of Appellate Procedure*.

STANDARD OF REVIEW

The determination of whether an arbitration award should be vacated is a question of law and the standard of review is *de novo*. *Diversified Enters. v. CIT Tech. Fin. Servs.*, 2011 W. Va. LEXIS 137 (W. Va. Apr. 18, 2011)

ARGUMENT

The Federal Arbitration Act, 9 U.S.C. §10 sets forth the statutory grounds for vacating an arbitration award. That section provides:

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Emphasis added.

In addition to the statutory grounds, there is a further grounds developed by the Federal courts referred to as “manifest disregard for the law.” *Wilko v. Swan*, 346 U.S. 427 (1953) as interpreted by *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).¹ “Manifest disregard

¹ The dispute in *Hall Street* involved a commercial lease between Mattel and its predecessors, as lessees, and Hall Street and its predecessors, as lessors. Hall Street filed suit, claiming that Mattel had (i) improperly terminated the lease and (ii) failed to comply with applicable environmental laws during the lease term. While the litigation was still pending in federal court, the parties entered into an agreement to arbitrate the second issue..

for the law” is usually conceptualized as a summary of grounds (3) and (4) of §10. In what is perhaps the clearest statement in support of the interpretation of *Hall* that “manifest disregard for the law” is still a viable ground for vacatur, the U. S. Supreme Court declared:

In holding that §§ 10 and 11 [of 9 U.S.C.] 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*, *supra*, 128 S. Ct. at 1406 (2008)

The arbitration agreement was noteworthy because it included a clause allowing the parties to seek judicial review of the arbitral award for plain legal errors. By contrast, the FAA's vacatur standards bar courts from second-guessing the substantive correctness of arbitral awards, permitting review only for *procedural* irregularities that evince extreme or outrageous conduct, such as corruption or fraud by one of the parties or the arbitrators. By vesting the district court with the power to review the arbitrator's award for ordinary mistakes of law, the arbitration agreement in *Hall Street* represented an attempt by the parties to contract around this clear mandate of the FAA.

At the time, there had been an unresolved circuit split regarding whether private parties were in fact entitled to alter the vacatur and modification grounds set forth in FAA sections 10 and 11, respectively. The Supreme Court granted certiorari in *Hall Street* in order to resolve this split, not to consider the manifest disregard doctrine.

The precise question presented by *Hall Street*'s petition for certiorari was whether "the Federal Arbitration Act ("FAA") precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA."

The Court answered this question in the affirmative: The FAA prohibits expanded judicial review through private ordering. In so doing, it concluded that FAA sections 10 and 11 set forth the "exclusive" standards for vacatur and modification of arbitral awards -- a conclusion whose meaning is more complex than at first appears.

A. Manifest Disregard for the Law

The Petitioner in this case below, Ryan Cunningham, was a 17.57 percent owner of Mountain Country Partners, LLC, (hereinafter “MCP”) a West Virginia Limited Liability Company. Before bringing the arbitration proceeding in Florida, the Petitioner brought the above-styled action in the Circuit Court of Kanawha County in aid of arbitration.² Petitioner believed and still believes that the Respondent, Ronald F. LeGrand, was engaged in fraud *vis à vis* the investors in Mountain Country Partners. At the time this case was tried in arbitration, Petitioner could not prove that such fraud had been perpetrated because Respondent LeGrand had not provided Petitioner the contact information for the investors—something to which Petitioner was absolutely entitled under West Virginia law. Petitioner needed and was entitled to the names and addresses of the other investors in order to make his case that MCP needed to be reorganized under standard equity principles in order to safeguard valuable property.

Petitioner applied to the Circuit Court for an order in aid of arbitration that would give him the information he needed to formulate his case. And, the Circuit Court, Judge John Hrko presiding, **granted** Petitioner Cunningham’s motion and **ordered** that the books and records be produced pursuant to the West Virginia LLC statute.³ *See*, Judge Hrko’s Order of 5 November 2010, JA, pp.1-3.

² For a detailed description of this process and supporting authority, *See* R. Neely, "Wrestling the Arbitration Bear: An In-Depth Look at the Abuses and Injustices of Arbitration," *The West Virginia Lawyer* 22 (July-September 2011).

