STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Shapiro, P.J., and Jansen and Donofrio, JJ.)

ENGENIUS, INC. and ENGENIUS-EU, LTD.,	Docket No. 141977
Plaintiffs-Appellees,	Court of Appeals No. 290682
v.	
FORD MOTOR COMPANY,	Wayne County Circuit Court Case No. 03-331133-CK
Defendant-Appellant.	Hon. Michael F. Sapala

DEFENDANT-APPELLANT FORD MOTOR COMPANY'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

DICKINSON WRIGHT PLLC
Edward H. Pappas (P23224)
Kathleen A. Lang (P34695)
Phillip J. DeRosier (P55595)
500 Woodward Avenue, Suite 4000
Detroit, Michigan 48226-3425
(313) 223-3500

Attorneys for Defendant-Appellant Ford Motor Company

RECEIVED
JUN - 8 2011
CLERK SUPREME COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

BASIS OF JURISDICTION vii

STATEMENT OF QUESTIONS INVOLVED viii

INTRODUCTION 1

I. The Contracts 2

A. The FACTS Contract 2

B. The eCATS Contract 5

C. The Underlying Litigation and Referral of the Parties' Dispute to Arbitration 8

II. The Final Arbitration Awards 8

A. The FACTS Award 9

B. The eCATS Award 9

C. Tortious Interference Award 12

III. Judicial Review 13

IV. Summary of Argument 14

V. Argument: The Moment the Arbitration Panel Determined That the Arbitration Clause Was Not Part of the FACTS Contract, It Lost All Power to Arbitrate the FACTS Contractual Dispute 16

A. The Question Posed by This Court 16

B. The Court of Appeals' Erred in Determining That the Arbitrators Retained Jurisdiction Over the FACTS Contract Dispute 18

1. Ford's Global Terms and Conditions (GTC) were not merely "separable"; according to the Panel the GTC never were part of the FACTS contract 18

2. Ford did not confer jurisdiction or power to arbitrate the FACTS contract dispute merely by requesting arbitration. 19

3. Courts, not arbitrators, decide arbitrability 23

4. When the underlying dispute was never arbitrable in the first place, there is no arbitral jurisdiction to be "divested" 25

(a) Analogy to subject-matter jurisdiction 25

(b) These same rules apply to arbitration subject-matter jurisdiction 26

C. Conclusion: The Arbitration Panel's FACTS Award Is Unenforceable 27

VI. Argument: With Respect to Each of the Three Awards, the Court of Appeals Failed to Perform the Review Required Under *Gavin* 27

A. DAIIE v Gavin Is the Law on the Standard of Review of Arbitration Awards 27

B. Under Gavin, Material Errors of Law Must Be Corrected 28

C. The Arbitration Panel Committed a Material Error of Law that Warrants Vacating the FACTS Award 30

D. The Arbitration Panel Committed a Material Error of Law That Warrants Vacating the eCATS Award 33

1. Error on the face of the eCATS award 33

2. The Court of Appeals' analysis 35

E. The Panel Committed Several Material Errors of Law that Warrant Vacating the Tortious Interference Award 37

1. The Panel's tortious interference award was based upon nothing more than Ford's decision to change vendors which, standing alone, is not a tort 37

2. The Panel's measure of damages for the tortious interference award bore no relationship to the alleged interference with employment contracts between EnGenius-EU and its employees 38

3. The Arbitration Panel deprived Ford of the opportunity to present evidence to rebut EnGenius's diminution in value damage theory..... 40

F. Conclusion: The Court of Appeals Should Have Reviewed all Three Awards Under the Gavin Standard of Review and Had It Correctly Done So, All Three Awards Should Have Been Vacated..... 42

CONCLUSION AND RELIEF REQUESTED 42

TABLE OF AUTHORITIES

Cases

Acme Cut Stone Co v New Ctr Dev Corp, 281 Mich 32; 274 NW 700 (1937) 17

ADR N Am, LLC v Agway, 303 F3d 653 (CA 6, 2002) 31

AT&T Techs, Inc v Commc'ns Workers of Am, 475 US 643; 106 S Ct 1415; 89 L Ed 2d 648 (1986) 22, 23

Bed v Fallon, 307 Mich 466; 12 NW2d 396 (1943) 32

Churella v Pioneer State Mut Ins Co, 258 Mich App 260; 671 NW2d 125 (2003) 25

Confinco, Inc v Bakrie & Bros, NV, 395 F Supp 613 (SDNY, 1975) 42

DAIIE v Gavin, 416 Mich 407; 331 NW2d 418 (1982) 1, 14, 15, 27, 28, 29, 30, 35

Daimler Chrysler Corp v Wesco Dist, Inc, 281 Mich App 240, 248; 706 NW2d 828 (2008) 31

EnGenius, Inc v Ford Motor Co, 488 Mich 1052; 794 NW2d 615 (2011) 16

First Options of Chicago, Inc v Kaplan, 514 US 938, 944-945; 116 S Ct 1920; 131 L Ed 2d 785 (1995) 24, 26

Fox v Bd of Regents of Univ of Mich, 375 Mich 238; 134 NW2d 146 (1965) 25

Gordon Sel-Way, Inc v Spence Bros, Inc, 438 Mich 488; 475 NW2d 704 (1991) 17, 27, 34

Granite Rock Co v Int'l Bhd of Teamsters, 546 F3d 1169, 1178 (CA 9, 2008), *rev'd*, ___ US ___; 130 S Ct 2847, 2863 (2010) 18, 19, 20, 21, 22, 24

Hayman Co v Brady Mech, Inc, 139 Mich App 185; 362 NW2d 243 (1985) 28

Helms v LeMieux, 486 Mich 937; 782 NW2d 503 (2010) 33, 34

Hilgendorf v St John Hosp & Med Ctr Corp, 245 Mich App 670; 630 NW2d 356 (2001) 20

Howsam v Dean Witter Reynolds, Inc, 537 US 79; 123 S Ct 588; 154 L Ed 2d 491 (2002) 24

Huntington Woods v Ajax Paving Indus, Inc, 196 Mich App 71; 492 NW2d 463 (1992) 24

Joba Constr Co, Inc v Burns & Roe, Inc, 121 Mich App 615; 329 NW2d 760 (1982) 20

John Wiley & Sons, Inc v Livingston, 376 US 543; 84 S Ct 909; 11 L Ed 2d 898 (1964) 24

Kaleva-Norman-Dickson Sch Dist No 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n, 393 Mich 583; 227 NW2d 500 (1975) 27

Miller v Miller, 474 Mich 27; 707 NW2d 341 (2005) 17

Port Huron Area Sch Dist v Port Huron Edu Ass'n, 426 Mich 143; 393 NW2d 811 (1986) 17

Preston v Ferrer, 552 US 346, 128 S Ct 978, 169 L Ed 2d 917 (2008) 18

Reed v Mich Metro Girl Scout Council, 201 Mich App 10; 506 NW2d 231 (1993) 38

Rent-A-Ctr, W, Inc v Jackson, __US __; 130 S Ct 2772; 177 L Ed 2d 403 (2010) 18

SCA Servs, Inc v Gen Mill Supply Co, 129 Mich App 224; 341 NW2d 480 (1983) 17

Smith v Highland Park Board of Educ, 83 Mich App 541; 269 NW2d 216 (1978) 26

Stolt-Nielsen SA v AnimalFeeds Int'l Corp, ___US___, 130 S Ct 1758 (2010) 26

Stowe v Mutual Home Builders Corp, 252 Mich 492; 233 NW 391 (1930) 27

Tokar v Estate of Tokar, 258 Mich App 350; 671 NW2d 139 (2003) 17

Tomecek v Bavas, 482 Mich 484; 759 NW2d 178 (2008) 32

Travelers Ins Co v Detroit Edison Co, 465 Mich 185; 631 NW2d 733 (2001) 26

Trost v Buckstop Lure Co, 249 Mich App 580; 644 NW2d 54 (2002) 26

UAW-GM Human Resources Ctr v KSL Recreation Corp, 228 Mich App 486, 502; 503 NW2d 411 (1998) 32

Urban Assocs, Inc v Standex Elecs, Inc, 216 Fed Appx 495 (CA 6, 2007) 38, 39

Statutes

MCR 3.602(J)(2) 17, 42

MCR 3.602(J)(2)(d) 16

9 USC 10(a)(3) 16, 42

BASIS OF JURISDICTION

On January 9, 2009, the Wayne County Circuit Court issued its Judgment Confirming Arbitration Award in Favor of Plaintiffs-Appellees EnGenius, Inc. ("EnGenius") and EnGenius-EU, Ltd. ("EnGenius-EU") and Against Defendant. (App 501a). Defendant-Appellant Ford Motor Company ("Ford") timely moved for reconsideration, and on February 9, 2009, the trial court entered its Order Denying Ford's Motion for Reconsideration of Plaintiffs' Motion to Confirm Arbitration Award. (App 523a). Finally, on February 24, 2009, the trial court entered its Order Denying Ford's Motion to Vacate Final Arbitration Award. (App 560a).

Ford subsequently filed a claim of appeal to the Michigan Court of Appeals, which affirmed the trial court's decision in an unpublished opinion issued on July 29, 2010. (App 683a). On March 9, 2011, this Court granted Ford's Application for Leave to Appeal. (App 829a).

STATEMENT OF QUESTIONS INVOLVED

I. "[W]hether the arbitration panel in this case, having determined that the arbitration clause was not included in the parties' FACTS contract, was nevertheless empowered to retain jurisdiction over the arbitration of that contract and to render an award for its breach."

