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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

CARY KATZ, an individual, Plaintiff, vs. CRTV LLC, a Delaware Limited Liability Company, Defendant.	CASE NO. A-18-773251-C DEPT NO. XXXI

MOTION OF MARK STEYN, MARK STEYN ENTERPRISES (US), INC., AND OAK HILL MEDIA, INC. TO INTERVENE

COMES NOW, Movants, MARK STEYN ("Steyn"), MARK STEYN ENTERPRISES (US), INC. ("MSE"), and OAK HILL MEDIA, INC. ("OHM" and collectively as the "Steyn Plaintiffs") by and through their attorneys, KOLESAR AND LEATHAM, and hereby moves this Honorable Court to intervene in this matter. This Motion is brought pursuant the pleadings and papers on file in this matter, the attached Memorandum of Points and Authorities, the exhibits attached thereto, the Declaration of Michael Murphy, Esq., the provisions of NRCP 24 and NRS 12.130, and any argument presented at the time of hearing of this matter.

DATED this 25 day of April, 2018.

KOLESAR & LEATHAM

By _____
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NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion on for hearing on the _____ day of _____, 2018, in Department 31 of the above-entitled Court at the hour of ____:____ ___.m., or as soon thereafter as counsel may be heard.

DATED this 25 day of April, 2018.

KOLESAR & LEATHAM

By _____
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Proposed Plaintiffs-In-Intervention, Mark Steyn ("Steyn"), Mark Steyn Enterprises (US), INC. ("MSE"), and Oak Hill Media, Inc. ("OHM" and collectively as the "Steyn Plaintiffs") are bona fide creditors of CRTV, LLC ("CRTV") having obtained a $4 million Arbitration Award against CRTV on February 21, 2018 – an Award that is on the precipice of being entered as a judgment by the New York Supreme Court.

The purpose of this motion is to allow the Steyn Plaintiffs to prevent a grave injustice from being perpetrated by the current parties to this action: Cary Katz ("Katz") and CRTV. Specifically, after having been placed on notice as to the Steyn Parties' substantial claims, Katz, the majority owner, founder, and sole investor in CRTV, devised a strategy to manufacture sham debt instruments totaling tens of millions of dollars, payable to him, so as to prevent CRTV's assets from collection by the Steyn Plaintiffs.

Katz is no doubt aware that simply transferring all CRTV's assets to himself several days before the Steyn Plaintiffs' New York judgment becomes final would obviously constitute a fraudulent conveyance under Nevada law. Accordingly, as part of Katz and CRTV's conspiracy to defraud the Steyn Plaintiffs – and avoid taking responsibility for CRTV's debts – Katz has brought the present action so as to cloak these fraudulent transfers with judicial approval. Katz and CRTV are pretending that there is now a dispute between them regarding the repayment of these sham debt instruments. Indeed, Katz – who has effectively sued himself – has brought the present action in an effort to make his own company appear insolvent before the Steyn Plaintiffs have a chance to collect the amounts they are rightfully owed. Katz and CRTV hope that if they obtain a judgment in Katz's favor for $20 million, they will render CRTV "judgment proof," and avoid having to be accountable for the injuries that they have caused the Steyn Plaintiffs.

As set forth herein, the straightforward facts that underlie this matter make it clear that the Steyn Plaintiffs are entitled to intervene as a matter of right pursuant to NRCP 24(a)(2), or in the alternative, with the permission of the Court pursuant to NRCP 24(b). Thus, the Court should grant the Steyn Plaintiffs' Motion to Intervene in its entirety so that they may pursue their claims

against Katz and CRTV as set forth in the Complaint-In-Intervention, attached hereto as **Exhibit 1**.

II. STATEMENT OF FACTS

CRTV is a media company that produces original content by Michelle Malkin, Steven Crowder, Mark Levin and other hosts which it provides to paid subscribers through an online streaming service. *See* the Declaration of Michael Murphy, attached hereto as **Exhibit 2** at ¶ 3. Katz formed CRTV in 2014, provided the capital necessary for its formation and operation, and effectively exercises complete control over CRTV. **Ex. 2** at ¶ 4-5. In or around May of 2016, the Steyn Plaintiffs entered into agreements with CRTV whereby Steyn would host "The Mark Steyn Show" to be broadcast on CRTV's network. **Ex. 2** at ¶ 6.

Steyn is an international bestselling author, recording artist, and radio and television personality. Steyn frequently appears across various mediums of news and entertainment throughout the United States and internationally around the world. **Ex. 2** at ¶ 7.

In February of 2017, in breach of CRTV's contracts, Katz caused CRTV to cancel the Mark Steyn Show, causing great injury to the Steyn Plaintiffs. To make matters worse, CRTV and Katz blamed the Steyn Plaintiffs for the cancellation, and initiated an arbitration before the American Arbitration Association ("AAA") against Steyn and MSE, seeking nearly $10 million in damages. **Ex. 2** at ¶ 8. On March 22, 2017, the Steyn Plaintiffs filed counterclaims in the arbitration, for breach of the agreements. Accordingly, as of March 22, 2017, Katz and CRTV were on notice of Plaintiffs' valuable claims. **Ex. 2** at ¶ 10.

On February 21, 2018, the AAA arbitrator, the Hon. Justice Elaine Gordon (Ret.), issued a decision awarding the Steyn Plaintiffs damages in the total amount of $2,708,124.00, plus interest at a rate of 9% accruing from the date of CRTV's breach of its contracts with the respective parties, and also recovery of their fees and costs in the total amount of $1,089,303.98 (the "Award"). Moreover, each and every one of CRTV's claims was rejected by the arbitrator. The Award is attached hereto as **Exhibit 3**. In sum, the Steyn Plaintiffs prevailed entirely in their arbitration against CRTV. **Ex. 2** at ¶ 11.

On February 26, 2018 the Steyn Plaintiffs filed a petition in the New York Supreme Court to confirm the Award. The Defendants unsuccessfully opposed the Steyn Plaintiffs' petition and

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after several weeks of motion practice (including a denied Motion to Vacate filed by CRTV), the Court issued a decision and order on April 19, 2018 confirming the Award (the "Order"), a transcript of which is attached hereto as **Exhibit 4**. This decision has, as of the filing of this motion, not yet been formalized into a judgment, but a judgment is forthcoming. **Ex. 2** at ¶ 12. Although CRTV objected unsuccessfully to two aspects of the Final Award, it has not challenged at all that portion of the Award in which CRTV is adjudicated as having breached its contract with MSE and Steyn, damaging these two Plaintiffs in the amount of $1.8 million. Accordingly, whatever their objections to the New York Supreme Court's confirmation of the full award, by their own arguments CRTV and Katz implicitly accept CRTV owes Steyn and MSE at least $1.875 million, an amount that includes costs awarded, but that does not include interest. As the New York Supreme Court has ordered, despite CRTV's "objections," the judgment will be for the full amount, in favor of Plaintiffs, for the $3.8 million described herein – an amount that has already grown to more than $4 million, as the result of already accrued interest. Nor will it be stayed pending whatever further delaying measures Katz and CRTV may attempt. **Ex. 2** at ¶ 13.

Unbeknownst to the Steyn Plaintiffs, Katz devised a scheme following CRTV's receipt of their notice of the Steyn Plaintiffs' claims that would allow him to render CRTV judgment proof in the event that the Steyn Plaintiffs were successful in the arbitration. Despite having invested millions into CRTV since its inception – without any expectation for repayment – after the Steyn Plaintiffs initiated their claims, Katz and CRTV suspiciously and fraudulently elected to recharacterize just enough of these investments as debt, so as to manufacture an insolvency of CRTV. **Ex. 2** at ¶ 14. One of these notes was entered into on January 26, 2018, just days after Katz and CRTV learned for the first time (through an Interim Award), that they had lost the arbitration, and would owe the Steyn Plaintiffs millions of dollars. **Ex. 2** at ¶ 15.

Thus, to effect this conspiracy, Katz used his effective control over CRTV to cause the execution of two promissory notes between himself, as lender, and CRTV, as borrower, in the total amount of $20 million dollars. The notes were created solely as an option for Katz to later allege that the notes were in default, and causing CRTV to become insolvent. **Ex. 2** at ¶ 16.

On April 16, 2018, three days before the New York Court issued the Order confirming the

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Award, Katz decided it was time to put his plan into action. On that same date, Katz, in his individual capacity, alleges that he made a written "demand" to CRTV for repayment of the $20 million-dollar investment in CRTV, plus accrued interest. **Ex. 2** at ¶ 17. Katz then caused CRTV to respond to his own demand by stating that it could not pay Katz the amounts owed at that time, and would also be unable to repay Katz in the future when the notes eventually became due. **Ex. 2** at ¶ 18.

On April 20, 2018, one day **after** learning that the Award would be confirmed, Katz initiated the present action by filing a Complaint against CRTV to recover the amounts allegedly owed to him based upon a theory of anticipatory repudiation. **Ex. 2** at ¶ 19. This suit would be comical, if it was not so dishonorable, as Katz has essentially sued himself. Indeed, Katz hopes to quietly use his control over CRTV to have the parties quickly stipulate to a $20 million-dollar judgment so that CRTV will be made insolvent before the Steyn Plaintiffs' New York judgment can be executed. Tellingly, there is no evidence that Katz has any plans to cease operation of CRTV after fleecing it of all its assets. Instead, it appears that Katz will simply disregard the corporate form and make his personal funds available to CRTV going forward.

To be clear, this action is nothing more than a cover for the fraudulent conveyance of funds from CRTV to Katz. Therefore, the Steyn Plaintiffs must be permitted to intervene so that they can protect their interest in these funds before Katz and CRTV complete their fraudulent scheme.

III. ARGUMENT

A. The Steyn Plaintiffs are Entitled to Intervene as a Matter of Right Pursuant to NRCP 24(a)(2) and NRS 12.130.

"NRS 12.130 allows, before the trial commences, 'any person ... who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both' to intervene in an action under the Nevada Rules of Civil Procedure." *Am. Home Assur. Co. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 1229, 1235, 147 P.3d 1120, 1124 (2006) (quoting NRS 12.130). Under NRCP 24(a)(2), a party must satisfy four requirements in order to intervene as a matter of right: (i) that it has a sufficient interest in the subject matter of the litigation, (ii) that it could suffer an impairment of its ability to protect that interest if it does not intervene, (iii) that its

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interest is not adequately represented by existing parties, and (iv) that its application is timely. *Am. Home Assur. Co.*, 122 Nev. At 1238, 147 P.3d at 1126. As discussed herein, the Steyn Plaintiffs unmistakably satisfy all four of these requirements.

First, the Steyn Plaintiffs have a direct interest in the subject matter of the present litigation because it has been initiated for the singular purpose of facilitating a fraudulent transfer between CRTV and Katz, at the Steyn Plaintiffs' expense. The Steyn Plaintiffs have a legally protected right as creditors pursuant to NRS 112.210(1)(c)(1) to move for an injunction against a debtor who seeks to avoid payment of a debt by making a fraudulent transfer of its assets. As such, they are entitled to intervene in this action to protect this interest which is specifically at issue in the present case.

Second, the Steyn Plaintiffs' ability to protect their interests without intervention will be severely impaired if intervention is not permitted, as CRTV and Katz will be able to complete their fraudulent conveyance rendering CRTV insolvent. This will force the Steyn Plaintiffs to bring a subsequent action in Nevada, naming the identical parties that appear here, in order to claw back the fraudulent conveyance from Katz to CRTV so that they can collect on their judgment. This outcome would not only give Katz a greater opportunity to hide assets and frustrate the Steyn Plaintiffs' judgment collection efforts (which Katz has already shown he is ready, willing, and able to do), but would also result in a waste of additional legal fees, costs, and the resources of this Court.

Third, it is obvious that the interests of the Steyn Plaintiffs are not adequately represented by CRTV and Katz, as this case was brought solely in an effort to deprive them of their rights. The only person whose interests are being represented in this case is Katz, who is in complete control of CRTV and directly adverse to the Steyn Plaintiffs.

Finally, this motion to intervene is timely as it was filed only five days after the initiation of the action. Pursuant to NRS 12.130(1), an applicant may intervene at any time "before trial." In addition, there is absolutely no cognizable argument that this motion is in any way prejudicial to the rights of the other parties to the action.

In conclusion, the Steyn Plaintiffs satisfy the requirements to intervene as a matter of right

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pursuant to NRS 12.130 and NRCP 24(a)(2) and so the motion should be granted in its entirety.

B. Alternatively, the Steyn Plaintiffs Should Be Granted Permissive Intervention Under NRCP 24(b)(2).

NRCP 24(b) provides the Court with discretion to permit a party to intervene when an applicant's claim or defense and the main action have a common question of law or fact. NRCP 24(b). In exercising its discretion, the Court should consider whether the intervention will delay or prejudice the adjudication of the rights of the original parties. *Id.*

A central issue in the Steyn Plaintiffs' Complaint-In-Intervention is whether CRTV has the right to transfer its funds to Katz, rendering it insolvent. At least on its face, Katz's complaint is focused on the identical issue, as he brought the initial action in the hopes of receiving a judgment that will grant him that precise relief that the Steyn Plaintiffs now seek to oppose. In addition, the true nature of Katz's complaint is to frustrate the Steyn Plaintiffs' efforts to collect on the New York judgement. In this light, the intervening claims are not merely related to the main action, but are actually the sole reason that it was filed. Also, as already discussed, this motion to intervene was filed only five days after the initiation of the action, and so there is no delay or prejudice to the rights of the original parties. Hence, the Court should exercise its discretion to allow the Steyn Plaintiffs to permissively join the original action.

