No. 23-35404

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEXT LEVEL VENTURES, LLC, a Washington limited liability company,

Petitioner-Appellee,

v.

AVID HOLDINGS LTD, a Hong Kong S.A.R. limited liability company, f/k/a Alderego Group, Ltd.,

Respondent-Appellant.

On Appeal from the United States District Court for the Western District of Washington, No. 2:22-cv-01083-JCC, Hon. John C. Coughenour

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner-Appellee Next Level Ventures, LLC, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

DATED: April 9, 2024

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INTRODUCTION

Appellant Avid Holdings, LTD, f/k/a Alderego Group, Ltd. ("Avid") seeks to reverse the District Court's confirmation of an arbitration award resulting from an arbitration hearing Avid *knew about and chose not to attend*. Avid concededly moved the District Court to vacate the award more than seven months after the award was entered, and indisputably, at least four months after Avid acknowledges it learned of the award. The District Court denied Avid's request to vacate the award because Avid's motion was not filed within the three-month limitation period proscribed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 12. ER 6-7. The District Court further determined that equitable tolling did not apply where Avid had actual knowledge of the arbitration and simply chose not to participate. ER 7-8.

But the District Court did not stop there. The District Court also acknowledged that "**Avid Would Fare No Better on the Merits.**" ER-8 (formatting in original). The District Court considered Avid's assertions that the award was procured by fraud, but determined Avid's convoluted and conspiratorial accusations were "unsupported" and not "plausible" in light of the evidence in the record. ER 5 & n.5, 8-9. The District Court further considered Avid's arguments that the arbitrator exceeded his authority, but found Avid's knowledge of the arbitration and decision not to participate defeated its arguments. ER-9.

Now, in a final attempt, Avid asks this Court to reverse the District Court and direct an order vacating the arbitration award. But Avid still fails to provide any grounds to warrant such a result.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this action under 28 U.S.C. § 1332(a)(1) because Next Level Ventures, LLC ("Next Level" or "NLV") and Avid are citizens of different states and the amount in controversy exceeds $75,000.00 exclusive of costs and interests. The District Court also had jurisdiction over this action pursuant to 9 U.S.C. § 203 because Avid is a Hong Kong, S.A.R. limited liability company whose principal place of business is not in the United States, and Next Level is a Washington limited liability company with its principal place of business in Washington, thus the Final Award falls under the New York Convention giving the District Court original jurisdiction.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 and Rule 4(a) of the Federal Rules of Appellate Procedure because this appeal is from a final judgment.

The District Court entered its Order and Judgment on May 11, 2023, denying Avid's Amended Motion to Vacate Arbitration Award and granting Next Level's Cross-Motion to Confirm Arbitration Award.

Appellant timely filed its Notice of Appeal on June 9, 2023. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly determined that Avid's Motion to Vacate was untimely. *See* ER 3-11.

2. Whether the District Court correctly determined that the illegality doctrine is inapplicable. *See* ER 3-11.

3. Whether the District Court correctly determined the Final Award was not procured by fraud. *See* ER 3-11.

4. Whether the District Court correctly determined Arbitrator Thomas Brewer did not exceed his authority. *See* ER 3-11.

5. Whether the District Court correctly applied the Federal Arbitration Act as the procedure to confirm the arbitration award. *See* ER 3-11.

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this brief, or the Addendum to Appellant's Opening Brief.

STATEMENT OF THE CASE

This appeal arises from the District Court's confirmation of the April 22, 2022 arbitration award in favor of Appellee Next Level, and against Appellant Avid (the "Final Award").

A. The Dispute Between Next Level and Avid.

In April 2020, Next Level entered into an amended and restated "Exclusive Distribution Agreement" (the "Distribution Agreement") with Avid, which is owned by Jonathan Carfield and his wife Hanna Carfield (the "Carfields" and individually "Jonathan" and "Hanna"), to sell vaporization devices and accessories ("VDAs"). *See* ER-82. The Distribution Agreement provides that Avid will sell VDAs to Next Level and Next Level will enjoy the exclusive right to market and resell those VDAs worldwide. Under the Distribution Agreement, Avid also promised to indemnify and defend Next Level against any third-party claims for patent infringement. ER-88, § 15.

On September 1, 2021, Avid refused to ship product from China to Next Level as required by the Distribution Agreement. ER-96-98. This breach was accompanied by several other breaches of the Distribution Agreement at or near that time, including Avid's unilateral demand for changes in payment terms, refusal to accept new purchase orders, and refusal to indemnify Next Level for Next Level's costs and expenses incurred in defending a patent infringement proceeding brought by a third party in the United States International Trade Commission. ER-100-102. On September 2, 2021, Next Level notified Avid that it was in breach of the Distribution Agreement. ER-100-102.

On October 5, 2021, Next Level initiated arbitration against Avid (the "Arbitration"). Arbitrator Thomas Brewer (the "Arbitrator") ultimately determined that (1) Next Level did not breach the Distribution Agreement, (2) Next Level took reasonable steps to minimize harms to its business continuity resulting from Avid's multiple breaches of the Distribution Agreement, and (3) Avid owes indemnification to Next Level for the third-party patent infringement claims. ER-129, ¶115(D).

B. Confirmation of the Final Award in the District Court.

On August 2, 2022, Next Level petitioned the District Court to confirm the Final Award. Avid waited until December 7, 2022 to move to vacate the Final Award on various grounds, including that Avid lacked notice, that the Final Award was procured by fraud, and that the Arbitrator had exceeded his authority in the Arbitration. Avid also challenged Next Level's motion to confirm by raising a belated argument, on opposition to Next Level's motion to confirm, about the "illegality doctrine." The District Court rejected all these arguments, denied Avid's Motion to Vacate, confirmed the Final Award under the Federal Arbitration Act (the "Order") and issued the corresponding Judgment (the "Judgment"). *See* ER-2, 3-11.

In confirming the Final Award, first, the District Court held Avid's attack on the Final Award was barred by the jurisdictional time limit, and that "Next Level

present[ed] the Court with significant unrebutted evidence that Mr. Carfield was aware of the arbitration proceeding and simply chose not to participate," making "equitable tolling…inappropriate." ER-8. Second, the District Court rejected the argument that the doctrine of illegality applies, holding that "[n]othing in the record indicates that the Distribution Agreement was for the distribution of illicit substances, just vaping devices and accessories." ER-6-7, n.8. Third, the District Court rejected the argument that Next Level procured the Final Award through fraud, holding that while Avid lobbed several accusations about alleged "fraud," "**they are unsupported**." ER-9 (emphasis in original). Finally, the District Court ruled the Arbitrator did not exceed his authority, especially in light of the "unrebutted evidence that Avid was aware of the proceeding and chose not to participate." *Id.*

The District Court's Order confirming the Final Award was supported by, among others, the following facts and supporting evidence.

1. Next Level properly notified Avid of the Arbitration.

Next Level properly notified Avid about the initiation of the Arbitration. ER-112-113, ¶¶ 30-35. Next Level caused all its submissions in the Arbitration, including the Arbitration Demand and Arbitration Brief, to be mailed via Federal Express to three addresses, including the address specified in the Distribution Agreement. SER-34-42, 76-83; ER-89, § 21.

In the Final Award, the Arbitrator found that Avid "had been given 'due notice,' as that term is used in Section R-31 of [AAA's Commercial Arbitration Rules], of, and in addition . . . also received timely actual notice of, the pendency of this arbitration and of the scheduled date for the Preliminary Hearing." ER-108, 112-113, ¶¶ 13, 30-35.

