IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WALGREEN CO., Petitioner, v. PWNHEALTH, LLC, doing business as Everly Health Solutions, Respondent.	)	C.A. No. 24-cv-356 RGA
PWNHEALTH, LLC, doing business as Everly Health Solutions, Petitioner, v. WALGREEN CO., Respondent.	)	C.A. No. 24-cv-357 RGA

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC.
IN SUPPORT OF PETITIONER'S MOTION TO VACATE IN NO. 24-cv-356 AND
IN OPPOSITION TO RESPONDENT'S MOTION TO CONFIRM IN NO. 24-cv-357

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus Retail Litigation Center, Inc. ("RLC"), provides courts with retail-industry perspective on potential industry-wide consequences of significant cases. Since its founding in 2010, the RLC has participated as an *amicus* in more than 200 cases. Its *amicus* briefs have been favorably cited by multiple courts. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *Chewy, Inc. v. U.S. Dep't of Lab.*, 69 F.4th 773, 777–78 (11th Cir. 2023); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020). The RLC's members employ millions of workers throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than $1 trillion in annual sales.

The RLC has a strong interest in this case because its members frequently enter into contracts with other businesses that contain agreements to arbitrate disputes. Arbitration's value as a method of alternative dispute resolution depends on the limited—but not toothless—nature of judicial review of arbitral rulings. Under the Federal Arbitration Act ("FAA"), a court may vacate an arbitral award only under a narrow set of circumstances, and it is critical that courts not overstep their limited role in the process. Arbitrators deserve and should receive deference, even when they have erred in finding facts and applying the law. The FAA's tailored scheme of judicial review ensures "just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

At the same time, it is also critical that courts exercise their power to intervene when an arbitration goes so grievously awry that it can fairly be said that the arbitrator has "exceeded [his]

[1] No person other than *amicus*, its members, and its counsel authored any part of this brief. Neither any party, any party's counsel, nor any person other than *amicus*, its members, and its counsel contributed money that was intended to fund the preparation or submission of this brief. Walgreens has consented to the filing of this brief; PWN does not consent to the filing.

powers"—such as when an arbitrator ignores parties' bargained-for contractual terms and replaces them with his own judgment. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671–72 (2010) (alteration in original); *see* 9 U.S.C. § 10(a)(4). The fundamentals of an arbitrator's job when applying contractual terms are to identify the relevant contractual language and endeavor to interpret and apply that language. If an arbitrator has done this, deference is due and a court lacks power to vacate or modify the arbitral ruling, even if it is clearly erroneous. But when an arbitrator does not meet this minimum standard—when he ignores or fails to identify the relevant contractual language, instead substituting his own principles for those agreed upon by the parties—he has exceeded his powers, and no deference is due. When courts fail to intervene in such circumstances, it harms the entire system of arbitration, in which parties expect neutral interpretation and even-handed application of their agreements.

The RLC and its members have a substantial interest in ensuring that sophisticated businesses can continue to negotiate and agree to terms that will be interpreted by arbitrators, as the FAA requires. Therefore, the RLC writes to urge this Court to play its narrow but critical role under the FAA and vacate the arbitral ruling to ensure that the contractual language to which the parties agreed is interpreted.

ARGUMENT

Though finality is an important component of arbitration, this is the rare case warranting judicial intervention. As businesses often do in commercial contracts, Walgreens and PWN unambiguously agreed to limit either party's liability to the other in the event any dispute arose relating to their agreement. Yet the arbitrator circumvented the contractual cap and awarded PWN a sum that was an order of magnitude greater than the agreed-upon limit.

The arbitrator's conclusion that the limitation-of-liability provision in the parties' contract did not apply rested entirely on an interpretation of words *that do not appear in or relate to that provision*. As set forth in Part II of this brief, the Supreme Court's precedents applying the FAA make clear that when an arbitrator fails to identify, interpret, and apply the language on which the parties agreed, he has exceeded his authority and the award is subject to judicial review. That is exactly what happened here. The arbitrator's error was tantamount to ignoring the parties' contract altogether and thus was the narrow sort of error that justifies judicial vacatur of an arbitral award.

I. Arbitration's Important Role in Commercial Dispute Resolution Depends on Significant, But Not Absolute, Judicial Deference.