IV. CONCLUSION

As set forth herein, the Steyn Plaintiffs easily satisfy to intervene as a matter of right pursuant to NRCP 24(a)(2) and NRS 12.130, as well as the standard for permissive intervention pursuant to NRCP 24(b). Therefore, the Court should grant the present motion in its entirety.

DATED this 25th day of April, 2018.

KOLESAR & LEATHAM

By */s/ Alan J. Lefebvre*
ALAN J. LEFEBVRE, ESQ.
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 25th day of April, 2018, I caused to be served a true and correct copy of foregoing **MOTION OF MARK STEYN, MARK STEYN ENTERPRISES (US), INC., AND OAK HILL MEDIA, INC. TO INTERVENE** in the following manner:

(UNITED STATES MAIL) For those parties not registered pursuant to Administrative Order 14-2, service was made in the following manner: By depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written:

Jeffery A. Bendavid, Esq.
Stephanie J. Smith, Esq.
MORAN BRANDON BENDAVID MORAN
630 S. 4th Street
Las Vegas, Nevada 89101

Attorneys for Plaintiff
CARY KATZ

Cindy Kuhn

An Employee of KOLESAR & LEATHAM

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EXHIBIT 1

(Proposed Complaint-in-Intervention)

CII
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Attorneys for Plaintiffs-In-Intervention, MARK STEYN, MARK STEYN ENTERPRISES (US), INC., and OAK HILL MEDIA, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

CARY KATZ, an individual, Plaintiff, vs. CRTV LLC, a Delaware Limited Liability Company, Defendant.	CASE NO. A-18-773251-C DEPT NO. XXXI
MARK STEYN, an individual; MARK STEYN ENTERPRISES (US), INC., a New Hampshire Corporation; and OAK HILL MEDIA, INC., a Vermont Corporation. Plaintiffs-In-Intervention, vs. CARY KATZ, an individual; and CRTV LLC, a Delaware Limited Liability Company, Defendants-In-Intervention.	

COMPLAINT-IN-INTERVENTION

COMES NOW, Plaintiffs-In-Intervention, MARK STEYN ("Steyn"), MARK STEYN ENTERPRISES (US), INC. ("MSE"), and OAK HILL MEDIA, INC. ("OHM" and collectively

as "Plaintiffs") by and through their attorney of record, ALAN LEFEBVRE, ESQ. of KOLESAR AND LEATHAM, and hereby submit this Complaint-In-Intervention against Defendants-In-Intervention CRTV, LLC ("CRTV") and CARY KATZ ("Katz" and collectively as "Defendants"), and allege the following:

INTRODUCTION

1. Steyn, MSE, and OHM are creditors of CRTV, as they are now owed a principal amount of nearly $4 million as the result of a February 21, 2018 Arbitration Award ("Award") that, as of this filing, is on the precipice of being confirmed as a judgment of the New York Supreme Court.

2. At issue in this action is the use, by CRTV, and its insider Katz (majority owner, founder, lone investor, and effective manager), of this Court to legitimize sham debt instruments between Katz and CRTV – reflecting $20 million of "debt" – that were designed for one purpose: to thwart the attempts of creditors – Steyn, MSE, and OHM – to collect on this Award. CRTV and Katz's scheme – which this Complaint in Intervention seeks to block – is quite simple.

3. First, CRTV executed two loan instruments in favor of Katz for more than $20 million, each of which were created **after** being notified of Plaintiffs' sizable claims. Indeed, one of the debt instruments was issued **days** after CRTV and Katz first learned that CRTV would be liable to Plaintiffs in an amount totaling at least $3 million. Plaintiffs are informed and believe that these debt instruments are a fraud, given that Katz has previously invested substantial sums, without any expectation of repayment. It was only after being placed on notice of Plaintiffs' claims that Katz suddenly decided that his investments should be characterized as debt.

4. Second, upon discovering their loss was imminent against Plaintiffs, CRTV and Katz manufactured a dispute, pretending that Katz was calling these notes, with CRTV stating it could not satisfy them. This manufactured dispute led to Katz initiating an action against CRTV (in this proceeding), **one day after** the New York Supreme Court ruled from the bench that the Award would be confirmed as a Judgment in the near future. In this proceeding, Katz is essentially suing himself (CRTV).

. . .

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5. Katz and CRTV hope they can obtain this Court's stamp of approval on that debt, in the form of a judgment, so that they can attempt to use these insider fraudulent documents to avoid satisfying CRTV's obligations to Plaintiffs. Put simply, if CRTV is bound to these sham insider notes totaling $20 million, it will be rendered insolvent, and unable to satisfy the legitimate debt owed to CRTV's creditors: Mark Steyn, Mark Steyn Enterprises, and OHM.

6. With this Complaint-in-Intervention, Plaintiffs seek to protect their valuable award against CRTV from the conspiracy of CRTV and Katz to defraud, and shirk their obligations to Plaintiffs.

JURISDICTION AND PARTIES

7. Plaintiff Steyn is, and at all times relevant hereto was, an individual residing in New Hampshire.

8. Plaintiff MSE is, and at all times relevant hereto was, a New Hampshire Corporation.

9. Plaintiff OHM is, and at all times relevant hereto was, a Vermont Corporation.

10. Defendant Katz is, and at all times relevant hereto was, an individual residing in Clark County, Nevada.

11. Defendant CRTV is, and at all times relevant hereto was, a Delaware limited liability company conducting business in Clark County, Nevada.

12. This Court has subject matter jurisdiction as the amount in dispute is in excess of $15,000.00.

13. Venue is proper in this Court pursuant to NRS 13.040 because Defendant Katz is a resident of Clark County, Nevada; Defendant CRTV purports to conduct business in Clark County, Nevada; and the wrongful acts alleged herein occurred in Clark County, Nevada.

BACKGROUND

14. CRTV is a media company that produces original content by Michelle Malkin, Steven Crowder, Mark Levin and other hosts for distribution through its web-based streaming service located at http://www.crtv.com.

15. Katz formed CRTV in 2014 and has always been its majority owner.

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16. Upon information and belief, Katz exercises effective, complete control over the management and operations of CRTV.

17. Steyn is an international bestselling author, recording artist, and radio and television personality. Steyn frequently appears across various mediums of news and entertainment throughout the United States and internationally around the world.

18. OHM is a corporation owned by Melissa Howes. OHM assists Steyn with matters related to his various projects OHM co-produces Steyn's audio and video projects.

19. MSE is a corporation owned by Steyn which serves as a "loan out" company for Steyn which produces, publishes and distributes work by Steyn and others.

20. In or around May of 2016, Plaintiffs entered into agreements with CRTV, whereby Steyn would host "The Mark Steyn Show" to be broadcast on CRTV's network.

21. In February of 2017, in breach of CRTV's contracts, Katz caused CRTV to cancel the Mark Steyn Show, causing great injury to Plaintiffs. To make matters worse, CRTV and Katz blamed Plaintiffs for the cancellation, and initiated an arbitration before the American Arbitration Association ("AAA") against Steyn and MSE, seeking nearly $10 million in damages.

22. On March 22, 2017, MSE, Steyn, and OHM filed counterclaims in the arbitration for breach of the agreements. Accordingly, as of March 22, 2017, Katz and CRTV were on notice of Plaintiffs' valuable claims.

23. On January 22, 2018, the Arbitrator issued her Interim Award, which, again, was the first date that CRTV (and Katz) knew that CRTV's claims had been rejected, that Mark Steyn, MSE, and OHM would be recovering millions of dollars, and that CRTV may also be obligated to pay Plaintiffs' attorneys fees.

24. On February 21, 2018, the AAA arbitrator, Justice Elaine Gordon, issued a decision awarding Plaintiffs damages in the total amount of $2,708,124.00, plus interest at a rate of 9% accruing from the date of CRTV's breach of its contracts with the respective parties, and also recovery of Plaintiffs fees and costs in the total amount of $1,089,303.98 (the "Award"). Moreover, each and every claim of CRTV was rejected by the arbitrator. Thus, Plaintiffs prevailed entirely in their arbitration against CRTV.

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25. On February 26, 2018 the Plaintiffs filed a petition in New York State Court to confirm the Award.

26. The Defendants unsuccessfully opposed Plaintiffs' petition and, after several weeks of motion practice, including CRTV's own Motion to Vacate the Award, the New York Supreme Court issued a decision and order on April 19, 2018 confirming the Award (the "Order"). This decision has, as of the filing of this Complaint, not yet been formalized into a judgment, but a judgment is forthcoming.

27. Although CRTV objected unsuccessfully to two aspects of the Final Award, it has not challenged at all that portion of the Award in which CRTV is adjudicated as having breached its contract with MSE and Steyn, damaging these two Plaintiffs in the amount of $1.8 million. Accordingly, whatever their objections to the New York Supreme Court's confirmation of the full award, by their own arguments CRTV and Katz implicitly accept CRTV owes Steyn and MSE at least $1.875 million, an amount that includes costs awarded, but that does not include interest. As the New York Supreme Court has ordered, despite CRTV's "objections," the judgment will be for the full amount, in favor of Plaintiffs, for the $3.8 million described herein – an amount that has already grown to more than $4 million, as the result of already accrued interest. Nor will it be stayed pending whatever further delaying measures Katz and CRTV may attempt.

DEFENDANTS CONSPIRE TO USE THE PRESENT LITIGATION TO PREVENT PLAINTIFFS FROM RECOVERING THE AMOUNTS OWED PURSUANT TO THE AWARD

28. Unbeknownst to Plaintiffs, Katz devised a scheme following CRTV's receipt of Plaintiffs' notice of claim that would allow him to render CRTV judgment proof in the event that Plaintiffs were successful in arbitration.

29. Upon information and belief, Katz used his effective control over CRTV (as majority member, founder, and/or effective manager) to cause the execution of two promissory notes between himself, as lender, and CRTV, as borrower, in the total amount of $20 million dollars. On information and belief, Katz has invested millions into CRTV, without any expectation of repayment, and only decided to re-characterize these investments as debt after Plaintiffs filed

their counterclaims in the arbitration. Thus, the very idea that this $20 million is "debt" is, in and of itself, a sham, and a fraud, designed to thwart Mark Steyn, MSE, and OHM's recovery as creditors of CRTV

30. These promissory notes between CRTV and Katz were executed after CRTV received the Plaintiffs' notice of claims on which the Award is based. Indeed, the second of these two notes – the January 26, 2018 note – was executed *four days* after issuance of the Interim Award by the Arbitrator – the first date on which CRTV and Katz learned they had been soundly defeated by Steyn, MSE, and OHM.

31. On April 16, 2018, three days before the New York Supreme Court issued its ruling confirming the Award, Katz, fearing that Plaintiffs would be successful, decided to put his scheme into action and to cause CRTV to become insolvent by fraudulently transferring all of its assets to himself through this manufactured fraudulent debt.

32. On that same date, Katz, in his individual capacity, alleges that he made a written "demand" for repayment of these $20 million in "loans," plus accrued interest.

33. Upon information and belief, Katz then caused CRTV to respond to his own demand by stating that CRTV could not pay Katz the amounts owed at that time, and also would not be able to repay Katz in the future when the notes eventually became due.

34. On April 20, 2018 – the day after learning the Award would be confirmed – Katz initiated the present sham lawsuit by filing a Complaint against CRTV to recover the amounts allegedly owed to him based upon a theory of anticipatory repudiation. As majority owner, founder, and effectively in charge of CRTV, Katz has essentially sued himself.

35. Upon information and belief, the total assets of CRTV are less than the $20 million sought by Katz in this case.

36. Upon information and belief, Katz seeks to acquire a Nevada judgment against CRTV so that he can transfer all of its assets to himself before Plaintiffs' New York judgment is finalized.

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37. Upon information and belief, Katz has no plans to cease the operation of CRTV, and instead intends to abuse the corporate form by operating CRTV using his personal assets, while holding out CRTV as an insolvent entity to the detriment of Plaintiffs.

38. Upon information and belief, any amounts recovered by Katz will still be available to CRTV, despite the fact that it will appear to be insolvent.

39. Put simply, Katz initiated the present action as a sham litigation to muddy the waters and make a fraudulent transfer from CRTV to himself seem legitimate.

FIRST CAUSE OF ACTION

(Fraudulent Conveyance Against CRTV)

40. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 39 above as though fully set forth herein.

41. At all relevant times, Plaintiffs were and are creditors of CRTV within the meaning of the Uniform Fraudulent Transfers Act, as codified in NRS 112.140, et seq.

42. At all relevant times, Katz was and is an insider of CRTV within the meaning of the Uniform Fraudulent Transfers Act, as codified in NRS 112.140, et seq.

43. Upon information and belief, CRTV intends to transfer all of its assets to Katz and render itself insolvent with the actual intent to hinder, delay, and defraud the creditor Plaintiffs.

44. The transfer of assets from CRTV to Katz is a fraudulent transfer pursuant to NRS 112.180(1)(a).

45. Pursuant to NRS 112.180(2), evidence of CRTV's fraudulent intent can be established by several factors, including, but not limited to, the fact that the transfer will be made to Katz as an insider, CRTV will remain in possession of the funds following the transfer, CRTV was sued by Plaintiffs prior to the transfer, and the transfer will be of substantially all of CRTV's assets causing it to become insolvent following the transfer.

46. Pursuant to NRS 112.210(1)(c)(1), Plaintiffs are entitled to an injunction prohibiting this fraudulent transfer of funds from CRTV to Katz.

