

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Shapiro, PJ, and Jansen and Donofrio, JJ)

ENGENIUS, INC., and
ENGENIUS-EU, LTD.,

Plaintiffs-Appellees,

v

FORD MOTOR COMPANY,

Defendant-Appellant.

Docket No. 141977

COA Case No. 290682

LC Case No. 03-331133-CK
Wayne County Circuit Court
Hon. Michael F. Sapala

BRIEF ON APPEAL – APPELLEES

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF BASIS OF JURISDICTION

Defendant, Ford Motor Co. (“Ford”), sought leave to appeal the unanimous July 29, 2010 unpublished *per curiam* Court of Appeals’ Opinion (the “July 29, 2010 Opinion”) and the September 15, 2010 Court of Appeals’ Order denying Ford’s motion for reconsideration of the July 29, 2010 Opinion which affirmed a Judgment entered on January 9, 2009 by Judge Michael F. Sapala of the Wayne County Circuit Court (the “Judgment”) which confirmed an Arbitration Award (the “Arbitration Award”) rendered in favor of EnGenius, Inc. (“EnGenius”) and EnGenius-EU, Ltd. (“EEU”) (collectively, the “EnGenius Parties”) and against Ford dated December 12, 2008.

This Court granted leave to appeal on March 9, 2011 limited to the single, discrete issue related to the FACTS Contract. Specifically, this Court ordered:

The application for leave to appeal the July 29, 2010 judgment of the Court of Appeals is considered, and it is GRANTED. The parties are directed to address whether 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. Order Granting Leave to Appeal, App at 829a.

As a result, this Court has jurisdiction over the single, discrete issue related to the FACTS Contract for which leave to appeal was granted by this Court.

Notwithstanding the foregoing, Ford addressed all the issues raised in its Application, including those issues for which leave to appeal was not granted. Appellees have denied that this Court has jurisdiction over any issue for which leave to appeal was not granted, but this Court denied Appellees’ motion to strike Ford’s non-conforming brief. *See*, Appellees’ Motion to Strike All References to Issues for Which Leave to Appeal Was Not Granted but Which Are Improperly Included in Appellant’s Brief on Appeal Pursuant to MCR 7.316(A)(7) (the “Motion to Strike”) (Docket Entry 90); Appellees’ Reply Brief in Further Support of Motion to Strike (Docket Entry 93); Order Denying Motion to Strike (Docket Entry 94).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER THERE IS ANY BASIS TO SET ASIDE ANY PORTION OF THE VALID, BINDING AND ENFORCEABLE ARBITRATION AWARD AS TO FORD'S BREACH OF THE FACTS CONTRACT WHERE THE TRIAL COURT FIRST DETERMINED ARBITRABILITY PURSUANT TO FORD'S MOTION REQUESTING THE TRIAL COURT TO SEND APPELLEES' CLAIMS TO ARBITRATION AND THEN THE ARBITRATORS SUBSEQUENTLY MADE FACTUAL DETERMINATIONS AS TO THE FACTS BREACH OF CONTRACT CLAIM.

The EnGenius Parties Answer: NO
Ford Answers: YES
This Court Should Answer: NO

- II. EVEN IF THIS COURT SOMEHOW OVERTURNS YEARS OF PRECEDENT AND ALLOWS A REVIEW OF THE FACTUAL DETERMINATIONS AND MERITS OF THE ARBITRATORS' AWARD, WHETHER THERE IS ANY BASIS TO OVERTURN THE ARBITRATION AWARD.

The EnGenius Parties Answer: NO
Ford Answers: YES
This Court Should Answer: NO

INTRODUCTION

This case exemplifies the most critical problem facing arbitration today – disgruntled losing parties, like Ford, that are unhappy with the outcome of a private binding arbitration of their disputes, engage in a never-ending array of challenges to the merits of valid, final and binding arbitration awards, and seek to re-litigate the underlying merits of their disputes in Court, in direct contravention of the promise of arbitration. The United States Supreme Court recently held that “[t]he overarching purpose of the [Federal Arbitration Act] . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *AT&T Mobility LLC v Concepcion*, ___ US ___ (Case No. 09-983, April 27, 2011) (emphasis added).

Nonetheless, unhappy litigants, such as Ford, continue to attempt to persuade courts to review the merits of arbitration awards in derogation of the promise of speedy and cost-effective binding arbitration and well-settled precedent as to the narrow scope of judicial review¹. A number of courts have made clear that they are fed up with the constant stonewalling, delay and meritless challenges to final, binding arbitration awards. For instance, in *Cuna Mut Ins Soc v Office and Professional Employees Internat’l Union, Local 39*, 443 F3d 556, 560-561 (7th Cir 2006), the Seventh Circuit recognized the long line of Seventh Circuit cases that have used Rule 11 sanctions to discourage parties from attempting to nullify the benefits of the arbitral process by making endless challenges in court to arbitration awards, thereby delaying the process and increasing costs. *See also, Dominion Video Satellite, Inc v Eshostar Satellite LLC*, 430 F3d 1269, 1274-1275, 1278-1281 (10th Cir 2005).

As another example, in *B L Harbert Internat’l, LLC v Hercules Steel Co*, 441 F3d 905, 913-914 (11th Cir 2006), the Eleventh Circuit made clear its dissatisfaction with the never-say-die attitude of the losing party in an arbitration by breaking the promise of arbitration by dragging the

1/ Ford has been challenging the merits of the arbitration award in this case for over 2½ years at this point.

dispute through the court system. The Eleventh Circuit noted:

Arbitration's allure is dependent upon the arbitrator being the last decision maker in all but the most unusual cases. The more cases there are, like this one, in which the arbitrator is only the first stop along the way, the less arbitration there will be. If arbitration is to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrator's decision will be honored sooner instead of later.

Ford's tactics here are a prime example of a party breaking the promise of arbitration and destroying arbitration as a meaningful alternative to litigation. The parties already have fully and exhaustively litigated this matter during the past 7½ years. This Court should reject Ford's arguments, and not disturb the Arbitration Panel's Final Arbitration Award rendered over 2½ years ago, so that the very purpose and policy behind binding arbitration is not completely subverted and undermined by virtue of Ford's unrelenting and seemingly unending pattern of stonewall and delay.

In this case, it was Ford who demanded arbitration based upon a broad arbitration clause in its Global Terms and Conditions (the "Global Terms") which Ford drafted and incorporates by reference into every purchase order ("PO") it issues (*i.e.*, Ford essentially demands arbitration of every business dispute it may encounter) pursuant to the arbitration rules Ford unilaterally chose (CPR). Ford's arbitration provision allowed Ford to remove the claims filed by the EnGenius Parties from court to arbitration, which is exactly what Ford did. Ford's arbitration provision is exhaustive and comprehensive, and Ford therefore asserted and persuaded the Trial Court that its arbitration provision encompassed all claims in this matter. However, after a lengthy and full arbitration, Ford now seeks to challenge the merits of the factual determinations of the Arbitration Panel, and further argues that one claim that was submitted to arbitration at Ford's request should somehow not have been arbitrated at all. Ford is attempting to turn the benefit of arbitration on its head by demanding arbitration, then, once an award was rendered against it, challenging the merits of the award as if no arbitration had even taken place. Ford's actions defeat the fundamental purpose and policy behind

arbitration as a “streamlined process” for dispute resolution.

In a transparent attempt to lend substance to its challenge to the valid, binding and enforceable arbitration award, Ford contends that the issues it purports to present are jurisprudentially important because parties “should know what standard of review Michigan courts will apply when reviewing arbitration awards and how that standard will be applied.” In fact, the law on this issue is well settled and crystal clear, and Ford especially well knew the limited standard of judicial review that applied to arbitration awards when Ford included a broad arbitration provision in its Global Terms which Ford has been incorporating into all its POs for years.

Apparently undeterred by the opinion of the Trial Court and the unanimous opinion of the Court of Appeals, which specifically chastised Ford for attempting to challenge and re-litigate the underlying merits of the binding Arbitration Award in direct contravention of the universal standard of limited judicial review of arbitration awards recognized for years by this Court, federal courts and courts throughout the country, Ford now brazenly requests this Court to review and overturn the factual determinations of the final, binding Arbitration Award, which is absolutely prohibited.

After having its arguments exposed for what they truly were in the courts below (*i.e.*, blatant attempts to re-open and re-litigate the merits of the underlying arbitration), Ford now makes little effort to disguise its real position: that the Arbitration Panel in this matter somehow “got it wrong,” and that, unsurprisingly, only Ford’s own party-appointed arbitrator (who, it was subsequently learned, also served as Ford’s lead trial counsel in another trial at the same time as the arbitration hearing itself and afterwards), somehow “got it right.” Indeed, under the rules governing the arbitration in this matter, a unanimous decision by the Arbitration Panel is not required (CPR Rule

14.2)², and Ford’s party-appointed arbitrator’s dissent is not even considered part of the Arbitration Award at all (CPR Rule 14.3). CPR Rules 14.2, 14.3, App at 345a.

In a stunning display of hubris, Ford blames everyone but itself for the award rendered against it. Despite Ford’s desperate effort to re-write the history of this matter, it has already been definitively determined that it was Ford that breached two separate contracts with EnGenius, tortiously interfered with EEU’s relationship with its employees, altered evidence, presented incredible, manufactured and unbelievable testimony that was rejected by the Arbitration Panel, used EnGenius’ proprietary software without right or authorization, and without compensation to EnGenius, and obtained the benefits of millions of dollars of work from EnGenius while stringing EnGenius along, but failing to pay for such work while attempting to acquire EnGenius’ sophisticated software without compensation by deliberately trying to put EnGenius out of business.

Not only does Ford refuse to take responsibility for its own improper actions, as conclusively determined by the Arbitration Panel, it also casts aspersions on all those who disagree with Ford’s trumped up and factually false positions. Specifically, Ford casts aspersions upon the majority of the Arbitration Panel, comprised of former Oakland County Circuit Court Chief Judge Barry Howard and former president of the Michigan Trial Lawyers Association, Sheldon Miller, the well-respected Wayne County Circuit Court Judge Michael F. Sapala, and the well-respected judges of the Michigan Court of Appeals’ panel (Hon. Douglas B. Shapiro, Hon. Kathleen Jansen and Hon. Pat M. Donofrio) that unanimously rejected Ford’s frivolous positions in a detailed and well-reasoned unpublished opinion which applied the proper standard of judicial review of the arbitration award.

In its instant Appeal, Ford asks this Court, just as it asked the Trial Court and the Court of

2/ It is undisputed that the arbitration in this matter was governed by the rules promulgated by the Center for Public Resources (the “CPR”).

Appeals, to review the Arbitration Award on the merits, overturn the factual determinations made by the Arbitration Panel and substitute its judgment for that of the Arbitration Panel, all of which is entirely impermissible and well outside the narrow and limited grounds for which judicial review of an arbitration award is permitted. The Trial Court and the Court of Appeals both properly recognized the well-established role of the judiciary in reviewing an arbitration award, and both the Trial Court and the Court of Appeals properly refused to vacate the Arbitration Award pursuant to the well-settled jurisprudence of this State, as espoused by this Court, as well as made clear by the Federal Arbitration Act (the “FAA”), and all courts across the country. As the Court of Appeals noted in its opinion, 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. *See, e.g., Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991); *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). Indeed, the long-standing and well-settled principles of law in this State and under the FAA make clear that the merits of arbitration awards are not reviewable, and the review and opinions of the Trial Court and the Court of Appeals fully adhered to these well-settled principles. *See, e.g., Gordon Sel-Way, supra; DAIIE, supra; Dawahare v Spencer*, 210 F3d 666, 669 (6th Cir 2000); *Uhl v Komatsu Forklift Co*, 512 F3d 294, 305 (6th Cir 2008); *Nationwide Mut Ins Co v Home Ins Co*, 429 F3d 640, 643 (6th Cir 2005); *Shelby County Health Care Corp v AFSCME, Local 1733*, 967 F2d 1091, 1094 (6th Cir 1992); MCR 3.602(J); 9 USC § 10.

In a desperate effort to challenge the merits of the arbitration claims, Ford, as it did in the Trial Court and the Court of Appeals, continues to rely upon the self-serving dissent (the “Dissent”) of its own party-appointed arbitrator, Norman Lippitt (“Lippitt”). Ford’s reliance upon the Dissent is utterly misplaced and entirely improper inasmuch as the Dissent is not even part of the final Arbitration Award and therefore should not even be considered by this Court. CPR Rule 14.3

unequivocally states: “A member of the Tribunal who does not join in an award may issue a dissenting opinion. Such opinion shall not constitute a part of the award.” CPR Rule 14.3, App at 345a (emphasis added).

