

NO. A14-0017

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State of Minnesota
In Court of Appeals

Jeffrey M. Davies,
Respondent/Cross-Appellant,
vs.

Waterstone Capital Management, L.P.,
Appellant/Cross-Respondent.

**PRINCIPAL BRIEF AND APPENDIX OF
RESPONDENT/CROSS-APPELLANT JEFFREY M. DAVIES**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

I. DID THE ARBITRATOR HAVE EXCLUSIVE AUTHORITY TO DETERMINE THE TIMELINESS OF DAVIES' CLAIMS?

Waterstone first raised this issue to the arbitrator (R.A. 97-99), and Davies raised it again in the second district court action. (Mem. in Opp. to Vacating & in Supp. of Confirming the Arb. Awards at 15-18.) The District Court (Judge Bernhardson) held that the arbitrator, not the district court, had authority to determine the enforceability of the contractual limitations period and that the arbitrator's decision was entitled to great deference. (Add. 25.)¹

Apposite authorities:

- *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014);
- AAA Employment Arbitration Rules 4, 6; and
- *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187 (9th Cir. 2004).

II. HAS WATERSTONE FAILED TO PROVE ANY OF THE STATUTORY GROUNDS FOR VACATUR?

Davies raised this issue in the second district court action. (Mem. in Opp. to Vacating & in Supp. of Confirming the Arb. Awards at 9-31.) The District Court (Judge Bernhardson) confirmed the arbitration award, holding that (1) manifest disregard of the law was not a valid ground for vacating the arbitration award, and (2) the arbitrator did not exceed his authority such that the arbitration award should be vacated. (Add. 23-28.)

¹ Davies will adopt Waterstone's abbreviations for Waterstone's Addendum (Add. XX) and Appendix (A. XX). Cites to Davies' own Appendix will follow the format R.A. XX.

Apposite authorities:

- 9 U.S.C. § 10(a) (2014);
- *Medicine Shoppe Int'l., Inc. v. Turner Invs., Inc.*, 614 F.3d 485 (8th Cir. 2010); and
- *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

STATEMENT OF THE CASE

This is a dispute over whether an award from an esteemed Minnesota arbitrator—ordering that Respondent Jeffrey Davies is entitled to more than ten million dollars from his former employer for breach of contract and defamation—should be confirmed.

Waterstone’s Statement of the Case sets forth the applicable district court proceedings in this case’s history, but ignores a critical arbitral proceeding: in arbitration, Waterstone moved for dismissal of Davies’ claims based on the 90-day limitation period. (R.A. 91-105.) The arbitrator analyzed Waterstone’s arguments and rejected them, finding that the contractual limitation period was unreasonable under Minnesota law, that Davies had not slept on his rights, and that Waterstone was not prejudiced. (A. 72-75.) The “primary question” raised in Waterstone’s appeal (W. Br. 13²)—the timeliness of Davies’ claims—is one that has been decided in Davies’ favor by two separate district court judges and an arbitrator.

Waterstone also failed to mention that Davies filed a Notice of Related Appeal, challenging the District Court’s authority to rule on the timeliness of his claims. (R.A. 151-57.)

STATEMENT OF FACTS

A. Davies’ Work at Waterstone

Waterstone is a hedge fund that managed \$1.8 billion of assets at the time of the arbitration. (A. 128-29 ¶¶ 1-2.) It is owned by Shawn Bergerson. (A. 130 ¶ 4.) In 2007,

² Cites to Waterstone’s principal brief will follow the format “W. Br. XX.”

Davies began working at Waterstone as “an analyst and trader of fixed income securities with a specialization in the High Yield energy sector.” (A. 129 ¶ 3.) Davies did due diligence on companies within assigned sectors in order to determine what positions to take for the fund. (Tr. V. 2, pp. 523-34.)³ As part of his duties, Davies served as Waterstone’s point person to Wall Street brokers for credit trading. (Tr. V. 2, p. 525.)

Davies’ employment with Waterstone was subject to an employment agreement (“Agreement”). (A. 202.) Waterstone was the “sole scrivener” of the Agreement (A. 203), and the Agreement provided that Davies could not work in any capacity in the State of Minnesota in the investment field for one year after termination. (A. 6 ¶ 3(b).) The Agreement also provided broadly for arbitration of “any controversy or claim arising out of or relating to” the Agreement. (A. 8 ¶ 5.)

Davies regularly handled large financial transactions at Waterstone. In 2009, Davies traded \$700 million in bonds, in 2010 he traded \$4 billion of bonds, and in just six months of 2011, he traded \$5 billion of bonds. (Tr. V. 2, p. 532.) Davies, on behalf of Waterstone, bought and sold positions in large national and international companies. (Tr. V. 3, pp. 581-87.) Davies testified about his work investing in companies headquartered

³ Citations to the arbitration awards (included in Appellant’s Appendix) are appropriate as the arbitrator heard all the evidence and is the final judge of the facts. *See Office of State Auditor v. Minn. Ass’n of Prof’l Emps.*, 504 N.W.2d 751, 754 (Minn. 1993); *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967). Davies cites the arbitration transcripts only when necessary to supplement information in the awards. The transcript is in exhibits A-E to Pamela Abbate-Datillo’s July 26, 2013 affidavit in the second district court action.

all over the United States as well as in Norway, Australia, Canada, and the Cayman Islands. (Tr. V. 3, pp. 539, 559, 581-87, 598-601.)

Davies earned significant profits for Waterstone. Waterstone “consistently praised Davies” both through positive performance reviews and significant bonuses. (A. 133-34 ¶¶ 10-13.) Indeed “[b]y the end of 2010, Davies had emerged as one of Waterstone’s top performing analysts and traders,” and in 2011, he “was producing results that were unmatched by Bergerson or his peers.” (A. 134 ¶¶ 12-13.) Due to his success and his emerging reputation in the national energy credit sector, a prominent hedge fund in New York City presented Davies with an employment opportunity in early 2011. (A. 134 ¶ 14.) Bergerson convinced Davies to forego the New York opportunity by explaining that Davies would be walking away from approximately \$6 million if he left, that Davies would be made a partner in 2012, and that Davies would earn more at Waterstone than at the New York fund. (A. 134-37 ¶¶ 14-20.)

Just eight weeks after Bergerson made those representations to Davies, Bergerson revoked them. On June 28, 2011, Bergerson told Davies that Davies would not be made a partner in 2012. (A. 139 ¶ 25.) On June 29, Davies spoke with Bergerson and expressed his frustration about Bergerson breaking his word. (A. 141 ¶ 29.) Bergerson “left the room immediately.” (*Id.*) Within hours, Waterstone put Davies on a paid leave of absence and escorted him from the building. (A. 142 ¶ 32.) Other employees described Bergerson as generally “pissed” and “on a rampage” on the 29th. (A. 140

¶ 27.)⁴ Arbitrator Pemberton concluded that the record did not support any connection between Davies' transactions or trading and his paid leave or termination. (A.140 ¶ 26; A. 175-77 ¶¶ 106-09.)⁵ Instead, the evidence suggested Bergerson was upset about the fund's performance and took his frustration out on various employees. (A. 140-43 ¶¶ 27, 33, 34.) Waterstone terminated two other employees soon after Davies. (A. 143 ¶ 34.)

On July 8, 2011, Waterstone's general counsel informed Davies he was being terminated, and threatened to terminate him "for cause"⁶ if he did not release all claims

⁴ Bergerson sharply criticized another employee via email on June 28, as well as Davies. (A. 140 ¶ 27.)

⁵ In determining that Waterstone lacked any basis to terminate Davies "for cause," Arbitrator Pemberton found Davies' testimony "credible and supported by the record." (A. 131 ¶¶ 5, 7.) He concluded that the evidence showed "Davies was the victim in this situation and not the perpetrator of it in any way." (A. 184 ¶ 122.) In contrast, he found Bergerson's testimony "not credible and contrary to the record." (A.131 ¶ 6; A. 136 ¶ 18; A. 166 ¶ 83.) Notably, Bergerson testified that he was not familiar with many of Waterstone's asserted bases for "cause," and did not even know what the reasons meant. (A. 156 ¶ 61; A. 175 ¶ 104). Arbitrator Pemberton also found the testimony of Waterstone's Chief Operating Officer (Mr. Kalish) and Chief Compliance Officer/general counsel (Mr. Erb) "not credible" on critical points. (A. 172 n.20; A. 179 ¶ 115.) At the hearing, Erb asserted, without jest, that Waterstone could have terminated Davies "for cause" if he asked "a Waterstone employee what they had for lunch" while he was on paid leave (A. 169 ¶ 91). Furthermore, Arbitrator Pemberton noted that Waterstone had inappropriately withheld documents from production to Davies and may have tampered with one of the produced documents. (A.135 n.4; A.141 ¶ 28; A. 180 ¶ 116.)

⁶ The record does not support Waterstone's assertion that it spent the time between June 29 and July 15 investigating whether Davies' conduct warranted a "for cause" termination. (W. Br. 7.) Arbitrator Pemberton found that Waterstone failed to introduce evidence of such an investigation (A. 173 ¶ 98; A. 179-80 ¶¶ 114-116; A. 182 ¶ 119), and quoted Waterstone's Chief Compliance Officer as testifying that "Waterstone did not conduct *any* investigation prior to terminating Davies' employment." (A. 179 ¶ 115.) Instead, Arbitrator Pemberton found that "Bergerson's intention [behind the paid leave] was to gain time to lay groundwork for the termination for alleged cause and to

against Waterstone. (A. 146 ¶ 39.) Davies refused to sign the release and on July 15, 2011, Waterstone sent Davies a letter terminating him “for cause.” (*Id.* ¶ 40; A. 11.) The letter did not identify the cause. (A. 11.)