2. Avid's principals chose not to participate in the Arbitration.

Jonathan testified in the Delaware Action[1] that he "knew the Arbitration was pending" against his company, Avid, and that he relied on a business colleague, Zach Sweedler ("Zach"), to engage an attorney to represent Avid in the Arbitration. ER-135, 77:5-18; ER-141-142, 88:4-89:5. Jonathan confirmed that he received "the documents that were sent to China in the arbitration proceeding." ER-143-144, 90:24-91:2.

Avid engaged attorney Preston Ricardo ("Ricardo") in connection with the Arbitration on October 7, 2021. SER-44-52. Consistent with this, during the first administrative conference in the Arbitration on October 19, 2021, Ricardo appeared on behalf of Avid, formerly known as AlderEgo Group, Ltd. ER-218-219. Three days later, on October 22, 2021, Ricardo inexplicably sent Next Level

[1] Some of the unlawful activities of Avid's principals and its successors are the subject of a separate action pending in the Delaware Court of Chancery, *Next Level Ventures, LLC v. AVID USA Technologies, LLC, Jonathan Carfield and Hanna Carfield*, C.A. No. 2022-0699-MTX (the "Delaware Action").

an email stating "neither I nor my firm has been engaged by AlderEgo Group, Ltd. to represent it in this or any other arbitration," which was directly contrary to Ricardo's engagement letter signed by Jonathan. ER-221-222.

After Ricardo disclaimed further representation in the Arbitration, Avid sought "replacement counsel" in the Arbitration. SER-14. This confirms that Avid *knew* the Arbitration was moving forward; it also confirms Avid knew how to retain counsel and participate in the Arbitration when it wished to.

Avid principal Jonathan's own text messages show that, as of November 29, 2021, Avid was aware the Arbitration was pending, long before the April 2022 Final Award. ER-229 (Jonathan: "We didn't hear any reply and we freaked out cause [sic.] we thought we were going to miss the deadline and default. Which would have been disastrous." Zach Sweedler: "And I told you we didn't need to respond. After asking Bill." Jonathan: "No dude. You're so mixed up. That was the arbitration. This is the ITC. ***Arbitration we didn't need to reply to***." (emphasis added)). Avid thus chose to abstain from the Arbitration.

Jonathan further memorialized Avid's deliberate decision to disregard the Arbitration in a LinkedIn post disparaging Next Level and its principals, wherein Jonathan states:

> The distributor [Next Level] files an arbitration to maintain the exclusive distribution agreement… If the distributor [Next Level] loses, it doesn't matter because they will continue using your TM without your permission and force you into spending legal costs that

> are hard to enforce without dumping more money into lawyers. Therefore, **we didn't even respond and they won by DEFAULT**.

ER-235 (bolding added for emphasis, capitalization in original).

Despite being provided with notice of the Arbitration, and confirmed delivery to Avid of all filings by Next Level, the International Centre for Dispute Resolution ("ICDR") for the American Arbitration Association ("AAA"), and the Arbitrator, Avid chose not to participate in the Arbitration. ER-106-109, ¶¶ 5, 6, 13, 15, 16, 17, 18.

3. Avid received notice of the Final Award from the ICDR.

The Arbitration concluded on April 22, 2022, when the Arbitrator entered the Final Award in favor of Next Level, which included a damage award and declaratory relief. ER-104-130. The ICDR caused all Arbitration filings, including the Final Award, to be sent to the three addresses used by Next Level to serve Avid as identified above. ER-237-238; ER-109, ¶ 17 ("The ICDR website file for this arbitration contains copies of courier receipts confirming that this notice was sent to Respondent by Federal Express courier, and also confirming that the Notice of Hearing was delivered to Respondent in Hong Kong by Federal Express"). After the entry of the Final Award on April 22, 2022, Avid did not file the Motion to Vacate until nearly eight months later, on December 7, 2022.

It is beyond dispute that Avid received the Final Award at least by August 9, 2022, when, in connection with the Delaware action, Next Level sent a copy of the

Delaware Complaint, and the Delaware Motion for Temporary Restraining Order, to Avid's principals and their new entity. The Final Award was attached as an exhibit to those papers. SER-74. On August 17, 2022, Avid's principals, represented by the same attorneys who have appeared in this case, explicitly asked the Delaware court to take judicial notice of the underlying proceedings before the District Court where Next Level petitioned to confirm the Final Award. They said:

> Even if Next Level were entitled to some remedy against its counterparty, it has achieved that remedy in an arbitration against Avid Holdings, which it is in the process of seeking to confirm in the United States District Court for the Western District of Washington . . . . **The Court may take judicial notice of Plaintiff's Petition to Confirm Arbitration Award and Enter Judgment**. Next Level Ventures, LLC v. Avid Holdings, Ltd. f/k/a Alderego Group, Ltd., C.A. No. 2:22-cv-01083-JCC (W.D. Wash. 2022), Dkt. 1 ¶ 17.

SER-5-6 (emphasis added). Yet Avid waited nearly four months from *that point* to file its initial motion to vacate on December 7, 2022. (the "Motion to Vacate").[2]

SUMMARY OF ARGUMENT

This Court should affirm the District Court's Order and Judgment. The District Court correctly denied Avid's Motion to Vacate because it was not filed within the three-month limitations period provided by 9 U.S.C. § 12. Indeed, Avid's Motion to Vacate was filed more than seven months after the entry of the

[2] On February 24, 2023, Avid filed its "Amended Motion to Vacate Arbitration Award," superseding its initial December 7, 2022 motion to vacate. For ease of reference, Next Level's use of the term "Motion to Vacate" encompasses both filings.

Final Award, and by Avid's own admission, at least 4 months after Avid's actual receipt of the Final Award. The District Court rejected Avid's request for equitable tolling, reasoning that Avid's wild conspiracy claims were not consistent with the record, and in any event, Avid's *actual knowledge* of the Arbitration precluded application of equitable tolling. The District Court's Order and Judgment can be affirmed on this ground alone.

Nonetheless, even if Avid's Motion to Vacate was not untimely (it was), or even if equitable tolling applied (it does not), Avid's appeal still fails. First, Avid's argument about the illegality doctrine fails to show that the District Court's factual finding (that the parties do not deal in illicit substances) was clearly erroneous, and Avid's own authority only buttresses the District Court's conclusion that the illegality doctrine therefore has no application here. Second, the District Court correctly held Avid failed to clearly articulate any purported fraud, let alone provide clear and convincing evidence. Third, the District Court correctly determined that the Arbitrator did not exceed his authority. Avid does nothing more than express its disagreement with the Arbitrator's Final Award. Avid fails to show how the Final Award *exceeded* the Arbitrator's authority—a high bar under the controlling authorities.

Finally, each of Avid's arguments operates under the premise that the Washington Arbitration Act applied to the District Court's proceedings, rather than

the FAA. Below, Avid originally moved to vacate the Final Award under the FAA, but after realizing that its Motion to Vacate was clearly untimely, changed gears and argued that the Washington Arbitration Act applied instead. The District Court correctly determined that the Federal Arbitration Act applied, and that the Distribution Agreement's choice-of-law clause only incorporated Washington substantive law. The District Court also concluded that application of the Washington Arbitration Act would not lead to a different result, a ruling which Avid never challenges.

STANDARD OF REVIEW

This Court reviews "the confirmation or vacation of an arbitration award like any other district court decision[,] accepting findings of fact that are not clearly erroneous but deciding questions of law de novo." *Coutee v. Barington Cap. Grp., L.P.*, 336 F.3d 1128, 1132 (9th Cir. 2003) (cleaned up).[3] "With respect to the underlying arbitration decision, however, [the] review is both limited and highly deferential." *Id*. (cleaned up). This Court "may vacate an arbitration award only if the conduct of the arbitrators violated the Federal Arbitration Act (FAA), or if the

[3] "A finding of fact is clearly erroneous only when, although there is evidence in the record to support it, the court of appeals is left with the 'definite and firm conviction' that a mistake has been committed." *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 539 (9th Cir. 1982).

award itself is completely irrational or constitutes manifest disregard of the law." *Id*. (cleaned up).

