To be Argued by:
CAITLIN J. HALLIGAN, ESQ.
(Time Requested: 30 Minutes)

APL-2019-00040
New York County Clerk's Index No. 656341/16

Court of Appeals

of the

State of New York

AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Petitioner-Respondent,

– against –

ALLIED CAPITAL CORPORATION and CIENA CAPITAL LLC (f/k/a Business Loan Express LLC),

Respondents-Appellants.

BRIEF FOR PETITIONER-RESPONDENT

GORDON REES SCULLY MANSUKHANI, LLP
95 Glastonbury Boulevard, Suite 206
Glastonbury, Connecticut 06033
Tel.: (860) 278-7448
Fax: (860) 560-1085

GORDON REES SCULLY MANSUKHANI, LLP
500 Mamaroneck Avenue, Suite 503
Harrison, New York 10528
Tel.: (914) 777-2225
Fax: (914) 709-4566

SELENDY & GAY PLLC
1290 Avenue of Americas
New York, New York 10104
Tel.: (212) 390-9000
Fax: (212) 390-9399

Attorneys for Petitioner-Respondent

Date Completed: July 12, 2019

Corporate Disclosure Statement

Pursuant to Court of Appeals Rule 500.1(f), Respondent American International Specialty Lines Insurance Company, now known as AIG Specialty Insurance Company, states that it is a direct, wholly-owned (100%) subsidiary of AIG Property Casualty U.S., Inc., which is a wholly-owned (100%) subsidiary of AIG Property Casualty Inc., which is a wholly-owned (100%) subsidiary of American International Group, Inc., which is a publicly-held corporation. No parent entity or publicly held entity owns 10% or more of the stock of American International Group, Inc.

Respondent's affiliates are: AIG Capital Corporation, AIG Global Asset Management Holdings Corp., AIG Asset Management (Europe) Limited, AIG Asset Management (U.S.), LLC, AIG Global Real Estate Investment Corp., AIGGRE Europe Real Estate Fund I GP S.a.r.l., AIGGRE U.S. Real Estate Fund I GP, LLC, AIGGRE U.S. Real Estate Fund I, LP, AIGGRE U.S. Real Estate Fund II GP, LLC, Mt. Mansfield Company, Inc., AIG Employee Services, Inc., AIG Federal Savings Bank, AIG Financial Products Corp., AIG Matched Funding Corp., AIG-FP Pinestead Holdings Corp., AIG Life Insurance Company (Switzerland) Ltd, AIG Markets, Inc., AIG Property Casualty Inc., AIG Claims, Inc., AIG PC Global Services, Inc., AIG Property Casualty International, LLC, AIG Egypt Insurance Company S.A.E., AIG Insurance Management Services, Inc., Grand Isle SAC Limited, AIG International Holdings GmbH, AIG APAC HOLDINGS PTE. LTD., AIG Asia

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Joint-Stock Company, AIG Ukraine Insurance Company, Johannesburg Insurance Holdings (Proprietary) Limited, AIG Life South Africa Limited, AIG South Africa Limited, AIG Travel, Inc., AIG Travel Assist, Inc., AIG Travel Asia Pacific Pte. Ltd., AIG Travel Assist Malaysia Sdn. Bhd., AIG Travel EMEA Limited, Travel Guard Group Canada, Inc./Groupe Garde Voyage du Canada, Inc., Travel Guard Group, Inc., American International Reinsurance Company, Ltd., Validus Holdings, Ltd., Talbot Holdings Ltd., Talbot Underwriting Holdings Ltd., Talbot Underwriting Ltd., Validus Reinsurance, Ltd., Validus Holdings (UK) Ltd., Validus Reinsurance (Switzerland) Ltd, Validus Ventures Ltd., AlphaCat Managers Ltd., AIG Property Casualty U.S., Inc., AIG Aerospace Insurance Services, Inc., AIG Assurance Company, AIG Property Casualty Company, AIG Specialty Insurance Company, AIG WarrantyGuard, Inc., AIU Insurance Company, American Home Assurance Company, AIGGRE EOLA LLC, Jefferson Eola Venture LLC, American Home Assurance Company Escritorio de Representacao no Brasil Ltda., AIG Insurance Company China Limited, Commerce and Industry Insurance Company, Eaglestone Reinsurance Company, Arthur J. Glatfelter Agency, Inc., Volunteer Firemen's Insurance Services, Inc., Granite State Insurance Company, Illinois National Insurance Co., Lexington Insurance Company, Pine Street Real Estate Holdings Corp., National Union Fire Insurance Company of Pittsburgh, Pa., American International Overseas Association, American International Realty Corp., National Union Fire

Insurance Company of Vermont, New Hampshire Insurance Company, Risk Specialists Companies Insurance Agency, Inc., Service Net Warranty, LLC, The Insurance Company of the State of Pennsylvania, Western World Insurance Group, Inc., Crop Risk Services, Inc., Western World Insurance Company, Stratford Insurance Company, Tudor Insurance Company, AIG Technologies, Inc., AIG Shared Services Corporation, AM Holdings LLC, American Security Life Insurance Company Limited, Blackboard U.S. Holdings, Inc., Blackboard Customer Care Insurance Services, LLC, Blackboard Services, LLC, Blackboard Specialty Insurance Company, Blackboard Insurance Company, Fortitude Group Holdings, LLC, Fortitude Life & Annuity Solutions, Inc., Fortitude Reinsurance Company Ltd., MG Reinsurance Limited, SAFG Retirement Services, Inc., AIG Life Holdings, Inc., AGC Life Insurance Company, AIG Life of Bermuda, Ltd., American General Life Insurance Company, SA Affordable Housing, LLC, SunAmerica Affordable Housing Partners, Inc., SunAmerica Asset Management, LLC, AIG Capital Services, Inc., The United States Life Insurance Company in the City of New York, The Variable Annuity Life Insurance Company, VALIC Financial Advisors, Inc., Valic Retirement Services Company.

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Preliminary Statement

Both New York and federal law promote arbitration as an efficient means of solving private disputes. As part of this pro-arbitration policy, courts applying either New York arbitration law or the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, may confirm an arbitrator's "partial final award," which conclusively determines some but not all of the claims submitted to arbitration. Allowing arbitrators to issue, and courts to enforce, these partial final awards ensures that arbitrators can efficiently resolve disputes. Respondent American International Specialty Lines Insurance Co. ("AISLIC") brought this action to enforce such a "Partial Final Award," which conclusively decided the issue of liability in an insurance dispute.

State and federal law—and the procedural rules of arbitration fora—have clear standards for when arbitration awards are final and may be enforced by a court. Once arbitrators have issued an award, they are "*functus officio*," or without power to re-decide that part of the dispute, allowing the judicial system to take over and enforce the award. In the context of partial final awards, the doctrine of *functus officio* allows arbitrators to issue enforceable awards that narrow the scope of a dispute. *Functus officio* therefore serves as a procedural safeguard, promoting both efficiency of the arbitration process and enforceability of arbitration awards.

Here, however, despite agreeing to a bifurcation of liability and damages in the arbitration, Appellants sought reconsideration after the arbitration tribunal ("Tribunal") issued its Partial Final Award on liability. Although the Tribunal was without power to reconsider its final award, one member of the Tribunal decided to switch his vote, and the new majority purported to issue a "corrected" Award. Years of litigation ensued, culminating in this appeal. The uncertainty and delay resulting from Appellants' decision to challenge the Partial Final Award demonstrate why the doctrine of *functus officio* is so important—and why Appellants' position is contrary to the law and pro-arbitration policy of both federal and state law.

As the Appellate Division correctly concluded, under both federal and state law, the Tribunal's authority over the issues decided by the Partial Final Award had lapsed, and its "corrected" award, along with a subsequent final award incorporating that "corrected" award, were issued in excess of its authority. Appellants ask this Court to reverse the Appellate Division. Lacking any authority for their position, they propose that this Court upend settled principles of finality in arbitration proceedings to reach their preferred result. The Court should decline this invitation and affirm the Appellate Division, for three reasons:

First, Appellants assume that New York law, not federal law, governs whether the Partial Final Award was final and enforceable. As the Appellate Division recognized, state and federal law are entirely consistent on this question: both recognize

the enforceability and finality of partial final awards. Thus, this Court need not decide which law governs the dispute, but if it reaches the issue, the Court should conclude that federal law applies. Appellants' analysis, which is based on a misreading of New York law, misses the mark.