“[B]ecause of the damage done to [Davies’] reputation and image in the industry by the pretextual termination for cause,” Davies was unemployed for a time and then took a position at a firm in Houston, Texas at a small fraction of his former compensation. (A. 137 ¶ 19; A. 147-48 ¶¶ 42-45; A. 192 ¶¶ 140-141.)

B. The First District Court Action

Davies initially sought to have his breach of contract, defamation, and promissory estoppel claims heard in state court.⁷ (A. 12-27.) After litigating for approximately four months, including serving discovery requests and taking depositions, Waterstone made a dispositive motion under Rule 12.03 entitled “Motion for Judgment on the Pleadings, or In the Alternative, To Dismiss For Lack of Subject Matter Jurisdiction.” (R.A. 14-47.)

maliciously defame Davies” as well as “to avoid paying Davies his employment benefits.” (A. 173-74 ¶ 99; A.182 ¶ 119.)

⁷ On its motions to dismiss Davies’ complaint and Davies’ arbitration claims (R.A. 14-47, 91-105), Waterstone presented no evidence regarding Davies’ reasons for filing his claims in court. Waterstone therefore cannot rely on such evidence in arguing that the District Court and/or the arbitrator erred in deciding that the 90-day limitations period was unreasonable. (W. Br. 28.) Waterstone’s current attempts to draw inferences from Davies’ emails to another attorney are inappropriate and immaterial. (W. Br. 8-9.) In addition, the post-award text messages that Waterstone includes in its Confidential Appendix are irrelevant. Waterstone provided the same messages to the Arbitrator (R.A. 136-38), and he implicitly found them irrelevant as he did not mention them in his Final Award. (A. 201-211.) While Davies is not proud of the language and tone he used, those 2012 messages have no evidentiary value regarding his intent in 2011.

Waterstone's first argument was that Davies' claims should be dismissed because the Agreement provided that arbitration would be the "exclusive remedy" for any employment disputes. (R.A. 21-22.) Waterstone stated that Davies had "entered into a valid and enforceable agreement to arbitrate." (R.A. 23-24.) Waterstone argued that the Minnesota Uniform Arbitration Act ("MUAA") governed its motion, but cited cases under both the MUAA and the Federal Arbitration Act ("FAA"). (R.A. 22-38.) Waterstone also asked the District Court to enforce the 90-day limitations period in the Agreement and dismiss Davies' claims as untimely. (R.A. 37-38.) Waterstone argued the District Court had authority to decide that issue as an exception to the general rule that procedural arbitrability is for arbitrators to decide. (*Id.*)

In opposition, Davies pointed out the incongruity of Waterstone claiming the dispute was arbitrable, while asking the District Court to dismiss the claims. (R.A. 48, 53-73.) Davies argued that there was not a valid and enforceable arbitration clause in his Agreement, or if there was, Waterstone had waived it by participating in litigation, and that the 90-day limitation period was unreasonable as a matter of law. (R.A. 48.) Davies did not take a position on which arbitration act governed the question of arbitrability; he cited decisions under both state and federal acts. (*Id.*)

Judge Meyer of the Hennepin County District Court found all the claims were arbitrable (the "Arbitrability Decision"). (Add. 11.) Judge Meyer also decided that the 90-day limitation period was unreasonable under Minnesota law and therefore granted Davies another 90 days to commence arbitration (the "Timeliness Decision"). (Add. 10-11.)

Waterstone immediately appealed, but this Court determined the appeal was premature.⁸ (Add. 14-17.)

C. The Arbitration Proceeding and Awards

Davies commenced the arbitration with the American Arbitration Association (“AAA”) in April 2012. The parties selected Richard Pemberton as the sole arbitrator of the dispute.

Arbitrator Pemberton is an esteemed Minnesota lawyer and arbitrator who has been consistently selected as a Super Lawyer and one of the “Best Lawyers in America.” (R.A. 139.) Arbitrator Pemberton received the Minnesota State Bar Association’s “Advocate Award” for 2013, which recognized that he has “demonstrated commitment to the civil litigation system over years of service, brought about structural improvements to the civil litigation system and advanced the cause of underrepresented groups.” (*Id.*)

On August 1, 2012, Waterstone affirmatively asked Arbitrator Pemberton to rule on the enforceability of the 90-day limitation. Waterstone filed a motion to dismiss Davies’ claims. (R.A. 91-105.) Waterstone reiterated its position that the arbitration agreement was valid and enforceable.⁹ (R.A. 96-97.) In no uncertain terms, Waterstone argued that the District Court had exceeded its authority in issuing the Timeliness Decision:

⁸ Waterstone now complains that this Court may have reached a different result if the Court had analyzed the issue under the FAA. (W. Br. 35, n.18.) Waterstone was free to argue the FAA to this Court.

⁹ Davies did not refute the arbitrability of his claims during the arbitration. (R.A. 106-35.)

Because the District Court's decision did not simply address the timeliness question, and 'preclude all need for arbitration,' the Court acted outside the scope of its authority. The Court usurped the Arbitrator's authority to interpret the contract and resolve disputes over the timeliness of a demand. Therefore, the Arbitrator is not bound by the District Court's decision.

(R.A. 99.)

After inviting briefing and holding a hearing, Arbitrator Pemberton denied Waterstone's motion. (A. 72-75.) Arbitrator Pemberton found that the issue of whether he had authority to disagree with the District Court was immaterial because he did not disagree. (A. 73.) In a three-page reasoned order, he found that the 90-day limitation period was unreasonable, and that Davies' claims were timely, noting that Waterstone had not been prejudiced. (A. 72-75.)

The parties presented their cases during a week-long hearing in January 2013. (A. 125.) Testimony was received from fourteen witnesses, and over 300 exhibits were admitted into evidence. (*Id.*) The parties then submitted extensive post-hearing briefing.¹⁰

On April 8, 2013, Arbitrator Pemberton awarded Davies nine million dollars in damages and declared Davies the Prevailing Party in an Interim Award. In his 77-page

¹⁰ Contrary to Waterstone's contention that the arbitrator's award "is almost verbatim the 76-page Proposed Findings of Facts and Conclusions of Law that Davies submitted after the Arbitration," (W. Br. 42 n.21), Arbitrator Pemberton made substantial changes to Davies' proposed award. (*Compare* Exhibit G to August 20, 2013, "Second Affidavit of Pamela Abbate-Dattilo" with Interim Award at A.121-A.196.) Notably, Arbitrator Pemberton rejected Davies' promissory-estoppel claim (*e.g.*, A.138-39 ¶¶ 21-23) and made different findings and conclusions regarding Davies' alleged willful misconduct (A. 146-47 ¶¶ 41-42), Waterstone's publication of accusations against Davies (A. 157-58 ¶ 65), and Davies' termination without cause (A. 175-77 ¶¶ 106-110), among many other topics.

Interim Award, Arbitrator Pemberton made detailed findings of fact to support his conclusions. Critically, he found that improper motives drove Waterstone's treatment of Davies. (A. 182 ¶ 119.) He found Bergerson acted with "malice" in trying to teach Davies a "lesson": "that you do not challenge Mr. Bergerson or confront him." (A. 181 ¶ 117.) Bergerson wanted "retribution for what he regarded to be an insult to his superiority and infallibility." (A. 188 ¶ 132.) Notably, "Waterstone labeled Davies' termination as 'for cause' only after Davies had refused to accede to Waterstone's demand that he sign a release of all of his claims against Waterstone." (A. 182 ¶ 119.) "In view of the dearth of evidence supporting each of Waterstone's purported bases for 'cause,' it is apparent that Waterstone falsely characterized Davies' termination as 'for cause' as a pretext to avoid paying Davies his employment benefits and to damage his employability in the industry." (*Id.*)

Applying those findings of fact, Arbitrator Pemberton concluded Waterstone had: (1) breached Davies' employment contract by terminating him "for cause" when it had no legitimate cause; and (2) defamed Davies by publishing that termination within the industry and compelling him to tell prospective employers that he was terminated for cause. (A. 127.) Arbitrator Pemberton awarded Davies nine million dollars "for the combined damages relating to breach of contract and defamation" and noted the award covered "both past and future damages." (*Id.*) No specific amount of damages was attributed to either of Davies' claims. (*Id.*) Arbitrator Pemberton found against Davies on his promissory estoppel claim. (*Id.*)

After receiving additional briefing on Davies' request for attorneys' fees, Arbitrator Pemberton issued an eleven-page Final Award,¹¹ awarding Davies over one million dollars in attorneys' fees, costs and disbursements. (A. 201-211.) While Davies' counsel had requested three million dollars in attorneys' fees based on the lodestar factors, Arbitrator Pemberton instead awarded fees based on the hours expended by Davies' counsel, and discounted almost \$300,000 worth of those hours. (A. 206-07.) Arbitrator Pemberton awarded Davies another \$34,091.57 in costs and disbursements. (A. 210.)