Furthermore, notwithstanding that the majority of the Arbitration Panel expressly rejected the arguments raised by Lippitt, Ford now contends that the majority’s ruling, which comprises the entirety of the Final Arbitration Award, should somehow be disregarded in favor of Lippitt’s opinions on the merits, although Ford can offer no explanation (because there is none) as to why Lippitt’s opinions on the merits of highly disputed issues should be given more weight than those of the majority (other than that Lippitt’s Dissent, like all of Lippitt’s rulings during the arbitration, favored Ford, of course).

In any event, the Dissent by Lippitt is not at all surprising inasmuch as Lippitt, as Ford’s party-appointed arbitrator, sided with Ford on every single issue throughout the entire 5½ years of arbitration. Neither of the other two arbitrators, former Judge Barry Howard (“Howard”), the neutral arbitrator, and Sheldon Miller, the EnGenius Parties’ party-appointed arbitrator, consistently ruled for one side or the other, but Lippitt undisputedly ruled only for Ford throughout the entire 5½ years of this highly contested litigation. Lippitt’s pattern of ruling exclusively in favor of Ford on every decision throughout the arbitration became unsurprising once it was revealed that Lippitt was actually serving as Ford’s lead counsel in a multi-million dollar lawsuit in the Wayne County Circuit Court during the very time Lippitt was serving as Ford’s party-appointed arbitrator on the Arbitration Panel. The EnGenius Parties were not made aware of this fact prior to the arbitration, and only learned of this near the conclusion of the extensive arbitration hearings when Lippitt actually adjourned scheduled hearing dates in the arbitration because he had developed a scheduling conflict stemming from his role as Ford’s lead counsel in a multi-week trial before Judge Gillis (American

Axle v Ford, Wayne County Circuit Court Case No. 06-629249-CK) which was scheduled on the very same dates that Lippitt was scheduled to serve as an arbitrator during the final portion of the arbitration hearing in this matter. Lippitt continued his representation of Ford and served as Ford's lead counsel in another major case which was litigated in Wayne County Circuit Court, Innovision v Ford, Case No. 09-003373-CZ, before Judge Wendy M. Baxter, through June 2011.

Ford's implication that the fact that the arbitration award was a "split 2-1 decision" makes it somehow less deserving of deference than a unanimous decision is likewise disingenuous and utterly misplaced. The governing CPR Rules make crystal clear that no weight is to be given to the fact that a decision is not unanimous. CPR Rule 14.2, App at 345a. There is absolutely no requirement for a unanimous decision, and the very reason panels are comprised of an odd number of members is in order to ensure that a panel can not become evenly deadlocked notwithstanding that there may be disagreements among the arbitrators. *Id.* In any event, the Trial Court and the Court of Appeals unanimously confirmed the Arbitration Award rendered by the Arbitration Panel in all respects, and this Court should do the same.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND RELEVANT FACTS

At the conclusion of the arbitration hearing, the EnGenius Parties filed their comprehensive Post-Hearing Brief (which is included in Appellees' App at 22b-72b) along with three volumes of supporting exhibits³, which are part of the Court file⁴. See, Court of Appeals Docket Nos. 74 and 75. Therein, the EnGenius Parties summarized the overwhelming evidence which they presented at the arbitration hearing, fully supporting the merits of their arbitration claims and providing full factual support for the well-reasoned Final Arbitration Award. A summary of the key underlying

3/ These exhibits represent only a small fraction of the total exhibits introduced at the arbitration hearing which were reviewed and considered by the Arbitration Panel.

4/ The exhibits referenced herein are included in Appellees' Appendix.

facts follows which corrects the incomplete and inaccurate factual summary submitted by Ford.

EnGenius was a long time supplier of engineering services and solutions to Ford for approximately 20 years, first as a division of a company called Computer Methods Corporation (“CMC”), and then on its own after it was spun off as a separate corporation from CMC. Arbitration Award, App at 77a. Throughout this 20 year period, EnGenius provided various high-level products and services to Ford, including end of line (“EOL”) test systems, which are complex computer test systems designed to check every component of every Ford vehicle manufactured at a particular plant in order to determine if such vehicles meet the required quality standards to be shipped to Ford’s dealers for sale to the public. *Id.*

From 1992 through 1994, CMC/EnGenius helped support and maintain a comprehensive EOL test system for Ford assembly plants commonly known as “FACTS,” which was used to test every Ford vehicle during the assembly process. Claimants’ Notice of Arbitration, App at 204a. The FACTS system was installed in every Ford plant worldwide, and it was supported by EnGenius in conjunction with other vendors and Ford as part of a team. *Id.*

Because the FACTS system was becoming antiquated, Ford sought to ensure that it would have access to a vendor who maintained the knowledge, skills and personnel necessary to fully support the FACTS system, which Ford would be phasing out over time, so long as Ford chose to continue to use the FACTS system. FACTS Worldwide Lifetime Contract, App at 357a-358a (EnGenius Arbitration Exh. 28). Therefore, on June 30, 2000, Ford and EnGenius entered into an agreement (the “FACTS Worldwide Lifetime Contract”) wherein EnGenius agreed to exclusively provide support for FACTS for as long as Ford continued to use the FACTS system (*i.e.*, for the life of the system), and Ford in turn agreed to exclusively use EnGenius to provide such support for the time it continued to use FACTS. *Id.* Of course, it was within Ford’s discretion whether, and for how

long, it would use the FACTS system at some of its plants, all of its plants or none of its plants, but, to the extent Ford used FACTS, Ford agreed to exclusively use EnGenius for its support, and EnGenius agreed to maintain the skills, knowledge base and personnel to do so. April 16, 2007 Arbitration Tr at 60-61 (Foxworthy), Appellees' App at 78b-79b. Prior to the execution of the FACTS Worldwide Lifetime Contract, there was no assurance that EnGenius (or anyone else) would maintain the resources, knowledge and personnel necessary to continue to support the outdated and obsolete FACTS system because the system was being phased out over time. Appellees' App at 76b-78b (Foxworthy); Appellees' App at 403b-409b (EnGenius Arbitration Exh. 1485).

In the meantime, Ford decided to implement a new and improved state-of-the-art EOL test system to replace FACTS. eCATS Contract, Appellees App at 409b-542b (EnGenius Arbitration Exh. 1494). Following a lengthy and arduous evaluation and bid process conducted by Ford, EnGenius won the bid to develop and implement the new EOL test system, called eCATS. *Id.*

Ford and EnGenius negotiated and signed a comprehensive written contract governing the eCATS project called Software Terms and Conditions (the "Software Terms") which had numerous documents attached thereto and incorporated therein (the "eCATS Contract"). *Id.* The eCATS Contract was negotiated by Nazih Saad ("Saad"), then president of EnGenius, and Charles Kovsky, corporate counsel for EnGenius, on behalf of EnGenius, and Tom Maxwell ("Maxwell"), Ford's Manager of Global Core Final Assembly Engineering, Brian Price, a Ford Purchasing agent, and Ian McGregor, Ford's corporate counsel, on behalf of Ford. Claimants' Notice of Arbitration, App at 206a. The eCATS Contract was a five year contract whereby EnGenius would develop, implement and support state-of-the-art EOL software for Ford for use at any of Ford's plants worldwide. eCATS Contract, Appellees' App at 409b-542b (EnGenius Arbitration Exh. 1494). In connection with the worldwide scope of the eCATS project, EnGenius, at the direction of Ford, established a

company, known as EEU, whose sole purpose was to support the eCATS system in Ford's European plants. Claimants' Notice of Arbitration, App at 209a-210a.

Pursuant to the eCATS Contract, EnGenius was to develop, launch and support eCATS at plants designated by Ford in accord with specifications which were at first to yield the same results as FACTS, but which gradually were expanded to achieve better and additional enhancements. eCATS Contract, Appellees' App at 409b-542b (EnGenius Arbitration Exh. 1494). Pursuant to the eCATS Contract, Ford was to provide to EnGenius: (1) detailed requirements for the Project from Ford "Focus Groups" by January 2000; (2) representative vehicles and modules⁵ for development and validation; (3) test facilities; (4) the specifications for the automotive network exchange ("ANX"), which is required to connect to Ford's computer network; (5) official vehicle specific configuration system ("VSCS") information⁶; (6) Teledata information⁷; (7) official Part 2 specifications⁸; (8) purchase orders ("PO") 12 weeks in advance of delivery strictly to set priorities and to satisfy the annual payments due EnGenius in the aggregate; (9) Ford's Worldwide System Requirements; (10) "Hex" files⁹ for vehicles running the vehicle identification ("VID") block¹⁰;

5/ "Modules" are the various computer sub-systems used by Ford in its vehicles. EnGenius required samples of these modules in order to ensure that eCATS properly communicated with Ford's internal computer software programs.

6/ VSCS information defines all possible configurations for the electronic options on a given vehicle.

7/ Teledata information is a listing of all possible components for a particular vehicle make and model.

8/ Each module on a vehicle has a Part 2 specification associated with it. The Part 2 specification provides the information which the module needs in order to access the vehicle's computer system.

9/ "Hex" files are the computer software files which must be installed in a particular module in order to dictate how the module behaves in the vehicle.

10/ The VID block is a small portion of computer software coded with information identifying the particular vehicle in which the software is installed, such as the vehicle identification number and the options installed on the vehicle.

(11) optimized test sequences¹¹; (12) the training plan for Ford plant personnel; and (13) fixed annual payments in specific amounts set forth in the agreed to cost matrix. *Id.* at Attachments A-F, Appellees' App at 413b-542b.

After the eCATS Contract was executed by Ford and EnGenius, EnGenius began to pour extensive money, time and resources into the eCATS project. Specifically, EnGenius, at great effort and expense: (1) expanded its offices; (2) created a test garage with the necessary equipment; (3) built a computer server room; and (4) at the direction of Ford, facilitated the creation of the affiliated entity, EEU. Claimants' Notice of Arbitration, App at 207a. EnGenius also hired 60-65 engineers who were devoted full time to the eCATS project. April 17, 2007 Arbitration Tr at 182-183 (Foxworthy), Appellees' App at 144b-145b.

EnGenius' job was made exponentially more difficult, costly and time-consuming because Ford failed to fulfill its obligations. For instance, Ford failed to timely provide the following items, among others, which were necessary for the proper, timely and smooth implementation of the eCATS system:

- (1) an ANX connection which would have allowed remote access to the eCATS system (See, e.g., Appellees' App at 131b-132b (April 17, 2007 Arbitration Tr at 60-61, 68-70, 72 (Foxworthy)), 184b-186b (Sept. 20, 2007 Arbitration Tr at 46-48 (Petersen)); 291b-295b (EnGenius Arbitration Exhs. 43, 44);
- (2) test vehicles which would have allowed full and more timely testing of the eCATS system on a variety of vehicle configurations (See, e.g., Appellees' App at 131b-132b (April 17, 2007 Arbitration Tr at 60-61 (Foxworthy)); 165b-166b (Sept. 18, 2007 Arbitration Tr at 25-26 (Petersen)); 225b (Oct. 12, 2007 Arbitration Tr at 27 (Birley)); 309b-310b (EnGenius Arbitration Exh. 71);
- (3) test facilities which would have allowed testing of the eCATS system in a

11/ Because eCATS was able to concurrently communicate with multiple networks in Ford vehicles, the testing time for each vehicle could be reduced. However, Ford had to instruct EnGenius with respect to which networks in a vehicle could be activated simultaneously in order for eCATS to simultaneously communicate with more than one network, thereby reducing the testing time required for a particular vehicle.

plant-like environment (See, e.g., Appellees' App at 132b (April 17, 2007 Arbitration Tr at 61 (Foxworthy)); 183b (Sept. 20, 2007 Arbitration Tr at 39 (Petersen)); 225b (Oct. 12, 2007 Arbitration Tr at 27 (Birley)); 308b (EnGenius Arbitration Exh. 63); and

- (4) teledata information, Part II specifications and VSCS information which were necessary in order to ensure that the eCATS system functioned in accord with Ford's specifications and requirements (See, e.g., Appellees' App at 120b-123b (April 16, 2007 Arbitration Tr at 178-179, 181-182), 131b-132b, 137b (April 17, 2007 Arbitration Tr at 60-61, 78 (Foxworthy)); 166b (Sept. 18, 2007 Arbitration Tr at 26 (Leonard)); 186b-188b (Sept. 20, 2007 Arbitration Tr at 48, 57-58 (Petersen)); 225b (Oct. 12, 2007 Arbitration Tr at 27 (Birley)); 291b-292b, 309b-310b (EnGenius Arbitration Exhs. 43; 71))).