Second, Appellants incorrectly assert that the parties were required to expressly authorize partial final awards in their written arbitration agreement—a requirement for which Appellants cite no authority. Contrary to Appellants' contentions, the parties here authorized the Tribunal to issue a partial final award on the issue of liability. Having issued that award, the Tribunal was without authority to revisit it.

Finally, seemingly aware that their desired interpretation of New York arbitration law is not supported by current case law, Appellants ask this Court to impose a new limitation on the manner in which parties and arbitrators can structure arbitration proceedings and arbitration awards. Appellants' proposed new rule would encourage countless parties in arbitration to demand that arbitrators "reconsider" final awards—preventing the efficient resolution of disputes by delaying the day when an arbitration award is final and enforceable in a court. As such, it is contrary to the sound, pro-arbitration policy of this state. Furthermore, Appellants' novel rule would put New York at odds with (and would therefore likely be preempted by)

federal law. The Court should affirm the Appellate Division and reject Appellants' proposal to change New York arbitration law.

Questions Presented

1. When an arbitration tribunal issues an award based on two contracts, each of which choose the law of different states, does the Federal Arbitration Act or New York Civil Practice Law and Rules Article 75 govern confirmation or vacatur of the tribunal's awards?

2. Did the Appellate Division err when it concluded that arbitrators who issue a "Partial Final Award" that "finally determine[s] an issue" are without power to later revisit and reverse that award?

3. Should this Court adopt a novel requirement that parties to arbitration agreements expressly provide for partial final awards in their written agreements?

Statement of the Case

A. Appellants Settle Fraud Charges With the Federal Government

Appellant Ciena Capital LLC ("Ciena"), formerly known as Business Loan Express, Inc., originated and serviced loans guaranteed by the United States Small Business Administration ("SBA") as part of the SBA's Preferred Lender Program. (A. 57.) As a participant in the Preferred Lender Program, if Ciena originated loans that complied with the SBA's guaranty requirements, it could receive the SBA's partial guaranty against the loan's default, and could also act as the loan servicer. (*Id.*)

In December 2004, *qui tam* relators brought a sealed False Claims Act complaint (the "Fraud Complaint") against Ciena, Allied, and certain of their officers and directors, in the Northern District of Georgia. The relators alleged that Ciena had "systematically engag[ed] in loan origination fraud committing the SBA to guaranty loans which, under SBA's policies . . . should never have been made." (A. 233-34.) The complaint also alleged that Allied was liable for the fraud, as Ciena's alter ego.[1] (A. 250.)

Approximately two years after it was filed, Patrick Harrington, a Ciena employee who had been named in the Fraud Complaint, was indicted in the District of Michigan on conspiracy charges. (A. 59.) He pled guilty in 2007. (A. 60.) As part of a settlement agreement, Ciena agreed to pay for the government's losses stemming from Harrington's fraud. (*Id.*) The charges against Harrington also gave rise to two shareholder suits against Allied and its officers and directors. (*Id.*)

Also in 2007, the same relators who had filed the Fraud Complaint filed a second *qui tam* action, alleging that Ciena had made fraudulent loans to shrimp-boat operators. (A. 58.) The government began an investigation into Ciena's loan practices, which Allied learned about through a request for documents. (*Id.*) On Sep-

[1] Relator David Einhorn, a hedge fund manager, later wrote a book about his campaign against Allied. David Einhorn, *Fooling Some of the People All of the Time: A Long Short Story* (2010).

tember 26, 2008, counsel for Ciena learned about the Fraud Complaint, which remained under seal, for the first time. (*Id.*) Four days later, Ciena filed for bankruptcy. (A. 60.)

In November 2010, the government intervened in the Fraud Complaint action, leading to a settlement of the claim (the "Fraud Settlement") under which Ciena would pay $10.1 million. (A. 800-06.) At the time of the Fraud Settlement, Ciena was still in bankruptcy. Allied owned 94.9% of Ciena, and had provided a pre-petition credit facility to Ciena, for which it held a secured claim. (A. 62, A. 801.) In the Fraud Settlement, Allied agreed to release enough of its secured claim to allow Ciena to pay the government $10.1 million. (A. 62, A. 810.) Ciena paid for the Fraud Settlement using funds from a post-petition revolving credit facility created by Allied for Ciena's "general corporate purposes." (A. 62-63.) Drawdowns from the revolving credit facility were loans, which Ciena was obligated to repay to Allied. (*Id.*)

B. Appellants Seek Indemnification from AISLIC

Appellants and AISLIC were parties to two insurance agreements relevant to this case. In a policy executed in 2006 (the "2006 Policy"), AISLIC agreed to insure Allied and Ciena for "Loss[es] . . . arising from a Claim . . . for any actual or alleged Wrongful Act of any Insured in the rendering or failure to render Professional Services[.]" (A. 181.) The 2006 Policy provided for alternative dispute resolution,

allowing the parties to choose either mediation or arbitration (the "2006 Arbitration Clause"). The 2006 Arbitration Clause specifically required "arbitration submitted to the American Arbitration Association," and provided that the arbitrators "shall . . . give due consideration to the general principles of the law of" Delaware. (A. 192; A. 524.)

AISLIC and Allied also executed an insurance policy in 2008 (the "2008 Policy"), which insured Allied, but not Ciena. The 2008 Policy insured Allied for "Loss[es] . . . arising from a Claim . . . for any Wrongful Act . . . including those from Professional Services." (A. 126.) The 2008 Policy also included an alternative dispute resolution provision (the "2008 Arbitration Clause"), which stated that "[t]he dispute . . . shall be governed by the internal laws of the State of New York." (A. 146.) Unlike the 2006 Arbitration Clause, it did not specify an arbitration forum or specific arbitral rules to be followed.

Allied sought indemnification from AISLIC for its alleged Losses from the Fraud Settlement, including defense costs and the purported cost of settlement. AISLIC denied coverage, and in October 2010 Allied and Ciena filed a Demand for Arbitration. (A. 261.)

C. The Arbitration

Allied and Ciena's Demand for Arbitration included three Claims for Relief: two claims for breach of contract, alleging that under either the 2006 or 2008 Policies, AISLIC was obligated to pay for Appellants' defense costs and the costs of the Fraud Settlement; and a claim for a declaratory judgment declaring AISLIC's liability. (A. 267-69.)

The parties each selected an arbitrator, and those two individuals then chose a "neutral" chair. Pursuant to the Tribunal's Procedural Order Number 1, issued February 11, 2013, the "Chair [was] authorized to make procedural rulings subject to any parties' request that the full panel deliberate on the matter." (A. 525.)

The parties made dispositive motions. On March 14, 2016, the Tribunal issued its decision, in a form that it specifically titled a "Partial Final Award." The Tribunal determined that the 2008 Policy governed Allied's claim of a "Loss" stemming from the Fraud Settlement. (A. 78.) It concluded that under that policy, Allied had not suffered a covered "Loss" because it "'settled' a case in a way that cost it nothing," and so rejected its claim that it suffered a covered "Loss" under the 2008 Policy. (A. 69-70.) The Partial Final Award also denied Appellants' claim under the 2006 Policy.

With respect to Allied's claim for defense costs, the Tribunal concluded that "[a]n insurer's obligation to defend is broader than its obligation to indemnify," and

therefore the Fraud Complaint action was "sufficient to trigger" AISLIC's obligation to provide a defense. (A. 80.) The Tribunal added:

> We find that the questions raised by the parties regarding defense costs . . . cannot be decided on motions for summary disposition. [Appellants] recognize this, stating that the "quantum of attorney's fees need not be decided on this motion, but could be the subject of a separate evidentiary process in the event coverage is found" . . . . We agree.

(A. 81.) Arbitrator Edward Joyce, Appellants' party-appointed arbitrator, dissented from what he termed "the final award." (A. 84.)

On April 1, 2016, Appellants requested that the Tribunal reconsider the Partial Final Award, and issue a second Partial Final Award reversing itself on the issue of whether Allied suffered a covered "Loss" from the Fraud Settlement. (A. 455.)