A. Business-Versus-Business Arbitration Is a Valuable Tool.

It has been nearly a century since Congress enacted the FAA, which "declar[es] . . . a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see* The United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16). With the FAA's assurance that arbitration agreements will be enforced, arbitration has become a backbone of commercial relationships across the country. Indeed, the American Arbitration Association ("AAA"), the largest organization offering arbitral services, handles approximately 10,000 arbitrations each year.[2]

Arbitration "promise[s] . . . quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 505 (2018); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) ("Parties 'trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" (alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628

[2] *See AAA-ICDR Data and Statistics*, Am. Arb. Ass'n, https://www.adr.org/research (last visited May 7, 2024) (providing statistics from recent years).

(1985))). In federal court, the median civil case takes nearly three years to progress from filing to the beginning of trial.[3] Then comes trial itself, not to mention many more months of post-trial motion practice. Appeals then routinely draw out a case by close to a year or more.[4] And in the meantime, businesses must sometimes operate under the uncertain specter of crushing liability. By contrast, arbitration is swift: the AAA reports that the average arbitration is complete in under a year, and that arbitration therefore saves several billions of dollars a year in opportunity costs as compared to litigation.[5]

Not only is arbitration more efficient than litigation, but it also permits selection of a decisionmaker with particular expertise, making it a more appropriate forum for specialized disputes. Unlike judicial dispute resolution, parties in arbitration may select an adjudicator who has familiarity with relevant subject matter—or any other neutral decisionmaker that the parties believe will fairly resolve a particular type of dispute. The ability to choose an adjudicator ensures that the parties can come away knowing that that their positions were understood and addressed—regardless of the outcome. The AAA even offers "specialized rules and supplements tailored for specific types of business disputes," in addition to its distinct set of rules governing commercial disputes generally. *Practice Areas: Commercial*, Am. Arb. Ass'n, https://www.adr.org/commercial (last

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[3] *See* U.S. Cts., U.S. District Courts—Combined Civil and Criminal Federal Court Management Statistics (December 31, 2023), at 1 (n.d.), https://www.uscourts.gov/sites/default/files/fcms_na_distprofile1231.2023_0.pdf (median of 35.6 months for 12-month period ending December 31, 2023).

[4] *See* U.S. Cts., U.S. Courts of Appeals Federal Court Management Statistics (December 31, 2023), at 2 (n.d.), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile1231.2023.pdf (median of 9.8 months from notice of appeal to disposition for 12-month period ending December 31, 2023).

[5] *See Measuring the Costs of Delays in Dispute Resolution*, Am. Arb. Ass'n, https://go.adr.org/impactsofdelay.html (last visited May 7, 2024).

visited May 7, 2024). This feature of arbitration promotes accuracy and ensures that participants can predict the range of plausible outcomes.

In short, nearly a century of experience has shown that arbitration benefits businesses seeking to agree on terms that will promote efficiency and reduce the risk of unforeseeable outcomes, and to resolve disputes in a forum that ensures those agreements are properly and fully considered. Businesses' trust in arbitration has benefited the judicial system too: because businesses have an alternative, reliable, neutral forum for resolving their disputes, they are able to forgo judicial resolution and thereby free up judicial resources.

B. Deferential Judicial Review Is Critical to Arbitration's Success.

If arbitral decisions were nothing more than recommendations, arbitration would be of little value. The benefits of the arbitration system stem from the deferential standard of review courts must apply when arbitral decisions are challenged in federal court. As the Supreme Court has explained, "[i]f parties could take 'full-bore legal and evidentiary appeals,' arbitration would become 'merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568–69 (2013) (quoting *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008)). The Court has thus interpreted the judicial-review provisions of the FAA "as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall St.*, 552 U.S. at 588.