Furthermore, Ford experienced an internal power struggle between Ford's Vehicle Operations ("VO") and Process Leadership ("PL") divisions¹², as well as Ford's North American ("Ford NA") and European divisions, regarding the eCATS project and experienced cash flow problems relating to the eCATS project. See, e.g., Appellees' App at 328b (EnGenius Arbitration Exh. 357); 142b-143b (Apr 17, 2007 Arbitration Tr at 155-156 (Foxworthy)); 193b-194b (Sept. 25, 2007 Tr at 47-48 (Jameson)). In fact, Ford acknowledged that EnGenius was caught in a power struggle between Ford of Europe and Ford NA which admittedly frustrated Ford Europe. Appellees' App at 193b-194b (Sept. 25, 2007 Arbitration Tr at 47-48 (Jameson)). Ford Europe felt that Ford NA treated it like a "redheaded stepchild" inasmuch as Ford NA "called the shots" with respect to the eCATS project and supposedly favored the desires of Ford NA at the supposed expense of Ford of Europe. *Id.*

Despite Ford's failures to fulfill its obligations, which made the eCATS project vastly more difficult, expensive and time-consuming for EnGenius, EnGenius nonetheless successfully developed and implemented a revolutionary new EOL test system that far surpassed FACTS in speed, capabilities and efficacy, and which would save Ford over \$190 million over five years. *See,*

12/ Ford's VO division had traditionally managed EOL test systems within Ford, however, Ford sought to transfer this responsibility to PL, which had traditionally managed Ford's IT systems, inasmuch as the EOL system was controlled by sophisticated computer hardware and software.

e.g., Appellees' App at 279b-290b (EnGenius Arbitration Exh. 41). In fact, from March through December 2000, Ford signed off on each component of the eCATS system ("milestones") wherein Ford approved the functionality and operation of the entire eCATS system, and attested in writing that the eCATS system met or exceeded Ford's specifications and requirements, which it did. Appellees' App at 264b-269b (EnGenius Arbitration Exhs. 36-39).

Ford also caused additional work and expense for EnGenius by unilaterally changing the functional specifications and requirements for the eCATS project and the launch schedule and priority of plants at which eCATS would be implemented. See, e.g., April 30, 2007 Arbitration Tr at 51-52, 55-56 (Foxworthy), Appellees' App at 154b-157b. Ford further requested a variety of work to be performed by EnGenius which exceeded the scope of requirements set forth in the eCATS Contracts (known as "pre-commits"). See, e.g., Oct. 16, 2007 Arbitration Tr at 90-91 (Machecek), Appellees' App at 229b-230b; Appellees' App at 241b-242b (Oct. 22, 2007 Arbitration Tr at 181-182 (Wegrzyn)); Appellees' App at 311b (EnGenius Arbitration Exh. 132). EnGenius made every effort to accommodate Ford's numerous unilateral modifications and alterations to the eCATS system, to the extent possible, but Ford failed to compensate EnGenius therefor. *Id.*

Ultimately, Ford decided upon its Wayne Assembly Plant (the "Wayne Plant") as the first plant to receive and implement the eCATS system, and Ford specifically approved the eCATS system for use in production at the Wayne Plant during two separate comprehensive demonstrations called "buyoffs" (one at Ford's Diagnostic Service Center for Ford's VO division, and another at the Wayne Plant for Wayne Plant representatives as well as representatives of Ford's VO division) which took place in November and December 2000. Appellees' App at 167b-175b (Sept. 18, 2007

Arbitration Tr at 32-40 (Leonard)¹³). Thus, as of December 2000, the entire eCATS system was approved by VO and the management of the Wayne Plant. Appellees' App at 127b-128b (April 17, 2007 Arbitration Tr at 43-44 (Foxworthy). On January 2, 2001, with the full knowledge and approval of Ford, EnGenius successfully implemented and launched eCATS at the Wayne Plant. *Id.* at 128b (Foxworthy). It is undisputed that the eCATS system was used to successfully test over 200,000 vehicles manufactured at the Wayne Plant. *Id.* at 128b (Foxworthy).

In fact, four months after the eCATS system had been successfully launched at the Wayne Plant, Ford's primary engineer who was serving as Ford's project manager for the eCATS project, Mike Makowski ("Makowski"), prepared a nomination form for eCATS to be eligible to receive the prestigious Henry Ford Technology Award which extolled the many virtues of the eCATS system. Appellees' App at 273b (EnGenius Arbitration Exh. 40 at 4) (the eCATS system is described as "the revolutionary new End of Line master test system [that] is able to reduce cycle time, repair time and increase plant productivity," the use of eCATS "has resulted in a 70% reduction in diagnostic development times" and the total projected savings to Ford from eCATS over a five-year period would be \$190 million). Similarly, Makowski, as Ford's internal project manager of the eCATS project, later made a presentation to Ford's Michigan Truck Plant in order to convince it to spend a portion of its budget on the eCATS system, approximately six months after the eCATS system had been put into use at the Wayne Plant, wherein Makowski again extolled the virtues of the eCATS system. Appellees' App at 280b-281b (EnGenius Arbitration Exh. 41 at 2-3 (for instance, "potential for \$1M/yr. savings per plant," "reduced false testing failures" and "increased cycle time savings"))).

Ford nevertheless fell behind in its payment obligations to EnGenius for this work.

13/ Bob Leonard is an EnGenius engineer who was directly involved with the eCATS project and was present at the buyoffs.

Appellees' App at 128b (April 17, 2007 Arbitration Tr at 44 (Foxworthy)). As set forth in the eCATS Contract, Ford had agreed to provide to EnGenius yearly fixed minimum payments over the 5-year life of the eCATS project in order to ensure that EnGenius would have sufficient cash to support the project from its initial "ramp-up" through completion. App at 359a (EnGenius Arbitration Exh. 100); Appellees' App at 409b-542b (EnGenius Arbitration Exh. 1494); Appellees' App at 83b-119b (April 16, 2007 Tr at 99-135 (Foxworthy)); 158b-160b (April 30, 2007 Tr at 66-68 (Saad)). EnGenius initially had reduced the price of the eCATS Contract based upon promises and commitments from Ford, as well as the parties' agreement that EnGenius would retain ownership of the eCATS software. *Id.* But, after the project started, the price of the eCATS Contract increased from \$28 million to \$32 million by agreement of the parties as a result of Ford's decision to add additional engineers to work on eCATS in Europe and Ford's reversal of its decision to enable EnGenius to re-assign FACTS resources to work on the eCATS project. See, e.g., Appellees' App at 130b (April 17, 2007 Tr at 57 (Foxworthy)).

Ford's failure to compensate EnGenius caused great financial hardships to EnGenius, and brought it to the brink of insolvency, which is precisely what Ford wanted. *Id.* at 140b-141b; Appellees' App at 329b-330b, 543b-544b (EnGenius Arbitration Exhs. 409; 1555). Because Ford wanted the eCATS system, Ford engaged in a deliberate effort to put EnGenius out of business, which, if Ford was successful, would have permitted Ford to obtain ownership of the eCATS software without compensating EnGenius therefor based upon a provision in the eCATS Contract which provided that Ford would automatically obtain ownership of the eCATS software if EnGenius no longer continued to do business. Appellees' App at 412b (EnGenius Arbitration Exh. 1494 at ¶ 11).

In August 2001, after the eCATS system had run for eight months testing production vehicles

at the Wayne Plant, another “buyoff” event was scheduled whereat Ford personnel would review the eCATS system for yet another final approval which supposedly would result in full payment to EnGenius. Appellees’ App at 296b, 325b (EnGenius Arbitration Exhs. 49; 343); 138b-139b (April 17, 2007 Arbitration Tr at 123-124 (Foxworthy)); 212b-214b (Oct. 4, 2007 Arbitration Tr at 120-122 (Eyes)). Although the eCATS system fully functioned at the “buyoff” event, and the Ford personnel present at the “buyoff” expressly acknowledged their satisfaction with the eCATS system, Ford inexplicably and disingenuously refused to approve a “buyoff.” Appellees’ App at 169b (Sept. 18, 2007 Arbitration Tr at 34 (Leonard)). When EnGenius requested in writing that Ford provide the precise reasons for its refusal to “buyoff,” Ford ignored EnGenius’ requests, and simply referred EnGenius to Ford’s requirements documents without any explanation as to what features of the eCATS system had purportedly not been demonstrated to Ford’s satisfaction at the “buyoff.” See, e.g., Appellees’ App at 260b-263b (EnGenius Arbitration Exhs. 23; 24). Ford did not provide any explanation as to why it refused to “buyoff” the eCATS system despite David Foxworthy’s (“Foxworthy”), EnGenius’ project manager of the eCATS project who was hand-picked by Ford, repeated requests because there was no *bona fide* reason therefor. See, e.g., Appellees’ App at 297b (EnGenius Arbitration Exh. 54).

During this entire time, Ford was “bleeding EnGenius dry” inasmuch as EnGenius continued to provide substantial services to Ford, including devoting 60-65 engineers to the eCATS project on a full time basis, even though Ford failed to compensate EnGenius, and while Ford deliberately refused to “buyoff” as an excuse to hold back on annual payments that were long overdue to EnGenius. See, e.g., Appellees’ App at 215b-217b (Oct. 4, 2007 Arbitration Tr at 154-156 (Eyes)); 325b, 326b, 320b-321b (EnGenius Arbitration Exhs. 343; 345; 270). Tellingly, Ford’s own high level manager, Bill Russo (“Russo”), acknowledged that EnGenius had expended over \$12 million

in development costs for the eCATS project, and had seen little, if any, return. Appellees' App at 563b-564b (Ford Arbitration Exh. 719).

Ford's refusal to "buyoff" was nothing more than a ruse fabricated to support Ford's disingenuous refusal to compensate EnGenius, its impending improper termination of EnGenius and its improper efforts to obtain the ownership rights to the eCATS software without any payment to EnGenius by driving EnGenius out of business. *Id.* As the majority of the Arbitration Panel found as a matter of fact, Ford had, prior to the August 2001 "buyoff" event, already made its decision to terminate EnGenius, and intended to keep this information secret from EnGenius. Claimants' Notice of Arbitration, App at 211a. Internal Ford emails from as early as April 2001 show that Ford had already made its decision to terminate EnGenius, but Ford deliberately strung EnGenius along thereby inducing EnGenius to continue to perform at great expense and hardship during which time Ford was putting in place its machinations. See, e.g., Appellees' App at 214b-217b (Oct. 4, 2007 Arbitration Tr at 154-156 (Eyes)); 253b-255b (Oct. 26, 2007 Arbitration Tr at 21-23 (Makowski)); 298b-306b, 325b, 336b-389b, 555b-556b (EnGenius Arbitration Exhs. 55, 343, 869, 1591). Mike Wegrzyn ("Wegrzyn"), a Ford engineer, testified that new vendors were notified in July 2001 that Ford would be bidding a new eCATS system, and that such information should not be shared with EnGenius. Appellees' App at 246b-249b (Oct. 23, 2007 Arbitration Tr at 73-76 (Wegrzyn)).

Even more damning, internal Ford memos reveal that Ford altered its internal write-up regarding the August 2001 buy-off in order to make it appear that the eCATS system somehow did not perform as well as it actually had during the buy-off. Cf., Appellees' App at 545b-553b and 557b-562b, 565b-570b (EnGenius Arbitration Exhs. 1587, 1588 and Ford Arbitration Exhs. 425, 743); 234b-240b (Oct. 22, 2007 Arbitration Tr at 141-147 (Wegrzyn acknowledges existence of

different versions of “his” notes of buy-off where items initially referenced as successfully tested [positive] were subsequently changed to unsuccessfully tested [negative])). Indeed, Ford was still discussing, altering and changing its internal buy-off notes more than one year after the August 2001 buyoff. Appellees’ App at 554b (EnGenius Arbitration Exh. 1589 (Wegrzyn asks Birley, Ford’s prior EOL supervisor, and White, Ford’s implementation engineer for EOL testing, if they have any changes to the notes from August 2001 buyoff in September 2002)). Also, Ford’s internal emails reveal that Ford deliberately misled EnGenius about the results of the buyoff in order to bide its time until its plan for obtaining a new vendor was in place. *See, e.g.*, Appellees’ App at 325b, 326b, 320b (EnGenius Arbitration Exhs. 343; 345; 270 (Phil Jameson, Ford’s project manager for eCATS in Europe, states that Ford’s “main strategy [is] leveraging EnGenius out”)). The notes of Rob Greene (“Greene”), an outside consultant hired by Ford, expressly state that the plan to terminate EnGenius was being implemented “secretly without EnGenius’ knowledge.” Appellees’ App at 331b (EnGenius Arbitration Exh. 796). *See also*, Appellees’ App at 259b (Dec. 9, 2007 Tr at 83 (Makowski) (“Q. And in fact, EnGenius was not told about the rebid process when it was started by Ford, right? A. I don’t believe we told EnGenius at the time. EnGenius didn’t really need to know about the new eCATS or a back up plan.”)).