Noting that "the Partial Final Award is *final*," AISLIC objected to reconsideration as "both procedurally and substantively defective." (A. 457.) After further briefing, the Tribunal ordered a reconsideration hearing. AISLIC stated that it would participate, but noted that it "reserve[d] all of its legal rights with respect to contesting the propriety of such procedure," and that it "vehemently object[ed]" to the hearing of new evidence. (A. 464.) At the hearing on reconsideration, AISLIC argued that reconsideration was inappropriate, citing to the doctrine of *functus officio*. (A. 488.) Nevertheless, two members of the Tribunal voted to issue what they called a

"corrected" partial final award, which reversed its determination that the Fraud Settlement did not constitute a covered "Loss." (A. 86, A. 98.) One member dissented on the basis that "the Tribunal is barred by the doctrine of *functus officio* from reconsidering and altering its Partial Final Award." (A. 101.) After an evidentiary hearing concerning the amount of defense costs, the Tribunal issued a "Final" award, which incorporated its "corrected" partial final award, awarding Allied $7.5 million from AISLIC. (A. 116.)

D. Procedural History

Citing both the FAA and state law, AISLIC moved in State Supreme Court to confirm the Partial Final Award and to vacate the "corrected award," and then on consent filed an amended petition to vacate the Final Award as well. (A. 12.) Supreme Court (Jaffe, J.) denied the petition to confirm the Partial Final Award, holding that the Tribunal was not prohibited from reconsidering its award, but not addressing AISLIC's *functus officio* argument. (A. 7-8.)

AISLIC appealed to the Appellate Division, First Department, which reversed. Citing both federal and state law concerning finality in arbitration, the Appellate Division held that the "corrected PFA and final award should be vacated and the PFA should be confirmed on the ground that the panel exceeded its authority when it reconsidered the PFA." (A. 991-93.) The court discussed federal cases holding that arbitrators are *functus officio* on issues decided in a partial award,

"meaning that their authority over those questions is ended." (A. 991-93.) Justice Gische dissented. (A. 998-1010.) The Appellate Division granted Appellants' motion for leave to appeal. (A. 982.)

Argument

I. Under Both Federal And New York Law, Arbitrators May Issue, And Cannot Later Revise, Partial Final Awards

Appellants assume without explanation that New York law governs this dispute, and insist that it does not recognize the existence of "partial awards." (*See* Br. 39 n.3.) Appellants also suggest that New York law is "unlike" federal law on this issue, and further that federal courts are "divided" on the reviewability of partial awards. (*Id.*) Appellants are wrong in all respects: Federal law, not New York law, governs this dispute. In all events, the result under either the FAA or CPLR Article 75 is the same: Contrary to what Appellants claim, federal and state law clearly support the issuance and judicial enforcement of partial awards.

Under both the FAA and New York law—and the procedures of all major New York-based arbitration fora—arbitrators may enter partial final awards to dispose of either severable claims or bifurcated phases of an arbitration proceeding. Once arbitrators issue a partial final award, they are without authority to substantively modify it, leaving courts free to enforce or vacate the award. Accordingly, this Court should affirm the Appellate Division.

A. Federal Law Governs This Dispute

In its decision, the Appellate Division applied both federal cases and the vacatur provision of CPLR 7511(b), but did not engage in a choice-of-law analysis to decide whether the FAA or state law governs this dispute.[2] (A. 987-997.) The ground for the Appellate Division's decision—that it was in "excess of the panel's authority" to revisit the Partial Final Award—is found *both* in CPLR 7511(b) and in FAA Section 10(a)(4), and as discussed further below, the Appellate Division's holding was correct as a matter of both state and federal law. *See Mahn v. Major, Lindsey, and Africa, LLC*, 159 A.D.3d 546, 546-47, 74 N.Y.S.3d 7, 8 (1st Dep't 2018) (holding that an award was "properly confirmed" under analysis based on CPLR 7511 even though the "matter involved interstate commerce, and was thus governed by the terms of the [FAA]," because "the requirements for vacatur of an arbitration award are nearly identical under the FAA and CPLR 7511" and "the result remains the same"). For that reason, the Court need not reach the issue of whether the FAA or New York law governs this dispute. *See N.J.R. Assocs. v. Tausend*, 19 N.Y.3d 597, 602, 950 N.Y.S.2d 320, 322 (2012) (concluding that "[i]t is unnecessary . . . to decide whether the contract at issue is subject to the FAA or New York law because under either analysis" the result is the same).

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[2] The dissent characterized the majority as ordering "[*vacatur*] under CPLR 7511." (A. 998.) Although the Appellate Division majority did cite to CPLR 7511, it also cited federal caselaw, and did not specify whether its decision was based on state, and not federal, law.

If the court were nonetheless to conclude that the FAA and New York law lead to different results here, it should determine that the FAA governs this dispute. Unless displaced by the parties' agreement, "where a contract containing an arbitration provision 'affects' interstate commerce, disputes arising thereunder are subject to the FAA." *Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252, 793 N.Y.S.2d 831, 834 (2005). The 2006 and 2008 Policies at issue here are contracts "affecting commerce," and because the parties never agreed that New York law would govern the arbitration, the FAA applies.

The use of the phrase "involving commerce" in the FAA, 9 U.S.C. § 2, is the "functional equivalent" of the phrase "affecting commerce," and "signals Congress' intent to exercise its Commerce Clause powers to the fullest extent." *Id.* (citing *Allied–Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 273–274 (1995)). If a contract is governed by the FAA, "federal substantive law regarding arbitration" will apply in both state and federal courts, *Preston v. Ferrer*, 552 U.S. 346, 349 (2008), and federal arbitration law will provide the governing standards for confirmation and vacatur, *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 480, 813 N.Y.S.2d 691, 696 (2006). The insurance contracts at issue here, which insured nation-wide lending operations, clearly fall into the scope of Congress's broad commerce powers. *See Utica Mut. Ins. Co. v. Gulf Ins. Co.*, 306 A.D.2d 877, 878, 762 N.Y.S.2d 730, 732 (4th Dep't 2003) ("insurance transactions constitute commerce

within the meaning of the Commerce Clause"); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003) ("No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause.").

Parties to arbitration agreements in contracts "involving commerce" may displace federal law, but only through express choice-of-law provisions, which "will be honored unless the chosen law creates a conflict with the terms of, or policies underlying, the FAA." *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 201, 623 N.Y.S.2d 800, 808 (1995) (citing *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)); *see also Preston*, 552 U.S. at 349. Thus, absent a choice of law other than the FAA in the agreement to arbitrate in the 2006 and 2008 Policies, the FAA would presumptively govern any arbitration arising out of those contracts, including the federal standards for confirmation or *vacatur* of arbitration awards.

The parties here did include choice of law provisions in the 2006 and 2008 Policies, but these clauses conflict: the 2006 Policy chose Delaware law and the rules of the American Arbitration Association to govern any arbitration, and the

2008 Policy chose New York law.[3] (A. 146; A. 191-92; A. 524.) Appellants themselves defined the scope of the arbitration arising from these Policies through their Demand for Arbitration, which made claims under both policies. (A. 262-64.) After reviewing the conflicting choice-of-law provisions, the Tribunal itself determined that Delaware law would govern interpretation of the 2006 Policy and New York law would govern interpretation of the 2008 policy, but that the arbitration proceedings themselves were "clearly governed by the Federal Arbitration Act."[4] (A. 798.)

Not only must the FAA apply in light of the conflicting choice of law provisions, but Appellant Ciena is neither a party to nor an insured under a contract choosing New York law. Ciena is an appellant here because it made a claim in arbitration expressly based on the 2006 Policy, under which it was an insured, and which chose Delaware law and the rules of the American Arbitration Association.

The parties never chose New York law to govern the arbitration. Indeed, *neither* side challenged the Tribunal's determination that the FAA would govern the

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[3] The Arbitrators' Procedural Order Number 1 recognized that the dispute involved both policies, stating that New York law would govern the 2008 Policy and Delaware law would govern the 2006 Policy. (A. 524.) In the Partial Final Award AISLIC now seeks to confirm, the Tribunal considered and interpreted both the 2006 and 2008 Policies. (A. 73.)

