

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

CASE NO.: 4D19-0828  
L.T. No.: 502017CA007465

AVIATION PERFORMANCE  
SOLUTIONS, LLC,

Appellant,

v.

DOUGLAS G. MATTHEWS,

Appellee.

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**APPELLEE'S ANSWER BRIEF**

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Alan M. Burger, Esq.  
[aburger@mcdonaldhopkins.com](mailto:aburger@mcdonaldhopkins.com)  
Florida Bar Number: 833290  
Mary F. April, Esq.  
[mapril@mcdonaldhopkins.com](mailto:mapril@mcdonaldhopkins.com)  
Florida Bar Number: 982245  
MCDONALD HOPKINS LLC  
505 South Flagler Drive, Suite 300  
West Palm Beach, Florida 33401  
Telephone: (561) 472-2121  
Facsimile: (561) 472-2122

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## **PREFACE**

The Final Summary Judgment as to Douglas G. Matthews on appeal, entered July 17, 2019, will be referred to as the “Final Judgment.”

Appellant, Aviation Performance Solutions, LLC, will be referred to as “APS.”

Appellee, Douglas G. Matthews, will be referred to as “Mr. Matthews.”

The Amended Record on Appeal will be cited as “R. \_\_\_\_.”

## **STATEMENT OF THE CASE AND OF THE FACTS**

The subject of this appeal is an order entered by the trial court on January 25, 2018 (“Order”) vacating an arbitration award against Mr. Matthews “because Mr. Matthews was never made a party to the arbitration proceedings and Mr. Matthews was not afforded proper notice that he was considered a party to the arbitration proceedings.” R. 3494-95. The Final Judgment was subsequently entered on July 17, 2019. R. 3664-65.<sup>1</sup>

### **A. Factual Background**

Global Aviation Management, Inc. (“Global”) sold an experimental, ex-military jet aircraft and engine to APS. R. 1011. APS was to pay Global \$230,000, but APS asserted that Global breached the Aircraft Purchase Agreement (“Agreement”). R. 319, 332. The Agreement contained an arbitration clause and also provided that the Agreement would be construed and interpreted in accordance with Florida law. R. 322-23.

On October 16, 2015, Global brought an arbitration claim against APS under the Agreement before the American Arbitration Association (“AAA”). R. 318-26.

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<sup>1</sup> A separate order vacating an award against Global Aviation Management, Inc. and ordering a rehearing before a new arbitrator was entered on July 26, 2019. APS appealed that order in Case No. 4D19-2551, which was dismissed “without prejudice to appeal from a final order.” APS is seeking discretionary jurisdiction before the Florida Supreme Court in that case, which was never consolidated with this appeal.

The claimant in arbitration was Global. Mr. Matthews was specifically listed as Global's representative. R. 318.

On June 8, 2016, the AAA arbitrator, Mr. John Hodge, entered a scheduling order that specified a date certain to add claims or parties:

2. Pursuant to the direction of the Arbitrator, all parties shall amend/specify claims and/or counterclaims (monetary amounts) and file any motion to join additional parties by July 6, 2016.

R. 328-29. APS then filed a counterclaim against Global, which alleged:

Claimant Global Aviation Management, Inc. has breached, and continues to breach, the "Aircraft Purchase Agreement," entered into by the parties . . . . Respondent's counterclaim seeks any and all damages that have been caused by, and will be caused by, Claimant's breaches of the Agreement.

R. 332. Mr. Matthews was not named or even mentioned in APS's counterclaim, and he was never subsequently added as a party. *See* R. 331-32. Further, there was no piercing-the-corporate-veil or alter-ego claim made. *Id.*

In accordance with the scheduling order, which required identification of witnesses and anticipated testimony, APS listed Doug Matthews, in his capacity as a representative of Global, as a witness in its Initial Disclosure of Witnesses, summarizing his testimony:

Mr. Matthews and other representatives, agents, and/or employees of Global Aviation Management, Inc. are expected to testify regarding the facts relative to this matter, including, without limitation, **Global Aviation's knowledge and acquisition of the subject Aircraft . . . .**"

R. 3484 (emphasis added).

As directed by the scheduling order, Global and APS also submitted prehearing memoranda. R. 1010-1049; R. 334-401. Had there been any indication that APS was seeking individual liability against Mr. Matthews, APS would have been previously required to not only add Mr. Matthews as a party and specify the basis for such a claim, but also to include relevant argument about that issue in its prehearing memorandum. APS's Prehearing Memorandum made it clear from the beginning that the dispute was solely between Global and APS:

As this Tribunal is aware, this matter arises from the sale of a Siai Marchetti aircraft, model S211 ("Subject Aircraft"), from Petitioner/Counter-defendant Global Aviation Management ("Global") to APS. . . . It is clear from the evidence and exhibits that will be presented by both parties that Global breached the Agreement in multiple ways, including, without limitation:

\* \* \*

Global acted through its owner, Doug Matthews. . . . On or about December 23, 2014, **APS and Global entered into the Agreement.**

R. 334-35 (emphasis added). The headings in APS's prehearing memorandum also show that APS's counterclaim was that Global breached its Agreement with APS:

- A. Global Breached Express Terms of the Agreement by Failing to Timely Deliver the Subject Aircraft to APS.
- B. Global Breached Express Terms of the Agreement by Failing to Timely Replace, at no Cost to APS, Inoperative, Unairworthy and Unserviceable Components.
- C. Global Breached the Implied Covenant of Good Faith and Fair Dealing.
- D. APS has Incurred Contractual Damages.

E. APS is entitled to its Attorney's Fees and Costs.

R. 338-42.

It was not until the very beginning of the arbitration hearing that APS asserted, for the first time, that Mr. Matthews was purportedly a party to the arbitration. R. 2836. The arbitrator opened the proceedings and counsel identified the parties and witnesses as follows:

ARBITRATOR HODGE: Okay. Good afternoon to all. I'm John Hodge, I'm the arbitrator assigned to this case. . . . The caption is Global Aviation Management Incorporated, Petitioner, versus Aviation Performance Solutions Incorporated, Respondent. . . .

So thank you very much and at this point let's just go around the room, start with counsel first, state your name and your affiliation and then the various witnesses that are present, persons that are present for that particular party please.

MR. BURGER: After that, can we discuss the rule on that issue?

ARBITRATOR HODGE: Yeah.

MR. BURGER: Okay.

ARBITRATOR HODGE: So let's first start I guess with the Petitioner.

MR. BURGER: Alan Burger on behalf of the Petitioner. With me is Doug Matthews.

ARBITRATOR HODGE: Okay. And who is with you from –

MR. BURGER: Global?

ARBITRATOR HODGE: Yes.

MR. BURGER: Doug Matthews. He's not a party to the action.

ARBITRATOR HODGE: Okay.

MR. MCCULLOCH: Timothy McCulloch. I represent Aviation Performance Solutions. And I'm also Counter Claimant. I'm not sure I agree that Doug Matthews is not personally a party to this, but something we'll have to deal with in the counterclaim, I think.

\* \* \*

MR. MCCULLOCH: In light of the issue that Mr. Burger has raised, if the fact that Doug Matthews is not – we're here on an arbitration clause in a contract that Doug Matthews signed personally, individually. And if he is not subject to that arbitration, that's why we're here on the arbitration, that's why we're here in Florida and that's what claim was made.

I'm not sure at all how Global can take the position that he's not part of this and that he is not – somehow Global invoked a clause of a contract to which they're not a party.