Furthermore, the internal notes of Ford employees, including John Eyes (“Eyes”), Ford’s Purchasing Manager for eCATS, and Jameson, demonstrate that Ford wanted to acquire ownership of the eCATS software without purchasing it. Appellees’ App at 312b, 325b (EnGenius Arbitration Exhs. 151 (Eyes’ notes wherein he crosses out the word “buy,” and indicates instead “we need to own eCATS”); 343 (Ford seeks to delay buyoff while it awaits bids from other suppliers); 345 (Eyes indicates that Ford will not set up meeting with EnGenius)). Eyes admitted that, despite indicating to EnGenius that Ford was trying to help it with its cash flow problems, Ford was in reality

withholding payments due to EnGenius in order to compel EnGenius to assist Ford without compensation in Ford's transition to a new vendor for FACTS support in violation of the FACTS Contract. Appellees' App at 328b (EnGenius Arbitration Exh. 357); 221b (Oct. 5, 2007 Arbitration Tr at 25 (Eyes)).

In addition, Ford induced all of EEU's employees to leave EEU and work for a new company supported by Ford which took all of EEU's business and continued to service Ford through the former employees in the same role they had on behalf of EEU. *See, e.g.*, Appellees' App at 325b, 326b, 320b (EnGenius Arbitration Exhs. 343; 345; 270 (Jameson states that Ford's "main strategy [is] leveraging EnGenius out")); 195b-196b (Sept. 25, 2007 Arbitration Tr at 131-132 (Jameson) (Jameson "pissed off" at EnGenius)). Ford also canceled EnGenius as its exclusive supplier of FACTS support in December 2001, but continued to use FACTS and hired a replacement for EnGenius in blatant violation of the FACTS Worldwide Lifetime Contract for at least another four more years. *See, e.g.*, Appellees' App at 192b (Sept. 25, 2007 Arbitration Tr at 20 (Jameson)); 206b (Oct. 2, 2007 Tr at 6 (Makowski)); 207b-208b (Oct. 2, 2007 Arbitration Tr at 12-13 (Wegrzyn)). *See also, e.g.*, Appellees' App at 332b-335b, 390b-402b (EnGenius Arbitration Exhs. 844, 845, 875, 876, 1097, 1098 (POs to, and invoices from, Cosworth n/k/a Mahle Powertrain, EnGenius' replacement, for support of FACTS system during 2002-2004)).

The Arbitration Panel acknowledged the credible (and frequently unrebutted) testimony of Foxworthy, who fully and completely explained the course of dealings between the parties. Claimants' Notice of Arbitration, App at 203a-204a. Foxworthy was so skilled and proficient regarding EOL systems that Ford insisted that Foxworthy head up the eCATS project, and thereafter sought to hire him away from EnGenius. *See, e.g.*, Appellees' App at 80b-82b (Apr 16, 2007 Arbitration Tr at 62-64 (Foxworthy)); 307b (EnGenius Arbitration Exh. 56). Ford was unable to

rebut Foxworthy's testimony, and could not rebut the overwhelming evidence provided by the EnGenius Parties at the arbitration proceeding. *See generally*, Claimants' Post-Hearing Brief, Appellees' App at 22b-72b; Court of Appeals Docket Nos. 74 and 75 (Exhibit Vols. I-III containing fraction of exhibits introduced at the hearing and excerpts of testimony presented at the hearing).

ARGUMENT

I. COUNTER-STANDARD OF REVIEW.

Ford fails to reference the complete and correct standard of review of arbitration awards. Appellees therefore set forth the full and complete standard of review below.

Because there are virtually no material differences between the substantive provisions of the FAA and the Michigan Court Rules with respect to the confirmation and/or *vacatur* of an arbitration award, it is undisputed that Michigan Courts frequently look to Federal precedent in these circumstances. Furthermore, there is no question that even in a proceeding under the FAA, the forum state's procedural rules govern. *See, Volt Info Sciences, Inc v Board of Trustees of Leland Stanford Junior Univ*, 489 US 468, 470; 109 S Ct 1248; 103 L Ed 2d 488 (1989).

MCR 3.602(J) states, in pertinent part:

- (2) On motion of a party, the court shall vacate an award if:
 - (a) the award was procured by corruption, fraud, or other undue means;
 - (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
 - (c) the arbitrator exceeded his or her powers; or
 - (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award. (emphasis added).

Section 10(a) of the Federal Arbitration Act states:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 USC § 10(a).

The FAA “establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.” *Preston v Ferrer*, 552 US 346, 349; 128 S Ct 978; 169 L Ed 2d 917 (2008). The FAA presumes that courts will confirm arbitration awards. *See, e.g., Dawahare*, 210 F3d at 669. *See also, Uhl*, 512 F3d at 305; *Dluhos v Strasberg*, 321 F3d 365, 370 (3d Cir 2003) (arbitration awards are entitled to extreme deference); *Stolt-Nielsen SA v AnimalFeeds Int’l Corp*, ___ US __; 130 S Ct 1758, 1767; 176 L Ed 2d 605 (2010) (a party seeking to vacate an arbitration award must clear a “high hurdle.”); *United Transp Union Local 1589 v Suburban Transit Corp*, 51 F3d 376, 379 (3d Cir 1995) (the Third Circuit held that it “must enforce an arbitration award unless there is absolutely no support at all in the record justifying the arbitrator’s determinations.”); *Burlington Northern and Santa Fe Ry Co v Public Serv Co of Oklahoma*, 636 F3d 562, 568 (10th Cir 2010) (the “finality of any arbitration award would be meaningless if a losing party could re-litigate its dispute in court by claiming an arbitrator exceeded his or her authority.”).

“When courts are called on to review an arbitrator’s decision, the review is very narrow;

[it is] one of the narrowest standards of judicial review in all of American jurisprudence.” *Uhl, supra* (emphasis added), quoting, *Nationwide Mut Ins*, 429 F3d at 643. See also, *Shelby County Health Care*, 967 F2d at 1094 (“It is well-established that courts should play only a limited role in reviewing the decisions of arbitrators.”).

Michigan law is fully in accord with Federal jurisprudence on this issue. Indeed, this Court has held that “[t]he court’s power to modify, correct, or vacate an arbitration award, however, is very limited.” *Gordon Sel-Way*, 438 Mich at 495 (emphasis added). The Michigan Court of Appeals recently noted:

Our courts rarely vacate arbitral awards precisely because the scope of review is narrow, and a court is not permitted to speculate about the panel’s reasoning or substitute its own reasoning in order to overturn an award. As our Supreme Court explained in [*DAIIE v*] *Gavin*, [416 Mich 407, 429; 331 NW2d 418 (1982)] . . .

It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable, such as that involved in these cases. In many cases the arbitrator’s alleged error will be as equally attributable to alleged “unwarranted” fact finding as to asserted “error of law.” In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator’s findings of fact are unreviewable. *Guardian Alarm Co of Michigan v May*, 2007 Mich App LEXIS 2705, *7-*8 (2007) (*per curiam*) (Appellees’ App at 574b) (emphasis added). See also, *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 555-557; 682 NW2d 542 (2004).

Indeed, this Court has made clear that a court may set aside an arbitration award only if it clearly appears on the face of the award or in the reasons for the decision that the arbitrator made an error of law and that, but for that error, a substantially different award must be made. *Gordon Sel-Way*, 438 Mich at 497. Ford does not, and can not, dispute the foregoing standards of review which the Trial Court and the Court of Appeals fully applied.

II. FORD’S CHALLENGE AS TO THE ARBITRABILITY OF THE CLAIM FOR BREACH OF THE FACTS WORLDWIDE LIFETIME CONTRACT IS NOTHING MORE THAN A CHALLENGE TO THE FACTUAL DETERMINATIONS MADE BY THE ARBITRATORS REGARDING THE MEANING, NATURE AND SCOPE OF THE FACTS WORLDWIDE LIFETIME CONTRACT.

Although Ford has attempted to disguise its instant argument as one challenging the Arbitration Panel’s authority to decide arbitrability (which it did not do), Ford is really seeking to challenge the Arbitration Panel’s factual determination of the meaning, nature and scope of the FACTS Worldwide Lifetime Contract, which has nothing to do with arbitrability. In any event, Ford’s position fails because: (1) Ford did not appeal the Trial Court’s order sending this matter to arbitration; (2) Ford is estopped from now asserting that the Arbitration Panel somehow lacked authority to resolve the FACTS breach of contract claim which Ford demanded be arbitrated; (3) Ford has waived its right to raise these issues under the CPR Rules because Ford did not raise them at any time during the arbitration; and (4) the arbitration provision is entirely severable from the interpretation of the contract upon which the contract claims are premised pursuant to the binding precedent of the United States Supreme Court.

A. Ford Did Not Appeal the Trial Court’s Order Sending this Matter to Arbitration, and Ford Is Estopped from Now Asserting That the Arbitration Panel Should Not Have Heard the FACTS Breach of Contract Claim.

When the EnGenius Parties filed their claims initially in Wayne County Circuit Court, Ford filed a motion for summary disposition arguing that all of the EnGenius Parties’ claims must be resolved through binding arbitration. Ford argued to the Trial Court that all of the EnGenius Parties’ claims, including those sounding in tort, must be arbitrated so long as the broad arbitration provision in the Global Terms in any way “touched upon” the claims of the EnGenius Parties. Ford further argued that the Engenius Parties and Ford had engaged in transactions which involved POs, and such POs incorporated by reference the Global Terms which contained the broad arbitration provision.

See, Ford's Mot for Summ Disp and Reply Br, Appellees' App at 1b-21b. Ford further argued that it issued POs for work performed under the FACTS Worldwide Lifetime Contract, and for some of the work performed under the eCATS Contract. Thus, Ford asserted in the Trial Court that all of the EnGenius Parties' claims were subject to arbitration because such claims "touch upon" the type of work covered by the POs, not because the POs were (or were not) a direct part of the FACTS Worldwide Lifetime Contract.

On January 28, 2004, the Trial Court granted Ford's motion for summary disposition and ordered that this entire matter, including tort claims brought by EEU, which was not even a party to the FACTS Worldwide Lifetime Contract, be resolved via binding arbitration. Order Granting Mot for Summ Disp, App at 194a-197a. The Trial Court made no factual findings as to whether any PO or the Global Terms were a direct part of any specific agreement between the parties, and did not set forth any factual findings in its Order, nor did Ford request any such findings because, according to Ford, "all claims which touch upon or are related to matters covered by the parties' agreement" are subject to the broad arbitration provision contained in the Global Terms. *Id.* In other words, Ford never contended that it mattered whether the POs were or were not "part" of the FACTS Worldwide Lifetime Contract because the arbitration clause contained in the Global Terms was broad enough to encompass the claims brought by the EnGenius Parties simply based upon the broad parameters of the arbitration provision that touched upon in some manner all of the EnGenius Parties' claims, including the POs which were required for payment.