Accordingly, "[t]here is a strong presumption under the [FAA] in favor of enforcing arbitration awards." *Hamilton Park Health Care Ctr. Ltd. v. 1199 SEIU United Healthcare Workers E.*, 817 F.3d 857, 861 (3d Cir. 2016) (quoting *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 241 (3d Cir. 2005)). While a "party still can ask a court to review the

arbitrator's decision," the court may "set that decision aside only in very unusual circumstances." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). Those "exceedingly narrow circumstances" are the ones set forth in Section 10(a) of the FAA. *France v. Bernstein*, 43 F.4th 367, 377 (3d Cir. 2022) (quoting *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 251 (3d Cir. 2013)); *see* 9 U.S.C. § 10(a). Most relevant here, the FAA permits judicial intervention "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

A party asking a court to disturb an arbitral ruling "must clear a high hurdle"; "even a serious error" by the arbitrator(s) is not grounds for vacating an arbitration decision under Section 10(a)(4). *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010); *see Oxford Health Plans*, 569 U.S. at 569 ("A party seeking relief under [Section 10(a)(4)] bears a heavy burden."). With respect to a question of contract interpretation, so long as the arbitrator is "'even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000) (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). "It is only when the arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (alteration in original) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). In such a situation, "an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract." *Stolt-Nielsen*, 559 U.S. at 672 (alteration in original) (quoting 9 U.S.C.

§ 10(a)(4)); *see, e.g.*, *MarkDutchCo 1 B.V. v. Zeta Interactive Corp.*, 411 F. Supp. 3d 316, 327 (D. Del. 2019), *aff'd*, No. 19-3845, 2021 WL 3503805 (3d Cir. Aug. 10, 2021).

C. Though Judicial Review Must Be Narrow, Arbitration Also Depends on Its Availability as a Guardrail to Correct Extreme Malfunctions.

To ensure that the benefits of arbitration are realized, it is critical for courts to carefully guard the line of appropriate deference to arbitrators. Indeed, both sides of the line must be guarded. *See Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113 (3d Cir. 1996) ("[T]he courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators."). Courts must take utmost care not to substitute their judgment for that of an arbitrator. But courts must also not become rubber stamps for arbitral rulings that fail to engage with the language of parties' contracts. Arbitration's success rests on the assurance that arbitrators will follow the law and observe any express constraints on their authority in the governing arbitration agreement. If arbitrators reach conclusions not even arguably consistent with the parties' contractual agreements, then arbitration's benefits evaporate and Section 10(a)(4) applies. Indeed, such a possibility is the very reason why Congress included *some* mechanism for judicial review. No rational commercial actor would submit to a forum that is permitted to resolve disputes arbitrarily.

The key dividing line separating erroneous arbitral contract constructions that are entitled to deference and those that warrant vacatur under Section 10(a)(4) is the one drawn by the Supreme Court between the arbitral rulings at issue in *Stolt-Nielsen*, 559 U.S. 662, and *Oxford Health Plans*, 569 U.S. 564. In both cases, a party sought review of an arbitrator's ruling that a contract permitted arbitration on a class basis. The Supreme Court held that Section 10(a)(4) permitted vacatur of the arbitral ruling in *Stolt-Nielsen* but not the ruling in *Oxford Health Plans*: in the former case, the arbitrator had not interpreted the contract's language, whereas in the latter, the arbitrator had

just performed his interpretative task poorly. *See Stolt-Nielsen*, 559 U.S. at 668–69; *Oxford Health Plans*, 569 U.S. at 566–68.

Specifically, in *Stolt-Nielsen*, the parties "stipulated that the arbitration clause was silent with respect to class arbitration," 559 U.S. at 668, leaving the arbitrators to decide on the availability of that procedure based on their own public-policy views, *see id.* at 672–73. The Supreme Court explained that class arbitration is only available if the parties have so agreed in their contract. *Id.* at 684. The Court therefore, "[r]elying on § 10(a)(4), . . . vacated the arbitrators' decision approving class proceedings because, in the absence of such an agreement, the arbitrators had 'simply . . . imposed [their] own view of sound policy.'" *Oxford Health Plans*, 569 U.S. at 567 (third and fourth alterations in original) (quoting *Stolt-Nielsen*, 559 U.S. at 672). They had not, as was required, "construe[d] the parties' contract." *Id.* at 571.

In *Oxford Health Plans*, the arbitrator also permitted class arbitration, but did so based on his *interpretation* of contractual language. 569 U.S. at 566. The arbitrator's interpretation of that language was likely incorrect. *See id.* at 572 ("Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation . . . ."); *id.* at 574 (Alito, J., concurring) ("[I]f we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration. . . .'" (second alteration in original) (quoting *Stolt-Nielsen*, 559 U.S. at 574)). But that did not matter.