\* \* \*

MR. BURGER: So the arbitration was commenced by Global Aviation. The contract is signed Douglas G. Matthews as agent. He's a disclosed agent for a principal and his principal is Global.

Under Florida Law when an agent has been disclosed as an agent and there is a principal, the agent is not a party to the contract. He's actually acting for the principal, not individually.

\* \* \*

Their counterclaim says Global Aviation Management, Inc. has breached and continues to breach the aircraft agreement. It does not say Douglas Matthews.

So I'm not sure how they get to Mr. Matthews individually. He was not a party to the agreement.

ARBITRATOR HODGE: Okay. Let me –

MR. BURGER: Under Florida Law by the way, Global, who's the party, invoked arbitration.

ARBITRATOR HODGE: Let me just say that I think the contract states that Mr. Matthews is an agent and he signed it had [sic] as an agent. And Tim, I'll take under advisement your point. I think it's well taken.

However, we've also gotten to this far down in the proceeding and this has not been raised earlier. And it concerns me that had there been a question of his role, then that's something that should have been addressed I think earlier in the proceeding. Because certainly the contract weighs out that he is an agent, you know, for Global Aviation Management. So –

\* \* \*

ARBITRATOR HODGE: Well, why was this not brought up sooner?

MR. MCCULLOCH: I just think we didn't think that it was an issue. And it apparently appears to be. It's the first time that I've heard this issue raised is right now.

So the reason I didn't raise it is I didn't understand it to be an issue earlier because it hadn't been raised by the other party.

R. 2834-41.

Mr. Matthews was present throughout the arbitration solely as Global's corporate representative, and he was Global's first witness. R. 2857. Neither Mr. Matthews nor Global ever consented to Mr. Matthews' participation in the arbitration as a party or to consider his personal liability. Not only did Mr. Matthews timely raise the objection that he was not a party at the very beginning of the arbitration, but during the testimony of APS's corporate representative, when

Global's counsel specifically stated that he did not want the failure to object every time the issue arose to be seen as a waiver, the arbitrator specifically acknowledged that it was a continuing objection:

Q. Is this the purchase agreement between Doug Matthews and Aviation Performance Solutions?

A. It looks like it. Yes, sir.

MR. BURGER: Objection.

THE WITNESS: I believe so.

MR. BURGER: John?

THE ARBITRATOR: Yes.

MR. BURGER: We have an objection to the question because the Purchase Agreement is not between Doug Matthews. And we've already dealt with this issue, so I made an objection to the question.

THE ARBITRATOR: All right. Mr. Burger, your objection is noted. I think we all agree that this contract has been entered into evidence previously, and the contract speaks for itself as to who the parties are. And without referring specifically to the document, my recollection is, is that Mr. Matthews was acting as an agent in this and, obviously, I think you objected previously.

So the objection is noted for the record, and the document is already in evidence. So let's go ahead and proceed. The document speaks for itself as to who the parties are.

**MR. BURGER: And so I don't have to make that objection again, if the issue comes up and I don't make the objection, I just don't want a waiver.**

**THE ARBITRATOR: Okay. That's fine. And you can use that as a continuing objection.**

MR. BURGER: Thank you.

R. 2548:13-2549:18 (emphasis added).

The Arbitrator entered an award on June 20, 2017 in favor of APS for \$156,434.39, plus attorneys' fees and costs of \$80,262. R. 84. He found that Mr. Matthews was jointly liable with Global for the award, on the ground that "the evidence suggests that his role was mixed to the point of being an *alter ego* for Global and *vice versa*." R. 82. APS never raised an alter-ego argument; in fact, the words "alter ego" do not appear anywhere in APS's claims or in the entire transcript of the arbitration.

**B. The Unlicensed Practice of Law**

Timothy I. McCulloch ("Mr. McCulloch") appeared for APS. He is licensed in Arizona, but he was not authorized to practice law in Florida during the entire time of the arbitration.<sup>2</sup> Global noted in its post-hearing brief submitted to the arbitrator that Mr. McCulloch was required to obtain admission in Florida and failed to do so. R. 1746. Mr. McCulloch admits that he became aware *during* the arbitration—at least by May 4, 2017, when Global submitted its post-hearing brief—that he had not complied with Rule 1-3.11 of the Rules Regulating the Florida Bar. Initial Br. at 3.

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<sup>2</sup> Mr. McCulloch was later admitted pro hac vice in the 15th Judicial Circuit and argued on behalf of APS at the hearing on Mr. Matthews' motion to vacate the award.

Yet it was not until June 26, 2017, *after* the arbitration award was issued in APS's favor, that Mr. McCulloch submitted the Verified Statement required by Rule 1-3.11, providing the Florida Bar with information regarding his admission to the Arizona Bar and status. R. 497. **Even then, Mr. McCulloch's Verified Statement to the Bar failed to disclose that the Global/APS arbitration had already been concluded.** *See* R. 496-97.

When Mr. Matthews raised the issue with The Florida Bar, it noted in its letter to Mr. McCulloch that the Verified Statement and fees were not filed until June 26, 2017, "long after you filed documents with the arbitration forum and appeared at the arbitration itself." R. 1008. The Florida Bar wrote to Mr. Matthews the same day, advising that because the arbitration was over, there was no [unlicensed] activity for the Bar to stop. R. 309. It also noted that "whether Mr. McCulloch is eligible for attorneys' fees **is a question to be decided by the court** in the pending circuit court action, not the Florida Bar." *Id.* (emphasis added).

### C. **Procedural History**

Global and Mr. Matthews filed a Complaint to Vacate Arbitration Award, and APS filed a Petition to Confirm Arbitration Award. R. 10-85; R. 86-123. Motion practice ensued, the pleadings were amended, and Global and Mr. Matthews sought discovery, most of which was stayed. *See* R. 509-675, R. 508.

Early on in the proceedings, Mr. Matthews also filed a Statement Under Penalties of Perjury, in which he outlined the substantial prejudice to his rights that he incurred:

Individually, if I believed that I was personally a party in the Arbitration Proceedings, I would have considered seeking the advice of independent counsel as to the interrelationship between myself and the corporation, explored claims or defenses available to me in my individual capacity and the legal proofs required of APS. I would have conducted discovery and would have approached the Arbitration Hearings differently with respect to evidence presented. Furthermore, certain material decisions relating to the conduct of the Arbitration Proceedings and the conduct of discovery (inclusive of issuance of subpoenas, taking of depositions and witnesses presented) would have differed.

R. 313, Matthews Statement ¶ 13.

After holding a status conference, the court ordered that a one-hour hearing would be scheduled on the issues of vacating the award against Mr. Matthews and entitlement to attorneys' fees. R. 1498-99. The parties agreed that the evidence presented at the hearing would be limited to (a) information previously provided to or received from the Florida Bar, (b) all pleadings or orders in the case or in the arbitration, (c) all exhibits admitted during the underlying arbitration, and (d) transcripts of any proceedings, including the arbitration. *Id.*

At the January 9, 2019 hearing on Mr. Matthews' motion to vacate the award, the court asked Mr. McCulloch, who was by then admitted pro hac vice, pointblank whether Mr. Matthews had received due process:

THE COURT: . . . Let me just ask Counsel for Defendants, APS: Do you agree or disagree that Mr. Matthews never received Notice that APS sought individual liability? That's my first concern. Notice, due process, opportunity to be heard.