[4] AISLIC has not identified authority addressing the issue of which law governs in a circumstance where an arbitration arises from two contracts with conflicting choice-of-law provisions, where those contracts clearly "involv[e] commerce." On these unique facts, however, it is clear that the FAA must supply the relevant law because there is no agreement that any other law, including New York or Delaware law, would apply to all disputes arising from *both* of the Policies at issue.

proceedings.[5] There is therefore no basis to assume, as Appellants apparently do, that New York law displaces the FAA for purposes of this appeal. In light of the conflicting choice-of-law provisions in the 2006 and 2008 Arbitration Clauses, this Court should apply federal law if it were to reach the choice-of-law issue, but the result is the same under state or federal law.

B. Both Federal And State Law Recognize Partial Final Awards

As Appellants are forced to concede (Br. 39 n.3), federal law *expressly* provides for judicial review of "partial award[s]," *see* 9 U.S.C. § 16(a), and federal courts will review partial awards that finally and conclusively decide an issue. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 669 (2010) (reviewing arbitrators' decision to permit class arbitration); *Trade & Transport, Inc. v. Nat. Petrol. Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991) (arbitration panel was *functus officio* as to liability after issuing a partial final award on that subject); *Andrea Doreen, Ltd. v. Bldg. Material Local Union 282*, 250 F. Supp. 2d 107, 116 (E.D.N.Y. 2003) (noting that the Second Circuit has "encouraged" confirmation of "separable arbitration awards, even where the petition to confirm is brought prior to the conclusion of all arbitration proceedings."). Indeed, courts "reviewing an arbitration order can confirm and/or vacate the award, either in whole *or in part*," and

[5] Although AISLIC challenged the Tribunal's determination that the JAMS Rules did not apply to the arbitration, *see* note 11, *infra*, it never questioned the Tribunal's determination that the FAA governed the proceeding. Neither did Appellants.

may confirm only *part* of a *partial* award that is otherwise non-final. *Glob. Gold Mining LLC v. Caldera Res., Inc.*, 941 F. Supp. 2d 374, 384 (S.D.N.Y. 2013) (quoting *Robert Lewis Rosen Assocs., Ltd. v. Webb,* 473 F.3d 498, 504 (2d Cir. 2007)).

New York law, like federal law, allows for enforcement of partial final awards where those awards "finally and conclusively dispose[] of a separate and independent claim, even though it does not dispose of all of the claims that were submitted to arbitration." *Wendt v. BondFactor Co., LLC*, 169 A.D.3d 808, 810, 94 N.Y.S.2d 134, 136 (2d Dep't 2019). In *Wendt*, for example, the Second Department held that because a partial final award "indicated that it was final with respect to the matters addressed therein," it was final and severable from a subsequent award on fees, and the subsequent award did not extend the time to challenge the first award. *Id.*; *see also, e.g.*, *Franco v. Dweck*, 165 A.D.3d 551, 553, 87 N.Y.S.2d 5, 8 (1st Dep't 2018), *leave to appeal denied*, 33 N.Y.3d 903 (2019) (affirming partial final award which reserved the issue of attorneys' fees); *Cheng v. Oxford Health Plans, Inc*., 84 A.D.3d 673, 674, 923 N.Y.S.2d 533, 534 (1st Dep't 2011) (affirming order denying vacatur of serial awards concerning class certification); *cf. Muller v. Wertzberger*, 39 Misc.3d 1237(A), 972 N.Y.S.2d 144 (N.Y. Sup. Ct. 2013) (While an "arbitration award [that] does not purport to be a final decision as to any one claim or party" is not final, "that is not to say that an interim or partial award cannot be final if it fully resolves a separate and independent claim or the liability of a particular party.").

In the face of this clear precedent, Appellants resort to citing inapposite authority concerning whether courts should review partial awards on preliminary procedural issues. Appellants first claim that federal courts are "divided" on whether to enforce Partial Final Awards, citing, for example, Justice Ginsburg's dissent in *Stolt-Nielsen* (*see* Br. 39-40, n.3). Not only are Appellants asking this Court to rely on a dissent, rather than a majority opinion, but the dissent is irrelevant to the question presented here: the dissent distinguishes the partial final awards deemed reviewable by the federal circuit courts—including partial awards bifurcating liability from damages—from procedural "preliminary rulings" that Justice Ginsburg argues are not ripe for review. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. at 692 (2010) (Ginsburg, J., dissenting).

Appellants then turn to New York cases, focusing on another inapposite decision, *Mobil Oil v. Asamera Oil (Indonesia) Ltd.*, 43 N.Y.2d 276, 401 N.Y.S.2d 186 (1977). *Mobil Oil* concerned a challenge to an arbitrator's "intermediate procedural determination" about which of two sets of procedural rules would apply in the arbitration. 43 N.Y.2d at 281; 401 N.Y.S.2d at 188. This Court dismissed the challenge because the arbitrator's decision addressed only a "very limited procedural question"; the award was not a partial final award in title or substance. *Id.* This Court's holding in *Mobil Oil*, along with Justice Ginsburg's dissent in *Stolt-Nielsen*, stand for the uncontroverted proposition that an arbitrator's preliminary procedural rulings

are not properly the subject of partial final awards.[6] That principle has no application in this case.

Consistent with, and reflecting the FAA and New York law, the rules of all major arbitration fora based in New York provide for partial awards, underscoring their value as a tool for arbitrators to efficiently decide disputes. *See* JAMS Comprehensive Arbitration Rules & Procedures Rule 24 (providing that "[t]he Arbitrator shall render a Final Award or a Partial Final Award"); American Arbitration Association Rule 47 (arbitrators "may make" partial awards); National Arbitration and Mediation Comprehensive Dispute Resolution Rules and Procedures Rule 34(j) ("the Arbitrator(s) shall be entitled to render interim, interlocutory, or partial Awards"); UNCITRAL Arbitration Rule 34 ("The arbitral tribunal may make separate awards on different issues at different times.").[7] This is no mere coincidence:

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[6] Similarly, Appellants assert that "in California, a 'partial final award,' is *not* an 'award' under that State's law." (Br. 39 n.3 (citing *Maplebear, Inc. v. Busick*, 26 Cal. App. 5th 394 (2018))). This is incorrect. Like *Mobil Oil*, *Maplebear* concerned a preliminary procedural decision: whether to permit a party to seek class certification. 26 Cal. App. 5th at 398. *Maplebear* itself referenced and distinguished three other California cases in which courts reviewed partial awards that did not address preliminary issues. 26 Cal. App. 5th at 404, 405 n.10 (discussing and distinguishing *Hightower v. Superior Court*, 86 Cal. App. 4th 1415 (2001), *Roehl v. Ritchie,* 147 Cal. App. 4th 338 (2007), and *EHM Productions, Inc. v. Starline Tours of Hollywood, Inc.,* 21 Cal. App. 5th 1058 (2018)); *see also* 2 Domke on Com. Arb. § 33:1 ("Under the California Arbitration Act, an arbitrator may utilize a multiple incremental or successive award process as a means, in an appropriate case, of finally deciding all submitted issues." (citations omitted)).

[7] The UNCITRAL Arbitration Rules are the default rules of a New York-based arbitration organization, the New York International Arbitration Center. *See* NYIAC Rules, *available at* https://nyiac.org/about/rules/. The United Nations promulgated the UNCITRAL Arbitration Rules "after

parties arbitrating under these institutional rules assume that their awards will be confirmable in both federal and state courts. Appellants cannot credibly maintain that the highest Court in New York, which has a "long and strong public policy favoring arbitration," *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66, 845 N.Y.S.2d 217, 221-22 (2007) (citing *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 49, 666 N.Y.S.2d 990, 996 (1997)), should suddenly announce that New York law deviates in a key respect from widely-applied institutional rules.

C. Under Federal And New York Law, Arbitrators Exceed Their Authority When They Purport To Reverse An Award

While Appellants argue that the Tribunal had authority to correct its Partial Final Award because it was correcting a purported "fundamental error" in its initial award, (Br. 58), that is incorrect in several respects. The Tribunal's Partial Final Award properly rejected Appellants' claim of a loss stemming from the Fraud Settlement. But even if that decision had been erroneous, the Tribunal would have lacked authority to revisit it. Under both federal and state arbitration law, arbitrators exceed their authority where they substantively modify final and partial final arbitration awards absent the parties' consent. Having issued an award, they are *functus officio* as to the issues decided, "meaning that their authority over those questions is

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extensive consultation with arbitral institutions and centres of international commercial arbitration," and "[r]ecommends the use of the Arbitration Rules . . . in the settlement of disputes arising in the context of international commercial relations." United Nations Comm'n on International Trade Law, UNCITRAL Arbitration Rules at 2 (August 15, 2010), https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

ended." *Trade & Transport, Inc. v. Nat. Petrol. Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991).