The Court of Appeals answered: Yes.

Ford answers: No.

II. Whether the Court of Appeals erred by upholding the FACTS arbitration award: (1) when the arbitrators themselves found that the contract did not contain an arbitration agreement; (2) when the Court of Appeals' decision created a new rule that once vested, an arbitrator can *never* be divested of the power to arbitrate; and (3) when the arbitrators created an unprecedented and unsupportable rule of law that allowed them to arbitrarily pick and choose which terms of the parties' Purchase Order and General Terms and Conditions to enforce—i.e., to rewrite the contract for the parties?

The Court of Appeals answered: No.

Ford answers: Yes.

III. Whether the Court of Appeals erred by affirming an award of guaranteed annual payments (1) that the arbitrators expressly found were not authorized or provided by the parties' eCATS contract, and (2) based on a rationale not found in the arbitration award?

The Court of Appeals answered: No.

Ford answers: Yes.

IV. Whether the Court of Appeals erred by refusing to review the arbitration award despite the fact that the arbitrators (1) awarded damages for Ford's alleged tortious interference with its contract with EnGenius-EU even though no such tort exists under Michigan law, and (2) denied Ford the right to submit material evidence on the damages issue?

The Court of Appeals answered: No.

Ford answers: Yes.

INTRODUCTION

This appeal presents several jurisprudentially significant issues concerning arbitral jurisdiction, the arbitrators' obligation to enforce the contract entered into between the parties rather than create a new contract, and the proper scope of review of arbitration awards in Michigan. An Arbitration Panel, in a split 2-1 decision, made three awards in favor of EnGenius. Two of the awards involved contracts—one referred to as the FACTS contract, and the other as the eCATS contract. The third award was for Ford's alleged tortious interference with employment contracts between EnGenius-EU and its employees. Ford seeks review of all three awards.

In broad terms the questions on appeal separate into two categories: (1) can an arbitrator proceed to adjudicate and render an award after determining that there was no agreement to arbitrate that dispute; and (2) can a Michigan court avoid review of an arbitration award by doing nothing more than branding the issue on appeal as involving "the merits," or does this Court's standard of review in *DAIIE v Gavin*, 416 Mich 407; 331 NW2d 418 (1982), require more? The *Gavin* standard is clear. Arbitrators exceed their power "whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Id.* at 434. A court must set aside an arbitration award when it "appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made." *Id.* at 443 (citation and internal quotation marks omitted).

The issues presented are important because lower courts and litigants in Michigan need to know the scope of the arbitrators' power when they address the formation of the parties' contract and make a finding of fact that the parties never formed an agreement to arbitrate that dispute. Do the arbitrators in that situation merely ignore the lack of an agreement to arbitrate and arbitrate anyway, or should they simply stop and send the matter back to the referring court? The related question is whether arbitrators should be deciding issues of arbitrability without a clear and unmistakable agreement by the parties delegating that question to them.

With respect to the second broad issue, parties like Ford and EnGenius, as well as others who do business in Michigan, should know what standard of review Michigan courts will apply when reviewing arbitration awards and how that standard will be applied. In practical terms, how far can an arbitrator stray from the parties' contract and Michigan law before a court will vacate the award?

This appeal raises these issues and more. It presents this Court with the opportunity to put the bench, bar, and contracting parties on clear notice that it will insist that arbitration panels and reviewing courts respect not only the parties' agreement to arbitrate, but their substantive agreement as well.

I. The Contracts

A. The FACTS Contract

The FACTS Contract. EnGenius was a supplier of software development and support services for Ford's "end-of-line test system" used to test vehicles as they come

off the assembly line.[1] (App 77-78a). Ford contracted with EnGenius to provide support and maintenance of the Ford Assembly Configuration and Test System ("FACTS") in each of Ford's plants worldwide. (*Id.*) Three documents potentially comprised the FACTS support services contract: (1) a June 28, 2000 document; (2) a subsequent 2001 FACTS Purchase Order; and (3) Ford's Global Terms and Conditions ("GTC"). Of the three documents, *only the GTC contained an arbitration agreement.*

EnGenius's Position on FACTS. EnGenius claimed that Ford and EnGenius had "entered into an agreement" on June 30, 2000 under which "EnGenius agreed to support FACTS for the life of Ford's use of the FACTS system." (Complaint, ¶ 17, App 232-233a). That June 30, 2000 document simply provides that:

> EnGenius will retain the worldwide lifetime FACTS software support at the current VO plants that use the FACTS end-of-line software.

(App 357-358a).

Ford's Position on FACTS. Ford maintained that the FACTS contract required the issuance of separate purchase orders. The first, and last, of those purchase orders was issued for FACTS maintenance and support from January through December 2001, for a total price of $1,200,335. (2001 FACTS Purchase Order, App 138a). That 2001 Purchase Order provided that "Ford's payment obligation is as specified in the purchase order." (*Id* at p. 1). The purchase order expressly incorporated Ford's GTC: "This

---

[1] When manufactured vehicles arrive at the end of the assembly line, the end-of-line test system performs a number of comprehensive tests on these vehicles to ensure that relevant Ford and governmental quality, safety, and environmental standards are met. If a vehicle successfully passes these tests, it is then ready for shipment to Ford dealerships.

purchase order is governed by buyer's terms and conditions FGT27, Rev. 09/2000"; "Form FGT27 revised 9/00 available from the buyers is made part of the terms and conditions of this purchase order." (App 140a). Ford argued that the integration clause in the GTC superseded the June 30, 2000, document, and reserved to Ford the right to terminate the FACTS contract at any time, which it ultimately did. (App 78-80a).

The Arbitrators' Opinion on FACTS. Two of the three arbitrators (hereinafter the "Panel") accepted EnGenius's position and found that "the sole agreement between the parties" regarding FACTS support services consisted of the document signed on June 30, 2000. (Final Award, p 2, App 78a). The Panel found that this document standing alone was a binding "bilateral contract" in which EnGenius promised to perform support services for FACTS in return for Ford's promise that it would exclusively engage EnGenius for those services so long as it continued to use the FACTS system. (*Id.* at 3-4, App 79-80a). The Panel brushed aside the lack of pricing or means to determine pricing in the June 30, 2000, document, stating "price was not an essential term." (*Id.* at 3, App 79a).

With respect to the 2001 FACTS Purchase Order, the Panel found that it was "not part of the FACTS contract," and that Ford's GTC which included the only arbitration clause were "no more than proposals for additional terms to the FACTS contract never accepted by [EnGenius]." (*Id.* at 2-5, App 78-81a). The problem with that finding, lost on the Panel, is that without Ford's GTC as part of the FACTS contract there was never a "meeting of minds" to arbitrate any dispute involving the FACTS contract.

B. The eCATS Contract

The eCATS Contract. As the FACTS system became obsolete, Ford decided to completely replace it with a new system was called eCATS. Ford ultimately selected EnGenius as its eCATS supplier.

The Arbitrators' Opinion on eCATS. The arbitrators found that EnGenius and Ford entered into a contract for the development and implementation of eCATS. (Final Award, p 5, App 81a). Unlike the FACTS contract, all the arbitrators agreed on the documents that comprised the eCATS contract. Those documents consisted of the purchase orders to be issued by Ford for work on the eCATS system, Ford's GTC, and the parties' "Software Terms and Conditions" agreement. (*Id.* at 5).

The Purchase Orders and GTC. The eCATS development and roll-out were to consist of three distinct phases. The first phase was called the "NRE" phase (which stands for "non-recurring engineering costs"). Ford issued EnGenius a purchase order in the amount of $2.5 million for the NRE phase of the project (the "NRE Purchase Order"). (NRE Purchase Order, App 168a). It is undisputed that Ford paid EnGenius the full $2.5 million under the NRE Purchase Order. (See Ford's Motion to Vacate Arbitration Award, p 5, App 104a).

The second phase of the project required EnGenius to successfully launch eCATS in Ford's thirty-six plants around the world. A separate purchase order was to be issued for each plant, with Ford paying EnGenius approximately $600,000 per plant for the first six plants, and approximately $181,000 for each subsequent plant launch. (App 104a). The first plant to launch was to be Ford's Wayne Stamping and Assembly Plant in

Wayne, Michigan. Ford did in fact issue a purchase order to launch eCATS at the Wayne plant. (App 171a). The Wayne plant was the only launch of eCATS.[2]

The third phase of the eCATS project related to long-term support of the system, including modifications necessary to test new vehicles and/or changes in existing vehicles. No purchase orders for this phase of the program were ever issued.

Software Terms and Conditions. The final component of the eCATS contract was the parties' "Software Terms and Conditions" agreement. The Software Terms and Conditions agreement was a licensing agreement by which EnGenius agreed to license the eCATS software for use by Ford in its end-of-line test systems. (Software Terms and Conditions, ¶ 1, App 187a). The Software Terms and Conditions agreement provided that Ford could terminate it at any time on 120 days notice. (*Id.* ¶ 12, App 190a). It also provided that eCATS services would be performed and paid for pursuant to separate Ford purchase orders. (*Id.* ¶ 2 and Attachment A, App 187a, 191a).

Pricing. The agreed prices for the eCATS work were set forth in EnGenius's final "launch cost" proposal, which was referenced in the Software Terms and Conditions agreement. (EnGenius Arbitration Exhibit 100, App 359a).[3] The total price for all of the

---

[2] Other purchase orders were issued but the work under them was not completed. (App 104-105a).

