Case No. ___

In the

Supreme Court of the United States

DANIEL PETERSON,

Petitioner,

v.

MINERVA SURGICAL, INC.

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A century ago, many courts declined to enforce arbitration agreements, concerned that arbitration as a non-judicial process could bypass essential judicial oversight and compromise justice. In response, Congress enacted the Federal Arbitration Act (FAA) in 1925, establishing arbitration as an alternative to litigation. However, Congress did not specify that agreements to arbitrate would be the exclusive means for resolving legal claims, nor that courts should relinquish their Article III duties in confirming and enforcing these agreements. Now, ninety-nine years later, judicial emphasis on enforcing arbitration agreements over ensuring just outcomes raises questions about whether this approach aligns with both the Constitution and the FAA.

The questions presented are:

1. Whether, under a proper application of the Constitution, the Court can relinquish its Article III duties by merely deferring to arbitrators when enforcing arbitration awards.

2. Whether, under a proper application of the FAA, the Court should enforce arbitration awards that manifestly disregard the law or violate public policy.

3. Whether the Court should clarify the extent of discretion that courts retain under Article III of the Constitution when reviewing arbitration awards.

PARTIES TO THE PROCEEDING

Petitioner is Daniel Peterson. Respondent is Minerva Surgical, Inc. Although the lawsuit named David Clapper, Minerva's CEO, as a defendant, the cover is proper because the circuit court's judgment referenced only Minerva. App. 2, n. 1 (noting that no party explained why Clapper is an independent party from Minerva).

CORPORATE DISCLOSURE STATEMENT

Peterson is a natural person and a former employee of Minerva Surgical, Inc., a corporation that specializes in women's healthcare, particularly in the treatment of abnormal uterine bleeding.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case, as defined by Rule 14.1(b)(iii):

- *Peterson v. Minerva Surgical, Inc.,* No. 19-2050-KHV, U.S. District Court for the District of Kansas. Judgment entered on Dec. 8, 2023.
- *Peterson v. Minerva Surgical, Inc.,* No. 24-3003, U.S. Court of Appeals for the Tenth Circuit. Judgment entered on Aug. 15, 2024.

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APPENDIX

Note on appendix contents and confidentiality:

The lower court opinions directly related to this case, as defined by Rule 14.1(b)(iii), are included in full. Other documents in the appendix contain only the pertinent parts relevant to the legal issues. Regarding confidentiality, Peterson moved to seal certain documents to protect Minerva's confidentiality interests. The court overruled the motion, stating: "The public interest in court proceedings includes the assurance that courts are run fairly and that judges are honest." Order at 1 (D. Kan. Nov. 6, 2023); Order at 1 (D. Kan. Dec. 8, 2023).

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PETITION FOR WRIT OF CERTIORARI

After receiving Food and Drug Administration (FDA) approval for its surgical device, Minerva discovered the device was causing patient injuries. Instead of fulfilling its legal obligation to recall the defective product, Minerva concealed the design flaw and continued selling the device for patient use.

Peterson stood in Minerva's way. After uncovering the defect, he blew the whistle and documented the dangers of the device to protect the public from avoidable harm. Minerva retaliated. In response, Peterson sued in district court, but because Minerva mandated arbitration as a condition of employment, the court compelled the case to arbitration.

Behind the closed doors of arbitration, Minerva defended itself through false testimony and unsupported denials. In addition to accepting Minerva's testimony as truth, the arbitrator misapplied the law and committed legal errors that benefited Minerva, allowing it to prevail.

Turning to the courts, Peterson sought judicial review and vacatur. But justice was denied. As the Tenth Circuit candidly acknowledged, the courts lack both the discretion and power to intervene in arbitration matters.

Now, as the final arbiter of the law, Peterson petitions the Court for a writ of certiorari to review the Tenth Circuit's judgment.

OPINIONS BELOW

The opinion of the district court (App. 13–27) is unreported. The opinion of the court of appeals panel (App. 1–12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on Aug. 15, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. art. I, § 1, cl. 1

Legislative Power

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. II, § 1, cl. 1

Executive Power

> The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. III, § 1

Judicial Power

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. VI, cl. 2

Supreme Law of the Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amend. V

Due Process Clause

No person shall be … deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1

Equal Protection Clause

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

9 U.S.C. § 2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 9

Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) 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;
>
> [subsections (2) and (3) are not pertinent to this writ and have been omitted];
>
> (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.

28 U.S.C. § 453

Oath of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.

21 C.F.R. § 7.40

Food and Drug Administration, Recall policy

(a) Recall is an effective method of removing or correcting consumer products that are in violation of laws administered by the Food and Drug Administration. Recall is a

voluntary action that takes place because manufacturers and distributors carry out their responsibility to protect the public health and well-being from products that present a risk of injury or gross deception or are otherwise defective.

Cal. Lab. Code § 1102.5

Whistleblower protection

(a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to … a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance … if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information … to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance … if the employee has reasonable cause to believe

that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

Cal. Civ. Code § 3300

Measure of Damages,
Breach of Contract

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

Cal. Civ. Code § 3301

Uncertainty of Damages,
Breach of Contract

No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.

STATEMENT OF THE CASE

I. Factual background

Minerva was founded with a single product, a self-named surgical device designed to treat abnormal uterine bleeding through a procedure called endometrial ablation. This elective procedure uses thermal energy to destroy the endometrial lining of the uterus, thereby reducing or stopping heavy menstrual bleeding.

Although generally considered safe, the procedure does not come without risks. One of the most serious complications is a bowel burn—a thermal injury to the intestines during the procedure. This injury often requires major surgery, known as a bowel resection, to remove the damaged section. If the healthy ends of the bowel cannot be reconnected, it may need to be diverted through an opening in the abdomen, requiring the use of a colostomy bag.

In short, a bowel burn is *always* a severe and potentially life-threatening injury. Importantly, bowel burns during endometrial ablation are linked to uterine perforation (a hole in the uterus), which creates a direct pathway for heat to damage the bowel. This is why it is vital for an endometrial ablation device to reliably detect perforations and prevent such injuries—a concern highlighted by both the FDA and Minerva itself.

In fact, when the FDA approved Minerva's device, it issued the *Summary of Safety and Effectiveness Data* (SSED), explicitly addressing the need for Minerva to detect perforations:

> The Uterine Integrity Test verifies that there are no perforations or holes in the uterine wall.[1]
> SSED, p. 4.

Minerva's *Instructions for Use* (IFU) then emphasize the importance of this test:

> Activation of the [device] … in the setting of a uterine perforation is likely to result in serious patient injury.[2]
> IFU, p. 3.

Minerva's website further warns: "If the UTERINE integrity TEST fails after reasonable attempts to implement the troubleshooting procedures, abort the procedure." Then highlighted in bold, "**Post-treatment, any patient reporting signs/symptoms that could indicate a serious complication, e.g., bowel injury, should be thoroughly evaluated without delay**."[3]

Recognizing the vital connection between perforation detection and patient safety, Minerva took steps to address a defect compromising reliable detection. In January 2017, over a year after FDA approval, the company filed Patent Application No. 15/418,635 with the U.S. Patent and Trademark

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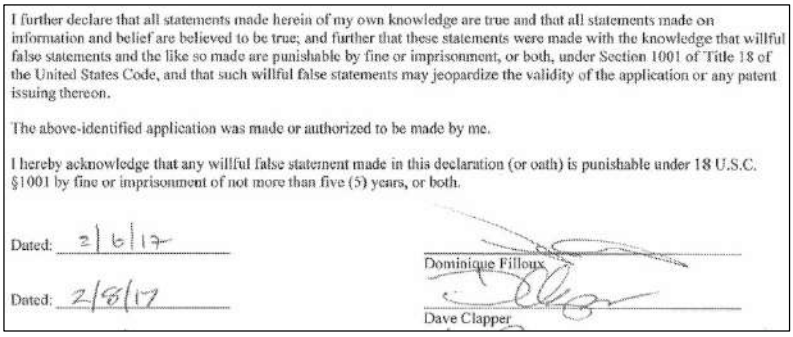
[1] Minerva Endometrial Ablation System, SSED, (Jul. 27, 2015), https://www.accessdata.fda.gov/cdrh_docs/pdf14/P140013b.pdf.
[2] Minerva Endometrial Ablation System, IFU, L0107 Rev. D, https://minervasurgical.com/resources/minerva-es-ifu/.
[3] Minerva, *Safety Information* (website), https://minervasurgical.com/safety/ (last visited Nov. 1, 2024).

Office (USPTO) with the intent to *correct and replace* its original design.

This action followed Minerva's discovery of a defect impairing the device's ability to detect uterine perforations. CEO Clapper and other representatives signed the application, fully aware of the risks for making false statements—fines, imprisonment, or patent invalidation. Reproduced at App. 54.



I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

The above-identified application was made or authorized to be made by me.

I hereby acknowledge that any willful false statement made in this declaration (or oath) is punishable under 18 U.S.C. §1001 by fine or imprisonment of not more than five (5) years, or both.

Dated: 2/6/17 — Dominique Filloux

Dated: 2/8/17 — Dave Clapper

Despite initiating plans to replace the original design, Minerva chose not to comply with the FDA's recall policy, which requires that manufacturers "protect the public health and well-being from products that present a risk of injury or gross deception or are otherwise defective." 21 C.F.R. § 7.40.

Then, in May 2017, while the patent application was still pending, the FDA approved the replacement device. App. 38. Despite knowing the original design had a defect compromising patient safety, Minerva continued to sell both devices concurrently, justifying it as a *Market Preference Evaluation*—a needless step, as safety is not a preference but a requirement. App. 66; 70.

In February 2019, the USPTO granted Patent No. 10,213,151 B2. App. 55–58. It disclosed the following:

- The original design had a defect because it "plugs the perforation" resulting in "characterizing the uterus as non-perforated when there is a perforation." App. 56;
- This device defect "would likely cause thermal injury to organs within the abdominal cavity." App. 58;
- "Such an injury to organs in the patient's abdominal cavity could be very serious and potentially life-threatening." App. 58;
- The replacement device "solve[d] the problem of mischaracterizing the integrity of the uterine cavity." App. 58;
- With the replacement device, the "perforation will be detected easily." App. 58; and
- As a result, "the physician then will know not to perform the ablation procedure." App. 58.

Finally, in March 2024, the Tenth Circuit supplemented the record on appeal, certifying that Minerva "believed all statements within the application were true." App. 29.

In summary, Minerva could only claim its endometrial ablation device was safe if it reliably detected uterine perforations, as holes in the uterus lead to bowel burns.

With an understanding of the procedure, the device, and the associated patient risks now established, the following timeline clarifies Peterson's role and tenure at Minerva:

July 31, 2015: Minerva receives FDA approval for its device, and it hires Peterson as a Territory Manager. Soon after, he makes Minerva's first sale. App. 37.

While this approval allows the company to sell its product, federal regulations also require Minerva to:

> carry out [its] responsibility to protect public health and well-being from products that present a risk of injury or gross deception or are otherwise defective.
> 21 C.F.R. § 7.40.

October 30, 2015: Minerva recognizes Peterson as a clinical and safety expert. App. 37.

Sometime around January 2016: Peterson sketches a concept to add extension tubing to the sides of Minerva's silicon array.[4] App. 37.

April 30, 2016: Minerva promotes Peterson to Area Sales Director because he is "a leader by example and someone with a vision for the future." App. 37.

December 17, 2016: Peterson emails the head of engineering to advise that the sales team *never*

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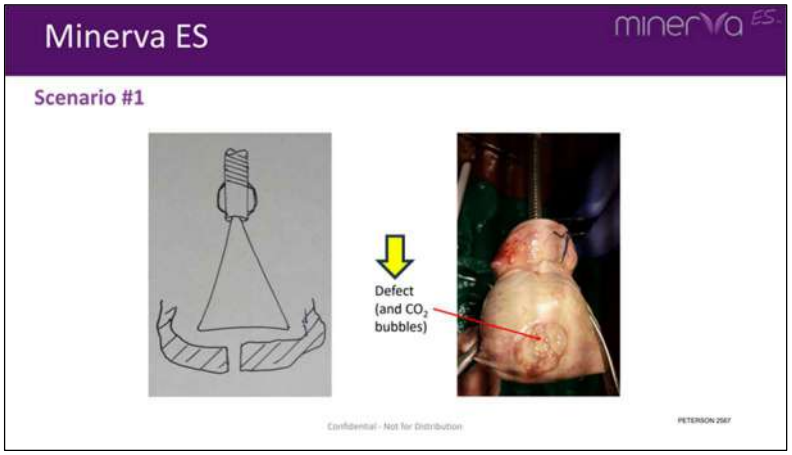
[4] Because Minerva's array is made of silicone—a material known for sealing holes—Peterson suspected the silicone array might be hiding uterine perforations by sealing them.

receives feedback or updates on investigations into safety complaints. App. 37.

January 24, 2017: The sales directors inform Minerva that it is blaming doctors and its own sales representatives for patient injuries resulting from a design defect.[5] App. 37.

May 15, 2017: CEO Clapper emails the sales team to celebrate FDA's approval of "the new CO_2 extension tubes for MINERVA ES device!" App. 38.

January 14–18, 2018: Minerva hosts an internal meeting to celebrate the launch of its replacement device, ES, during which it discloses the defect in the original design but instructs the sales team to keep this information confidential. App. 38; 71–72. The company also highlights its engineering studies on pig uteri (reproduced at App. 67–69), which confirmed that the original design conceals perforations, placing patients at risk.



[5] Minerva purported that the injuries were due to poor technique.

Additionally, Minerva reveled in sharing the results of a study *on patients*. By continuing to use the defective device after the replacement's FDA approval, Minerva was able to conduct a clandestine internal study comparing the two devices. App. 66. The results were revealing: the replacement design, ES, caused zero bowel burns because of undetected uterine perforations, whereas the original design resulted in at least thirteen.[6] App. 70.

In response, Peterson asks Minerva to either stop selling the original design or recall and replace it with ES to ensure patient safety. App. 38.

Minerva refuses. App. 38.

Aware that exposure of a dangerous defect could devastate sales and lead to product liability lawsuits, Minerva implemented an unwritten policy prohibiting the documentation of device concerns. This covert policy was intended to avoid triggering an FDA recall or attracting public scrutiny, yet both the Chief Financial Officer and Vice President of Sales acknowledged it in voicemails. App. 71–72.

April 7, 2018: In response to Minerva's retaliatory actions against him for his ongoing efforts to protect patients from a device defect, Peterson

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[6] The court's opinion noted that "Minerva's internal documents showed … one injury for every 1,269 procedures." App. 3, n.2. However, this figure does not represent Minerva's overall injury rate, as it excludes other adverse events; it solely reflects Minerva's rate of bowel burns caused by undetected uterine perforations. In fact, Peterson's injury estimate is based on simple math: 16,500 divided by 1,269 equals 13. *See* App. 70.

contacts Human Resources (HR) to raise concerns about his treatment compared to other Area Sales Directors. App. 38.

April 17, 2018: Peterson requests medical leave, citing Minerva's retaliatory actions and escalating patient safety concerns, which aggravated a neurological condition linked to his service-connected military disability. App. 39.

Simultaneously, in hopes of prompting Minerva to replace the remaining original design inventory with ES, Peterson blew the whistle by documenting Minerva's failure to protect patients from a known product defect—violating the company's policy that required employees to conceal patient safety concerns. In this email (reproduced at App. 73–75), Peterson documents the need for Minerva to recall the original (or "classic") design and replace it with ES to protect patients from further *avoidable* injuries:[7]

As previously discussed on numerous occasions (including at last week's ASD meeting in St. Louis), the issue of "classic" inventory on customers' shelves is a significant concern and a key factor in the retaliation and mistreatment I have experienced from you in a multitude of ways. The great news is ES has shown to be a wonderfully effective enhancement to Minerva technology—a big win for patient safety and reduction in adverse events. I am extremely proud of it and the role I played in its roll out. That said, ES will allow Minerva to ultimately become the market share leader—efficacy (E) and safety (S) are the two most important aspects of any surgical procedure. You have asked me not to document my concern and our discussions. I have done significant reflection on this aspect and feel it is important I document my position on the need to exchange any remaining "classic" inventory on customers' shelfs. At this point it should be relatively minimal; nevertheless, if we are able to avoid another adverse event and patient injury it is both warranted and appropriate.

As for the below response from Customer Service, I am aware from our previous discussions that you have directed responses to such requests. It is absurd to label this request as a "no reason return". The reason is simple:

- "classic" - bowel injury with uterine perforation only, frequency 1 in 1,269
- ES - bowel injury with uterine perforation only, **frequency 0**
- Based on summer 2017 launch and approximate procedure volume in that time frame, I would estimate 7 to 10 bowel burns with uterine perforation that could have and should have been avoided.

[7] The Tenth Circuit noted that this email was "not in the record." App. 4, n. 3. However, Peterson provided it to the court. Mot. at 30 (D. Kan.). The full email is also in the record. ROA 293–94.

Approved leave through August 2018: After Minerva approved Peterson's leave, the parties' perspectives sharply diverged on key issues, including whether his departure was a resignation or termination and who was responsible for his failure to return to work. To summarize, Minerva believed Peterson acted in bad faith, and Peterson viewed Minerva similarly. App. 39–45; 48–49.

August 3, 2018: Peterson informs Minerva that he cannot remain on indefinite, *unpaid* leave, to which HR responds by clarifying that his employment has not been terminated. App. 45.