MR. MCCULLOCH: Your Honor, I would say that I think that they did because the initial question of whether Mr. Matthews was going to be personally part of the lawsuit was brought up initially by Mr. Burger right at the outset of the arbitration.

R. 3603:20-3604:4. Throughout the hearing, counsel for APS could not point the court to where APS had put Mr. Matthews on notice prior to the arbitration hearing that he was going to be a party to the arbitration. Yet APS admitted in its Answer to Petition to Vacate Arbitration Award that it knew prior to the final hearing that it intended to seek relief against Mr. Matthews. R. 516, ¶ 49; R. 853, ¶ 49. Instead, Mr. McCulloch asserted repeatedly that Mr. Matthews was on notice that he was subject to individual liability because he was present at the arbitration hearing as a corporate representative and remained throughout the arbitration. R. 3604:8-14; R. 3605:10-3606:1.

The court noted that the witness list with the summaries of testimony, filed by APS prior to the arbitration hearing, was devoid of anything that would put Mr. Matthews on notice of any claim against him individually:

MR. MCCULLOCH: . . . I do want to take issue with the way – so, Mr. Burger says the arbitrator basically gave them the impression that this was not going to be an issue and that they were completely surprised when it came out of the blue.

THE COURT: Not only that, but he's saying you did the same thing beforehand with your witness list.

MR. MCCULLOCH: That I – I'm sorry?

THE COURT: The witness list that was filed in this situation, in the Triple A, doesn't include that Mr. Matthews would be addressing those issues as party to this lawsuit.

MR. MCCULLOCH: I mean, they were really such alter egos that we just considered them one and the same.

THE COURT: But that's not on the witness list, right? I mean, how's someone supposed to know you're considering them one and the same or an alter ego when it's not disclosed on the witness list?

MR. MCCULLOCH: Because, Your Honor, such little –

THE COURT: Isn't that "gotcha"?

MR. MCCULLOCH: **There's such little leadup to arbitration. It just doesn't give time to flesh it out on discovery.**

R. 3635:19-3636:21 (emphasis added). Notably, the first day of the arbitration was October 25, 2016—**over a year after Global's claim was filed.**

In fact, APS's counsel virtually admitted the lack of notice:

MR. MCCULLOCH: I think the Court is on solid footing to say substantively Mr. Matthews received the due process that he was entitled to. He had ample, ample, ample opportunity to take advantage—

THE COURT: Where is that in the record?

MR. MCCULLOCH: Excuse—

THE COURT: Where is that any evidence or addition to the record that he had that due process? A Notice? Something in writing

to him from the Triple A saying that the issues would be heard?  
Anything in advance of the arbitration?

MR. MCCULLOCH: But I think because of the attenuated – I agree with the Court that prior to it, there's an argument that he did not know. And I think if it lives and breathes on the Notice leading up the Hearing, I think that could be problematic for us.

R. 3638:9-25.

On January 25, 2019, the court entered the Order vacating the award against Mr. Matthews, based on APS's failure to make Mr. Matthews a party to the arbitration proceedings and failure to provide him proper notice and due process.

R. 3494-95. The Final Judgment was later entered, and this appeal followed.

## SUMMARY OF THE ARGUMENT

The Final Judgment was properly vacated and should be affirmed. Failure to provide proper notice of the initiation of an arbitration proceeding that substantially prejudices the rights of a party is one of the statutory grounds on which an arbitration award *shall* be vacated.

Mr. Matthews never received notice that APS “considered” him a party to the arbitration; thus he was denied due process. Mr. Matthews was never named as a party in any of the arbitration papers. APS never filed a motion to add him as a party, even though the scheduling order set a date for adding parties. Mr. Matthews was never treated as though he were a party to the arbitration, such as being required to file papers in compliance with the scheduling order or being asked if he wanted to conduct cross examination. Finally, he objected at the very beginning of the arbitration hearing to being deemed a party and thus did not waive any of his rights.

Mr. Matthews did not consent to the arbitrator determining if he was personally liable. Arbitration is mandated only for those disputes that the parties have agreed to submit to arbitration, and nothing in the counterclaim against Global raised the issue that Mr. Matthews was an alter ego of Global. Mr. Matthews never agreed to arbitration, and Global was never put on notice that APS was making a claim to pierce the corporate veil. In fact, the phrase “alter ego” was

never mentioned during the entire arbitration. Thus, the arbitrator exceeded his powers in finding that Mr. Matthews was jointly liable with Global.

The trial court properly vacated the award of attorneys' fees to APS because Mr. McCulloch was never authorized to practice law in a Florida arbitration. He submitted an application only after the award was made. The argument that obtaining authorization to practice law from The Florida Bar is "functionally ministerial" and that The Florida Bar will accept the form without further evaluation is meritless. Failure to be authorized to practice law is a third-degree felony.

It is the authorization to practice law in Florida that permits The Florida Bar to exercise jurisdiction over an out-of-state lawyer and to impose discipline when necessary. Submitting an application after the fact undermines the ability of The Florida Bar to perform these functions in order to protect the public. Florida case law is clear that awarding attorneys' fees to a nonlawyer is against public policy and, if paid, must be disgorged. The fee award here does not fall within the public policy of upholding an arbitration award even if the arbitrator makes a mistake of law or determines that a contract is illegal, because the regulation of attorneys is a judicial function that falls outside an arbitrator's powers. The Florida Bar confirmed this when it told Mr. Matthews that whether Mr. McCulloch was eligible for fees would be up to the circuit court.

## ARGUMENT

### **I. Standard of review.**

In reviewing an order confirming or vacating an arbitration award, appellate courts are to apply the same standards as in an ordinary case. *Boyhan v. Maguire*, 693 So. 2d 659, 662 (Fla. 4th DCA 1997). Findings of fact are reviewed under a competent and substantial evidence standard and questions of law are reviewed de novo. *Id.*

To vacate an arbitration award, a party must establish one of the statutory grounds set forth in section 682.13, namely, specified extrinsic acts of misconduct or procedural errors. *Id.*; *Talel Corp. v. Shimonovitch*, 84 So. 3d 1192, 1193 (Fla. 4th DCA 2012). Whether an arbitrator exceeded his powers within the meaning of section 682.13, Florida Statutes, is an issue of law subject to de novo review. *Lake City Fire & Rescue Ass'n, Local 2288 v. City of Lake City*, 240 So. 3d 128, 130 (Fla 1st DCA 2018) (citing *Nash v. Fla. Atl. Univ. Bd. of Trs.*, 213 So. 3d 363, 366 (Fla. 4th DCA 2017)). The failure of an arbitrator to give notice and an opportunity to be heard will vitiate an award. *Talel*, 84 So. 3d at 1194.

### **II. The trial court correctly vacated the award as to Mr. Matthews because he was never named as a party to the arbitration nor given notice that APS would seek individual liability against him.**

Section 682.13(1) provides that the court *shall* vacate an arbitration award for the following three grounds relevant to this appeal:

(1) Upon motion of a party to an arbitration proceeding, the court shall vacate an arbitration award if:

\* \* \*

(d) An arbitrator exceeded the arbitrator's powers;

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under s. 682.06(3) not later than the beginning of the arbitration hearing; or

(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in s. 682.032 so as to prejudice substantially the rights of a party to the arbitration proceeding.

§ 682.13(1), Fla. Stat. (2013). All three grounds apply to Mr. Matthews. The court found that “the arbitrator exceeded his jurisdiction and authority because Mr. Matthews was never made a party to the arbitration proceedings and Mr. Matthews was not afforded proper notice that he was considered a party to the arbitration proceedings.” R. 3494-95.