The Court explained that the arbitral decision in *Stolt-Nielsen* had been overturned "because it lacked *any* contractual basis for ordering class procedures," not because of an erroneous contract interpretation. *Oxford Health Plans*, 569 U.S. at 571. In other words, "in setting aside the arbitrators' decision, [*Stolt-Nielsen*] found not that they had misinterpreted the contract, but

that they had abandoned their interpretive role." *Id.* But in *Oxford Health Plans,* "the arbitrator did construe the contract (focusing, per usual, on its language)." *Id.* And the Court explained that Section 10(a)(4) "permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly." *Id.* at 572; *see id.* ("*Stolt-Nielsen* and this case thus fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions.").

Thus, the question for a court deciding whether vacatur of an arbitrator's construction of a contract is warranted under Section 10(a)(4) is whether the arbitrator can be said, at least arguably, to have interpreted and applied language that actually appears in the contract and is relevant to the question the arbitrator is deciding. When an arbitrator has failed to undertake that task, the arbitration has not lived up to its promise.

This rule dovetails with the purposes of arbitration. Arbitrators are, at core, replacements for courts. While arbitration's value as a method of alternative dispute resolution depends on courts refraining from second-guessing how arbitrators have fulfilled their quasi-judicial function, this deference does not preclude courts from stepping in when an arbitrator has abrogated his duty to interpret the actual words of a contract. Practically, when an arbitrator has replicated a court's task in resolving a contractual dispute—locating the relevant contractual language, interpreting its meaning, and applying it to the question at issue—that work must be left undisturbed. But when an arbitrator has ignored or disregarded bargained-for contractual terms, a court can—indeed, must—step in to set things right.

II. The Arbitral Award Here Must Be Vacated Because the Arbitrator Failed to Interpret the Contract's Liability Cap.

In this case, the arbitrator quoted and relied on a purported contractual term that does not actually appear in the relevant provision. Such a circumstance presents "the rare situation where

not even [a court's] heavy degree of deference to arbitrators can save an arbitration decision and award." *Monongahela Valley Hosp. Inc. v. United Steel Workers Int'l Union, AFL-CIO, CLC*, 946 F.3d 195, 197 (3d Cir. 2019). The parties' contract—which contained their agreement to arbitrate disputes—provided a cap on total liability from either side to the other for any claims related to their commercial relationship. Instead of even attempting to construe or apply that provision of the contract, the arbitrator ignored the cap by invoking language that does not appear in or relate to the applicable contractual term. Because the arbitrator's decision reflects a *disregard* of the contract's language—rather than an incorrect interpretation of that language—it should be vacated.

A. The Arbitrator's Reliance on Language That Does Not Appear in or Relate to the Relevant Provision Constituted a Failure to Interpret the Parties' Agreement.

Paragraph 13 of the parties' contract sets forth a number of "[l]imitation[s] of [l]iability" (in all-caps, no less). Doc. 24-1 in No. 24-cv-356, at 19 (¶ 13). One of those limitations was that, subject to irrelevant exceptions:

> [T]he total liability of each party, its affiliates or representatives to the other party, its affiliates or representatives for all losses *related to, resulting from or in connection with* the [Walgreens] services, PWN platform, PWN services or the performance thereof or this agreement shall not exceed the total fees paid and payable by [Walgreens] to PWN for the 12-month period prior to the occurrence of the event giving rise to the losses . . . .

Id. (¶ 13.1) (emphasis added) (capitalization altered) (the "Liability Cap"). Lest there be any doubt as to the ramifications of this liability limit, the paragraph further states that "each party acknowledges and agrees that it may be waiving rights with respect to claims that are at this time unknown or unsuspected." *Id.* at 20 (¶ 13.1) (capitalization altered). The calculation called for in the Liability Cap yields a damages cap of approximately $79.1 million. Doc. 16 in No. 24-cv-356, at 3 ("Walgreens Br."); *see* Doc. 28-1 in No. 24-cv-356, at 13–14. Yet the arbitral award is nearly *$1 billion* including interest—more than ten times the amount bargained for.