"A district court's decision whether to apply equitable tolling is generally reviewed for abuse of discretion, but where the relevant facts are undisputed, review is de novo." *Jones v. Blanas*, 393 F.3d 918, 926 (9th Cir. 2004); *see also Leong v. Potter*, 347 F.3d 1117, 1121 (9th Cir. 2003) ("[T]he court's decision whether to apply equitable tolling or equitable estoppel is reviewed for abuse of discretion.").

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT AVID'S MOTION TO VACATE WAS UNTIMELY AND THAT TOLLING WAS NOT WARRANTED.

The District Court correctly denied Avid's Motion to Vacate because it was not filed within the three-month limitations period provided by 9 U.S.C. § 12. The District Court found as fact that (1) the ICDR notified the parties of the Final Award on April 22, 2022; (2) the Final Award was delivered to the address required for notice under the parties' Distribution Agreement; (3) the IDCR delivered a copy of the Final Award to Jonathan's personal address as well; and (4) Avid "provide[d] no evidence supporting" its assertion that it did not receive notice. ER-7. Because Avid did not file its Motion to Vacate until December 7, 2022 "more than seven months beyond the award date," the District Court held

"Avid's motion to vacate is untimely." *Id.* Because Avid cannot demonstrate the District Court's findings are clearly erroneous, the Court should affirm.

In addition, the District Court declined to apply equitable tolling because (1) the record did not support Avid's conspiracy allegations; and (2) Avid had actual knowledge of the Arbitration, precluding equitable tolling. ER-7-8. Avid cannot demonstrate the District Court abused its discretion. The District Court found that the "ICDR sent notification to the parties of the arbitrator's final award on April 22, 2022." ER-6. Through its principals, Avid also received the Final Award via email from Next Level's counsel on August 9, 2022. SER-74. Days later, Avid's counsel requested that a Delaware court take judicial notice of the pending confirmation proceedings, confirming Avid's knowledge of the same. SER-6-7.

A. Avid's Motion to Vacate was Untimely.

The District Court correctly rejected Avid's Motion to Vacate as untimely. Under the FAA, a motion to vacate "must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. Failure to file a motion to vacate within the three-month limitations period precludes vacatur. *See Stevens v. Jiffy Lube Int'l, Inc.*, 911 F.3d 1249, 1252 (9th Cir. 2018) (dismissing motion to vacate brought one day late); *see also Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984) ("No exception to this three month limitations period is mentioned in the statute. Thus, under its terms, a party

may not raise a motion to vacate, modify, or correct an arbitration award after the three month period has run.").

Here, the Final Award was entered on April 22, 2022. ER-104-130. And Avid concedes that it did not file its Motion to Vacate until December 7, 2022, "more than seven months beyond the award date." ER-7; *see also Romero v. Citibank USA, Nat. Ass'n*, 551 F. Supp. 2d 1010, 1014 (E.D. Cal. 2008) (holding that motion to vacate filed four months after entry of the award was "well past three months from the date the [a]rbitration [a]ward was entered" and thus the movant "los[t] his right to oppose the confirmation of the award"). Avid's principal, Jonathan confirmed that he received "the documents that were sent to China in the arbitration proceeding." ER-143-144, 90:24-91:2. Jonathan further memorialized Avid's deliberate decision to disregard the Arbitration in a LinkedIn post, and confirmed Avid's knowledge of the Final Award. ER-235 ("Therefore, ***we didn't even respond and they won by DEFAULT.***") (bolding and italics added for emphasis, capitalization in original). Thus, Avid's Motion to Vacate was untimely, and the District Court correctly denied the motion on that basis.

Avid attempts to excuse its untimely filing by asserting that the Final Award was never "delivered," such that the three-month limitations period never began to run. Avid's argument runs contrary to the District Court's findings based on record evidence—none of which are clearly erroneous. On the same date that the

Final Award was entered, the ICDR transmitted the Final Award to both Next Level and Avid with a letter confirming the same. ER-237-238. The ICDR's letter further confirms that the Final Award was sent to Avid and Mr. Carfield at three different addresses: (1) Room 1206 12/F, Easter 397 Hennessy Road, Wan Chai, Hong Kong; (2) Apt 2702, Unit 1, Block A, Tianyuan Building 5, Gangxia Center, 518016, Guangdong; (3) Room 21 Unit A, 11/F, Tin Wui Industrial Building, No. 3 Hing Wong Street Tuen Mun. ER-237. Based on this evidence, the District Court correctly found that the Final Award was in fact "delivered" to Avid on April 22, 2022.

The District Court's conclusion is straightforward, and is compelled by the governing Commercial Arbitration Rules that set forth the mechanics of the delivery of the Final Award. *See Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 573 (7th Cir. 2007) (holding that delivery occurred on the date that "the AAA case manager placed the award in the mail"); *Staples v. Morgan Stanley Smith Barney*, No. CV 13-13-H-CCL, 2013 WL 5786593, at *5 (D. Mont. Oct. 28, 2013) ("Under the parties' rules of arbitration in this case, the arbitration award was delivered by mail on September 5, 2011."). Specifically, Rule 50 of the AAA Commercial Arbitration Rules provides that: "Parties shall accept as notice and delivery of the award the ***placing of the award or a true copy thereof in the mail*** addressed to the ***parties or their representatives*** at their last known addresses, personal or

electronic service of the award, or the filing of the award in any other manner that is permitted by law." (Emphasis added). That is exactly what happened on April 22, 2022: the arbitrator mailed the Final Award to Avid (and its representative) at various addresses. Thus, Rule 50 dictates that the Final Award was delivered as of that date.

The District Court's conclusion is buttressed by the undisputed fact that by no later than August 2022, Avid had actual receipt of the Final Award and knew of the underlying confirmation proceedings. *See* Appellant's Opening Brief ("OB") 44 (Avid conceding that it did not file its Motion until "four months" after what it acknowledges was its actual notice of the Final Award). On August 2, 2022, Next Level initiated the underlying confirmation proceedings, in which the Final Award was formally "filed." 9 U.S.C. § 12. On August 9, 2022, Next Level sent, via email to Avid's principals, the papers it had just filed to initiate the Delaware Action, including the Delaware complaint and the Delaware motion for temporary restraining order seeking injunctive relief in aid of the Final Award. SER-74. The Final Award was attached to these filings as an exhibit. On August 17, 2022, the Carfields filed their opposition (through the same counsel representing them in the confirmation proceedings and in this appeal) to the motion for temporary restraining order, wherein they attempted to weaponize the Final Award by asserting that it barred the Delaware action under a res judicata theory. Clearly,

Avid was aware of the Final Award as of the date of that filing. Moreover, the Carfields explicitly requested that the Delaware Court of Chancery take "judicial notice" of the pending confirmation proceedings before the District Court, admitting knowledge of the Final Award. SER-5-6.

Avid's undisputed actual notice of the Final Award and the underlying confirmation proceedings, combined with the equally undisputed fact that it failed to file its Motion to Vacate until nearly four months later, conclusively establishes that Avid's Motion to Vacate was untimely under 9 U.S.C. § 12. *See Staples*, 2013 WL 5786593, at *5 (holding that request for vacatur was untimely based on the fact that movant had actual notice of the Final Award and failed to file within three-month timeframe); *Harrison v. Westcon Grp. N. Am., Inc.*, No. 06 CIV. 4499 (LTS), 2007 WL 9815660, at *2 (S.D.N.Y. Nov. 5, 2007) ("Here, it is undisputed that Petitioners' counsel received, and acknowledged, actual notice of the award by email on February 27, 2006, more than three months before the petition to vacate was filed.").