Nevertheless, notwithstanding that Ford itself requested that the Trial Court determine the arbitrability of this matter, which the Trial Court did, Ford now seeks to use that determination, which was rendered in its favor as it argued, to bolster its instant Appeal. Order Granting Ford's Motion for Summ Disp, App at 194a-195a; Order Granting Ford's Mot for Summ Disp *Nunc Pro*

Tunc, App at 196a-197a. But Ford did not appeal the orders by the Trial Court sending this matter to arbitration at Ford's request. And it is black letter law that a party can not base its claim of error on appeal upon its own actions and arguments in the lower court in any event. *See, e.g., In re Leete*, 2010 Mich App LEXIS 2152, *9 (2010) (*per curiam*) (designated for publication) (Appellees' App at 579b). Ford not only waived its right to appeal the Trial Court's Orders sending the FACTS claim to arbitration, but Ford is estopped from challenging such Orders which were issued at Ford's insistence and request. In a desperate effort to avoid this well-settled principle, which is fatal to Ford's position on appeal, Ford contends that the cases cited by the Court of Appeals for the proposition that an appellant may not "claim as error on appeal something to which it specifically consented in the trial court" are somehow inapplicable to this matter. Ford's Br at 20 n 9. Tellingly, Ford does not and could not disagree with the fundamental principle recited, but nonetheless contends that none of the cases cited by the Court of Appeals relate to arbitration. Of course, this is irrelevant because it is Ford's actions in the Trial Court, demanding arbitration of the FACTS breach of contract claim, but later contending that such claim was beyond the jurisdiction of the Arbitration Panel after the Arbitration Panel rendered its award, that Ford is now seeking to use as an "appellate parachute." *In re Leete*, 2010 Mich App LEXIS 2152 at *9, *citing, Phinney v Verbrugge*, 222 Mich App 513, 544; 564 NW2d 532 (1997) ("[A] party may not successfully obtain appellate relief based on a position that is contrary to that which he advanced in the trial court." (emphasis added)). Therefore, the cases cited by the Court of Appeals, and well-settled law on this issue, clearly apply to Ford's behavior in the Trial Court.

Finally, Ford's purported analogy to subject matter jurisdiction is nothing more than a circular argument – it is of course true that, if a court lacks jurisdiction, it can not decide an issue. But in the matter at bar, the Trial Court determined that the Arbitration Panel did in fact have

jurisdiction based upon the broad arbitration provision contained in the Global Terms, which was the very position advocated by Ford in the Trial Court and which Ford chose not to appeal.

B. Ford Waived its Right to Contest the Arbitration Panel's Authority Because it Failed to Raise Such Issue in the Arbitration as Required by the CPR.

After the Trial Court determined the arbitrability of this matter, the merits of the claims were submitted to the Arbitration Panel. Specifically, the Arbitration Panel determined and resolved the factual dispute as to the meaning, nature and scope of the FACTS Worldwide Lifetime Contract. This is precisely the dispute which was presented to the Arbitration Panel for resolution pursuant to the Trial Court's order granting Ford's motion to require arbitration. Because Ford was dissatisfied with the Arbitration Panel's decision on the merits of its claim, Ford made the *post hoc* argument that the Arbitration Panel was somehow bound by a purported factual determination of the scope of the FACTS Worldwide Lifetime Contract supposedly made by the Trial Court. See, Ford's Mot to Vacate, App at 107a, 116a. But no such factual determination had been made by the Trial Court, which the Trial Court confirmed, and the determinations as to the meaning, nature and scope of the FACTS Worldwide Lifetime Contract were solely within the exclusive province of the Arbitration Panel. See, e.g., *Gordon Sel-Way*, 438 Mich at 497; *Nordlund & Assocs, Inc v Village of Hesperia*, 288 Mich App 222, 229-230; 792 NW2d 59 (2010) (*per curiam*); *Byron Ctr Pub Schs Bd of Ed v Kent County Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990); *Donegan v Michigan Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986); *Lawrence v Will Darrah & Assocs, Inc*, 445 Mich 1, 12 n 12; 516 NW2d 43 (1994). Indeed, it is clear that the Arbitration Panel's decision as to the make-up of the FACTS Worldwide Lifetime Contract was entirely within its authority and did not overrule, subvert or contradict any ruling made by the Trial Court because the Trial Court determined that this matter was arbitrable based upon the existence of the arbitration provision in the Global Terms themselves as incorporated into Ford's POs, not based upon the make-up of the

FACTS Worldwide Lifetime Contract (whatever the Arbitration Panel determined that to be). Furthermore, CPR Rule 8.2 expressly provides that the Arbitration Panel has “the power to determine the existence, validity or scope of the contract of which an arbitration clause forms a part.” CPR Rule 8.2, App at 343a.

Thus, even if Ford’s position is correct, which it is not, Ford was required, pursuant to the arbitration rules governing this matter, to assert in the arbitration that: (1) the Trial Court had somehow determined that the POs were part of the FACTS Worldwide Lifetime Contract (which it did not); and (2) the Arbitration Panel was somehow bound by some factual determination made by the Trial Court as the meaning, nature and scope of the FACTS Worldwide Lifetime Contract (which it was not). Ford never made any such arguments during the entire course of the arbitration notwithstanding that the nature, substance and composition of the FACTS Worldwide Lifetime Contract was undisputedly a central issue which was heavily litigated during the 5½ years of arbitration proceedings in this matter in connection with EnGenius’ claim for breach of the FACTS Worldwide Lifetime Contract. CPR Rule 20 states:

A party knowing of a failure to comply with any provision of these Rules, or any requirement of the arbitration agreement or any direction of the Tribunal, and neglecting to state its objections promptly, waives any objection thereto. CPR Rule 20, App at 347a (emphasis added).

Therefore, even if Ford’s position had merit, which it does not, Ford waived these very issues since Ford never once raised these issues during the arbitration when addressing the terms of the FACTS Worldwide Lifetime Contract or otherwise.

C. The Arbitration Panel Did Not Determine Arbitrability, and the Factual Determinations Made by the Arbitration Panel as to the Meaning, Nature and Scope of the FACTS Worldwide Lifetime Contract Did Not Divest It of Jurisdiction.

Following the conclusion of the arbitration, Ford contended that the Trial Court’s determination to send this matter to arbitration amounted to a factual finding by the Trial Court that

the Global Terms were somehow part of the FACTS Worldwide Lifetime Contract. Apparently realizing that there is absolutely no support for this position in the record, inasmuch as the Trial Court made no such finding, Ford now instead contends that the Arbitration Panel made the determination of arbitrability, although it did no such thing. In fact, Ford's Motion to Vacate the Final Arbitration Award was heard by the very same Judge, Hon. Michael F. Sapala, who ordered this matter to arbitration pursuant to Ford's request, and thus Judge Sapala clearly knew the meaning and intent of his own Order sending this matter to arbitration. If Judge Sapala believed that he had made a factual finding that was somehow disregarded by the Arbitration Panel, he obviously would have said so when the issue was squarely before him. Furthermore, if Judge Sapala believed that the Arbitration Panel's determination that the POs were not part of the FACTS Worldwide Lifetime Contract in any way altered his determination of the broad reach of the arbitration provision in the Global Terms, as advocated by Ford, he would have said so¹⁴. Of course, Judge Sapala did no such thing because he did not find anything in the Final Arbitration Award which contravened his Order sending this dispute to binding arbitration based upon Ford's broad arbitration provision. In fact, Judge Sapala held that he was satisfied that "the [Arbitration] Panel did not decide any issue not properly before it." Order Denying Motion to Vacate, App at 555a (Court).

Thus, the Trial Court did not and could not have made any finding with respect to the merits of the underlying claims as to FACTS (or anything else), but rather merely held that Ford had shown that all claims in this matter should be resolved in arbitration as Ford requested inasmuch as

14/ In fact, Ford has never challenged the arbitrability of the separate claim for tortious interference asserted by EEU or EnGenius' tort claim for breach of fiduciary duty and quasi-contract claims (which were dismissed by the Arbitration Panel), because, regardless of whether the Global Terms are considered part of any of the written agreements, the arbitration provision in the Global Terms was incorporated into all of the POs and it is broad enough to encompass all of these claims, as Ford asserted in the Trial Court when it sought arbitration. Indeed, even in its instant Appeal, Ford does not contend that the tortious interference claim should be remanded for further proceedings, even if this Court somehow accepts Ford's disingenuous position that the FACTS dispute was not subject to arbitration.

arbitration as a method for the private resolution of disputes is favored by the public policy of Michigan, and arbitration clauses, like the one contained at issue, which was undoubtedly part of the POs (but not part of the FACTS Worldwide Lifetime Contract), are to be broadly applied such that any claims that “touch upon or are related to” the matters covered by such agreement should be arbitrated. *See, e.g., Kaleva-Norman-Dickson Sch Dist No. 6 v Kaleva- Norman-Dickson Sch Teachers’ Ass’n*, 393 Mich 583, 591; 227 NW2d 500 (1975); *Rembert v Ryan’s Family Steak Houses, Inc*, 235 Mich App 118, 123; 596 NW2d 208 (1999); *United Steelworkers of Am v Warrior & Gulf Navigation Co*, 363 US 574, 582; 80 S Ct 1347; 4 L Ed 2d 1409 (1960).

Once Ford’s post-award argument that the Arbitration Panel had somehow contravened some ruling purportedly made by the Trial Court failed (because the Trial Court affirmed that it had not made any factual determinations as to the meaning, nature and scope of the FACTS Worldwide Lifetime Contract), Ford next argued that the Arbitration Panel had abdicated its jurisdiction by making the factual determination that the POs were vehicles for payment, but the Global Terms were not directly part of the FACTS Worldwide Lifetime Contract. This argument was entirely without merit, and it already has been soundly rejected by the courts, which refuse to be drawn into the trap which Ford’s Catch-22 argument attempts to set. For instance, in *United Steelworkers of Am v American Mfg Co*, 363 US 564, 568; 80 S Ct 1343; 4 L Ed 2d 1403 (1960) (cited with approval by this Court in *Kaleva-Norman, supra*), the Supreme Court held that, while the question of whether a dispute is arbitrable is for a court, the judicial inquiry “is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.” (emphasis added). Ford utterly ignores this case, which is binding authority as to the application of the FAA.

In *Preston, supra*, the United States Supreme Court again rejected the very argument

advanced by Ford. In *Preston*, a performer contended that a dispute concerning whether his attorney had acted as an unlicensed talent agent under California law, rather than a personal manager, was within the exclusive jurisdiction of a California state administrative agency, regardless of an arbitration provision in the parties' contract inasmuch as such contract would have been void *ab initio* if the plaintiff's position was correct (*i.e.*, that the attorney was in fact acting as unlicensed talent agent who therefore could not enter into a valid agreement to represent the performer at all). *Preston*, 552 US at 349-351. The Supreme Court held that, because the parties agreed to arbitrate all disputes relating to the contract, it was the function of an arbitrator, rather than the California state agency, to determine whether the attorney violated California law by acting as an unlicensed talent agent. *Id.* at 353-354. The arbitrator, therefore, was free to determine that the attorney did act as unlicensed talent agent, and therefore determine that the contract containing the arbitration clause was invalid, without divesting himself of the jurisdiction he derived from the broad arbitration provision in the contract. *Id.* Ford fails to address this United States Supreme Court decision.

In *Rent-A-Center, West, Inc v Jackson*, ___ US __; 130 S Ct 2772; 177 L Ed 2d 403 (2010), the plaintiff filed an employment discrimination suit in Federal District Court in Nevada against his former employer. The defendant moved to stay or dismiss the proceeding and to compel arbitration under the FAA based upon an agreement signed by the plaintiff and the defendant. *Id.* at 2775. The plaintiff opposed such motion by asserting that the entire agreement was unenforceable because it was unconscionable under Nevada law. *Id.*

In *Rent-A-Center*, the United States Supreme Court determined that, notwithstanding the plaintiff's challenge to the entire agreement on the grounds of unconscionability, the clear and unambiguous language of the arbitration provision required that all challenges to the validity and enforceability of the agreement as a whole must be decided by the arbitrator. *Id.* at 2778-2779.

Thus, the *Rent-A-Center* Court clearly recognized that an arbitrator could ultimately determine that the agreement containing the arbitration provision from which it derived its authority was entirely unenforceable or invalid, but such decision would not alter the fact that the arbitrator, not the court, decides this issue. In addition, in arriving at its decision in *Rent-A-Center*, the United States Supreme Court fully considered and confirmed the line of cases relied upon by EnGenius confirming that an arbitration provision is enforceable regardless of whether the agreement containing it, or any other provision in the agreement, is ultimately found to be enforceable or applicable. The United States Supreme Court held in *Rent-A-Center*:

In a line of cases neither party has asked us to overrule, we held that only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable. See *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 U S 395, 403–404[; 87 S Ct 1801; 18 L Ed 2d 1270] (1967); *Buckeye [Check Cashing, Inc v John Cardegna*, 546 US 440, 446-448; 126 S Ct 1204; 163 L Ed 2d 1038 (2006)]; *Preston v Ferrer*, 552 U S 346, 353–354 (2008). That is because §2 [of the FAA] states that a “written provision” “to settle by arbitration a controversy” is “valid, irrevocable, and enforceable” without mention of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. “[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” *Buckeye*, 546 US, at 445; see also *id.*, at 447 (the severability rule is based on § 2). *Id.* at 6-7.