The arbitrator gave one reason that the Liability Cap did not affect the $802.7 million disgorgement award under the Lanham Act: because "the limitation clause applies only to claims 'arising under' the MSA [*i.e.*, the parties' agreement] and the Lanham Act claims are equitable, not contractual, in nature." 2/8/24 Partial Final Arbitral Award 36. But critically, the key phrase "arising under" on which the arbitrator rested his analysis *does not appear in the Liability Cap*; the arbitrator's summation of the Liability Cap was thus wrong, as a factual matter, about what the contract said. His reliance on contractual language not in the relevant provision reflected such an extreme departure from his duty to interpret the terms of the parties' contract as to warrant judicial intervention and vacatur. Even under the limited form of review of arbitral decisions, that analysis cannot be permitted to stand.

As Walgreens has amply and accurately explained, this justification for ignoring the contractual cap on liability lacks even the faintest hint of support in the language on which the parties agreed. *See* Walgreens Br. 7–13. Even if the arbitrator were correct when he (dubiously) asserted that PWN's Lanham Act claims, due to their purported "equitable . . . nature, did not "'aris[e] under'" the contract, that is completely beside the point because the phrase "'arising under'" *does not appear in the Liability Cap*. In fact, the Liability Cap does not even refer to particular claims; instead, it capaciously encompasses "all *losses related to, resulting from or in connection with* the [Walgreens] services, PWN platform, PWN services or the performance thereof or this agreement." Doc. 24-1 in No. 24-cv-356, at 19 (¶ 13.1) (capitalization altered) (emphasis added). Put simply, the arbitrator did not interpret the contractual language; he "interpreted" altogether different language that had no bearing at all on the issue before him. The arbitrator was obligated to at least attempt to construe the governing language, not substitute his own language for the provision upon which the parties had agreed.

Errors such as quoting and relying on language not found in the relevant contractual provision are of the rare variety that warrant vacatur under Section 10(a)(4) of the FAA because they are not grounded in an attempt to identify, interpret, and apply the relevant portion of the parties' agreement. *Sutter*, 675 F.3d at 220. Like in *Stolt-Nielsen*, the arbitrator's "decision was not 'based on a determination regarding the parties' intent'" because the language on which he relied was not that on which the parties agreed. *Oxford Health Plans*, 569 U.S. at 571 (quoting *Stolt-Nielsen*, 559 U.S. at 673 n.4). The arbitrator's ruling evinces no reasonable effort to "interpret and enforce" the contract. *Sutter v. Oxford Health Plans LLC*, 675 F.3d 315, 220 (3d Cir. 2012), *aff'd*, 569 U.S. 564. The events here are precisely why courts, though rarely permitted to intervene, still play an important role as a last-ditch backstop to arbitral decisions that entirely ignore the relevant language of the parties' agreement.

Nor does it matter that the arbitrator's rejection of the damages cap did not purport to rest on the arbitrator's "own conception of sound policy," *Stolt-Nielsen*, 559 U.S. at 663. Section 10(a)(4) is not limited to cases where arbitrators choose policy over law; such a choice is merely an example of a scenario when the arbitrator's decision has not "draw[n] its essence from the contract," *E. Associated Coal*, 531 U.S. at 62 (quoting *Misco*, 484 U.S. at 38). When the arbitrator interprets the incorrect words and eschews the governing contractual language, the import is the same—he has failed to execute the role that the parties bargained for: to construe the language on which they agreed. *See Oxford Health Plans*, 569 U.S. at 569. He has thus "exceeded [his] powers" within the meaning of 9 U.S.C. § 10(a)(4). That is what happened here, and vacatur is therefore warranted.

Finally, a proper application of the Liability Cap would have precluded analyzing PWN's Lanham Act claims. Even before interest, the arbitrator found that PWN's damages on its contract

claims summed to $83.4 million, an amount that itself exceeds the parties' agreed-upon limit on total liability. Hence, the true measure of an appropriate Lanham Act disgorgement should have been, and is, moot. The arbitrator had no basis for wading into those issues.[6]