Functus officio is a default rule under federal law, applying "absent an agreement by the parties to the contrary." *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342 (2d Cir. 2010) (citing *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 370 (2d Cir. 1999)); *United Bhd. of Carpenters v. Tappan Zee Constructors, LLC*, No. 1:14-CV-03688 (ALC), 2015 WL 10861108, at *7 (S.D.N.Y. Mar. 25, 2015), *aff'd*, 804 F.3d 270 (2d Cir. 2015) ("parties may agree to enlarge the authority and jurisdiction of the arbitrator, giving him the ability to reconsider issues."). The same is true in state law under CPLR 7509, which applies to prevent arbitrators from modifying an award, with limited exceptions for correction of minor errors. (*See* A. 992 (decision of the Appellate Division, citing CPLR 7509).) By purporting to "correct" anything other than a computational error, the Tribunal violated the doctrine of *functus officio*.

Under the doctrine of *functus officio*, once a tribunal has issued a final or partial final determination, it has no further source of authority—and there is no basis for deference to its decisions. Federal law recognizes only limited exceptions to *functus officio*, to correct mistakes apparent on the face of the award or to clarify ambiguous awards. *See Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544 (2d Cir. 2018); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368 (2d Cir. 1999).

New York courts similarly recognize the doctrine of *functus officio*. Indeed, the principle underpinning the common-law doctrine of *functus officio* is so critical to effective and enforceable arbitration that it has been codified into law, including in the CPLR. CPLR 7509 provides that an arbitrator may only modify an award if a party moves for modification in writing within twenty days of delivery of the award—and then only to modify it for the limited purposes provided for in CPLR 7511(c), which mirror the limited grounds on which an arbitrator may correct an award under federal law.[8]

Far from falling into "desuetude," as Appellants contend (Br. 13), the doctrine of *functus officio* is alive and well in New York, both as a common-law doctrine and as a result of the application of CPLR 7509. (A. 992 (Appellate Division's decision)). *See Hanover Ins. Co. v. Am. Int'l Underwriters Ins. Co.*, 266 A.D.2d 545, 698 N.Y.S.2d 908 (Mem) (2d Dep't 1999) ("We reject the appellant's contention that the arbitrators had the authority to vacate the arbitration award . . . . After an arbitrator renders an award, he or she is generally without power to render a new award or to modify the original award."); *Wolff & Munier, Inc. v. Diesel Const. Co.*,

[8] Like the FAA, CPLR 7511(c) permits arbitrators to revisit an award only to correct a "miscalculation of figures," address an award on "a matter not submitted" if "the award may be corrected without affecting the merits of the decision," or to correct an imperfection in "the matter of form" of the award that does not "affect[] the merits of the controversy." Appellants cannot, and never even attempt, to show that the "corrected" award falls into any category of correction permitted by either the federal caselaw concerning error-correction, or CPLR 7511(c).

41 A.D.2d 618, 340 N.Y.S.2d 455, 457 (1st Dep't 1973) ("After they rendered the original award. . . , the arbitrators were *functus officio* except for the purpose of entertaining an application, made within twenty days, to correct a deficiency of form or a miscalculation of figures or to eliminate matter not submitted." (citing to CPLR 7509, 7511(c)); *In re Pinkesz (Wertzberger)*, 44 Misc. 3d 1227(A), 997 N.Y.S.2d 669 (N.Y. Sup. Ct. 2014) ("Once an arbitrator has rendered an award pursuant to an applicable arbitration agreement, the arbitrator is generally deemed *functus officio* . . . . The power to modify such award or otherwise bind the parties terminates upon its issuance.") *aff'd sub nom. Pinkesz v. Wertzberger*, 139 A.D.3d 1071, 30 N.Y.S.3d 832 (2d Dep't 2016); *see also Avamer Assocs., L.P. v. 57 St. Assocs., L.P.*, 67 A.D.3d 483, 484, 890 N.Y.S.2d 2, 3 (1st Dep't 2009) ("no proper basis for the modification under CPLR 7509" where arbitrators "reconsider[ed]" the original award rather than "correct[ed] a computational error"); *Aetna Cas. & Sur. Co. v. Vigilant Ins. Co.*, 241 A.D.2d 451, 452, 660 N.Y.S.2d 58, 59 (2d Dep't 1997) ("the relief sought [from the arbitrator,] . . . the complete vacatur of the award, is not sanctioned by CPLR 7509. Therefore the arbitrators were without authority to vacate the arbitration award[.]"); *Silber v. Silber*, 204 A.D.2d 527, 529, 611 N.Y.S.2d 302 (2d Dep't 1994), *leave to appeal dismissed in part, denied in part*, 85 N.Y.2d 856, 624 N.Y.S.2d 370(Mem) (1995) (directing *vacatur* of an award and noting that "After an arbitrator renders an

award, the arbitrator is without power to render a new award or to modify the original award, except as provided in CPLR 7509.").

It is not surprising that pro-arbitration federal and state law incorporate the doctrine of *functus officio*, even where they otherwise empower arbitrators with broad procedural discretion. *Functus officio* is an essential procedural safeguard. Without it, the finality of arbitration awards would be uncertain, encouraging parties to re-litigate even a "final" award. "[That] is, in effect, no award at all, for the object of parties in submitting their disputes to arbitration is to make an end of litigation." 2 Domke on Comm. Arb. § 33:2 (2019); *Compania Chilena De Navegacion Interoceanica, S.A. v. Norton, Lilly & Co.,* 652 F. Supp. 1512, 1517 (S.D.N.Y. 1987) (function of partial final awards is to "clarify the parties' rights in the 'interim' period pending a final decision on the merits"). Such a dramatic shift would undermine the benefits of arbitration, because finality for partial awards ensures that parties can take advantage of the "relatively quick and inexpensive resolution of contractual disputes" offered by arbitration. *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 282 (2d Cir. 1986).

II. The Tribunal Issued A Valid Partial Final Award On Liability, Rendering It *Functus Officio* On That Issue

The Appellate Division, relying on both state and federal law, correctly determined that the parties authorized the Tribunal to issue the Partial Final Award on liability. The Appellate Division also correctly concluded that, having issued that

final award on liability, the Tribunal was *functus officio* on the issue and did not have authority to issue the purported "corrected" award.

A. The 2006 and 2008 Arbitration Clauses Did Not Preclude The Tribunal From Granting A Partial Final Award

Nothing in the 2006 or 2008 Arbitration Clauses precludes, or even refers to, the Tribunal's authority to issue partial final awards. Instead, "disputes or differences" "under or in connection with" the 2006 Policy, or concerning the "construction or interpretation" of the 2008 Policy, is left to the Arbitrators. (*See* A. 146; A. 191.) In light of these broad delegation provisions, "it is appropriate to presume that [the] parties . . . implicitly authorize[d] the [Tribunal] to adopt such procedures as [were] necessary to give effect to the parties' agreement," including for "questions . . . which grow out of the dispute and bear on its final disposition." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684–85 (2010).

Grasping for evidence that the parties had limited the Tribunal's authority to issue partial final awards in advance of the August 2015 dispositive motion hearing, Appellants claim that the use of the terms "all disputes" and "final and binding" "'decision' (singular)" in the 2006 and 2008 Arbitration Clauses somehow "establishes a *contractual* limit on the arbitrators' authority," precluding them from issuing a partial final award. (Br. 28, 30 (emphasis in original) (citing both the 2006 and 2008 Policies at A. 146, A. 191-92.)) Unable to cite a single relevant authority for this proposition, Appellants speculate that "[i]f the parties had contemplated that the

arbitrators would issue multiple 'final and binding' decisions (plural) and multiple awards (plural), they would not have referred to 'the' final and binding decision and 'the' award upon that decision." (Br. 33.)