In *Granite Rock Co v International Brotherhood of Teamsters*, ___ US ___; 130 S Ct 2847, 2857; 177 L Ed 2d 567 (2010), the United States Supreme Court further confirmed that “courts must treat the arbitration clause as severable from the contract in which it appears, and thus apply the clause to all disputes within its scope ‘[u]nless the [validity] challenge is to the arbitration clause itself’ or the party ‘disputes the formation of [the] contract.’” See also, Court of Appeals Op, App at 686a. Thus, Ford's contention that the Court of Appeals' determination that the arbitration clause was severable from the remainder of the Global Terms was somehow in error is simply incorrect. That is, the Court of Appeals determined that, because the arbitration provision was undisputedly

part of POs issued by Ford to EnGenius, the arbitration provision therein was severable and applicable to the claims at issue regardless of whether the PO was determined to be part of the FACTS Worldwide Lifetime Contract itself. CPR Rule 8.2 likewise provides that the Arbitration Panel has “the power to determine the existence, validity or scope of the contract of which an arbitration clause forms a part. For the purposes of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.” CPR Rule 8.2, App at 343a (emphasis added).

In *City of Roosevelt Park v Police Officers Labor Council*, Mich Ct of Appeals Case No. 295588 (May 12, 2011) (*per curiam*) (Appellees’ App at 571b), the Michigan Court of Appeals reversed the trial court’s decision to vacate an arbitration award. Therein, the plaintiff and defendant were parties to a collective bargaining agreement (the “CBA”) which provided for arbitration in certain circumstances. *Id.* The plaintiff initially agreed to arbitration, but, after the arbitration award was rendered, sought to have the award vacated by the trial court on the basis that the grievance at issue was not subject to arbitration at all based upon the provisions of the CBA. *Id.* The trial court undertook an interpretation of the provisions of the CBA, determined that the arbitrator had erroneously interpreted the CBA and, as a result, vacated the arbitration award. *Id.*

The Court of Appeals in *Roosevelt Park* determined that the trial court erred in undertaking its own interpretation of the CBA inasmuch as this was in the sole province of the arbitrator. The Court of Appeals held:

Ultimately, it does not matter whether we (or, for that matter, the trial court) agrees with the arbitrator’s interpretation of the contract. As the United States Supreme Court pointed out in *United Steelworkers of America v Enterprise Wheel & Car Corp*, 363 US 593, 599; 80 S Ct 1358; 4 L Ed 2d 1424 (1960), “so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his.” This Court follows this principle as well. *See, e.g., Michigan Ass’n of Police v City of Pontiac*, 177 Mich App 752, 760; 442 NW2d 773 (1989), which quoted the

following passage from *United Paperworkers Int'l Union, AFL-CIO v Misco*, 484 US 29, 38; 108 S Ct 364; 98 L Ed 2d 286 (1987): ““But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”” The trial court’s error lies in failing to heed this principle. *Id.* (emphasis added).

Similarly here, Ford sought arbitration, but, after an unfavorable award was rendered by the Arbitration Panel on the FACTS breach of contract claim, sought to vacate the Arbitration Award rendered against it regarding the FACTS contract award on the basis that the Arbitration Panel had somehow improperly interpreted the FACTS Worldwide Lifetime Contract. However, it is in the exclusive province of the Arbitration Panel to interpret the meaning, nature and scope of the FACTS Worldwide Lifetime Contract, and, regardless of whether a court disagrees with the Arbitration Panel’s interpretation, such interpretation must be upheld. *Id.* See also, CPR Rule 8.2, App at 343a.

In any event, in its Brief on Appeal, Ford fails to even address the *United Steelworkers v American Mfg, Preston*, and *Rent-A-Center* cases, all of which completely undermine Ford’s instant untenable position, and Ford baldly contends that the Court of Appeals somehow misinterpreted the clear holding of the United States Supreme Court in *Granite Rock*, which it did not. Ford also fails to even address the governing arbitration provision, CPR Rule 8.2. CPR Rule 8.2, App at 343a. Furthermore, Ford was required to raise any objection it had regarding the alleged lack of jurisdiction of the arbitration panel during the arbitration, which Ford did not do. CPR Rule 20, App at 347a. Therefore, Ford has waived its right to raise this issue. *Id.*

Now, Ford has once again attempted to shift its argument by contending that the Arbitration Panel somehow determined arbitrability, even though it did not such thing. The record clearly reflects that the Trial Court determined that this matter should be arbitrated when it granted Ford’s motion seeking to require arbitration of all of the EnGenius Parties’ claims. Thus, there is simply no basis to assert that the Arbitration Panel made any determination as to the arbitrability of this

matter (and in fact the Arbitration Panel did not even exist prior to the Trial Court's determination of arbitrability, and would not have even been constituted but for the Trial Court's determination that this matter should be arbitrated).

Ford further contends that the Court of Appeals determined that the Arbitration Panel somehow had no choice but to arbitrate the FACTS dispute "even if it lacked jurisdiction." On the contrary, the Court of Appeals ruled that the Arbitration Panel "lacked the power to divest [itself] of jurisdiction over the matter." That is, once the Trial Court determined that the arbitration provision in the Global Terms/POs governed this dispute, the Arbitration Panel was entirely free to determine the composition of the FACTS Worldwide Lifetime Contract without fear of divesting itself of jurisdiction, including reaching a determination that the Global Terms/POs were not directly part of the FACTS Worldwide Lifetime Contract. See, e.g., *Preston, supra*; *Rent-A-Center, supra*; *City of Roosevelt Park, supra*. In other words, the Arbitration Panel did not have to worry about Ford's trap – it was entirely free to determine the makeup of the FACTS Worldwide Lifetime Contract based upon the evidence without fear of divesting itself of jurisdiction.

In short, it is entirely irrelevant whether the POs or the Global Terms were or were not directly part of the FACTS Worldwide Lifetime Contract because it is undisputed that a portion of the parties' relationship was based upon POs which included the Global Terms, and the Trial Court determined that this alone was sufficient to bring the claims of the EnGenius Parties' within the scope of the arbitration provision contained in the Global Terms as Ford argued in its motion which sent the claims to arbitration. The Arbitration Panel found as a matter of fact that the POs containing Ford's Global Terms were "vehicles for payment," even though they were not directly part of the FACTS Worldwide Lifetime Contract. In fact, in the Trial Court, Ford argued that the very same broad arbitration provision in Ford's Global Terms/POs governed all claims brought by the EnGenius

Parties, including the tort claims – *i.e.*, claims that had nothing to do with the FACTS Worldwide Lifetime Contract no matter how it was ultimately construed.

III. FORD'S CHALLENGES TO THE MERITS OF THE ARBITRATION PANEL'S FACTUAL DETERMINATION FAIL AS A MATTER OF LAW AND FACT.

Because Ford realized that there clearly is no ground to vacate the Final Arbitration Award on the face of the Final Arbitration Award, Ford disingenuously attempted to pigeonhole its arguments to the Court of Appeals into the limited grounds permitted by the Michigan Court Rules for *vacatur* of the Final Arbitration Award by asserting that the Arbitration Panel somehow exceeded its authority. But, whatever clothes it may be dressed up in, Ford's argument in substance represents a challenge to the merits of the arbitration claims, not a challenge to the authority of the Arbitration Panel to render the award, as the Trial Court and the Court of Appeals correctly recognized.

An arbitrator only exceeds its authority when its decision encompasses issues not properly submitted to arbitration pursuant to the parties' arbitration agreement. *See, e.g., Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005); *FSC Sec Corp v Freel*, 14 F3d 1310, 1312-1313 (8th Cir 1994); *Blue Bell, Inc v W Glove Works Ltd*, 816 F Supp 236, 240 (SDNY 1993). Indeed, MCR 3.602(J)(2) makes clear that “[t]he fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.” (emphasis added). This Court has held that “[t]he court’s power to modify, correct, or vacate an arbitration award, however, is very limited.” *Gordon Sel-Way*, 438 Mich at 495 (emphasis added). The Michigan Court of Appeals has followed the precedent set by this Court and confirmed that Michigan “courts rarely vacate arbitral awards precisely because the scope of review is narrow, and a court is not permitted to speculate about the panel’s reasoning or substitute its own reasoning in order to overturn an award.” *Guardian Alarm Co*, 2007 Mich App LEXIS 2705, *7-*8 (2007) (*per curiam*) (Appellees’ App at 574b). The United States Supreme Court has held that “[w]hen courts are called on to review an arbitrator’s

decision, the review is very narrow; [it is] one of the narrowest standards of judicial review in all of American jurisprudence¹⁵.” *Nationwide Mut Ins*, 429 F3d at 643 (emphasis and footnote added).

Nevertheless, Ford is essentially asking this Court to overturn 30 years of well-settled precedent from this Court, Federal courts and courts across the country. The standard of review of an arbitration award is clear, but Ford nonetheless wants this Court to change it on a wholesale basis (for the sole benefit of Ford) which would entirely undermine and usurp arbitration’s long-standing and favored role as a meaningful alternative dispute resolution option which Ford chose and required the Engenius Parties to agree to in connection with their business relationship with Ford. *See, e.g., Preston*, 552 US at 349.

Ford nonetheless contends that the Trial Court and the Court of Appeals somehow failed to properly review its disingenuous challenges to the Arbitration Award. Contrary to Ford’s assertion, the reviews accorded to it by both the Trial Court and the Court of Appeals were not “toothless,” and in fact fully and completely analyzed, considered and expressly rejected the issues raised by Ford under the proper standard of review set by this Court.

Specifically, the Trial Court reviewed and considered the extensive briefing submitted by the parties with respect to Ford’s Motion to Vacate, and conducted a comprehensive oral argument with respect thereto. Only after reviewing and considering all of the positions advanced by the parties did the Trial Court expressly reject each and every argument made by Ford.

Subsequently, the Court of Appeals, after extensive briefing and oral argument, fully analyzed, considered and unanimously rejected the issues raised by Ford in a detailed opinion, and then unanimously rejected Ford’s motion for reconsideration wherein Ford disingenuously asserted

15/ Ford’s suggestion that this reduces the standard of review to a “quip” is unfounded. The central point, affirmed by the United States Supreme Court, is that there are very narrow and limited grounds for disturbing an arbitration award, and a disagreement by a party as to any factual determination made by an arbitration panel is simply not one of them.

that the Court of Appeals had somehow failed to fully address the issues it raised.

A. **No Grounds Exist to Support Ford's Purported Challenge to the Merits of the Arbitration Panel's Factual Determination Regarding the Damage Award for Ford's Breach of the FACTS Worldwide Lifetime Contract, and Such Factual Determination Was Correctly Decided in Any Event.**

Ford's contention that the Arbitration Panel somehow committed some error in connection with its determination as to the amount of damages to award as compensation for Ford's breach of the FACTS Worldwide Lifetime Contract is without merit, and is in fact nothing more than an impermissible challenge to the merits of the Arbitration Panel's factual determination as to the amount of damages. Because there is simply no error on the face of the award as to the amount of damages awarded for Ford's breach of the FACTS Worldwide Lifetime Contract, this Court's review of the factual determination made by the Arbitration Panel is foreclosed. *See, e.g., Gordon Sel-Way*, 438 Mich at 497; *Nordlund & Assocs.*, 288 Mich App at 229-230 (an arbitrator is free to determine the amount of damages as he sees fit and an arbitrator's determination as to the amount of damages can only be modified if there is "an evident miscalculation of figures," such as "where an arbitrator errs in adding up a column of numbers."); *Byron Ctr Pub Schs Bd of Ed*, 186 Mich App at 31; *Donegan*, 151 Mich App at 549; *Lawrence*, 445 Mich at 12 n 12.