D. The Second District Court Action

Waterstone moved to vacate the Award. Davies cross-moved to confirm the Award. Davies argued that the FAA governed and that Waterstone had not shown any of the four statutory bases for vacating an award under the FAA. (Mem. in Opp. to Vacating & in Supp. of Confirming the Arb. Awards at 9-31.)

The District Court denied Waterstone's motion to vacate and granted Davies' motion to confirm (the "Confirmation Order"). (Add. 18.) The District Court found that "the FAA and consistent Minnesota law" applied to its analysis. (Add. 22.)

With respect to Waterstone's request that the court reconsider the Timeliness Decision, the District Court concluded that the federal and state acts both gave the arbitrator authority to determine issues of timeliness and that the parties' incorporation of the AAA rules "provides further clear evidence of the parties' intent" to have the

¹¹ Davies will use "Award" to encompass both the Interim Award and Final Award.

arbitrator decide “the validity of a contractual prerequisite to arbitration.” (Add. 23-25.)

The court found:

Arbitrator Pemberton decided the combined question of whether the 90-day contractual period of limitations was enforceable and thus whether Davies’s Demand was timely ... on the merits and without legal deference to the district court’s decision. **The decision was within the scope of Arbitrator Pemberton’s authority under the Agreement and applicable law, and thus, like all of the arbitrator’s decisions, is accorded deference by this Court.**

(Add. 25, emphasis added.) The District Court also clarified that it agreed with the decision not to enforce the 90-day limitation period. (*Id.*)

Furthermore, the District Court found “manifest disregard” was not a basis for vacatur under either the FAA or Minnesota law. (Add. 22-23.) On Waterstone’s sole “relevant legal ground[.]” for vacatur, the District Court found Arbitrator Pemberton did not exceed his power. (Add. 27.) Judge Bernhardson reasoned, “there is no question that all of the disputed issues arise out of the Agreement and thus were correctly within the scope of the arbitration clause. The Court finds the Award to be comprehensive, thorough, and well-reasoned.” (*Id.*)

Judgment was entered on the Confirmation Order on December 2, 2013. Waterstone appealed from the Judgment, and Davies filed a Notice of Related Appeal.

ARGUMENT

Arbitration awards are afforded the highest deference available in the law. The Award in Davies’ favor, thoughtfully considered and rendered by an esteemed Minnesota arbitrator, should be no different. As Waterstone itself stressed during arbitration,

applicable law and the parties' Agreement placed the question of whether Davies' claims were timely before the arbitrator, and the arbitrator found that his claims were timely.

Waterstone's appeal of both district court judgments fails. Its appeal of Judge Meyer's Timeliness Decision fails because that decision became unreviewable after Arbitrator Pemberton decided the same issue. Waterstone's appeal of Judge Bernhardson's Confirmation Order fails because Waterstone makes no valid arguments that the Award should be vacated.

I. THE FAA CONTROLS

A. Davies' Employment Involved Interstate Commerce

As the District Court correctly determined, the FAA governs this dispute. (Add. 22.) The FAA applies in both state and federal court if the contract at issue "*in fact* involve[s] interstate commerce." *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 351 (Minn. 2003). The United States Supreme Court has "interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). In *Alafabco*, the Supreme Court held that the FAA governed loan agreements that were made by an Alabama bank to an Alabama corporation because those loans were used to fund the corporation's work in other states, the loans were secured by assets that had moved in interstate commerce, and because of "the broad impact of commercial lending on the national economy." *Id.* at 57-58.

Davies' employment with Waterstone unquestionably affected and involved interstate commerce. Waterstone does not contest this fact. (W Br. 34, 37-38.) As an employee of a hedge fund who was responsible for trades in the energy sector, Davies was involved in interstate commerce every day. Davies was Waterstone's liaison to Wall Street brokers. Davies regularly bought and sold securities of companies all over the country and around the world. Furthermore, the sheer size of Davies' trading (reaching a pace of \$10 billion in trades annually) would affect interstate commerce, regardless of the location of those companies. Therefore, the FAA applies to this dispute. *See Giuliano v. Inland Empire Pers., Inc.*, 149 Cal. App. 4th 1276, 1287 (Cal. Ct. App. 2007) (holding that FAA applied to arbitration clause contained in employment contract where employee "engaged in activity that affected interstate commerce by negotiating multi-million dollar loan agreements with a bank that was headquartered in another state") (internal quotations omitted).

Waterstone mistakenly argues that this Court should apply the repealed MUAA to this dispute. (W. Br. 35-36.) The FAA is "a body of federal substantive law of arbitrability, applicable to *any* arbitration agreement within the coverage of the Act"—that is, any arbitration agreement evidencing a transaction involving interstate commerce. *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (emphasis added); *see* 9 U.S.C. § 2 (2014). While parties may choose to have state arbitration acts provide the legal parameters for the arbitration, that choice is not lightly inferred. Courts "will not interpret an arbitration agreement as precluding the application of the FAA unless the parties' intent that the agreement be so construed is abundantly clear." *UHC Mgmt. Co., Inc. v. Computer Scis.*

Corp., 148 F.3d 992, 997 (8th Cir. 1998). A generic choice of law provision in a contract does not provide “abundantly clear” evidence of the parties’ intent to preclude application of the FAA. *See id.*; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995); *Precision Press, Inc. v. MLP U.S.A., Inc.*, 620 F. Supp. 2d 981, 991 (N.D. Iowa 2009) (listing relevant cases). In short, nothing in the Agreement prevents application of the FAA.

B. No Doctrine Precludes This Court From Correctly Applying the FAA

Waterstone argues that the doctrine of judicial estoppel prevents this Court from applying the FAA. Minnesota does not recognize that doctrine, however, and it would not apply to prevent Davies’ arguments in any case.

1. Minnesota does not recognize judicial estoppel

Minnesota does not recognize the doctrine of judicial estoppel. *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005) (“The doctrine of judicial estoppel has not been expressly recognized by this court.” “[W]e decline to adopt the doctrine at this time.”) In a dispute in which the parties had changed their arguments regarding arbitrability, the Minnesota Supreme Court refused to apply judicial estoppel. *Illinois Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 800-01 (Minn. 2004). These two cases are binding on this Court and post-date the Minnesota case cited by Waterstone. (*See* W. Br. 34.)¹²

¹² The Washington case cited by Waterstone (W. Br. 35) stands for the unremarkable proposition that if an appellant does not raise its argument at the trial court on a motion to vacate, it cannot raise it for the first time at the court of appeals. *Broom v. Morgan Stanley DW, Inc.*, No. 60115-6-I, 2008 WL 4053440, at *2 (Wash. Ct. App. Sept. 2,

2. *Judicial estoppel is inapplicable*

Even if judicial estoppel were recognized in Minnesota, it would not preclude Davies from arguing for application of the proper arbitration statute. Waterstone's own authority states that judicial estoppel only applies if a party takes a first position that is adopted by the court, and later takes a "clearly inconsistent" position. *Port Auth. of St. Paul v. Harstad*, 531 N.W.2d 496, 500 (Minn. Ct. App. 1995). Before Judge Meyer and Arbitrator Pemberton, Davies did not take any position on which arbitration act governed. Davies' briefs cited cases interpreting both the FAA and the MUAA.¹³ Davies never analyzed which act was applicable, and certainly never rejected application of the FAA. In addition, neither Judge Meyer nor Arbitrator Pemberton ever "adopted" any position by Davies that is inconsistent with his current argument that the FAA governs. Therefore, judicial estoppel does not prevent Davies' argument.

Furthermore, judicial estoppel would be especially inequitable in this case, where both parties have changed their positions. Waterstone has vacillated on the question of whether the court or the arbitrator had authority to decide the timeliness of Davies'

2008). Davies properly argued the FAA during the cross-motions to confirm and vacate the arbitration awards at the District Court.

¹³ Compare R.A. 63 and 123 (citing FAA cases) with R.A. 64 (citing MUAA case *Brothers Jurewicz*). Davies argued exclusively for application of the FAA in his briefs to confirm his arbitration award. (Mem. in Opp. to Vacating & in Supp. of Confirming the Arb. Awards.) In finding that the FAA controlled, the District Court impliedly rejected Waterstone's argument that Davies was precluded from arguing for a proper application of that federal statute. (See Waterstone's Reply Mem. in Supp. of Motion to Vacate at 4-6.)

claims: before Judge Meyer, Waterstone argued that timeliness was a question for the court to decide (R.A. 37-38); before Arbitrator Pemberton, Waterstone argued that timeliness was for the arbitrator (R.A. 97-101); before Judge Bernhardson, Waterstone yet again changed its position and argued that the District Court had authority to decide the timeliness issue. (Waterstone's Reply Mem. in Support of Motion To Vacate at 3-4.)

3. *The interests of justice favor deciding this appeal according to the law*

This Court is willing to accept revised arguments on appeal in the interest of reaching the correct decision. In particular, the Court of Appeals recently considered whether Minnesota's Revised Uniform Arbitration Act ("MRUAA") applied to a dispute, even though neither party had raised that issue before the district court. *Educ. Minn. Inver Grove Heights v. Indep. Sch. Dist. No. 199, Inver Grove Heights*, No. A12-1309, 2013 WL 1500879, at *2 (Minn. Ct. App. Apr. 15, 2013). In deciding to do so it reasoned:

[T]his court has discretion to address any issue as the interests of justice require. Minn. R. Civ. App. P. 103.04. And an appellate court has an obligation to decide cases according to the law, and "that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities."