³ **§ 31B-4-408. Member's right to information.**

(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.

MCP's capital structure is complex, involving different classes of equity and debt. A bare list of who the investors are and their percentage ownership interests is important, but standing alone that is insufficient without knowing what class of membership interest or debt instrument each investor holds and the terms of those interests, i.e., whether those terms are contained in a subscription agreement or other similar agreement or elsewhere. Any such agreements and all other records were covered by the Judge Hrko's Order and such is and was relevant information for the purposes of showing Mr. LeGrand's violation of his fiduciary duties. Private placement memoranda and other documents with which Mr. Cunningham was provided over time hinted at the existence of such agreements.

Also plainly relevant and falling squarely within the "books and records" of MCP is a description of MCP's outstanding obligations to its investors. Based on various statements by Mr. LeGrand over the years, Mr. Cunningham believed at the time the arbitration was begun that at least \$14 million was owed to investors, but copies of the actual agreements and an accounting of how much was due were never provided him because of the Arbitrator's refusal to follow the law.

(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.

Thus here are the items that Mr. Cunningham needed and to which he was entitled in order to make his case before the arbitrator.

1. Full contact information including names, addresses, phone numbers, and e-mail addresses for all equity or debt investors in MCP;
2. Full information regarding the equity or debt interest of each investor, including percentage ownership and copies of any subscription or other similar agreement describing MCP's obligations to the investors and vice versa; and,
3. Records of the amount and repayment terms of MCP's outstanding obligation to each investor.

Although this case was originally assigned to Judge Stucky, Judge Stucky was indisposed, so Judge Hrko was assigned in to hear this case. Judge Hrko's Order, JA, pp.1-3, gave Plaintiff complete access to all the books and records of MCP as is required by the West Virginia Statute and which Order would have allowed Mr. Cunningham access to all the information listed above.

West Virginia Code 31B-4-408 gives all members of an LLC the explicit right to inspect all of the books and is specific and unequivocal in its mandate. The Arbitrator's refusal to follow the West Virginia law made the rest of the arbitration a farce. Furthermore, Rule 10.1 of the CPR Rules for Non-Administered Arbitration provides:

Rule 10: Applicable Law(s) And Remedies

- 10.1 **The Tribunal shall apply the substantive law(s) or rules of law designated by the parties** as applicable to the dispute. Failing such a designation by the parties, the Tribunal shall apply such law(s) or rules of law as it determines to be appropriate. [emphasis added.]

JA, p.629. The MCP Operating Agreement, of which the Arbitration Clause that forced this arbitration is a part, provides in Section 14.08, entitled GOVERNING LAW:

Except as otherwise specified herein, **this agreement is governed by and shall be construed in accordance with the law of the State of West Virginia**, excluding any conflicts-of-law rule or principle that might refer the governance of construction of this agreement to the law of another jurisdiction. [emphasis added.]

JA, p. 107. Therefore, the very contract from which the arbitration clause emerged gave the arbitrator **no discretion** with regard to whether to apply clear West Virginia law. Rule 10.1, by which the Arbitrator was bound, relating to the rules of the forum **required** the Arbitrator to follow the law as specified in the contract from which the authority to arbitrate originated, and Section 14.08 of the very Operating Agreement in which the arbitration clause is found, provided **explicitly** that the law of West Virginia was to apply to **all** disputes.

Because the Arbitrator was required by the **very contract itself** to apply West Virginia law and did not do so, the Petitioner, Mr. Cunningham, has made his case that there was “manifest disregard for the law.”

The refusal to follow the law was **willful** and shows partiality if not outright corruption. Furthermore, in the event, it turns out that Mr. LeGrand **was** guilty of fraud. as the following article from the *Charleston Gazette* reporting that the SEC levied a \$150,000 civil penalty against Mr. LeGrand for investor related fraud clearly shows. That story is as follows:

OIL, GAS COMPANY HEADS AGREE TO SETTLEMENT ON SEC FRAUD CASE

Publication: THE CHARLESTON GAZETTE

Published: Thursday, July 14, 2011

Page: 2A

Byline: NOT AVAILABLE

Two heads of a West Virginia oil and gas company agreed to pay a settlement in a federal civil case in which the U.S. Securities and Exchange Commission alleged they solicited investors into their company by misrepresenting the risk involved.

