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 REPLY 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
AUG 03 2011
CORBIN DAVIS
CLERK SUPREME COURT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. Introduction 1

II. Because the Power to Arbitrate Derives from the Parties' Agreement, There Must Be an Agreement to Arbitrate 1

A. EnGenius never directly answers the question posed by this Court 1

B. None of the "reasons" given by EnGenius empowers an arbitration panel to render an award in the absence of an agreement to arbitrate 2

III. This Court's *Gavin* Standard of Review Permits Review of "the Merits" of an Arbitration Award, Provided the Award Is a Product of a Material Legal Error Plainly Evident on the Face of the Award and but for That Error, There Would Have Been a Substantially Different Outcome 5

IV. The Three Legal Errors Reviewable Under *Gavin* 7

A. An award based upon selective lifting of pricing information from a contract not found to be part of the FACTS contract utilizing a new legal doctrine 7

B. An award of guaranteed payments for breach of the eCATS contract that did not contemplate guaranteed payments 8

C. An award of damages for tortious interference based upon actions that were neither a tort nor related to interference with any employment contract 10

V. Conclusion 10

TABLE OF AUTHORITIES

Cases

Carr v Kalamazoo Vegetable Parchment Co, 354 Mich 327; 92 NW2d 295 (1958) 1

DAIIE v Gavin, 416 Mich 407; 331 NW2d 418 (1982) ..... passim

Detroit v A W Kutsche & Co, 309 Mich 700; 16 NW2d 128 (1944) 8

First Options of Chicago, Inc v Kaplan, 514 US 938 (1995) 1

Gordon Sel-Way, Inc v Spence Bros, Inc, 438 Mich 488; 475 NW2d 704 (1991) 8

Granite Rock Co v Int'l Bhd of Teamsters, ___ U.S. ___; 130 S Ct 2847 (2010) 2

I. Introduction

Ford presented two main issues for consideration by this Court: (1) can an arbitrator proceed to adjudicate and render an award after determining that there was no agreement to arbitrate that dispute (the question posed by this Court); and (2) under the standard of review announced by this Court in *DAIIE v Gavin*, 416 Mich 407; 331 NW2d 418 (1982), is Ford entitled to have the eCATS and tortious interference awards vacated? The questions are not addressed in EnGenius's response, which amounts to an essay on everything but those two issues.

II. Because the Power to Arbitrate Derives from the Parties' Agreement, There Must Be an Agreement to Arbitrate

A. EnGenius never directly answers the question posed by this Court

The question this Court posed was whether the Panel was "empowered to retain jurisdiction over the arbitration of that contract and to render an award for its breach," "having determined that the arbitration clause was not included in the parties' FACTS contract." *EnGenius, Inc v Ford Motor Co*, 488 Mich 1052; 794 NW2d 615 (2011). Ford answered the question in a straightforward manner—once the Panel found that the agreement to arbitrate was "no more than proposals for additional terms to the FACTS contract never accepted by [EnGenius]," the Panel should have stopped. Arbitrators have no power to arbitrate in the absence of an agreement to arbitrate that dispute. See *First Options of Chicago, Inc v Kaplan*, 514 US 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration"); *Carr v Kalamazoo Vegetable Parchment Co*, 354 Mich 327, 332; 92 NW2d 295 (1958) (referring to the "universal holding—'that the arbitrator derives his power solely from the agreement between the parties'").

In contrast, EnGenius avoids answering the question directly, instead providing a hodgepodge of reasons for dispensing with the need for any agreement to arbitrate the FACTS dispute. EnGenius begins with the argument that Ford "waived," or at least should be estopped from complaining about, a lack of arbitrability because it was *Ford* that asked for arbitration. Next, EnGenius tells this Court that Ford should have anticipated the possibility that the Panel might find that there was no agreement to arbitrate, and that it is too late now to complain. EnGenius then tells this Court that the lack of an actual agreement to arbitrate the FACTS contract dispute can be overlooked when, as here, there is an arbitration clause somewhere in the record, albeit as part of a different contract. Finally, EnGenius contends that to the extent there must be a connection between that arbitration clause and the FACTS contract dispute, that connection was made here because the Panel did selectively lift (or more properly extrapolate) pricing information from the 2001 FACTS Purchase Order, and in doing so necessarily "touched upon" the arbitration agreement. In other words, EnGenius argues that the Panel's power to arbitrate can be supported from a host of reasons *other than* the existence of an actual agreement to arbitrate that dispute. But that is simply not the law.