**A. Mr. Matthews was not given notice that he was a party to the arbitration.**

Section 682.032, Florida Statutes, provides for notice of initiation of an arbitration proceeding against a party as follows:

(1) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(2) Unless a person objects for lack or insufficiency of notice under s. 682.06(3)<sup>3</sup> not later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack of or insufficiency of notice.

Rule R-4(e) of the AAA Commercial Arbitration Rules provides:

- (e) information to be included with any arbitration filing includes:
- i. the name of each party;
  - ii. the address for each party, including telephone and fax numbers and e-mail addresses;
  - iii. if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
  - iv. a statement setting forth the nature of the claim including the relief sought and the amount involved; and
  - v. the locale requested if the arbitration agreement does not specify one.

R. 301.

It is undisputed that Mr. Matthews was not named as a party in *any* of the papers filed by APS prior to the beginning of the arbitration hearing. APS's counterclaim was brought against Global and stated that Global breached the Agreement. R. 332. APS's prehearing memorandum also specifically stated, "APS and Global entered into the Agreement." R. 334-35.

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<sup>3</sup> Section 682.06(3) contains the same notice language:

(3) . . . Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. . . .

Moreover, the Arbitrator entered a scheduling order that provided that any party should file a motion to join additional parties by July 6, 2016. R. 328. Adding a party also requires paying the AAA an additional party fee. APS never filed a motion to add Mr. Matthews as a party and never paid an additional party fee. If Mr. Matthews had in fact been added as a party, under the AAA rules, the claim would have needed to be in writing and he would have had 14 days to file an answer and respond to the new claim made against him individually. *See* R. 301-02 (AAA Rules R-5(a) and R-6(b)). By not following these rules, APS waived the right to proceed against Mr. Matthews.

When the arbitrator asked why the issue was not raised earlier, counsel for APS responded, “I just think we didn’t think that it was an issue.” Similarly, when asked by the court why the witness list filed with the AAA did not disclose that Mr. Matthews would be addressing those issues as a party to the lawsuit, counsel responded, “I mean, they were really such alter egos that we just considered them one and the same.”

The court rightly questioned, “I mean, how’s someone supposed to know you’re considering them one and the same or an alter ego when it’s not disclosed on the witness list?” Counsel’s excuse was that he didn’t have “time to flesh it out on discovery” and that “all of this was being done in a considerable vacuum.” R. 3636:12-3637:3. Yet APS admitted in its answer to the petition to vacate that APS

always intended to seek relief against Mr. Matthews. R. 516, ¶ 49; R. 853, ¶ 49. None of that counters the fact that Mr. Matthews was not named in the arbitration claim and never received notice that a judgment might be entered against him. Furthermore, Global’s demand for arbitration was filed on October 16, 2015, but the first day of the arbitration hearing began over a year later, on October 25, 2016. The excuse that there was not enough time rings hollow, especially in light of APS’s admission that it always intended to seek relief against Mr. Matthews.

The Florida Constitution guarantees that “[n]o person shall be deprived of life, liberty or property without due process of law . . . .” Art. I, § 9, Fla. Const. Procedural due process contemplates that the defendant shall be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure before judgment is rendered against him. *J.B. v. Fla. Dep’t of Children & Family Servs.*, 768 So. 2d 1060, 1064 (Fla. 2000). “A violation of the due process guarantee of notice and an opportunity to be heard renders a judgment void.” *Viets v. Am. Recruiters Enters., Inc.*, 922 So. 2d 1090, 1095 (Fla. 4th DCA 2006).

Statutes must be given their plain and obvious meaning. *Brooks v. Anastasia Mosquito Control Dist.*, 148 So. 2d 64, 66 (Fla. 1st DCA 1963). The word “shall” is a mandatory term as opposed to the permissive or discretionary word “may.” *Id.*; *In re Forfeiture of a 1977 Datsun 280Z Automobile, Vin #HLS30408139*, 448 So. 2d 78, 79 (Fla. 4th DCA 1984). There is no dispute that

Mr. Matthews did not receive notice *as required* by section 682.032(1), Florida Statutes, and the award was properly vacated for lack of due process.

**B. Mr. Matthews immediately objected at the beginning of the arbitration hearing when he learned that APS “considered” him a party.**

APS admitted that Mr. Matthews did not have any notice prior to the beginning of the arbitration hearing and that Mr. Matthews raised the issue immediately. APS’s argument to the court was that the burden was on Mr. Matthews to know that he was a party or to take some action beyond objecting at the beginning of the hearing. But that is not required by the statute. The statute requires objection, and the AAA rules of procedure require a written demand and at least 14 days to respond.

APS argued then and now that because he was present as the corporate representative of Global at the hearing, Mr. Matthews should have already divined that he was subject to individual liability, too. APS suggests that the arbitrator made a mistake of law on this point that cannot be challenged. Initial Br. at 8. To the contrary, it was a violation of due process.

APS cites *Schnurmacher Holding, Inc. v. Noreiga*, 542 So. 2d 1327, 1328 (Fla. 1989) for its holding that “*in the absence of one of the factors listed in section 682.13(1)*, a trial court has no authority to overturn an award.” (Emphasis added.) But this case fits squarely into section 682.13(1)(f), because Mr. Matthews did not

have proper notice of the initiation of the arbitration against him individually, which is a procedural error. Thus, vacatur of the award cannot be challenged on the ground that it was merely a mistake of law by the arbitrator.

APS more than misses the mark by citing *Koch v. Waller & Co., Inc.*, 439 So. 2d 1041 (Fla. 4th DCA 1983), in support of its argument that Mr. Matthews waived his right to object to the arbitrator's authority over him. *Id.* at 1042. In fact, *Koch v. Waller* disposes of APS's waiver argument and mandates affirmance.

There, Mr. Koch was president of Multiple Images, Inc. *Id.* *Waller & Co.* sought arbitration against Multiple Images, Inc. and three individuals—Camins, Wignall, and Koch. *Id.* Camins, Wignall and Multiple Images, all represented by the same attorney, filed answering statements. *Id.* Mr. Koch did not file an answering statement, and he attended all of the proceedings. When *Waller & Co.* sought to confirm the award, Mr. Koch claimed for the first time that he had signed the contract in a representative capacity and was not personally liable. *Id.* at 1043. This Court rejected his argument because Mr. Koch was a named party and he did not object at the commencement of the hearing.

There are two critical distinctions between *Koch v. Waller* and this case. First, the demand for arbitration “plainly listed the corporation and the three individuals (including Koch) as defendants.” *Id.* Second, Mr. Koch attended the

entire arbitration but never objected to or raised the issue of his status as an individual defendant. *Id.*

Just the opposite occurred here—Mr. Matthews was never named as a party, and he not only objected at the beginning of the arbitration the minute counsel for APS stated, “I’m not sure I agree that Doug Matthews is not personally a party to this,” but throughout the proceedings. In fact, the arbitrator acknowledged that objection again midway through the arbitration and granted Mr. Matthews a continuing objection on that basis. The very circumstances that resulted in Mr. Koch’s waiver are not present here. *Koch v. Waller* is directly on point and is dispositive of APS’s waiver argument against APS.