B. PWN's Defenses of the Arbitrator's Decision Lack Merit.

PWN's defense of the arbitrator's construction of the Liability Cap is unavailing. The bulk of PWN's arguments are fresh theories as to the inapplicability of the Liability Cap on which the arbitrator did not rely. For instance, PWN argues that the Liability Cap covers only "losses" incurred in connection with the parties' contract, Doc. 24-1 in No. 24-cv-356, at 19 (¶ 13.1) (capitalization altered), whereas disgorgement under the Lanham Act does not compensate the plaintiff for its losses. *See* Doc. 33 in No. 24-cv-356, at 9–10 ("PWN Br."). PWN also argues that the disgorgement award was not "related to, resulting from or in connection with the [Walgreens] services, PWN platform, PWN services or the performance thereof or this agreement," Doc. 24-1 in No. 24-cv-356, at 19 (¶ 13.1) (capitalization altered), because the Lanham Act violation occurred when Walgreens *failed* to perform its duties under the contract. *See* PWN Br. 11. PWN further invokes a purported interpretive principle that limitation-of-liability provisions must make explicit their applicability to noncontractual remedies. *See id.* at 13–14. Whatever the merit of these theories, they plainly played no role in the arbitrator's decision, and they are therefore no basis for deference under the FAA.

Buried within PWN's scattershot theories is one attempted defense of the arbitrator's actual rationale: PWN claims that the arbitrator could not have misconstrued the parties' agreement when he interpreted and applied the phrase "'arising under,'" because the arbitrator—his use of quotation

[6] *Amicus* does not adopt Walgreens' distinct argument that vacatur is warranted because the arbitrator was biased against Walgreens. *See* Walgreens Br. 18–20.

marks and reference to the contract notwithstanding—"nowhere claimed to be quoting the contract." PWN Br. 11; *see id.* at 11–12. In PWN's view, the quotation marks at issue were scare quotes, not an attempt at actually quoting the relevant contractual language. PWN compares the arbitrator's use of quotations in applying the phrase "'arising under'" to his use of quotations in defining the term "website" for purposes of the arbitral decision. *Id.* at 11; *see* 2/8/24 Partial Final Arbitral Award 3 n.3 ("Although I use the term 'website' to describe the vehicle through which individuals would obtain Covid tests, it is important to note that Walgreens also had an app that consumers could use to access the jointly-created website for the same purpose."). One need only read the arbitrator's words to see the implausibility of PWN's revisionist theory.

But even if PWN's strained view of the arbitrator's thought process were accurate, it would make the arbitrator's error *worse*, not better. The lesson of the Supreme Court's cases in this area is that deference is owed only when the arbitrator's decision draws its essence from the *actual governing language* in the parties' contract. Whether the arbitrator misreads the words that appear in the written document (as appears to have happened here) or feels free to ignore that language altogether and invoke his own theory of the parties' agreement (as PWN argues occurred), he has failed in the fundamentals of his task.[7]

[7] PWN also suggests that even if the arbitrator *did* construe and apply the wrong language, "it would not warrant vacatur, because the arbitrator was still 'arguably construing the contract,' preventing this Court" from intervening. PWN Br. 11–12 (quoting *Oxford Health Plans*, 569 U.S. at 572). This argument fails, as interpreting invented language is not "arguably construing" a contract. *Oxford Health Plans*, 569 U.S. at 572 (quoting *E. Associated Coal*, 531 U.S. at 62). PWN claims support for the argument in *Brentwood Medical Associates*, 396 F.3d 237, *see* PWN Br. 12, but in that case the court concluded not that the arbitrator's "inexplicable quotation of language that was not present in the agreement" was nonetheless worthy of deference, but instead that it was "was harmless, since he would have arrived at the conclusion he reached here, even absent the discussion of the aberrant language," *Brentwood Med. Assocs.*, 396 F.3d at 243. Moreover, *Brentwood Medical Associates* was decided before the Supreme Court's decisions in *Stolt-Nielsen* and *Oxford Health Plans*, which provide essential guidance for handling situations such as this one.

CONCLUSION

Walgreens' motion to vacate should be granted, and PWN's motion to confirm should be denied.

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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's Standing Order Regarding Briefing in All Cases, undersigned counsel certifies that the foregoing brief is in 12-point Times New Roman font and, as calculated by Microsoft Word, contains **4,740** words and **15** pages, excluding the caption, title, tables of contents and authorities, and signature blocks.

/s/ Todd C. Schiltz
Todd C. Schiltz (#3253)

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[PROPOSED] ORDER

Upon consideration of the motion of Retail Litigation Center, Inc., for leave to file a brief as *amicus curiae*, it is hereby **ORDERED** that the motion for leave to file is **GRANTED**.

Dated: _____

_____
The Honorable Richard G. Andrews
United States District Judge