Ronald F. **LeGrand**, the founder and manager of Mountain Country Partners LLC, and his former partner in the company, Frederick E. Wheat Jr., both residents of Florida, agreed to pay a civil penalty of \$150,000 for falsely representing to investors the security of their company.

From about September to December of 2006, **LeGrand** and Wheat raised more than \$9.5 million for the Walton-based company by selling promissory notes and limited partnership interests to 54 investors scattered across the U.S., according to an SEC release.

The men raised the funds through email and by conducting seminars and convinced the investors to purchase land and other assets from "a bankrupt oil and gas company headquartered in West Virginia," the release states. It's not clear from the release whether the "bankrupt" company is in reference to Mountain Country Partners. An SEC representative could not be reached late Wednesday afternoon for clarification.

LeGrand and Wheat solicited the investors by misrepresenting the degree of risk and the amount of expected return on their investments, the release states. To date, the company has been unable to repay the returns that **LeGrand** and Wheat promised to the investors.

The two company heads agreed to settle the lawsuit without admitting or denying the commission's charges...

JA, pp. 343-344. After the hearing in the Circuit Court, but before the Court rendered an opinion on the vacatur issue, the actual U. S. District Court documents, including the SEC complaint and the Consent Decree, became available and were forwarded to Judge Stucky. JA, pp. 556-576.

The failure of the Arbitrator to follow the law and allow the Petitioner access to MCP's investor list substantially undermined the ability of the Petitioner to show an overall course of conduct involving widespread fraud that would have militated in favor of giving Mr. Cunningham relief in the Arbitration by, among other things, requiring the election of a new managing member.

Jacksonville, Florida is a comparatively small American city with a bar and business community that has on-going relations with one another. The *Code of Ethics* for arbitrators is, in

many respects, similar to the *Code of Judicial Conduct* for judges, and one of the tenets of both Codes is that an arbitrator or judge who has a relationship of any sort with one of the parties must disclose such relationship. It is virtually impossible to prove grounds (1) and (2) for vacating an arbitration award, namely (1) where the award was procured by corruption, fraud, or undue means; or (2) where there was evident partiality or corruption in the arbitrators, or either of them. However, circumstantial evidence can lead to an inference of at least “partiality” and failure to follow the law is a good starting point. Providing a member of an LLC with access to the books and records was not something within the discretion of a circuit judge, and certainly it was not something within the discretion of an Arbitrator given the requirement of the **rules of the forum** that the law designated by the parties to the arbitration agreement be followed.

B. Refusal to Hear Relevant Evidence

The rules for non-administered arbitration as well as the AAA arbitration rules and the FINRA arbitration rules provide that strict rules of evidence need not be followed. That is perfectly reasonable in circumstances where hearsay evidence is obviously reliable as when, for example, a public official explains his actions by saying that “the Governor instructed me to do such and such.” However, in this case a very substantial monetary award, namely \$113,717.50 was allowed upon the rankest hearsay—testimony that would have been stricken from any real judicial proceeding. For reasons shown below, a Motion to Reopen the Hearing, JA, pp. 364-369, was filed and improperly refused.

On the final day of the hearings before the Arbitrator, the Claimant, Ryan Cunningham, was suffering a recurrence of heat prostration that had disabled him the previous summer whilst working in the Sun on an oil well site. As Part of the motion to reopen the hearing presented to the arbitrator was an affidavit from Mr. Cunningham and a letter from Ira Morris, M.D., Mr.

Cunningham's doctor, explaining the problem of sun stroke recurrence. JA, pp. 372-375. On the last day of the hearing, undersigned counsel announced to the tribunal that Mr. Cunningham was ill and unable to come to the hearing. This could have resulted in an adjournment and a necessary reconvening of the proceedings had undersigned counsel not taken the Arbitrator at his word that he would disregard unreliable hearsay testimony. Undersigned counsel assumed that because the testimony against Mr. Cunningham was outrageous and preposterous in its legitimacy, that it would be disregarded.