47. Plaintiff has had to retain the services of legal counsel to prosecute this action and is therefore entitled to an award against the Defendants for costs and attorneys' fees.

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SECOND CAUSE OF ACTION

(Civil Conspiracy Against CRTV and Katz)

48. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 47 above as though fully set forth herein.

49. At all pertinent times, Katz and CRTV acted in concert, intending to accomplish the unlawful objective of harming Plaintiffs by fraudulently transferring and concealing assets, thereby frustrating and preventing the Plaintiffs' proper and legal collection efforts.

50. As a direct and proximate result of this conspiracy, Plaintiffs have suffered damages in an amount to be proven at trial.

51. Plaintiffs have suffered additional damages in the form of attorneys' fees as a proximate and foreseeable result of this conspiracy.

THIRD CAUSE OF ACTION

(Declaratory Relief Against CRTV and Katz)

52. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 51 above as though fully set forth herein.

53. An actual and present controversy has arisen between Plaintiffs and Defendants with respect to the priority of repayment between CRTV's outstanding debt to Plaintiffs and the alleged debt that Defendants claim CRTV owes to Katz.

54. Plaintiffs contend that CRTV must repay Plaintiffs the amounts owed to them before any payments can be made from CRTV to Katz.

55. Defendants not only deny this contention, but they seek to actively avoid it by initiating the present action in an effort to legitimize a fraudulent conveyance from CRTV to Katz.

56. Plaintiffs desire a judicial determination that Plaintiffs' judgment against CRTV shall have priority over any judgment that Katz may receive in this action.

57. A judicial determination is necessary and appropriate at this time under the circumstances because Defendants are actively trying to use this case to subvert Plaintiffs collection efforts and carry out a fraudulent conveyance to render CRTV insolvent.

WHEREFORE, Plaintiffs-In-Intervention pray for relief as follows:

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1. For an injunction preventing any transfers of assets from CRTV to Katz until Plaintiffs are able to collect the amounts owed to them as creditors of CRTV.

2. For damages awarded to Plaintiffs and against Defendants in an amount to be determined at trial.

3. For a declaration that Plaintiffs' judgment against CRTV shall have priority over any judgment that Katz may receive in this action.

4. For interest, costs of suit, and attorneys' fees.

5. For such other relief as the Court deems proper.

DATED this _____ day of _____, 2018.

KOLESAR & LEATHAM

By _____
ALAN J. LEFEBVRE, ESQ.
Nevada Bar No. 000848
400 South Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145

Attorneys for Plaintiffs-In-Intervention,
MARK STEYN, MARK STEYN ENTERPRISES (US), INC., and OAK HILL MEDIA, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the _____ day of _____, 2018, I caused to be served a true and correct copy of foregoing COMPLAINT-IN-INTERVENTION in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed below:

Jeffery A. Bendavid, Esq.
Stephanie J. Smith, Esq.
MORAN BRANDON BENDAVID MORAN
630 S. 4th Street
Las Vegas, Nevada 89101

Attorneys for Plaintiff
CARY KATZ

_____
An Employee of KOLESAR & LEATHAM

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EXHIBIT 2

(Declaration of Michael Murphy)

DECL
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Attorney for Movants
MARK STEYN, MARK STEYN ENTERPRISES (US), INC., and OAK HILL MEDIA, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

CARY KATZ, an individual, Plaintiff, vs. CRTV LLC, a Delaware Limited Liability Company, Defendant.	CASE NO. A-18-1773251-C DEPT NO. XXXI **DECLARATION OF MICHAEL MURPHY [IN SUPPORT OF THE PLAINTFFS-IN-INTERVENTION'S MOTION TO INTERVENE]**

I, MICHAEL MURPHY, declare under penalty of perjury:

1. I am an attorney licensed in the state of California and a partner of the law firm Gerard Fox Law, P.C. I have personal knowledge of the matters set forth herein and know them to be true, except for items which I have stated are true in my knowledge and experience, and as to those matters I believe them to be true but do not know to a certainty.

2. I submit this Declaration in support of the Motion to Intervene brought on behalf of Mark Steyn ("Steyn"), Mark Steyn Enterprises (US), Inc. ("MSE"), and Oak Hill Media, Inc. ("OHM" and collectively as the "Steyn Plaintiffs") pursuant to NRCP 24 and NRS 12.130.

. . .

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3. CRTV, LLC ("CRTV") is a media company that produces original content by Michelle Malkin, Steven Crowder, Mark Levin and other hosts which it provides to paid subscribers through an online streaming service.

4. Cary Katz ("Katz") formed CRTV in 2014 and provided the capital necessary for its formation and operation.

5. In my knowledge and experience, Katz exercises effective and complete control over CRTV.

6. In or around May of 2016, the Steyn Plaintiffs entered into agreements with CRTV whereby Steyn would host "The Mark Steyn Show" to be broadcast on CRTV's network.

7. Steyn is an international bestselling author, recording artist, and radio and television personality. Steyn frequently appears across various mediums of news and entertainment throughout the United States and internationally around the world.

8. In February of 2017, in breach of CRTV's contracts, Katz caused CRTV to cancel the Mark Steyn Show, causing great injury to the Steyn Plaintiffs. To make matters worse, CRTV and Katz blamed the Steyn Plaintiffs for the cancellation, and initiated an arbitration before the American Arbitration Association ("AAA") against Steyn and MSE, seeking nearly $10 million in damages.

9. I have personal knowledge of these proceedings because I represented the Steyn Plaintiffs in the AAA arbitration proceeding against CRTV and Katz.

10. On March 22, 2017, the Steyn Plaintiffs filed counterclaims in the arbitration, for breach of the agreements. Accordingly, as of March 22, 2017, Katz and CRTV were on notice of Plaintiffs' valuable claims.

11. On February 21, 2018, the AAA arbitrator, the Hon. Justice Elaine Gordon (Ret.), issued a decision awarding the Steyn Plaintiffs damages in the total amount of $2,708,124.00, plus interest at a rate of 9% accruing from the date of CRTV's breach of its contracts with the respective parties, and also recovery of their fees and costs in the total amount of $1,089,303.98 (the "Award"). Moreover, each and every one of CRTV's claims was rejected by the arbitrator. In sum, the Steyn Plaintiffs prevailed entirely in their arbitration against CRTV.

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12. On February 26, 2018 the Steyn Plaintiffs filed a petition in the New York Supreme Court to confirm the Award. The Defendants unsuccessfully opposed the Steyn Plaintiffs' petition and after several weeks of motion practice (including a denied Motion to Vacate filed by CRTV), the Court issued a decision and order on April 19, 2018 confirming the Award (the "Order"). This decision has, as of the filing of this motion, not yet been formalized into a judgment, but a judgment is forthcoming.

13. Although CRTV objected unsuccessfully to two aspects of the Final Award, it has not challenged at all that portion of the Award in which CRTV is adjudicated as having breached its contract with MSE and Steyn, damaging these two Plaintiffs in the amount of $1.8 million. Accordingly, whatever their objections to the New York Supreme Court's confirmation of the full award, by their own arguments CRTV and Katz implicitly accept CRTV owes Steyn and MSE at least $1.875 million, an amount that includes costs awarded, but that does not include interest. As the New York Supreme Court has ordered, despite CRTV's "objections," the judgment will be for the full amount, in favor of Plaintiffs, for the $3.8 million described herein – an amount that has already grown to more than $4 million, as the result of already accrued interest. Nor will it be stayed pending whatever further delaying measures Katz and CRTV may attempt.

14. In my knowledge and experience, and unbeknownst to the Steyn Plaintiffs, Katz devised a scheme following CRTV's receipt of their notice of the Steyn Plaintiffs' claims that would allow him to render CRTV judgment proof in the event that the Steyn Plaintiffs were successful in the arbitration. In my further knowledge and experience, despite Katz's having invested millions into CRTV since its inception – without any expectation for repayment – after the Steyn Plaintiffs initiated their claims, Katz and CRTV suspiciously and fraudulently elected to recharacterize just enough of these investments as debt, so as to manufacture an insolvency of CRTV.

15. One of these notes was entered into on January 26, 2018, just days after Katz and CRTV learned for the first time (through an Interim Award), that they had lost the arbitration, and would owe the Steyn Plaintiffs millions of dollars.

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16. In my knowledge and experience, to effect this conspiracy, Katz used his effective control over CRTV to cause the execution of two promissory notes between himself, as lender, and CRTV, as borrower, in the total amount of $20 million dollars. The notes were created solely as an option for Katz to later allege that the notes were in default, and to cause CRTV to become insolvent.

17. On April 16, 2018, three days before the New York Court issued the Order confirming the award, Katz alleges that he made a written "demand" to CRTV for repayment of the $20 million-dollar investment in CRTV, plus accrued interest.

18. In my knowledge and experience, Katz then caused CRTV to respond to his own demand by stating that it could not pay Katz the amounts owed at that time, and would also be unable to repay Katz in the future when the notes eventually became due.

19. On April 20, 2018, one day after learning that the Award would be confirmed, Katz initiated the present action by filing a Complaint against CRTV to recover the amounts allegedly owed to him based upon a theory of anticipatory repudiation.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 25 day of April, 2018, in Los Angeles County, Los Angeles, California.

Michael Murphy

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EXHIBIT 3

(Final Award – Arbitration #01-17-0001-0996)

AMERICAN ARBITRATION ASSOCIATION®

CRTV v. Mark Steyn and Mark Steyn Enterprises

Mark Steyn, Mark Steyn Enterprises and Oak Hill Media LLC v. CRTV and Cary Katz

01-17-0001-0996

Final Award

The Parties

The Claimant and Counterclaim Respondent in this matter is Conservative Review Television, LLC (CRTV).

The Respondents are Mark Steyn (Steyn) and Mark Steyn Enterprises (US) Inc. (MSE). Together they will be referred to as Steyn.

The Counterclaimants are Mark Steyn, Mark Steyn Enterprises (US) Inc. and Oak Hill Media Services, Inc. (Oak Hill).

Cary Katz (Katz) is the majority stockholder of CRTV and a Counterclaim Respondent.

Melissa Howes was the principal of Oak Hill and is Mark Steyn's business representative.

Background

Cary Katz is a successful businessman, who formed CRTV in 2014. In an email to Mellissa Howes, Katz described CRTV as follows: "CRTV streams original programs and content which feature news and commentary from a politically conservative perspective." Katz testified that there were three people he sought to form the core of CRTV; Michelle Malkin, Mark Levin and Mark Steyn. He was successful in recruiting Levin to join him at CRTV and also recruited Malkin, but he was repeatedly rebuffed from 2014 to 2016 by Steyn's business representative, Melissa Howes. She informed him that Steyn was not interested in doing a television show centered on American politics.

Katz was persistent. He had listened to Steyn guest host the Rush Limbaugh radio program and believed Steyn was a great voice for liberty. Katz knew little else of Steyn's background. He assigned one of his staff, Chris Crane, to research Steyn. His goal was to use that knowledge to pitch to Steyn a show Steyn would be interested in doing. Crane contacted people who worked for Mark Steyn and met with them to learn much about Steyn, his interests, preferences and his background.

CRTV also hired a prominent set designer to draw a conceptual rendering of the show's set. He designed a set with a chalet setting and various areas in which to film, including

a cabaret which was outfitted with tables, a stage, and a bar.

Using the set design and the information he gathered, Crane, along with a CRTV producer, Jason Meath, produced a sizzle reel. Knowing that Steyn was not interested in doing an 'ordinary' political talk show, the sizzle reel was a video pitch of the show concept CRTV hoped would entice Steyn to join their operation. As Steyn testified, it made the difference in changing his mind. He felt, as he watched, that they were "inside his head."

The sizzle reel was shown to Steyn and Melissa Howes on April 9, 2016 at a meeting in Vermont, which Katz and CRTV had finally convinced Steyn to attend. The sizzle reel included renderings of a custom-built set and a narrator who described Steyn's various accomplishments and the show's concept:

Mark Steyn's already a worldwide presence: Appearing as a guest on TV. He's a bestselling author, writer, and journalist—is read in National Review, Investor's Business Daily, The Atlantic, Irish Times, Jerusalem Post.... And of course—as heard on the radio....Conservatives know Mark Steyn from sitting in the chair for Rush [Limbaugh], [Sean]Hannity, and Hugh Hewitt; but isn't it time Mark Steyn gets his very own chair? Welcome to the Steyn Studio in Burlington, Vermont. Finally, viewers will be transported to Mark Steyn's inner sanctum of common sense politics, arts, culture, and so much more. A striking set incorporating everything important and beloved to the Steyn fan base.... And when things get too serious, there's always room - to get groovy.

The video focused on Steyn's interests; writing, the arts, culture, world politics, and music. The set shown in the sizzle reel was an extravagant rendering of the inside of a ski chalet with an attached cabaret complete with a stage for performers. The Cabaret was named 'Marvin's' using the name of Steyn's cat. Steyn could see himself in this show, just as he could not have seen himself in a conventional televised talk show in what he called the "conservative ghetto." The emails also reveal that, having spent a great deal of money defending a libel suit, Steyn needed money.

The Contract

Negotiations culminated in a Binding Term Sheet. In that term sheet, the Parties promised to cooperate and work with each other, but their ultimate responsibilities were divided. CRTV retained ultimate control of business decisions and Steyn retained creative control. CRTV was responsible for hiring a production staff and building a set in Burlington, Vermont. Steyn was responsible for delivering 200 shows a year, each 48 minutes long. His responsibility to deliver this content was to begin as soon as the Burlington studio was 'fully functioning.' In a separate letter memorandum, a related entity, Oak Hill Media, was retained and paid to provide services to Steyn. In a side agreement, Melissa Howes, the principal of Oak Hill Media at the time, and Steyn's business partner, was loaned $750,000 by CRTV to purchase a house in the Burlington area. The contract was effective on July 1, 2016. The contract between CRTV and Steyn provided for an arbitration clause, the letter memorandum with Oak Hill Media did not.