Moreover, after the *Koch v. Waller* decision, section 682.13(1) was revised to add subsection (f), which is an explicit provision that the court *shall* vacate an arbitration award if “the arbitration was conducted without proper notice of the initiation of an arbitration as required in s. 682.032 so as to prejudice substantially the rights of a party to the arbitration proceeding.”<sup>4</sup>

“[A] party may move to vacate unless the court has already ruled on the issue *or* the party participated in the arbitration and failed to object.” *Koch*, 439 So. 2d at 1043 (emphasis in original). Here, the court did not previously rule on

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<sup>4</sup> Florida’s Arbitration Code was substantially revised in 2013. The Revised Florida Arbitration Code largely adopted the provisions of the 2000 revision of the Uniform Arbitration Act. Subsection (f) was a new ground of vacatur intended to meet due process concerns. Revised Unif. Arbitration Act § 23 cmt. A(3) (2000).

the issue, Mr. Matthews did object at the beginning of the arbitration, and the arbitrator granted a continuing objection on that ground. Thus Mr. Matthews properly moved to vacate the award.

In addition, Mr. Matthews' rights were substantially prejudiced. He testified in his Statement Under Penalties of Perjury that he relied on the papers filed in the arbitration proceeding and the AAA rules in making decisions with respect to the arbitration proceedings on behalf of Global. R. 312, ¶ 9. Mr. Matthews testified that if he believed he was personally a party to the arbitration proceedings, he would have considered seeking the advice of independent counsel as to the interrelationship between himself and the corporation, he would have explored claims or defenses available to him in his individual capacity, and he would have conducted discovery and approached the arbitration proceedings differently with respect to the evidence presented. R. 313, ¶ 13. In particular, he would have made different material decisions relating to the conduct of discovery, including issuing subpoenas and taking depositions, and as to the witnesses presented. *Id.* Instead, neither Mr. Matthews nor Global's counsel had the ability to prepare for the issue in advance. *Id.*, ¶ 15.

Throughout the entire process, neither APS nor the arbitrator complained that Mr. Matthews had not complied with the pretrial hearing requirements or that he had not filed a witness list or a pre- or post-hearing brief. No one ever asked

during the entire arbitration, “Mr. Matthews, do you want to cross examine? Mr. Matthews, do you want to present any witnesses?”, as would have been the case if he were properly made a party to the proceeding.

The unfortunate fact of the matter is that Mr. McCulloch sandbagged the proceedings and Mr. Matthews on the first day of the arbitration and then continuously attempted to rope him in as a party, despite Global’s continued objections. However, the record is clear that Mr. Matthews was never properly named as a party. He objected immediately at the beginning of the arbitration hearing, when it became clear that APS was “considering” him a party. His rights were substantially prejudiced. APS’s only stated reason for not naming Mr. Matthews as a party was that Mr. McCulloch didn’t think he had to, but that argument falls flat, because of the requirement to actually add Mr. Matthews as a party. Mr. Matthews falls squarely under section 682.13(1)(f), Florida Statutes. On that basis alone, the trial court correctly vacated the entire arbitration award against Mr. Matthews, and the Final Judgment should be affirmed.

**C. The trial court’s vacatur was not based on a concession by APS.**

APS posits that the award was erroneously vacated because the court believed APS had conceded that Mr. Matthews was not a signatory to the Agreement. On the contrary, the court vacated the award because Mr. Matthews never received notice that he was an individual respondent in the arbitration.

The arbitrator started the hearing by asking each counsel to give their name, affiliation, and the various witnesses present. Counsel for Global introduced himself and said, “With me is Doug Matthews,” as Mr. Matthews was going to be Global’s first witness. When the arbitrator asked, “Who is with you from Global?” counsel for Global stated, “Doug Matthews. He’s not a party to the action,” clarifying that Doug Matthews was solely present in his capacity as Global’s corporate representative.

Mr. McCulloch responded, “I’m not sure I agree that Doug Matthews is not personally a party to this.” Had Mr. McCulloch been “sure,” Mr. McCulloch would have been obligated to show the arbitrator and the arbitrator should have insisted that Mr. McCulloch indicate exactly what steps he had taken prior to the hearing to put Mr. Matthews on notice that he was a party to the arbitration and could be held personally liable. Mr. McCulloch did not because he could not.

Instead, Mr. McCulloch tried to rope Mr. Matthews in by claiming that because Mr. Matthews had signed the contract document on behalf of Global, Mr. Matthews should have known that Mr. Matthews was subject to arbitration. Mr. McCulloch continued, “I’m not sure at all how *Global* can take the position that he’s not part of this and that he is not – somehow Global invoked a clause of a contract to which they’re not a party.” R. 2837:24-2838:2 (emphasis added). The statement that Global was not a party to the contract directly contradicted all of

APS's prior representations to the arbitrator and Global that the Agreement was between Global and APS.

Counsel for Global explained that Mr. Matthews signed the contract as an agent and that he was a disclosed agent for a disclosed principal and therefore was not individually liable. The discussion before the arbitrator continued as to whether Mr. Matthews signed as an individual party to the contract or whether he signed as an agent for Global, but nothing in that discussion bears on the question of whether he was given notice that APS's counterclaim was against him individually.

Even if the court was mistaken in its statement that "Defendant conceded that Mr. Matthews was not a signatory to the agreement," it is harmless error, as the court goes on to state, "and further, he had no advance notice that he would be made a party to the arbitration." R. 3495. The court's entire basis for vacating the award was the fact that "Mr. Matthews was never made a party to the arbitration proceedings and Mr. Matthews was not afforded proper notice that he was considered a party to the arbitration proceedings." R. 3494.

It is undisputed that none of the arbitration papers ever mentioned Mr. Matthews as a party, and the court again asked at the end of the hearing whether there was anything in advance of the arbitration that would give him notice. R.

3638:15-19. Mr. McCulloch responded, “I agree with the Court that prior to it, there’s an argument that he did not know.” R. 3638:21-22.

**D. Mr. Matthews did not consent to the arbitrator determining whether he was personally liable.**

APS claims that the mere discussion by counsel at the beginning of the arbitration as to why Mr. Matthews was not a party to the Agreement constituted Mr. Matthews’ consent to arbitrate that very issue. APS’s argument puts Mr. Matthews in a Catch-22. First APS gave Mr. Matthews no notice that he was a party. Then by objecting and explaining his objection, APS claims that he participated in the arbitration and thus waived his right to object to the arbitrator’s authority. On the contrary, Mr. Matthews’ participation was limited to his role as Global’s corporate representative.

Indeed, Global’s counsel objected whenever APS attempted to slide in a reference to Mr. Matthews’ obligations under the contract. During his cross examination of Mr. Matthews, who was testifying as Global’s representative, Mr. McCulloch asked:

Q. Is it your position in this litigation or this arbitration that the lack of a zero in a serial number **relieves you of any of your obligations under the contract?**

MR. BURGER: Objection.

\* \* \*

Q. Then what is [sic] the fact under your contention that the aircraft is not airworthy as of today have anything to do with respect to Global Aviation and **your obligations under the contract?**

MR. BURGER: Objection.

THE WITNESS: The only obligations under the contract are Global's. . . .

R. 2941:16-20; R. 2942:8-14 (emphasis added). Later in the proceedings, when Global's counsel again made the record clear that Mr. Matthews was not waiving any rights, the arbitrator specifically noted that Mr. Matthews had a continuing objection. That is not consent. The fact that Mr. Matthews remained at the arbitration as Global's representative does not change that fact. APS is also wrong in claiming that counsel for Global agreed with the arbitrator that it was fair for him to consider parol evidence to determine the purported ambiguity concerning the identification of Mr. Matthews as a party. Initial Br. at 15. Before the quoted portions at the bottom of page 15 of the Initial Brief, there were several pages of discussion about whether the Agreement was a fully-integrated contract, which morphed into whether the contract was ambiguous. R. 2945-49.