[3] Based on their differing view of when EnGenius was entitled to payment under the eCATS contract, the parties interpreted this document in fundamentally different ways. Ford's position, which is consistent with what the majority ultimately held, was that each amount listed on this document next to a particular plant, constituted the amount for which Ford would issue a purchase order for the launch of eCATS at that particular plant. Once EnGenius successfully launched eCATS at that plant, EnGenius would be paid this amount in conformance with the purchase order that was ultimately issued, such as was illustrated by the Wayne Purchase Order. By contrast, in arguing for "guaranteed annual payments," EnGenius took the position that it was

Footnote continued on next page ...

contemplated eCATS work was $28,140,883, which the arbitrators found was subsequently increased to $32 million. (Final Award, pp 6, 8-9, App 82a, 84-85a).

Construing the contract documents together, the arbitrators found that the parties entered into a "fixed price contract" payable in return for EnGenius's completion of the individual "deliverables" included in the contract and subject to Ford's right of termination. (Final Award, pp 8-9, App 84-85a) (finding a "fixed price contract of $32 million subject to deliverables, subject to the termination provisions . . . .").

Regarding EnGenius's claim that it was entitled to *guaranteed* annual payments under the eCATS contract regardless of the amount of contract work performed or authorized by purchase orders, the arbitrators disagreed:

> EnGenius' position is that the contract was a guaranteed fixed annual payment, based upon EnGenius Exhibit 100 [the Launch Cost summary], as modified by EnGenius Exhibit 1496 over five years. Claimant cites Ford Attorney McGregor's letter regarding fixed payments (EnGenius Exhibit 250), yet that letter makes reference to deliverables and milestones. *Further, nowhere in Claimant's Exhibits 100 or 1496, which are included in the eCATS contract, does any language appear guaranteeing a minimum annual payment.*

(Final Award, p 7, App 83a) (emphasis added); (See also *id.* at 8-9, App 84-85a) (finding that payment under the eCATS contract was "subject to deliverables.").

Footnote continued from previous page ...

entitled to the sums listed at the bottom of each yearly column, regardless of whether eCATS was launched at each particular plant, and regardless of the terms of any purchase order issued, so long as they "worked" on the eCATS project. Thus, this document illustrates the fundamental disagreement between a "deliverables" contract that Ford advocated, and which the majority ultimately found—i.e., payment when the product is successfully delivered—and a "guaranteed annual payment" contract which EnGenius advocated—i.e., EnGenius is entitled to yearly sums regardless of whether any product is successfully delivered, so long as they showed up to work.

C. *The Underlying Litigation and Referral of the Parties' Dispute to Arbitration*

EnGenius sued Ford in the Wayne County Circuit Court alleging that Ford had breached the FACTS and eCATS contracts by terminating EnGenius as its supplier. (Complaint, ¶¶ 119-134, App 252-253a). Ford moved to compel arbitration of all of EnGenius's claims under Ford's GTC.[4] Ford also moved for arbitration of EnGenius's overlapping quasi-contractual and business tort claims, including a claim that Ford had tortiously interfered with the contracts of employees of EnGenius-EU, a European affiliate of EnGenius created to provide support for the eCATS system in Ford's plants in Europe. (*Id.*, ¶¶ 135-187, App 254-262a). The trial court granted Ford's motion, finding that all of EnGenius's claims were "subject to arbitration." (Stipulated Corrected Order Granting Ford Motor Company's Motion for Summary Disposition *Nunc Pro Tunc,* 3/2/2005, App 196a).

II. The Final Arbitration Awards

The arbitrators were at odds on the correct factual and legal analysis. The Panel made three monetary awards against Ford, each on a different basis: (1) $1,239,885 for breach of the FACTS contract; (2) $14,425,954 for eCATS fixed price contract through May 8, 2008, including $2,878,800 in pre-commits; and (3) $1,946,131 for tortious interference.[5] The remaining arbitrator filed a forceful dissent.[6]

---

[4] The only document in this record containing an arbitration clause is Ford's GTC.

[5] The arbitrators dismissed all of EnGenius's other claims. (Final Award, pp 14, 16, App 90a, 92a; Arbitrators' Decision Regarding Ford's Motion to Dismiss, 10/16/2007, App 322a).

A. The FACTS Award

As previously mentioned, the Panel found that the only FACTS-related document containing an arbitration clause, the 2001 FACTS Purchase Order and accompanying GTC, was not part of the FACTS contract. Despite the resulting lack of an agreement to arbitrate the FACTS dispute, the Panel proceeded to render an award anyway. The Panel found that Ford breached the FACTS contract "by using FACTS and not paying for it." (Final Award, p 4, App 80a). They found that the FACTS system was "still in use in Mexico" and in other plants through 2004. (*Id.* at 4, App 80a). The arbitrators awarded EnGenius $1,239,885 in lost profits based upon pricing information taken from purchase orders that the arbitrators characterized as mere "vehicles for payment." (*Id.* at 2, 15, App 78a, 91a).

B. The eCATS Award

The Panel found that Ford breached the eCATS contract by delaying the work and failing to provide necessary cooperation and support, and that these breaches "repeatedly pushed back the buyoff for the Wayne plant and the future implementation at other manufacturing facilities." (*Id.* at 10-11, App 86-87a). These breaches, the arbitrators found, "prevented and excused [EnGenius's] obligation to provide deliverables" and, moreover, entitled EnGenius to damages. (*Id.* at 11, App 87a).

Footnote continued from previous page ...

[6] Two of the arbitrators issued an "interim" opinion and award, followed by a final award on December 12, 2008. (Interim Arbitration Opinion, App 3a; Final Award, App 77a). The third arbitrator issued a dissenting opinion to the interim award (Arbitrator Norman L. Lippitt's Dissenting Opinion in Response to The Majority's "Interim Arbitration Opinion and Award," 12/1/2008, App 21a), and then a supplemental response to the Final Award. (Arbitrator Norman L. Lippitt's Supplement in Response to the Majority's December 12, 2008 Arbitration Opinion and Award, 12/22/2008, App 95a).

Despite having previously found that the eCATS contract did not provide for guaranteed annual payments and that eCATS was instead a "deliverables" contract, the arbitrators awarded as damages guaranteed annual payments. (*Id.*, at 7, App 83a). According to the Panel, the award of $11,547,154 was made based on the testimony of Barry Lefkowitz, EnGenius's damages witness. (Final Award, p 15, App 91a, citing Lefkowitz, Tr 10/1/07, pp 19-20, App 369-370a). Lefkowitz testified that the figure of $11,547,154 was based upon a calculation of "guaranteed annual payments" for the two years and four months between contract formation and termination, less the $5.5 million that Ford paid for EnGenius's actual eCATS work:

> We then took that [launch] cost matrix, and indicated, as you can see on this schedule, that for the year 2000, the annual contract fee would be $7,604,650. That would have been the amount due for the entire year, 2000. We have the amount under that cost matrix for 2001 of $7,251,820 again that same year, that same full year amount for the cost matrix. And for the third year, 2002, we have allocated four months of that annual [fee] of $6,719,162. And the reason we applied four months of it is that ... there was a cancellation of the contract by Ford in January of 2002. ... The total of the three amounts would be $17,096,191. We then applied payments that had been paid by Ford in accordance with the information we had received totaling, well, there's three payments, in 2000 there was a payment of 2.5 million dollars. In 2001, there were payments of $1,049,037 and a final payment in 2002 of 2 million dollars, totaling a net amount due from Ford under the contract of $11,547,154.

(Lefkowitz, Arbitration Tr 10/1/07, pp 18-19, App 368-369a).

Hence, although the Panel specifically found the eCATS contract to be a "deliverables contract," and that "nowhere" in the contract was there language entitling EnGenius to "guaranteed annual payments," the Panel nevertheless awarded EnGenius

"guaranteed annual payments" as damages for breach of the eCATS contract. The dissenting arbitrator was particularly critical and troubled by this aspect of the award:

> The majority ignores controlling principles of law and ignores the contract documents and gratuitously provides [EnGenius] with $14,425,954.00 in damages – an amount totally inconsistent with the majority's own conclusion that the eCATS did not provide for guaranteed annual payments . . . .
>
> * * *
>
> It is beyond logic how the majority can arrive at that conclusion within the body and face of its opinion when, one page earlier, the majority finds the eCATS contract does not contain any guaranteed minimum annual payments. It is my hope, as a matter of justice, that a reviewing [c]ourt will address the majority's blatant inconsistency and correct this $14 million error.

(Dissenting Op at pp 20-22, App 40-42a).

The Panel also awarded $2,878,800 for "pre-commits" authorized by Ford without the issuance of a purchase order, for a total eCATS award of $14,425,954 (Final Award at p 15, App 91a). Here, too, the dissenting arbitrator took the Panel to task for gratuitously awarding damages for "pre-commits," not based on any agreement and because all quasi-contract claims had been dismissed:

> . . . [T]he majority's award of $2,878,800 in "pre-commits" by Ford is simply wrong. Not only does the majority fail to discuss adequately any liability for these alleged pre-commits, there simply is no legal theory that would permit this panel with the requisite authority to award damages for such a claim. . . .
>
> While the majority finds that the eCATS contract required the issuance of purchase orders, there was no evidence that a purchase order for these allege[d] "extras" was ever generated . . . .

(*Id.* at 38, App 58a).