Jurisdiction RE: Oak Hill Media

The Claimant argues that the Arbitrator does not have jurisdiction over the claims Oak Hill, as a party, has asserted. Oak Hill bases its claim against CRTV on the letter memorandum. That letter memorandum is separate from the Binding Term Sheet executed by CRTV, Mark Steyn, and Mark Steyn Enterprises. The letter memorandum between CRTV and Oak Hill has its own integration and 'entire agreement clauses. Unlike the Binding Term Sheet, the Oak Hill letter memorandum has no arbitration clause.

Arbitration is a process which originates in a contractual agreement. A Party cannot be forced to submit to an arbitration proceeding in any dispute which the Party has not agreed to submit to arbitration. Oak Hill Media is a related LLC, owned by Steyn and Howes. Oak Hill and Steyn assert that CRTV has waived it arbitrability claim by participating in these proceedings and by substantively contesting and submitting evidence in relation to Oak Hill's claims. Oak Hill claims this conduct is a clear and unambiguous waiver of CRTV's jurisdictional claim.

CRTV has relied on *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, (1995), arguing that a Court, and not the arbitration panel, should decide whether a panel has jurisdiction over a dispute. CRTV argues that like the Kaplans who were Respondents, along with the company they owned, in a debt case, CRTV agreed only to arbitrate with Steyn, but not with Oak Hill. The U.S. Supreme Court found that whether or not the court could determine arbitrability depended on whether or not the Parties agreed to have an arbitrator determine arbitrability.

In *First Options,* the Kaplans justified their presence at the arbitration because they were the owners of the co-respondent. The Kaplans filed written objection to jurisdiction with the arbitration panel, which decided in favor of *First Options*. The Kaplans then sought to vacate the award, which was instead confirmed by the District Court. The case was appealed.

The Supreme Court found that a Party, who did not agree to arbitrate, should get a de novo review to preserve their rights. This review leads to a determination of whether or not the Parties agreed to arbitrate. The Court in *First Options* stated that in deciding whether the Parties had agreed to arbitrate, a court should apply "ordinary state-law principles governing contract formation." *Id*. One must determine, under state law, whether there is clear and unequivocal evidence that the Parties agreed to arbitrate.

Here, CRTV raised the lack of an arbitration agreement in its answer to the counterclaim. It did not however mention it by motion, nor in its pre-hearing brief, nor in its initial post-hearing brief. It was raised, for only the second time, in CRTV's reply brief.

It is true that CRTV was present at the hearing because it had originally brought the claim. It was also defending against Steyn's counter-claim. But CRTV went further in defending against Oak Hill's claim. It submitted exhibits to refute Oak Hill's damage claim and offered expert testimony to rebut its damages as well.

New York substantive law governs this matter. Under New York law, where a Party fails to seek a stay of arbitration prior to the hearing, that Party may not challenge the arbitrator's jurisdiction. *Allstate Ins. Co. v. New York Petroleum Ass'n Compensation*

Trust, 67 A.D.3d 479, 479 (1st Dep't 2009) (citing *Commerce & Indus. Ins. Co. v. Nester,* 90 N.Y.2d 255, 261-62 (1997)); *DeMartino v. New York City Dep't of Transp.*, 67 A.D.3d 479, 479 (1st Dep't 2009).

Similarly, under the FAA, "[a]n arbitrator derives his or her authority from the intent of the Parties ...." *Time Warner Cable of New York City, LLC v. Int'l B'hood of Elec. Workers,* 170 F. Supp. 3d 392, 410 (E.D.N.Y. 2016) (citing *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.,* 559 U.S. 662, 682-83 (2010)). By "submit[ting] an issue to arbitration, rather than seeking a stay, that Party has waived the right to challenge the arbitrators' jurisdiction." *Consolidated Rail Corp. v. Metropolitan Transp. Auth.,* No. 95 Civ. 2142, 1996 WL 137587 at *7, n. 6 (S.D.N.Y. Mar. 22, 1996) (citing *Halley Optical Corp. v. Jagar Int'l Mktg.,* 752 F. Supp. 638, 639 (S.D.N.Y. 1990)); see also *Conn. Tech. Dev. Co. v. Univ. of Conn. Educ. Props., Inc.,* 102 F.3d 677, 685 (2d Cir. 1996) ("An objection to the arbitrability of a claim must be made on a timely basis, or it is waived."); *Opals on Ice Lingerie v. Body Lines, Inc.,* 320 F.3d 362, 368 (2d Cir. 2003) (participating in arbitration proceedings without timely objection to arbitrability may constitute waiver of right to object).

But as noted in *First Options*, the simple failure to move for a stay, or the choice to stay silent, may be insufficient to determine arbitrability in the absence of a written agreement. An agreement to arbitrate must be clear and unequivocal, in writing or by conduct. An entity which claims to have never agreed to arbitration has not waived their right to contest arbitrability in a court, unless their agreement to arbitrate can be demonstrated, clearly and unequivocally under contract law principles.

In light of this rule, CRTV's reliance on *First Options* is misplaced. The Kaplans did not object, but neither did they participate. Only their corporate entity defended. Simply put, unlike CRTV in relation to Oak Hill, the Kaplans neither participated, nor showed by their behavior, that they had agreed to arbitration. In this matter, CRTV has participated and defended against Oak Hill and having done so, the cases, both in federal and state courts, make clear that an agreement to arbitrate can be inferred from CRTV's conduct.

As the Second Circuit has explained "although a Party is bound by an arbitral award only where it has agreed to arbitrate, an agreement may be implied from the Party's conduct." *Gvozdenovic v. United Airlines, Inc.*, 933 F.2d 1100 (2d Cir. 1991) (agreement to arbitrate and waiver of objections to arbitrability inferred where Party voluntarily and without objection participated in arbitration proceedings). Where, as here, CRTV "manifests a clear intent to arbitrate its dispute" with Oak Hill by, among other things, failing to pursue its jurisdiction defense and then mounting a substantive defense to Oak Hill's claims, an agreement by CRTV to arbitrate the dispute should be implied. See, e.g., *Teamsters Local Union No. 764 v. J.H. Merritt and Co.,* 770 F.2d 40 (3d Cir.1985) *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)

"On whatever basis it rests, waiver, estoppel or new contract, the result is that the grievance submitted to the arbiter defines his authority without regard to whether the Parties had a prior legal obligation to submit the dispute." *Id.* The case law is rife with examples of courts holding that behavior similar to CRTV's shows a Party's intent to

arbitrate.

For example, where a Party participated in the hearing on the merits, offering testimony and witnesses, the Party was deemed to have waived its objections to arbitrability. *New York City Dist. Council of Carpenters Pension Fund v. Tadco Const. Corp.*, 2008 WL 540078 (SDNY Feb. 28, 2008); see also *Merrill Lynch & Co., Inc. v. Optibase, Ltd.*, No. 03-civ.4191, 2003 WL 21507322 (S.D.N.Y. June 30, 2003) (Party pursued discovery in the arbitral forum relating to merits of the claims and was thus unlikely to succeed on its argument that it did not agree to arbitrate those claims); *iPayment* 2016 WL 1544736, at *4 "failing to maintain an objection to the arbitrator's jurisdiction" and "participating beyond disputing arbitrability, such as engaging in discovery, testifying, and submitting papers on the merits of the underlying dispute may evidence waiver") (quoting *Opals on Ice,* 320 F.3d at 369).

CRTV's conduct after filing its Answer displayed an intent to arbitrate the Oak Hill claim, under both New York and federal law. CRTV never raised jurisdiction after pleading it in its Answer. (See CRTV Answer, Sept. 9, 2017). After that pleading, CRTV failed to "raise an explicit objection," see *Tadco*, 2008 WL 540078. It did not repeatedly reserve the right to contest" arbitrability, *Herman Miller, Inc. v. Worth Capital, Inc.,* 173 F.3d 844, 1999 WL 132183 at *1 (2d Cir. 1999). It did not file a motion nor seek relief for lack of jurisdiction. *Penrod Mgmt. Grp. V. Stewart's Mobile Concepts, Ltd.*, 07-CV-10649, 2008 WL 463720, at *1, 3 (S.D.N.Y. Feb. 19, 2008).

Instead, CRTV "pursued discovery in the arbitral forum relating to the merits" of Oak Hill's claims, *Optibase*, 2003 WL 21507322; and participated in the hearing "beyond disputing arbitrability" by "testifying and submitting papers on the merits" of Oak Hill's claims. *iPayment*, supra.

CRTV failed to raise the issue in a Pre-Hearing brief intended to encompass "all significant disputed issues." CRTV retained an expert "to evaluate the alleged economic damages ... incurred by Respondents" – defined as including Oak Hill Media, – "due to the allegations in their counterclaims."

At the hearing, CRTV offered testimony specifically intended to argue the merits of Oak Hill's claim. For example, CRTV elicited testimony from Mr. Wunderlich as to whether "some of [his] opinions regarding Mark Steyn Enterprises also apply to the damages claimed by Oak Hill Media." Mr. Wunderlich went on to offer testimony about mitigation, present value, and the anticipated duration of the relationship between CRTV and Oak Hill.

In addition to *First Options*, CRTV relies on *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 290 (3d Cir. 2003), which involved a foreign arbitration award enforcement proceeding. China Minmetals is not persuasive, as its holding relies on an allegedly forged document.

CRTV agreed by its conduct to submit Oak Hill's claims to arbitration when it mounted a substantive defense to those claims. Under contract law, it is estopped from pursuing the arbitrability claim. There was a clear and unequivocal waiver of any claim of lack of arbitrability. By its conduct, CRTV has agreed to arbitration and submitted the dispute

with Oak Hill to arbitration. The Arbitrator has jurisdiction over the dispute between Oak Hill and CRTV. Oak Hill Media, LLC, is a proper party to this arbitration.

Discussion

CRTV contends that while Steyn agreed, by contract, to host the Mark Steyn Show, he "aggrandized" his role and became the executive producer. In so doing, they claim that "he failed to assemble a staff, failed to create a budget, failed to set a schedule, failed to implement structure, failed to rehearse, and failed to treat the crew with respect; and, because of these failures, failed to create enough content for the show, thereby destroying it."

CRTV asserts that it has proven that Steyn breached his contract with CRTV, by failing to provide the show enough of Steyn's time and effort and by failing to provide the show enough content. Lastly, CRTV contends that "Steyn's company" converted CRTV's property.

There is no argument that the Binding Term Sheet formed a valid contract between CRTV and Steyn. In that contract, there is both a delineation of the duties of the Parties and an obligation of cooperation between them in certain areas. CRTV retained control over the business aspects of the show and Steyn retained creative control. The contract provides that CRTV shall retain production, office and security staff, and build a studio in Burlington, Vermont where the show was to be primarily shot. Steyn was to create enough content for 200 shows per year, with each show being 48 minutes long. Steyn's obligation to deliver the content was to begin when the studio in Burlington was 'fully functional.' The Parties anticipated that would be around October 1, 2016.

The evidence shows that the Parties began the project in good faith. The contract was effective July 1, 2016. Steyn was on a previously planned research trip in Europe for the summer (of which CRTV was aware,) and took time while abroad to arrange interviews, choose music and create and record the openings and closings for the show. CRTV hired the producer Steyn had recommended: Rikki Ratliff, who was hired away from Fox Business where she was the producer for John Stoessel. She had run a daily TV show in the past.

Unfortunately, this working relationship failed. Steyn returned from Europe in September, 2016. The studio was under construction, but Steyn had scheduled shoots in London believing that a technical crew would have been hired by Ratliff upon his return and would be in place to edit the content filmed off site. But Ratliff had not hired a technical crew, despite having the authority to do so. In fact, there was no staff in place to edit content or assist and support further content production.

In September, frustrated by Ratliff's inaction, Howes, on behalf of Steyn, asked CRTV to send her someone who "knows TV" to help get the show running. She also asked for assistance in hiring directors and production staff.

CRTV management agreed that Ratliff had done little to advance the show or construction of the set. Chris Crane wrote to Katz that Steyn and Howes "concerns

regarding Rikki's ability, experience, judgment and leadership were validated." Ratliff was fired after setting up a disastrous interview with a completely unqualified job candidate.

While it is true that Ratliff encountered difficulties communicating with Steyn through Howes, Steyn, Howes and CRTV executives agreed Ratliff accomplished little, made poor decisions, which cost the show time, and cost CRTV money and failed to hire staff.

Despite its earlier agreement, CRTV now blames the Respondents for Ratliff's failure. Katz, no doubt embarrassed by her termination after wooing her away from another job, hired Ratliff for another CRTV position. It is clear though, at the time, CRTV executives supported Steyn's opinions, conclusions, and actions regarding Ratliff's performance.

It is interesting to note, that aside from Howes, there appears to have been little oversight of the production from July to September. Great amounts of money were being spent to build the set, yet it is unclear who from CRTV was supervising or checking on Ratliff as the summer wore on.

In any event, Ratliff's failure meant that the positions deemed critical by Steyn, Howes and Crane (on behalf of CRTV) needed to be quickly filled. Given the complexity of building a show from the ground up, the Parties had given themselves a tight timeline. In addition, the Mark Steyn Show was more complex to film, edit and produce than any of the other CRTV shows done at that time.