1. The ICDR "delivered" the Final Award.

Lacking any factual basis to contest the District Court's conclusion that Avid received notice of the Final Award, Avid argues that the time to move to vacate the award *never began to run* because the Final Award was not "delivered" to Avid. *See* 9 U.S.C. § 12 (requiring vacatur "within three months after the award is filed

or delivered"). Avid contends "delivery" does not occur until Avid "received" the Final Order, and only at the specific address of "Room 1206 12/F, Easter 397 Hennessy Road, Wan Chai, Hong Kong" (hereinafter, "Room 1206")—one of the three addresses noted above that the ICDR sent the Final Award to. *See* OB 12, 40-42. Relying on the Carfields' self-serving statements that Avid did not receive the Final Award at this specific address, and apparently invoking the "conspiracy" (found to be "unsupported" by the District Court) regarding Mr. Zhao, Avid contends that the three-month limitations period never began to run. Not so.

Avid bases its argument on the notice provision in Section 21 of the Distribution Agreement, contending that agreement dictates how "delivery" of the Final Award was to occur. It did not.[4] By its own terms, Section 21 applies only to communications "*under this Agreement*," whereas Section 30 of the Distribution Agreement more specifically provides that the same agreement is subject to

[4] Avid's argument also relies on the Washington Arbitration Act, which as discussed below, does not apply to this dispute (as evidenced by Avid's initial decision to invoke the FAA when moving to vacate). SER-91-93. As explained below, the FAA applies. Moreover, Avid's argument fails under the Washington Arbitration Act as well. Avid invokes Wash. Rev. Code § 7.04A.090, but that provision applies only to service for "initiat[ing] an arbitration." *See id.* -.090(1). The provision setting forth the Washington Arbitration Act's limitations period for filing a motion to vacate, section 7.04A.230, incorporates section 7.04A.190, which more generally provides that "[t]he arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding." The ICDR did so on April 22, 2022, as the District Court found.

arbitration that will be "administered by the [AAA] ***in accordance with its Commercial Arbitration Rules.***" By its own terms, Section 21 only governs the substantive communications under the contract, while any "notice" regarding arbitration filings is governed by the procedural rules of arbitration and the FAA. *See Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) ("Section eighteen, by its terms, applied only to notices which were required to be sent under the franchise agreement, such as default or termination notices. The arbitration clause, which is contained in section sixteen of the agreement, governed the notice procedures in the arbitration."). As noted above, Commercial Arbitration Rule 50 governs delivery of the Final Award, and states that delivery occurs by mail at the moment the Final Award is placed in the mail. The District Court found that the Arbitrator mailed the Final Award to Room 1206 on April 22, 2022 (among other addresses), and Avid does not (and cannot) contest that finding.

Avid otherwise attempts to support its argument by asserting that two courts have determined that "delivery" under 9 U.S.C. § 12 "requires actual receipt by the required means." OB 41. Neither case supports Avid's argument. Quite the contrary, they only buttress the District Court's ruling. In *Sargent v. Paine Webber Jackson Curtis*, it was undisputed the date of "delivery" and "actual receipt" were the same, so the court did not address any distinction between those terms. *See* 882 F.2d 529, 531 (D.C. Cir. 1989). Moreover, the case says nothing of delivery

requiring any specific "means" but instead simply equates delivery with some form of actual receipt. *See id.* Avid does not challenge that it actually received the Final Award at the other two addresses noted above in the IDCR's letter, and it is undisputed that Avid also had actual receipt of the Final Award by no later than August 17, 2022. Applying *Sargent,* Avid's motion to vacate is untimely because Avid failed to bring its Motion to Vacate within three-months of actually receiving of the Final Award.

Worse still is Avid's reliance on an unpublished order by the District of Maryland in the *Choice Hotels* case, wherein that court ***rejected*** an argument that is nearly identical to the one Avid makes. *See Choice Hotels Int'l, Inc. v. F & R Grp. Invs., LLC*, No. CIV.A. RWT-13-2188, 2014 WL 3405030 (D. Md. July 9, 2014). Like in this case, the arbitrator sent a copy of the final award to the defendant by mail on March 20, 2013, using an address for the defendant set forth in the parties' underlying contract. *See id.* at *2. The defendant claimed it never received the final award until February 5, 2014, when the plaintiff first served the defendant with a motion to confirm. *See id.* The defendant filed its motion to vacate on February 25, 2014, and argued that its motion to vacate was timely because it was filed within 20 days of actual receipt of the final award. *Id.* The district court rejected the argument on the basis that the arbitrator's use of the address set forth in the contract was sufficient, and that the defendant's argument

about not receiving the final award rang particularly hollow because the contract also specified that "any notice" to that address was "deemed given and received at the date and time of sending." *See id.* at *3.

Choice Hotels is easily distinguishable because the district court's analysis about "receipt" was only made necessary by the fact that the defendant raised a colorable argument that they *did* file their motion to vacate within three months of having actually received the award. But here, as noted above, it is beyond dispute and in fact conceded that Avid did not do so. Moreover, *Choice Hotels* does not purport to stand for the proposition that a notice provision in a contract dictates the only manner in which a final award may be "delivered," but only that the court may look to those provisions to conclude that a party is estopped from arguing that it did not receive the final award.

Finally, Avid ignores the District Court's dispositive factual findings. Even if "delivery" required actual receipt at the Room 1206 address (it does not), the District Court found that this occurred and Avid has not and cannot demonstrate clear error. *See Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1165–66 (9th Cir. 2019) (directing that district court's factual findings in confirmation proceedings are upheld unless clearly erroneous). First, the District Court found that the Final Award was indeed sent to Room 1206. ER-7. It then rejected Avid's contention that it did not receive the Final Award

because Mr. Zhao had intercepted or withheld it, on the basis that this assertion was unsupported. *Id.* Avid has not even attempted to demonstrate that these factual findings are clearly erroneous. The District Court was entitled to treat the ICDR's delivery of the Final Award to Room 1206 as prima facie evidence of Avid's receipt of the same, particularly in light of Mr. Carfield's multiple statements evincing his awareness of the Final Award and related statements that Avid simply chose not to participate in the Arbitration for strategic reasons.

B. The District Court Correctly Rejected Equitable Tolling.

The District Court rejected Avid's request for equitable tolling, reasoning that its wild conspiracy claims were "not consistent with the record before the Court," and in any event, Avid's *actual knowledge* of the Arbitration precluded application of equitable tolling. ER 7-8. Avid has failed to demonstrate that the District Court clearly erred in determining that Avid had actual knowledge of the Arbitration, and thus fails to demonstrate that the District Court erred in declining to apply equitable tolling on this basis alone. Moreover, even Avid concedes that it filed its Motion to Vacate late—"four months after it received notice of the Final Award." OB 44. Given Avid's concession, the District Court did not abuse its discretion. *See Leong*, 347 F.3d at 1121 ("[T]he court's decision whether to apply equitable tolling . . . is reviewed for abuse of discretion.").

The party invoking equitable tolling "must meet the heavy burden of establishing its entitlement to equitable tolling for a court to vacate an award." *Move, Inc. v. Citigroup Glob. Markets, Inc.*, 840 F.3d 1152, 1157 (9th Cir. 2016). Specifically, "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408 (2005); *see also A. Miner Contracting, Inc. v. Dana Kepner Co., Inc.*, 696 F. App'x 234, 235 (9th Cir. 2017) (applying this standard in the context of the FAA).