August 7, 2018: Peterson emails HR, expressing uncertainty about how to proceed and documenting that Minerva did not conduct a genuine investigation into his safety concerns. App. 45; 77.

April 8, 2018: HR responds, informing Peterson that his safety concerns are "without merit." App. 77. HR further clarifies its position, stating, "Nothing in the voicemails or in the binder you sent to our attorney changes that." App. 77.

With the interactive process at an impasse and no resolution reached on the safety issue, Peterson considers himself terminated, while Minerva later characterizes it as a voluntary resignation. App. 49.

II. Proceedings below

This lawsuit can be divided into three phases, which are arbitration,[8] the motion to reopen and vacate, and the appeal.

A. Arbitration

January 30, 2019: Under 28 U.S.C. § 1332, Kansas attorney Albert Kuhl files an employment lawsuit in federal court on behalf of Peterson, asserting multiple claims, including retaliation in violation of public policy and disability discrimination. Compl. (D. Kan).

October 23, 2019: The court stays the case and enforces the arbitration agreement that Minerva mandated as a condition of employment. Order (D. Kan.).

January 31, 2020: California attorney Ramsey Hanafi files a petition for arbitration on behalf of Peterson in JAMS, asserting federal and state claims, including "wrongful termination in violation of public policy (42 U.S.C. 12101, *et. seq*.; Cal. Gov. Code § 1102.5)."[9] App. 47.

May 18, 2021: After Peterson's lawsuit remained "open for over two and a half years with no forward progress," the court administratively closes the case "without prejudice to the rights of the parties to

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[8] Though the arbitration proceeding was private, Peterson includes it here because the courts exercised their judicial authority to enforce the award.

[9] Peterson's claims include the Americans with Disabilities Act, 42 U.S.C. § 12101, yet he sets it aside in this writ to focus on whistleblowing, which serves as the nexus of all his claims.

reopen the proceedings for good cause shown." Order (D. Kan.).

September 14, 2021: The arbitrator grants Minerva leave to file a breach of contract counterclaim against Peterson for retaining confidential company documents. App. 47. Notably, Minerva waited *more than three years* to pursue this claim, despite Peterson proactively informing the company that he had retained the documents as part of the safety investigation. App. 76; 77. Moreover, under Section 2, *Confidential Information*, of the employment agreement, Minerva's policy addresses not the retention of confidential information but rather its unauthorized use and disclosure. App. 59.

May 15–19, 2023: JAMS conducts a private, unrecorded arbitration hearing over Zoom. App. 47.

June 15, 2023: The arbitrator issues an interim award, ruling against Peterson on all claims and in favor of Minerva on its breach of contract counterclaim. App. 47.

August 21, 2023: JAMS issues its final award. As the arbitrator observed, Peterson's time at Minerva had been "uneventful" until the "situation culminated in the events of 2018," triggered by the rollout of Minerva's replacement device, which led to a "downward spiral." App. 48. As for the cause, both parties offered differing perspectives. Peterson attributed the issue to "retaliation over his concerns about product safety—whistleblowing." App. 48–49. In contrast, Minerva pointed to "job performance" issues and "lapses in professional judgment," citing

incidents such as Peterson's failure to follow the company's expense policy and his suggestion to include a video in a sales presentation titled *Book of Truth,* on the importance of truthfulness when selling surgical devices. App. 49–50.

Turning to the arbitrator's award, on Peterson's foundational whistleblower claim, the arbitrator correctly cited § 1102.5, titled *Whistleblower Protection,* acknowledging the statute:

> While retaliation claims take many forms, Peterson focuses his claim on … California Labor Code section 1102.5.
> App. 49–50.

Next, the arbitrator stated that "Minerva presented evidence that there was nothing unsafe about the original device." App. 51. Based on this testimony, the arbitrator concluded:

- "Whether Peterson was engaged in protected activity is a matter of dispute." App. 51; and
- "It is questionable whether Peterson's advocacy for exchanging the original device for the ES device was reasonable." App. 51.

Yet, after citing the correct standard of § 1102.5 to evaluate the whistleblower claim, the arbitrator applied California Civil Jury Instruction (CACI) 2505, tied to § 12940(h), which provides the wrong essential elements for evaluating whistleblower claims. App. 51. In doing so, the arbitrator applied the wrong legal standard to Peterson's foundational claim, despite referencing the correct one at the outset.

After ruling against Peterson on his claims, the arbitrator decided Minerva's breach of contract counterclaim. During litigation, Minerva hired a forensic computer expert to analyze Peterson's hard drive, which resulted in a *litigation expense* of $7,029.94. App. 52. Curiously, Minerva paid for this analysis even though Peterson had informed the company years earlier, when he left Minerva, that he had retained company documents—a fact Minerva acknowledged multiple times. App. 76; 77. Moreover, while the arbitrator did not mention it in his award, CEO Clapper *volunteered* during his testimony—despite objections from his own attorneys—that he hired the expert "to get Peterson to walk away."[10] The award, however, explicitly states: "there is no evidence of improper information-sharing," and "Minerva concedes that it is unable to prove actual loss or unjust enrichment." App. 52–53. Nonetheless, the arbitrator awarded Minerva the following:

- $7,029.94 in damages for a litigation expense;
- $190,000 in attorney fees; plus
- $1,529 in costs. App. 53.

In brief, the arbitrator ruled against all of Peterson's claims and awarded Minerva nearly $200,000 for a breach of contract counterclaim—for a litigation expense—even while acknowledging that Minerva failed to prove damages and that Peterson

[10] Peterson stated this in both his district court (pp. 34–35) and Tenth Circuit (p. 29) briefs, which Minerva never disputed.

neither disseminated the information nor profited from retaining it.

B. The motion to reopen and vacate

September 22, 2023: Now proceeding pro se, Peterson moves the court to reopen the case and vacate the award. Mot. (D. Kan.). He provides the following reasons in support of the motion:[11]

- Minerva defended itself with unsupported denials, which Peterson refuted with documented evidence. Consequently, the court had the authority to intervene. Fed. R. Civ. P. 60(b)(6) (providing "any reason that justifies relief" as grounds to relieve a party from a final judgment); 9 U.S.C. § 10(a)(1) (providing "undue means" as grounds to vacate an arbitration award). ROA 173–76;
- Minerva prevailed by fraud because of its use of perjury, falsification, concealment, and misrepresentation during the arbitral proceedings. Consequently, the court had authority to intervene. Fed. R. Civ. P. 60(b)(3) (providing fraud as grounds to relieve a party from a final judgment); 9 U.S.C. § 10(a)(1) (providing fraud as grounds to vacate an arbitration award). ROA 176–187;

[11] As a pro se litigant, Peterson presumed that the Federal Rules of Civil Procedure would apply to the federal court's review of his arbitration award.

- Minerva abused the legal system by misusing the privacy of arbitration along with nondisclosure and confidentiality agreements to unjustly prevail. Consequently, the court had the authority to intervene. Fed. R. Civ. P. 60(b)(6); 9 U.S.C. § 10(a)(1). ROA 187–88; and
- After correctly citing Cal. Lab. Code § 1102.5, the arbitrator erred by applying the wrong legal standard, Cal. Gov. Code § 12940(h), to Peterson's foundational whistleblowing claim. Additionally, the arbitrator awarded damages to Minerva despite its failure to prove damages, violating Cal. Civ. Code §§ 3300 and 3301. Consequently, the court had authority to intervene. Fed. R. Civ. P. 60(b)(1) (providing legal mistakes as grounds to relieve a party from a final judgment). ROA 188–198.

October 23, 2019: Minerva responds to Peterson's motion. Resp. (D. Kan.). In addition to arguing that the court should deny Peterson's motion under 9 U.S.C. § 10, Minerva contended that denial was warranted under the Tenth Circuit's "judicially created grounds" of "violation of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing." ROA 212.

At its core, Minerva's response focused on the finality of binding arbitration, arguing that Peterson should not get a second chance. ROA 213. Notably, Minerva never asserted that its original design was safe; instead, it argued that the issue was irrelevant

because "determining whether the medical device was flawed is not the role of this Court." ROA 216. Regarding the arbitrator's legal errors, Minerva avoided the issue.

December 8, 2023: The court overrules Peterson's motion. App. 13–27. In doing so, it acknowledged that courts "must afford maximum deference to the decisions of the arbitrator." App. 14. The court further emphasized that this deference must be "extreme" because "the standard of review of arbitral awards is among the narrowest known to law." App. 15. The court issues judgment, confirming the award *without reopening the case*. J. (D. Kan.).

C. The appeal

February 10, 2024: Peterson, still proceeding pro se, files his appeal. Appellant Br. (Tenth Cir.). In support of reversing and remanding the case, he provides the following reasons:

- The court erred by failing to provide relief under both the FAA's grounds for vacatur and the judicially created grounds of "manifest disregard of the law" and "violation of public policy." *Id*. at 20–22;
- The arbitrator knew the correct whistleblower statute and disregarded it. *Id*. at 23–26;
- The arbitrator awarded Minerva for Peterson's breach of contract despite no breach. *Id*. at 26–28;
- The arbitrator awarded Minerva even though Peterson caused no damage. *Id*. at 28–30; and

- The arbitrator disregarded documented evidence that showed Minerva provided false testimony. *Id*. at 30–38.

March 4, 2024: The court supplements the record on appeal to reflect that Minerva signed the patent application because it believed that the information contained therein was true. App. 28–29.

March 19, 2024: Minerva responds to Peterson's appeal. App. 30–36. To begin, Minerva states that Peterson's appeal was "based on *federal question jurisdiction* under 28 U.S.C. § 1331," indicating that the case should be adjudicated in the federal court system.[12] App. 30 (emphasis added).

Next, Minerva disregarded Peterson's Questions Presented and substituted its own. App. 31. Minerva then rejected Peterson's statement of facts, offering an alternative version instead. App. 31–36. In these alternative facts, Minerva admitted the following:

- Minerva *admitted* that whistleblowing is the nexus of Peterson's claims because "[n]early all of [his] claims required him to prove an 'adverse employment action' resulted from his engaging in 'protected activity.'" App. 32.
- Minerva *admitted* that the "situation culminated in the events of 2018," which is when Minerva confidentially shared with the sales team that its original design had a defect that injured patients. App. 33.

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[12] Peterson filed his lawsuit based on diversity of citizenship under 28 U.S.C. § 1332. Appellant Br. at vi.

- Minerva *admitted* that it "worked on product improvements, particularly in response to reports of injuries to patients caused by perforations to the uterus that had not been detected … because of limitations in the product design." App. 34.
- Minerva *admitted* that "the FDA did not permit [it] ... to claim the newer ES device was 'safer' than the original." App. 35. Despite making this argument to the arbitrator—and now the court, Minerva's own marketing materials prove that it made such claims anyway. App. 60–65.
- Minerva *admitted* that it "criticized Peterson for communicating product concerns in writing" because he "took the customer's position and … advocated for the exchange of devices based on reasons related to comparative incidents of injury." App. 35.

August 15, 2024: The court issues an order and judgment affirming the district court's decision. App 1–12. In doing so, the appeals court, like the district court, acknowledged that "the standard of review of arbitral awards is among the narrowest known to law." App. 6. Then, when discussing the possible justifications for vacatur, the court recognized that it lacked both discretion and power over arbitration awards. App. 3 (stating "we do not have discretion to overturn them"); App. 8 (stating "federal courts do not have the power to review an arbitrator's factual findings"); App. 9 (stating a "federal court cannot set

aside an arbitration award based on legal error unless it amounts to 'manifest disregard of the law'"); App. 10 (rejecting Peterson's public policy argument because "we have no power to review that finding").

In addition, although Minerva *changed its story* and admitted to the court that its original design had a defect that injured patients—effectively conceding that its testimony during arbitration was false and arguing against its own prior statements—the court nevertheless accepted the arbitrator's conclusion that the original design was safe. App. 8; 10.

Furthermore, the court acknowledged that the arbitrator's belief in the device's safety was an "important part" of the arbitrator's "conclusion that Peterson did not genuinely believe the product was unsafe." App. 8.

REASONS FOR GRANTING THE PETITION

I. Although an employee can waive their right to a jury trial, the waiver does not extend to other constitutional principles.

Under the FAA, employees can waive their right to resolve employment disputes by judicial remedies, such as jury trial. *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). But the waiver is about the place of resolution: arbitration instead of court. *Id.* (recognizing that a party "only submits to their resolution in an arbitral, rather than a judicial, forum"). Although *Gilmer* established that employees could waive their right to a jury trial in favor of

arbitration, this holding does not extend to other fundamental constitutional rights.

A. No person shall be denied due process or equal protection under the law.

The Due Process Clause, as enshrined in the Fifth Amendment, guarantees that the government provides fair procedures before depriving an individual of life, liberty, or property. U.S. Const. amend. V. Seventy-seven years later, the Fourteenth Amendment expanded these protections by extending due process and equal protection to all citizens. U.S. Const. amend. XIV, § 1.

Accordingly, a court can only confirm an arbitration award if the arbitral process resolves the legal dispute with due process and equal protection of the laws. This aligns with the FAA, which states, "the court must grant [an order to confirm] *unless* the award is vacated, modified, or corrected." 9 U.S.C. § 9 (emphasis added). The Act's use of the word "unless" is deliberate. With this word, Congress signaled that it expects courts to conditionally confirm arbitration awards.

B. The rule of law reigns supreme.

As Thomas Paine declared in his 1776 pamphlet *Common Sense*, "The Law is King." This principle is embodied in the Supremacy Clause, which ensures that the Constitution and federal laws are the supreme law of the land. U.S. Const. art. VI, cl. 2. Accordingly, judges are bound to "administer justice ... under the Constitution." 28 U.S.C. § 453.

As such:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied. *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2259 (2024) (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936)).

However, courts have strayed from exercising independent judgment in determining whether arbitration awards adhere to the rule of law. Instead, they increasingly use their immense judicial power to confirm and enforce awards with mere deference to arbitrators. Yet, the Constitution prevents such unchecked authority.

C. The Framers designed a system of checks and balances to protect individual liberty.

Recognizing the unassailable importance of the balance of power, the Framers drafted the first three articles of the Constitution to establish a clear division of power between the Legislative Branch (U.S. Const. art. I), Executive Branch (art. II), and Judicial Branch (art. III). This separation ensures that the Judicial Branch can impartially administer the law through independent judgment. *Loper Bright*, 144 S. Ct. at 2257. This independence is crucial, as it allows the courts to serve as a constitutional check on erroneous interpretations of the law that "dictate the outcome of cases." *Id.* at 2274 (Thomas, J., concurring). Indeed, "[t]his duty of independent

judgment is perhaps 'the defining characteristic of Article III judges.'" *Id.* at 2283 (Gorsuch, J., concurring) (quoting *Stern v. Marshall*, 564 U.S. 462, 483 (2011)). Moreover, independent judgment is inseparable from the foundational principle of judicial review, which embodies the Court's authority to interpret the Constitution. *See Marbury v. Madison*, 5 U.S. 137 (1803).

Crucially, both independent judgment and judicial review are integral to arbitration because, under the FAA, courts exercise their Article III powers when enforcing arbitration awards. Accordingly, in enacting the FAA, Congress intended for the Judicial Branch to maintain supervisory authority over arbitration. *Smith v. Spizzirri*, 601 U.S. 472, 478 (2024) (recognizing the "supervisory role that the FAA envisions for the courts").

However, courts have increasingly relinquished their duty of independent judgment and power of judicial review by merely deferring to arbitrators. In Peterson's case, for example, the Tenth Circuit, despite its Article III powers, repeatedly acknowledged that it lacked discretion and power over arbitration awards:

- "[W]e *do not have discretion* to overturn them." App. 3 (emphasis added);
- "[F]ederal courts *do not have power* to review an arbitrator's factual findings." App. 8 (emphasis added);

- "A federal court *cannot* set aside an arbitration award based on legal error." App. 9 (emphasis added); and
- "[W]e have *no power* to review that finding." App. 10 (emphasis added).

Moreover, after disposing of Peterson's appeal, the court issued an unpublished opinion because the precedent—regarding the court's lack of discretion and power over arbitration awards—was already well established.[13]

But this raises a critical question:

How did the courts lose their discretion and power over arbitration awards?

The answer:

The courts' increasing deference to arbitrators.

As the Tenth Circuit has emphasized, courts are required to apply "extreme deference" to arbitration awards. *Hollern v. Wachovia Sec., Inc.*, 458 F.3d 1169, 1172 (10th Cir. 2006). This deference is further exemplified by decisions requiring "maximum deference." *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995).

Yet this deference to arbitrators contrasts sharply with the Court's decision to overrule *Chevron*, where the Court divided on whether to defer to federal agencies based on their expertise. *Loper Bright*, 144 S. Ct. at 2311 (Kagan, J., dissenting) (stating that agencies tend to be a "better choice" as "experts in the field"), *contra Chevron U.S.A., Inc. v. Nat. Res. Def.*

[13] The district court also issued an unpublished opinion.

Council, Inc., 467 U.S. 837 (1984). Unlike federal agencies, arbitrators are not typically subject-matter experts; rather, they are professionals hired for their knowledge of general legal principles. For instance, in *Peterson*, the parties did not choose the arbitrator for his expertise in healthcare, medical devices, or FDA regulations but rather to resolve the employment dispute based on the application of law.

II. Lower court decisions conflict on the extent of judicial authority to vacate arbitration awards.

Over the century since Congress enacted the FAA, the courts have undergone a transformative shift in their authority to vacate arbitration awards, leading to significant conflict. This conflict extends not only to how courts should interpret and apply the FAA but also to how they should reconcile evolving judicial doctrines developed over the last hundred years.