When counsel raised a hearsay objection, the Tribunal assured Petitioner's counsel:

As I said the very first day, I will take it in for what it's worth and discard it if it is not relevant.

JA, p. 346.

There was an inordinate amount of "who struck John" hearsay evidence presented by Mr. LeGrand's witnesses in this case, but Mr. Cunningham's side of the "who struck John" was never submitted because, as in the case of Mr. LeGrand's "who struck John," there were no witnesses with admissible evidence under even the most liberal interpretation of the rules of evidence. Undersigned counsel does not, as a matter of principle, attempt to present obviously inadmissible evidence; however, counsel does offer hearsay evidence such as the example below in the interest of saving time and avoiding unnecessary delay. Admittedly, then, as indicated above, there are instances when a "hearsay" objection is unreasonable as, for example, in the colloquy that might proceed between a government official and his counsel trying to establish why a certain thing was done:

Counsel: Who directed you to send the plans out for bid?

Witness: The Governor.

Now technically that is hearsay, but it is hardly appropriate to make a big deal about it unless one has reason to believe that the statement is untruthful because the governor can be brought in, although at substantial expense and inconvenience. That type of situation, counsel believed, was what was meant by the standard hearsay rules not applying strictly in arbitration. Thus, counsel did not bring in witnesses who had relevant but judicially inadmissible hearsay evidence that would have exonerated Mr. Cunningham.

Part of the third day of testimony, Vol. III, can be found in “scrunch” format at JA, pp. 384-396. The testimony of Ms. Hill, JA, pp. 386-388, and Mr. Burgess, JA, 381-383, 389-390, appeared to undersigned counsel so preposterous and so flagrantly outside the rules of evidence that undersigned counsel could not conceive how the tribunal could take that testimony seriously, particularly in light of such things as Mr. Cunningham being required to continue to pay \$800 per month for MCP’s Rhinos because Claimant naively signed for them personally to keep MCP going when he was in charge, and Mr. LeGrand’s inveigling of Mr. Cunningham to be personally liable for the Kincaid 8 well.⁴

Although adherence to the “strict” rules of evidence is not required in arbitration, flagrant disregard for those rules leads to fabulously unjust results. For example, Ms. Hill’s testimony concerning the bills for air travel was entirely outside anything permitted by either Rule 803, *W.Va. R. Evid.* or Rule 803, *Fed R. Evid.* Ms. Hill was not the official custodian of the records

⁴ Certainly the overall integrity of the MCP operation under the direction of Mr. LeGrand was hardly exemplary. The Tribunal heard the testimony by Mr. Rhodes concerning how Mr. LeGrand cheated him by failing to pay his bill for services rendered to MCP, and the testimony of Mr. Gwynn concerning how cash to which he was entitled in Legacy, LLC was used by Mr. LeGrand without Mr. Gwynn’s knowledge to satisfy an obligation of MCP. Now that is direct testimony and should have made the Tribunal wary of the accuracy of hearsay allegations against Mr. Cunningham. JA 365-366.

from which she testified; she did not receive the records in the “normal course of business” and, most importantly, her cross examination revealed that she knew nothing about the events surrounding the air travel. *See*, JA, p. 388.

There is no rule of evidence that would make testimony concerning a transaction about which the witness ADMITS that she knows nothing relevant! A little laxity in the rules of evidence is appropriate in arbitration, but total speculation and the introduction of documents that no one can explain is simply beyond the Pale.

Similarly, Mr. Burgess based the majority of his testimony on rampant hearsay. *See*, JA, 392-393. In the testimony on JA, p. 392, Mr. Burgess is testifying about invoices that were billed to someone else. He is not the custodian of the records; the records did not come to him in the normal course of business; and, he has no personal knowledge of the underlying transaction. And the hearsay problem gets worse: Soon we get double hearsay. *See*, JA, p.393. So now Mr. Burgess is being asked to draw inferences from (1) documents of which he is not the custodian; (2) documents that did not come to him in the normal course of business; and (3) documents that reflect transactions about which he has no personal knowledge because he did not work either for Raven Ridge or for the Rexroads.