However, even if the merits of the Arbitration Panel's factual determination as to the amount of damages to award for Ford's breach of the FACTS Worldwide Lifetime Contract could be considered, there was no error made by the Arbitration Panel in any event. Ford premises its disingenuous position upon its unfounded and factually unsupportable claim that the Arbitration Panel somehow "borrowed" terms from other documents outside the FACTS Worldwide Lifetime Contract. In fact, the Arbitration Panel did not "borrow" any terms from any other documents after determining that the FACTS Worldwide Lifetime Contract governed the parties' relationship with respect to the FACTS dispute. Rather, in determining the amount of damages to award to EnGenius

as compensation for Ford's breach of the FACTS Worldwide Lifetime Contract, the Arbitration Panel looked at all other evidence in the case, including the 2001 FACTS PO which included the amounts paid by Ford for use of the FACTS software during the entire year immediately preceding Ford's breach of the FACTS Worldwide Lifetime Contract in 2002. Indeed, there is no dispute that Ford paid the amounts due for maintenance and support of the FACTS software in 2001, but nonetheless continued to use the FACTS software in 2002 and thereafter without using EnGenius for maintenance and support, which the Arbitration Panel determined as a matter of fact was a breach of the FACTS Worldwide Lifetime Contract. Arbitration Award, App at 80a. As a result, the Arbitration Panel considered the last amount Ford had paid for its authorized use of the FACTS software in 2001, as well as the amount paid to EnGenius' replacement, when determining the amount of damages for Ford's unauthorized use of the FACTS software for periods after 2001. Thus, Ford's suggestion that the Arbitration Panel somehow "cherry-picked" terms from the 2001 Purchase Order is disingenuous inasmuch as the Arbitration Panel did not apply any term of the 2001 FACTS PO, but rather used the amount paid by Ford to EnGenius for maintenance and support of the FACTS software in 2001 (as set forth in the 2001 FACTS PO) as part of the evidentiary basis to determine the amount of damages owed to EnGenius for Ford's failure to continue to use EnGenius for maintenance and support of the FACTS software after 2001, as it was required to do, while continuing to use the FACTS software without right or authorization, along with the actual amounts paid to EnGenius' replacement.

Ford's argument that the Arbitration Panel somehow made a "substantial error of law" by "ignoring" the 2001 FACTS PO is nonsensical. Indeed, the Arbitration Panel did consider the 2001 FACTS PO in determining the damages inasmuch as there is no dispute that EnGenius was paid for the 2001 FACTS support it provided. EnGenius' claim was that it was not paid for Ford's continued

use of the FACTS software after 2001 in derogation of the FACTS Worldwide Lifetime Contract¹⁶. Ford's suggestion that, but for that purported error, the FACTS award would have been zero since EnGenius was paid in full for the work it performed under 2001 FACTS PO is a non-sequitur – EnGenius was not seeking and did not receive damages for its 2001 FACTS support because it had been paid therefor. EnGenius did receive damages for Ford's continued use of the FACTS software after 2001 in breach of the FACTS Worldwide Lifetime Contract. Arbitration Award, App at 80a, 91a. EnGenius alleged, and the Arbitration Panel found, that Ford was required to exclusively use EnGenius for maintenance and support of the FACTS system pursuant to the FACTS Worldwide Lifetime Contract for each year that Ford continued to use the FACTS system after 2001. Arbitration Award, App at 80a.

B. No Grounds Exist to Support Ford's Purported Challenge to the Merits of the Arbitration Panel's Factual Determination Regarding the Damage Award for Ford's Breach of the eCATS Contract, and Such Factual Determination Was Correctly Decided in Any Event.

Ford argues that, notwithstanding the Arbitration Panel's finding to the contrary based upon the evidence presented at the arbitration, EnGenius somehow failed to demonstrate damages as a result of Ford's breach of the eCATS Contract¹⁷. This is, once again, nothing more than an

16/ No parol evidence was introduced with respect to the 2001 FACTS PO because the EnGenius Parties did not even allege that Ford failed to comply with the 2001 FACTS PO. Furthermore, Ford's position that a PO issued in May 2001 should be construed as part of the separate and distinct FACTS Worldwide Lifetime Contract which was executed in June 2000 makes no sense because these are hardly "contemporaneous documents." Cf., App at 138a (2001 FACTS PO) and 358a (FACTS Worldwide Lifetime Contract).

17/ Ford's assertion, based upon Lippitt's Dissent, that it "takes chutzpa to breach a contract and then sue for specific performance of it," demonstrates Ford's and Lippitt's flagrant distortion of the reality of this matter. Ford Br at 36, n 16. The majority of the Arbitration Panel ruled that Ford, not EnGenius, breached the eCATS Contract based upon the overwhelming evidence, and, in any event, EnGenius never sought specific performance of the eCATS Contract at all – EnGenius merely sought to recover the damages it suffered as a result of Ford's breaches of the eCATS Contract during the time period that it had performed but had not been paid. Thus, although Ford concedes that the Arbitration Panel's decision as to who breached the eCATS Contract (*i.e.*, Ford) is not challengeable under any circumstances, it continues to impermissibly argue that this determination was somehow "wrong."

impermissible challenge to the merits of the Arbitration Panel’s decision as to the amount of damages to award for Ford’s breach of the eCATS Contract¹⁸, not a claim that the Arbitration Panel made a material error of law, which it clearly did not. In *Nordlund & Assocs*, 288 Mich App at 229-230, the Michigan Court of Appeals held that the merits of an arbitration award are not reviewable, and an arbitrator is free to determine the amount of damages as he sees fit. Furthermore, an arbitrator’s determination as to the amount of damages can only be modified if there is “an evident miscalculation of figures,” such as “where an arbitrator errs in adding up a column of numbers.” *Id.* See also, *Grain v Trinity Health*, 551 F3d 374 (6th Cir 2008), quoting, *Apex Plumbing Supply, Inc v US Supply Co*, 142 F3d 188, 194 (4th Cir 1998) (“an evident . . . miscalculation of figures” concerns a computational error in determining the total amount of an award.” (emphasis added)). The Michigan Court of Appeals cautioned that claims of arbitrator error are not to be used as “a ruse to induce this Court to review the merits of the arbitrator’s decision.” *Nordlund, supra.* See also, *Byron Ctr Pub Schs*, 186 Mich App at 31; *Donegan*, 151 Mich App at 549; *Lawrence*, 445 Mich at 12 n 12. There is simply no computational error present or argued in this case.

Specifically, Ford erroneously contends that the Arbitration Panel awarded “guaranteed annual payments” contrary to its determination that the eCATS Contract did not provide for guaranteed annual payments¹⁹. But the Arbitration Panel did not award any “guaranteed” payment;

18/ Ford can not and does not challenge the Arbitration Panel’s determination that Ford breached the eCATS Contract.

19/ Ford contends that EnGenius somehow took the position, after litigation ensued, that the eCATS Contract was a “guaranteed fixed annual payment contract.” On the contrary, EnGenius has, both before and after this litigation began, asserted that, pursuant to the eCATS Contract, Ford was required to make fixed annual payments for the work EnGenius was performing in order to sustain the eCATS project. Indeed, Ford’s own counsel, who was part of the negotiating team with respect to the eCATS Contract, admitted that the eCATS Contract was a “fixed price contract”. Appellees’ App at 313b-319b (EnGenius Arbitration Exh. 250). Nevertheless, Ford has repeatedly mischaracterized EnGenius’ claim throughout the arbitration and appellate proceedings.

rather the Arbitration Panel expressly determined that EnGenius had performed the work necessary to entitle it to the fixed annual payments set forth in the eCATS Contract (or had been prevented from obtaining sign offs for deliverables by virtue of Ford's breaches of its duties and obligations under the terms of the eCATS Contract) based upon the evidence presented at the arbitration. Arbitration Award, App at 91a-92a.

In fact, the Arbitration Panel awarded damages for breach of the eCATS Contract only for the period of 2000 and 2001 (during which period EnGenius was performing pursuant to the eCATS Contract that was in effect and not yet terminated by Ford), and for the first four months of 2002²⁰, but not the remaining three years of the contract. *Id.* The Arbitration Panel determined that, during 2001 and 2002, EnGenius performed the work identified in the eCATS Contract for which payment should have, but had not, been made. Arbitration Award, App at 85a-87a, 91a-92a. Ford conceded that EnGenius was entitled to be paid for work completed or partially performed. *Id.* at 83a-84a. Thus, Ford's annual payments were due to EnGenius not because they were guaranteed, but rather because EnGenius actually performed the work required to earn such payments, as the Arbitration Panel found as a matter of fact. *Id.* at 86a-87a, 90a. Furthermore, Ford's contention that Engenius somehow failed to provide deliverables is absurd. The Arbitration Panel, based upon the evidence, determined that EnGenius did provide deliverables, but Ford would simply refuse to sign off or accept such deliverables in bad faith and in breach of its obligations, or Ford prevented EnGenius from providing certain deliverables as a result of Ford's breaches²¹. *See, e.g.*, Arbitration Award,

20/ The Arbitration Panel expressly recognized Ford's right to terminate the eCATS Contract with 120 days' notice based upon the undisputed evidence presented at the arbitration. Arbitration Award, App at 91a.

21/ Ford's contention that the Court of Appeals somehow affirmed this point on a rationale "not advanced by the Panel" is simply false. Ford's Br at 14. The Panel expressly found that EnGenius performed its obligation under the eCATS Contract and was fully entitled to receive compensation therefor. Arbitration Award, App at 86a-87a.

App at 87a (“The Panel finds that Ford’s breaches prevented and excused [EnGenius’] obligation to provide deliverables”); Appellees’ App at 169b (Sept. 18, 2007 Arbitration Tr at 34 (Leonard) (Ford refuses Wayne buy off although EnGenius met all requirements)); 149b-150b (April 24, 2007 Tr at 62-63 (Foxworthy) (EnGenius had provided all deliverables for Ford’s Cologne plant including the implementation of the CAN protocol as requested by Ford, but Ford told EnGenius to leave the plant)); 179b (Sept. 19, 2007 Tr at 46 (Schramm) (same)). Although Ford disagreed as to whether EnGenius performed such work, there can be no dispute that this is a factual matter upon which the Arbitration Panel ruled that EnGenius did perform work based upon the evidence presented at the arbitration, and which is therefore not reviewable by this, or any other, court. *See, e.g., Gordon Sel-Way, supra; DAIE, supra; Dawahare, supra; Uhl, supra; Nationwide Mut Ins, supra; Shelby County Health Care, supra.* Had the Arbitration Panel awarded “guaranteed” annual payments, as Ford contends, it would have awarded the entire amount due under the eCATS Contract (\$32 million), less payments made by Ford, which it did not do. Rather, the Arbitration Panel awarded to EnGenius the payments EnGenius was entitled to receive for the work it performed in 2000, 2001 and the first four months of 2002 (due to the 120 day notice requirement set forth in the eCATS Contract). Arbitration Award, App at 91a-92a.

The Arbitration Panel also properly awarded damages for pre-commits (*i.e.*, extras – work that Ford requested and authorized in connection with the eCATS Contract that EnGenius performed over and above the base requirements of the eCATS Contract). Although Ford now purports to challenge the award of damages for pre-commits, Ford did not challenge this portion of the Final Arbitration Award in its Motion to Vacate, and therefore it has not preserved its right to raise this issue in this Court. *Napier v Jacobs*, 429 Mich 222, 235; 414 NW2d 862 (1987) (generally, an issue not raised by the appealing party before and considered by the trial court is not preserved for

appellate review); *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992) (same). *See*, Motion to Vacate, App at 121a-128a.

In any event, this portion of the award is based upon the testimony and admissions of Ford's own representatives. For instance, Ford's own director of Purchasing for Global Machinery and Tooling, Mary Machecek ("Machecek"), admitted under oath that, after Ford examined EnGenius' claims for damages, EnGenius had performed services for which it had not been paid pursuant to such pre-commits. Appellees' App at 230b (Oct. 16, 2007 Arbitration Tr at 91 (Machecek)). See also, Appellees' App at 241b-242b (Oct. 22, 2007 Arbitration Tr at 181-182 (Wegrzyn) (aware of pre-commits and knows that Ford held extensive training in an attempt to curb use of pre-commits after termination of EnGenius)); Appellees' App at 311b (EnGenius Arbitration Exh. 132 (Machecek acknowledges that there are "pre commits [*i.e.*, direction by Ford to EnGenius to perform extra work over and above the eCATS Contract for which Ford promised to compensate EnGenius] all over the place" in connection with Ford's requests to EnGenius for work)).

Ford now apparently contends that the Arbitration Panel could not award EnGenius damages for: (1) substantial work that EnGenius had performed (*i.e.*, deliverables), but for which Ford wrongfully refused to sign off or pay for; and (2) substantial work that EnGenius performed but which Ford's wrongful actions prevented from reaching the final state of a completed deliverable. Ford cites no legal support for this position, because there is none. Instead, Ford invites this Court to perform the very sort of review of the evidence and factual findings of the arbitrators which is absolutely prohibited, and in which the Court of Appeals correctly refused to engage.