A. Courts are uncertain about their authority to vacate awards under the FAA's plain language.

Congress provided the courts with two avenues for vacating arbitration awards, one contractual and the other arbitration-specific.

1. Arbitration agreements are valid contracts, but only conditionally.

Under the FAA, arbitration agreements are valid, irrevocable, and enforceable. This makes perfect sense because, without enforceability, arbitration agreements would be an ineffective alternative to

litigation. But as an alternative, Congress made enforcement conditional. An arbitration agreement:

> shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract*.
> 9 U.S.C. § 2 (emphasis added).

As an acknowledgment of the statute's intended meaning, in *Morgan v. Sundance, Inc.*, the Court held that "federal policy is about treating arbitration contracts like all others." 596 U.S. 411, 418 (2022). And the Court has long upheld that contracts are unenforceable if they violate the law:

> The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) (quoting *McMullen v. Hoffman,* 174 U.S. 639, 654 (1899)).

Furthermore, as evidenced by a nineteenth century holding, contracts that violate public policy are void: "The whole doctrine of voiding contracts for illegality and immorality is founded on public policy." *Hanauer v. Doane*, 79 U.S. 342, 349 (1870). Simply put, any contract contrary to public policy "calls for judicial condemnation." *Weil v. Neary*, 278 U.S. 160, 174 (1929). But Congress did not stop at contractual grounds for vacatur; it added more.

2. Beyond contractual grounds, the FAA provides arbitration-specific grounds for vacatur.

In *addition* to contractual grounds, the FAA gave the courts arbitration-specific authority to vacate awards under 9 U.S.C. § 10, which includes fraud or undue means under § 10(a)(1). These are two distinct grounds, and this petition will begin by addressing fraud.

The Court has long defined fraud as "perjury, falsification, concealment, [or] misrepresentation." *Knauer v. United States*, 328 U.S. 654, 657 (1946). So, if a party perjures, falsifies, conceals, or misrepresents to prevail in arbitration, the Court should intervene under § 10(a)(1). Yet court reversals of arbitration awards for fraud are exceedingly rare.

One such exception is *France v. Bernstein*, where the court reversed because France perjured testimony and knowingly concealed evidence. 43 F.4th 367, 378 (3d Cir. 2022). What sets *France* apart was that the concealed evidence went undiscovered until after the arbitral hearing. *Id.* at 379 (holding the non-production of responsive documents was not discoverable through reasonable diligence). But this distinction is unhelpful when a party uses false testimony to hide the truth about evidence available during arbitration.

The issue is clear: fraud determinations hinge on how the factfinder accesses and interprets the facts.

In arbitration, however, the arbitrator serves as both judge and jury. Thus, when a party engages in fraud—whether by perjury, falsification, concealment, or misrepresentation—to deceive the arbitrator, the lack of independent judicial review enables the wrongdoer to evade truth and accountability. Neither the Constitution nor the FAA envisions arbitration as a mechanism for wrongdoers to exploit and undermine justice.

Peterson's case underscores this concern. Although Minerva prevailed, it did so through false testimony, asserting that "there was nothing unsafe about the original device." App. 51. However, the documented evidence unequivocally contradicts this testimony, showing that Minerva knew it was false:

- Minerva's patent for a replacement device. App. 54; 55–58 (swearing to the U.S. Patent Office that its device had a defect that could cause patient injuries);
- Minerva's tests on pig uteri. App. 67–69 (showing a device with a dangerous defect); and
- Minerva's tests on patients. App. 70 (comparing the injury rate of the defective device to its replacement).

To further cement the truth, on March 4, 2024, the court—on its own motion—supplemented the appellate record, certifying that Minerva "testified that it signed [its application for a replacement device] because it believed all statements within the application were true." Mot. (Tenth Cir.); App. 29.

Legally, it was now certain: Minerva knew its device had a defect that caused patient injuries. App. 58 (stating it "would likely cause thermal injury").

As a result of this legal certainty, Minerva admitted to the court that its defective original design caused patient injuries. App. 34 (admitting "injuries to patients caused by perforations"). By doing so, Minerva contradicted its own arbitration testimony, effectively destroying its previous position. Yet, despite Minerva's admission of perjury, the court rejected Peterson's appeal, dismissing his arguments as "a veiled attempt to have us review the arbitrator's finding of fact." App. 8. In reaching this decision, the court affirmed its own limitations, explicitly acknowledging that, when it comes to reviewing arbitration awards, "federal courts *do not have power*." App. 8 (emphasis added).

The FAA's grounds for vacatur under § 10(a)(1) extend beyond fraud, however, covering instances when an award is procured by "undue means." While courts generally interpret undue means as something short of fraud, they diverge on its definition:

- The First Circuit defines it as behavior that is "underhanded or conniving." *Hoolahan v. IBC Advanced Alloys Corp.*, 947 F.3d 101, 113 (1st Cir. 2020);
- The Fourth Circuit explains it as "something like fraud." *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 858 (4th Cir. 2010);

- The Eighth Circuit characterizes it as "intentional misconduct." *PaineWebber Grp. Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 993 (8th Cir. 1999); while
- The Ninth Circuit describes it as "behavior that is immoral if not illegal." *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992).

As for *Peterson*, despite describing undue means as "behavior that is immoral if not illegal or otherwise in bad faith," the court overruled the motion, citing a lack of "supporting authority for the proposition" that a party's misuse of the legal system for its advantage constitutes undue means. App. 20–21 (internal quotation marks omitted). Regardless, a common thread emerges from these diverging definitions: each interpretation involves some degree of misconduct. But whatever the hurdle, both justice and public safety are compromised if the courts cannot agree on its height.

Beyond fraud and undue means, the FAA provides for vacatur "where the arbitrators exceeded their powers." § 10(a)(4). The term "exceeded," however, necessitates judicial interpretation to determine when arbitrators have overstepped their authority. The Court addressed this by establishing the *Stolt-Nielsen* Standard, which holds that arbitrators exceed their powers when their decisions do not draw their essence from the arbitration agreement. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666–67 (2010) (holding that the

arbitration panel "imposed its own policy choice and thus exceeded its powers"). Yet despite this standard, court decisions remain in conflict, as demonstrated by the following examples:[14]

Second Circuit

The court reversed a district court's decision to vacate an arbitration award based on the finding that the court lacked authority to vacate, even though the arbitrator had improperly interpreted the terms of the agreement. *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 115 (2d Cir. 2011).

As the dissenting judge pointed out:

> While [the limited review of arbitration awards] is surely a relevant point, this concern was not only as fully applicable to the award in *Stolt–Nielsen* as it is here but was also discussed extensively by the Supreme Court in that case. I will rely on the Supreme Court's discussion.

Id. at 132 (Winter, R., dissenting).

Third Circuit

The court stated: "Judicial review of labor arbitration is deferential but not toothless." *Indep. Lab'y Employees' Union, Inc. v. ExxonMobil Rsch. & Eng'g Co.*, 11 F.4th 210, 219 (3d Cir. 2021) (Bibas, S., concurring). This statement is superb on the surface.

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[14] To avoid redundancy, Peterson will address instances where the arbitrator exceeded his authority in the forthcoming section on judicially created grounds (pp. 39–44).

Upon closer inspection, however, the court's review lacked teeth, as it upheld the award despite the arbitrator misreading the contract. *Id.* (holding that "we must uphold an arbitral award if it has any toehold in the text").

Then, with a nod to arbitral deference, the court acknowledged that it would have reversed the award if it had been decided outside arbitration:

> *If this were a contract case, I would stop there and reverse the award*. But labor arbitration is different. And our highly deferential standard of review requires us to uphold the award.
>
> *Id.* at 220 (emphasis added).

In the end, this not only conflicts with the *Stolt-Nielsen* Standard by allowing the arbitrator to misinterpret the contract, but it also contradicts the Court's ruling in *Morgan*, which prohibits courts from creating rules that favor arbitration over litigation. 596 U.S. at 418.

Ninth Circuit

The court demonstrated that, beyond conflict, there is also confusion regarding when to apply the "exceeded power" standard. In this case, the court used § 10(a)(4) as potential grounds to vacate an award for manifest disregard of the law. *HayDay Farms, Inc. v. FeeDx Holdings, Inc.*, 55 F.4th 1232, 1240 (9th Cir. 2022) (stating "[v]acatur under § 10(a)(4) is warranted when an arbitration award exhibits a manifest disregard of law").

B. Courts are uncertain whether they may vacate awards based on judicially created grounds.

In addition to conflicting interpretations of the FAA, there is also disagreement over whether courts can provide grounds for review beyond those enumerated in the statute. This conflict springboarded in 2008 with *Hall St. Assocs., LLC v. Mattel, Inc*., where the Court held that Section 10 of the FAA provides the "exclusive" grounds for judicial review. 552 U.S. 576, 590. However, the Court limited its decision to "the scope of expeditious judicial review," leaving open the possibility of "other possible avenues for judicial enforcement of arbitration awards." *Id*. Despite the holding in *Hall Street*, the Court divided over the historical context and purpose of the FAA. For instance, as Justice Stevens emphasized in his dissent, the FAA is "a shield …, not a sword to cut down … judicial review for errors of law." *Id*. at 595 (Stevens, J., dissenting). This division further complicated the decision's interpretation and application. Now, sixteen years after *Hall Street*, doctrines such as manifest disregard of the law and violation of public policy remain ongoing sources of significant discord.

1. The courts disagree on whether an arbitrator has the power to manifestly disregard of the law.

The idea of "manifest disregard" stems from common law principles of judicial review and dates to 1953, when the Court indicated that arbitration

awards could be vacated for manifest disregard of the law as an implicit, judicially created ground for vacatur. *Wilko v. Swan*, 346 U.S. 427, 436–37 (stating manifest disregard is "subject to judicial review for error in interpretation"). Then, in 2008, about half a century after *Wilko*, the Court decided *Hall Street*, sparking uncertainty and conflict over whether manifest disregard survived or perished. Since *Hall Street*, circuit court decisions have suggested the following:[15]

Manifest Disregard Survived:

First, Second, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. circuits.

Manifest Disregard Perished:

Third, Fifth, Seventh, and Eighth circuits.

Regardless, even if manifest disregard survived *Hall Street*, it does not matter if the bar for vacatur is insurmountable. To demonstrate, here is how the Tenth Circuit applies the concept.[16]

In *Peterson*, the court stated that "the Tenth Circuit recognizes … manifest disregard of the law … as grounds to vacate." App. 15 (quoting *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001)). To prevail under this standard, the arbitrator must demonstrate "willful inattentiveness to the governing

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[15] While this survived/perished list may be debated, circuit court decisions generally suggest its accuracy. At the very least, research underscores significant conflict among the courts.

[16] Peterson is no exception. The Tenth Circuit has not reversed an arbitration award on the grounds of manifest disregard since *Hall Street* (2008); all appeals have fallen short.

law." App. 23 (quoting *Bowen v. Amoco Pipeline Co.,* 254 F.3d 925, 932 (10th Cir. 2001)).

The court continued:

> It is not sufficient to show that the arbitrator misunderstood the law or made an error; the record must show that "the arbitrator knew the law and explicitly disregarded it."
> App. 23–24.

And in *Peterson*, the arbitrator:

- cited the correct standard for evaluating whistleblower retaliation claims, § 1102.5 (App. 50);
- disregarded this standard (App 51); then
- applied § 12940(h), a standard that does not evaluate whistleblowing (App. 51).

Thus, the arbitrator "knew the law and explicitly disregarded it." But, in the end, despite meeting the court's own cited standard, the court did not reverse.

So, Peterson appealed.

On appeal, the court once again referenced the "willful inattentiveness" standard. App. 9 (quoting *Dish Network LLC v. Ray*, 900 F.3d 1240, 1243 (10th Cir. 2018)). Nevertheless, the court permitted the arbitrator to apply the wrong standard—despite citing the correct one—in deciding Peterson's whistleblower claim, justifying this by stating the arbitrator conducted "basic research" showing that "California standards are universal." App. 9. However, the court's opinion omitted that these standards are not universal; the correct standard for

whistleblower retaliation claims is § 1102.5. *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 709 (2022).

In addition to permitting the arbitrator's use of the wrong standard on Peterson's foundational claim, the Tenth Circuit affirmed the district court's judgment in favor of Minerva, despite its testimony that "there was nothing unsafe about the original device." App. 51. Documentary evidence conclusively disproved this statement, as shown by the following:

- Documented evidence shows that Minerva was aware its device had a defect that injured patients. App. 55–58; 67–69; 70;
- The court supplemented the record on appeal to confirm that Minerva signed its patent application—which acknowledged a device defect that could injure patients—because it was the truth. App. 29; and
- Minerva admitted to the court that its device was unsafe due to a known defect that caused patient injuries, effectively incriminating itself for perjury. App. 34.

Regarding Minerva's breach of contract counterclaim, it prevailed even though Peterson's act of copying information did not constitute a breach under the employment agreement, which prohibited only unauthorized disclosure. App. 52; 59. Moreover, Minerva conceded that "it is unable to prove actual loss or unjust enrichment," resulting in no damages under Cal. Civ. Code §§ 3300 and 3301. App. 53. Yet, the arbitrator awarded Minerva damages.

Peterson aside, the courts' conflicting views are concerning. Because, at its core, the courts' disagreement is not about whether an arbitrator must follow the law; it is about whether an arbitrator has the power to manifestly disregard it.

2. The courts disagree on whether an arbitrator has the power to violate public policy.

Public policy is a principle aimed at prohibiting actions that could harm the public.[17] Yet each circuit court generally mirrors its stance on manifest disregard of the law, so not all courts recognize violations of public policy as grounds to vacate. Nevertheless, even if violation of public policy survived *Hall Street*, it does not matter if the bar is insurmountable. To illustrate, here is how the Tenth Circuit applies the concept.[18]

In *Peterson*, the court stated that "the Tenth Circuit recognizes … violation of public policy … as grounds to vacate." App. 15 (D. Kan.) (quoting *Sheldon*, 269 F.3d at 1206). Similarly, both the California Supreme Court and the state legislature affirm the importance of whistleblower protection as rooted in public policy. *See Lawson*, 12 Cal. 5th at 716 (acknowledging the legislature's intent to "encourage earlier and more frequent reporting of … illegal acts").

However, even though the arbitrator decided Peterson's whistleblowing claim without applying the

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[17] *Public policy*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[18] Like manifest disregard, the Tenth Circuit has not reversed an arbitration award on public policy grounds since *Hall Street*.

public policy protections for whistleblowers, the court did not reverse.

So, Peterson appealed.

On appeal, the court did not review Peterson's argument; instead, it outright rejected it, stating it had *no power*: "[T]he arbitrator found the original device to be safe … and we have *no power* to review that finding. We therefore reject Peterson's public policy argument." App. 10 (emphasis added).

Peterson aside, the conflict's existence among the courts is alarming. At its heart, the disagreement rests on whether an arbitrator has the power to violate public policy and jeopardize public well-being.

III. Court rules that favor arbitration conflict with the federal policy.

In 2022, the Court issued a definitive holding: "The federal policy is … not about fostering arbitration." *Morgan*, 596 U.S. at 418. *But see, e.g.:*

- "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983);
- Arbitration "must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26; and
- "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it].'" *Hall St. Assocs.*, 552 U.S. at 576 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

By diverging from prior Court holdings and resolving the question of whether federal policy favors arbitration, *Morgan* allowed the Court to address whether courts can create rules that favor arbitration:

> [A] court may not devise novel rules to favor arbitration over litigation.
> 596 U.S. at 418.

Nevertheless, contrary to *Morgan*, courts consistently confirm and enforce arbitration awards based on judicially created rules that favor arbitration over litigation. While some may argue that the FAA endorses these rules, this is incorrect. To quote Martin Luther King, Jr., "Sometimes a law is just on its face and unjust in its application."[19]

To demonstrate this, the following are three examples of novel rules that favor arbitration and result in unjust outcomes when compared to litigation:

- Arbitrators can decide legal claims by using the wrong legal standard.[20] App. 9; 51.
    - In contrast, courts "must reverse" if the wrong standard is used in litigation. *E.E.O.C. v. Beverage Distributors Co., LLC,* 780 F.3d 1018, 1022 (10th Cir. 2015);

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[19] *Letter from Birmingham Jail* (Apr. 16, 1963).

[20] The arbitrator used CACI 2505, tied to § 12940(h), to evaluate Peterson's whistleblower claim. The correct instruction, however, is CACI 4603, tied to § 1102.5.

- Courts cannot provide relief from an arbitration award due to a legal error, even if the arbitrator misapplied the law. App. 9.
    - In contrast, in litigation, a judge's error of law—even if not obvious or flagrant—is grounds for relief. *Kemp v. United States*, 596 U.S. 528, 528–29 (2022); and
- Courts cannot overturn an arbitration award for clearly erroneous findings of fact because the courts have *no discretion* and *no power* to review factual findings. App. 3; 8; 10.
    - In contrast, in litigation, courts will overturn a lower court's factual findings when "the reviewing court … is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

IV. Arbitration services are provided by businesses, and money motivates.

Last year, a comprehensive review of academic literature, *Mandatory Employment Arbitration*,[21] identified three reasons why employers commonly mandate arbitration as a condition of employment:

- Employers win more;

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[21] Alexander J.S. Colvin & Mark D. Gough, *Mandatory Employment Arbitration*, 19 Ann. Rev. L. & Soc. Sci. 131, 131–44 (2023).