The relevant provision in the 2006 Clause—which Appellants cite as support for their argument—contradicts their wholly unfounded conjecture. It states that disputes should be arbitrated "under or in accordance with" the commercial arbitration rules of the American Arbitration Association (A. 192)—rules which *expressly* provide for arbitrators' authority to bifurcate proceedings and issue partial awards. Commercial Arbitration Rules and Mediation Procedures, Effective September 15, 2005, at Rule 30 ("The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may . . . bifurcate proceedings"), Rule 47(b) ("In addition to a final award, the arbitrator may make other decisions, including . . . partial rulings, orders, and awards.").[9] This very provision is evidence that the parties did not intend their agreement to limit the authority of their arbitrators to decide whether to bifurcate proceedings and issue partial awards. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 (1995) (Parties' agreement to arbitration under the rules of the National Association

[9]Available at *https://www.adr.org/sites/default/files/Commercial%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Sept.%2015%2C%202005.pdf*.

of Securities Dealers, which permitted arbitrators to award punitive damages, "contradict[ed]" a party's argument that "the parties [had] agreed to foreclose claims for punitive damage.").

Appellants' position on the use of the singular word "award" is also flatly contradicted by legal authority. FAA Section 9, for example, permits judicial confirmation of arbitration awards by federal courts where parties agree that "a judgment of the court shall be entered upon *the award*"—and yet there is no question that federal courts can and do enter judgment on partial arbitration awards. 9 U.S.C. § 9; *see also* 9 U.S.C. § 16 (noting right of appeal from an order "confirming or denying confirmation of an award *or partial award*." (emphasis added)).

Finally, Appellants' proposed reading of the 2006 and 2008 Policies is contradicted both by its *own position in the arbitration* and the Tribunal's determinations, which must be accorded deference. Even after it challenged the Partial Final Award, Appellants specifically requested that the Tribunal issue *another partial final award*—demonstrating its belief that the Tribunal did, in fact, have the authority to issue such awards. (A. 455.) The Partial Final Award phrased the Tribunal's decision to bifurcate as a "find[ing]": "We find that the questions raised by the parties regarding defense costs properly reimbursable cannot be decided on motions for summary disposition." (A. 81.) Clearly, the Tribunal believed it had the procedural

authority to make such a finding and issue a Partial Final Award—and that conclusion is entitled to deference. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684–85 (2010).

B. The Parties Consented To A Partial Final Award On Liability

Appellants argue that the parties did not authorize the Tribunal to issue a partial final award because there was no "*contract*, consisting of offer and acceptance and memorialized in writing" to permit a partial award. (Br. 47-48 (emphasis in original).) Appellants cite no support for the proposition that a written contract, with formal offer and acceptance, is required to permit partial final awards under New York or federal law.

Instead, Appellants resort to a review of 19th century caselaw and secondary sources, which Appellants claim show that even today, the parties' "submission" to the arbitrators is coextensive with a "written arbitration agreement." (Br. 24, *see also* 34 (equating the "submission" with the "written agreement to arbitrate"), 47 (same).) But Appellants mischaracterize or selectively quote the sources they cite for this proposition, which is wrong both as a historical matter and with respect to modern arbitration law.

Appellants' detour into legal history focuses on a 19th-century case, *Jones v. Welwood*. (Br. 33, 37-38, 41-42, 47.) Although Appellants claim that *Welwood* supports the position that parties may only grant authority for a partial award in their

written arbitration agreement, *Welwood* actually made clear that "[a]rbitration contracts should be construed like other cont[r]acts . . . with a view of arriving at the intent of the parties. They may provide either expressly *or by implication* for partial or separate awards." *Jones v. Welwood*, 71 N.Y. 208, 213 (1877) (emphasis added). Compounding their error, Appellants provided this Court with excerpts from a treatise cited in *Welwood* that purportedly supports the position that parties cannot "give arbitrators authority to issue confirmable partial awards by oral statements or by conduct." (Br. 42.) But Appellants *omit* the portions of that same treatise, which noted that even at that time, "[s]trict compliance with the stipulations of the submission [could be] . . . be waived by the parties by their subsequent conduct," and that written submissions could be orally "extended" or "abrogated in whole or in part." John T. Morse Jr., *The Law of Arbitration and Award* 82, 264 (Boston, Little, Brown & Co. 1872).[10] Indeed, the treatise recognized that parties could "empower[]" arbitrators to decide only part of the dispute. *Id.* at 342.

In any event, whether or not the *Welwood* court or 19th-century treatise writers would have approved of the Partial Final Award here, modern courts recognize

[10] Appellants cite to the Morse treatise for the proposition that a "written submission cannot be varied by parol evidence," and note that "a contract cannot be implied where the parties have entered into a written agreement." (Br. 41-42.) AISLIC does not ask this Court to refer to "parol evidence" for purposes of interpreting the parties' original arbitration agreements, or to find an "implied contract." AISLIC's position is that the parties' submission of part of their dispute for final disposition empowered the arbitrators to issue a partial final award.

that parties may "submit" part of their dispute for final, enforceable disposition by the arbitrators, even if the "original" submission did not expressly contemplate final awards. *Trade & Transport, Inc. v. National Petrol. Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991). That is what happened here. As the Appellate Division found, at the summary disposition stage, "AISLIC and Allied agreed that the panel was to make an immediate, final determination as to the issue of AISLIC's liability under the policies," noting that it was *Appellants themselves* who requested bifurcation of liability and damages (A. 993-94.) As the Appellate Division also noted (A. 994), Allied's briefing stated that "the quantum of attorneys' fees need not be decided on this motion, but could be subject to a separate evidentiary process *in the event coverage is found*." (A. 81.) At the hearing, Appellants' counsel then stated "*What we would suggest is* that [damages] . . . would be the topic for a separate proceeding . . . like an inquest to prove up what was done and how much was done." (A. 399 at 140:17-25 (emphasis added).) Counsel for Appellants agreed that bifurcation might permit the parties to resolve any remaining damages issues between them. (*Id.*) This colloquy demonstrates why judicially-enforceable partial final awards are a particularly valuable means to efficiently resolve disputes: as both the Tribunal and Appellants understood, partial final awards help arbitrators progressively narrow the scope of issues to be decided, and can encourage settlement or expedited resolution of remaining issues.

Trapped by their own words in the hearing, Appellants resort to asserting that because AISLIC did not also state, *in writing*, that it consented to bifurcation, there was no "contract" to bifurcate. (Br. 48.) But Appellants entirely ignore the nature of the proceedings in which both parties were engaged—cross-motions for summary disposition, on which *neither* side expected or were prepared to present testimony or evidence concerning the amount of damages. Indeed, when a lawyer for Allied interjected at the hearing to offer commentary about the nature of the "Loss" purportedly suffered by Allied, the Tribunal Chairperson specifically noted that "We're not taking testimony." (A. 411 at 186:4.) There was no need for AISLIC's counsel to expressly state that it consented to a bifurcated hearing because it was willingly *participating* in a bifurcated hearing on liability.

Appellants' *post hoc* attempt to engraft new requirements on how AISLIC must manifest its intent to bifurcate, which was obvious under the circumstances, has no basis in either New York or federal law. *See Andrea Doreen, Ltd. v. Bldg. Material Local Union 282*, 250 F. Supp. 2d 107, 112–13 (E.D.N.Y. 2003) ("Any argument that liability cannot be confirmed because both parties did not explicitly agree that each part of the bifurcated award would be final must fail."); *McGregor Van De Moere, Inc. v. Paychex, Inc.,* 927 F.Supp. 616, 618 (W.D.N.Y. 1996) (deciding that the decision on liability was final and could be confirmed because the

parties had bifurcated liability from damages, and noting that parties need not "expressly declare that an award on liability in a bifurcated proceeding will be deemed 'final'" for finality to attach).