The arbitrator stated that he didn't know where Mr. McCulloch's line of questioning was going, but he wanted to make sure it was relevant to whether there was a breach of the contract. R. 2949:13-18. Interestingly, APS left out of its quoted material the paragraph where the arbitrator stated that Global could continue to object:

So I'm just going to have to – Tim, you go ahead and ask a few questions. If I feel like you're getting too far afield, I'm just going to stop you. **Alan, you feel free to object again.**

MR. BURGER: Yeah, in part I think it's backward. Maybe the issue is – and I don't want to interfere with how he's trying to try his case because that's not my province. He's entitled to it. That's his province.

But there hasn't been any indication that there's an ambiguity in the contract. So now he wants to introduce evidence to try to cause an ambiguity. That's – you follow me?

THE COURT: I do. I want to see where he's going.

MR. BURGER: That's fair.

R. 2949:15-2950:5 (emphasis added). APS contends that saying “That's fair” meant that it was fair for the arbitrator to consider the evidence. Initial Br. at 17. But it is obvious that Global's counsel meant that it was fair for the arbitrator to want to see where Mr. McCulloch was going.

The unresolved question was whether Mr. Matthews was a party to the contract. The arbitrator never found that Mr. Matthews was a party but only held him liable as an alter ego of Global, which was a claim that was never presented to the arbitrator. Contractual arbitration is only mandated for controversies or disputes that the parties have agreed to submit to arbitration. *Nestler-Poletto Realty, Inc. v. Kassin*, 730 So. 2d 324, 326 (Fla. 4th DCA 1999). Under Florida's arbitration code, when a challenge is to the making of and existence of a written agreement between the parties, the issue is one that the trial court is required to

resolve. *Operis Grp. Corp. v. E.I. at Doral, LLC*, 973 So. 2d 485, 489 (Fla. 3d DCA 2007).

“[T]he court shall vacate an arbitration award if . . . (d) An arbitrator exceeded the arbitrator’s powers.” § 682.13(1)(d), Fla. Stat. “An arbitrator exceeds his powers only by going ‘beyond the authority granted by the parties or the operative documents. . . .’” *Computer Task Grp., Inc. v. Palm Beach County*, 782 So. 2d 942, 943 (Fla. 4th DCA 2001) (quoting *Applewhite v. Sheen Fin. Res., Inc.*, 608 So. 2d 80, 83 (Fla. 4th DCA 1992)). “The test for whether an arbitrator exceeds his authority is whether the arbitrator had the power, based on the parties’ submissions or the arbitration agreement, to reach a certain issue . . . .” *Computer Task Grp.*, 782 So. 2d at 943.

The arbitrator exceeded his powers in entering an award against Mr. Matthews because Mr. Matthews never entered into an arbitration agreement in his individual capacity. Moreover, Mr. Matthews’ alleged liability as an alter ego was not a claim submitted by either APS or Global. In fact, no theory of liability as to Mr. Matthews was ever presented. The first time the term “alter ego” even appeared throughout the entire proceeding was in the arbitrator’s award.

Further, there was no requirement for Global to cancel the arbitration so that Mr. Matthews could bring an action in circuit court to determine whether he would have to arbitrate. The burden was not on Mr. Matthews to show that he was *not* a

party to the arbitration. Section 682.13(1)(e) provides that the court *shall* vacate an arbitration award if there was no agreement to arbitrate, *unless* the person participated in the arbitration proceeding *without* raising the objection at the beginning. Mr. Matthews complied with the statute, and the court properly vacated the arbitration award against him.

**E. Mr. Matthews did not waive his right to state court consideration of the question of jurisdiction.**

APS once again misleads the Court when it states, “Appellees initiated the arbitration proceeding” and “Mr. Matthews specifically chose the arbitration forum to resolve the dispute with APS.” Initial Br. at 19. To the contrary, only Global initiated the arbitration proceeding. As previously noted, the burden was not on Mr. Matthews to show that he was not a party, and Global did not have a burden to stop the proceedings and force a non-party to seek judicial intervention. The statute is clear—the only burden on Mr. Matthews was to object at the beginning of the arbitration, which he did.

Waiver is “an intentional relinquishment or abandonment of a known right or privilege.” *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318 (1968) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)); *Green By and Through Swan v. Ed Ricke & Sons, Inc.*, 438 So. 2d 25, 28 n.1 (Fla. 3d DCA 1983) (Schwartz, J., *dissenting*) (citing *Johnson v. Zerbst*).

Because counsel for Global engaged in the discussion about whether Mr. Matthews signed the contract as an agent on behalf of Global in response to APS's assertion that it considered Mr. Matthews a party, APS claims that Mr. Matthews waived his objection that he had not been made a party to the arbitration proceedings.

Mr. Matthews did not submit the question of whether he was a party to the arbitrator. Simply because he continued to be present solely as Global's corporate representative, and the arbitrator conducted the arbitration that had previously been scheduled between Global and APS, does not mean that Mr. Matthews knowingly and intentionally consented to be a party to the arbitration or subjected himself to potential individual liability or that he waived any rights.

**F. Mr. Matthews did not agree that the arbitrator could resolve a jurisdictional question pertaining to him.**

APS's entire argument presupposes that Mr. Matthews was a party to the Agreement. He was not. Thus, he did not enter into an agreement to arbitrate according to the commercial arbitration rules of the AAA. APS intentionally and misleadingly uses the term "parties" indiscriminately. There is a difference between "parties," meaning specific parties to an agreement, and "parties" used in the vernacular to refer to people or entities generally. An arbitrator is not empowered to decide whether he has jurisdiction over anyone other than the parties to an agreement.

There is no question that Global and APS agreed to have any disputes arising out of the Agreement determined in arbitration and that the Agreement incorporated the commercial arbitration rules. That is why Global initially filed its claim with the AAA and not in circuit court.

Rule R-7 of the AAA rules, governing jurisdiction, states that the arbitrator shall have the power to rule on his or her own jurisdiction. Notably, Rule R-7(c) also states:

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection.

R. 302. Mr. Matthews was never named as a party to APS's counterclaim and therefore could not object to the jurisdiction of the AAA in an answering statement. Had he been named as a party, he could have engaged the question of whether he was a party to the Agreement individually with the court at that time. He was not given that opportunity. APS's case law on this issue is not on point, because in each of the cited cases it was clear who the parties to the contract were.

Mr. Matthews never agreed that he was a party to the Agreement in his individual capacity. As a result, only a trial court could rule on whether he was a party to the Agreement and subject to the jurisdiction of the AAA. *See Operis Grp. Corp. v. E.I. at Doral, LLC*, 973 So. 2d 485, 489 (Fla. 3d DCA 2007).

**III. The trial court correctly vacated the arbitrator's award of attorney's fees, because Mr. McCulloch was not authorized to practice law in Florida during the entire arbitration proceedings.**

As a threshold matter, the attorneys' fee issue is moot because the arbitrator's award was properly vacated in toto as to Mr. Matthews. R. 3495. Thus, the Court need not reach this issue at all.