Id. (citations omitted); *see also Peterson v. Lenz*, No. A04-374, 2004 WL 2793331, at *6 (Minn. Ct. App. 2004). That same reasoning applies here to support application of the FAA, even if neither party had raised that statute before this appeal.

Similarly, this Court "will not reverse a correct decision by the district court simply because we disagree with its reasoning." *State v. Eichers*, 840 N.W.2d 210, 216

(Minn. Ct. App. 2013), *review granted* (Minn. Feb. 26, 2014); *see also State v. Fellegy*, 819 N.W.2d 700, 707 (Minn. Ct. App. 2012) (“We may affirm the district court on any ground, including one not relied on by the district court.”) This Court may therefore apply the FAA to affirm the District Court’s order.

II. THE FIRST DISTRICT COURT ORDER IS UNREVIEWABLE

Judge Meyer’s order is made up of two primary parts – the Arbitrability Decision and the Timeliness Decision. Neither party appeals the Arbitrability Decision. With respect to the Timeliness Decision, Waterstone seeks *de novo* review (W. Br. 14), but the decision is unreviewable because the District Court lacked authority to rule on the timeliness issue. Although the District Court sided with Davies on timeliness, the issue of authority is important to resolve because it clarifies whether the Court can review the Timeliness Decision at all.

A. Waterstone Cannot Contest the Arbitrability Decision

Judge Meyer had authority to determine whether Davies’ claims were subject to a valid arbitration agreement. The FAA gives courts authority to determine “gateway issues” of arbitrability. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013). In general, those gateway issues are: whether the parties have a valid agreement to arbitrate and whether the arbitration agreement covers the present dispute. *Id.* Gateway issues of arbitrability have also been described as “substantive arbitrability,” while the dispositive issues assigned to arbitrators are described as “procedural arbitrability.” *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002).

Waterstone cites a section of the MUAA providing that vacatur is appropriate if “there was no agreement to arbitrate.” (W. Br. 14.) Waterstone has never indicated it planned to argue that the District Court was wrong to order this dispute to arbitration. In fact, Waterstone has argued at every stage of this proceeding that the parties’ arbitration agreement was valid and enforceable. (See Add. 23, finding that “Waterstone does not challenge the district court’s determination that an agreement to arbitrate exists.”) In this Court, Waterstone acknowledges that “there is no dispute that the Agreement required Davies to arbitrate” (W. Br. 37), and Waterstone’s Statement of the Case focused exclusively on the Timeliness Decision and the Arbitration Award. (R.A. 143-50.) Nor did Waterstone argue to the District Court that the Arbitration Award must be vacated because the dispute was not arbitrable. (Waterstone Mem. in Support of Motion To Vacate.) Therefore, the Arbitrability Decision is not properly before this Court on appeal.

B. The Arbitrator Had Exclusive Authority to Decide the Timeliness Issue Under the FAA and the Agreement

1. The FAA presumes procedural arbitrability is for the arbitrator to decide

The FAA presumes arbitrators have authority to determine the timeliness of claims. Any issues outside the few gateway issues of substantive arbitrability—even if they affect the viability of the claims at issue—are within the jurisdiction of the arbitrator. The United States Supreme Court reiterated this principle just last month in *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014):

[C]ourts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. . . . These procedural matters include claims of “waiver, delay, or a like defense to arbitrability.”

Id. at 1207 (internal citations omitted).

As Waterstone argued to Arbitrator Pemberton, the timeliness of a claim is a defense that courts have repeatedly held is for arbitrators to decide. In *BG Group*, the Supreme Court cited its 2002 decision in *Howsam* to conclude that issues of procedural arbitrability, i.e., whether “prerequisites such as **time limits**, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate” have been met, are for the arbitrators to decide. *Id.* (quoting *Howsam*, 537 U.S. at 85)(emphasis added); accord *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 872 (8th Cir. 2004) (concluding that “questions of whether waiver occurred and whether demand was sufficient and timely under the agreement, involve issues of procedural arbitrability, matters presumptively for the arbitrator”).

In a nearly identical context in *Chiafos v. Rest. Depot LLC*, No. 09-0499, 2009 WL 2778077, at *8 (D. Minn. Aug. 28, 2009), an employer sought to have an employee’s claim dismissed based on a contractual limitations period in the arbitration clause. The judge refused to do so, finding that limitations defenses are appropriately directed to the arbitrator. *Id.* at *8. In its analysis, the court reasoned that, under the FAA, courts “regularly refer the question of a time limitation, whether styled as a statute of limitations or some other time limit, to arbitrators.” *Id.* Therefore, Arbitrator Pemberton was

authorized to determine whether Davies' claims were precluded by the 90-day limitation period in the arbitration clause.

On this question, the FAA and the current state arbitration act (the MRUAA) agree. The MRUAA provides that: “[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled.” Minn. Stat. § 572B.06(c) (2014).¹⁴ Comments to the Revised Uniform Arbitration Act, from which the MRUAA was taken, confirm that the term “condition precedent” includes limitations issues:

Subsections (b) and (c) of Section 6 are intended to incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA that...issues of procedural arbitrability, i.e., whether **prerequisites such as time limits**, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.

(R.A. 12 (emphasis added).)

Therefore, once the District Court determined the gateway issues of arbitrability—whether the parties had a valid arbitration agreement whose scope covered Davies' claims—it should have referred the timeliness issues to the arbitrator. *See* 9 U.S.C. § 3 (2014) (“If any suit or proceeding be brought in any of the courts of the United States. . . ,

¹⁴ The FAA governs the issues in this appeal. However, if this Court should decide to apply a Minnesota Act, it should be the MRUAA, and not the arbitration act it replaced. “On or after August 1, 2011, [the MRUAA] govern[s] agreements to arbitrate even if the arbitration agreement was entered into prior to August 1, 2011.” Minn. Stat. § 572B.03(b) (2014). The only exception is for “an action or proceeding commenced or right accrued before [August 1, 2011].” Minn. Stat. § 572B.30 (2014). Here, all of the relevant events occurred after August 1, 2011. The “action” commenced when Davies filed his complaint in District Court on August 15, 2011. The “proceeding”—although undefined—must have occurred on or after August 15, 2011, because no proceeding occurred prior to the filing of the complaint. And finally, none of Davies' rights that are affected by the MRUAA had accrued before August 1, 2011.

the court in which such suit is pending, **upon being satisfied that the issue** involved in such suit or proceeding **is referable to arbitration** under such an agreement, **shall** on application of one of the parties **stay the trial of the action** until such arbitration has been had in accordance with the terms of the agreement”) (emphasis added); *accord* Minn. Stat. § 572B.07(a) (2014) (“Unless the court finds that there is no enforceable agreement to arbitrate, it **shall order the parties to arbitrate.**”) (emphasis added).

2. *The parties’ Agreement delegated issues of timeliness to the Arbitrator*

Not only does the law assume that arbitrators decide procedural issues like the timeliness of a demand, but the parties explicitly gave the arbitrator authority to decide timeliness by adopting the rules of the American Arbitration Association (“AAA”). (A. 8 ¶ 5.) Under the FAA, courts treat incorporated arbitral rules as part of the arbitration agreement that must be enforced. *See Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (finding the “arbitration provision’s incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties’ intent” to allow the arbitrator to determine issues authorized by the AAA Rules).

The Agreement’s broad arbitration clause states that “any controversy or claim arising out of or relating to this Agreement, including the making and entering into thereof, shall be subject to final and binding arbitration in Minneapolis, Minnesota, in accordance with the rules of the American Arbitration Association then in effect.” (A. 8 ¶ 5.) The AAA applies its Employment Arbitration Rules when parties contract “for

arbitration by the AAA of an employment dispute without specifying particular rules.”
(Rule 1 at R.A. 2.)

The Employment Arbitration Rules of the AAA give the arbitrator the following specific powers that are relevant to this appeal:

- “Any dispute over the timeliness of the demand shall be referred to the arbitrator” (Rule 4(i)(1) at R.A. 3); and
- “The arbitrator shall have the power to rule on his or her own jurisdiction” (Rule 6(a) at R.A. 4).

Those clear statements empowered Arbitrator Pemberton, and not the District Court, to determine whether Davies’ demand was timely. Because arbitration is a matter of contract, the parties’ intent to grant Pemberton authority to decide “any dispute over the timeliness of the demand” is controlling.

3. *The FAA preempts Minnesota decisions to the contrary*

Waterstone cites Minnesota cases that appear to sanction a district court’s determination of timeliness defenses. (W. Br. 14, 36.) However, the FAA preempts the application of those cases to the instant dispute. In particular, “the FAA pre-empts state laws which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (quotation omitted); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747-48 (2011). Minnesota case law that attempts to override the federal presumption in favor of arbitrators deciding issues of procedural arbitrability, and further attempts to override the parties’ contractual choice to

assign timeliness issues to the arbitrator by incorporating AAA rules, impermissibly interferes with arbitration and is therefore preempted by the FAA.

C. The Timeliness Decision Is Unreviewable

1. The District Court lacked authority to decide timeliness

Because both the FAA and the Agreement gave Arbitrator Pemberton, and not the District Court, authority to determine the merits of Waterstone's limitations defense, the District Court erred in ruling on the timeliness issue. Therefore, this Court should not review the Timeliness Decision on the merits.