The case most on point is *Trade & Transport, Inc. v. National Petroleum Charterers Inc.*, on which the Appellate Division correctly relied. In *Trade & Transport*, the Second Circuit held that arbitrators have the "authority and responsibility" to bifurcate the liability determination from damages on a claim if the parties agree." 931 F.2d at 195. Contrary to Appellants' contention that parties to an arbitration agreement may not submit part of their dispute for final determination, the Second Circuit held that parties could "modif[y] their original submission to the arbitrators in order to cause a bifurcated decision," requiring a partial award on "the issue of liability." *Id.* The Court continued that "once arbitrators have finally decided the submitted issues, they are . . . '*functus officio*,' meaning that their authority over those questions is ended." *Id.*

In an effort to save their misguided position, Appellants resort to mischaracterizing *Trade & Transport*, implying that in that case the parties "entered into a contract . . . memorialized in writing" in order to enable arbitrators to issue a partial final award. (Br. 48.) In fact, the decision makes clear that parties may orally agree to submit part of their dispute in order to secure a partial final award. The Second Circuit specifically quoted the *oral* colloquy that led to the arbitrators' decision to

bifurcate, in which counsel for the (ultimately prevailing) party stated "I think there are areas here that cannot in fact be determined today, dollars and cents damages amounts, but I think findings can be made with regard to the issue of liability . . . ." 931 F.2d 192-93. Counsel for the other party responded "I am not in the position tonight to comment on [damages] . . . . The question to detain us [is] . . . [liability for cancellation of the charter.]" *Id.*

Not only does *Trade & Transport* provide no support whatsoever for Appellants' position that some sort of "written" "contract" is required to bifurcate an arbitration hearing for purposes of a partial final award, but a comparison of the quoted colloquy with conduct of the parties here demonstrates why the Appellate Department was correct to conclude that "*there is no question* that during the arbitration proceedings, the parties agreed to an immediate determination solely as to liability, which they expected would be final[.]" (A. 995 (emphasis added).) Like counsel in *Trade & Transport*, Appellants proposed a finding on liability, and, as in *Trade & Transport*, neither side was "in the position . . . to comment on [damages]" at the hearing—which was not an evidentiary proceeding. *See Trade & Transport*, 931 F.2d at 193. When they moved for reconsideration, Appellants specifically asked that the reconsidered award take the form of a partial final award (A. 455)—clearly demonstrating that Appellants believed the Tribunal was empowered to issue partial final awards on liability. Appellants may now regret having proposed bifurcation,

but they cannot reasonably claim that the proceedings were bifurcated against their wishes, or that they did not realize that the Tribunal had the authority to issue a partial final award.

C. The Partial Final Award Determined The Issue of Liability, Rendering The Tribunal *Functus Officio* On That Issue

The Partial Final Award conclusively determined the issue of AISLIC's liability to Appellants. The Tribunal made two final determinations: first, that Allied did *not* suffer a "Loss" from its arrangements with Ciena to pay for the Fraud Settlement, and second, that AISLIC was liable for Allied's defense costs from the Fraud Complaint action. It left open only the amount of those defense costs. The Tribunal itself chose to title the award a "Partial Final Award," reflecting its plain view that—as it was tasked to do—it had issued a "reasoned Award." (A. 56.)

Under both federal and state law, the award was "final" for purposes of judicial review. *Trade & Transport*, 931 F.2d at 195 (decision is "final" for purposes of judicial review and *functus officio* where "arbitrators have finally decided the submitted issues," even as to "part of the dispute"); *Wendt v. BondFactor Co., LLC*, 169 A.D.3d 808, 810, 94 N.Y.S.3d 134, 136 (2d Dep't 2019) (partial award on one claimant's employment claim is final if it "finally and conclusively disposes of [that claimant's] independent claim, even though it does not dispose of all of the claims that were submitted to arbitration."). The Tribunal's chosen nomenclature for its decision, a "Partial Final Award," makes it clear that it intended the award to be the

conclusive determination of liability. It could have, but did not, issue an "interim" ruling. Even Appellants' chosen party-arbitrator Edward M. Joyce expressly acknowledged that the award was "final." (A. 84.) This Court should respect the Tribunal's intentional choice to issue a "final" award on the issue.

If, however, the Court determines that the Partial Final Award was not completely "final" because it left open the issue of damages—notwithstanding the parties' consent to bifurcate the proceedings—the Court should still confirm the *first* part of the Partial Final Award, denying Allied's claim for liability relating to Ciena's payment of the Fraud Settlement. *Glob. Gold Min. LLC*, 941 F. Supp. 2d at 384 ("[a] court reviewing an arbitration order can confirm and/or vacate the award, either in whole *or in part.*" (citing *Robert Lewis Rosen Assocs., Ltd. V. Webb* (2d Cir. 2007)). There is no dispute that, as to this part of the award, there was nothing left for the Tribunal to do, because it had conclusively determined that AISLIC was not liable to Appellants, given that Allied had "'settled' a case in a way that cost it nothing." (A. 69-70.) Because AISLIC's liability for the Fraud Settlement was separate from the issue of whether it owed Allied defense costs, Appellants have not, and could not, identify any basis on which that portion of the award should not be confirmed.

D. The Tribunal Exceeded Its Authority When It Purported To "Correct" The Partial Final Award

To justify the Tribunal's attempt to "correct"—that is, entirely reverse—its award, Appellants suggest that under the 2006 and 2008 Arbitration Clauses and New York law, the Tribunal was within its "broad" authority to correct a "fundamental error in a partial ruling." (Br. 54, 58.) Appellants have it exactly backwards: as discussed above in Part I, *functus officio* and CPLR 7509 are default rules which limit the otherwise broad authority granted to arbitrators, and which apply unless the parties agree to grant the arbitrators the power of reconsideration. Here, nothing in the parties' agreement displaces the doctrine of *functus officio*.

Appellants cite to the 2006 Arbitration Clause (Br. 54 (citing A. 191)) as evidence of the "broad" reconsideration power of the Tribunal, claiming that because the arbitrators were empowered to decide "all disputes," they had the authority to decide their own authority for reconsideration. But this citation itself demonstrates the error in Appellants' analysis. As discussed *supra*, the 2006 Arbitration Clause incorporates the then-prevailing commercial rules of the American Arbitration Association, which expressly provide *both* for the issuance of partial final awards *and* that "the arbitrator is not empowered to redetermine the merits of any claim already decided." *See* Commercial Arbitration Rules and Mediation Procedures, Effective September 15, 2005, at Rules 30, 46, 47. Similarly, the 2008 Policy chooses New York law—which includes strict limitations on arbitrators' reconsideration of their

awards as set forth in CPLR 7509. Contrary to Appellants' arguments, the Policies demonstrate that the parties never intended to displace the default rule that arbitrators may not substantively reconsider a Partial Final Award. The arbitrators therefore exceeded their authority when they purported to reconsider and reverse the Partial Final Award.

In a last-ditch effort to avoid the doctrine of *functus officio*, Appellants assert that AISLIC consented to the arbitrators' determination of their ability to reconsider the Partial Final Award. (Br. 55-56.) This fact-based claim is raised for the first time on appeal, and is waived for that reason. *Bingham v. N.Y.C. Transit. Auth.,* 99 N.Y.2d 355, 359, 756 N.Y.S.2d 129, 131 (2003). It is also false. Appellants omit AISLIC's repeated and express objections to reconsideration, both in briefing and at the hearing. Appellants' assertion that "both parties submitted that the arbitrators had authority to determine the reconsideration question" (A. 56) is flatly contradicted by the record: AISLIC objected to reconsideration because "[t]here has been *no agreement among the parties* in this arbitration to redetermine the issues addressed in the Tribunal's Award." (A. 461 (emphasis added).) After Appellants moved for reconsideration, AISLIC objected that the "the Partial Final Award is

final," and argued that reconsideration was "both procedurally and substantively defective."[11] (A. 457.) AISLIC also cited to the doctrine of *functus officio* at the hearing, to support its position that reconsideration was inappropriate. (A. 488.)

Appellants do not, and cannot, cite any authority for the proposition that more was required of AISLIC to preserve its objection. *See Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 331 (3d Cir. 1991) (finding no waiver where the party "did participate in the conference call with the umpire as well as [submit] various letters," but where the party "at all times took the position that the first award needed no clarification and that [the reconsideration] request would, if granted, constitute more than the limited clarification that arbitrators are permitted to make on their own."); *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) (concluding that a party did not waive a challenge to arbitrators' jurisdiction over a dispute where the party filed with the arbitrators "a written memorandum objecting to the arbitrators' jurisdiction," because "merely arguing the arbitrability issue to an

[11] AISLIC's position throughout this litigation has been that the JAMS Rules applied to the arbitration, and those Rules preclude reconsideration of a final award after fourteen calendar days. (A. 457, A. 461.) For that reason, in a letter to the Tribunal, AISLIC described *functus officio* as a "red herring," because it would be unnecessary to refer to common-law authority if the JAMS Rules governed. (A. 462 (citing JAMS Rule 24, which provides that an "[a]ward is considered final . . . fourteen (14) calendar days after service.")). After the Tribunal's new majority nevertheless chose to revisit the Partial Final Award, AISLIC took prompt and timely action to confirm the Partial Final Award and vacate the "corrected" award, both as a matter of the JAMS Rules and under federal and state law. (A. 12, 23.)

arbitrator does not indicate a clear willingness to arbitrate that issue."). That is particularly true because AISLIC could not take the risk of offending the Tribunal by refusing to engage in further proceedings on liability, as the damages issue was pending before the same panel. *See, e.g.*, *First Options*, 514 U.S. at 946 (the fact that a party was already engaged in a separate arbitration before the same tribunal was an "obvious explanation" for the party's continued presence in the arbitration, and militated against a finding of waiver).