B. None of the "reasons" given by EnGenius empowers an arbitration panel to render an award in the absence of an agreement to arbitrate

EnGenius addresses *Granite Rock*'s rejection of a mere request for arbitration as a substitute for an arbitration agreement the only way it can—by ignoring it. *Granite Rock Co v Int'l Bhd of Teamsters*, ___ U.S. ___; 130 S Ct 2847, 2863 (2010). Instead, EnGenius repeatedly relies on the fact that Ford itself requested that the FACTS contract dispute be referred to arbitration, as if that were the entire answer to the issue. (Br at pp 23-24 and 28). Like *Granite Rock*, however, Ford by seeking arbitration did not agree to submit the question of arbitrability to the arbitrators or consent to arbitrate a dispute the arbitrators ultimately concluded was not arbitrable. Ford's request for

arbitration was based upon the premise that the 2001 FACTS Purchase Order, which contained the only arbitration clause in the record, was part of the FACTS contract.

EnGenius continues its "waiver" theme by arguing that even *after* the trial court determined the arbitrability of the FACTS contract dispute (a precondition to referring the matter to arbitration and a conclusion that necessarily embodies a finding that the arbitration clause *was* part of the FACTS contract), Ford should have anticipated that the arbitrators would rewrite the FACTS contract, find that it did not contain an arbitration clause, and then proceed to render an award anyway. Ford was under no obligation to anticipate a decision by the Panel to overturn the trial court's basis for arbitrability because the issue of arbitrability was outside the Panel's jurisdiction. Once the arbitrators' award made clear, however, that they had determined Ford's purchase orders to be mere "vehicles for payment" and not part of the parties' agreement – and therefore that they were considering a contract they concluded did not contain an arbitrability provision – Ford timely and properly raised the arbitrability issue.

While the arbitrators were certainly permitted to interpret the parties' contract, they could not decide the question of arbitrability because the parties did not delegate that question to them. Even EnGenius agrees that the trial court was responsible for deciding arbitrability. (Br at p 26). Thus, the question is not whether the arbitrators could interpret the FACTS contract, but instead whether, in the course of doing so, they could in practical terms undo the trial court's finding of arbitrability. As discussed, the answer is plainly no because the parties did not submit the issue of arbitrability to the arbitrators.

Still grappling for a better answer, EnGenius next argues that the referral to arbitration – and not the arbitration agreement – gives the arbitrators their power. EnGenius contends that once the trial court referred the FACTS dispute to arbitration, power was vested at that moment and could not be subsequently divested. This was the Court of Appeals' conclusion as well. EnGenius

even goes so far as to tell this Court that "it is entirely irrelevant whether the POs or the Global terms were or were not directly part of the FACTS Worldwide Lifetime Contract." (Br at p 34). Hence, when the Panel found that there never was an agreement (i.e., a meeting of the minds) to arbitrate the FACTS dispute, it really did not matter. The problem with that argument is that it is inconsistent with the fundamental proposition that in the absence of an agreement to arbitrate, the dispute is not arbitrable. (See authorities cited at pp 16-17 of Ford's principal brief).

EnGenius then argues that an arbitration award cannot be vacated for lack of arbitrability so long as there is an arbitration clause somewhere in the record, and points to a line of cases holding that an agreement to arbitrate is severable. (Br at pp 29-33). This argument fares no better than EnGenius's earlier stabs at avoiding the implications of the Panel's finding about what comprises the FACTS contract. EnGenius claims that Ford "fails to address" this line of cases. (Br at pp 30, 33). But to be "severable," the agreement to arbitrate first has to be part of the agreement. See CPR 8.2 ("[T]he arbitration clause shall be considered as separable from any contract *of which it forms a part.*") (emphasis added). One cannot sever something that was never part of the parties' agreement. According to the Panel, the arbitration clause never formed a part of the FACTS contract.

What EnGenius is really asking is for this Court to recognize a previously unheard of arbitration principle—that no agreement to arbitrate a particular dispute is required so long as the record contains an agreement between the parties to arbitrate some other dispute. This Court should decline that invitation for the obvious reason that it too is at odds with the fundamental principle that arbitration is a matter of contract. If there is no agreement to arbitrate, the dispute is not arbitrable.

As its final fallback argument, EnGenius resorts to arguing that it was not necessary for there to be an agreement to arbitrate in the FACTS contract because the Panel "touched upon" a

document that *did* contain an arbitration clause when it borrowed pricing terms from the 2001 FACTS Purchase Order, while at the same time finding that the FACTS purchase order *did not govern the parties' relationship*. According to EnGenius, this was sufficient for the Panel to grant itself the power to arbitrate the FACTS dispute. (Br at pp 23-24, and 29). That argument cannot be taken seriously. The 2001 FACTS Purchase Order is either part of the contract or there is no agreement to arbitrate.

Once the Panel determined that the confines of the FACTS contract did not include an agreement to arbitrate, the Panel should have stopped arbitrating because it did not have the power to render any award. The power to arbitrate derives from the parties' agreement and absent an agreement there is no power.