In addition, the arbitrator exceeded his powers in finding Mr. Matthews liable for contractual attorneys' fees when Mr. Matthews was not a party to the contract and no alter-ego theory was ever put forward as an issue for the arbitrator to decide. APS's entire argument is premised on its conclusion that Mr. Matthews was a party to the Agreement and "bargained for an arbitrator to make decisions of Florida law." *See* Initial Br. at 24. But Mr. Matthews did no such thing. The fee award should be vacated on that ground as well.

**A. The failure of Mr. McCulloch to be authorized to practice law in Florida is not a mistake of law that the arbitrator could pass upon.**

In the event this Court does consider the issue, the award of attorneys' fees here does not fall into the category of a mistake of law that cannot be challenged outside of arbitration. The unlicensed practice of law is a violation of the Rules Regulating The Florida Bar by the *lawyer*, which falls outside the purview of any agreement and the arbitration code. "[R]egulatory measures make it a criminal offense to practice law without a license, *see* section 454.23, Fla. Stat., and the

admission of attorneys to practice law is considered a judicial function, *see* section 454.021, Fla. Stat.” *Vista Designs, Inc. v. Silverman*, 774 So. 2d 884, 887 (Fla. 4th DCA 2001). In *Vista Designs*, this Court held that an attorney engaged in the unauthorized practice of law was required to disgorge attorneys’ fees paid to him. *Id.* at 888.

Mr. McCulloch was a nonlawyer as defined by the Rules Regulating The Florida Bar who engaged in the unauthorized practice of law during the entire course of the arbitration. The Florida Bar defines a nonlawyer as follows:

**(c) Nonlawyer or Nonattorney.** For purposes of this chapter, a nonlawyer or nonattorney is an individual who is not a member of The Florida Bar. *This includes, but is not limited to, lawyers admitted in other jurisdictions . . . .*

R. Regulating Fla. Bar 10-2.1 (emphasis added). The appearance of a non-Florida lawyer in an arbitration proceeding is governed as follows:

**(a) Non-Florida Lawyer Appearing in an Arbitration Proceeding in Florida.** A lawyer currently eligible to practice law in another United States jurisdiction or a non-United States jurisdiction may appear in an arbitration proceeding in this jurisdiction if the appearance is:

(1) for a client who resides in or has an office in the lawyer’s home state; or

\* \* \*

Such lawyer *shall* comply with the applicable portions of this rule and of rule 4-5.5.

**(b) Lawyer Prohibited from Appearing.** *No lawyer is authorized to appear* pursuant to this rule if the lawyer:

\* \* \*

(5) has failed to provide notice to The Florida Bar or pay the filing fee as required by this rule . . .

**(c) Application of Rules Regulating The Florida Bar.** Lawyers permitted to appear by this rule shall be subject to these Rules Regulating The Florida Bar while engaged in the permitted representation, including, without limitation, rule 4-5.5.

\* \* \*

**(e) Content of Verified Statement for Leave to Appear.** In all arbitration proceedings except international arbitrations, *prior to practicing pursuant to this rule*, the non-Florida lawyer shall file a verified statement with The Florida Bar and serve a copy of the verified statement on opposing counsel, if known. . . .

R. Regulating Fla. Bar 1-3.11 (emphases added). Rule 4-5.5, referred to in rule 1-3.11, provides:

**(b) Prohibited Conduct.** A lawyer who is not admitted to practice in Florida *may not*:

\* \* \*

(3) appear in court, before an administrative agency, or before any other tribunal unless authorized to do so by the court, administrative agency, or tribunal pursuant to the applicable rules of the court, administrative agency, or tribunal.

R. Regulating Fla. Bar 4-5.5 (emphasis added).

A nonlawyer is not authorized to practice law in Florida. *The Florida Bar v. Rapoport*, 845 So. 2d 874, 877 (Fla. 2003). Under rule 1-3.11, Mr. McCulloch was a nonlawyer prohibited from appearing in the arbitration because he did not file a Verified Statement with The Florida Bar *prior* to practicing in Florida.

Attorneys' fees may not be awarded to a nonlawyer. *Morrison v. West*, 30 So. 3d 561, 566 (Fla. 4th DCA 2010). "Allowing an attorney to recover fees for

the unauthorized practice of law is a violation of public policy, irrespective of the private interests and understandings of the parties. The judicial power of this state should not be used to effectuate a violation of public policy.” *Id.* Further, “[a]ny person not licensed *or otherwise authorized to practice law in this state* who practices law in this state . . . commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.” § 454.23, Fla. Stat. (emphasis added). “To award fees for illegal activities is contrary to public policy.” *Morrison v. West*, 30 So. 3d at 566.

West argued that his conduct would have been legal under rule 4-5.5 after it was amended to permit multi-jurisdictional practice and that it should have been applied retroactively to authorize his conduct. *Id.* at 566-67. The Florida Supreme Court rejected the argument that the rule could be applied retroactively. *Id.* at 567. Likewise, Mr. McCulloch could not retroactively be authorized to practice law in Florida by submitting his Verified Statement after the fact.

Rule 3-4.1 of the Rules Regulating The Florida Bar provides:

Every member of The Florida Bar and *every lawyer of another state* or foreign country who provides or offers to provide any legal services in this state . . . *is charged with notice and held to know the provisions of this rule* . . . . Jurisdiction over a lawyer of another state who is not a member of The Florida Bar is limited to conduct as a lawyer in relation to the business for which the lawyer was permitted to practice in this state . . . .

(Emphasis added.) In regulating the authorized practice of law, the Florida Supreme Court's primary goal is the protection of the public. *See Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 184 (Fla. 1995).

The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice . . . is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control . . . .

*Morrison v. West*, 30 So. 3d at 567 (quoting *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 184 (Fla. 1995)).

The protection of the public cannot be accomplished if the rules are ignored without recrimination, because The Florida Bar does not have jurisdiction over a lawyer who is not authorized to practice law in Florida. That is why the Verified Statement must be filed *prior to practicing under the rule* in order for the representation to be authorized, as specified by rule 3-1.1 and as noted by The Florida Bar in its letter to Mr. McCulloch.

It is undisputed that Mr. McCulloch did not comply with rule 1-3.11 at any time during the nearly one-and-a-half year course of the arbitration proceedings. It was only after the arbitration award was entered that he took action to file the Verified Statement. Further, Mr. McCulloch's statement that he took immediate action to rectify the situation upon learning of it is yet another example of truth-stretching. *See Initial Br. at 27.* It was over six weeks from the time that Global

submitted its post-hearing brief on May 4, 2017, where Mr. McCulloch professed he learned he had to be admitted to practice in Florida, until June 26, 2017, when he finally submitted his Verified Statement to The Florida Bar.

Even then, the Verified Statement was at best disingenuous. Mr. McCulloch did not list anything in response to the item: “Movant has appeared as counsel in Florida arbitrations during the past five (5) years in the following matters . . . .” R. 496-97. Yet he concludes, “WHEREFORE, Movant respectfully files this Verified Statement with The Florida Bar to appear in this case only,” knowing full well that there was nothing to appear in going forward and that the arbitration was completed. By signing a *Verified* Statement with these material omissions and half truths, Mr. McCulloch further underscores why attorneys’ fees should not be awarded in the arbitration.

**B. Public policy required that the attorneys’ fees award be vacated.**

APS claims that under *Visiting Nurse Association of Florida, Inc. v. Jupiter Medical Center, Inc.*, 154 So. 3d 1115 (Fla. 2014), public policy is not a valid basis for vacating an arbitration award. Initial Br. at 25. The question before the Florida Supreme Court in *Visiting Nurse* was if a court must determine whether a contract is legal before enforcing an arbitral award based on the contract. *Visiting Nurse*, 154 So. 3d at 1118.