"For the first element, a litigant must demonstrate 'that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim in federal court.'" *Arizona Health Care Cost Containment Sys. v. Centers for Medicare & Medicaid Servs.*, 582 F. Supp. 3d 690, 698 (D. Ariz. 2022) (quoting *Smith v. Davis*, 953 F.3d 582, 598–99 (9th Cir. 2020)). "[T]he second prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary and beyond its control." *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 257 (2016). The movant must also demonstrate that the "extraordinary circumstance" was *the* cause of the untimely filing. *See Smith v. Davis*, 953 F.3d

582, 591 (9th Cir. 2020). This is a "high bar" and it will "only be the rare case" where equitable tolling is warranted. *Move, Inc.*, 840 F.3d at 1157-58.

Avid has not and cannot demonstrate that the District Court abused its discretion by rejecting equitable tolling. The District Court found that Avid had failed to act with reasonable diligence, on the basis that Avid's suggestion that it "diligently pursued its rights" was "not consistent with the record before the Court." ER-7-8. The District Court also specifically found that Mr. Carfield "was aware of the arbitration proceeding and simply chose not to participate," based upon numerous instances wherein Mr. Carfield unambiguously stated as much. ER-7-8, n.9. From this finding, the District Court concluded that Avid failed to demonstrate reasonable diligence because "actual knowledge of the arbitration precludes tolling of the deadline for moving to vacate." ER-7-8 (cleaned up, citing cases.) The District Court was correct; choosing not to participate in the underlying Arbitration negates the required showing that Avid acted with reasonable diligence.

Avid's concession that it received the Final Award "four months" before moving to vacate categorically bars equitable tolling. OB 44. Equitable tolling only stays operation of the statute of limitations until the time at which the purported extraordinary circumstance abates. *See Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002). Once Avid had actual notice of the Final Award, it had

to file its Motion to Vacate within the applicable three-month limitations period, which it concededly did not do. *See Int'l Relief & Dev., Inc. v. Ladu*, 474 F. App'x 165, 166 (4th Cir. 2012) (equitable tolling not warranted where litigant moving for vacatur failed to file his motion in a timely manner "even under his version of the date he received notice of the adverse arbitration decision"); *Shu v. Hutt*, No. 19-CV-06969-JCS, 2020 WL 13517233, at *5 (N.D. Cal. Apr. 27, 2020) ("Even assuming that this allegations [sic] was sufficient to toll the FAA limitation period, his claim is untimely because he would have had to have filed it within three months of his discovery."). This is another independent reason that equitable tolling is not warranted.

Avid's suggestion that it could not have filed its Motion to Vacate any earlier because it "had no means of discovering" the purported conspiracy with Mr. Zhao is inconsistent with Avid's arguments that the Arbitrator's errors are "evident on the face of the Final Award." OB 40. Given these alleged facial defects, Avid should have filed its motion to vacate immediately upon receiving the Final Award—regardless of any "conspiracy" hampering its receipt in the first place. Failure to do so negates any assertion that Avid acted with reasonable diligence. *See Choice Hotels Int'l, Inc. v. Shiv Hosp., L.L.C.*, 491 F.3d 171, 178 (4th Cir. 2007) ("If the award was without-a-doubt ultra vires, *Shiv* should have

been jumping at the chance to return to federal court and have the award vacated.").[5]

For all the foregoing reasons, Avid has failed to demonstrate that the District Court abused its discretion in declining to apply equitable tolling under the circumstances.

II. THE DISTRICT COURT CORRECTLY REJECTED AVID'S BELATED ILLEGALITY DEFENSE

A. 9 U.S.C. § 12 Bars Avid's Illegality Defense.

Avid failed to timely file its Motion to Vacate, and by doing so, waived its ability to challenge the Final Award on any basis—including the defense of illegality. "The FAA mandates courts to confirm an arbitration award *unless the award has been vacated, modified or corrected*." *DeMartini v. Johns*, 693 F. App'x 534, 538 (9th Cir. 2017) (emphasis added). The FAA's three-month limitations period thus not only precludes an untimely motion to vacate, but also

[5] Avid's argument that it could not have known the basis for its fraud challenge until the Delaware Action is conclusory in that it fails to articulate ***what*** exactly Avid obtained in that action, ***when*** Avid obtained it, or any other relevant information that led Avid to the epiphany that it should move to vacate the Final Award. It was Avid's burden to demonstrate a prima facie case in support of equitable tolling, and that the District Court abused its discretion by declining to apply it. By failing to provide ***any*** specifics, Avid has necessarily failed both of its burdens. *See Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1209 (11th Cir. 2014) ("[T]he allegations supporting equitable tolling must be specific and not conclusory" (cleaned up)); *Williams v. Dexter*, 649 F. Supp. 2d 1055, 1062 (C.D. Cal. 2009) (rejecting request for equitable tolling "unsupported by competent evidence" and "grossly conclusory," and citing cases).

precludes that party from opposing the confirmation on any basis. *See Bhd. of Teamsters & Auto Truck Drivers Loc. No. 70 of Alameda Cnty. v. Celotex Corp.*, 708 F.2d 488, 490 (9th Cir. 1983) ("[A] party's failure to petition to vacate an unfavorable award within the applicable statutory period bars the party from asserting affirmative defenses in a subsequent proceeding to confirm the award."). As a result, Avid may not circumvent the three-month limitations period by raising the illegality defense in "opposition to Next Level's motion to confirm." OB 20.

Avid's unsupported and conclusory suggestion that the defense of illegality cannot be waived because it concerns "subject matter jurisdiction" is incorrect as a matter of law and was inadequately briefed. Avid does not cite a single case holding that illegality implicates subject matter jurisdiction, because it does not. The doctrine of illegality is an affirmative defense that (where raised and proven) restricts only those remedies where the Court "would itself be enforcing the precise conduct made unlawful." *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 80 (1982). This Court, along with many others, has thus rejected the notion that "illegality" bears on subject matter jurisdiction. *See Shulman v. Kaplan*, 58 F.4th 404, 407-409 & n.1 (9th Cir. 2023) (rejecting argument that purported illegality of relief sought deprived a plaintiff of Article III standing); *Kenney v. Helix TCS, Inc.*, 939 F.3d 1106, 1107-08 (10th Cir. 2019) (affirming rejection of motion to dismiss for lack of subject matter jurisdiction premised on illegality doctrine, because the

illegality doctrine is a "challenge to the legal sufficiency of [the] claims pled rather than the jurisdiction of the federal courts"); *Whittaker Elec. Sys. v. Dalton*, 124 F.3d 1443, 1446 (Fed. Cir. 1997) (applying doctrine of "waiver" to illegality defense).

This Court's recent opinion in *Shulman v. Kaplan* is particularly instructive, because it rejects Avid's undeveloped argument in the specific context of a dispute between the owners of a business that (unlike Next Level and Avid) actually "grows, markets, and sells cannabis." 58 F.4th at 407. There, the defendant moved to dismiss the claims against it because the plaintiffs' "alleged injuries…relate to a cannabis business, which is illegal under federal law" such that "any remedy would contravene federal law and constitute an illegal mandate." *Id.* at 408. This Court indicated that the defendant appeared to be requesting "dismissal for lack of subject matter jurisdiction," on Article III standing grounds. *See id.* at 407-408 & n.1. This Court then concluded that subject matter jurisdiction was not implicated by the purported illegality of the remedy sought, and explained: "the fact that [plaintiffs] seek damages for economic harms related to cannabis ***is not relevant*** to whether a court could, theoretically, fashion a remedy to redress their injuries. Therefore, the alleged harm in this case is redressable by the federal court." *Id.* at 409 (emphasis added); *see also Siva Enterprises v. Ott*, No. 2:18-CV-06881-CAS(GJSx), 2018 WL 6844714, at *5

(C.D. Cal. Nov. 5, 2018) (rejecting similar argument on essentially the same grounds).