However, the District Court's error is immaterial, because Waterstone later asked Arbitrator Pemberton, who did have authority, to decide the merits of its limitations defense. *See In re Commitment of Rud*, No. A13-1158, 2014 WL 802487, at *2 (Minn. Ct. App. Mar. 3, 2014) (affirming district court, even after finding it relied on inaccurate facts, because outcome of case would not change and appellant was not prejudiced, citing *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975)); *see also* Minn. R. Civ. P. 61 (2014) (noting that no error "in any ruling or order . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.").

Waterstone now posits that because Davies responded to Waterstone's argument that his claims were time-barred, he conferred jurisdiction on the District Court to decide the timeliness issue. (W. Br. 33.) Waterstone cites no authority for that proposition.

(*Id.*)¹⁵ In fact, the AAA rules state plainly that a party does not waive its right to arbitrate an issue by placing it before the court. (Rule 42(a) at R.A. 7.) Therefore, Waterstone’s argument that the parties gave up their right to arbitrate the timeliness issue by raising it before Judge Meyer fails.

2. *Waterstone’s request that Arbitrator Pemberton decide timeliness made the District Court’s Timeliness Decision unreviewable*

Even if, however, the parties’ submission of the timeliness issue to the District Court would have otherwise allowed Waterstone to obtain a *de novo* review of the Timeliness Decision, that was no longer true after Waterstone made its motion to dismiss to Arbitrator Pemberton.¹⁶ Waterstone offers no authority for this Court to ignore the fact that the arbitrator subsequently decided the timeliness of Davies’ claims. (W. Br. 14.)¹⁷

¹⁵ Waterstone’s reliance on *Lewallen* and *Volt Info. Scis., Inc.* is misplaced. (W. Br. 33.) *Lewallen v. Green Tree Servicing L.L.C.*, 487 F.3d 1085 (8th Cir. 2007) dealt with a party’s waiver of its entire right to arbitrate by invoking the machinery of litigation, an issue that Judge Meyer decided and neither party has challenged. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989), did not deal with waiver at all, but with the scope of the parties’ arbitration agreement. “This was not a finding that appellant had ‘waived’ an FAA-guaranteed right to compel arbitration of this dispute, but a finding that it had no such right in the first place, because the parties’ agreement did not require arbitration to proceed in this situation.” *Id.*

¹⁶ Waterstone has never been a victim of a “Catch 22” created by Davies, as it now argues. (*See* W. Br. 35). Waterstone has made its own bed. Waterstone first chose to breach its contract with Davies and defame him. Then Waterstone affirmatively chose to ignore applicable arbitration law, by making a Rule 12.03 motion raising timeliness to the District Court. Then Waterstone affirmatively chose to again present its timeliness defense to Arbitrator Pemberton.

¹⁷ Minn. Stat. § 572B.23(a)(5) (2014) does not support Waterstone’s argument, even if the MRUAA governed. (*See* W. Br. 38.) That statute requires a party to raise first with the arbitrator an argument that “there was no agreement to arbitrate.” As set forth in

In a case on all fours with this one, *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187 (9th Cir. 2004), the district court first ruled that the parties' dispute was arbitrable, and the appellant then raised the same issue with the arbitrator (who reached the same conclusion). On appeal, the Ninth Circuit refused to review the district court's order, and instead looked exclusively, and deferentially, to the arbitrator's award. *Id.* at 1189.

The Ninth Circuit did not consider whether the order compelling arbitration was correct when it was issued—before the plaintiff submitted the matter of arbitrability to the arbitrator. Instead, it stated that the plaintiff could not challenge the arbitration panel's authority to decide arbitrability after having affirmatively argued that it had such authority. *Id.* at 1192-93. As a result, the Ninth Circuit concluded that “[the plaintiff] is now bound by the arbitration panel's findings on arbitrability and the merits unless it can overcome the highly deferential standard of review employed by the federal courts regarding arbitrators' holdings.” *Id.* at 1193.

Furthermore, the United States Supreme Court's recent decision in *BG Group* confirms that when an arbitrator decides something within his or her authority, that decision is entitled to extraordinary deference. In *BG Group*, the party who lost in arbitration was seeking a *de novo* review of the arbitrator's determination that a condition precedent to arbitration had been met. *Id.* at 1206. In that case, the condition precedent was a contractual requirement that the parties litigate in a local tribunal for at least 18

Section II.A., *supra*, Waterstone has always taken the position, as it does on appeal, that the parties have a valid and enforceable agreement to arbitrate.

months before commencing arbitration. *Id.* at 1207. Because the application and interpretation of that condition precedent was within the arbitrator's authority, the Court refused to review it *de novo* and instead applied the extraordinary deference it affords arbitration awards. *Id.* at 1210. The Court explained: "The interpretation and application of the local litigation provision is primarily for the arbitrators. Reviewing courts cannot review their decision *de novo*. Rather, they must do so with considerable deference." *Id.*

As set forth above, the arbitrator had exclusive authority to determine the timeliness issue. Waterstone recognized that when it presented that issue to Arbitrator Pemberton and asked him to dismiss Davies' claims based on the 90-day limitations period. Therefore, because the Timeliness Decision was issued in error, this Court should not review its merits at all. The only decision about the timeliness of Davies' claims that is properly before this Court is Arbitrator Pemberton's decision, and, as the Confirmation Order recognized, that must be reviewed under the extremely deferential standard afforded to arbitration awards.

III. ALTERNATIVELY, THE DISTRICT COURT'S TIMELINESS DECISION WAS NOT CLEAR ERROR

If this Court concludes that the Timeliness Decision is reviewable, it should be affirmed either: a) because Waterstone did not preserve this argument for appeal; or b) because the District Court did not clearly err in finding the 90-day period was unreasonable under Minnesota law.

A. Waterstone Failed To Preserve Its Reasonableness Argument

In its initial memorandum to Judge Meyer supporting dismissal of Davies' claims, Waterstone did not address whether the 90-day limitation period in the Agreement was reasonable. (R.A. 37-38.) It was only in Waterstone's reply brief that it argued the 90-day period was reasonable. (R.A. 88-89.) However, the District Court struck Waterstone's reply brief for non-compliance with applicable page limitations. (Add. 11-12.) Waterstone has not indicated it would appeal the District Court's striking of its reply brief (R.A. 143-50) and did not address it in its principal brief. Therefore, Waterstone's reply brief is not part of the appellate record. As such, Waterstone did not properly preserve for appeal its argument that the 90-day limitations period is reasonable. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

B. The District Court Did Not Clearly Err In Concluding The Limitations Period Is Unreasonable

Even assuming Waterstone preserved its argument for appeal, Judge Meyer correctly decided that the 90-day limitation period was unreasonably short for bringing breach of contract and defamation claims.

To be enforceable, "contractual limitations periods for claims to be arbitrated must be reasonable." *Peggy Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 607 (Minn. 2002). A district court's determination of whether a contractual limitations period is reasonable is not reviewed *de novo*, but reviewed for clear error.¹⁸ *Henning Nelson*

¹⁸ *Peggy Rose* states that "[a]ppellate courts review a determination of arbitrability *de novo*." 640 N.W.2d at 606. But *Peggy Rose* did not specify what standard of review

Constr. Co. v. Fireman's Fund Am. Life Ins. Co., 383 N.W.2d 645, 650 (Minn. 1986); *Freeman v. Skogen*, No. C5-93-348, 1993 WL 318927, at *2 (Minn. Ct. App. Aug. 24, 1993). Waterstone cannot establish clear error by Judge Meyer.

Judge Meyer found that: (1) Davies filed the litigation within the 90-day window, putting Waterstone on notice of his claims soon after the dispute arose; (2) Davies believed and maintained in good faith that the arbitration clause was inapplicable; (3) Waterstone could have moved to compel arbitration within the 90-day window but chose to wait until the window had elapsed; and (4) Waterstone had suffered no prejudice by the passage of time. Judge Meyer concluded that, under these circumstances, enforcement of the 90-day contractual limitations period would be unreasonable. (Add. 10-11.) The District Court's conclusion was not clearly erroneous.¹⁹

applies to a district court's determination regarding the reasonableness of a contractual limitations period. *See id.* Nor did it expressly overrule the clear statement in *Henning* and in the Court of Appeals' decision in *Peggy Rose* that such determinations are fact specific inquiries that are subject to clear-error review. *See id.*; *Henning*, 383 N.W.2d at 651; *Peggy Rose Revocable Trust v. Eppich*, No. C3-00-1163, 2001 WL 50878, at * 2 (Minn. Ct. App. Jan. 23, 2001). *Henning*, therefore, is controlling regarding the applicable standard of review. This conclusion is consistent with the general rule that reasonableness is a fact question subject to clear-error review. *See In re Pamela Andreas Stisser Grantor Trust*, 818 N.W.2d 495, 507 (Minn. 2012) (addressing the reasonableness of compensation for a personal representative); *Highview N. Apartments v. Ramsey Cnty.*, 323 N.W.2d 65, 72 (Minn. 1982) (addressing the reasonableness of property use); *City of Minnetonka v. Carlson*, 298 N.W.2d 763, 766 (Minn. 1980) (addressing the reasonableness of attorneys' fees); *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977) (addressing whether a reasonable person would believe a statement to be defamatory).