In any event, both categories of damages awarded by the Arbitration Panel are well recognized under Michigan law. Under Michigan law, a party asserting breach of contract may recover all damages which are "the direct, natural and proximate cause of the breach." *Alan Custom*

Homes, Inc v Krol, 256 Mich App 505, 512; 667 NW2d 379 (2003). This Court has held:

Commentators agree that courts should be flexible when ruling on what damages are available for breach of contract. Professor Corbin notes:

The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case. [5 Corbin, Contracts, § 1002, p 33.]

Likewise, professors Calamari and Perillo observe:

It should be noted that the rule is not applied blindly and mechanically. Courts must be aware of the transactional context in which the transactions occur. [Calamari & Perillo, Contracts (3d ed), § 14-7, p 599.] *Lawrence v Will Darrah & Assocs, Inc*, 445 Mich 1, 12 n 12; 516 NW2d 43 (1994) (emphasis added).

In addition, “[c]onsequential damages are recoverable for a breach of contract when those damages arise naturally from the breach or can reasonably be said to have been in contemplation of the parties at the time they entered the contract.” *Mosher, Dolan, Cataldo & Kelly, Inc v Feinbloom*, 2007 Mich App LEXIS 2442, *11-*13 (2007) (*per curiam*) (Appellees’ App at 594b).

In the matter at bar, the Arbitration Panel properly recognized that compensatory and consequential damages could be awarded, and determined as a matter of fact that EnGenius had presented substantial and credible evidence in support of its request for damages²². Arbitration Award, App at 91a-92a. The Arbitration Panel refused to dismiss EnGenius’ claim for breach of the eCATS Contract, for which EnGenius had specifically sought compensatory and consequential damages, and the Arbitration Panel in no way limited the damages that could be recovered by EnGenius in this regard except that EnGenius could not seek damages for the diminution in value

22/ Ford apparently contends that the damages for “pre-commits” could only have been awarded in connection with EnGenius’ quasi-contractual claims; however, the work done in connection with such “pre-commits” was directly related to the eCATS Contract (*i.e.*, extras) and therefore is properly categorized as compensatory and/or consequential damages flowing from Ford’s breach of the eCATS Contract, exactly as the Arbitration Panel determined.

of the entire company as a going concern or damages for certain other specified projects. Arbitration Award, App at 87a-89a, 92a. Ford's disagreement with the Arbitration Panel's resolution of factual disputes as to the amount of damages, or the Arbitration Panel's decision to award damages, can not and does not support *vacatur* of the Final Arbitration Award.

C. **No Grounds Exists to Support Ford's Purported Challenge to EEU's Tortious Interference Arbitration Award Inasmuch as Ford Was Not Prohibited from Offering Any Evidence and the Factual Findings of the Arbitration Panel Regarding the Merits of the Claim Are Not Reviewable in Any Event.**

1. **Ford's Challenge to the Arbitration Panel's Factual Determination that Ford was Liable for Tortious Interference Fails as a Matter of Law.**

Ford's contention that it is not liable for tortious interference is entirely without merit. The Arbitration Panel determined, as a matter of fact, that Ford's conduct was improper and tortious. Despite Ford's claim to the contrary, Ford was not found liable for tortious interference because it chose to change vendors. Ford was found liable because it interfered with EEU's business relationships with its employees. Ford's instant attempt to have this Court review the factual determinations made by the Arbitration Panel is entirely improper and must be denied.

Essentially, Ford contends that it can not be held liable for tortious interference because it purportedly had a legitimate business motive for its interference. Any factual issue as to the legitimacy, or lack of legitimacy, of Ford's motive was a factual determination which was made by the Arbitration Panel and can not be reviewed by this, or any other, court. *See, e.g., Gordon Sel-Way*, 438 Mich at 495; *DAIIE*, 416 Mich at 429.

2. **Ford's Challenge as to the Arbitration Panel's Factual Finding as to the Amount of Damages Suffered by EnGenius as a result of Ford's Tortious Interference Fails as a Matter of Law.**

Ford contends that the damages awarded for its tortious interference are somehow improper because they purportedly amount to damages from the termination of Ford's own contract. Once

again, Ford fully argued this issue before the Arbitration Panel and lost based upon the evidence presented at the arbitration. The Arbitration Panel expressly found that Ford had tortiously interfered with the business relationships between EEU and its employees (not any agreement Ford had) as a matter of fact, and the Arbitration Panel therefore awarded damages solely for Ford's tortious interference with EEU's business relationships with its employees. App at 88a-89a.

Nonetheless, Ford is now improperly attempting to challenge the merits of this factual determination by the Arbitration Panel. Based upon all the unrebutted evidence before it, the Arbitration Panel determined that Ford's actions did meet each and every element of tortious interference under Michigan law, exactly as the Court of Appeals confirmed. In addition, the Arbitration Panel noted that it was undisputed that Ford had retained EEU's former employees to work on the very same project once they were employed by the new company selected and supported by Ford. App at 88a-89a. The Arbitration Panel further held that Ford could offer no other possible explanation for the mass exodus of EEU employees, other than its tortious interference. *Id.*

The Court of Appeals confirmed the Arbitration Panel's determination, and expressly held:

There is nothing in Michigan law to suggest that a defendant like Ford may not be held liable for tortiously interfering with the existing contractual or business relationships between another company and that other company's employees. Nor does Ford attempt to argue that there was not a recognized and established contractual or business relationship between EEU and EEU's employees. This Court has specifically held that a defendant may tortiously interfere with the contractual and business relations between another company and that company's employees. In short, contrary to Ford's arguments on appeal, a defendant in the position of Ford may be held liable in tort under Michigan law for its wrongful interference with such an employment relationship. App at 687a-688a (emphasis added, citations omitted).

Notwithstanding the foregoing, and apparently realizing that the Arbitration Panel's factual determination that Ford met all the elements of tortious interference is unreviewable, Ford, once again purporting to rely upon Lippitt's Dissent, contends that the damages awarded for its tortious interference were somehow improper under Michigan law. However, the Arbitration Panel's

determination as to the amount of damages is a factual determination which is not subject to review. *See, e.g., Nordlund & Assocs*, 288 Mich App at 229-230 (an arbitrator is free to determine the amount of damages as he sees fit and an arbitrator's determination as to the amount of damages can only be modified if there is "an evident miscalculation of figures," such as "where an arbitrator errs in adding up a column of numbers."); *Byron Ctr Pub Schs Bd of Ed*, 186 Mich App at 31; *Donegan*, 151 Mich App at 549; *Lawrence*, 445 Mich at 12 n 12.

In any event, Ford contends that, because none of the EEU "employees whose employment relationships were allegedly interfered with testified," somehow the Arbitration Panel's determination should be vacated. The fact that no EEU employees whose employment was interfered with testified at the arbitration hearing simply presents a factual question which was resolved by the Arbitration Panel based upon Ford's European project manager, Phil Jameson's ("Jameson"), admissions under oath. Specifically, the Arbitration Panel determined that EEU had met its burden of proof regarding Ford's tortious interference based upon the testimony and evidence that was presented, including the damning testimony of Ford's own representative wherein Ford's representative, Jameson, essentially admitted to interfering with EEU's relationships with its employees. *See*, Appellees' App at 195b-197b (Sept. 25, 2007 Tr at 131-132, 153 (Jameson)); 320b-324b (EnGenius Arbitration Exhs. 270, 272).

Ford also contends that EnGenius was not entitled to any damages because, even if Ford interfered with EEU's business relationship with its employees, Ford was going to terminate its relationship with EnGenius regardless. Ford continues to assert that "EnGenius was losing the business opportunity." Ford knows full well that damages were awarded only to the separate entity, EEU, and it was EEU's business relationships with which Ford interfered. Ford's continuing and deliberate effort to confuse this issue by suggesting that EnGenius, not EEU, somehow suffered these

damages is entirely improper. Indeed, because Ford needed EEU's employees to continue to service its business in Europe, it simply improperly stole such employees away from EEU. There is no evidence in the record that Ford intended to terminate its relationship with EEU if it could not first steal away all of EEU's employees. The Arbitration Panel's factual determination as to the amount of these damages can not be reviewed by this Court.

The single, unpublished case relied upon by Ford, *Urban Assocs, Inc v Standex Eleces, Inc*, 216 Fed Appx 495 (6th Cir 2007), has no precedential value in this Court or even in the Sixth Circuit itself, and does not support Ford's position in any event. See, 6th Cir Rule 206(c) (only published panel opinions are binding on subsequent panels). Specifically, the *Urban Assocs* Court did not premise its decision upon whether the plaintiff in that case would have lost a client even if the employee had remained with her employer. *Id.* at 513 n13. The Urban Assocs Court determined that the defendant had not committed any wrongful act, and therefore there could be no liability for tortious interference. *Id.* at 514. In contrast, the Arbitration Panel here determined as a matter of fact that Ford had committed a wrongful act, and this factual determination is not subject to review.

3. Ford Was Not Precluded from Offering Any Evidence as to EEU's Claim of Tortious Interference.

Ford contends that it was somehow instructed not to introduce evidence with respect to EEU's damages resulting from Ford's tortious interference because such damages had somehow been dismissed. On the contrary, the Arbitration Panel never dismissed EEU's claims for tortious interference, and the Arbitration Panel never instructed Ford that it could not present evidence regarding EEU's claim for damages with respect thereto. In fact, Ford can not and does not contend that EEU's claim for tortious interference itself had been dismissed, because it clearly was not.

In its October 16, 2007 Order, the Arbitration Panel dismissed only the diminution in value damage claim asserted by EnGenius, not EEU, in connection with the breach of the eCATS Contract

claim pursued by EnGenius. Arbitrator's Decision Regarding Ford's Motion to Dismiss Claims, App at 322a-324a. EEU was not a party to the eCATS breach of contract claim at all nor did it seek any damages in connection with such claim. eCATS Contract, App at 223a-224a, 228a. Indeed, Ford's motion to dismiss, which resulted in the October 16, 2007 Order, sought to dismiss only damages for the diminution in value of EnGenius, not EEU. *Id.* Ford cites this very language in its instant Brief, but apparently, in a blatant effort to mislead this Court, continues to assert that the diminution in value damages as to EEU were somehow dismissed, which they clearly were not. *Id.* Furthermore, neither the October 16, 2007 Order, nor any other order of the Arbitration Panel, dismissed EEU's claim for tortious interference, and Ford does not assert otherwise. *Id.* EnGenius was not a party to EEU's tort claims, and this claim was extensively argued in the final briefs submitted by the parties. Ford never suggested that EEU's separate tort claim had been dismissed. Thus, Ford's decision as to whether to present or not to present certain evidence relating to EEU's damage claim with respect to EEU's separate tort claim was its own strategic choice and certainly does not amount to any refusal by the Arbitration Panel to hear evidence (because Ford never sought to present any). In fact, Arbitrator Howard confirmed on the record during the Arbitration Hearing that Ford could present any evidence it chose. App at 328a-329a (Howard). Furthermore, Ford never raised this issue with the CPR promptly after the Final Arbitration Award was issued, or at any time thereafter, and therefore Ford has waived this issue pursuant to CPR Rule 20. CPR Rule 20, App at 347a. Furthermore, Ford's disingenuous assertion that "the parties" somehow used the names EnGenius and EEU interchangeably is simply false – the parties never used these names interchangeably, and the Engenius Parties made clear which party was asserting each claim throughout this matter.

In any event, the Arbitration Panel did not even award damages for the diminution in value

of EEU. The measure of damages awarded for Ford's tortious interference with EEU was simple. EEU's damages expert, Barry Lefkowitz, reviewed all the payments made by Ford to Tumarc, the new company that performed the business that had belonged to EEU through EEU's former employees, and Lefkowitz determined that the very business performed by EEU's former employees would have amounted to the \$1.9 million in lost profits which the Arbitration Panel awarded to EEU for damages resulting from Ford's tortious interference. See, Appellees' App at 201b-202b (Oct. 1, 2007 Arbitration Tr at 151-152 (Lefkowitz)). That is, the damages awarded were the damages which flowed from Ford's tortious interference with the relationship between EEU and its employees. In contrast, damages for diminution in value are something entirely different and are not what was awarded here inasmuch as diminution in value represents the loss of value of a business as a going concern based upon its assets and annual income over a period of time.

CONCLUSION

For all of the foregoing reasons, the EnGenius Parties respectfully request that this Honorable Court affirm the December 12, 2008 Arbitration Award in all respects as affirmed in the January 9, 2009 Judgment entered by Judge Michael F. Sapala of the Wayne County Circuit Court, the July 29, 2010 Opinion of the Court of Appeals and the September 15, 2010 Order of the Court of Appeals denying Ford's motion for reconsideration.

Respectfully submitted,

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