Shulman and the foregoing cases all establish that the defense of illegality has no bearing on subject matter jurisdiction and can be waived, and Avid did waive it by failing to comply with 9 U.S.C. § 12's three-month limitations period.

B. Avid's Illegality Argument Fails on the Merits.

The District Court correctly rejected Avid's illegality argument on the merits, concluding that it had no application because "[n]othing in the record indicates that the Distribution Agreement was for the distribution of illicit substances, just vaping devices and accessories." ER-6-7, n.8. Avid does not even attempt to show that the District Court's factual finding (that the parties do not deal in illicit substances) was clearly erroneous, precluding reversal.

The illegality doctrine applies only to the extent that "the judgment of the Court would itself be enforcing the precise conduct made unlawful." *Bassidji v. Goe*, 413 F.3d 928, 937 (9th Cir. 2005) (quoting *Kaiser Steel*, 455 U.S. at 80). In other words, the defense applies only "***when no other remedy exists except one that would compel a party to violate the [Controlled Substances Act]***. Conversely, courts will enforce a contract related to marijuana when enforcing the contract does not require a party to violate the CSA." *See J. Lilly, LLC v. Clearspan Fabric Structures Int'l, Inc.*, No. 3:18-CV-01104-HZ, 2020 WL

1855190, at *12 (D. Or. Apr. 13, 2020) (emphasis added, cleaned up); *see also* 21 U.S.C.A. § 801 *et seq*. The District Court rightly concluded that confirming the Final Award would not compel a violation of the CSA, because the underlying Distribution Agreement does not even relate to "the actual production or sale of cannabis" and instead relates only to vaping devices and accessories. ER-6-7, n.8. *See Siva Enterprises v. Ott*, No. 218CV06881CASGJSX, 2018 WL 6844714, at *5 (C.D. Cal. Nov. 5, 2018).

Avid suggests that the District Court erred, but fails to offer any explanation. Avid never asserts that the District Court's order *necessarily* compels or "condones" a violation of the CSA, and instead equivocates that the District Court's order "***may*** condone a violation of the CSA." OB 22. Avid appears to offer two bases in support of its undeveloped and inadequately briefed suggestion. First, it argues that the District Court's analysis was too "narrow," asserting that the unpublished *J. Lilly* case stands for the proposition that the illegality "limitation" applies "even when the dispute indirectly concerns" the manufacture or sale of marijuana. OB 21. But *J. Lilly* does not say anything of the sort, and is instead a garden-variety instance of a court declining to award a commercial marijuana grower and retailer with lost profits that it alleged it would have earned from its direct manufacture and sale of marijuana. *See* 2020 WL 1855190, at *1-2, 11-12. The *J. Lilly* case thus ***directly*** involved manufacture and sale of marijuana,

and only further supports the District Court's ruling that the illegality doctrine is irrelevant here because the Distribution Agreement does not involve or contemplate the manufacture or sale of marijuana.

Second, Avid further speculates that the underling vaping devices are "*arguably* subject to the CSA." OB 22. Avid offers no supporting authorities for this statement. Instead, Avid argues that, at least at some point in time, the United States Patent and Trademark Office refused registration for goods "encompassing CBD or other extracts of marijuana because such goods are illegal under federal law." *Id.* Avid fails to explain how USPTO policy or its apparent legal conclusions are at all relevant to the District Court's confirmation of the Final Award. This argument is thus inadequately briefed. Avid's argument is also not preserved. Avid did not make it below. SER-28-30.

III. THE DISTRICT COURT CORRECTLY DETERMINED THE FINAL AWARD WAS NOT PROCURED BY FRAUD.

In confirming the Final Award, the District Court found that Avid failed to provide *any evidence* of fraud, let alone clear and convincing evidence. ER-8-9. The District Court wrote "for section 10(a)(1) to apply, Avid must first establish this fraud by clear and convincing evidence. And while Avid's accusations are certainly detailed and, if true, significant, **they are unsupported**." ER-8-9, emphasis in original, quotation marks omitted, citing *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986) and

Dkt. Nos. 21, 31. The District Court further observed that "Avid ostensibly admits as much by indicating that it will develop needed evidence through a separate arbitration proceeding." ER-9, n.10, citing Dkt. No. 21 at 12. Beyond the fact that Avid provided *no evidence* of fraud, the District Court further found that it is "debatable" if Avid's *mere allegations even related to fraud*. ER-8-9 (whether Avid's allegations of fraud and undue means "support[ed] Avid's contention that the award itself was 'procured' by fraud is debatable"), citing 9 U.S.C. § 10(a)(1).[6] To prevail on appeal, Avid must demonstrate the District Court's factual findings were clearly erroneous. Avid cannot.

The FAA allows vacatur of awards "procured by corruption, fraud or undue means." 9 U.S.C. § 10(a)(1). Avid does not and cannot shoulder its exceedingly high burden to demonstrate fraud in the procurement of the Final Award—let alone that the District Court's contrary conclusion was clearly erroneous. Vacatur under Section 10(a)(1) requires the party alleging fraud to demonstrate an "extremely high degree of improper conduct" in procuring an arbitration award. *Crowley Marine Servs., Inc. v. Pac. Ref. Co.*, No. C 98-3804-SC, 1999 WL 13713, at *3

[6] Avid complains that the "District Court impermissibly resolved a fact issue on the papers without oral argument or an evidentiary hearing." Avid provides no support for this assertion, and Avid also fails to grapple with the District Court's cited authorities regarding this issue. The District Court found "oral argument unnecessary" because "[s]uch motion can be decided 'solely on the papers submitted by the parties in support of their motions.'" ER-3 (citing numerous authorities in support).

(N.D. Cal. Jan. 5, 1999) (cleaned up); *see also A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992) (explaining that fraud "clearly connotes behavior that is immoral if not illegal"). Moreover, that party must demonstrate that the purported fraud "was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence." *A.G. Edwards*, 967 F.2d at 1404. Because the statute only allows for vacatur of awards "procured" by fraud or undue means, that party must also demonstrate that the purported fraud "caused the award to be given." *Id*. at 1403.

A. Avid Fails to Provide Clear and Convincing Evidence of Fraud.

Avid fails to clearly articulate any purported fraud, let alone provide clear and convincing evidence. Avid argues that Next Level and Mr. Zhao conspired to cut Avid out of the business and deprive Avid of counsel in the Arbitration, OB 34-36, but Avid provides no explanation of what this means, nor any supporting record evidence. Avid knew the Arbitration was proceeding and chose not to participate. ER-135, 77:16-18; ER-235. It would be unreasonable to conclude Avid chose not to participate *and* could not find counsel, especially given that Avid was initially represented by attorney Preston Ricardo.

As the District Court also recognized, the vague scenarios Avid conjures are inconsistent with meritorious Section 10(a)(1) challenges, ER-8-9, which typically

involve situations where the prevailing party submitted perjured testimony or concealed material evidence from the opposing party. *See France v. Bernstein*, 43 F.4th 367, 378 (3d Cir. 2022) (citing to various other circuits, and explaining that fraud under Section 10(a)(1) includes perjured testimony and knowingly concealing evidence); *ABC Int'l Trades, Inc. v. Fun 4 All Corp*., 79 F. App'x 346, 348 (9th Cir. 2003) (alleged fraud was withholding material evidence); *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp*., 791 F.2d 1334, 1339 (9th Cir. 1986) (alleged fraud was falsified documents).