C. Tortious Interference Award

Finally, the Panel found that Ford had tortiously interfered with the advantageous business relationship between EnGenius-EU and its employees. (Final Award, p 12, App 88a). According to the Panel, Ford's project manager in Europe, Phillip Jameson, took actions that "clearly were designed to interfere with EnGenius and place Ford's business elsewhere." (*Id.*, App 88a).

As damages for Ford's interference with the employee contracts, the Panel awarded $1,946,131 based upon lost profits or "diminution in value" to EnGenius-EU occasioned by Ford's decision to change its vendor in Europe from EnGenius-EU to Tumarc:

> Q. Can you please explain ***how you arrived at the diminution of value of EnGenius-EU***, Limited with respect to this demonstrative aid?
>
> A. We were provided documents, in this PO, relative to sales for work that would have been done, it would have been sales by EU. . . . We analyzed the total of those invoices which were a 1,057,680 for 2003 and again this is based on a limited amount of information. And with that amount we applied that price to sale ratio for the comparable sales I referred to earlier was a median of 1.84 and we've applied that ratio to this sales volume and conservatively are estimating that ***the value of the company would have been $1,946,131***.

(Lefkowitz, Arbitration Tr 10/1/2007, pp 61-62, App 371-372a) (emphasis added).

This award completely surprised Ford because the arbitrators previously dismissed the diminution in value claims, finding those damages foreclosed by their interpretation of the eCATS contract. (Arbitrators' Decision Regarding Ford's Motion to Dismiss

claims, 10/16/2007, ¶ 7, App 323a). In reliance on the dismissal of EnGenius's claims for diminution in value damages, Ford did not present expert testimony on that topic. The neutral arbitrator agreed that such testimony was unnecessary and that if the arbitrators were inclined to change course, Ford would be provided an opportunity to present its evidence on this topic. (Arbitration Tr 10/22/2007, pp 5-6, App 328-329a).

III. Judicial Review

The Trial Court. The trial court confirmed the Final Award over Ford's objection. (Judgment, 1/9/09, App 501a; 1/9/09 Hrg Tr, App 479a). Ford's motion for reconsideration was denied (App 523a), as well as its separate motion to vacate the Final Award. (App 560a). According to the trial court: "It is not proper for this court to set aside the analysis and conclusions resultant from any arbitrator's view of the facts and the law applicable thereto." (2/17/09 Hrg Tr, p 8, App 558a).

The Court of Appeals. The Court of Appeals, likewise, declined review and affirmed the trial court's decision in an unpublished opinion. (COA Op, App 683a). As to the FACTS award, the Court of Appeals concluded that even though the Panel determined that the arbitration clause contained in Ford's GTC was not part of the FACTS contract, the Panel was nevertheless empowered to "adjudicate plaintiffs' claims thereunder." (*Id.* at 4, App 686a). The Court of Appeals found in relevant part that Ford "waived" any challenge to the arbitrators' jurisdiction since it moved for arbitration of the FACTS dispute, and that the Panel properly "treated the GTC's arbitration clause as separable from the remainder of the FACTS Contract, itself." (*Id.*, App 686a). In any event, the Court of Appeals believed

that once vested with power to arbitrate, the arbitrators could not be subsequently divested of that same power. (*Id.* at 5, App 687a).

The Court of Appeals also upheld the Panel's eCATS award, but on a rationale not advanced by the Panel. According to the Court of Appeals, the Panel's award was "based upon the arbitrators' determination that plaintiffs were entitled to compensation under the eCATS Contract for work that had already been completed." (*Id.* at 5, App 687a).

The Court of Appeals misapprehended Ford's challenge to the Panel's tortious interference award. Notably, the Court of Appeals did not address Ford's argument that it had been deprived of the opportunity to present diminution in value evidence. Nor did the Court of Appeals address Ford's argument that the damages awarded by the arbitrators were based not on any tortious interference with EnGenius-EU's employees, but rather on Ford's decision to terminate its business relationship with EnGenius. The Court of Appeals simply concluded that it was unable to disturb the Panel's factual finding that Ford had interfered with the relationship between EnGenius-EU and its employees. (See *id.* at 5-6, App 687-688a).

IV. Summary of Argument

In *Gavin* this Court held that an arbitrators' award must be set aside when it appears from the face of the award or the reasons for the decision that through an error of law the arbitrators were led to a wrong conclusion and but for that error a substantially different award would have been made. *Gavin*, 416 Mich at 443 Each of the three awards is infected with a material legal error that is apparent from the face of the award. No

searching analysis is required. No review of the merits is necessary. Each award should have been reviewed under the *Gavin* standard.

As this Court recognized in its order granting leave, the Panel made an award after it concluded there was no agreement by Ford and EnGenius to arbitrate the FACTS dispute. The Panel found that the FACTS contract consisted of only one document. That document did not contain an arbitration clause. As found by the Panel, therefore, the FACTS contract did not include an arbitration provision. As a consequence of that finding, the FACTS dispute was not arbitrable. Contrary to the Court of Appeals' conclusion, arbitrators have no vested power to lose if the dispute was never arbitrable—i.e., that the parties never intended as part of their agreement to arbitrate that particular dispute. There is no power to decide matters that were never arbitrable merely because of the referral by the trial court.

The eCATS award also should be reversed under *Gavin* for two reasons. The Panel found as a matter of fact that the eCATS contract did not provide for guaranteed annual payments, but then inexplicably—a mere few pages later in the same opinion—adopted as its eCATS award a damages analysis based upon guaranteed annual payments. That type of material error, which is plain on the face of the award and requires no extended discussion, is exactly the type of error that requires appellate review. On appeal, the Court of Appeals failed to address that error. Instead, and despite this Court's directive in *Gavin*, the Court of Appeals attributed to the Panel an unreviewable finding of fact that the Panel did not in fact make and that is not reflected in the Panel's award.

The last award, for tortious interference, was the product of two different material errors. Like the eCATS award, the errors are apparent on the face of the award. First, after recognizing that a party cannot interfere with its own contracts, the Panel nevertheless made an award based on a loss of business occasioned by Ford's decision to change vendors, not damages caused by Ford interfering with employment contracts between EnGenius-EU and its employees. Second, to make matters worse, Ford was precluded from offering evidence on diminution of value—the very basis for this award. Even if innocently done, depriving a party of the opportunity to present material evidence is an additional statutory basis to vacate an award. MCR 3.602 (J)(2)(d); 9 USC § 10 (a)(3).

V. Argument: The Moment the Arbitration Panel Determined That the Arbitration Clause Was Not Part of the FACTS Contract, It Lost All Power to Arbitrate the FACTS Contractual Dispute

A. The Question Posed by This Court

After granting the application for leave to appeal, this Court directed both parties to specifically address—

> [W]hether the arbitration panel in this case, having determined that the arbitration clause was not included in the parties' FACTS contract, was nevertheless empowered to retain jurisdiction over the arbitration of that contract and to render an award for its breach.

EnGenius, Inc v Ford Motor Co, 488 Mich 1052; 794 NW2d 615 (2011).

The answer to this question is straightforward. Once the Panel reached the conclusion that the only arbitration clause in the record was not part of the FACTS contract, the FACTS contractual dispute was no longer arbitrable. As this Court

observed long ago in *Acme Cut Stone Co v New Ctr Dev Corp*, 281 Mich 32, 45; 274 NW 700 (1937), "courts in this jurisdiction and others have universally held that the arbitrator derives his power solely from the agreement between the parties." Thus, "a finding of no agreement to arbitrate precludes the power or jurisdiction of an arbitrator to act." *SCA Servs, Inc v Gen Mill Supply Co*, 129 Mich App 224, 229; 341 NW2d 480 (1983) (citation and internal quotation marks omitted); see also *Port Huron Area Sch Dist v Port Huron Edu Ass'n*, 426 Mich 143, 151; 393 NW2d 811 (1986)("[A]n arbitrator possesses no general jurisdiction to resolve such matters independent of the arbitration contract.").

The de novo standard governs the review of "a trial court's decision to enforce, vacate, or modify a statutory arbitration award." *Tokar v Estate of Tokar*, 258 Mich App 350, 352; 671 NW2d 139 (2003), citing *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 496-497; 475 NW2d 704 (1991). A trial court should vacate an arbitration award when "[t]he arbitrator exceeded his or her powers." MCR 3.602 (J)(2). Arbitrators exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law. *Miller v Miller,* 474 Mich 27, 30; 707 NW2d 341 (2005).

If, as the arbitrators themselves concluded, the FACTS contract did not include the arbitration clause contained in Ford's GTC (a finding that the Court of Appeals held was unreviewable (COA Op at 4, App 686a)), then the Panel lacked the power to render any award.

B. The Court of Appeals' Erred in Determining That the Arbitrators Retained Jurisdiction Over the FACTS Contract Dispute

The Court of Appeals nevertheless refused to vacate the FACTS award, but none of the reasons it gave for that refusal can withstand scrutiny.

1. Ford's Global Terms and Conditions (GTC) were not merely "separable"; according to the Panel the GTC never were part of the FACTS contract

In refusing to set aside the FACTS award, the Court of Appeals first asserted that the Panel properly treated the GTC's arbitration clause to be "separable from the remainder of the FACTS Contract, itself." (COA Op at 4, App 686a) (citing *Granite Rock Co v Int'l Brotherhood of Teamsters*, ___ US ___; 130 S Ct 2847; 177 L Ed 2d 567 (2010)).