- Employers pay less; and
- Employers benefit from repeat business. *Id.* at 142.

As a result, employer use of mandatory arbitration has surged from "an insignificant practice" to "the predominant dispute resolution mechanism for employment rights today." *Id.* at 132. This rapid growth has created a booming market for private arbitration companies who market their services to employers. And money motivates in America, often described as "the land of capitalism." In fact, this idea dates to at least 1776, when Adam Smith argued in *The Wealth of Nations* that financial incentives are a primary motivator of behavior. This principle is also embedded in the law, which the legal system reinforces in several ways.

First, a judge who has a financial interest in a controversy shall disqualify himself or herself from the proceeding. *Code of Conduct for U.S. Judges*, Canon 3C(1)(c).

Second, criminal case law reflects that judges cannot have a direct pecuniary interest in the outcome of a decision. The fundamental precedent on judicial financial interest is *Tumey v. State of Ohio*, which involves an Ohio mayor who stood to gain $12 by convicting a defendant, Tumey, compared to $0 if acquitted. 273 U.S. 510 (1927). The Court held that the mayor violated Tumey's Fourteenth Amendment right by depriving him of due process because the judge had a direct pecuniary interest tied to ruling against him. *Id.* at 523.

Third, civil case law demonstrates that even the mere presence of a financial incentive—regardless of whether it involves a direct monetary payment—can influence a judge's impartiality. The Court extended this principle from *Tumey* into the civil context in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In *Caperton*, the Court reversed a circuit court decision to overturn a $50 million judgment against A.T. Massey Coal Co. because a judge on the three-judge panel refused to recuse himself despite having received a large campaign contribution from A.T. Massey's CEO. Although the judge did not personally gain financially from overturning the judgment, the Court held that the contribution undermined the judge's ability "to maintain the integrity of the judiciary and the rule of law." *Id.* at 889. However, the Court split on whether to reverse the decision, as allowing recusal claims based on a vague "probability of bias" could erode public confidence in judicial fairness. *Id.* at 902 (Roberts, C.J., dissenting). Yet a critical distinction remains: arbitration binds parties without courts exercising independent judgment or conducting meaningful judicial review of the arbitrator's decision.

V. This case has national significance because mandatory arbitration affects more than 50% of employees and about 60 million workers.

This writ request extends far beyond the named parties of this lawsuit. According to academic literature, "The rise of mandatory arbitration is

arguably the single most important development in US employment law and dispute resolution in the past three decades." *Mandatory Employment Arbitration* at 132. And the stakes: Employer mandated arbitration now affects "more than 50% of employees and cover[s] about 60 million workers." *Id.* at 133.

Moreover, mandatory arbitration is rampant in industries that have historically disadvantaged women and minority workers. *Id.*

As evidence of the above, the U.S. Department of Labor prosecutes workplace violations where workers are harmed by mandatory arbitration agreements. As the Solicitor of Labor explained:

> Because mandatory arbitration is on the rise, there are more workplaces where the Labor Department's Office of the Solicitor provides the only viable avenue for meaningful legal recourse.[22]
>
> U.S. Dep't of Lab.

It is difficult to imagine that Congress enacted the FAA to hinder "meaningful legal recourse." But even if so, it is impossible to imagine that the Framers of the Constitution would be okay with it.

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[22] Seema Nanda, *Mandatory Arbitration Won't Stop Us from Enforcing the Law*, U.S. Dep't of Lab. Blog (Mar. 20, 2023), https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law.

CONCLUSION

Above the entrance to the Supreme Court are the words: EQUAL JUSTICE UNDER LAW.

To fulfill this promise, the Court must serve as the final arbiter of the law, exercising independent judgment and maintaining the power of judicial review over arbitration awards. Continued extreme judicial deference to arbitrators erodes this essential role, allowing arbitration to undermine the Constitution's system of checks and balances and enabling wrongdoers to evade accountability. By reaffirming the courts' supervisory authority over arbitration, as Congress intended, and restoring the balance of power envisioned by the Framers when they vested the Judiciary with Article III powers, the Court can ensure that the promise of equal justice under law remains a living reality—not merely an ideal etched in stone above its entrance.

WHEREFORE, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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November 1, 2024

APPENDIX

Note on appendix contents and confidentiality:

The lower court opinions directly related to this case, as defined by Rule 14.1(b)(iii), are included in full. Other documents in the appendix contain only the pertinent parts relevant to the legal issues. Regarding confidentiality, Peterson moved to seal certain documents to protect Minerva's confidentiality interests. The court overruled the motion, stating: "The public interest in court proceedings includes the assurance that courts are run fairly and that judges are honest." Order at 1 (D. Kan. Nov. 6, 2023); Order at 1 (D. Kan. Dec. 8, 2023).

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED: August 15, 2024
Christopher M. Wolpert
Clerk of Court

DANIEL PETERSON,
Plaintiff - Appellant,
v.
MINERVA SURGICAL, INC.; DAVID CLAPPER,
Defendants - Appellees.

No. 24-3003
(D.C. No. 2:19-CV-02050-KHV-TJJ)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **EID**, and **FEDERICO**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Daniel Peterson, pro se, appeals the district court's denial of his motion to vacate an arbitration award and its order confirming that award. We have jurisdiction under 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(1)(D) and we affirm.

I

Defendant Minerva Surgical, Inc., is a medical device manufacturer headquartered in California. Peterson worked for Minerva as a sales representative in Kansas from 2015 to 2018, when he either resigned or was forced out. Peterson believed he was unlawfully forced out.

Peterson's employment contract required arbitration to resolve disputes, so he filed an arbitration demand against Minerva.[1]

He claimed, among other things, that Minerva violated California Labor Code § 1102.5(b), which prohibits employers from retaliating against employees based on whistleblowing activities. Minerva, for its part, filed a counterclaim alleging Peterson breached his employment contract when, after the end of his employment, he kept a copy of Minerva's trade secrets.

The arbitrator held a five-day hearing in May 2023. Following the hearing, the arbitrator entered an

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[1] Peterson's demand named David Clapper, Minerva's CEO, as a defendant. In this lawsuit he likewise names Clapper as a defendant. No party has explained why Clapper is a proper party independent from Minerva, so we will refer exclusively to Minerva.

award that summarized his factual findings and legal conclusions.

A

The following findings of fact made by the arbitrator are most relevant to this appeal. Although Peterson disagrees with some of them, we do not have discretion to overturn them. *See Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co.*, 119 F.3d 847, 849 (10th Cir. 1997) ("Errors in … the arbitrator's factual findings … do not justify review or reversal on the merits of the controversy.").

Minerva makes endometrial ablation devices used to treat heavy menstrual bleeding. Minerva's original device received FDA approval in 2015 or thereabouts. Minerva recruited Peterson that same year to be a sales representative.

By 2016, Minerva had received reports of injuries allegedly caused by its device or by doctors not using the device correctly.[2] By 2017, it had developed, patented, and received FDA approval for a modified device designed to prevent those injuries.

When the modified device became available, doctors told Peterson and other sales personnel that they wanted to exchange their original devices for the modified version, but Minerva generally would not permit this. When Peterson and other sales personnel emailed Minerva executives about doctors' safety concerns with the original devices, Minerva

[2] Minerva's internal documents showed an injury rate of 0.079%, or one injury for every 1,269 procedures.

executives criticized them for putting safety concerns in writing.

On April 17, 2018, Peterson emailed three top Minerva executives asserting they had retaliated against him and otherwise mistreated him based on his advocacy for allowing doctors to exchange the original devices for the modified versions.[3] He again advocated for allowing an exchange, pointing to the incidence of injury.

Minutes later, Peterson emailed a request for a leave of absence based on personal medical challenges. Minerva granted that leave. Over the next few months, Peterson (sometimes through his attorney) and Minerva (sometimes through its attorneys) exchanged many emails—Peterson insisted on written communication only—about the nature and severity of Peterson's disability and whether Minerva could accommodate it. In early September 2018, he announced to Minerva that he would provide no more information about his disability, and he was no longer a Minerva employee.

Minerva treated this announcement from Peterson as a resignation, which it accepted. Peterson's employment contract then obligated him to return all Minerva property, including confidential information. Sometime later, Minerva discovered that Peterson had nonetheless retained a hard drive containing thousands of Minerva documents,

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[3] This email is not in the record (as opposed to the arbitrator's brief summary of it), so it is unclear what alleged retaliation or mistreatment Peterson was referring to.

including trade secrets. Minerva hired a computer forensics expert to analyze the data on that hard drive, which Peterson still possessed as of the arbitration hearing. Minerva paid the expert more than $7,000 for his services.

B

The arbitrator concluded Peterson's California whistleblower claim failed because:

- He had not proven protected activity, i.e., advocating for swapping the original devices for the modified devices based on genuine safety concerns, as opposed to concerns about keeping customers satisfied.
- He had not proven that he suffered an adverse employment action. Specifically, he had not proven that his months-long email exchange about disability was a sham process intended to force him to resign.
- Even if he had proven the foregoing two elements, he had not proven that his reports of safety concerns were a substantial motivating reason in Minerva's alleged scheme to force him to resign.

As for Minerva's contract counterclaim, the arbitrator found Peterson's retention of trade secrets qualified as a breach and he awarded damages in the amount of the fee Minerva paid to the computer forensics expert, about $7,000. The arbitrator further awarded Minerva $190,000 in fees and about $1,500 in costs based on a fee-shifting clause in Peterson's

employment contract. Finally, the arbitrator ordered Peterson to return Minerva's documents.

II

Peterson, now pro se, moved in the United States District Court for the District of Kansas to set aside the arbitration award. *See* 9 U.S.C. § 10(a). Minerva opposed and cross-moved for confirmation. *See id.* § 9. The district court denied Peterson's motion, granted Minerva's cross-motion, and entered final judgment consistent with the arbitrator's award. Peterson now timely appeals.

III

"We review a district court's order to vacate or enforce an arbitration award de novo." *Dish Network LLC v. Ray*, 900 F.3d 1240, 1243 (10th Cir. 2018) ("*Ray*"). A federal court's ability to vacate an arbitration award is extremely limited. *See id.* (summarizing the possible justifications for vacatur). Indeed, "the standard of review of arbitral awards 'is among the narrowest known to the law.'" *ARW Exploration Corp. v. Aguirre,* 45 F.3d 1455, 1462 (10th Cir. 1995) (internal quotation marks omitted). We will

discuss below the possible justifications for vacatur, as they become relevant to Peterson's arguments.[4]

A

1

As noted, the arbitrator concluded Peterson's whistleblower retaliation claim failed in part because he failed to show protected activity. The arbitrator believed Peterson's safety complaints were profit-motivated, not genuinely safety-motivated. One reason the arbitrator gave in support of this interpretation of the evidence was that "the original device had never been deemed unsafe by the FDA or subject to recall." R. at 235. Peterson claims the arbitrator was misled by Minerva's witnesses' testimony that the original device was still safe, in contrast to evidence he introduced that the original device was unsafe. Peterson therefore claims "the [arbitration] award was procured by … fraud," 9 U.S.C. § 10(a)(1), which is one justification for this court to vacate an arbitration award.

Minerva says the arbitrator never made a finding that the device was either safe or unsafe. For argument's sake, we will accept Peterson's

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[4] We decline to consider one of Peterson's main arguments. The district court denied Peterson's motion to vacate because he had not followed a District of Kansas local rule governing the length and content of motions. Peterson says this was error, but the district court also provided a complete alternative analysis on the merits. We likewise focus on the merits, so even if the district court made a procedural error, any such error is harmless. *See* Fed. R. Civ. P. 61 (requiring courts to disregard harmless error).

interpretation that the arbitrator concluded the original device was safe. We will further assume this was an important part of the arbitrator's further conclusion that Peterson did not genuinely believe the product was unsafe. Still, the first conclusion—the original device was safe—is not the product of fraud. It is merely the resolution of a factual dispute. The arbitrator had before him all the evidence Peterson now offers to show the original product was unsafe. The arbitrator resolved the factual issue against Peterson.

As we have already stated, federal courts do not have power to review an arbitrator's factual findings. *See Denver & Rio Grande*, 119 F.3d at 849. Because it is a veiled attempt to have us review the arbitrator's finding of fact, we reject Peterson's fraud theory.

2

During the arbitration, Peterson pursued multiple retaliation claims, such as a California whistleblower retaliation claim, retaliating against a person who requests a disability accommodation in violation of California law, and retaliating in violation of Kansas common law. Analyzing all of Peterson's retaliation claims together, the arbitrator set forth a five-element test Peterson needed to satisfy in order to prevail. One of those elements was that "the protected activity was a substantial motivating reason for the adverse employment action." R. at 235. Peterson argues this was error because his California whistleblower claim only requires him to prove that his protected activity "was a contributing factor in the

alleged prohibited action against the employee," Cal. Lab. Code § 1102.6, not a substantial motivating reason.

A federal court cannot set aside an arbitration award based on legal error unless it amounts to "a manifest disregard of the law, defined as willful inattentiveness to the governing law." *Ray*, 900 F.3d at 1243 (internal quotation marks omitted). Peterson believes he satisfies this standard because the arbitrator's supporting citation for the five-element retaliation test was as follows: "CACI 2505 and 4603; no citations to Kansas law were provided but basic research supports that the California standards are universal." R. at 235 n.2. CACI 2505 is the California pattern jury instruction for Peterson's disability-based retaliation claim. It uses the "substantial motivating reason" formulation. CACI 4603 is the pattern instruction for Peterson's whistleblower-based retaliation claim, and it uses the "contributing factor" formulation. Thus, according to Peterson, the arbitrator manifestly disregarded the law because it is clear the arbitrator looked at the law and saw the two differing standards, but he chose to apply the inapplicable standard.

We are not persuaded. In our reading, any error resulted from the initial choice to treat all retaliation claims as equivalent—further evidenced by the arbitrator's statement about "basic research" showing that "California standards are universal," R. at 235 n.2. Even if it was a misapplication of California law, we are not convinced it was "willful inattentiveness,"

Ray, 900 F.3d at 1243 (internal quotation marks omitted). We therefore reject this argument.

3

We may also vacate an arbitration award "when [it] violates public policy." *Id*. Peterson claims the arbitrator's denial of his whistleblower claim does just that.[5] He seems to argue that California's whistleblower protections are meant to serve public policy (specifically, public safety), so the arbitrator's flawed reasoning as to his whistleblower claim must necessarily violate public policy.

Peterson failed to preserve this argument in the district court. His mention of the public policy exception in this context was very brief. *See* R. at 195. Regardless, he provides no support for the idea that erroneous analysis of a cause of action intended to further public safety is automatically a violation of public policy that justifies overturning an arbitration award. Also, we have presumed the arbitrator found the original device to be safe, as Peterson contends, and we have no power to review that finding. We therefore reject Peterson's public policy argument.

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[5] Peterson also repeatedly claims, without specifics, that the arbitrator's *entire* award violates public policy. We disregard these arguments as inadequately developed. *See United States v. Jones,* 768 F.3d 1096, 1105 (10th Cir. 2014) ("[P]erfunctory or cursory reference to issues unaccompanied by some effort at developed argument are inadequate to warrant consideration … .").

B

1

Peterson argues the arbitrator manifestly disregarded the law because he found Peterson breached his employment contract by making a copy of Minerva's confidential information. Peterson says the employment contract only prohibits disclosure, not copying, so there was no breach.

Peterson did not make this argument to the district court until his reply brief in support of his motion to vacate the arbitration award, and the district court did not rule on it. "[W]hen a litigant fails to raise an issue below in a timely fashion and the court below does not address the merits of the issue, the litigant has not preserved the issue for appellate review." *FDIC v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999). We therefore do not address this argument further.

2

Peterson also argues the arbitrator manifestly disregarded the law by finding a breach of contract without evidence of damages. Peterson argues the amount Minerva paid to its computer forensics expert cannot count as damages because it was a litigation expense. He does not tell us which state's law applies to this claim. The only decision he cites is *Tank Connection, LLC v. Haight*, 161 F. Supp. 3d 957 (D. Kan. 2016), which held that the plaintiff could not claim computer forensic consulting fees as damages for trade-secret misappropriation under Kansas law

because the plaintiff was searching for evidence of misappropriation, not compensating for losses caused by the misappropriation, *see id*. at 960, 965–66.

If the arbitrator committed any error here, it again did not rise to "willful inattentiveness," *Ray*, 900 F.3d at 1243 (internal quotation marks omitted). We find no basis to vacate the award.

IV

We affirm the district court's judgment. We deny Minerva's request for attorneys' fees and costs on appeal. Minerva did not put the fee-shifting portion of the employment contract into the record, so we cannot say whether we (as opposed to the arbitrator) have power to award fees and costs.

Entered for the Court

Richard E.N. Federico
Circuit Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED: December 8, 2023

DANIEL PETERSON,
Plaintiff,

v.

MINERVA SURGICAL, INC. and
DAVID CLAPPER,
Defendants.

CIVIL ACTION
No. 19-2050-KHV

MEMORANDUM AND ORDER

[Decided by Kathryn H. Vratil, District Judge.]

On January 30, 2019, Daniel Peterson filed suit against Minerva Surgical, Inc. and David Clapper, alleging discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111 et seq. (Count I), retaliation in violation of the ADA (Count II), retaliation in violation of Kansas public policy (Count III), breach of implied contract (Count IV) and tortious interference with prospective business advantage (Count V). See Complaint (Doc. #1). In addition, plaintiff sought a declaratory judgment on the enforceability of the arbitration provision within his employment contract (Count VI).