This is because Section 10(a)(1) contemplates a situation where a party's improper conduct manipulates the merits of a dispute. Courts will not vacate an award where alleged misconduct was immaterial to the merits of the arbitration, or where the alleged improper conduct was or could have been brought to the Arbitrator's attention. *See ABC Int'l*, 79 F. App'x at 348; *Terk Techs. Corp. v. Dockery*, 86 F. Supp. 2d 706, 710 (E.D. Mich. 2000), *aff'd*, 3 F. App'x 459 (6th Cir. 2001) ("Deposition testimony that they claim was perjured and caused them to go to arbitration . . . was not presented to, or considered by, the arbitrators. Therefore, even if Mr. Bihm's deposition testimony was 'suborned perjury,' this Court does not conclude that the award was 'procured by fraud.'").

It is not clear what Avid means when it says it was "prevented" "from being able to engage counsel" (setting aside that this does not comport with the testimony

of Avid's principals Jonathan and Hanna Carfield, or Avid's retention of counsel for the Arbitration). OB 35. Avid's choice to ignore the Arbitration does not relate to the underlying merits of the dispute, and Avid cannot demonstrate (as one could in the case of perjured testimony or withholding of documents) that its failure to participate "caused" the Final Award to be issued in Next Level's favor.

This is especially true where the Final Award was supported by specific findings and conclusions made by the Arbitrator, based on evidence before him. Nor can Avid argue that its alleged inability to participate was "not discoverable upon the exercise of due diligence." *A.G. Edwards*, 967 F.2d at 1404. Again, Avid knew the Arbitration was pending, yet chose not to participate in the Arbitration. Nothing prevented Avid from appearing and seeking a stay while it sought counsel.

None of Avid's other allegations of "fraud" warrant relief.

- Avid refers to a letter that Zhao sent to Avid's attorney Preston Ricardo, OB 27, but this letter was necessarily known to Avid at the time of the Arbitration, because Avid had retained Ricardo to represent Avid in the Arbitration. Thus, it could have been presented to the Arbitrator if warranted. *See also ARMA, S.R.O. v. BAE Sys. Overseas, Inc.*, 961 F. Supp. 2d 245, 260 (D.D.C. 2013) ("Regardless of any falsity in the content of the letter, Petitioner cannot demonstrate

that this alleged fraud was not discoverable at the time of the arbitration."). Moreover, as the District Court correctly determined, Avid's allegations that Next Level conspired with Zhao to end Avid's relationship with attorney Preston Ricardo is not "plausible, in light of (a) Mr. Ricardo's response to Zhao's communication, and/or (b) the unrebutted evidence of Mr. Carfield's affirmative decision to not participate in the arbitration, discussed later in this Order." ER-5, citing Dkt. No. 31 at 6.

- Avid implies that it was financially incapable of participating in the Arbitration, OB 27, but cites no evidence or authority holding that financial distress would excuse Avid from participating in the Arbitration.

At bottom, Avid appears to argue the Arbitration was unfair because Avid did not participate in the entire proceeding. But this ignores Avid's own choice to not participate. "A hearing is fundamentally fair if the minimal requirements of fairness— adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator—are met." *Carpenters 46 N. California Ctys. Conf. Bd. v. Zcon Builders*, 96 F.3d 410, 413 (9th Cir. 1996). Where a party has actual or constructive notice of a proceeding but chooses not to appear despite that notice, the failure to appear does not warrant vacatur of an arbitration award. *See id.*

("Sharon Hill received adequate notice, we cannot say that the procedural fairness of the hearing, or the integrity of the decision, has been seriously called into question."); *see also Rsch. & Dev. Ctr. "Teploenergetika," LLC v. EP Int'l, LLC*, 182 F. Supp. 3d 556, 566 (E.D. Va. 2016) (explaining that a "participation" defense amounts to a procedural argument about the fairness of the arbitration, which is not cognizable where the party fails to avail itself of options to participate). That is precisely what happened here, as the District Court found—a finding that Avid has failed to demonstrate is clearly erroneous.

B. Discovery is not warranted.

Avid never requested that the District Court permit discovery. Thus, the issue is not preserved and is waived. In an attempt to get around this defect, Avid states without citation that "[t]he District Court understood that Avid sought discovery in aid of establishing clear and convincing evidence of Next Level's fraud and undue means." OB 35. From where the District Court's understanding would have flowed remains unstated. At best, in a footnote, Avid cited *U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001), noting the Rule 9(b) *pleading* requirement for fraud may be relaxed to permit discovery in limited cases, and then offhandedly claimed "This is such a case." SER-23, n.6. That footnote is hardly a request for the District Court to permit Avid to engage in discovery on the issue of whether the Final Award was procured by fraud. The

District Court correctly understood that Avid only sought to develop evidence in separate arbitration proceedings. ER-9, n.10 ("Avid ostensibly admits as much by indicating that it will develop needed evidence through a separate arbitration proceeding.").

But even if Avid *did* request discovery (it did not), the District Court would not have abused its discretion in denying discovery. *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 829 (9th Cir. 2019) ("We review the district court's rulings concerning discovery and evidentiary issues for an abuse of discretion[.]"). Avid offers only conclusory statements alleging that that Next Level made "false submissions" and refused to provide to Avid the materials submitted to the arbitrator, together with a cryptic statement that "[t]here is a reason" for this. OB 40. But Avid does not explain these assertions nor does it support them with record evidence. Given the paltry record, the District Court would not have abused its discretion even if Avid had requested discovery.

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE ARBITRATOR DID NOT EXCEED HIS AUTHORITY.

The District Court correctly determined that the Arbitrator did not exceed his authority. ER-9. The FAA provides that an award may be vacated if "the arbitrators exceeded their powers [such] . . . that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). "When reviewing the district court's confirmation of an arbitration award, the appellate

court must accept the district court's findings of fact unless clearly erroneous but decide questions of law de novo." *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1172 (9th Cir. 2010). Nonetheless, this Court has recognized that its "review of [an] arbitration panel's decision is greatly limited." *Id.*

"The grounds to vacate an arbitration award are extremely narrow . . . a mere difference of opinion regarding contractual interpretation will not suffice." *Astronics Elec. Sys. Corp. v. MAGicALL, Inc.*, No. C22-729 TSZ, 2022 WL 3018185, at *4 (W.D. Wash. July 29, 2022) (cleaned up). Instead, the party moving to vacate must demonstrate that the arbitrator's interpretation of the contract is "completely irrational." C*omedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1288 (9th Cir. 2009). This standard is "extremely narrow and is satisfied only where the arbitration decision fails to draw its essence from the agreement." *Id.* (cleaned up). Therefore, an award may not be vacated merely because the court "might have interpreted the contract differently." *Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009); *see also id.* at 1102 ("Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute."); *Emps. Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1486 (9th Cir. 1991) ("We thus have no authority to vacate an award solely because of an alleged error in contract interpretation.").

Avid contends the Arbitrator exceeded his authority by (1) permitting Next Level to engage in self-help to obtain substitute Goods as proscribed by the Distribution Agreement, (2) permitting Next Level to exercise its rights of self-help for the full term of the Distribution Agreement, and (3) by awarding Next Level indemnification. OB 37-39. None of these arguments demonstrate the Arbitrator was "completely irrational."

First, Avid argues that the Arbitrator should have interpreted the word "another" in the self-help clause set forth at Section 4.2 of the Distribution Agreement in a way that would preclude Next Level from obtaining substitute goods from any manufacturer in China. OB 37-38. Avid could have and should have made this argument to the Arbitrator ***in the Arbitration***. It is waived now. *See generally, United Steelworkers of Am., AFL-CIO-CLC v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981) ("Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator.") But even if they were not waived, they are not reviewable under the FAA because they amount to nothing more than a difference of opinion over the Arbitrator's ruling, which is not a sufficient reason to vacate an award.