III. This Court's *Gavin* Standard of Review Permits Review of "the Merits" of an Arbitration Award, Provided the Award Is a Product of a Material Legal Error Plainly Evident on the Face of the Award and but for That Error, There Would Have Been a Substantially Different Outcome

In response to Ford's challenge to the FACTS, eCATS, and tortious interference awards under *Gavin*, EnGenius correctly recites a portion of the *Gavin* standard of review and concedes that it governs this case. (Br at pp 20-22). But from there on EnGenius disregards *Gavin*.

A searching review of EnGenius's brief reveals only two situations in which EnGenius concedes that review of arbitration awards is even possible: (1) lack of jurisdiction; and (2) "computational errors." (Br at pp 35, 40). EnGenius would have this Court avoid looking at any of the legal errors in the award that Ford has carefully identified. This is why EnGenius begins its brief with yet a third attack on this Court's denial of EnGenius's effort to limit the issues in this appeal. (Br at p vii). EnGenius then attempts to narrow the scope of review to accomplish the same result.

It is not a coincidence that EnGenius never discusses this Court's holdings in *Gavin* with any substance and constantly attempts to recast and narrow the scope of review that the *Gavin* Court announced. EnGenius is effectively advocating the extreme "no review" standard expressly rejected in *Gavin*. Like EnGenius, Nancy Gavin advocated for a "no-review rule," or one of "virtual non-reviewability," based on the notion that the goal of arbitration is the "expeditious, inexpensive, and unreviewable resolution of private disputes." *Gavin*, 416 Mich at 426. But this Court rejected that position, finding that those are "not the goals or purpose" of arbitration. *Id.* The *Gavin* Court instead recognized that "[t]he process of dispute resolution and the procedural advantages of arbitration are the servants of the law governing the issues in dispute, not the reverse." *Id.* at 427.

This not-so-subtle point was lost on the Court of Appeals as well. The statement in the Court of Appeals' opinion that "decisions on the merits are not judicially reviewable" incorrectly states the standard of review of arbitration awards. (Op at p 4).[1] In Michigan, courts have a duty to vacate arbitration awards whenever arbitrators can be fairly said to have acted "in contravention of controlling principles of law." *Gavin*, 416 Mich at 434. As the *Gavin* Court cautioned, the Michigan judiciary "is not a procedural pass through . . . to be used to validate patently erroneous arbitration awards as a trade-off for docket relief and speedy, inexpensive, and unreviewable dispute resolution." *Id.* at 430.

Here, Ford challenges the Panel's FACTS, eCATS, and tortious interference awards on the following grounds:

(1) In rendering an award for breach of the FACTS contract, the Panel found that the 2001 FACTS Purchase Order was not part of the parties' contract, and was instead a mere

[1] The same is true for EnGenius's overly broad statement that "it is black-letter law that a court reviewing an arbitration award may not disturb an arbitration award based upon the alleged merits of the claims." (Br at p 5).

"vehicle[] for payment," yet "cherry-picked" pricing terms from that document and other purchase orders to determine damages because the sole document that it found *did* constitute the parties' contract—the June 28, 2000 document—was admittedly devoid of pricing information;

(2) The Panel awarded guaranteed annual payments as damages for breach of the eCATS contract after finding a mere few pages earlier that the eCATS contract did not provide for guaranteed payments; and

(3) The Panel awarded damages for alleged tortious interference with an employment contract based solely on Ford's decision to change vendors, which is not even a tort.

Contrary to EnGenius's assertion, none of these challenges are to the arbitrator's *factual* findings. Each of these *legal* errors appears on the face of the award. Each error involves an error of law and in each case, but for the error, the award would have been different. In short, all prerequisites have been met for review under *Gavin*.

IV. The Three Legal Errors Reviewable Under *Gavin*

A. An award based upon selective lifting of pricing information from a contract not found to be part of the FACTS contract utilizing a new legal doctrine

Ford argued that it was legal error for the Panel to "cherry-pick" pricing terms from Ford's 2001 FACTS Purchase Order, but not its integration clause, despite finding that Ford's purchase orders were mere "vehicles for payment and not part of the FACTS contract." (Final Award, p 2, App 78a). There simply is no principle of contract law in Michigan that allows for such an "analysis," and EnGenius makes no attempt to persuade the Court otherwise. EnGenius merely avoids the entire discussion by repeating what the Panel concluded. (Br at p 34). Had the arbitrators properly taken into account the 2001 FACTS Purchase Order and its integration clause, there would have been no basis for *any* award under the FACTS contract because EnGenius was admittedly paid in full for the work it performed under that purchase order.