See id. On October 23, 2019, the Court sustained defendants' motion to compel arbitration. See Memorandum And Order (Doc. #30).

This matter is before the Court on Plaintiff's Motion To Reopen Case & Vacate Arbitration Award (Doc. #41) filed September 22, 2023 and Defendants' Response To Plaintiff's Motion To Reopen Case And Vacate Arbitration Award And Application For Order Confirming Arbitration Award (Doc. #52) filed November 3, 2023. For reasons set forth below, the Court overrules plaintiff's motion and sustains defendants' motion to confirm the arbitration award.

Legal Standard

The Court's power to review an arbitration panel award is quite limited; indeed, it is "among the narrowest known to the law." ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995). Courts must afford maximum deference to the decisions of the arbitrator and will only set aside the decision in "very unusual circumstances." Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568 (2013); THI of N.M. at Vida Encantada, LLC v. Lovato, 864 F.3d 1080,1083 (10th Cir. 2017). The party seeking to vacate an arbitrator's award therefore "bears a heavy burden." Oxford Health Plans, 569 U.S. at 569.

Section 10 of the Federal Arbitration Act ("FAA") enumerates the grounds on which the Court may vacate an arbitration award:

(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 U.S.C. § 10(a). In addition, the Tenth Circuit recognizes violation of public policy, manifest disregard of the law and denial of a fundamentally fair hearing as grounds to vacate. Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001).

Aside from these limited circumstances, Section 9 of the FAA requires courts to confirm arbitration awards. THI of N.M., 864 F.3d at 1084; 9 U.S.C. § 9 ("At any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order."). In reviewing an arbitration award, the Court must "give extreme deference to the determination of the arbitration panel for the standard of review of arbitral awards is among the narrowest known to law." Hollern v. Wachovia Sec., Inc., 458 F.3d 1169, 1172

(10th Cir. 2006) (quoting Brown v. Coleman Co., 220 F.3d 1180, 1182 (10th Cir. 2000)). "Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances." Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1146–47 (10th Cir. 1982).

Factual Background

The factual background underlying the parties' dispute is set forth in detail in the Court's Memorandum And Order (Doc. #30) filed October 23, 2019.

Highly summarized, Minerva employed plaintiff for over two and a half years as an Area Sales Director. In that role, plaintiff worked as an intermediary between the sales and engineering teams and acted as a "go-to resource" on product functionality and patient safety. Complaint (Doc. #1), ¶ 10. Sometime between late 2017 and early 2018, Minerva introduced a redesigned medical device product (the "ES")—which plaintiff assisted in designing—to replace a prior device (the "Classic"). Minerva informed the sales team that it would not be recalling the Classic. In April of 2018, plaintiff voiced concerns to management about performance problems with the Classic and whether Minerva should continue to sell them. On August 3, 2018, Minerva terminated plaintiff's employment.

During his employment, plaintiff agreed to arbitrate all disputes "arising out of, relating to, or resulting from [plaintiff's] employment with the

company or the termination of [his] employment with the company." Employment Agreement (Doc. #13-1) filed May 3, 2019 at 78. On January 30, 2019, plaintiff filed suit against Minerva and Clapper (Minerva's President and Chief Executive Officer), alleging that they failed to make reasonable employment accommodations for his disabilities, retaliated by terminating his employment and interfered with his future employment. See Complaint (Doc. #1). Plaintiff asserts that Minerva and its employees knew of the design defects in the Classic. Further, he contends that because he "blew the whistle" on the known defect, Minerva retaliated and terminated his employment. See Motion To Reopen Case (Doc. #41).

Procedural Background

On October 23, 2019, the Court sustained defendants' motion to compel arbitration pursuant to the arbitration clause in plaintiff's employment agreement. See Memorandum And Order (Doc. #30). On May 18, 2021, the Court administratively closed the case based on the pending arbitration proceedings. See Order (Doc. #39).

On January 31, 2020, plaintiff filed a Demand for Arbitration with the Judicial Arbitration and Mediation Services, Inc. ("JAMS"), an alternative dispute resolution company, against Minerva, Clapper and Thomas Pendlebury (Minerva's Vice President of Sales). Final Arbitration Award (Doc. #52-1) filed November 2, 2023 at 3. Plaintiff asserted claims for disability discrimination, failure to accommodate, retaliation, wrongful termination,

breach of implied contract, tortious interference with prospective business advantage, negligent interference with economic relations, defamation and patent correction. Id. On September 22, 2021, Minerva filed a cross-complaint against plaintiff for breach of contract, misappropriation of trade secrets and breach of duty of loyalty. Id.

Beginning on May 15, 2023 and lasting five days, the Honorable Richard J. McAdams (Ret.) conducted the arbitration hearing remotely by Zoom. Id. at 4. On June 15, 2023, the arbitrator issued an Interim Award finding that Minerva, Clapper and Pendlebury were not liable and that plaintiff had breached his contract with Minerva. Id. at 6. On August 21, 2023, JAMS issued its final award, ordering plaintiff to pay Minerva $198,558.94[1] and return all confidential documents and property. Id. at 22–27.

On September 22, 2023, plaintiff, proceeding pro se, filed this motion to reopen the case and vacate the arbitration award. See Motion To Reopen Case (Doc. #41). On November 2, 2023, defendants filed their application for an order confirming the arbitration award. See Application For Order Confirming Arbitration Award (Doc. #52).

Analysis

Initially, defendants argue that plaintiff's motion to reopen his case and vacate the arbitration award does not follow the procedural requirements set forth

[1] The arbitrator awarded Minerva $7,029.94 for breach of contract, $190,000 in attorney fees and $1,529 in costs.

in the District of Kansas Local Rules. Specifically, defendants assert that plaintiff's motion did not contain (1) a statement of the specific relief sought; (2) a statement of the nature of the matter before the Court; (3) a concise statement of the facts with citations to the record; and (4) his argument, referring to all statutes and authorities relied on. See D. Kan. Local Rule 7.1(a). Further, defendants point out that plaintiff's 36-page motion exceeds the rule's 15-page limit. See D. Kan. Local Rule 7.1(d)(3).

Even though the Court liberally construes the pleadings of pro se litigants, see Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), they must still comply with procedural rules which govern the action. Yang v. Archuleta, 525 F.3d 925, 927 n.1 (10th Cir. 2008). After reviewing plaintiff's motion, the Court concludes that plaintiff did not comply with Rule 7.1(a) because his statement of facts (7 pages) was not concise and did not provide citations to the record. Moreover, plaintiff's motion clearly exceeds the 15-page limit. Because plaintiff did not follow the procedural requirements set forth in the Local Rules, the Court overrules his motion.

Even if plaintiff had filed a proper motion, he has not shown that relief is warranted under Section 10 of the FAA to vacate the arbitration award.

I. Vacating The Arbitration Award

Plaintiff argues that the Court should reopen his case and vacate the arbitration award because (1) Minerva presented unsupported evidence that there was "nothing unsafe" about the Classic; (2) Minerva

abused the legal system by requiring arbitration; (3) Minerva fraudulently concealed and misrepresented the safety of the Classic; and (4) the arbitrator made various mistakes of law in analyzing the claims.

Defendant responds that (1) plaintiff has not addressed or sufficiently argued any grounds for vacating the award; and (2) plaintiff is asserting factual arguments already addressed and decided by the arbitrator. For these reasons, defendants request the Court overrule plaintiff's motion and confirm the final award.

A. Undue Means

Plaintiff argues that because Minerva presented unsupported evidence in arbitration and abused the legal system by requiring arbitration, the arbitration award was procured by "undue means" and the Court must vacate the award.

To vacate an arbitration award based on undue means, the movant must show that (1) the undue means were not discoverable upon the exercise of due diligence prior to or during the arbitration and (2) a nexus exists between the alleged undue means and the basis for the arbitrator's decision. See Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1022 (5th Cir. 1990); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988). The party asserting that the award was procured by undue means must establish the undue means by clear and convincing evidence. Bonar, 835 F.2d at 1383. Undue means generally require behavior that is "immoral if not illegal" or "otherwise in bad faith." A.G. Edwards &

Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992); MPJ v. Aero Sky, L.L.C., 673 F. Supp. 2d 475, 494 (W.D. Tex. 2009).

Plaintiff's allegations do not rise to the level of undue means under this test. First, plaintiff claims that the evidence did not support Minerva's testimony that there was nothing unsafe about the Classic. Because of this, plaintiff asserts that the arbitrator incorrectly believed that the device was safe, which undermined his claims. This argument appears to be nothing more than a factual dispute—which the arbitrator resolved—as to whether the Classic was actually safe. Because plaintiff's motion attempts to rehash the evidence and arguments that he previously presented to the arbitrator, it is not a sufficient ground on which to vacate the final award. See Cessna Aircraft Co. v. Avcorp Indus., Inc., 943 F. Supp. 2d 1191, 1198 (D. Kan. 2013) ("It is the [arbitrator]'s role—not the court's—to assess expert credibility, weigh the evidence, and make findings of fact.").

Second, plaintiff claims that Minerva obtained its award by misusing aspects of the legal system to its advantage. Specifically, he argues that Minerva unjustly used a mandatory arbitration agreement, asserted denials in its arbitration pleadings and employed its lawyers to encourage settlement of the dispute. Plaintiff has not provided, and the Court does not find, supporting authority for the proposition that such litigation tactics amount to misuse of the legal system. As such, plaintiff has not shown that

defendants obtained the arbitration award through undue means. Accordingly, the Court overrules plaintiff's motion on this ground.

B. Fraud

Plaintiff argues that the Court should vacate the arbitration award because defendants procured it through fraud, including by making misrepresentations and concealing known safety issues.

To vacate an arbitration award based on fraud, the movant must establish by clear and convincing evidence that (1) due diligence could not have resulted in the discovery of the fraud prior to the arbitration and (2) there is a nexus between the alleged fraud and the basis for the arbitrator's decision. Foster v. Turley, 808 F.2d 38, 42 (10th Cir. 1986); Forsythe, 915 F.2d at

1022. To protect the finality of arbitration decisions, courts must use caution in vacating an award based on fraud. Foster, 808 F.2d at 42. "Fraud requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of an arbitrator, or willfully destroying or withholding evidence." MPJ, 673 F. Supp. 2d at 494.

For purposes of vacating the arbitration award, plaintiff has not shown fraud. Plaintiff alleges six instances of fraud: (1) Minerva's patent application for the ES device contradicts its arbitration testimony about the safety of the Classic; (2) Minerva's ES patent contradicts its arbitration testimony that it did not create the device to correct the Classic design; (3)

because the United States Food and Drug Administration ("FDA") approved the ES device, Minerva thought it could ignore the design defects of the Classic; (4) Minerva used misleading patient injury reports submitted to the FDA to demonstrate the safety of the Classic; (5) Minerva falsely marketed ES as a "safer device;" and (6) Minerva concealed actual patient injury rates prior to the 2018 national sales meeting.

To begin, the Court disregards claims (3) through (6) because they involve conduct that occurred prior to and wholly separate from the arbitration proceedings and cannot form the basis for vacating the award. As to the first two allegations of fraud, plaintiff raises a factual dispute whether the Classic was safe and whether Minerva offered credible testimony in arbitration. The arbitrator decided these matters and the Court will not interfere with his determinations. Plaintiff's allegations do not demonstrate fraud and the Court therefore overrules plaintiff's motion on this ground.

C. Manifest Disregard Of The Law

Plaintiff argues that the Court must vacate the arbitration award because the arbitrator applied the incorrect legal standard to his retaliation claim and Minerva's counterclaim. Manifest disregard of the law requires "willful inattentiveness to the governing law." Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001). It is not sufficient to show that the arbitrator misunderstood the law or made an error;

the record must show that "the arbitrator knew[] the law and explicitly disregarded it." Id.

Plaintiff asserts that the arbitrator acted in manifest disregard of the law on two occasions. First, plaintiff contends that although the arbitrator correctly cited California Labor Code § 1102.5, he actually applied California Government Code § 12940(b) to decide the retaliation claim. Plaintiff claims that California Labor Code § 1102.5 contains whistleblower protections that would have shifted the burden of proof to Minerva, allowing him to better argue his claims. At most, this might suggest that the arbitrator misapplied or misinterpreted the governing law, but not that he explicitly disregarded it.

Second, plaintiff complains that Minerva never presented evidence of damages, and yet the arbitrator found breach of contract. Again, however, plaintiff attempts to challenge the factual findings of the arbitrator. At most, plaintiff demonstrates a factual dispute as to the correct amount of any damages, rather than the arbitrator's willful inattentiveness or explicit disregard for the law. Accordingly, the Court overrules plaintiff's motion on this ground.

II. Confirming The Arbitration Award

Because the Court decides that plaintiff provides no reason for the Court to vacate the award, it turns to defendants' request for an order confirming the award. Before the Court can confirm an arbitration award, it must determine whether it has jurisdiction to do so and whether this Court is the proper venue under Section 9 of the FAA.

A. Jurisdiction

In arbitration confirmation cases, the jurisdictional analysis is two-fold. See P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 866 (10th Cir. 1999). First, because the FAA does not confer federal question jurisdiction, the movant must show that the Court has subject matter jurisdiction over the matter. Id. Second, the movant must demonstrate that the parties agreed, either explicitly or implicitly, to have a court enter judgment on the arbitration award. Oklahoma City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d 791, 794–95 (10th Cir. 1991).

Neither party disputes that the Court has subject matter jurisdiction over this matter. Moreover, "[w]hen a court with subject-matter jurisdiction orders arbitration and then stays the suit pending resolution of the arbitral proceedings, that court retains jurisdiction to confirm or set aside the arbitral award." Dodson Int'l Parts, Inc. v. Williams Int'l Co. LLC, 12 F.4th 1212, 1227 (10th Cir. 2021) (citation omitted). Accordingly, the Court has subject matter jurisdiction to confirm the award.

Similarly, neither party disputes that they consented to judicial confirmation of the arbitration award. The arbitration provision of plaintiff's employment agreement with Minerva explicitly states, "I agree that the decree or award rendered by the arbitrator may be entered as a final and binding judgment in any court having jurisdiction thereof." Employment Agreement (Doc. #13-1) at 8. Because the parties agreed that a federal court may enter an

order confirming the award, the Court has jurisdiction to do so.

B. Venue

If the arbitration agreement does not designate a specific court to confirm the award, an application "may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9. Authority under the FAA to confirm an arbitration award, however, is not limited to the district court where the award was made. P & P Indus., Inc., 179 F.3d at 870. The FAA venue provision does not displace the general venue provisions of 28 U.S.C. § 1391(a). Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co., 529 U.S. 193, 198–202 (2000).

Here, the arbitration agreement specifies that "any court" may enter judgment. Employment Agreement (Doc. #13-1) at 8. Under Section 9 of the FAA, because the arbitrator made the award in California, the United States district courts in that state qualify as a proper venue to confirm the award. This Court, however, is also a proper venue under 28 U.S.C. § 1391(b)(2). Because "a substantial part of the events or omissions giving rise to the claim occurred" in Kansas, this Court also has authority under Section 9 to confirm the award. See Complaint (Doc. #1) at 1.

III. Conclusion

Section 9 of the FAA requires federal courts with jurisdiction to confirm arbitration awards "unless the award is vacated, modified, or corrected as prescribed in section 10 and 11 of this title." 9 U.S.C. § 9; THI of

N.M., 864 F.3d at 1084. As analyzed above, the Court overrules plaintiff's motion to vacate the arbitration award. In addition, neither party requests that the Court modify or correct the award. Because the record discloses no ground on which to vacate, modify or correct the arbitration award, and all jurisdiction and venue requirements are met, the Court sustains defendants' motion for an order confirming the arbitration award. The Court therefore finds that defendants are entitled to judgment confirming the Final Arbitration Award (Doc. #52-1) filed November 2, 2023, including all such relief provided in the final award.

IT IS THEREFORE ORDERED that Plaintiff's Motion To Reopen Case & Vacate Arbitration Award (Doc. #41) filed September 22, 2023 is **OVERRULED**.

IT IS FURTHER ORDERED that Defendants' Response To Plaintiff's Motion To Reopen Case And Vacate Arbitration Award And Application For Order Confirming Arbitration Award (Doc. #52) filed November 3, 2023 is **SUSTAINED**. **The Court confirms the Final Arbitration Award (Doc. #52-1) filed November 2, 2023, and directs the Clerk to enter judgment accordingly.**

Dated this 8th day of December, 2023 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED: March 1, 2024

DANIEL PETERSON,
Plaintiff,

v.

MINERVA SURGICAL, INC. and
DAVID CLAPPER,
Defendants.

CIVIL ACTION
No. 19-2050-KHV

MEMORANDUM AND ORDER

[Decided by Kathryn H. Vratil, District Judge.]

This matter is before the Court on plaintiff's Motion To Approve Statement Of Evidence For Record Of Appeal (Doc. #68) filed January 17, 2024. For reasons set forth below, the Court sustains in part and overrules in part plaintiff's motion.

[Parts not pertinent to this writ have been omitted.]

As to this point, plaintiff's recollection is the "best available means" to describe what transpired during the arbitration proceedings. Indeed, defendants never disputed the substance of this proposed statement; they merely refused to comment on it. Because this

statement is the best available evidence on that point, the Court sustains plaintiff's motion as to the first statement.