The same problems of lack of personal knowledge that undermine Mr. Burgess’s testimony similarly mar the testimony of Mr. Delbert Harris, JA, p. 392 whom the Tribunal heard by deposition. (Mr. Harris admitted that he had been fired by Mr. Cunningham for improper behavior.) The problem with Mr. Harris’s testimony is that it is like the sound of one hand clapping: Mr. Harris can testify to what he did with oil he took from various wells, but he cannot and did not testify concerning the circumstances under which that oil was delivered, who was paid or how the oil was accounted for. Indeed, Mr. Cunningham introduced an exhibit

showing that during the time about which Mr. Harris was testifying, the volume of oil produced was consistently going up and that was never called into question! JA, p. 443. That fact alone belies any inference that somehow oil was being stolen from MCP because, after Mr. Cunningham left, production declined dramatically. JA, pp. 443-444.

For all these reasons, particularly because Petitioner reasonably relied on the Tribunal keeping his word and disregarding rampant hearsay testimony, it was important that Mr. Cunningham be permitted to offer rebuttal testimony with regard to the allegations against him concerning such things as the 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's testimony would appear preposterous, counsel did not know for how long Mr. Cunningham would be disabled by his heat prostration problem. At the time of the final hearing, Jacksonville had been 93 degrees, which was the first time since Mr. Cunningham's recovery in the summer of 2010 that Mr. Cunningham had been exposed to inclement heat. JA, p. 536.

Therefore, because a very substantial award had been made against Mr. Cunningham based on pure hearsay testimony, Mr. Cunningham made his motion to the Arbitrator to reopen the case to allow him to present his own version of the facts even though he, too, would not be able to do so in conformity with the strict rules of evidence. However, the Arbitrator denied Mr. Cunningham's motion, JA, p. 550, even though it was clearly in the interest of justice that Mr. Cunningham be given a full hearing on relevant matters.

This failure to reopen the case to allow highly relevant rebuttal evidence when the entire award was based on inadmissible hearsay clearly comes within the third statutory grounds for vacating an award, namely:

(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

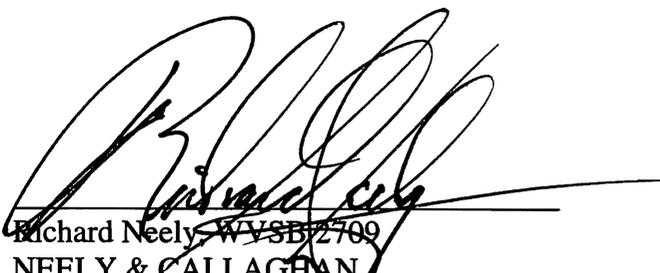
material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced...

When, as here, the grounds for vacating an award are set forth in a statute and the facts that show that the statutory criteria have been met are clear and unambiguous, it would be a travesty of justice to fail to vacate the award. And it is clear that there was a perverse failure to follow the law and give Mr. Cunningham access to books and records and that such failure materially prejudiced Mr. Cunningham's case, particularly in light of the recent SEC ruling assessing a fine for fraud. And, when the award is based, as it is in this case, on completely incompetent evidence and the Arbitrator refused to allow the Petitioner to rebut otherwise inadmissible and unreliable hearsay evidence, there is an obvious failure to allow relevant evidence.

CONCLUSION

Wherefore, Petitioner Cunningham prays that this Honorable Court reverse the final judgment of the Circuit Court of Kanawha County and remand this case with directions to vacate the arbitration award.

Respectfully submitted,
Petitioner, by counsel



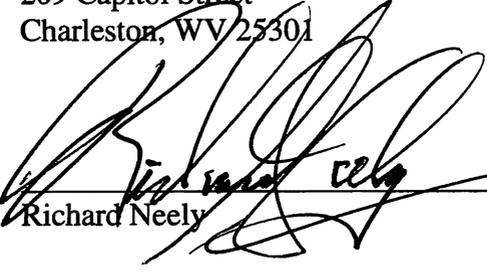
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CERTIFICATE OF SERVICE

I hereby certify that two true copies of the foregoing brief was served upon all counsel of record by hand delivery as follows:

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