In the effort to fill the necessary positions, the relations between the Parties suffered greatly. The process began well enough, as Katz and Crane called on Jason Meath, a CRTV producer, to assist with the production of the show. Feeling that he did not have enough time, Meath called a production staffing company which began its work without ever informing Steyn or Howes.

The production staffing company hired a series of consultants to help put together a production team. The consultants spent little time on the ground in Burlington and this led to disdain for them by Steyn. Meanwhile, Katz, who without argument was generous with funds, became frustrated by what he believed was the difficult behavior of Steyn. Interestingly, though he admired Steyn, he relied on his executives for his information. It does not appear that Steyn and Katz ever talked directly about the difficulties that were occurring or their different perceptions of them. Perhaps this is underscored most by their different views of the executive producer position.

After Ratliff's firing, the Parties agreed to fill the technical positions most critically needed to process content. They had agreed that the executive producer would later be promoted from among the ranks of others hired.

Katz took this, because of certain statements made by Howes and Steyn, to mean that Steyn was the executive producer. Steyn and Howes believed that they were keeping that position open and simply doing what needed to be done while production staff, editors, cameraman and directors were hired. Since it was CRTV's responsibility to hire the production staff, and a phenomenal amount of money was being spent, it is difficult to understand Katz's and CRTV's failure to confront the crisis directly.

The show limped along, as the studio was built, with intermittent communication between the Parties, as various people tried to pull together a production staff. While there is enough blame to be placed on all Parties, it is again odd that CRTV, in charge of both the construction and production did not take the bull by the horns. Katz seems to have been trying to please Steyn by doing things in the way he believed Steyn wanted them done. Unfortunately, he had no direct knowledge of what that might be. Suffice it to say, that by the time that the studio was finished and the crew largely in place, there was little love lost on both sides.

CRTV planned on launching the network on December 1, 2016. Unbeknownst to Steyn, in planning for the launch, CRTV was clearly soured on the Steyn show prospects and was considering speeding up other content. The lack of direct communication, in which misunderstandings festered, had taken its toll.

On October 20, 2016, Cary Katz wrote to his executive team of Chris Crane and Michael Boyd about another host named Crowder, "You need to speed up the development of this show we will need to get him up and running fast if Steyn screws us. I hate to even write that, but we have to be prepared for a worst case scenario."

Crane replies, "Fine, let's stay focused Crowder is always standing by. We will get through this."

Boyd writes "Why did he [Steyn] cancel the Christmas show?"

Crane replies "No one is cancelling anything. Let's announce everything and put this m.....f....r on the hook for everything. If anything goes wrong, it lands on HIM, not CRTV. 'Time to get tough with Pussy Steyn and Momma Bitch Nutcase Melissa. How's that for calm?...Time to man up."

To which Boyd responds "Totally agree."

And most incredibly, Katz responds to this by saying only "We will be relentlessly positive and strong"

It should be mentioned, that while Katz admired Steyn, Steyn was neither well understood by Katz nor liked by the CRTV staff. It was clear from the evidence and from Steyn's demeanor at the hearing that his interests are wide ranging, his insights are original, and his opinions are erudite. But he does not suffer fools, and while clever, he can be abrupt, temperamental, sarcastic, cutting, hurtful and rude. His zealous guarding of his time and personal space was seen as condescending by most around him.

Much was made of Steyn's personality and Howes' as well. She too can be biting and insulting. But certainly, in the news and entertainment business, just like in the business, legal and political worlds, dealing with difficult talent cannot be unusual or shocking to executives. While Steyn may be 'difficult,' and his fascination with music or cats barely understood by those producing shows for a conservative political network, he was the talent Katz had pursued; his clever, original insights and his sharp tongue were much of what made him a great voice for liberty. The sizzle reel had encouraged Steyn. CRTV promised Steyn they would help him create a multifaceted show different than anything

else they had produced.

No one at CRTV seemed to have comprehended the complexity of creating and producing the show they had agreed to originally produce. Katz repeatedly testified that his frame of reference for cost and complexity was the Mark Levin Show, which is completely different in format, content, and goals. It is a more traditional political talk show. The gulf between the expectations of Steyn, who appears, in his demeanor and standards to be a perfectionist, and the expectations of CRTV for cost, time and investment of effort, may have been too wide a gulf to span, resulting in the demise of the show.

CRTV contends that it extended itself to the last degree to provide Steyn with an excellent production team. It contends that, to the extent the show lacked a production team that could be ready for a timely launch of the show, it was solely because Steyn obstructed CRTV's effort to provide one. The actual events are more complicated.

For its part, CRTV spent an apparently unlimited amount of money to provide Steyn with a beautiful set. It hired one of the most prominent set designers in TV, Bryan Higgason for the job. He designed a set that Steyn approved. CRTV also hired a well-qualified and experienced architect to oversee the construction of the set. They built a beautiful set, which witnesses described as stunning, fabulous and state of the art.

It was also far behind schedule. Completion was anticipated to be October 1, 2016, but it was not completed until December, 2016. And while CRTV witnesses fault Steyn's absence over the summer for some of the delay, this position is not persuasive. CRTV was well aware, when it entered the contract that Steyn would not be present over the summer. But even if he had been, he was not bound by the contract to build or contribute to the building of the studio and set. Nor was he needed. CRTV was contractually bound to build the studio and hire the production crew. To the extent that Ratliff made decisions which were incorrect and impeded the project, it was CRTV's duty to oversee the construction, not Steyn's. Experienced personnel could have prevented what Steyn found upon his return; that the construction had left the set inadequate for its intended use. This would not have happened with adequate supervision of the construction by Ratliff or other CRTV personnel.

While the set construction was completed in December, 2016, and a production crew was assembled, the disagreement over who was to blame for the problems encountered is a small example of the larger dispute between the Parties. That is, who did not live up to their obligations under the contract? Did either Party breach the contract and, if so, how did that occur.

The answer to these questions it appears, as agreed upon by counsel during closing arguments, comes down to the question of whether or not the Burlington studio was 'fully functional' for the purpose of creating the 'highly produced' Mark Steyn Show.

Was the Burlington Studio fully functional?

As discussed above, after Ratliff's departure, Steyn, Howes and Crane met and, as Crane, on behalf of CRTV, reported to Katz, a consensus had been reached. A new executive producer would not be named until a person could be identified during the first

few months of production.

What happened next was described earlier. Jason Meath failed to fill the agreed upon key roles and hired Ventana Productions to fill spots, without informing Steyn. On the bright side, Mike Young, an independent contractor, was brought in to help with the build out of the studio and to hire technical staff. Unfortunately, this too was delayed because Meath failed to return phone calls from Young.

The anticipated completion date for the studio, October 31, 2016, passed.

By mid-November, Young had started to hire technical staff, filling the 'key roles' identified in Crane's consensus memo. The studio, however, remained incomplete. On, November 29, 2016, Young warned Katz that the studio was not ready for filming, as flooring and lighting were not yet completed. He also praised Howes for bringing in a 'launch team' ... to help produce the first and subsequent shows, producers, writers, and editors.

Earlier in November, Steyn had written to CRTV about his increasing concern about technical problems at the studio that required lengthy and inconvenient "workarounds." He wrote "[on] a daily show, you don't have the time for workarounds," such as driving two hours away to conduct interviews and filming off-site. He wrote that this "means the studio has to work as intended." Steyn testified: "we did not have a fully functioning studio, but because of my moral contractual obligation to my fans, we continued taping as much as we could."

Steyn testified that production was impeded by camera control problems, the inability to use the monitor which was a central element of the program, a flicker in the monitor which affected where one could be filmed on the set, and audio distortions, to name only a few of the problems attested to.

It's true that some content was produced in the studio in early December, 2016, but the test of whether the studio was fully functional is whether or not the equipment and the studio worked as intended. The studio's intended use was for the production of the Mark Steyn Show, a daily, 48-minute-long, "highly produced" broadcast. For instance, the monitor's use was central to the show. The 80"monitor was a focal feature of the set and was to be used for interviews of guests and to show film, news or other types of clips related to commentary or discussion on the program.

Other inadequacies in the studio became apparent to almost everyone who worked there and everyone who came to investigate or help. The cameras, which may have been adequate for a more traditional talk show were inadequate for the filming of this show and put a burden on post production. Even worse, the editing suites did not work properly and crashed repeatedly during post production. CRTV witnesses testified that post production created a choke point for the show which prevented the timely production of adequate amounts of material for the show. Indeed, it was unclear that the equipment could handle the size of the files needed to produce this type of show. The situation was bad enough that more than one person pleaded with CRTV for the presence of a full-time engineer to troubleshoot the problems and crashes as they occurred.

That some content could be produced at the studio does not prove that the studio was fully functional to produce entire shows that could be filmed, produced and delivered five times a week. Indeed, parts of the Christmas special had to be filmed off site. Some editing had to be done by Steyn at his office in Woodsville, New Hampshire. Audio problems which plagued performances were fixed in London. From the testimony, one can infer that the studio had been built and equipped with equipment standard to other CRTV studios but inadequate for the show agreed to in the term sheet.

During oral argument, the Parties disagreed about when, if ever, the studio became fully functional. CRTV points to the first week of December, but the overwhelming evidence is that many technical shortcomings made the studio not fully functional at that time. In the alternative, CRTV argues that by time of the notice of breach, and/or during the cure period, the "glitches" complained of were either fixed or so insubstantial that the studio was, at that time, fully functional.

Also in December, Katz unilaterally imposed a $25,000 per month budget on the Steyn show. While he called this a starting point for negotiation, it was a number substantially below what the show had cost per month to date. It was the same amount of money spent on CRTV's Mark Levin Show, a show that was, without dispute, far different in production values than the Steyn show.

Steyn hired Kraig Kitchin, an industry veteran, to work on negotiations with CRTV and Katz, regarding both the technical problems and the new budget restrictions. On December 30, 2016, Kitchin wrote an extensively detailed memo to Mike Young, both complimenting the beauty of the Burlington facility and pointing out the technical problems that still needed to be addressed.

While CRTV argues that Kitchin's memo was based on information told to him earlier in December, many of the problems he described appear in the emails sent by Joe Weasel, who had been hired to provide production assistance to the show in January, 2017, and appeared as a CRTV witness. Also in January, Carl Marxer, an employee of another Katz enterprise, Poker Central, again wrote of similar problems. While some problems had been improved upon, others remained. The studio did not have enough ISO recorders to cover the cameras in the studio; the program feed was not available from the studio for the editors to see during taping; two editors were not able to work on a project at the same time which was deemed necessary; an assistant editor station was needed; the camera robotic operator needed more than one CCU for the cameras, because this show, unlike the Mark Levin Show, had frequent lightings changes and the settings did not hold; the flicker previously noted by everyone in the set piece monitor had not been fixed despite various attempts; a flicker caused by LED lights had yet to be addressed by set electricians or technicians; the internet service to the studio was still inadequate; no cable TV set had been installed in Steyn's office so that he could prep for the show. In addition, Marxer again noted that an engineer was needed during the shooting to solve production problems as they arose.

CRTV relies on the testimony of Mike Dunn, a director, Mike Young, the technical contractor, and Paul Kullman a show staffer, for proof that the technical "glitches" were normal bugs that could be worked out or had been fixed by the time of the notice of

breach and the cure period. Contrary to this position, Mike Dunn testified that that some of the problems continued into February. He testified that early in February, there were synching issues; as late as February 20, 2017, the studio monitor continued to flicker and that the issue was not resolved prior to termination; post production problems persisted when studio editors could not make line cuts because of problems in synching isolated recordings.

While Young testified that the "glitches got ironed out as the show is filmed", he was not specific and he did not directly contradict Dunn's testimony. Kullman, who testified that he fixed the flickering monitor by unplugging and replugging cables, was not credible. His testimony was not supported by anyone else and he had obviously lied during his testimony about his whereabouts during an absence from work, both to Howes, at the time of the absence, and during his sworn arbitration testimony.

In critical ways, the studio was not ever fully functional. Not only did the large set monitor continue to flicker, its uplink technology, if any, did not work. This monitor, which allowed a show based in Vermont to have guests join it from anywhere in the world was critical both to the show's production and its budget. The edit room crashes continued. Musical performances, which had been anticipated in the term sheet, were hampered by the limited range of movement that could be shot, along with sound distortion and mixing issues.

Something is fully functional if it works as it is supposed to work for its intended use. The Burlington studio may have worked for others, but it did not work for the complex and highly produced broadcast that was supposed to be the Mark Steyn Show. Since a fully functioning studio was a condition precedent to Steyn's obligation to produce content, CRTV, having failed to meet its contractual obligation, did not have the right to declare a breach for lack of sufficient production of content. In addition, it is clear from the evidence that the cure demanded by CRTV was something that could not be accomplished in the studio that existed.

Breach

Since a fully functioning studio was a contractual obligation that CRTV failed to meet, CRTV did not have the right to declare a breach for lack of sufficient production of content. CRTV's breach of contract claim requires proof that CRTV fulfilled its material contractual obligations. Unless excused, the failure to complete a fully functional studio prevents recovery for breach of contract. *Dorfman v. American Student Assistance,* 104 A.D.3d 474, 474 (1st Dep't 2013); JP Morgan Chase v. J.H. Elec. of N.Y., Inc., 69 A.D.3d 802, 803 (2d Dep't 2010).

It is also clear, that Steyn's obligation to produce content commenced only when the studio was fully functional. In order to recover, CRTV would have had to prove that the studio was fully functional which, based on the above recitation of the facts found, it did not prove.