The holding in *Granite Rock* cited by the Court of Appeals merely stands for the unremarkable and inapplicable proposition that if a court invalidates a contract containing an arbitration clause (for example, if a loan agreement incorporates a usurious interest rate), it does not mean that the arbitration clause cannot be relied on "as evidence of the parties' consent to arbitrate matters within its scope."[7] *Granite Rock*, 130 S Ct at 2858. Courts "treat an arbitration clause as severable from the contract in which it appears and

[7] EnGenius cites three cases in support of this same proposition. *Preston v Ferrer*, 552 US 346, 128 S Ct 978, 169 L Ed 2d 917 (2008); *Rent-A-Ctr, W, Inc v Jackson*, __US __; 130 S Ct 2772; 177 L Ed 2d 403 (2010); *Granite Rock Co v Int'l Bhd of Teamsters*, __US__; 130 S Ct 2847; 177 L Ed 2d 567 (2010).

enforce it according to its terms unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself." *Id.*[8]

But there is a key difference between *Granite Rock* and this case. The Panel in this case did not declare the FACTS contract unenforceable or hold that the arbitration clause incorporated by reference into the FACTS purchase order was "severable" from the rest of the FACTS contract. Rather, it determined that the arbitration clause, which was only contained in the GTC, *was never part of the FACTS contract at all.* According to the Panel the arbitration clause was a mere proposal for additional terms that the parties rejected. (COA Op at p 1, App 683a). The end conclusion was that the singular document dated June 30, 2000, that the Panel found to be the "sole agreement between the parties" regarding FACTS support services does not, and according to the Panel never did, contain an arbitration clause. Thus, *Granite Rock* provides no support whatsoever for the Court of Appeals' "severability" analysis.

2. Ford did not confer jurisdiction or power to arbitrate the FACTS contract dispute merely by requesting arbitration.

The Court of Appeals next asserted that the Panel had the power to arbitrate the FACTS contractual dispute because Ford had "actively sought to submit this entire dispute [i.e., EnGenius's FACTS, eCATS, and tortious interference claims] to binding arbitration in accordance with the arbitration clause contained in the GTC," and thus "waived" any argument that the arbitrators lacked jurisdiction. (COA Op at 4, App

[8] EnGenius relies extensively on the argument that an arbitration clause is separable from any contract of which it forms a part. (Resp in Opp to Ford's Applic for Leave at p 32, App 796a).

686a).[9] On this particular point, *Granite Rock* is instructive. There, the Ninth Circuit had held that whether an arbitration clause covered the parties' dispute was largely immaterial because *Granite Rock* had *implicitly* consented to arbitrate by suing under the contract containing the arbitration clause. *Granite Rock Co v Int'l Bhd of Teamsters*, 546 F3d 1169, 1178 (CA 9, 2008), *rev'd*, ___ US ___; 130 S Ct 2847, 2863 (2010). Like the Court of Appeals below, the Ninth Circuit relied upon the argument that a party seeking arbitration *implicitly* consents to arbitration irrespective of any actual agreement to arbitrate that dispute. The United States Supreme Court disagreed—

> *We do not agree that by seeking an injunction against the strike so the parties could arbitrate the labor grievance that gave rise to it, Granite Rock also consented to arbitrate the ratification (formation) date dispute we address above. See* 564 F.3d at 1178. It is of course true that when Granite Rock sought that injunction it viewed the CBA (and all of its provisions) as enforceable. *But Granite Rock's decision to sue for compliance with the CBA's grievance procedures on strike-related matters does not establish an agreement, "implicit" or otherwise, to arbitrate an issue (the CBA's formation date) that Granite Rock did not raise, and that Granite Rock has always (and rightly, see Part II-C, supra) characterized as beyond the scope of the CBA's arbitration clause.* The mere fact that Local raised the formation date dispute as a defense to Granite Rock's suit does not make that dispute attributable to Granite Rock in the waiver or estoppel sense the Court of Appeals suggested, . . ., much less establish that Granite Rock agreed to arbitrate it by suing to enforce the CBA as to other matters.

---

[9] Neither of the two cases cited by the Court of Appeals as legal support for the analysis on this point involves arbitrations. See *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 696; 630 NW2d 356 (2001) (no error in jury instructions because, "a party is not entitled to relief based on an issue that the party's attorney concluded was proper at trial"); *Joba Constr Co, Inc v Burns & Roe, Inc,* 121 Mich App 615, 629; 329 NW2d 760 (1982) ("A party who procures the exclusion of evidence is estopped from later assigning as error the fact that such evidence was excluded").

Granite Rock, 130 S Ct at 2863 (emphasis added).

That is the same situation as here. Ford never agreed to arbitrate the question of arbitrability. Ford requested arbitration of the FACTS dispute because it believed (and still does) that the GTC (that included the arbitration clause) *were part of the FACTS contract.* Ford has never wavered in that position. Indeed, Ford's entire summary disposition motion was predicated on the existence of an agreement to arbitrate the FACTS contractual dispute.[10]

The issue is not who requested the referral to arbitration, but what did the parties agree to arbitrate. That answer is contained in the arbitration clause itself—

> 26(b). If either party initiates litigation on such contractual causes [arising from a purchase order], the other party shall have the right to initiate mediation and binding arbitration in accordance with . . . the CPR Rules for Non-Administered Arbitration of Business Disputes ("CPR") . . . (3) . . . [T]his clause 26 is subject to the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq and judgment upon the award rendered by the Arbitrator, if any, may be entered by any U.S. court having jurisdiction thereof.

(App 165a). This clause does not allow the gateway question of arbitrability of the FACTS dispute to be decided by the arbitrators.[11]

---

[10] EnGenius's argument that Ford waived this issue by not raising it at the arbitration is demonstrably false. Ford raised precisely this issue on page 7 of its December 28, 2006 motion for summary disposition; on page 6 of its October 2, 2007 brief in support of its motion for order of dismissal; and page 3 of its December 29, 2006 response in opposition to EnGenius's motion for summary disposition. See Tabs C, D and E of Ford's reply brief in support of motion to vacate. (App 388a, 423a, 449a).

[11] Nothing in this clause states that the parties agree to accept the Panel's conclusions irrespective of the ultimate arbitrability of the FACTS contract dispute. Nowhere does it state that the parties waive rights to appeal the Panel's award.

When, as here, arbitrability involves a question of whether the parties *formed* an agreement to arbitrate that particular dispute, it is an issue for the court, not the arbitrators to decide irrespective who requested arbitration—

> It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide.
>
> * * *
>
> Under that framework, a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*.
>
> * * *
>
> Accordingly, we hold that the parties' dispute over the CBA's formation date was for the District Court, not an arbitrator, to resolve, and remand for proceedings consistent with that conclusion.

Granite Rock, 130 S Ct at 2857-58, 2863 (emphasis in original).[12]

Merely requesting arbitration falls far short of retroactively creating an agreement to arbitrate. The agreement to arbitrate a dispute had to exist beforehand. *AT&T Techs, Inc v Commc'ns Workers of Am*, 475 US 643, 648-649; 106 S Ct 1415, 1418; 89 L Ed 2d 648 (1986). There is simply no basis for the Court of Appeals' conclusion that Ford agreed to accept whatever decision the Panel might reach even if the Panel lacked jurisdiction. In its haste to affirm the award, the Court of Appeals ignored the most important aspect of any case involving arbitration—the parties' agreement.

[12] The Court of Appeals cites *Arrow Overall Supply* for the proposition that "the existence of a contract to arbitrate and the enforceability of its terms must be determined by the court, and cannot be decided by the arbitrator." (COA Op at 4, App 686a). The Court of Appeals correctly recites this Court's holding, but then fails to correctly apply it.

3. Courts, not arbitrators, decide arbitrability

In addition to holding that Ford, by its conduct, *implicitly* conferred jurisdiction on the Panel, the Court of Appeals also concluded that it was without power to review the question of lack of jurisdiction because "the arbitrators made a factual finding that Ford's Purchase Order and GTC were not part of the FACTS Contract." (COA Op at 4, App 686a).

Questions of arbitrability are for the courts to decide, not the arbitrators. See *AT&T Techs, Inc v Commc'ns Workers of Am*, 475 US 643, 649; 106 S Ct 1415; 89 L Ed 2d 648 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). Whether the 2001 FACTS Purchase Order was part of the FACTS contract is a question of arbitrability that the trial court decided. The Panel derailed the normal arbitration process when, as part of the Panel's perceived "fact-finding" mission, it effectively determined that the trial court "got it wrong" and that there never was an agreement to arbitrate the FACTS contract dispute.

The division of labor between courts and arbitrators is well-settled—

> Applying this principle, our precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. *Ibid.* Where a party contests either or both matters, "the court" must resolve the disagreement. *Ibid.*

Granite Rock, 130 S Ct at 2857-58 (emphasis in italics is in original); see also *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 83-84; 123 S Ct 588; 154 L Ed 2d 491 (2002) (observing that the question of arbitrability is an issue for judicial determination); *John Wiley & Sons, Inc v Livingston*, 376 US 543, 547; 84 S Ct 909; 11 L Ed 2d 898 (1964) ("[W]hether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."). It is illogical to hold that courts, not arbitrators, *must* determine arbitrability if after the referral the arbitrators are free to address that same issue and reach a contrary conclusion.