IT IS THEREFORE ORDERED that plaintiff's Motion To Approve Statement Of Evidence For Record Of Appeal (Doc. #68) filed January 17, 2024 is **SUSTAINED in part** and **OVERRULED in part. The Court approves plaintiff's statement that "Minerva testified that it signed United States Patent Application No. US 15/418635 because it believed all statements within the application were true," and pursuant to Rule 10(c), directs the Clerk to include the statement in the record on appeal.**[1]

Dated this 1st day of March, 2024 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

[1] Based on this approved statement, on March 4, 2024, the Tenth Circuit filed the following minute order: "This court on its own motion supplements the record on appeal."

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 24-3003 FILED: March 19, 2024

DANIEL PETERSON,
Plaintiff - Appellant,

v.

MINERVA SURGICAL, INC., and
DAVID CLAPPER,
Defendants - Appellees.

Appeal from the United States District Court
for the District of Kansas
Honorable Kathryn H. Vratil,
United States District Judge
Case No. 19-2050-KHV

BRIEF OF THE APPELLEES

JURISDICTIONAL STATEMENT

Jurisdiction in the district court was based on federal question jurisdiction under 28 U.S.C. § 1331. (Doc. 1). The judgment appealed from was entered December 8, 2023. (ROA 23). Plaintiff's notice of appeal was filed January 3, 2024. (ROA 10). This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

Was plaintiff's motion to vacate the arbitration award properly denied?

Can plaintiff show prejudice from the district court's finding he failed to comply with Local Rule 7.1 because the court nevertheless addressed the motion on the merits?

Are the alleged errors in the arbitrator's award on the breach of contract counterclaim reviewable under the Federal Arbitration Act?

Can plaintiff show prejudice from the arbitrator's alleged "manifest disregard" for the law governing his retaliation claim, where the arbitrator's findings would have been the same under the legal standard urged by plaintiff, and where the arbitrator found the retaliation claim failed for lack of evidence of "protected activity" and "adverse employment action"?

Was the alleged "fraud" a factual dispute that was exclusively for the arbitrator?

Can plaintiff show prejudice where the alleged "fraud" was immaterial to the arbitrator's award?

STATEMENT OF THE CASE

[Parts not pertinent to this writ have been omitted.]

III. Statement of facts relevant to issues on appeal.

Defendants reject Peterson's statement of facts as unsupported by the record and contrary to the arbitrator's findings. The pertinent facts are set forth

in the arbitrator's award, which the district court determined "is the best available means to describe the proceedings for purposes of plaintiff's appeal." (Supp. ROA 81). Because nearly all of Peterson's claims required him to prove an "adverse employment action" resulted from his engaging in "protected activity," the principal fact issues at arbitration were whether Peterson resigned of his own volition or whether his employment was indirectly or constructively terminated by Minerva, and, if so, whether it was terminated for Peterson engaging in activity protected by law.

Minerva is a medical technology company headquartered in Redwood City, California. Following a long and generally successful history of working both together and separately in the medical supply field, David Clapper, Thomas Pendlebury, Wendy Bowman, and Daniel Peterson all found their way to Minerva: Clapper as CEO, Pendlebury as Vice-President of Sales, Bowman as Vice-President of Human Resources, and Peterson as Territory Manager and later as Area Sales Director. Peterson worked for Minerva from July 2015 through August 2018, when he resigned. (Supp. ROA 16).

Minerva designed and manufactured an "endometrial ablation device" or "ES device" used by doctors and hospitals to treat heavy menstrual bleeding. When Minerva received FDA approval for the ES device and prepared to roll it out commercially, Peterson was recruited by Clapper and Pendlebury in July 2015 as part of the sales force. In May 2016, he

was promoted to Area Sales Director under Pendlebury's supervision. The following years were uneventful, but in early 2018, around the time Minerva was planning to market a second iteration of the ES device, things began to take a downward spiral in the professional and personal relationships between Peterson, Clapper, and Pendlebury. (Supp. ROA 16-17).

This situation culminated in the events of 2018. The most significant events included some criticism of Peterson's work performance and meeting management objectives that stood to affect his compensation; his pursuit of other employment opportunities; his leave of absence in April; and his subsequent separation from Minerva in September. Peterson's claims arise from these events. (Supp. ROA 17).

In April 2018, Peterson requested leave as an accommodation for his alleged disabilities. Peterson's restrictions included limitations on his ability to travel by air. Minerva agreed to his request and Peterson began his first medical leave on April 17. While on medical leave, Peterson sought other employment and conducted interviews with other companies. (Supp. ROA 17-18). During his leave, Peterson actually accepted an offered position with Viveve on August 2, 2018, before separating from Minerva on September 4, when he unequivocally stated in an email to Wendy Bowman: "In summary to make it unarguably clear, I am no longer an employee." On September 6, Bowman notified

Peterson that "we are hereby accepting your resignation from employment at Minerva, effective September 4, 2018." (Supp. ROA 23).

As the arbitrator found in rejecting Peterson's disability claim, Peterson failed to prove not only that Minerva failed to accommodate his disability, but also that he was subjected to an adverse employment action as a result of his claimed disability: "[Peterson] was not formally terminated or discharged by Minerva. Bowman repeatedly countered his emails that he was discharged with responding emails that he was not." (Supp. ROA 24).

The arbitrator also found that Peterson failed to prove Minerva retaliated against him because of his claim he was a "whistleblower." This claim stemmed from changes Minerva made in the ES device after receiving adverse patient reports. Peterson's retaliation claim focused on his "reasonable belief that complaints or safety reports he made to Respondent Minerva identified the violation of a local, state, or federal rule or regulation, and that his safety reports were a 'contributing factor' in his suspension or termination." (Supp. ROA 25).

Over the years after the original device was developed, Minerva worked on product improvements, particularly in response to reports of injuries to patients caused by perforations to the uterus that had not been detected either because of limitations in the product design or by errors in its use. The original device had been approved by the FDA; the device and its production were subject to

frequent inspections and the FDA had been informed of the injuries. At no time was the device found to be unsafe or subject to a recall. (Supp. ROA 25).

Beginning in 2016, Minerva's engineering team sought improvements that would reduce the likelihood of perforations and, after months of brainstorming, testing and studies, a newer device, the "Minerva ES," was patented and approved by the FDA in May 2017. However, the FDA did not permit Minerva, absent further studies and supporting data, to claim the newer ES device was "safer" than the original, only that it was a "safety enhancement." (Supp. ROA 25).

As the newer ES device was rolled out, Peterson and other sales people reported that some doctors wanted to exchange their inventory of original devices. Minerva had a policy that, except for a few rare instances, exchanges would not be permitted. Peterson and other salespersons took exception with this policy, not strictly out of safety concerns but rather to maintain good customer relations. Minerva's salespeople sent Peterson emails about customers' concerns over the old device and for help swapping out devices, which Peterson passed on to Pendlebury, who criticized Peterson for communicating product concerns in writing. Peterson, however, took the customers' position and, in an April 17 email to Pendlebury, Clapper, and Bowman, advocated for the exchange of devices based on reasons related to the comparative incidents of injury. (Supp. ROA 26).

Seven minutes after his email to Pendlebury, "Peterson requested a four-week leave of absence, attaching a doctor's letter seemingly created earlier that day based on an April 5 visit." (Supp. ROA 26). Peterson took medical leave and never came back. (Supp. ROA 23).

Based on these findings of fact, the arbitrator determined that Peterson failed to prove his emails to Pendlebury amounted to a "protected activity" and that he failed to prove he was subjected to an "adverse employment action" because he resigned his employment voluntarily. (Supp. ROA 24-27). The arbitrator found that Peterson "was not formally terminated or discharged by Minerva" and rejected his claim he was constructively discharged because Minerva "failed to allow him to return to work." (Id.). The arbitrator rejected Peterson's claim he was "indefinitely suspended" by "not being allowed to return to work" because of Minerva's "motivation to terminate him due to his whistleblowing activities," instead concluding, "There is no evidence connecting anything Peterson said or did concerning product safety to any action on the part of Minerva in the course of the interactive process that led to the end of his employment." (Supp. ROA 27-28).

Appendix E

Post-Arbitration Brief, Timeline

Submitted to JAMS: June 7, 2023

[Parts not pertinent to this writ have been omitted; only the dates referenced in the writ are included.]

July 31, 2015 – Minerva hires Peterson as a Territory Manager with Area Sales Director stock options. Peterson makes the company's first sale.

October 30, 2015 – Tejas Mazmudar, engineer, texts Peterson for case updates. Mr. Regan wants to know Peterson observations so he can update Mr. Clapper. Despite the recent commercial launch, Minerva already acknowledges Peterson as a device, clinical, and safety expert. Ex. 49, p. 1.

Sometime around January 6, 2016 – Peterson draws a sketch on the back of a December 30, 2015, billing form to conceptualize adding extension tubing to the sides of Minerva's silicon array. Ex. 47.

April 30, 2016 – ASD promotion announcement, effective May 1, 2016. Tom Pendlebury, Vice President of Sales & Marketing, writes that Peterson is "a leader by example and someone with a vision for the future." Ex. 56.

December 17, 2016 – Peterson emails Mr. Filloux to advise that the sales team never receives feedback or updates on complaint investigations. Ex. 55.

January 24, 2017 – Mr. Rhoads emails Mr. Pendlebury and cc's ASDs to warn that it appears like Minerva is blaming sales representatives and doctors for Classic device errors. Ex. 58.

May 15, 2017 – ES is FDA approved. Mr. Clapper emails the sales team about FDA approval of "the new CO_2 extension tubes for MINERVA ES device!" Ex. 36.

January 14 through 18, 2018 –
National Sales Meeting.

January 15, 2018 – Mr. Filloux presents Minerva Product Review. Ex. 44. The presentation is well received and the company is optimistic about the safety enhancements of the ES device. Mr. Peterson brings up his desire to Mr. Clapper and Mr. Pendlebury to stop selling and/or voluntarily recall or replace Classic devices with the new ES device, but is told no.

April 7, 2018 – Peterson emails Ms. Bowman about Minerva's disparity of treatment of him compared to other Area Sales Directors. Ex. 66.

April 17, 2018 – Mr. Ballard emails Customer Service and his manager, Peterson, about concerns with the original design's safety compared to ES. He requests approval to exchange original design for ES. Ex. 29,

MINERVA-DP-1565.

April 17, 2018 – Sharon Sulse, Customer Service Manager, responds to Mr. Ballard. She advises that under Minerva policy and Finance direction, she cannot approve "no reason" returns. Ex. 29, MINERVA DP-1564-1565.

April 17, 2018 – Jon Wangsness, CFO, leaves Peterson a voicemail about Mr. Ballard's concerning email; he considers it a "shot across the bow." Ex. 83.

April 17, 2018 – Mr. Pendlebury leaves Peterson a voicemail to expand on the CFO's voicemail about Mr. Ballard's email. Putting safety concerns in writing is a big "no no." Mr. Pendlebury states Mr. Ballard's email is a huge problem for Minerva. In particular, Mr. Pendlebury warns that comments about the old devices being unsafe are not allowed, especially when compared to the new one (ES). Mr. Pendlebury directs Peterson to get with Mr. Ballard immediately to let him know: "No more emails like that." Ex. 85.

April 17, 2018 – Peterson requests medical leave and sends email formally outlining safety concerns in writing to protect patients and document Minerva's unlawfulness, despite understanding the email violated company policy against documenting patient safety concerns. Ex. 28.

April 17, 2018 – Peterson requests a four-week LOA. The request includes a note from Peterson's primary care physician, James Phillips, DO, who references neurologic symptoms that are exacerbated by stress. Ex. 3.

April 18, 2018 – Mr. Clapper leaves Peterson a voicemail about him taking medical leave for a month. Mr. Clapper states he is "calling as a friend, not as an employee of Minerva." Ex. 94.

April 19, 2018 – Customer Service responds to Mr. Ballard that the decision whether to recall and

replace belongs to Mr. Pendlebury and Mr. Wangsness. Ex. 29, MINERVA-DP-1564.

April 19, 2018 – Mr. Clapper leaves Peterson another voicemail to let him know he is concerned about him taking a month off. Ex. 93.

April 25, 2018 – Ms. Bowman acknowledges receipt of completed Certification of Physician for Medical Leave. She provides an additional form for Peterson's physician to complete. Ex. 116.

April 26, 2018 – Peterson provides Minerva with the requested disability certification, signed by Dr. Phillips, who requests accommodation of "reduced stress and travel". Ex. 23.

April 28, 2018 – Mr. Clapper emails Peterson to let him know Minerva received a letter from Peterson's attorney. Mr. Clapper states, "I don't need my friends turning in me right now." Ex. 27.

May 21, 2018 – Peterson provides HR a doctor's note indicating of no travel until June 18, 2018, from neurosurgeon, Steven Hess, MD. Dr. Hess made the travel restriction work-specific since work exacerbated stress (based on primary care physician documentation). Exercise and stress reduction, inclusive of personal travel, was recommended by Dr. Hess. Ex. 5.

May 29, 2018 – Ms. Bowman calls Peterson to discuss accommodation requests. Peterson returns Ms. Bowman's call. She rejects Peterson's requested accommodations and provides no alternatives. Ex. 6.

May 30, 2018 – Peterson emails Mr. Clapper about the voicemail Mr. Clapper left the day before, May 29, 2018, to discuss requested accommodations. The email references Mr. Clapper's desired explanation for Peterson's requested accommodations, which Mr. Clapper doubted. Ex. 7.

June 11, 2018 – Ms. Bowman asks more questions and requires additional clarification about Peterson's requested accommodations. Ex. 120 (PETERSON 267-268)

June 15, 2018 – Peterson provides Ms. Bowman with a note from neurosurgery specialists, Veronica Gavula, PA, for his anticipated August 1, 2018, return to work. Ms. Gavel's note indicates that she thought Peterson had already returned to work with "no flying" accommodation. Ex. 9.

June 16, 2018 – Peterson emails Ms. Bowman to provide additional information and clarification in response to her accommodation questions. Ex. 10.

June 25, 2018 – Targ Sill, Territory Manager, texts Peterson to ask if he should make assumptions about being assigned a new manager, Bryan Lore. Minerva also hires Stacey Hootkin to backfill Mr. Lore, in Chicago, because Mr. Lore has moved to Denver. During the same text string, Mr. Sill compliments Peterson for standing up to Minerva and doing the right thing. Mr. Sill then states that Peterson is an example for his daughters. Ex. 87.

June 26, 2018 – Peterson texts Kate Ginsburg, Territory Manager, to see if she is aware that Mr. Lore

is moving to Denver. Ms. Ginsburg responds that he is moving near her (in Denver). Ex. 124, pp. 41-42.

June 27, 2018 – Ms. Bowman emails Peterson to respond to his PTO questions and decline his accommodation requests with no alternatives. Ex. 11.

July 2, 2018 – Dr. Hess provides a note to approve Peterson' s return to work with reference to primary care physician, Dr. Phillips, prior request for reduced stress and travel. Ex. 12.

July 3, 2018 – Peterson emails Ms. Bowman about accommodations. No response. Ex. 13.

July 12, 2018 – Peterson emails Ms. Bowman and asks for a response to his July 3, 2018, email. Peterson requests use of PTO in preparation for his return to work. Ex. 13, MINERVA-DP-619.

July 23, 2018 – Ms. Bowman ignores Mr. Peterson's July 2 doctor's note and reiterates the denial of all of Peterson's accommodation requests. Ex. 13, MINERVA-DP-615-616.

July 25, 2018 – Peterson sends Ms. Bowman an email stating that despite his disagreement with Minerva's denial of his accommodations and the proposed accommodation of 15/40ths pay, he will return to full time work on August 1. Ex. 13, MINERVA-DP-614-615.

July 25, 2018 – Ms. Bowman acknowledges receipt of "full duty" release and requests yet another clarification from Dr. Phillips. Ex. 13, MINERVA-DP-614.

July 26, 2018 – Peterson obtains return to work certification, on Minerva's own form, from Dr. Phillips with "full release" and provides it to Minerva the following day. Ex. 15.

July 27, 2018 – Peterson emails Ms. Bowman because of no response to July 25, 2018, email. Peterson once again advises of release for full duty, attaches his doctor's confirmation, and presents himself as ready to work on August 1, 2018. Ex. 13, MINERVA-DP-612-613.

July 30, 2018 – Ms. Bowman again asks for clarification about Dr. Phillip's proposed accommodations. Ex. 14, PETERSON-DP-624.

July 30, 2018 – Peterson responds to Ms. Bowman that he is unclear how to obtain additional clarifications. The reason: "Accommodations have been requested numerous times and subsequently denied." Minerva simply declines Peterson's proposed accommodations without alternative. Ex. 14, MINERVA-DP-623.

July 30, 2018 – Ms. Bowman emails Peterson to let him know that his PTO payment will be made the next day. Ex. 14, MINERVA-DP-625.

July 30, 2018 – Despite Peterson already advising Ms. Bowman that Dr. Phillips is unable to provide further clarification, Ms. Bowman asks Peterson to get additional clarification from Dr. Phillips. Ex. 13,

MINERVA-DP-00612.

July 30, 2018 – Mr. Gries texts Peterson about Minerva's reorganization of Area Sales Directors. In

addition to other realignments, Minerva is hiring a west coast Area Sales Director. Ex. 124, p. 6.

August 1, 2018 – Peterson emails Ms. Bowman to start the day, presenting himself as willing and able to work. Peterson asks about email activation and scheduling a meeting with his direct reports (i.e., the Central Team). Ex. 17.

August 1, 2018 – Ms. Bowman does not allow Peterson's return to work. Instead, she emails Peterson for accommodation clarifications that Peterson has already explained that Dr. Phillips is unable to provide. Ex. 14, MINERVA-DP-623.