CRTV's alternative claim of breach arises from Section 3.1 of the Term Sheet. That Section provides that Steyn "shall devote sufficient professional time, efforts and attention to (a) creating, performing, hosting, announcing, promoting, marketing, and

being an on-air personality, as required by CRTV and customarily provided by a host of a radio/television show such as The Mark Steyn Show."

CRTV has outlined and offered proof of the acts or omissions it contends constitute a breach of the contract. These include Steyn's summer trip to Europe and a claimed failure to communicate adequately with Rikki Ratliff; a failure to rehearse; failure to attend meetings; failure to maintain a production schedule; tardiness; disrespect for the crew; interference and obstruction of the hiring process.

The first problem with this claim is that the contract itself sheds little light on what was expected of Steyn other than that which was customary. The executives at CRTV might have become disenchanted with Steyn, and talked about his shortcomings behind his back, but there is a complete lack of evidence of any action taken to directly confront Steyn or communicate to him a clear set of expectations.

Thus, CRTV must prove that Steyn deviated from devoting the time, effort and attention that is customarily provided by a host of a radio/television show like his and such deviation was the cause of the collapse of the show.

Both in setting forth the requirements of CRTV and what is customary, the term sheet is woefully lacking in detail, clear requirements and expectations.

"A custom, in order to become part of a contract, must be so far established and so far known to the Parties that it must be supposed that their contract was made in reference to it. For this purpose, the custom must be established, and not casual, uniform and not varying, general and not personal, and known to the Parties ... Usage is a matter of fact, not opinion." *Gerseta Corp. v. Silk Ass'n of America,* 220 A.D. 293, 295 (1st Dep't 1927).

This alternate claim of breach has not been proven.

Conversion

CRTV claims conversion by Steyn of four items: two computers, a mixer, and a keyboard, which are valued (as outlined in the CRTV's brief) at $8,950. Howes testified that these items were stored in production offices after February 8, 2017, in anticipation of producing scheduled content and to safeguard intellectual property stored on the computers. In order to prove conversion, CRTV must have shown that the Respondent "exercise[d] ... dominion over or interference with []property in defiance of the plaintiff's rights" *Ahles v. Aztec Enterprises, Inc.*, 120 A.D.2d 903 (3d Dep't 1986)

In order to prove that property has been kept in defiance of a person's rights, a demand must be made for the return of the property, and the wrongdoer must have refused that demand or disposed of the property. CRTV did not prove that the retention of the property in question was done in defiance of its rights. CRTV presented no evidence that it demanded the return of these items and that the Steyn Parties refused to return them.

The claim for conversion has not been proven.

The Steyn and Oak Hill Media Counterclaims

Breach of Contract
As outlined above, CRTV has failed to prove by its claims by a fair preponderance of the evidence.

On the other hand, Steyn has proven that they performed their contract and were attempting production of the show, but were hampered by the studio which was not fully functional. As their content production requirement began only after the studio was fully functional, CRTV breached its obligations to Steyn and Oak Hill.

Steyn and Oak Hill have presented evidence of resulting damages.

Fraud
Fraud necessitates the misrepresentation (or omission) of a known fact. To establish fraud, a Plaintiff must prove a misrepresentation or material omission of fact which was false and known to be false by the Defendant, made for the purpose of inducing the other Party to rely upon it, justifiable reliance, and injury." *Nerey v. Greenpoint Mortg. Funding, Inc.,* 144 A.D.3d 646,647 (2d Dep't 2016).

Steyn contends that the behavior of CRTV, based on comments found in internal e-mails ("going for the breach" "slow walking the budget") and the criticisms and suggestions of Mark Levin, constitute fraud; that is, CRTV intended to end the show, but strung Steyn along, praising shorter content during the cure period and then proceeding with its termination for lack of sufficient content. Fraud must be proven by clear and convincing evidence.

In addition, where a claim of fraud arises out of an underlying breach of contractual duties, an action for fraud will not lie unless the misrepresentations at issue are "collateral or extraneous to the agreements entered into by the Parties." *Spellman v. Columbia Manicure Manufacturing Co.,* 111 A.D.2d 320, 323 (N.Y. App. Div. 1985).

Crane's question, "are we going for a breach" was more of an expression of opinion than fact. Katz said he wanted to "slow walk" the budget talks while he waited to see how Steyn's first episodes turned out. Mark Levin may have hated the Mark Steyn show, and Katz may have worried about subscriptions, but this too is not clear and convincing evidence of fraud. There is no evidence of actionable fraudulent conduct.

Alter Ego and Tort Claims
The Counterclaimants did not brief these claims. They are deemed abandoned.

Damages
Under New York law, "a Party injured by breach of contract is entitled to be placed in the position it would have occupied had the contract been fulfilled according to its terms." *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.,* 500 F.3d 171, 185 (2d Cir. 2007). "In an action for breach of contract" Claimants are "entitled to the benefit of [their] bargain as written and [are] entitled to damages for the loss caused by failure to perform the stipulated bargain and the recovery may include the profits which he would have derived from performance of the contract" *Wechsler v. Hunt Health Sys., Ltd.,* 330 F. Supp. 2d 383, 424 (S.D.N.Y. 2004).

Under the Term Sheet, Steyn would have been paid $4,000,000 over five years, payable in $200,000 quarterly installments. At the time of CRTV's breach, Steyn had received $600,000 from CRTV as payments under the Term Sheet.

Under the Letter Agreement, CRTV owed Oak Hill Media $500,000 per year, payable in quarterly installments. CRTV also loaned Oak Hill approximately $750,000 interest-free for the purchase of a home, which Oak Hill agreed to repay in quarterly installments of $75,000. Because the quarterly loan payments set off the quarterly services payments earned under the Letter Memorandum, Oak Hill earned a net of $50,000 in each of the first three quarters of the term of the agreement, paying off $225,000 of the loan.

Oak Hill was also paying production staff through its own payroll system and then requesting reimbursement from CRTV. After the show was cancelled, CRTV refused to reimburse Howes for production-related expenses, including payroll.

Lori Hobart, who worked for Oak Hill, testified that CRTV failed to reimburse Oak Hill for certain expenses, all related to the production of content for the Show.

CRTV contends that Steyn has failed to mitigate his damages. They have incorrectly cited case law which does not apply in the current factual situation. If CRTV raises the issue of mitigation, then CRTV must prove the opportunity and failure to mitigate. They offered no such proof. Dr. Wunderlich's remark that Steyn should have been able to "find some kind" of work misunderstands the Parties' agreement. Steyn was free to continue his usual work. Hosting, as the named talent, his own show was what CRTV contracted with him to do. They would have had to show that he had the opportunity for another similar opportunity.

CRTV did not present any evidence that Steyn has failed to mitigate damages. Under New York law, it is not Steyn's duty in a contract case to prove that he has mitigated. The term sheet explicitly says that there is not an employment relationship, which under some causes of action would cause a plaintiff to prove mitigation. CRTV's argument is unavailing.

Similarly, except in certain statutorily mandated causes of action, a discount to present value need not be introduced by the Plaintiff. Indeed, the reduction can be made by the court, after a finding on liability and damages, if evidence has been presented upon which the court can base its calculations. Here, neither Party introduced any evidence at the hearing regarding what the appropriate discount rate would be for the reduction of damages to present value.

The discount rate, as used to reduce damages to present value in litigation, is normally based on the yield from a safe investment, such as the rate of return on US Treasury bills. Where, as in the present case, damages are not being awarded for losses far into the future and the US Treasury bills yield is approximately the same as the inflation rate, a present value calculation is essentially a wash, as both the inflation rate and the discount rate must be considered. Here, in the absence of any proof provided of the appropriate rate of discount or inflation, and an approximate one-year period over which the future damages are to accrue, a calculation based on "judicial notice" of both the inflation rate and the rate for 10-year Treasury notes at the time of the breach would

result in a present value calculation of essentially the future contract damages awarded.

CRTV, having not introduced any evidence of the appropriate discount rate, despite having called an expert who testified about the need for present value, should not be now permitted to argue for a more precise present value calculation. Having failed to introduce evidence that would have benefitted it in the analysis of damages, CRTV has effectively waived a claim for a more complex present value calculation. The present value is, under the circumstances of this case, the amount of the Award.

New York Statutes do mandate the imposition of interest. Under New York law, the Steyn Parties are also entitled to prejudgment interest at a rate of 9% (CPLR §§ 5001(a)-(b); 5002, 5004 ("interest shall be recovered upon a sum awarded because of a breach ... of contract."). MSE and Oak Hill are due prejudgment interest on the damages incurred from the date of the breach to the date of this decision. In addition, they are due interest on the amount of damages which would have been payable from the date of this decision through June, 2019 (see discussion regarding present value calculation, supra

The Parties further disagree about whether or not damages can run past the June 30, 2019, date written into the contract. The Binding Term Sheet requires the Parties to work in good faith, and as of January, 2019, are required to determine how the show is doing and whether or not it can be improved. CRTV retains the right to not renew the contract as of July 1, 2019, if it is dissatisfied with the show.

In a breach of contract action brought under New York law, a Party generally may recover lost profits if: (1) its alleged lost profits were caused by the breach of contract; (2) the damages were fairly within the contemplation of the Parties when contracting and; (3) the damages can be proved with a reasonable certainty. *Washington v. Kellwood Co.,* 105 F. Supp. 3d 293, 312-13 (S.D.N.Y. 2015); *Int'l Telecom. v. Generadora Electrica del Oriente S.A.*, 2004 WL 784941, at *3 (S.D.N.Y. April 13, 2004)

New York law must be used as a reference for whether or not the damages flowing from July 1, 2019, forward are speculative in nature. The recovery for future damages must be based on reasonable certainty and not be based on speculation. The evidence presented by CRTV regarding the difficult relationship between the Parties is not conclusive of whether or not damages are appropriate for the period after June 30, 2019. There are though, relevant facts which can be gleaned from the evidence. First, the relationship between the Parties was a new venture, with no track record of previous success. Second, there are a variety of unknown business factors which could affect renewal. Third, the right not to renew is unilaterally held by CRTV, and the criteria for non-renewal are broad and undefined.

In this case, one can only speculate about what circumstances might arise between now and June 30, 2019, to determine if CRTV would fail to renew the contractual relationship of the Parties. An attempt to prove that CRTV would have acted in good faith in relation to renewal, as suggested by the Respondents, would be based on guesswork and conjecture. The damages will therefore be limited by the outside date of June 30, 2019.

Past contractual damages owed to Steyn total $800,000.

Damages, based on contractual sums that would have been due Steyn in the future, are $1,000,000.

For Oak Hill, past damages, which include payments due to Oak Hill, less its repayment for the loan advance and production costs incurred by Oak Hill, are $508,124.

Damages, due to Oak Hill, which would have accrued after the date of this award, are $400,000. While CRTV asserted, for the first time, in its Response to the Interim Award, that Oak Hill should receive no post-termination damages (because its letter agreement is an at will arrangement which terminates if the Steyn contract terminates for "any reason"), this argument is unpersuasive under New York law. In addition, its calculation of damages, contained in a footnote, is unclear and therefore unpersuasive. It does not appear to be based on the submitted contractual payment schedule as modified by loan repayments.

The letter agreement refers to the Term Sheet. The evidence revealed that an agreement with Oak Hill was a condition for any agreement with Steyn. Both agreements were executed on the same day for the same term and purpose; the production of the Mark Steyn Show. Under New York law, all writings forming part of a single transaction are to be read together. See *TVT Records v. Island Def Jam Music Group,* 412 F.2d 82 (2d Cir. 2005); *This is Me, Inc. v. Taylor,* 157 F.3d 139, 143 (2d Cir.1998); *Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261, 263 (2d Cir.1965) ("[I]t is both good sense and good law that these closely integrated and nearly contemporaneous documents be construed together.") (quoting Kurz v. United States, 254 F.2d 811, 812 (2d Cir.1958) (per curiam)); see also *F.H. Krear & Co. v. Nineteen Named Trustees,* 810 F.2d 1250, 1258 (2d Cir.1987) (citing *Gordon* for the proposition that under New York law all writings forming a single transaction must be read together); *Nau v. Vulcan Rail & Constr. Co.,* 286 N.Y. 188, 197, 36 N.E.2d 106, 110 (1941) (finding that agreements at issue "were executed at substantially the same time, related to the same subject-matter, were contemporaneous writings and must be read together as one.").

If the law is followed, and the writings are read as one to give effect to the Parties' intent, it is logical and reasonable, that Oak Hill's agreement tracked that of Steyn. To have one agreement be for a term and the other at will is an interpretation which in no way acknowledges the purpose or intent of the writings. "A contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the Parties." *Cole v Macklowe*, 99 A.D.3d 595, 596 (1st Dept 2012). "[T]he aim is a practical interpretation of the expressions of the Parties to the end that there be a realization of [their] reasonable expectations" *Brown Bros. Elec. Contrs. v Beam Constr. Corp.,* 41 N.Y.2d 397, 400 (1977).

Attorneys' Fees

In their Counterclaims, Steyn and Oak Hill requested attorneys' fees and costs. In its answer to their Counterclaim, CRTV similarly requested attorneys' fees and costs.

Rule-47(d) of the Commercial Rules of the American Arbitration Association states:

(d) The award of the arbitrator(s) may include:

i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and ii. an award of attorneys' fees if all Parties have requested such an award or it is authorized by law or their arbitration agreement.

In their agreement, the Parties agreed to submit to arbitration any unresolved dispute or claim arising out of, or relating to, the Term Sheet "in accordance with the rules of the...AAA." When Parties agree to submit to arbitration and where their agreement is silent on the issue of attorney's' fees, the issue is deemed submitted to the arbitrator. *Paine Webber v. Bybyk* ,81 F3d 1193, 1202 (2d Cr.1966).