When the Court of Appeals refused to intervene it confused the question of arbitrability with general fact-finding questions for arbitrators. The latter questions are for arbitrators; the former is not. See *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944-945; 116 S Ct 1920; 131 L Ed 2d 785 (1995) (holding that absent clear and unmistakable language in the arbitration clause, courts should not assume that the parties agreed to arbitrate the question of arbitrability); see also *Huntington Woods v Ajax Paving Indus, Inc*, 196 Mich App 71, 74; 492 NW2d 463 (1992) ("The existence of an arbitration contract and the enforceability of its terms are judicial questions that cannot be decided by the arbitrator.").

The Court of Appeals allowed the Panel to determine its own jurisdiction and then concluded that the Panel's award, which was plainly beyond that jurisdiction, was unreviewable. This creates a gaping loophole in the court's authority to decide

arbitrability. It allows arbitrators to ignore the basis for the referral and arbitrate a matter that the panel itself found involved no agreement to arbitrate.

Had the issue of whether the GTC was part of the FACTS contract been correctly analyzed as a question of arbitrability that the Panel was not free to undo, we would never reach the next issue of whether once vested with power, an arbitrator can and, in fact, must proceed to arbitrate a dispute it just *found* was not arbitrable.[13]

4. When the underlying dispute was never arbitrable in the first place, there is no arbitral jurisdiction to be "divested"

The Court of Appeals held that, "although the arbitrators ultimately concluded that the Purchase Order and GTC were not part of the FACTS Contract, this determination could not divest them of their authority to decide [EnGenius's] claims arising under the FACTS agreement" because the trial court had already "determined that there was a valid agreement to arbitrate." (COA Op at 5, App 687a). In other words, once *vested* with jurisdiction the Panel could not be *divested* of that power.

Fundamental to the legitimacy of any award is the power of the adjudicating body to make that award. The point is proven by analogy to a court's subject matter jurisdiction.

(a) Analogy to subject-matter jurisdiction

When a court determines that it has no jurisdiction, a court should proceed no further. *Fox v Bd of Regents of Univ of Mich*, 375 Mich 238, 243; 134 NW2d 146, 148 (1965); *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 265 n 3, 671 NW2d

[13] This unique sequence of events likely explains the dearth of reported case law involving factually similar situations.

125 (2003); see also *Trost v Buckstop Lure Co*, 249 Mich App 580, 586; 644 NW2d 54 (2002) (holding that when a court lacks subject-matter jurisdiction, "the court's acts and proceedings are of no force and validity"). "A court either has, or does not have, subject-matter jurisdiction over a particular case." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001).

(b) These same rules apply to arbitration subject-matter jurisdiction

An arbitrator assumes the same role as a judge. The key difference, however, is the contractual source of the arbitrator's power to adjudicate. Whereas a state court derives its power to adjudicate from either the Michigan Constitution or by statute, an arbitrator's subject-matter jurisdiction or power to adjudicate derives solely from the agreement between the parties. See *Stolt-Nielsen SA v AnimalFeeds Int'l Corp*, ___US___, 130 S Ct 1758, 1773-1774 (2010) ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."); *First Options of Chicago, Inc v Kaplan,* 514 US 938, 943; 116 S Ct 1920; 131 L Ed 2d 785 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—which [sic] the parties have agreed to submit to arbitration."); see also *Smith v Highland Park Board of Educ.,* 83 Mich App 541, 546; 269 NW2d 216 (1978) ("An arbitrary award outside the scope of the agreement of arbitration is not binding on anyone, because it has no legal sanction.").

Parties can place limits on the terms of the arbitration, but "[a] party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration." *Kaleva-Norman-Dickson Sch Dist No 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975). Just as a lack of jurisdiction renders a court powerless to act, the effect is the same in arbitration. See *Stowe v Mutual Home Builders Corp*, 252 Mich 492, 497; 233 NW 391 (1930) (holding that an "award outside of the scope of the agreement of arbitration is not binding upon anyone, because it has no legal sanction").

C. Conclusion: The Arbitration Panel's FACTS Award Is Unenforceable

The answer to the question posed by this Court is "No." Once the Panel determined that the arbitration clause was not included in the parties' FACTS contract, the Panel was not empowered to retain jurisdiction over the arbitration of that dispute and render an award for its breach. In the absence of an agreement to arbitrate, the Panel should have stopped and sent that matter back to the trial court. As the authorities discussed above make clear, arbitrating a contractual dispute that was not subject to an arbitration agreement exceeds an arbitrator's powers and cannot be allowed to stand.

VI. Argument: With Respect to Each of the Three Awards, the Court of Appeals Failed to Perform the Review Required Under *Gavin*

A. DAIIE v Gavin Is the Law on the Standard of Review of Arbitration Awards

This Court's decision in *DAIIE v Gavin*, 416 Mich; 331 NW2d 418 (1982), is the seminal authority on a court's responsibility to review an arbitration award. See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich at 496 ("The appropriate standard of review

for determining whether arbitrators have exceeded the scope of their authority was set forth by this Court in *DAIIE v Gavin*."); *Hayman Co v Brady Mech, Inc*, 139 Mich App 185, 188; 362 NW2d 243 (1985) ("We agree with the plaintiff that the standard adopted in *Gavin* is applicable not just to the automotive insurance policy setting, but to all statutory arbitration."). Even EnGenius agrees *Gavin* is the law. (Resp in Opp to Ford's Applc for Leave at p 5, App 769a).

B. Under Gavin, Material Errors of Law Must Be Corrected

One of the Court's primary concerns in *Gavin* was that the Michigan judiciary not be used as "a procedural pass-through bureaucracy which may, by agreement of private disputants, be used to validate patently erroneous arbitration awards as a trade-off for docket relief and speedy, inexpensive, and unreviewable dispute resolution." *Gavin* at 433.

With these concerns in mind, this Court described the appropriate role of the judiciary:

> If the appellate judiciary has any proper function at all, it is to correct material error. In determining whether to reduce to judgment the awards of statutory arbitrators, one of the court's functions, perhaps its most important, is to determine whether the award rests upon an error of law of such materiality that it can be said that the arbitrators "exceeded their powers." Thus, in statutory arbitration, the arbitrators are not free to ignore controlling principles of law, either intentionally or unintentionally, even with the consent of the parties, and expect an ultimate judicial imprimatur as well.

Id. at 433-434. Providing concrete advice for that role, this Court then explained that "by ignoring express and unambiguous contract terms, arbitrators run an especially high risk of being found to have 'exceeded their powers.'" *Id.* at 434.

The Court further observed that the role of the reviewing courts is not to "discern the mental path leading to an award" or scrutinize the arbitrator's "intermediate mental indicia," and that "the arbitrator's findings of fact are unreviewable." *Id.* at 429. However, "just as a judge exceeds his power when he decides a case contrary to controlling principle of law, so does an arbitrator." *Id.* at 444. The role of the judiciary is to "secure to litigants who come to the courts for judicial confirmation and enforcement of arbitration results, that which we believe they agreed to: an arbitration award rendered according to the law which governs their dispute." *Id.* at 445.

This Court in *Gavin* wrestled with the proper *balance* to be struck in reviewing errors of law by arbitrators. *Id.* at 430. On one end of the spectrum are errors that "so plainly demonstrate a disregard of principles fundamental to a fair resolution of the dispute, or may so unequivocally generate a legally unsustainable result, that they cannot be said to be within the parties' agreement to arbitrate or the arbitrator's authority." *Id.* at 430. At the opposite end of the spectrum it is "equally plain that there are cases in which error committed by the arbitrators, either in the procedure governing the conduct of the dispute resolution or even in the application or non-application of a legal principle, is so minimal and inconsequential to the outcome of the arbitration as to be immaterial." *Id.*

This Court observed that justice and common sense require drawing "a line between the two and that it be drawn sufficiently close to the center of the spectrum that

it cannot in fairness be said that the line is a fiction and that errors of substantive law, no matter how egregious, are never reviewable because they are the price paid for the procedural advantages of the dispute resolution." *Id.* An "arbitrator's decisional process is circumscribed by a requirement of adherence to the principles of law which govern the issues in dispute. Chief among them is the contract which most immediately defines the rights and duties of the parties and confers upon the arbitrator the authority to act." *Id.* at 432.

The point here is that one cannot reduce the entire standard of review of arbitration awards by reducing it to the quip that it is "among the narrowest known to American law," and concluding that "decisions on the merits are not judicially reviewable." (COA Op at p 3, App 685a). That is not the law in this state. Had the Court of Appeals followed *Gavin*, and done so correctly, it would have reviewed each award and concluded that each award was the product of a material legal error plainly evident on the face of the award and, but for those errors, there would have been a substantially different outcome—in each situation.

C. *The Arbitration Panel Committed a Material Error of Law that Warrants Vacating the FACTS Award*[14]

The Panel concluded that the FACTS contract consisted of the June 28, 2000, document and nothing more. Nonetheless, the Panel's *award* draws from that document

[14] If the Court agrees that the Arbitration Panel lacked power or jurisdiction to render an award with respect to the FACTS contractual dispute once it found that the arbitration clause was not part of the FACTS contract, there is no need to reach this issue. But assuming that the Panel did have the power to adjudicate and render an award, the Court of Appeals should have nonetheless reviewed the legal error associated with that award—an error that appears on the face of the award itself.

as well as Ford purchase orders, selectively using some provisions and not others. After concluding that the June 28, 2000, document was the "sole" document comprising the FACTS contract, the Panel immediately began to borrow or "cherry-pick" terms from other documents and cobble-together a *new* contract upon which to base an award. (Final Award at p 2, App 78a). The Panel was forced into doing so because the June 28, 2000 document contains no payment or pricing for FACTS services (Final Award at p 3, App 79a) ("Price was not an essential term of the bilateral contract.").