B. An award of guaranteed payments for breach of the eCATS contract that did not contemplate guaranteed payments

Under *Gavin*, when an arbitrator ignores "express and unambiguous contract terms, arbitrators run an especially high risk of being found to have 'exceeded their powers.'" *Gavin*, 416 Mich at 434. On the face of the award, the Panel found that the eCATS contract was "a fixed price contract" "based upon deliverables," and not a "guaranteed fixed annual payment contract" as EnGenius claimed. (Final Award, pp 7-9, App 83-85a). Yet inexplicably, just a couple of pages later, the Panel awarded guaranteed annual payments for the period of time before Ford terminated the eCATS contract. (*Id.* at 15, App 91a). The basis for the award was pointedly the testimony of Barry Lefkowitz, who calculated damages based upon the assumption that the eCATS contract guaranteed EnGenius certain annual payments—exactly what the Panel expressly found that EnGenius was not entitled to recover. (*Id.*)

The Panel plainly exceeded its authority by awarding guaranteed payments to EnGenius after finding that Ford never promised to pay EnGenius guaranteed payments under the eCATS contract. This inconsistency is a clear case of error reviewable under *Gavin.* Arbitrators "have no authority to make an award ... outside of the contract." *Detroit v A W Kutsche & Co*, 309 Mich 700, 711; 16 NW2d 128 (1944); see also *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496-497; 475 NW2d 704 (1991) ("since arbitrators derive their authority from the parties' contract and arbitration agreement, they are bound to act within those terms").

EnGenius dismisses Ford's complaint as being outside the standard of review of arbitration awards, which EnGenius claims is limited to cases of no jurisdiction or computational errors. While using a measure of damages unrelated to the terms of the contract would be the ultimate "computational error," there simply is no support in *Gavin* for EnGenius's position. Under *Gavin*, *any* material legal error evident from the face of the award is subject to review.

As part of this same theme, EnGenius also tells the Court that "an arbitrator is free to determine the amount of damages as he sees fit." (Br at p 40). It is impossible to reconcile EnGenius's argument with this Court's holding in *Gavin* that an "arbitrator's decisional process is circumscribed by a requirement of adherence to the principles of law which govern the issues in dispute." *Id.* at 432. An arbitrator cannot determine damages "as he sees fit," if it violates Michigan law.

EnGenius challenges Ford's use of the term "guaranteed" annual payments, arguing instead that it was entitled to "fixed" payments. (Br at pp 40-41). However, EnGenius never attempts to explain the difference. And EnGenius claims that the Panel found as a matter of fact that EnGenius did just enough work to get the contemplated "fixed annual payments." (Br at p 41). At the same time, EnGenius neither denies being paid $5.5 million by Ford under the eCATS contract (based on work that Ford determined EnGenius *did* perform), nor claims to have performed an additional $14 million in work, i.e., the amount of the award, for which it was not paid. It is therefore clear that EnGenius has abandoned any endorsement of the Court of Appeals' reasoning that the eCATS award was "not based upon a determination that the eCATS Contract called for guaranteed annual payments," and instead was "based upon the arbitrators' determination that plaintiffs were entitled to compensation under the eCATS Contract for work that had already been completed." (COA Op at p 5, App 687a).

The problem with both the Court of Appeals' analysis and EnGenius's explanation is the fact that neither has a basis in the award itself. The Panel's eCATS award was based on its conclusion that Ford's actions "excused Claimant's obligation to provide deliverables," not that EnGenius did work for which it was not paid. (Final Award, p 11, App 87a). EnGenius desperately wants to point to some finding of fact that it did some work under eCATS to justify being paid "guaranteed fixed annual payments," but the Panel made no such finding. This

quandary explains EnGenius's decision to turn to citing portions of the arbitration record, and not the award itself, for proof that EnGenius "did perform work." (Br at p 42).

C. *An award of damages for tortious interference based upon actions that were neither a tort nor related to interference with any employment contract*

EnGenius tells the Court that Ford "improperly stole such employees away from EEU." (Br at p 48). But the damages awarded by the Panel were based not upon stealing any employees from EEU, but calculated by Barry Lefkowitz based upon EEU's *loss of the Ford contract*. The two events are legally unconnected. EnGenius responds again by claiming that "Ford is now improperly attempting to challenge the merits of this factual determination by the Arbitration panel," and since the tortious interference award does not involve a math mistake, it too is not reviewable. (Br at p 47). It may not involve a math mistake, but it certainly involves a mistake of law. Ford's decision to not do business with EnGenius is not a tort, and the loss of that income has nothing to do with "interference" with EEU employment contracts. As the Court of Appeals noted, a party cannot tortiously interfere with its own contract. (COA Op at p 5, App 687a).

V. Conclusion

In lieu of directly answering the question posed by the Court, or addressing what Ford contends are substantial errors of law on the face of the award, EnGenius attacks arguments Ford has never made, recites at length facts that have nothing to do with Ford's appeal, and generally avoids responding to Ford's principal brief. For all of the reasons discussed both here and in Ford's principal brief, the Court should reverse the Court of Appeals' decision and vacate the arbitration award in its entirety.

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: August 3, 2011