When Parties agree that disputes will be governed by a particular set of rules, those rules are deemed incorporated into the Parties' agreements. *B/E Aerospace, Inc. v Jet Aviation St. Louis, Inc.* 2012 WL1577497 (S.D.N.Y. May3, 2012); *Dunhill Franchisees Trust v. Dunhill Staffing Sys. Inc.* 513 F. Supp.2d 23 2007); *Warner Bros. Records v. PPX Enterprises* 776 N.Y.S. 2d 269 (2004).

In this matter, the Parties requested attorney's fees. CRTV's contention that its request was "pro forma" and therefore should be disregarded is not persuasive. CRTV claimed attorney's fees in its answers to the First and Second Amended Counterclaims as well as on the AAA cover sheet. These three requests were prayers for relief (i.e. requests for an award of fees to be made in their favor).

This matter, which was litigated for about one a year, was highly contested. It involved substantial, extensive electronic discovery (CRTV produced over 150,000 pages), witnesses in various parts of the country and a two-week arbitration proceeding at a location where none of the lawyers conducting the arbitration resided. Each side had multiple counsel assigned to the case and multiple counsel in attendance at the hearing. The presentations were thorough, even though the time frame was compressed.

CRTV, MSE and Oak Hill all claim to be prevailing Parties. CRTV initiated this arbitration with a claim that Steyn breached his contract with CRTV and he was both corporately and personally liable for damages. CRTV lost this claim. Indeed, MSE and Oak Hill prevailed on their counterclaim that CRTV was responsible for a breach of the contract. Essentially, this was the central dispute of the arbitration.

The Respondent's countered CRTV's breach of contract claim and included claims for fraud and tort as well as attempting to pierce the corporate veil. The proof and effort put into these additional claims was largely the same as its breach of contract claim and its defense to CRTV's claim.

When cases involve "related claims," as they do here, and a Plaintiff achieves significant overall relief, "the fee should not be reduced simply because the plaintiff failed to prevail

on every contention raised...the result is what matters.... A Court's rejection... of certain grounds is not a sufficient reason for reducing a fee." *Hensley v Eckerhart,* 461 U.S. 424.435 (1983.) New York law is consistent with this proposition. See *55 Walker Street Condominiums v. Walker Street, LLC* 6 A.D. 3d (1st Dep't. 2004); *Senfield v. I.S.T. A.* Holding Company CO. Inc, 235 A.D> 345 (1st Dep't1997.)

CRTV and Katz argue that Katz is a prevailing Party and therefor entitled to attorney's fees because claims made against Katz failed. But the holding of *Wiederhorn v. Merkin,* 98 A.D. 3d 859 (1st Dep't. 2012) counters this position as it applies to Katz. Having mounted a joint defense with CRTV, Katz cannot be considered separately for purposes of a fee award.

As for CRTV's position of being a prevailing Party, it ignores that pleading is allowed in the alternative. While MSE, Oak Hill, and Steyn abandoned or did not prove some their claims, Steyn prevailed on the central claim of this dispute: Was there a breach of the Parties' contract, and if so who was responsible for that breach? CRTV lost the central claim. The failure of MSE and Oak Hill to prevail on some "related claims" does not make CRTV a prevailing Party when MSE and Oak Hill achieved "significant overall relief."

In addition, the attorney's fee affidavit submitted by CRTV lacks sufficient detail upon which an award can reasonably be made. While the affidavit listed the hours billed, and resumes and rates for attorneys involved, CRTV offers no detail regarding which documents on what work the hours were accumulated. *Klein v. Robert's American Gourmet Food Inc.,* 28 A.D.3d 63, 75 (2d Dep't. 2006)

Attorney's fees and non-overhead costs are awarded to Steyn, MSE and Oak Hill as prevailing Parties. These fees and costs are awarded collectively to them as theirs was a collective defense and the proof of their claims was identical except for the calculation of damages. The fees are reduced because some hours billed were excessive. It is logical, too, that the attorneys' fees of MSE and Oak Hill would be higher than those of the Claimant, as CRTV was in control of much of the evidence upon which the Respondents' case relied.

The Respondent's attorney's fees are reduced by one third. Their costs are reduced by $30,403 which represents certain costs which are more appropriately classified as overhead. Costs are further reduced by the amount of $77,575 which was claimed by the Respondent Counterclaimants as costs paid to the AAA. AAA costs will be dealt with separately.

Attorneys' fees of $908,104 and costs of $104,625 are awarded to Steyn, MSE and Oak Hill.

CRTV shall be responsible for all AAA arbitration administrative fees and costs and all fees of the Arbitrator, including those of Steyn, MSE and Oak Hill.

FINAL AWARD

On the Claim filed by CRTV, an Award is made in favor of the Respondents. The Respondents have volunteered to return the property that was the subject of CRTV's conversion claim. The Parties shall make arrangements for the return of the property.

On the Counterclaims asserted by Steyn, MSE and Oak Hill:

1. An Award in favor of Steyn and MSE is made in the amount of $1,800,000, together with interest in the amount of 9% from the date of the breach to the date of the Award on past damages and from the date of the Award until payment is made on future damages.

2. An Award in favor of Oak Hill is made in the amount of $908,124, together with interest in the amount of 9% from the date of the breach to the date of the Award on past damages and from the date of the Award until payment is made on future damages.

3. Attorney's fees and costs are collectively awarded to Steyn, MSE and Oak Hill in the amount of $1,012,729.

4. The Administrative fees and expenses of the AAA totaling $31,600.00 are to be borne $31,600.00 by CRTV, LLC . The Compensation and expenses of Arbitrators totaling $123,749.98 are to be borne $123,749.98 by CRTV, LLC . Therefore, CRTV, LLC has to pay Mark Steyn and Mark Steyn Enterprises (US), Inc., an amount of $76,574.98.

/s/ Judge Elaine Gordon, (ret.)
Arbitrator
February 21, 2018

EXHIBIT 4

(Transcript of April 19, 2018 Hearing)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - CIVIL BRANCH - PART: 3

----------X

MARK STEYN, MARK STEYN ENTERPRISES (US), INC., and OAK HILL MEDIA, INC.,

Plaintiffs,

-against-

INDEX NO. 650887/18

CRTV, LLC,

Defendant.

----------X

60 Centre Street
New York, New York 10007
April 19, 2018

B E F O R E:

HONORABLE EILEEN BRANSTEN, Justice

A P P E A R A N C E S:

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ANGELA TOLAS, CSR
OFFICIAL COURT REPORTER

THE COURT: Set up on Mark Steyn.

For Mark Steyn, Mark Steyn Enterprises (US), Incorporated, and Oak Hill Media Incorporated, I have for the petitioners from the Gerard Fox Law, PC, Michael Murphy. How are you?

MR. MURPHY: Yes.

THE COURT: And Edward Altabet.

MR. ALTABET: Yes, your Honor, good morning.

THE COURT: I also have from another law firm from Fishkin Lucks, LLP, I have Erin O'Leary.

MS. O'LEARY: Yes, your Honor, good morning.

THE COURT: For CRTV, LLC, I have from the Browne, George, Ross, LLP firm, I have Jeffrey Mitchell.

MR. MITCHELL: Yes, your Honor.

THE COURT: I have Benjamin Scheibe.

MR. SCHEIBE: Good morning, your Honor.

THE COURT: And Judith Cohen.

MS. COHEN: Good morning your Honor.

THE COURT: I also have people sitting in the back. Who are they?

MR. MURPHY: Yes, your Honor. I also have with me Mark Steyn, who's here on behalf of himself obviously, Mark Steyn Enterprises, and Catherine Clark who is here as the agent authorized representative of Oak Hill Media.

THE COURT: Is that acceptable to the other side

that the clients should be in the well or not?

MR. MITCHELL: I don't have an issue with that, your Honor.

THE COURT: All right, usually that's not acceptable, but.

MR. MITCHELL: I guess the question is, your Honor, because this is a special proceeding, are we going to call witnesses if there is going to be testimony?

THE COURT: No, I'm not going to be calling witnesses. I understand that, but we're not going to be calling witnesses.

MR. MURPHY: Your Honor if you would prefer it's fine, it's not required they sit here.

THE COURT: Okay, sit in the back.

MR. MURPHY: Thank you. Thank you, your Honor.

THE COURT: Okay, so this is motion sequence number one, and it's to confirm an arbitration award provided by the AAA Society. There is another gentleman here, but I don't have a card for him. Do I? Oh, yes, I did introduce him. It's Mr. Altabet.

MR. ALTABET: Yes, your Honor.

THE COURT: Background. Petitioners Mark Steyn, Mark Steyn Enterprises (US), Incorporated, otherwise known as MSE, and Oak Hill Media, Incorporated, otherwise known as Oak Hill, bring this petition to confirm an arbitration

award dated February 21, 2018. And it's otherwise known as the Award.

On May 9, 2016, Mark Steyn, MSE and Respondent C CRTV, LLC, otherwise known as CRTV, entered into a binding term sheet, otherwise known as the Steyn agreement, whereby Mr. Steyn and MSE would host, and CRTV would fund and produce a television program to be distributed by CRTV, otherwise known as the Show. Petition at paragraph 11.

As part of the same transaction, CRTV and Oak Hill Media entered into a letter agreement, dated May 9, 2016, the Oak Hill agreement, pursuant to which Oak Hill would provide ancillary services related to the show. And that's the petition at paragraph 15.

On February 8, 2017, CRTV mailed to Mr. Steyn, MSE and Oak Hill what was purported to be a "Notice of Termination" of the Steyn agreement. Petition at paragraph 17.

On February 20, 2017, CRTV initiated a demand for arbitration to the American Arbitration Association, which was later amended on March 14, 2017. As amended, the demand for arbitration alleged claims against Mr. Steyn and MSE for breach of the Steyn agreement, civil theft and conversion, and trespass to chattels. Petition at paragraph 18.

Mr. Steyn and MSE answered the demand on

March 22, 2017, and raised counterclaims for breach of the Steyn agreement and fraud. Petition at paragraph 19. In addition, Oak Hill asserted a claim for breach of the Oak Hill agreement.

The arbitration hearing was conducted from October 16 until October 26, 2017, in Williston, Vermont.

On February 21, 2018, the arbitrator, the Honorable Elaine Gordon, retired, rejected each of CRTV's claims and entered the award in the total amount of $3,797,427.98 in favor of Mr. Steyn, MSE, and Oak Hill. Petition at paragraph 36.

First, the arbitrator found that CRTV breached the Steyn agreement awarding Mr. Steyn and MSE $1,800,000 in damages, plus interest. Again, petition at paragraph 32.

Second, the arbitrator awarded Oak Hill $908,124 for unreimbursed expenses and amounts due under the Oak Hill agreement, plus interest. Again, petition at paragraph 33.

Finally, the arbitrator awarded Mr. Steyn, MSE and Oak Hill attorney's fees and costs.

So motion sequence number one is petitioner's motion to confirm the award. Petitioners now move to confirm the award pursuant to CPLR 7510. Respondent CRTV moves to vacate the award as to the fee award and the award

to Oak Hill.

Pursuant to CPLR 7510, Section 7510, the Court shall confirm an arbitration award upon the application of a party made within one year after its delivery to him, unless the award is vacated, modified or corrected. The award was issued on February 21, 2018. Thus, this proceeding was brought within one year of the delivery of the award.

It is well settled that judicial review of arbitration awards is extremely limited, and an arbitrator's award will be upheld when there is even a barely colorable justification for the result, regardless of errors of law or fact. Wien & Malkin, LLP versus Helmsley-Spear, Incorporated, 6 NY3d 471 at pages 479 and 480. A 2006 case.

Accordingly, a Court may only disturb an arbitrator's award where it is against strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power. McIver-Morgan, Incorporated v. Dal Piaz, 108 AD3d 47 at page 51, First Department 2013, affirmed 22 NY3d 1104, 2014.

Thus a party seeking to overturn an arbitration award must demonstrate vacatur is appropriate by clear and convincing evidence. See (US) Electronics, Incorporated

versus Sirius Satellite Radio, Incorporated, 73 AD3d 497, at pages 498, 499, First Department, 2010.

The fee award. CRTV argues the award of the $1,012,720 in attorney's fees to petitioners was improper because there was no statutory or contractual provision for fee-shifting.

Generally, New York follows the American rule, which requires each party to bear their own attorneys' fees in the absence of a contract or statute specifying otherwise. Gotham Partners, LP versus High River, LTD Partnership, 76 AD3d 203 at pages 204, First Department, 2010.

Petitioners argue the parties did agree to an award of attorneys' fees, by expressly and impliedly agreeing to the Steyn agreement that AAA rules would govern their arbitration.

Although the Steyn agreement did not explicitly provide for attorneys' fees, the Steyn agreement did incorporate the AAA rules, which provide for attorneys' fees. See Warner Brothers Records, Incorporated versus PPX Enterprises, Incorporated, 7 AD3d 330 at pages 330, 331, First Department, 2004, confirming arbitrator's award of fees where agreement incorporated AAA rules.

Pursuant to R-47(d)(ii) of the AAA rules, "The award of the arbitrators may include ... an award of

attorneys' fees if, and this is being emphasized, if all parties have requested such an award. If all parties have requested such an award or it is authorized by law or their arbitration agreement. The emphasis is added.

The arbitrator found that CRTV had requested fees by; one, by checking the box of the AAA cover sheet; two, in its prayer for relief in answer to the first amended counterclaim; and, three, in its prayer for relief in answer to the second amended counterclaim.