August 1, 2018 – Peterson returns to Dr. Phillips' office, yet again, at Ms. Bowman's request. Dr. Phillips approved full duty, again. He further wrote "limited travel and normal work hours are appropriate." Dr. Phillips marks the document as "**Final Report**" emphasized in bold. Ex. 16.

August 1, 2018 – Mr. Gries texts Peterson to welcome his return to work. Mr. Gries even asks if Peterson's email is working. It is not. Ex. 124, p. 9.

August 1, 2018 – Aaron Klossen, Territory Manager, texts to see if Mr. Peterson is "back in the saddle." Ex. 124, p. 17.

August 1, 2018 – Peterson texts Geoff Niemann, Area Sales Director, to get specifics for the following week's Area Sales Director meeting in Chicago. Ms. Bowman would not provide. Ex. 124, P. 68.

August 2, 2018 – Peterson emails Ms. Bowman Ex. 16.

August 3, 2018 – Peterson informs Minerva that he can no longer stay on indefinite leave and has to resign. Ex. 14, MINERVA-DP-622.

August 3, 2018 – Ms. Bowman emails Peterson to indicate he was not discharged. She asks for more clarification from Dr. Phillips, who has already stated he is unable to provide additional information. Ms. Bowman also provides a list of 23 "essential functions" and requires that each function is reviewed and completed to include how much time is acceptable for each function. Ex. 14, MINERVA-DP-621-622.

August 7, 2018 – Peterson emails Ms. Bowman to document it is not appropriate to provide additional accommodation documentation to Dr. Phillips, who already plainly indicated that he is unable to provide further clarification. Peterson also documents that Minerva did not conduct a genuine safety investigation into his prior safety concerns. Ex. 119.

August 8, 2018 – Ms. Bowman responds that Minerva has not received clarifications from Dr. Phillips and is putting Peterson "back on unpaid leave." Ms. Bowman also states Minerva previously investigated his safety concerns and found no merit. Ex. 118.

Appendix F

JAMS ARBITRATION
CASE REFERENCE NO. 1110025591

Awarded: August 21, 2023

Daniel Peterson,
Claimant,

and

Minerva Surgical, Inc.,
Thomas Pendlebury; and
David Clapper,
Respondents.

Minerva Surgical, Inc.,
Cross-Claimant,

and

Daniel Peterson,
Cross-Respondent.

FINAL ARBITRATION AWARD

[Awarded by Richard J. McAdams, Arbitrator.]

[Parts not pertinent to this writ have been omitted; for clarity, omissions outside sentences are indicated by brackets containing ellipses.]

I. Introduction and Procedural History

[…]

(b) Pleadings and Arbitrability

Claimant Daniel Peterson (Peterson), through counsel, filed a Demand for Arbitration with JAMS dated January 31, 2020, against Minerva Surgical, Inc. (Minerva), Thomas Pendlebury (Pendlebury) and David Clapper (Clapper), asserting claims against for … retaliation (Cal. Lab. Code § 1102.5); … wrongful termination in violation of public policy (42 U.S.C. 12101, *et. seq*.; Cal. Gov. Code. § 1102.5).

[…]

On September 14, 2021, Minerva's Motion for Leave to File a Cross-Compliant Against Claimant was granted. Minerva filed the Cross-Compliant on September 22, 2021.

II. The Arbitration Hearing

The arbitration hearing was conducted remotely via Zoom over five days, May 15-19, 2023. The proceedings were not reported or recorded.

[…]

IV. Interim Award

On June 15, 2023, Arbitrator issued an Interim Award setting forth Arbitrator's findings and conclusions on the issues submitted for arbitration. Respondents Minerva, Clapper and Pendlebury were determined to be the prevailing parties with regards to Peterson's claims and that Minerva was determined to be the prevailing party with regards to its counterclaim for breach of contract.

V. Facts

… Minerva designed and manufactured an "endometrial ablation device" used by doctors and hospitals to treat heavy menstrual bleeding. When the company received FDA approval for the device and prepared to roll it out commercially, Peterson was recruited by Clapper and Pendlebury in July 2015 as part of the sales force as a TM [Territory Manager]. In May 2016, he was promoted to become one of Minerva's six ASDs [Area Sales Directors] under the supervision of Pendlebury. The following years have been described as "uneventful" but in early 2018, at or about the time Minerva was planning to market a second iteration of the device—termed "ES" device—things began to take a downward spiral in the professional and personal relationships among Peterson, Clapper and Pendlebury after years of warm, close bonds—"almost familial" as some described it.

The situation culminated in the events of 2018. The most significant events included some criticism of Peterson's work performance and meeting management objectives (MBOs) that stood to affect his compensation; his pursuit of other employment opportunities; his leave of absence in April; and his subsequent separation from Minerva on September 4. Peterson's claims arise from those events.

The exact factors causing the breakdown remain uncertain. Each principal places blame on the others. Peterson sees the cause as arising from two factors: (1) disability conditions that developed, particularly

stress and anxiety aggravating a prior condition, and (2) retaliation over his concerns about product safety—whistleblowing. Minerva, on the other hand, asserts that any breakdown was caused by (1) criticism of Peterson's job performance, particularly by Pendlebury, regarding his MBOs (that stood to negatively affect his compensation) and (2) his superiors' displeasure with him for "lapses in professional judgment" arising from claims of inappropriate and offensive emails and PowerPoint materials.

VI. Analysis

A. Peterson's claims

1. Threshold issue: was Peterson terminated?

… Minerva avers that his employment ended when it accepted his resignation. … Peterson's theory [is] that he was essentially constructively discharged by Minerva because it failed to accommodate him and failed to participate in a timely good faith process—or, as variously summarized by Peterson, *failed to allow him to return to work.*

[…]

3. Retaliation claims

Background

Peterson alleges "whistleblower retaliation claims" under California and Kansas laws. While retaliation claims can take many forms, Peterson focuses his claim on his "reasonable belief that complaints of safety reports he made to Respondent Minerva identified the violation of a local, state, or

federal rule or regulation, and that his safety reports were a 'contributing' factor in his suspension or termination," citing California Labor code section 1102.5.

Peterson cites the following rules and regulations in support of his claim:

- Failure to report corrections or removals of the Classic device in order to reduce risk to health (21 CFR 806; 21 CFR 803);
- Failure to voluntarily recall the Classic device (21 CFR 810);
- False or deceptive labeling (FDCA, 21 U.S.C. § 352(a);
- False or deceptive advertising (21 U.S.C. § 352(q)); and
- Kansas criminal statute K.S.A. 21-6503 (making any form of "deception, fraud, false pretense, false promise, or misrepresentation of a material fact … in connection with the sale of any merchandise).

[…]

At a national sales meeting in early 2018, Peterson was asked to give a presentation to a Minerva national sales meeting touting the ES (a presentation Peterson titled the "Book of Truth"). It was well received by all, except for some criticism from his superiors prior to his presentation over parts of the planned PowerPoint materials.

[…]

Minerva presented evidence that there was nothing unsafe about the original device and that a "widespread exchange" would amount to a recall, necessitating disclosure to the FDA and to customers.

Discussion

Peterson's claims of retaliation require a showing that he was (1) engaged in protected activity; (2) he was subject to some adverse employment action; (3) the protected activity was a substantial motivating reason for the adverse employment action; (4) harm; and (5) the adverse employment action was a substantial factor in causing harm.[2]

Whether Peterson was engaged in protected activity is a matter of dispute. It is questionable whether Peterson's advocacy for exchanging the original device for the ES device was reasonable. As he stated in his "Book of Truth" presentation, the ES was a better product and indeed a safety improvement.

[…]

Likewise, the second element—adverse employment action—is highly disputed. As Peterson argues … , "his safety concerns were a contributing factor in Minerva's decision to force him to resign by forcing him to endure a sham 'interactive process' designed to never allow him to return to work."

---

[2] CACI 2505 and 4603; no citations to Kansas law were provided but basic research supports that the California standards are universal.

[…]

Nevertheless, … the retaliation claims fail for lack of the third element—that the protected activated was a substantial motivating reason for the adverse employment action.

[…]

B. Minerva's counterclaims

1. Background

Minerva brought a cross-complaint against Peterson for (1) breach of contract; (2) misappropriation of trade secrets; and (3) breach of duty of loyalty.

[…]

2. Breach of contract

There is no question that Peterson breached the Agreement by failing to promptly return company property and by his continued retention of Minerva's confidential information. As to dissemination, the evidence established that it was only shared with others in response to a subpoena. … [T]here is no evidence of improper information-sharing beyond the production in that litigation.

The failure to return and the continued retention justified Minerva hiring a forensic computer expert Geoffrey Brown of Berkeley Research Group (BRG) to analyze the data extracted from Peterson hard drive at the cost of $7,029.94.

3. Misappropriation of trade secrets

… A party suffering misappropriation of its trade secrets is entitled to recover damages and unjust

enrichment caused by the misappropriation. C.C. section 3246.3(a). Minerva concedes that it "is unable to prove actual loss or unjust enrichment."

[…]

Minerva's remedy arising from Peterson's failure to return and retention of the materials is limited to breach of contract damages for the forensic expert and an order returning the property immediately.

[…]

VIII. Conclusions and Final Arbitration Award

[…]

10. Minerva's claim for breach of contract has been established and Minerva is entitled to damages in the sum of $7,029.94 and an order that Peterson will return all confidential documents and any other Minerva property immediately upon the issuance of a Final Award in this matter.

[…]

13. Minerva, Clapper and Pendlebury are the prevailing parties with regards to Peterson's claims.

14. Minerva is the prevailing party with regards to its cross-claim for breach of contract.

15. Minerva as cross-claimant is entitled to an award of attorney fees in the sum of $190,000.

16. Minerva as cross-claimant is entitled to an award of costs in the sum of $ 1,529.

This award resolves all claims between the parties submitted for decision in this proceeding.

Appendix G

U.S. Patent Application No. 15/418,635
Filed: January 27, 2017
Attorney Docket No: 37646-726.201

[Parts not pertinent to this writ have been omitted.]

As a named inventor, I declare that:

I believe that I am the original inventor or an original joint inventor of a claimed invention in the application.

The application, entitled: SYSTEMS AND METHODS FOR EVALUATING THE INTEGRITY OF A UTERINE CAVITY, the specification of which __ is attached hereto or XX was filed on January 27, 2017, as Application No. 15/418,635.

I … declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

The above-identified application was made or authorized to be made by me.

I hereby acknowledge that any willful false statement made in this declaration (or oath) is punishable under 18 U.S.C. § 1001 by fine or imprisonment of not more than five (5) years, or both.

Appendix H

U.S. Patent No. 10,213,151 B2

Issued: February 26, 2019

BACKGROUND OF THE INVENTION

1. Field of the Invention

The present invention relates to systems and methods for global endometrial ablation in a treatment of menorrhagia. More particularly, the present invention relates to a subsystem using gas flows and a controller to test whether a patient's uterine cavity has a wall that is perforated or whether the uterus is intact, wherein such a test should be performed before proceeding with an ablation procedure.
Col. 1, ll. 1–15.

[Parts not pertinent to this writ have been omitted.]

[For clarity, a page break has been inserted to keep the images and descriptions of "the PRIOR ART" and its patented replacement, ES, together.]

The problem: silicon [array] plugging the hole [and hiding the perforation].

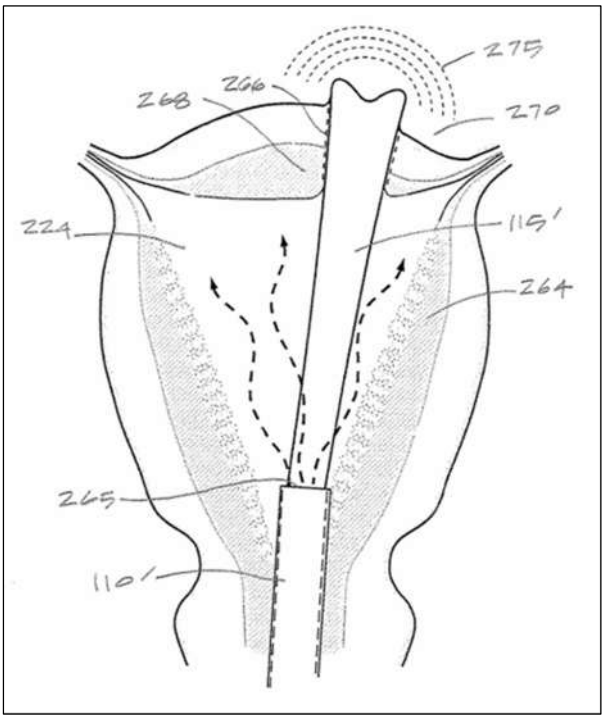


FIG. 5B

(PRIOR ART) [original design]

BRIEF SUMMARY OF THE INVENTION

FIG. 5B indicates that the energy applicator has penetrated the fundus, and potentially plugs the perforation so that gas flow does not exit the perforation which results in characterizing the uterus as non-perforated when there is a perforation.
Col. 3, ll. 60–64.

The solution: extension tubing [which helps resolve the "prior art's" defect as described in this patent].

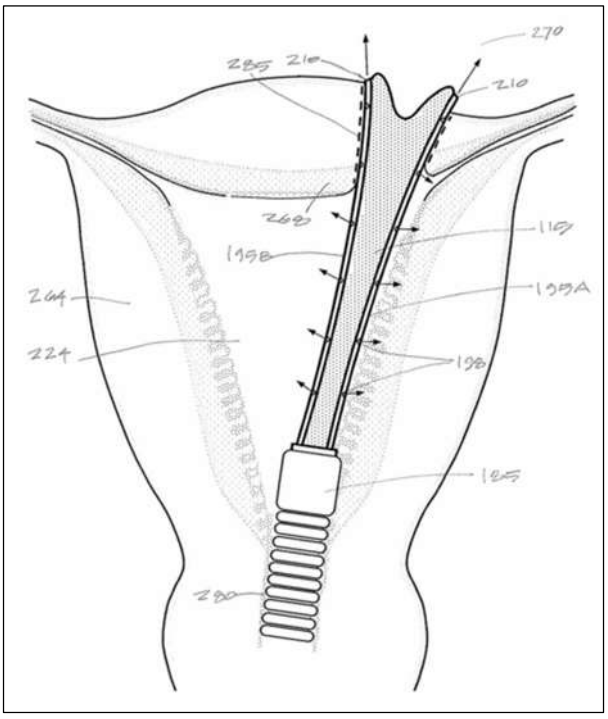


FIG. 6B
PRIOR ART'S replacement [ES].

BRIEF SUMMARY OF THE INVENTION

FIG. 6B indicates that the energy applicator has penetrated the fundus, and potentially plugs the perforation, except that unlike the prior art … , the gas flow is directed though non-collapsible flow channels to the distal tip of the energy applicator and into the abdominal cavity, wherein monitoring … will determine that there is a perforation in the uterine cavity wall. Col. 4, ll. 8–15.

DETAILED DESCRIPTION

[This section pertains to the original design.]

[A] second outcome is possible when the energy applicator effectively occludes or seals the perforation since the … applicator can effectively plug such a perforation. If this scenario were to occur, the further actuation of the energy applicator, with energy emission indicated … in FIG. 5B, would likely cause thermal injury to organs within the abdominal cavity outside the fundus. Col. 8, ll. 50–61.

Such an injury to organs in the patient's abdominal cavity could be very serious and potentially life-threatening. Col. 8, ll. 61–63.

[This section pertains to the replacement, ES, for the original design (referred to as "prior art").]

FIGS. 6A-6B illustrate the improved systems and methods corresponding to the invention, which can solve the problem of mischaracterizing the integrity of the uterine cavity, which can occur with a prior art system as illustrated in FIG. 5B.
Col. 8, ll. 64–67; col. 9, l. 1.

In this situation, even if … the energy applicator effectively plugs the perforation, such a perforation will be detected easily since CO2 will flow unimpeded through outlets into the patient's uterine cavity.
Col. 9, ll. 62–67.

Following the determination that there exists a perforation, the physician then will know to not perform an ablation procedure. Col. 10, ll. 5–7.

Appendix I

Minerva Surgical, Inc.
Employment Agreement

[Parts not pertinent to this writ have been omitted.]

2. Confidential Information

A. *Company Information.* I agree that during and after my employment with the company, I will hold in the strictest confidence, and will not use (except for the benefit of the Company during my employment) or disclose to any person, firm, or corporation (without written authorization of the President, CEO, or the Board of Directors of the Company) any Company Confidential Information. I understand the unauthorized use or disclosure of Company Confidential Information during my employment may lead to disciplinary action, up to and including immediate termination and legal action by the Company.

[…]

I understand that nothing in this Agreement is intended to limit employees' rights to discuss the terms, wages, and working conditions of their employment, as protected by applicable law.

Appendix J

Minerva Surgical, Inc.
Confidential marketing announcement:
ES Safety Design

[Minerva revised these confidential marketing announcements prior to distribution. Peterson added text boxes to the documents provided to the district court, now part of the record on appeal, to help the court understand the need for ES. References to "Hologic" refer to the market leader. Its product, like Minerva's, uses an array. However, unlike Minerva's silicone array, which is a sealant, Hologic's array incorporates a breathable metallic mesh that generally does not hide perforations by sealing them.]

Announcement 1:

MINERVA ES SAFETY DESIGN

ENHANCED SENSITIVITY

How Enhanced Sensitivity of Minerva ES Detects Uterine Perforations

Instead of the simple 10-second CO_2 pressure check of the older products.