The Arbitrator was entitled to conclude, as he did, that Avid breached the Distribution Agreement by failing to ship product. Moreover, it was more than

reasonable for the Arbitrator to conclude that the word "another," in Section 4.2 permitted Next Level, in the event of Avid's failure to timely fill orders, to obtain substitute goods from any person or entity ***other than Avid***. ER-85-86, §4.2. This accords with the plain meaning and purpose of that provision. Avid's mere disagreement with the Arbitrator's interpretation of the Distribution Agreement and related factual findings is insufficient to warrant vacatur and insufficient for a finding that the Arbitrator exceeded his authority.

Second, Avid takes issue with the Arbitrator's interpretation of Section 4.2. This time, Avid disagrees with the Arbitrator's finding and conclusion that "NLV continues to operate its business pursuant to its rights of 'self-help' . . . and must continue to do so for the full term of the Agreement . . . to obtain and enjoy the benefit of its bargain under the Agreement." ER-122 ¶ 88. This is the exact relief prescribed by the Distribution Agreement, which mandates the following:

> Failure to fill three consecutive timely orders by Seller may be deemed a breach of this Agreement and under threat of failure to deliver timely order to maintain business, Distributor may engage in seeking self-help to obtain similar substitution of goods from another country, region, manufacturer, or seller to maintain the orders.

ER-84-85, §4.2. The Final Award determined that "NLV engaged in permitted 'self-help' to obtain substitute VDs [vaporization devices and accessories] for the Goods that Avid failed to provide under the Agreement." ER-121, ¶82. In considering these issues, the Arbitrator determined:

- Avid's breaches created significant urgency for NLV to find a manufacturer that was capable and willing to manufacture substitute VDs[.]

- In attempting to identify such manufacturers, NLV determined that the most cost-effective solution to the need to obtain the substitute VDs was to purchase them directly from the original manufacturer that had been selling them to Avid (the Factory)[.]

ER-121, ¶¶83-84. The Arbitrator described how Next Level obtained substitute Goods by paying millions of dollars in Avid's manufacturing debts. He determined that:

> NLV is entitled to exercise its rights under Sections 4.2 and 6 of the Agreement, including (i) the right to continue to engage in self-help by obtaining substitute Goods from the Factory (Section 4.2) and (ii) the right to continue with the worldwide exclusive use of all Avid's trademarks licensed to NLV under the Agreement (Section 6).

ER-126, 129, ¶¶109, 115 (emphasis added).

Again, Avid's arguments amount to mere disagreement with the Arbitrator's interpretation of the Distribution Agreement, which cannot warrant vacatur. Avid fails to show that the Arbitrator's interpretation of the contract (and the District Court's confirmation) is "completely irrational." *Comedy Club, Inc.*, 553 F.3d at 1288. Moreover, Avid never raised the argument as to the duration of Next Level's self-help to the District Court. This argument is thus not preserved and is waived. *Ex parte Keizo Kamiyama*, 44 F.2d 503, 505 (9th Cir. 1930) ("It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court.").

Finally, Avid argues that Section 15.2 of the Distribution Agreement only provides indemnification for third-party claims that Avid's "branding or trademarks infringe intellectual property," and not for claims about "patents." OB 39. Avid fails to quote the entirety of Section 15.2(b). ER-88, §15.2(b). Section 15.2(b) requires Avid to indemnify Next Level for all "costs" and "expenses of any kind" resulting from any claim of third-party based upon "an allegation that the ***Goods or Seller branding or trademarks infringe or otherwise violate the property or intellectual property rights of a third party, including but not limited*** to trade secrets, copyrights, ***patents***, and trademarks." ER-88, §15.2(b) (emphases added). Section 15.2(b) explicitly requires indemnification for costs stemming from the third-party patent lawsuit over Goods provided under the Distribution Agreement—as the Arbitrator recognized when he quoted this provision in awarding indemnification. (*See* ER-125, ¶108).[7]

[7] This is not the first time Avid has made this mistake. Avid initially raised this argument to the District Court, SER-20, but upon Next Level's briefing to the District Court quoting the entirety of Section 15.2(b), Avid withdrew the argument. SER-20. In a May 8, 2023 letter to the District Court, Avid's counsel acknowledged Avid's "argument that the text of the indemnification clause set forth at Section 15.2 of the Distribution Agreement does not include words that reference patents is incorrect. This letter is to notify the Court that [Avid] hereby corrects that statement… I apologize for the oversight." SER-2. Next Level is unaware why Avid included this argument in its Opening Brief.

V. THE DISTRICT COURT CORRECTLY APPLIED THE FEDERAL ARBITRATION ACT AS THE PROCEDURE TO CONFIRM THE ARBITRATION AWARD.

Finally, the Federal Arbitration Act ("FAA") governs these proceedings, and the District Court correctly rejected Avid's belated argument that the Washington Arbitration Act ("WAA") applies. ER-6, & n.6; *see also* Wash. Rev. Code Ann. § 7.04A.010 *et seq*. Avid admits it first challenged the Final Award under the FAA. OB 23. After Next Level filed its opposition, and in an attempt to avoid the tardiness of its Motion to Vacate, Avid argued that the Washington Arbitration Act applies. Avid repeats that disingenuous argument here. OB 22-25. The FAA applies, and in any event, Avid fails to explain how the WAA would mandate a different result. As a result, any purported failure to apply the WAA would be harmless error.

The general Washington choice-of-law clause in the Distribution Agreement does not "trump the presumption that the FAA supplies the rules for arbitration." *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002) ("[T]he strong default presumption is that the FAA, not state law, supplies the rules for arbitration."); *see also Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000) (explaining that a choice-of-law clause governs substantive law and does not supplant the FAA). To overcome the presumption that the FAA applies, the contract must "contain a specific reference to the state arbitration rule

at issue." *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1212 (9th Cir. 1998) (applying *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)); *see also Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F. Supp. 2d 1177, 1187 (S.D. Cal. 2002) ("State procedural laws must be expressly incorporated into the contract."). The Distribution Agreement contains no specific reference to the WAA. The District Court thus correctly applied the FAA.

Avid's reliance on *Johnson v. Gruma Corp.*, 614 F.3d 1062 (9th Cir. 2010), is misplaced. In *Johnson*, this Court reiterated that FAA presumption applies to confirmation and vacation proceedings (contrary to Avid's unsupported argument that it does not), and concluded that the FAA did not apply in that case because the parties' underlying contract *explicitly cited and incorporated California's Arbitration Act*, and further specified that it applied to "enforcement" of the award. *See id.* at 1067; *see also* Cal. Civ. Proc. Code § 1280 *et seq*. *Johnson* simply illustrates what is required to overcome the presumption of the FAA, and those requirements are plainly lacking here. Likewise, Avid's reliance on *Greenpoint Techs., Inc. v. Peridot Associated* S.A., No. C08-1828 RSM, 2011 WL 646898 (W.D. Wash. Feb. 18, 2011) is erroneous. *Greenpoint* is an unpublished order wherein the parties do not appear to have disputed which arbitration rules applied and instead consented to application of the Washington Arbitration Act. *Greenpoint* contains no analysis, and it cannot overturn this Court's weighty

precedents noted above. *See also Quest Int'l Monitor Serv., Inc. v. Rockwell Collins, Inc.*, 845 F. App'x 591, 592 (9th Cir. 2021) (directly rejecting the unsupported argument Avid makes about "confirmation" being a matter of substantive as opposed to procedural law).

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's Judgment and Order granting Next Level's Cross-Motion to Confirm Arbitration Award.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, there are no known cases related to this appeal pending in the United States Court of Appeals for the Ninth Circuit.

Date: April 9, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,209 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 365, Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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ADDENDUM TABLE OF CONTENTS

AAA Commercial Arbitration Rule 50

R-50. Award Upon Settlement – Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses as set forth in Rule R-49(c).

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

Wash. Rev. Code 7.04A.190. Award.

(1) An arbitrator shall make a record of an award. The record must be authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(2) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.