Respondent argues that the arbitrator's conclusion was erroneous because CRTV never agreed to award attorneys' fees. Specifically, CRTV argues the arbitrator committed an error because; one, CRTV did not check, and I emphasize not check, the box for attorneys' fees on the demand form; and, two, CRTV did not include attorneys' fees in its prayer for relief on the contract claims.

CRTV contends the Court may review the arbitrator's finding as to the award of attorneys' fees because the error goes to a jurisdictional limitation on the arbitrator's power.

The attorneys' fees may not be awarded in an arbitration unless there is an "unmistakably clear" expression of the party's intention to waive the American rule. See Matza versus Oshman, Helfenstein & Matza, 33 AD3d, 493 at page 495, First Department, 2006 case.

Upon review of the demand, it is clear that the box for attorneys' fees was not, not checked. That's emphasized. Respondent's brief Appendix A.

Next, CRTV argues its pro forma prayer for fees in its answer to the counterclaims was only in response to petitioner's claim under a Vermont statute for computer crimes.

CRTV asserts it only requested fees because the Vermont statute contains a prevailing party attorneys' fees provision and it never requested attorneys' fees in regards to the contract claim.

Nevertheless, CRTV asserts this pro forma prayer is not enough to constitute an "unmistakably clear" expression of intent the be responsible for the attorneys' fees. CRTV sites to Matza versus Oshman, Helfenstein and Matza, 33 AD3d 493, First Department, 2006, in support of its argument.

In that case, the First Department vacated an award for attorneys' fees because the parties did not request attorneys' fees during the arbitration. See Matza at 33 AD3d at page 494. The First Department found that even though there was a single boilerplate request for attorneys' fees, the request was never pursued or mentioned again in the arbitration and thus there was no "unmistakably clear" expression of intent to waive the

American rule. At 494-95.

Thus, petitioners requested attorneys' fees in their answering statement and counterclaim request, George affirmation at Exhibit 8, and CRTV requested attorneys' fees in its answer to the counterclaims. George affirmation Exhibits 11 and 12.

Furthermore, CRTV submitted a declaration from Benjamin D. Scheibe, filed concurrently with CRTV's objections to the interim award that detailed the billing rate for each attorney who worked for the arbitration. Altabet reply affirmation, Exhibit 4.

Therefore, the Court finds that this case is more whole, is more similar to Warner Brothers Records versus PPX Enterprises, Incorporated, 7 AD3d, 330 at page 331, First Department 2004, where both parties requested an award for attorneys' fees.

Although it does appear that the arbitrator mistakenly found that CRTV requested attorneys' fees in its demand, the Court finds there is a colorable justification for the result, regardless of errors of fact. See Wien & Malkin, LLP versus Helmsley-Spear, Incorporated, 6 NY 3d 471 at page 479-480, 2006 case.

Accordingly, CRTV's motion to vacate the award for attorneys' fees is denied.

The Oak Hill award. CRTV argues that the

arbitrator exceeded her authority by granting the Oak Hill award because; one, the Oak Hill agreement did not contain an arbitration provision; two, CRTV did not waive its objection to arbitration; and, three, the arbitrator remade the Oak Hill agreement to include a "for cause" termination requirement.

Arbitrability. Petitioners' original counterclaims filed on March 22, 2017, asserted counterclaims on behalf of Oak Hill, and those claims were reiterated in the first and second amended counterclaims.

The oak Hill agreement does not contain an arbitration provision. However, it's well settled that under New York and federal law that a party may waive its objection to the arbitrability of claims if the party participates in the arbitration. See First Options of Chicago, Incorporated versus Kaplan, 514 (US) 938 at page 944, 1995 case (deciding whether parties agreed to arbitrate a matter should be based on "clear and unmistakable" evidence that the parties intended to submit to the arbitrability issue to the arbitration.) United Liverpool Faculty Association versus the Board of Education of Liverpool Central School District, 52 NY2d 1038 at page 1041, a 1981 case. (A party who has participated in the arbitration may not raise the question of arbitrability for vacating the award.)

CRTV first raised the issue of jurisdiction generally in the September 1, 2017, answer, asserting that the arbitrator lacked jurisdiction over the counterclaims.

Subsequently, CRTV made no further reference to jurisdiction until the last round of post-hearing briefing on December 22, 2017, asserting the arbitrator did not have jurisdiction over the Oak Hill claims.

Furthermore, as discussed in more detail below, CRTV participated in the arbitration, which concerned Oak Hill's claims. Accordingly, the Court finds the issue of arbitrability of Oak Hill's claims were properly before the arbitrator.

The arbitrator found that Oak Hill's claims were arbitrable because CRTV agreed to arbitrate those claims by substantively contesting and submitting evidence in relation to the Oak Hill claims. Award at paragraph three and four.

In the arbitration, CRTV cited the First Options of Chicago, Incorporated versus Kaplan 514 (US) 938, a 1995 case. In First Options the Kaplans justified their presence at the arbitration because they were owners of the co-respondent.

In the award, the arbitrator distinguished the First Options because in that case the Kaplans did not participate in the arbitration. The arbitrator concluded

First Options was distinguishable because CRTV manifested a clear intent to arbitrate by failing to pursue its jurisdictional defense and then mounting a substantive defense to the claims.

The arbitrator noted CRTV never raised objections to jurisdiction after pleading in its answer, nor did it file a motion nor seek relief for lack of jurisdiction. Award at page five.

Furthermore, CRTV pursued discovery relating to the merits, participated in the hearing beyond disputing arbitrability, retained an expert to evaluate part of Oak Hill's claims, and offered testimony regarding the merits of Oak Hill's claims. Award again at page five.

Therefore, the arbitrator concluded that CRTV's conduct displayed an intent to arbitrate the Oak Hill claim under both New York and federal law. Same citation.

While CRTV now argues that the award misstates and overstates its conduct, this falls outside the scope of judicial review. As the parties raised the issue of jurisdiction of the Oak Hill claims, the arbitrator was entitled to make a determination as to whether the claims were arbitrable. Accordingly, the arbitrator did not exceed her authority when she determined that CRTV waived its objection to jurisdiction over the Oak Hill claims.

Finally, CRTV argues the arbitrator exceeded her

authority by including a "for cause" termination requirement. The Oak Hill agreement provides, "If the Steyn agreement is terminated for any reason ... this letter agreement shall terminate concurrently with the termination of the Steyn agreement." George affirmation, Exhibit 3 and Exhibit 4.

CRTV argues the arbitrator "rewrote" the Oak Hill agreement by incorporating into the agreement the same "for cause" requirement found in the Steyn agreement. Contrary to the CRTV's arguments, it is clear that the arbitrator did not exceed her authority such that she effectively dispensed with her own brand of "industrial justice". See Stolt-Nielsen S.A. versus Animalfeeds International Corp. 559 (US) 662 at page 671 (US) 2010.

Furthermore, the Court finds CRTV fails to establish there was a manifest disregard of the law. To modify or vacate an award based on manifest disregard of the law, the movant must establish, "One, the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether; and, two, the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." Citing to Wien & Malkin, LLP versus Helmsley-Spear, Incorporated, 6 NY3d 471 at page 481, a 2006 case.

The award makes it clear that the arbitrator

considered CRTV's argument that the Oak Hill agreement is an at-will arrangement and found the argument unpersuasive. Award at page 17.

The arbitrator found that the Steyn agreement and the Oak Hill agreement should be "read as one to give effect to the parties' intent" because the Oak Hill agreement tracked the Steyn agreement and were executed on the same day for the same term and purpose. Therefore, CRTV's motion to vacate that portion of the award pertaining to the Oak Hill agreement is denied.

And conclusion. CRTV's cross-motion to vacate the award as to Oak Hill award and the award of attorneys' fees is denied. Petitioners' motion to confirm the award is granted. Petitioners should submit a proposed judgment.

That constitutes the decision and order of the Court. Now I'm urging everybody that you need to get a copy of this decision. And once I get a copy of the decision I will give you a gray sheet, actually it's white but it's called a gray sheet, and that will be the appealable order. That and the decision, all right.

MR. MITCHELL: Your Honor, may I just be heard for a moment? Just a couple of points. I don't know, obviously I don't expect it will change your Honor's mind, but I would like to address a couple of things that your Honor said in reading that decision that perhaps you may

not have considered, or might reconsider if I raise it. Is that acceptable to the Court?

THE COURT: Not really because I made a decision. I'm sorry. I assume these ideas were in your papers, right?

MR. MITCHELL: Your Honor, I think several things extrapolate from the papers. I prepared oral argument, obviously there is no purpose to coming to oral argument if you are going to argue what's in the papers. It's to bring light to certain things that were said, and I would like the opportunity at least to make a record of those things, your Honor, if I can.

THE COURT: I made the decision on the papers. So I mean that was the framework of where I made my decision. I think that if you now amplify those papers, you are really putting me in a position of having to redo it, and I'm not about to.

So I do think that the papers, they were very good, you know, they were totally good, you know, I'm sure that your argument that you're about to tell me about were in the argument you made.

MR. MITCHELL: With all due respect, your Honor, I think there was a couple of errors that your Honor made, I believe, in adopting some of the statements that were made in the moving papers, especially with respect to Mr.

Scheibe's submission on the attorneys' fees, because I think your Honor might have missed something. I want to make sure your Honor did not miss something.

THE COURT: If that's true, you can always make a motion to reargue. If I missed something that would be the appropriate way of doing it, because that gives the other side an opportunity to answer and an opportunity to argue it.

MR. MITCHELL: Being here in Court prepared to argue to your Honor, your Honor would not allow me the opportunity to express --

THE COURT: No. I'm saying that I took the papers that I believe I made a right decision. If you believe I overlooked something and I did not make the right decision, then your remedy is a motion to reargue because I failed to see this point and that and et cetera, et cetera. Whatever's your argument.

That's the appropriate way of doing it. That allows the other side to say no, no, no, you read it a hundred percent right. And then of course you have a reply saying I'm wrong.

MR. MITCHELL: I was hoping your Honor would want to hear just a couple of points.

THE COURT: No, because I have no way of remedying it.

MR. MITCHELL: Well, your decision is not entered yet. Many times I've been to Court where decisions have been read, preliminary decisions. I can think of many times it's happened where there is subsequent discussion regarding is there anything that is wrong. You can tell me I'm not correct. You know, you might disagree with what I am saying.

THE COURT: I'm giving you the opportunity to make such a motion, but on papers. Because guess what, the other way it's not fair to the other side. The other side doesn't have an opportunity to respond.

MR. MITCHELL: Well, your Honor, obviously what's going to come from this is the entry of a judgment. And if your Honor overlooked something, we will not have a stay of the entry of a judgment because of --

THE COURT: We're not getting into an entry of judgment at this moment, all right. You're going to have the decision as I read it. If you want to make a motion for reargument, that's a hundred percent your prerogative to do, and you have the opportunity to do it. I would suggest fairly quickly. And which would be an opportunity to argue your points. And if I mistook them I mistook them. I'm not saying I'm perfect, I'm far from it.

MR. MITCHELL: Understood. Is it possible at least -- we'll make the motion promptly, we can make it

within a week. If we say we do that, at least we'd like to prevent -- we don't want to have the judgment entered, or a judgment entered, until your Honor has had an opportunity at least to address some of the facts we think you overlooked in the decision. May we at least have a stay of the entry of judgment until you've had an opportunity --

THE COURT: Right now this is where it stands, okay. It stands that you have to order the minutes, and I have no idea how long it's going to take my court reporter to actually give me the minutes, all right. There is that. Then it has to come upstairs and I have to review it.

So I'm not saying its going to be done this instant. I'm not writing a gray sheet at this moment. So I do think that you have plenty of time.

MR. MITCHELL: Do we have to move in order to move this along properly theoretically we still need to have the transcript, and we would need to have, before we can move, there is no paper to move against until there is something entered. So we still run into the same problems once this becomes an entered order of your Honor, we run into a time problem. And there are several issues that I do think your Honor would want to address at least to have the opportunity to hear them.

THE COURT: Yes, sir.

MR. MURPHY: We object vigorously to any attempt

to prolong this any further. Any arguments that should have been made should have been in the papers. If they have a new argument, then it's waived. If they have an old argument that they believe is mistaken, that's what appeals are for, should they wish to do that.

But it is our belief that there is an effort on the other side to delay this as long as possible. We've gone through the process. We've gone through the arbitration. We've done the full briefing. And I don't think there is really any reason for us to delay this any longer.

THE COURT: I think I've told you the remedy. All I can say is that you should, you know, avail yourself of whatever remedies you believe you're entitled to, all right. But I'm not going to change my opinion at this point because it's really unfair to the other side.

I based it on the papers that were before me. If you say I made an error, which I'm not saying I didn't, okay, I'm not saying that I am perfect, I'm far, far from it, please. But I do think that you have remedy if I indeed created an error.

MR. MITCHELL: Just so we're clear it's not arguments that were not in the papers, in the motion papers you can see how many exhibits there are, I think your Honor overlooked things that were in the papers perhaps because

you didn't have enough time.

THE COURT: I'm saying that I am not perfect, all right.

MR. MITCHELL: There is no argue arguments that are not being made. There are simply issues from the cases and the law.

THE COURT: Get ready to do the next motion, okay.

MR. MITCHELL: Thank you.

THE COURT: Thank you very much.

* * *

CERTIFIED TO BE A TRUE AND CORRECT
TRANSCRIPT OF THE FOREGOING PROCEEDINGS.

ANGELA TOLAS, OFFICIAL COURT REPORTER