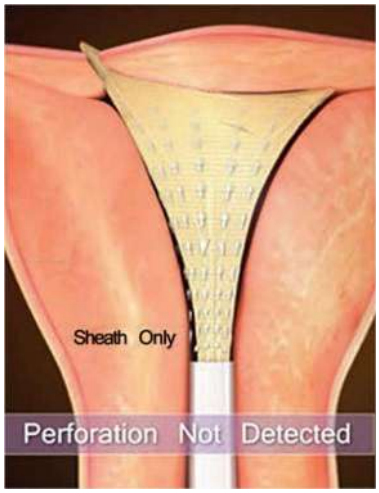
The Minerva ES Safety System involves a 3-phase sequential check of the uterine cavity safety conditions, each of which must pass before the treatment cycle can be initiated. In addition, during the treatment cycle there are 18 separate safety systems in the Minerva Controller which sense changing uterine cavity conditions in real-time.

Announcement 1 (continued)

Detecting Uterine Perforation with Minerva ES

[Original design—no extension tubes]

[Peterson added a text box to the district court document, now part of the record on appeal, stating:] Novasure uses a mesh array.



Current Endometrial Ablation Devices

NO CO_2 Flow at Array Tip

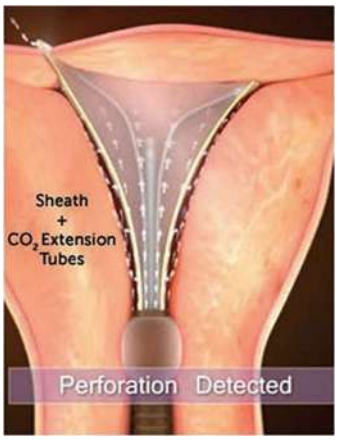
- CO_2 Flow Blocked by Array
- Cavity Pressure maintained
- FALSE positive
- Perforation NOT Detected

[Peterson added a text box to the district court document, now part of the record on appeal, stating:] Both the original design and Novasure use "sheath only" CO_2 flows. But only one uses **breathable** mesh.

Announcement 1 (continued)

[Replacement design, ES—with extension tubes]

[Peterson added a text box to the district court document, now part of the record on appeal, stating:] Minerva uses a silicon (sealant) array.

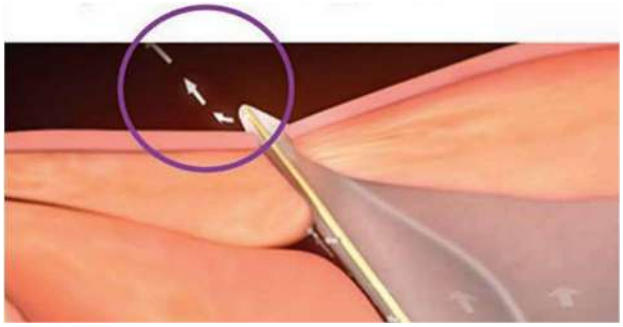


Minerva ES
Endometrial Ablation Device

Critical CO_2 Flow at BOTH Array Tips

- CO_2 flows out of tip
- Perforation detected

CO_2 flow at array tips detecting perforation



Announcement 2:

MINERVA ES SAFETY DESIGN

MINERVA ES DESIGN IS UNIQUE

The Minerva ES Safety system is the most significant advancement in patient safety and perforation detection in 15 years. The Minerva ES safety design is a patented 'technology first,' is exclusive to Minerva, and was approved by the FDA.

[The images from Announcement 2 have been omitted because Announcement 1's images clearly illustrate the consequences of the original design's defect: "**Perforation Not Detected.**" Additionally, Announcement 1 demonstrates that the replacement design resolved the issue: "**Perforation Detected.**"]

[Peterson added a text box to the district court document, now part of the record on appeal, stating:] Both the original design and Novasure use "sheath only" CO_2 flows. But only one uses a **breathable** mesh.

Uterine Perforation Detection CO_2 Flow

[Peterson added a text box to the district court document, now part of the record on appeal, stating:] Novasure uses a mesh array.

Current Endometrial Ablation Devices

- CO_2 Flow from ONLY from Sheath at base of the array [sic]
- No flow of CO_2 at the distal tips of the metalized [mesh] array
- Limited CO_2 flow throughout cavity

Announcement 2 (continued)

The limited sensitivity of the older design Endometrial Ablation products are a result of limited CO_2 flow. In older systems, CO_2 flows out of the device sheath opening into the lower uterine segment.

Therefore CO_2 must flow distally throughout the uterine cavity, to find and flow out of the perforation, thus limited in adequately detecting uterine perforations.

[Peterson added a text box to the district court document, now part of the record on appeal, stating:] Minerva uses a silicone (sealant) array.

[The replacement design, ES.]

- Patented CO_2 Extension Tubes extend from inside the sheath and along both lateral sides of the array
- CO_2 Flows from Sheath + CO_2 Extension Tubes
- Efficient Flow Through Uterine Cavity
- Critical CO_2 Flow at BOTH tips of the array

The enhanced sensitivity of the Minerva ES array is the result of the design of small, perforated tubes that extend from inside the sheath, running along the array edges, and all the way out to the distal tips.

In addition to efficiently flowing CO_2 into the uterine cavity, CO_2 flows out the tip of the array and is designed to detect a perforation, even if one or both of the distal tips is barley protruding through the uterine wall.

Announcement 3:

[The images from Announcement 3 have been omitted because the relevance of the announcement is how Minerva introduces the "ES Safety Design." Additionally, redundant parts of the announcement have been omitted.]

MINERVA ES SAFETY DESIGN

MOST SIGNIFICANT ADVANCEMENT IN PATIENT SAFETY IN 15 YEARS

Appendix K

Minerva Surgical, Inc.
Confidential email: ES Market Evaluation

[Parts not pertinent to this writ have been omitted.]

From:	Dominique Filloux [Vice President of Research & Development and Operations]
Subject:	Minerva ES market evaluation
Date:	May 24, 2017
To:	[company sales, marketing, and engineering leaders]

Hi all;

Here's a quick update on how things are going with the Minerva ES Market Preference Evaluation:

So far it's going great! … This includes cases with the Minerva ES as well as … a case where an actual perforation was easily detected.

Appendix L

Minerva Surgical, Inc.
Confidential PowerPoint presentation:
ES Review

Minerva ES

How did we evaluate the new Minerva ES?

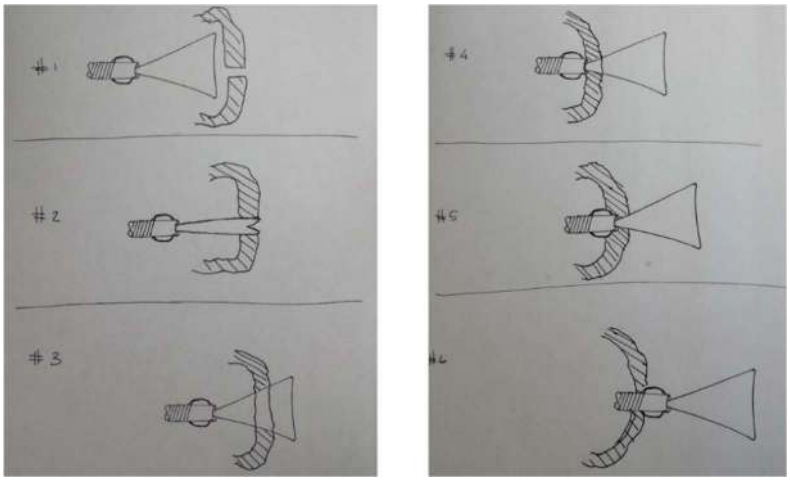
I. Completed all normal bench top testing

II. Also completed extirpated uteri studies to verify functionality in a variety of different clinical scenarios

I. Mal-positioning of the Minerva device

II. Effect of cavity conditions on CO_2 flow

Device placement scenarios considered:



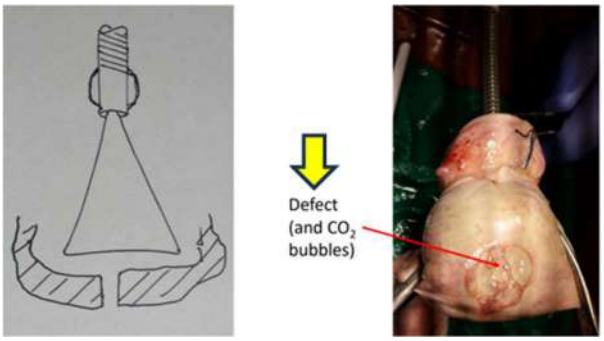
[Images from testing on extirpated porcine (pig) uteri begin on the next page.]

ES Review (continued)

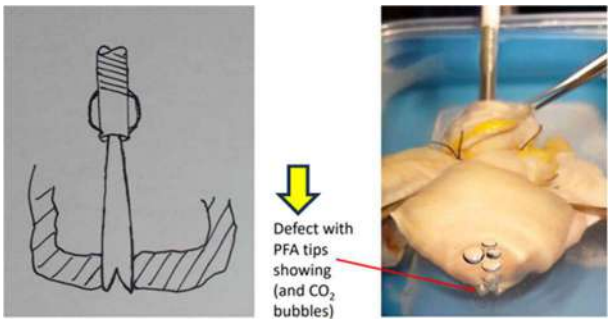
[Peterson added a text box to the district court document, now part of the record on appeal, stating:]
The problem (original design): The silicon array could plug the hole (no bubbles) at the patient's peril.
The solution (ES): The extension tubing reveals the danger (bubbles) and protects the patient.

[The image for Scenario #1 is also included in the petition on page 13. To avoid redundancy, not all scenarios are included; instead, three additional distinct scenarios are provided to aid the Court's understanding of the original design's defect.]

Scenario # 1



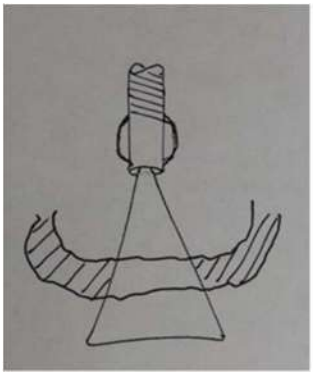
Scenario # 2



ES review (continued)

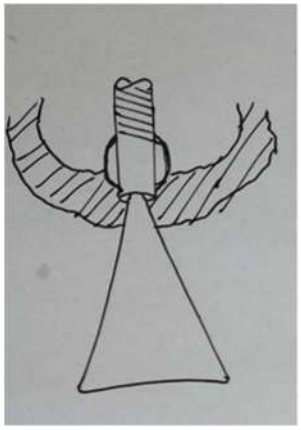
[Peterson added a text box to the district court document, now part of the record on appeal, stating:] Another defect solved with ES.

Scenario # 3



[Peterson added a text box to the district court document, now part of the record on appeal, stating:] Another defect solved with ES.

Scenario #5



Appendix M

Minerva Surgical, Inc.
Confidential PowerPoint presentation:
ES Product Safety

Topics to be covered

I. Product evolution:

- **I. Performance: Minerva Baseline vs. Minerva ES**
- **II. Safety: Minerva Baseline vs. Minerva ES**
- **III. What's next**

II. Key Procedural points/Tips and Tricks

III. Questions from the field

Product Safety

- **Safety details—Bowel Injuries:**

(bowel injury w/uterine perforation only)

Product	Rate	Freq.	"n"	Change
Minerva Baseline	0.079%	1 in 1,269	16,500	-
Minerva ES	0	0 in 7,500	7,500	∞

["Baseline" refers to Minerva's original design. "Frequency" is limited to "bowel injury with uterine perforation," meaning this comparison focuses solely on bowel burns caused by undetected uterine perforations."]

Appendix N

Minerva Surgical, Inc.
Voicemail Transcripts

Transcripts from voicemails.
Minerva in their own words.

Jon Wangsness, CFO

No. 3, 4/17/2018, Wangsness to Peterson.

"Hey, Dan. Jon Wangsness here, Redwood City. Hey, when you have a minute, I would very much like *to discuss this Barry Ballard email that just came across the bow here* that Sharon [Customer Service] forwarded to me. *I have some concerns, let's leave it at that*. So, if would we could chat, I'd very much appreciate it." (emphasis added).

Tom Pendlebury,
Vice President of Sales & Marketing

No. 104, 1/10/2017, Pendlebury to Peterson.

"Hey, Dan, Tom. *Not something I want to put into an email* to you. But … ." (emphasis added).

No. 103, 12/8/2017, Pendlebury to Peterson.

"Hey, Dan, it's Tom Pendlebury. I wanted to give you a call about that … situation. *I didn't want to put it in email*. That's why I wanted to have the conversation … ." (emphasis added).

Footnote [to the district court]: Plaintiff provided the arbitrator with the audio recordings, not transcripts. If the Court would like to hear Minerva in its own words, the audio files will be made available under Court direction.

Voicemail Transcripts (continued)

No. 84, 3/5/2018, Pendlebury to Peterson.

"Hey, Dan, give me a call about the expired devices in Tom Gries' area …. *We have to be real careful about what we put in writing about associating, ya know, injuries with anything*. I don't want to respond to this so give me a buzz, alright?" (emphasis added).

No. 85, 4/17/2018, Pendlebury to Peterson.

"Hey, Dan, Tom. Can you jump on this one fast for me …. Jon just let me know that Barry Ballard *did a big no-no by making a comment in email about replacing a device because it's not as safe as the—the new device is safer than the old device. … That's a huge problem for us*. I told these guys never to make any comment about something like that. I thought they all knew that. But I guess they are forgetting. Can you get with Barry, like, immediately and let him know no more emails like that in case he decides to send another clarification email … ." (emphasis added).

Appendix O

Minerva Surgical, Inc.
Confidential email: Product Return Request

From: Daniel Peterson

Sent: April 17, 2018

To: Thomas Pendlebury [Vice President of Sales & Marketing]

Cc: Dave Clapper [CEO]; Wendy Bowman [Director of Human Resources]

Subject: Confidential – Product Return Request

[Peterson added a text box to the district court document, now part of the record on appeal, stating:] In St. Louis, Tom Pendlebury and the sales directors listed patient bowel burns with the original design—*after* the launch of ES—due to undetected uterine perforation.

Tom,

As previously discussed on numerous occasions (including at last week's ASD meeting in St. Louis), the issue of "classic" in inventory on customer's shelves is a significant concern and a key factor in the retaliation and mistreatment I have experienced from you in a multitude of ways. The great news is ES has shown to be a wonderfully effective enhancement to Minerva technology—a big win for patient safety and reduction in adverse events. I am extremely proud of it and the role I played in its rollout. That said, ES will allow Minerva to ultimately become the market share leader—efficacy (E) and safety (S) are the two

most important aspects of any surgical procedure. You have asked me not to document my concern and our discussions. I have done significant reflection on this aspect and feel it is important I document my position on the need to exchange any remaining "classic" inventory on customers' shelves. At this point it should be relatively minimal; nevertheless, if we are able to avoid another adverse event and patient injury it is both warranted and appropriate.

As for the below response from Customer Service, I am aware from our previous discussions that you have directed responses to such requests. It is absurd to label this request as a "no reason return." The reason is simple:

- "classic" – bowel injury with uterine perforation only, frequency 1 in 1,269
- ES – bowel injury with uterine perforation only, **frequency 0**
- Based on summer 2017 launch and approximate procedure volume in that time frame, I would estimate 7 to 10 bowel burns with uterine perforation that could have and should have been avoided.

Respectfully,
Dan

Begin forwarded message: [next page]

Product Return Request (continued)

[Parts not pertinent to this writ have been omitted.]

From: Sharon Sulse [Customer Service]
Subject: RE: Lakeview Surgery Center
Date: April 17, 2018
To: Barry Ballard [Territory Manager]
Cc: Daniel Peterson

Per our procedures and per Finance, we only do returns for defective product. We do not allow the customer a window of time for "no reason" returns. … I've copied Jon and Tom to this email if they want to add anything.

[Begin forwarded message:]

From: Barry Ballard [Territory Manager]
Sent: April 17, 2018
To: Sharon Sulse [Customer Service]
Cc: Daniel Peterson
Subject: Lakeview Surgery Center

I just completed a case with Dr. __. … She expressed her concern regarding the safety or lack of safety compared with the ES models they have. I spoke with my manager Dan Peterson and asked if we could offer them a 1 for 1 exchange with the ES models.

Please let me know how to proceed with this customer's request.

Appendix P

Minerva Surgical, Inc.
Confidential email: PTO Inquiry

From:	Wendy Bowman [Director of Human Resources]
Subject:	RE: PTO Inquiry
Date:	July 14, 2018
To:	Daniel Peterson

Hi Dan,

You do mention in your email that you have extensive well-organized documentation to support the retaliation claims, please send this to me so I can investigate.

Also, please send me the allegedly retaliatory text messages Dave Clapper sent you so that I can look into that. Please also let me know what sort of retaliatory actions Tom took against you and when.

Thank you,
Wendy

Appendix Q

Minerva Surgical, Inc.
Confidential email:
Minerva Documentation Requests

From: Wendy Bowman [Director of Human Resources]

Subject: RE: Confidential – Minerva Documentation Requests

Date: August 8, 2018

To: Daniel Peterson

[Parts not pertinent to this writ have been omitted.]

Thank you for providing me with these voicemails. As I mentioned to you previously, the Company previously looked into your safety concerns and found them to be without merit. The Company is confident its product is safe and in compliance with all applicable laws. Nothing in the voicemails or in the binder you sent to our attorney changes that.