¹⁹ Notably, Arbitrator Pemberton and Judge Bernhardson also concluded that the 90-day limitations period was unreasonable. (Add. 25-26; A. 73-74.) Arbitrator Pemberton

Indeed, Minnesota case law and the statutory limitations periods for Davies' claims further support Judge Meyer's conclusion. No Minnesota cases have found a 90-day contractual limitations period to be reasonable.²⁰ *Cf. Henning*, 383 N.W.2d at 651 (affirming the district court's determination that a one-year contractual limitations period was unreasonable); *Bailey v. Ameriquest Mortg. Co.*, No. 01-545, 2002 WL 100391, at *5 (D. Minn. Jan. 23, 2002) (finding that a one-year limitations period in an arbitration agreement was unreasonable), *rev'd on other grounds by* 346 F.3d 821, 824 (8th Cir. 2003). The statutory limitations period is two years for Davies' defamation claim and six years for his breach-of-contract claims, which is **eight to twenty-four times** as long as the 90-day contractual limitations period. *See* Minn. Stat. §§ 541.05, subd. 1(1), 541.07(1) (2014). This disparity between the statutory and contractual limitations

reasoned that the 90-day limitations period did not serve any of the ordinary purposes for time limitations—like giving parties repose and ensuring that cases are tried before witnesses become unavailable or their memories fade. (A. 73-74.) Judge Bernhardson reasoned that the 90-day limitations period is substantially shorter than “the shortest general statute of limitations period set by the Minnesota Legislature [which] is one year” and the “shortest statute of limitations for claims likes Davies’s [for defamation and recovery of wages, which] is two years.” (Add. 26.) She also noted that the court was “hard-pressed to find a case in which a 90-day limitations period on a new claim, not review of an existing claim, was held to be reasonable.” (*Id.*)

²⁰ Waterstone incorrectly states that “Minnesota courts even enforce 10-day contractual limitations periods for commencing labor arbitration,” citing *Columbia Heights Fed’n of Teachers Local 710 v. Indep. Sch. Dist. No. 13*, 457 N.W.2d 775, 778 n.3. (Minn. Ct. App. 1990). (W. Br. 23.) *Columbia Heights* did not address, much less enforce, the 10-day limitations period. *Id.* Rather, the court stated that the arbitration clause in the relevant collective bargaining agreement did not apply to the dispute at issue. *Id.* at 778. In a footnote, the court quoted the clause (which included a 10-day limitations period), noting that, “[t]his provision, which was not addressed by the parties, is not essential to our decision.” *Id.* at 778 n.3.

periods further supports the District Court's conclusion that the 90-day limitation was unreasonable. *See Peggy Rose*, 640 N.W.2d at 607 (explaining that, "[i]n assessing the reasonableness of [the contractual limitation] provision . . . we find it useful as a starting point to consider" the relevant statute of limitations); *Henning*, 383 N.W.2d at 651 (affirming the district court's determination that a one-year contractual limitations period, as compared to a six-year statutory limitations period, was unreasonable).

Waterstone argues that 90-day statutory limitations periods are common in the labor and employment sphere, pointing to specific statutes of limitation in the Minnesota Human Rights Act, Title VII, the National Labor Relations Act, and the Uniform Arbitration Act as it applies to certain hybrid labor disputes. (W. Br. 22-23.) But these statutes do not provide a helpful comparison to the contractual limitation here for at least two reasons. First, Davies did not bring claims under these acts. Second, three of the statutes of limitation upon which Waterstone relies are periods for **appealing** the decision of the first decision-maker, not for filing an initial claim. Minn. Stat. § 363A.33, subd. 1 (2014); 42 U.S.C. § 2000e-5(f)(1) (2014); *Allen v. Hennepin Cnty.*, 680 N.W.2d 560, 566 (Minn. Ct. App. 2004), *review denied* (Minn. Aug. 17, 2004) (explaining that, under Minn. Stat. § 572.19, subd. 2, a discharged employee who sues his/her union for breach of the duty of fair representation and his/her employer for breach of the labor contract must do so within 90 days after the union announces that it will not pursue the employee's grievance). (*See Add. 26.*) As a result, these statutes do not support Waterstone's claim of reasonableness.

Waterstone also contends that the District Court erred in the factors it considered. (W. Br. 17-22, 25-29.) But the reasonableness of a contractual limitations period requires a case-by-case analysis of “the particular facts presented,” *Peggy Rose*, 640 N.W.2d at 606, not application of a formula. And Waterstone does not cite any case law prohibiting a district court from considering the factors that the District Court considered here. Indeed, *Fischer v. NWA, Inc.*, which Waterstone relies upon for the proposition that the District Court cannot consider the defendant’s delay in seeking arbitration (W. Br. 25-26), did not address the reasonableness of the contractual limitations period but instead addressed whether the respondent had waived its right to arbitrate. *Fischer v. NWA, Inc.*, 883 F.2d 594, 601 (8th Cir. 1989); *Fischer v. NWA, Inc.*, No. 3-87 Civ. 106, 1988 U.S. Dist. LEXIS 12590, *32-34 (D. Minn. June 9, 1988).²¹ *Fischer* is therefore inapposite.

Finally, Waterstone argues that the District Court erred in using the blue-pencil doctrine to re-write the contractual limitations period. However, assuming the District Court could address the timeliness issue at all,²² Minnesota law gave the District Court authority to invalidate an unreasonable limitations period. *See Peggy Rose*, 640 N.W.2d at 610; *Henning*, 383 N.W.2d at 651. Thus, once the District Court determined that the 90-day limitations period was unreasonably short, the court was empowered to refuse to

²¹ Other courts have found it is inappropriate for a defendant to intentionally wait until a contractual limitation period has run to file a motion to compel arbitration. *Medtronic, Inc. v. Guidant Corp.*, No. 00-1473, 2003 WL 21181103 (D. Minn. May 16, 2003).

²² Because the Agreement incorporates the AAA rules that expressly grant the arbitrator exclusive authority to determine issues of timeliness, Waterstone itself now asks this Court to “blue pencil” the Agreement by ignoring the AAA rules and finding the District Court had authority to rule on timeliness.

enforce that provision entirely. However, the parties' Agreement authorized the court to enforce the limitations period "to the extent that is reasonable" if it finds the term "invalid or unenforceable." (A. 8 ¶ 8.) The District Court's order complies with the parties' Agreement and makes the limitations period reasonable. *C.f. Beery v. Quest Diagnostics, Inc.*, 953 F. Supp. 2d 531, 548 (D.N.J. 2013) (severing 90-day limitation period from arbitration clause after concluding it was unenforceable); *Dortch v. Quality Rest. Concepts, LLC*, No. 1:12-CV-198, 2013 WL 1789603, at *8 (E.D. Tenn. Apr. 26, 2013) (severing unconscionable 20-day limitation period from rest of arbitration agreement); *Long v. BDP Int'l, Inc.*, 919 F. Supp. 2d 832, 846 (S.D. Tex. 2013) (severing unconscionable one-year limitation period from arbitration agreement).

Furthermore, the District Court's revision to the contractual limitation period helped Waterstone by forcing Davies to demand arbitration promptly after the court found the limitations period unreasonable. Therefore, even if the District Court erred in re-writing the contractual limitations period, that error was harmless to Waterstone and does not warrant reversal.

IV. JUDGE BERNHARDSON PROPERLY DENIED WATERSTONE'S MOTION TO VACATE

A. The Standard Of Review Is Extremely Deferential

The FAA grants arbitration awards the highest level of deference under the law. The Eighth Circuit summarized the standard as "[A]rbitrator's decisions [are afforded] an extraordinary level of deference and confirm[ed] so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority."

Crawford Grp., Inc. v. Holekamp, 543 F.3d 971, 976 (8th Cir. 2008) (internal quotations omitted); *see also Doral Fin. Corp. v. Garcia-Velez*, 725 F.3d 27, 31 (1st Cir. Jul. 31, 2013) (noting that judicial review of arbitration awards is “so deferential indeed that we have stated that ‘[a]rbitral awards are nearly impervious to judicial oversight.’” (alteration in original) (citation omitted)). Similarly, this Court has recently stated “[a] judicial appeal from an arbitration decision is subject to an extremely narrow standard of review.’ The courts must ‘exercise every reasonable presumption in favor of the award’s finality and validity.’” *Seagate Tech., LLC v. W. Digital Corp.*, 834 N.W.2d 555, 559 (Minn. Ct. App.), *review granted* (Minn. Oct. 15, 2013) (quoting *Hunter, Keith, Indus. Inc. v. Piper Capital Mgmt., Inc.*, 575 N.W.2d 850, 854 (Minn. Ct. App. 1998)). The limited review is necessary to uphold one of the fundamental purposes of arbitration:

That limited judicial review, we have explained, “maintain[s] arbitration’s essential virtue of resolving disputes straightaway.” . . . If parties could take “full-bore legal and evidentiary appeals,” arbitration would become “merely a prelude to a more cumbersome and time-consuming judicial review process.”

Sutter, 133 S. Ct. at 2068 (internal citations omitted). Waterstone is attempting to turn this into exactly the type of “full-bore legal and evidentiary appeal” that the FAA was designed to avoid.

B. Judge Bernhardson Correctly Concluded Arbitrator Pemberton Did Not Exceed His Authority

The FAA sets forth only four bases for vacating 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(a) (2014). Those four bases are **exclusive**. “An arbitral award may be vacated only on grounds enumerated in the Federal Arbitration Act (FAA).” *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 710 (8th Cir. 2011); *accord Medicine Shoppe Int’l., Inc. v. Turner Invs., Inc.*, 614 F.3d 485 (8th Cir. 2010) (“We have previously recognized the holding in *Hall Street* and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA.” (citing *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008)))

The only cognizable basis Waterstone raises for vacating the Award is that Arbitrator Pemberton allegedly exceeded his authority. But Waterstone waived this argument by not preserving it during the arbitration, and Arbitrator Pemberton was authorized by the Agreement and the AAA rules it incorporated to decide all of the issues put before him.