III. Appellants' Proposed New Rule Would Significantly Undermine Arbitration And This Court Should Reject It

Recognizing that neither federal nor New York law supports their position, Appellants propose that this Court create and apply a novel rule to arbitrations governed by New York law: "this Court should hold that arbitrators may reconsider a partial ruling that does not decide all disputes between the parties unless the parties have clearly provided otherwise in their written agreement." (Br. 58.)

For the reasons discussed in Part IA, the Court need not reach the question because—if the Court reaches the choice-of-law question at all—federal, not New York, law would apply. But if the Court were to consider Appellants' novel take on *functus officio*, the Court should reject it out of hand. The proposed rule would significantly undermine New York's pro-arbitration policy by opening the door to strategic gamesmanship from parties who—like Appellants—agree to issuance of a par-

tial final award but then are unhappy with the result. Moreover, Appellants' proposed new rule is fundamentally inconsistent with federal law, and this would leave New York law vulnerable to preemption by the FAA on this point.

A. Appellants' New Rule Would Undermine New York's Pro-Arbitration Policy

New York does not currently require that parties "clearly provide" for partial awards in a written arbitration agreement for good reason: a requirement that parties to an arbitration must agree in writing to any partial final award would undermine this Court's stated policy of "interfer[ing] as little as possible with the freedom of consenting parties to submit disputes to arbitration." *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66, 845 N.Y.S.2d 217, 222 (2007).

Appellants' proposal creates problems where none exist. It is any *restriction* on arbitrators' procedural discretion that should be expressly stated in writing. As this Court has held, "[a]ny limitation upon the remedial power of the arbitrator must be clearly contained, either explicitly or incorporated by reference, in the arbitration clause itself." *Bd. of Educ. of Dover Union Free Sch. Dist. v. Dover-Wingdale Teachers' Ass'n,* 61 N.Y.2d 913, 915 (1984). If parties wish to prevent their arbitrators from issuing partial final awards, they are free to so agree, or to agree to arbitration rules that do not provide for partial final awards. But by default, parties and arbitrators should be free to shape the appropriate form of relief over the course of their dispute.

In an effort to garner support for their proposed new limitation, Appellants predict that if the test for finality of a partial award is "what can be inferred from parties' positions in arbitration" or "counsel's conduct at the hearing," parties will "flood the courts" with litigation because of the uncertainty of whether the parties authorized the finality of a given award. (A. 45-46.) But as discussed above, the default rule in New York, as in federal courts and major arbitration institutions (including JAMS and the American Arbitration Association), already is, and should continue to be, that arbitrators can issue partial awards. Contrary to Appellants' argument, parties are rarely unclear as to whether they requested a partial award; the sky has yet to fall.[12] *See Publicis Commc'n v. True N. Commc'ns, Inc.*, 206 F.3d 725, 728 (7th Cir. 2000) ("Although [the plaintiff] suggests that our ruling will cause the international arbitration earth to quake and mountains to crumble, resolving this case actually requires determining only whether or not this particular order by this particular arbitration tribunal regarding these particular . . . records was final.").

[12] As discussed in Part II, Appellants cannot credibly claim to have been confused or uncertain as to whether the Tribunal was authorized to issue a partial award. Appellants *requested* bifurcation—in writing, a proposal they reiterated during the hearing. Furthermore, in their motion for reconsideration, *Appellants themselves requested* that the Tribunal issue a revised "Partial Final Award." (A. 455.) Appellants cannot now claim that they did not believe the Tribunal was authorized to issue the very form of award they repeatedly requested.

By contrast, Appellants' proposal—that the Court adopt a rule requiring parties to expressly consent to partial awards in their written agreements and retroactively apply that rule to all written agreements currently in existence, as well as future written agreements—would significantly complicate arbitration. Under Appellants' proposed limitation, the parties would have to *specifically and expressly* anticipate, possibly years in advance, the most efficient procedure for resolving any dispute that might arise—or engage, possibly in the middle of an arbitration, in a negotiation over a new arbitration agreement to specify the exact format of their desired ruling. Such a rule would discourage parties from agreeing to arbitrate, and it would also prevent arbitrators from shaping relief appropriate to the circumstances. *See, e.g. Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007) (confirming various orders in an arbitration in which the "arbitrators were asked to preside over the continuing process of sorting out the details of a commercial relationship, entering operative decisions along the way").

Although Appellants strive to frame this new limitation as favorable to arbitral discretion, it will discourage parties from choosing New York law for their arbitrations. Under Appellants' new rule, the party which loses a partial final award under Appellants' scheme will continue trying for reconsideration until the issuance of a final award. Courts operating under New York law will therefore no longer be able

to enforce partial awards, unless the parties had the foresight to "clearly provide otherwise" in the arbitration agreement, years in advance of any controversy.

B. Adoption of Appellants' New Rule Would Make New York Law Inconsistent With Federal Law And Risk Preemption

The FAA and New York arbitration law are very similar, for good reason: the FAA was based on New York arbitration law, and both federal and New York law continue to share a policy of promoting arbitration. *See Stark*, 9 N.Y.3d 59 at 66, 846 N.Y.S.2d at 221 (describing New York's "public policy favoring arbitration"); *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 205–06, 623 N.Y.S.2d 800, 807 (1995) ("Significantly, the FAA was modeled after New York's arbitration law . . . . Accordingly, no significant distinction can be drawn between the policies supporting the FAA and the arbitration provisions of the CPLR."). (*See also* A. 1006 n.1 ("Given the similarities between the New York Arbitration Act and the Federal Arbitration Act and the jurisprudence on arbitration issues, New York may look to federal authority for guidance" (dissenting opinion of Gische, J., below).)

Appellants' new rule would disrupt this long history of shared pro-arbitration objectives, and cause New York law to be out of step with federal law on an important issue of arbitration procedure. Not only would this new rule create confusion and difficulty for parties seeking to arbitrate under New York law, but the new rule could cause federal law to preempt state law on this issue, even in contracts that

choose New York law. *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (Where state law "conflict[s]" with the FAA, it is "well-established" that the FAA will displace state law); *see, e.g.*, *Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252, 793 N.Y.S.2d 831, 834 (2005).

As discussed in Parts I and II, *supra*, federal law is clear that parties can authorize arbitrators to issue partial final awards, and there is no requirement that this authorization be part of the parties' written arbitration agreement. Appellants' new rule would therefore make New York law inconsistent with federal law, in a manner that creates barriers to efficient arbitration of disputes and that would limit, rather than expand, parties' and arbitrators' abilities to shape the relief appropriate to their circumstances. Appellants' new rule would therefore create a "conflict" with the FAA, inviting preemption of New York law in the wide range of arbitration agreements that affect commerce.

Conclusion

Appellants ask this court not only to overrule the First Department, but to add new limitations to the ability of parties and arbitrators to efficiently and conclusively litigate disputes. Their requested relief is unsupported by the facts, existing law, and

the pro-arbitration policy of federal law and the law of this state. This Court should affirm the judgment of the First Department.

Respectfully submitted,

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SELENDY & GAY PLLC
Caitlin J. Halligan
1290 Avenue of the Americas
New York, NY 10104
Telephone: (212) 390-9000
E-mail: challigan@selendygay.com

GORDON & REES SCULLY MANSUKHANI, LLP
Lorraine M. Girolamo
500 Mamaroneck Avenue, Suite 503
Harrison, New York, 10528
Telephone: (914) 777-2225
Email: lgirolamo@grsm.com

Dennis O. Brown
Greil Roberts
95 Glastonbury Boulevard, Suite 206
Telephone: (860) 278-7448
Email: dbrown@grsm.com
groberts@grsm.com

Counsel for Petitioner-Respondent American International Specialty Lines Insurance Co.

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