In *Visiting Nurse*, Jupiter Medical Center asserted that an arbitration award should be vacated because the arbitrators issued the award based on an erroneous construction of the parties' purchase agreement, which construction would violate federal and state health care laws prohibiting kickbacks. *Id.* at 1118-19. The trial court dismissed the motion to vacate and enforced the arbitration award. *Id.* at 1119. The Fourth District reversed the dismissal and remanded the case for the trial court to consider the legality of the contract because "a Florida court cannot enforce an illegal contract." *Id.*

Upon review, the Florida Supreme Court reasoned that parties to an agreement containing an arbitration provision specifically bargained for an arbitrator's construction and interpretation of the agreement as an alternative to litigation in the court system. *Id.* at 1135. The Court noted that a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute, such as its obligation under a contract. *Id.* at 1127. But where the party has agreed to arbitrate, it is the arbitrator who should consider the claim that a contract containing an arbitration provision is void for illegality. *Id.* *Visiting Nurse* stands for the proposition that courts cannot vacate an award on the basis that an arbitrator's construction of a contract is illegal. *Id.* at 1132.

The Court noted that the language of section 682.13(1) does not include the term "illegality" or require a court to vacate an arbitrator's "illegal construction of

the underlying contract,” and an arbitration panel’s alleged construction of a contract to be an unlawful agreement is not one of the grounds in the statute. *Id.* at 1134-35.

Jupiter Medical argued that there is a public policy exception to the statute because illegal contracts should not be enforced, which the Court declined to adopt. The Court noted that where a contract is not patently illegal and criminal in nature, more expansive judicial review of an arbitral decision would amount to simple disagreement with an arbitrator’s application of the law to the facts. *Id.* at 1136 n.14.

*Visiting Nurse* stands for the proposition that parties to a contract cannot complain later that the arbitrator’s construction of a contract is illegal. That is not the equivalent of the public policy against awarding fees for illegal activities that the Florida Supreme Court set forth in *Morrison v. West*. As the Court stated, “Allowing an attorney to recover fees for the unauthorized practice of law is a violation of public policy, *irrespective of the private interests and understandings of the parties.*” *Morrison*, 30 So. 3d at 566 (emphasis added). West violated section 454.23 and so did Mr. McCulloch. *See id.* The Court held that West could not recover fees, and neither can Mr. McCulloch.

Mr. Matthews did not bargain for the Agreement or for an arbitrator’s construction of it. Moreover, Global did not challenge the validity of the

Agreement at all. This is not an issue of the construction of a contract violating public policy. Had another attorney authorized to practice law in Florida appeared at the arbitration, there would be no public policy issue of enforcing an illegal contract, and an attorneys' fee award would be enforceable.

This situation in this case is outside the construction of any contract and is part of the judicial regulation of attorneys. As this Court has stated, "The judicial power of the state should not be used to effectuate a violation of public policy." *Morrison v. West*; 30 So. 3d at 566. If the award of attorneys' fees is allowed to stand, it will render rule 1-3.11 entirely unenforceable, because it would permit every out-of-state lawyer to ignore the rule with impunity. There would be no enforcement mechanism as regards the unauthorized practice of law in Florida arbitrations, because in every instance an award of fees to an unauthorized lawyer would "merely be a mistake of law by the arbitrator."

Importantly, The Florida Bar recognized the judicial function at issue here when it stated, "[W]hether Mr. McCulloch is eligible for attorneys' fees is a question to be decided by the court in the pending circuit court action, not The Florida Bar." R. 309. The Florida Bar did not suggest that the illegality of the attorneys' fee award was something that could or should be determined by an arbitrator. The Florida Bar operates wholly outside the jurisdiction of the AAA, and it is the function of the judiciary to determine whether an award of fees is

appropriate when the Bar's rules have been violated. This Court has consistently held that attorneys' fees cannot be awarded to a nonlawyer, as defined by The Florida Bar. *E.g.*, *Morrison v. West*, 30 So. 3d 561 (Fla. 4th DCA 2010); *Vista Designs, Inc. v. Silverman*, 774 So. 2d 884 (2001).

The claim that The Florida Bar's approval is "functionally ministerial" and that The Florida Bar will accept the form without further evaluation is meritless and unsupported. The information provided in the Verified Statement allows The Florida Bar to follow up on individual lawyers and determine whether there have been any previous disciplinary proceedings or any other reason that the lawyer should not be permitted to practice law in Florida. Mr. McCulloch deprived The Florida Bar of that ability.

The provision of legal services by a non-Florida Bar member is illegal and a third-degree felony. *See* § 454.23, Fla. Stat. ("Any person not licensed *or otherwise authorized to practice law in this state . . .* commits a felony of the third degree . . .") (Emphasis added.). Indeed, requiring Global or Mr. Matthews to pay attorneys' fees to Mr. McCulloch would put them in the position of aiding or abetting a third-degree felony.

Lawyers are held to high ethical standards, and lawyers from other states are expected to know and to comply with pro hac vice requirements and other rules authorizing them to practice in foreign jurisdictions. Failure to rigorously enforce

these rules is an invitation for lawyers to cavalierly ignore them, as happened here, which is contrary to the strong public policy of this and other states. The trial court correctly vacated the arbitrator's attorneys' fee award.

### **CONCLUSION**

For all of the foregoing reasons, the Final Judgment vacating the arbitration award should be affirmed.

Respectfully submitted this 23rd day of December, 2019.

MCDONALD HOPKINS LLC  
*Counsel for Appellee/Respondent*

By: */s/ Alan M. Burger* \_\_\_\_\_

Alan M. Burger, Esq.

[aburger@mcdonaldhopkins.com](mailto:aburger@mcdonaldhopkins.com)

Florida Bar Number: 833290

Mary F. April, Esq.

[mapril@mcdonaldhopkins.com](mailto:mapril@mcdonaldhopkins.com)

Florida Bar Number: 982245

505 South Flagler Drive, Suite 300

West Palm Beach, Florida 33401

Telephone: (561) 472-2121

Facsimile: (561) 472-2122

Secondary email: [ltimoteo@mcdonaldhopkins.com](mailto:ltimoteo@mcdonaldhopkins.com)

Secondary email: [jlesson@mcdonaldhopkins.com](mailto:jlesson@mcdonaldhopkins.com)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23rd day of December, 2019, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the Florida Courts E-Filing Portal and served by e-mail to: Alan J. Perlman, Esq. and Vijay G. Brijbasi, Esq., DICKINSON WRIGHT PLLC, 350 East Las Olas Boulevard, Suite 1750, Fort Lauderdale, Florida 33301 ([aperlman@dickinsonwright.com](mailto:aperlman@dickinsonwright.com); [vbrijbasi@dickinsonwright.com](mailto:vbrijbasi@dickinsonwright.com)) and Timothy I. McCulloch, Esq., DICKINSON WRIGHT PLLC, 1850 N. Central Avenue, Suite 1400, Phoenix, Arizona 85004 ([tmcculloch@dickinsonwright.com](mailto:tmcculloch@dickinsonwright.com)).

By: /s/ Alan M. Burger  
Alan M. Burger, Esquire  
Florida Bar Number: 833290

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that this Answer Brief is prepared in Times New Roman 14-point font and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

/s/ Mary F. April  
Mary F. April, Esq.