The 2001 FACTS Purchase Order in contrast *did contain* pricing information for FACTS services performed by EnGenius and paid for by Ford. (Dissenting Op at pp 14-15, 18-19, App 34-35a, 38-39a). That purchase order involved the *same* services discussed in the June 28, 2000 document. (*Id.*). When EnGenius agreed to perform services under the 2001 Purchase Order, EnGenius accepted the terms and conditions set forth in the purchase order. See *Daimler Chrysler Corp v Wesco Dist, Inc*, 281 Mich App 240, 248; 706 NW2d 828 (2008).

One of the conditions that EnGenius accepted was an integration clause—

> (b) Once accepted, *such Purchase Order together with these terms and conditions will be the complete and exclusive statement of the purchase agreement.* Any modifications proposed by the seller are not part of the agreement in the absence of Buyer's written acceptance.

(App 142a) (emphasis added). A written integration clause is conclusive evidence that the parties intended *that document* and not some other document to be the final and complete expression of their agreement. See *ADR N Am, LLC v Agway,* 303 F3d 653, 658 (CA 6, 2002). When, as here, the purchase order includes an integration clause, that

contract is "conclusive and parole evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete 'on its face.'" *UAW-GM Human Resources Ctr v KSL Recreation Corp*, 228 Mich App 486, 502; 503 NW2d 411 (1998) (citation omitted).

Ignoring the fact that EnGenius accepted all the terms in the 2001 FACTS Purchase Order is a "substantial error of law." But for that error the FACTS award would have been substantially different. It would have been "zero" since EnGenius was admittedly paid in full for the work it performed under the 2001 FACTS Purchase Order.

Refusing to recognize the 2001 FACTS Purchase Order as part of the FACTS contract created unique problems for the Panel: (1) how to credibly explain why the subsequent 2001 FACTS Purchase Order was not part of the FACTS contract; and (2) how to determine damages for a breach of "an agreement" that contains no pricing information and on its face appears to be incomplete. With one stone, the Panel killed two birds—"[t]he Panel finds that the POs were vehicles for payment and not part of the FACTS contract." (Final Award at p 2, App78a). With that statement the Panel concluded it was empowered to not only treat the purchase orders as not part of the FACTS contract, but also to selectively lift pricing information from those same purchase orders to determine damages for a breach of the June 30, 2000, document which the Panel had concluded was a binding agreement in and of itself.

The controlling rule of law is that "contemporaneous documents relating to the same transaction" should be construed together. *Tomecek v Bavas*, 482 Mich 484, 493; 759 NW2d 178 (2008); *Bed v Fallon*, 307 Mich 466, 471-472; 12 NW2d 396 (1943)

("[I]t may reasonably be inferred that defendant gave plaintiff the purchase order of February 16th in pursuance of their agreement of February 5th. Therefore, such agreement and order should be construed together.") (citation and internal quotation marks omitted). Moreover, a contract must be read "as a whole" such that any interpretation "harmonizes all of the relevant language." *Helms v LeMieux*, 486 Mich 937; 782 NW2d 503 (2010).

Although this alleged error concerning the Panel's disregard of the 2001 FACTS Purchase Order as a mere "vehicle of payment" was briefed, the Court of Appeals never addressed it. Even if the Court of Appeals might ultimately disagree with Ford, it should have at least addressed ALL the points briefed on appeal.

D. The Arbitration Panel Committed a Material Error of Law That Warrants Vacating the eCATS Award

1. Error on the face of the eCATS award

As is evident from the face of the award, the arbitrators also clearly exceeded their powers when, having expressly found that the eCATS contract did not provide guaranteed annual payments, the Panel awarded guaranteed payments anyway.

In its analysis, the Panel found that "unlike the FACTS contract, there is a fixed price." (Final Award at p 6, App 82a). Specifically, the Panel states it found "that the eCATS contract is a fixed price contract of $32 million based upon deliverables, subject to the termination provision." (Final Award at p 8, App 84a). But, inexplicably, the Panel then awarded EnGenius damages based upon "the amount of the eCATS contract for the years 2000 and 2001, plus the four month termination provision"—the amount

EnGenius claimed was *guaranteed* for the first two years and four months—and an additional amount of $2,878,000 for damages on "additional pre-commits." (*Id.*).

The arbitrators made no findings or calculations to support these damages or that explained how they were caused by Ford's breach. Rather, they simply cited and adopted the calculation of EnGenius's damages expert, Barry Lefkowitz, who assumed $11.5 million in "annual payments" allegedly guaranteed for the first two years and four months of the contract term, less the amounts Ford had paid for work actually completed. (Final Award at p 15, citing Lefkowitz, Arbitration Tr 10/1/07 at 19-20, App 369-370a). The Panel then added another $2,878,800 for "pre-commits" under what appears to be some type of unpleaded and legally mutually exclusive quantum meruit theory of recovery, even though all quasi-contract bases for such an award had previously been dismissed.

Stating that the parties' contract does not provide for guaranteed annual payments and then awarding those very payments is a clear disregard of the law and the parties' contract. See *Gordon Sel-Way, Inc.*, 438 Mich at 498 (arbitrators exceed their power when they act beyond the material terms of the contract by ignoring its express and unambiguous terms). As the Panel itself found, nowhere in the eCATS contract were guaranteed annual payments provided.

The same disregard of the law invalidates the arbitrators' award of $2.8 million for so-called "pre-commits"—i.e., eCATS contract work that Ford allegedly authorized without issuing a Purchase Order. The Panel awarded the total contract price for all of

that work, whether EnGenius had done it or not, and despite the fact that they had dismissed all quasi-contractual claims.

2. The Court of Appeals' analysis

Despite the fact that the Panel's award had no basis whatsoever in the parties' eCATS contract, the Court of Appeals declined to disturb it. This is not the review envisioned by *Gavin.* Worse still, the review the Court of Appeals did perform consisted of reading into the award a nonexistent rationale. The "finding of fact" attributed to the Panel (that the eCATS award was for work that had been completed) is not one the Panel made. In disregard of this Court's directive in *Gavin* that reviewing courts not attempt to "discern the mental path leading to an award," the Court of Appeals did exactly that.

Not only did the Court of Appeals attribute to the Panel a finding that it did not make but also on a claim EnGenius never pursued. EnGenius did not seek "compensation under the eCATS Contract for work that had already been completed." EnGenius sued to be paid for work under the eCATS contract that EnGenius did not complete. Excluding the Wayne plant launch, EnGenius did not complete the deliverables under phase two of the eCATS contract.[15] EnGenius nevertheless sued for

[15] EnGenius was paid in full for phase one of the eCATS contract. (EnGenius Br on Appeal at pp 10, 34-35, App 629a, 653-654a). EnGenius was paid upon the launch of the Wayne plant. And, EnGenius was paid an additional $5.5 million for work under phase two of the eCATS contract, a sum that its expert deducted from his calculation of damages. (Final Award at 15, citing Lefkowitz, Arbitration Tr. 10/1/07 at 19-20, App 369-370a).

full payment under phase two, blaming Ford for EnGenius's failure to provide the deliverables in phase two.[16]

In support of its argument to be paid for work not completed under phase two, EnGenius took the position that phase two of the eCATS contract contemplated Ford making "fixed minimum" payments, not payments upon EnGenius providing deliverables. (See EnGenius's Br before the COA at 7, asserting Ford breached the eCATS contract by failing to make "fixed annual payment in specific amounts set forth in the agreed to cost matrix."). As the Panel itself noted in its award, "EnGenius claims that Ford failed to make the fixed payments of the contract. ..." (Final Award at p 7, App 83a). Even EnGenius's expert (upon whose testimony the Panel based its eCATS award) calculated the payments allegedly owed to EnGenius solely as the "annual contract fee." (Lefkowitz, Arbitration Tr, 10/1/07, p 18, App 368a, cited by the Final Award at p 15, App 91a).

Simply put, EnGenius never claimed to have performed over $14 million in contract deliverables for which it had not been paid. Instead, EnGenius claimed it was not paid the amount it was *guaranteed* under the eCATS contract—the fixed payment that it claimed it was entitled irrespective of doing *any* work. It was thus surprising when the Panel awarded EnGenius a measure of damages the Panel a few pages earlier stated was not available under the eCATS contract. It was likewise surprising when Ford asked the Court of Appeals to address the facial discrepancy in the Panel's award and the

[16] This tactic caused dissenting arbitrator Lippitt to note, "[i]t takes chutzpa to breach a contract and then sue for specific performance of it." (App 39a).

Panel's construction of the eCATS contract, only to have the Court of Appeals ignore that discrepancy and affirm the Panel's award on a basis that not even EnGenius requested.

E. The Panel Committed Several Material Errors of Law that Warrant Vacating the Tortious Interference Award

1. The Panel's tortious interference award was based upon nothing more than Ford's decision to change vendors which, standing alone, is not a tort

From the face of the tortious interference award, it is clear that the arbitrators awarded damages to EnGenius[17] based upon Ford's decision to change vendors and discontinue using the services of EnGenius-EU (a/k/a "EEU"). Hence, the first material error that is apparent is that the Panel awarded damages based on alleged conduct that was not improper, let alone a tort.