1. Waterstone waived this argument

Waterstone has waived its right to argue that Arbitrator Pemberton exceeded his authority within the meaning of Section 10(a)(4) of the FAA by doing two related things: (1) affirmatively asking Arbitrator Pemberton to rule on its timeliness motion and its

request for attorneys' fees; and (2) never advising Arbitrator Pemberton that Waterstone believed he lacked authority to rule on Waterstone's limitations defense.

First, Waterstone affirmatively filed a motion with Arbitrator Pemberton, asking him to dismiss Davies' claims based on the 90-day limitation period. Waterstone asked Arbitrator Pemberton to "find that Davies failed to meet the 90-day deadline for commencing arbitration and dismiss his Demand in its entirety." (R.A. 92.) Waterstone rightly noted that arbitrators, not courts, "should determine the timeliness of a demand for arbitration." (R.A. 97.)²³ Similarly, Waterstone acknowledged that the arbitrator "has the authority to interpret contract language." (R.A. 98.)

²³ In a single footnote of its brief to Arbitrator Pemberton in support of dismissal, Waterstone attempted weakly to preserve its right to appeal the timeliness issue. It wrote: "Should the Arbitrator deny this motion, and should the Arbitrator rule in Davies' favor on the merits, Waterstone intends to renew its appeal after the arbitration. Waterstone maintains all objections to participating in the arbitration, which it believes will ultimately be determined to have been untimely and unnecessary." (R.A. 95.) An objection in a footnote of a memorandum, which otherwise explicitly argues the arbitrator is fully authorized to decide an issue, is not sufficient to preserve Waterstone's objection. See *Lakeshore Eng'g Servs., Inc. v. Target Constr. Inc.*, ___ F. Supp. 2d ___, No. 13-14498, 2014 WL 793653, at *6 (E.D. Mich. Feb. 27, 2014) (finding subcontractor waived its right to challenge arbitrator's jurisdiction, because "[w]hile Defendant did make exactly three references to preserving the objection (in its Answering Statement, Answer, and Amended Counterclaim) every other action by Defendant belies these assertions."); *S & G Flooring, Inc. v. New York City Dist. Counsel of Carpenters Pension Fund*, No. 09-CV-2836, 2009 WL 4931045, at *5 (S.D.N.Y. Dec. 21, 2009) ("[I]f a party explicitly preserves their objection to jurisdiction before the arbitrator, it will be allowed to challenge jurisdiction in a petition to vacate. . . . A simple statement of reservation of rights is not enough, however, but rather a 'forceful objection' is necessary to indicate an unwillingness to submit to arbitration." (internal citations and quotations omitted)) Notably, even in Waterstone's "Closing Statement and Renewed Motion for Summary Judgment" there is no mention of the arbitrator having exceeded his authority. (A.107-120.)

As courts around the nation have held, “[i]f a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter.” *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 591 (7th Cir. 2001); *accord Minneapolis-St. Paul Mailers Union, Local No. 4 v. Nw. Publ’ns, Inc.*, 379 F.3d 502, 509 (8th Cir. 2004); *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187 (9th Cir. 2004); *Piggly Wiggly Operators’ Warehouse, Inc. v. Piggly Wiggly Operators’ Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980). Yet that is exactly what Waterstone did. It affirmatively requested that Arbitrator Pemberton dismiss Davies’ claims based on the 90-day limitation period and argued vociferously that Arbitrator Pemberton had authority to decide that issue. (R.A. 97-99.) As a result, Waterstone is precluded from now arguing that Arbitrator Pemberton lacked authority. *See P.O.P. Enters., Inc. v. Lively*, No. DO63550, 2014 WL 1378082, at *5 (Cal. Ct. App. Apr. 8, 2014) (rejecting argument that arbitrators exceeded their authority in determining timeliness because “the parties presented the timeliness of the arbitration to the arbitrators.”)

Waterstone has also waived its argument that the arbitrator lacked authority to rule on the timeliness issue by failing to raise that objection with Arbitrator Pemberton. *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d at 711-12 (“[A]ppellants have waived their right to enforce the contractual proscription on injunctive relief by failing to challenge Wells Fargo’s request for such relief and by requesting it themselves.”); *Campbell v. Am. Family Life Assur. Co. of Columbus, Inc.*, 613 F. Supp. 2d 1114, 1120

(D. Minn. 2009) (finding plaintiffs waived their argument that an arbitration award should be vacated because plaintiffs “did not preserve their objection” by raising it with arbitrator); *Seagate*, 834 N.W.2d at 562 (noting parties may not “completely fail to advise an arbitrator of objections to that arbitrator’s authority, and then obtain a judicial determination of that authority”).

The AAA rules also require that a party inform the arbitrator that it believes the arbitrator lacks authority to decide a particular question in order to later make a motion to vacate on the basis that the arbitrator exceeded his or her authority. Rule 6(c) states that “[a] party must object to the . . . arbitrability of a claim or counterclaim no later than the filing of the answering statement.” (R.A. 4.) Rule 36 provides that “[a]ny party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with, and who fails to state objections thereto in writing or in a transcribed record, shall be deemed to have waived the right to object.” (R.A. 6.) Waterstone never objected in its answering statement or in any other place to Arbitrator Pemberton’s authority or jurisdiction.

2. *Even if Waterstone had not waived its arguments that the arbitrator exceeded his power, the award would stand*

The only cognizable basis that Waterstone asserts for vacating the Awards is that Arbitrator Pemberton exceeded his power. Although this can be a legitimate basis for vacating arbitration awards, *see* 9 U.S.C. § 10(a)(4), Waterstone has not demonstrated that Arbitrator Pemberton acted outside his authority. Critically, Section 10(a)(4) does not authorize vacating an award simply because a court might reach a different factual or

legal conclusion than that reached by the arbitrator. The United States Supreme Court recently explained this standard in determining whether an arbitrator exceeded his power:

All we say is that convincing 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—a 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.

Sutter, 133 S. Ct. at 2070-71 (internal citations omitted). The only time an arbitration award may be vacated under Section 10(a)(4) is if an arbitrator “strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice.” *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010). That did not happen here.

Waterstone drafted the Agreement with an arbitration clause, and Waterstone therefore bargained for Arbitrator Pemberton's construction of the Agreement and his assessment of the relevant facts. Waterstone cannot now argue that Arbitrator Pemberton exceeded his power by doing exactly what Waterstone contractually obligated him to do and again explicitly requested that he do during the proceeding. Even if Arbitrator Pemberton had committed “grave error” in his construction of the Agreement or his application of facts to the law (which he did not), as long as he was even arguably trying to do his job under the arbitration agreement, his award stands, “however good, bad, or ugly.” *Sutter*, 133 S. Ct. at 2071.

Arbitrator Pemberton was authorized to determine the application of the contractual limitations period, whether damages were appropriate, and the availability of attorneys' fees under the Agreement as well as long-standing case law, and Waterstone consented to having Arbitrator Pemberton determine those issues.

a. Arbitrator Pemberton had authority to decide the timeliness issue

As is set forth in Section II.B. above, and as determined by the District Court in the Confirmation Order, Arbitrator Pemberton had authority to decide the enforceability of the 90-day limitation period in the Agreement. (Add. 25.) His authority derived not only from the federal and state case law delegating timeliness questions to arbitrators, but also from the parties' incorporation of the AAA rules that explicitly empower arbitrators to decide questions of timeliness.

None of the three cases that Waterstone cites (W. Br. 40) support Waterstone's position that Arbitrator Pemberton lacked authority to determine that the 90-day limitations period was unreasonable. None of those cases vacated the arbitrator's timeliness decision based on the arbitrator lacking authority to decide timeliness. Instead, *Mangan v. Owens Truckmen, Inc.*, 715 F. Supp. 436, 443-45 (E.D.N.Y. 1989), held that although the arbitrator **had authority** to decide whether the claim was time-barred, the arbitrator manifestly disregarded the law. *Id.* at 445. Waterstone's other two cases are unpublished decisions applying standards of review that are specific to collective bargaining agreements and inapplicable here.

b. Arbitrator Pemberton had authority to award damages

Arbitrator Pemberton explained that the damages he awarded Davies were for breach of contract and defamation. (A. 193-94 ¶ 143.) Davies asserted both those claims in his arbitration demand. (A. 64-65.) Despite that clear language, Waterstone argues that Arbitrator Pemberton “essentially” awarded Davies damages for a wrongful termination, which it argues exceeded the Arbitrator’s authority because Davies was an at-will employee and did not submit a claim for wrongful termination. (W. Br. 42.) However, Waterstone presented the same arguments it now makes about at-will employment to Arbitrator Pemberton (A. 120), and he explained his basis under Minnesota law for rejecting those arguments. (A. 136-37 ¶¶ 19-20; A. 193-94 ¶ 143.) As a result, the District Court properly found Arbitrator Pemberton acted within his power in awarding damages. (Add. 27.)

Contrary to bedrock principles of arbitration law, Waterstone is asking this Court to overturn the arbitration award based on a disagreement about the merits of the decision reached by the arbitrator. *See Seagate*, 834 N.W.2d at 565 (reversing the district court’s vacatur of an arbitration award in large part because “the district court’s excursion into the merits of [the dispute] violated [] bedrock principles” of arbitration law); *see also Sutter*, 133 S. Ct. at 2070-71. However, Arbitrator Pemberton had authority to award damages on Davies’ assert claims and Waterstone’s challenge fails.

c. Arbitrator Pemberton had authority to award attorneys’ fees

As the District Court properly concluded (Add. 28), Arbitrator Pemberton was authorized to award attorneys’ fees based on his interpretation of the Agreement, which

allowed an award of costs to the Prevailing Party. (*See* A. 203; *see also* A. 8 ¶5.) The plain language of the Final Award makes clear that Arbitrator Pemberton thoughtfully interpreted the Agreement and concluded it authorized an award of attorneys' fees. (A. 202-05.) Therefore, Arbitrator Pemberton did not exceed his authority in awarding attorneys' fees. *See Sutter*, 133 S. Ct. at 2070.

Furthermore, when both parties request attorneys' fees, they give arbitrators actual authority to award attorneys' fees to either party. *See In re Arbitration between Gen. Sec. Nat'l Ins. Co. and AequiCap Program Admins.*, 785 F. Supp. 2d 411, 419 n.6 (S.D.N.Y. 2011); *Wachovia Secs., LLC v. Brand*, Civil Action No. 4:08-CV-02349, 2010 WL 3420214, at *7-8 (D.S.C. Aug. 26, 2010). In this case, both parties requested fees. (A. 203-04.)

Moreover, even without contractual authority or consent, arbitrators have inherent authority to award attorneys' fees, especially where, as here, the arbitration clause is broad. *See Lindquist & Vennum, P.L.L.P. v. Louisiana Elastomer, LLC*, Civil No. 10-4886, 2011 WL 2912693, at *8 (D. Minn. Jul. 19, 2011); *AequiCap*, 785 F. Supp. 2d at 419 ("In light of the breadth of the contractual language, and in the absence of any contracted-for limitations, we conclude that the Panel had the inherent authority to award attorney's fees.").

C. Judge Bernhardson Properly Rejected Waterstone's Argument That Arbitrator Pemberton Manifestly Disregard the Law

Waterstone's only other argument is that Arbitrator Pemberton "manifestly disregarded" the applicable law. However, as Judge Bernhardson concluded (Add. 22-

23), manifest disregard is not a recognized basis for vacating arbitration awards. Even if it were, it would not apply to vacate the Award.

1. *Manifest disregard is not a cognizable basis for vacating awards*

Because the federal statutory bases for vacating arbitration awards are exclusive, any and all judicially-created rationale for overturning arbitration awards are invalid. In particular, “manifest disregard of the law” has not been a recognized basis for vacating an arbitration award since the United States Supreme Court’s 2008 *Hall Street* decision. *Medicine Shoppe*, 614 F.3d at 489 (“Appellants’ claims, including the claim that the arbitrator disregarded the law, are not included among those specifically enumerated in § 10 and are therefore not cognizable” (citing *Hall Street*, 552 U.S. at 586)); *Air Line Pilots Ass’n Int’l v. Trans States Airlines, LLC*, 638 F.3d 572, 578 (8th Cir. 2011) (explaining that “the Supreme Court’s decision in *Hall Street* . . . eliminated judicially created vacatur standards under the FAA, including manifest disregard for the law” (citing *Hall Street*, 552 U.S. at 586-87)).²⁴ Therefore, this Court need not consider whether Arbitrator Pemberton manifestly disregarded the law in issuing the Award.²⁵

²⁴ Waterstone ignores the federal cases holding that manifest disregard is not a cognizable basis for vacating arbitration awards and argues that the basis is “vital.” (W. Br. 48.) The argument is unsupported and insufficient to overcome the federal precedent to the contrary.

²⁵ “Manifest disregard” is also not a recognized basis for vacating awards under the Minnesota arbitration acts. *Seagate*, 834 N.W.2d at 565 n.8 (noting that manifest disregard of the law has not been adopted by Minnesota courts as grounds for vacating arbitration awards under the MUAA). Indeed, when the Minnesota Legislature repealed the MUAA and replaced it with the MRUAA in 2010, it did not include manifest disregard of the law among the bases for vacating arbitration awards. See Minn. Stat. § 572B.23(a) (2014).

2. *Even under the abrogated “manifest disregard” standard, the Award stands*

Even if “manifest disregard of the law” were a valid reason to vacate an arbitration award, it would not support vacatur in this case. *Seagate*, 834 N.W.2d at 565 (quoting the standards to establish that, even if Minnesota recognized “manifest disregard”, it did not compel vacatur of arbitrator’s award). “Manifest disregard” only supports vacatur if an arbitrator “knew the law and expressly disregarded it.” *Id.* at 565 n.8. An award may not be vacated, however, for “mere misapplication of the law.” *Id.* at 565. Arbitrator Pemberton’s decisions did not fall below those low standards; he thoughtfully applied Minnesota law at every juncture.

a. Arbitrator Pemberton did not manifestly disregard the at-will employment doctrine

Waterstone alleges that Arbitrator Pemberton manifestly disregarded the law when he rejected Waterstone’s assertion that Davies was an at-will employee. (W. Br. 49.) However, Minnesota law recognizes that “an employment agreement may supersede the at-will doctrine if it contains either termination conditions or a specified duration.” *Kvidera v. Rotation Eng’g & Mfg. Co.*, 705 N.W.2d 416, 421 (Minn. Ct. App. 2005); *see also Spera v. Kosieradzki Smith Law Firm, LLC*, No. A09-1907, 2010 WL 2650540, at *6 (Minn. Ct. App. Jul. 6, 2010). In this case, the Agreement did have termination conditions. Davies could only be denied his deferred compensation for cause as defined in the Agreement. (A. 129-30 ¶ 3.) Furthermore, when Bergerson wanted Davies to remain at Waterstone, he informed Davies he had accrued a certain amount of deferred compensation and millions more in bonus compensation. (A. 135-36 ¶¶ 16-17.) Those

explicit conditions and promises were enough for Arbitrator Pemberton to conclude Davies was entitled to breach-of-contract damages stemming from his pretextual termination. (A. 135-37 ¶¶ 16-20; A. 148-77 ¶¶ 46-110.) Because there is an exception to the at-will doctrine for employees who have received definite promises from their employers, and Davies fit in that exception, Waterstone cannot show that Arbitrator Pemberton knew the law and disregarded it.

Moreover, Waterstone mischaracterizes the Award as damages for Davies' "lost opportunity" to continue working for Waterstone. (W. Br. 50.) Arbitrator Pemberton stated that the Award was for the "deferred compensation and bonus" that Davies would have been entitled to had Waterstone not breached the employment contract by terminating Davies for cause. (A. 136-37 ¶ 19.) In addition, Arbitrator Pemberton clarified that the damages of nine million dollars were for both breach of contract and defamation but that "the entire amount is fully supported by the defamation findings ... and they need not be further rationalized." (A. 193-94 ¶ 143.) In other words, the nine million dollar award does not depend on any damages resulting from Davies' "lost opportunity" to work at Waterstone.

b. Arbitrator Pemberton did not manifestly disregard defamation law

Arbitrator Pemberton did not manifestly disregard Minnesota law on defamation. Instead, he engaged in a 17-page analysis of Davies' claims and Waterstone's defenses, carefully citing and applying the relevant Minnesota law. (A. 178-194.) Furthermore, even if the Court were to disagree with the application of the self-publication doctrine, it

would be immaterial because Arbitrator Pemberton also found evidence that Waterstone had directly defamed Davies and caused him damages before Davies ever made any affirmative statements. (A. 184-85 ¶ 124, finding Waterstone “published the termination for cause widely throughout the industry and had done the damage to Davies whether or not Davies said another word of the termination.”)

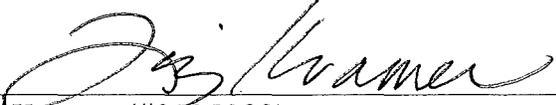
In sum, there is no evidence that Arbitrator Pemberton knew the law of defamation and at-will employment and expressly disregarded it.

CONCLUSION

Waterstone wrote the Agreement requiring that Davies submit any and all employment disputes to arbitration. Waterstone then breached the Agreement and maliciously defamed Davies. Davies submitted his claims to arbitration and, after an extensive hearing, he prevailed on those claims. Waterstone asks this Court to ignore all those proceedings and to reverse the Timeliness Decision, thereby dismissing Davies’ claims on the merits. To do so, however, Waterstone also asks this Court to ignore the FAA, its own Agreement’s incorporation of the AAA rules, and the extraordinary deference afforded to arbitration awards. The law does not support Waterstone’s requested relief.

Arbitrator Pemberton had authority to rule on the enforceability and application of the 90-day limitation period and had authority to award Davies damages and attorneys' fees. Therefore, the law supports affirming both the judgments that Waterstone appeals.

Dated: April 18, 2014

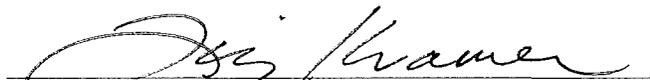


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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 131.01, subd. 5 and 132.01, subd. 1. By automatic word count, the length of this brief is 12,932 words. This brief was prepared using Microsoft Word 2010.

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