EnGenius-EU's damages expert, Barry Lefkowitz, whose opinion the Panel adopted, made his calculation solely based on lost profits to EnGenius-EU caused by Ford's decision to change vendors. (See EnGenius's Br in the Court of Appeals at p 38, App 657a (citing Oct 1, 2007 Tr at 151-152 (Lefkowitz)). The same lost profits reasoning stemming from cancellation of the EnGenius-EU contract pervades the Panel's award. The Panel states that the actions of the project manager for eCATS in Europe, Phillip Jameson, "clearly were designed to interfere with EnGenius and *place Ford's business elsewhere*." (Final Award at p 12, App 88a) (emphasis added). And the Panel

[17] The names EnGenius and EnGenius-EU are used interchangeably by the parties. And as the Panel's discussion reveals, it was the Panel, not Ford, that used the terms the names "EnGenius" and "EnGenius-EU" interchangeably in its discussion of the tortious interference award. Hence, Ford is not misleading anyone by using the names the Panel itself used.

pointed to a "strategy of leaving EnGenius out," "tortiously interfering *with EnGenius business relationships*." (Final Award at pp 12-13, 88-89a) (emphasis added). The Panel then found "the amount of damages caused by Ford's tortious *interference with EnGenius* to be $1,946,131, based upon the Lefkowitz testimony." (Final Award at p 16, App 92a, citing Tr 10/1/07 at 61-62) (emphasis added) (App 371-372a).

The problem with the Panel's award is that the claimed interference by Ford had nothing to do with EnGenius-EU's employment contracts and everything to do with Ford's decision to change vendors. But that is not a tort. Under Michigan law, Ford could not have wrongfully interfered *with its own contracts with EnGenius.* See *Reed v Mich Metro Girl Scout Council,* 201 Mich App 10, 13; 506 NW2d 231 (1993) ("To maintain a cause of action for tortious interference, the plaintiffs must establish that the defendant was a 'third party' to the contract or business relationship.").

2. The Panel's measure of damages for the tortious interference award bore no relationship to the alleged interference with employment contracts between EnGenius-EU and its employees

In addition to not being a tort, the damages the panel awarded were legally unconnected to any alleged tortious interference with any employment contract. The facts here match up with another case. In *Urban Assocs, Inc v Standex Elecs, Inc,* 216 Fed Appx 495 (CA 6, 2007), Urban accused Standex of wrongfully luring away a certain Urban employee, Ms. Falzone. Once Standex hired Falzone, Standex could use her as its own salesperson rather than paying commissions to Urban to have Falzone perform the same work. Standex made a business decision to take the sales in-house and hired away

the employee involved in those sales from Urban and then dropped Urban as a vendor. The Sixth Circuit rejected Urban's intentional interference claim—

> Plaintiff is correct that Michigan law provides a cause of action for tortious interference with ... an employee's at-will employment contract, such as is the case with Ms. Falzone. *See Health Call v. Atrium Home & Health Care Servs,* 268 Mich App 83 [; 706 NW2d 843 (2005)].[footnote omitted]] Nevertheless, Plaintiff has not suffered any damages as a result of Standex's inducement of Ms. Falzone [sic] to leave Plaintiff. The only client that Plaintiff lost in connection with Standex's actions was Standex ... and it is clear that Standex terminated its agreement with Plaintiff because it wanted to cease relying on sales representatives. Plaintiff would have lost Standex as a client even if Ms. Falzone had decided not to leave Plaintiff's employment.

Id. at 513. Likewise here, even assuming that Ford interfered with the employee contracts, what difference did that make with respect to EnGenius-EU's contract with Ford? EnGenius was losing that business opportunity no matter what.

Thus, the arbitrators' finding that Ford tortiously interfered with EnGenius-EU's employment contracts did not support a damage award that was clearly based on Ford's decision to take its business elsewhere.[18]

---

[18] As the dissenting arbitrator observed, none of the EnGenius-EU employees whose employment relationships were allegedly interfered with testified. (Dissenting Op at pp 51-53, App 71-73a). The Panel made no finding that if these employees had not left, the contract would have stayed with EnGenius-EU. On the contrary, the testimony relied upon by both the Panel and EnGenius was that the work was being moved to a new vendor regardless. (Final Award at p 11, App 87a). The Panel's own award makes clear that the alleged "interference" occurred after the decision to change vendors already had been made. (*Id.* at 12, App 88a.)

3. The Arbitration Panel deprived Ford of the opportunity to present evidence to rebut EnGenius's diminution in value damage theory

As damages for the alleged tortious interference, the arbitrators awarded the diminution in value of EnGenius-EU as calculated by EnGenius's expert, Barry Lefkowitz.[19] (Final Award at p 16, App 92a, citing Arbitration Tr, 10/1/07 at 62-63, App 372-373a). The Final Award leaves no doubt on this point by citing the exact testimony and dollar figure ($1,946,131) provided by Mr. Lefkowitz:

> The Panel finds that the amount of damages caused by Ford's tort[i]ous interference with EnGenius to be **$1,946,131**, based upon the Lefkowitz testimony. ***(Tr. 10/1/07 at 61-62)***

(*Id.* (emphasis in original)). Moreover, there is no question that Lefkowitz's theory was based on "diminution in value." ("Q. Can you please explain how you arrived at the diminution in value of EnGenius-EU . . . .? A. . . . [t]he value of the company would have been $1,946,131.") (Lefkowitz, Arbitration Tr 10/1/2007, pp 61-62, App 371-372a).

As discussed, there is no question that the damage formula the arbitrators used—*diminution in value* of EnGenius-EU—had nothing to do with the breach of any individual employment contract, but rather was intended to compensate EnGenius for the loss of Ford's business. That was bad enough, but to make matters worse, the arbitrators had previously dismissed *all* of EnGenius's claims for alleged *diminution in value*:

> Ford's Motion [to dismiss] Diminution of Value of EnGenius is granted:
>
> 1) This claim constitutes consequential damages not contemplated by parties at time of contract.

[19] Lefkowtiz's diminution of value analysis is a lost profits analysis.

2) Also, if UCC applies, not provided there as well.

3) Even if [Plaintiffs] are entitled to guaranteed annual payments (not decided here), Global Terms would still prohibit additional consequential damages.

(October 16, 2007 Arbitration Order, App 323a). All claims for recovery for diminution of value were gone from the case. Although it should have been unnecessary, Ford's counsel nonetheless, out of an abundance of caution, confirmed with the Panel that if for any reason the Panel changed its mind, Ford could at that time call its expert to rebut those valuations:

> MS. LANG: My next issue is, it would be my intent, I was going to have Van Conway testify tomorrow. He is only going to testify about the issues remaining with the [October 16, 2007] order in place, not the issues that have been dismissed; obviously, that would include the evaluation [sic] of EnGenius and EnGenius-EU...If for any reason the Panel decides to reconsider any of those issues, I want to reserve the right to bring him back at that time.
>
> JUDGE HOWARD: Which you would have automatically. And I might add, should he have the ability to bring in people, you will have the opportunity of responding. He will not be cut off, and I'm not saying that that's going to happen.
>
> MS. LANG: I understand that.
>
> JUDGE HOWARD: I understand. We got it.

(October 22, 2007 Tr at 5-6, App 328-329a).

As a result of this ruling and assurance, Ford's damages expert did not address alleged diminution in value damages. The Panel then turned around and awarded *diminution of value* as damages for tortious interference without giving Ford the opportunity to offer rebuttal expert testimony as promised.

Both the Michigan Court Rules and the Federal Arbitration Act require that an arbitration award be vacated when a party is precluded from offering evidence material to the dispute. MCR 3.602(J)(2) (award vacated if the arbitrator "refused to hear evidence material to the controversy"); 9 USC 10(a)(3) (award vacated if the arbitrators are "guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy"). If a party is prevented from offering evidence material to the controversy "[i]t makes no difference that the [arbitration] panel may have acted only in neglectful disregard rather than by explicitly 'refusing' to hear the evidence." *Confinco, Inc v Bakrie & Bros, NV*, 395 F Supp 613 (SDNY, 1975).

The Panel's failure to allow Ford's evidence, whether deliberate or accidental, requires vacating this arbitration award.

F. Conclusion: The Court of Appeals Should Have Reviewed all Three Awards Under the Gavin Standard of Review and Had It Correctly Done So, All Three Awards Should Have Been Vacated

The legal errors committed by the Panel were squarely reviewable under *Gavin*. Each involved a material error. Each involved an error apparent on the face of the award. And, but for the error, each award would have been substantially different. The Court of Appeals did not correctly apply the *Gavin* standard of review. Had it done so, all three awards should have been vacated.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in this brief, Ford requests that this Court reverse the July 29, 2010 judgment of the Court of Appeals and vacate the Panel's award in its entirety.

Regarding the FACTS contract dispute, if this Court concludes that the Panel should have stopped arbitrating that dispute after it concluded Ford's GTC was not part of the FACTS contract or that the Panel had no power to revisit the trial court's implicit finding that the GTC *was* part of the FACTS contract (upon which its arbitrability determination was necessarily based), then this Court should vacate the FACTS award and remand the FACTS contract dispute back to the trial court for further proceedings.

With respect to the remainder of the case, this Court should enter judgment in favor of Ford Motor Company.

Respectfully submitted,

DICKINSON WRIGHT PLLC

By: Edward H. Pappas

Edward H. Pappas (P23224)
Kathleen A. Lang (P34695)
Phillip J. DeRosier (P55595)
Attorneys for Ford Motor Company
500 Woodward Avenue, Suite 4000
Detroit, Michigan 48226-3425
(313) 223-3500

Attorneys for Defendant-Appellant Ford Motor Company

Dated: June 8, 2011