IN THE SUPREME COURT OF OHIO

BST OHIO CORPORATION *et al*.,	:	CASE NO. 2020-015
Plaintiffs/Appellants,	:	
v.	:	On Appeal from Cuyahoga County Court of Appeals, Eighth Appellate District
EVAN GARY WOLGANG *et al*.,	:	Court of Appeals Case No. CA 19 108130]
Defendants/Appellees.	:	

APPELLEES' BRIEF ON THE MERITS

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INTRODUCTION

The unanimous decision of the Eighth District Court of Appeals, requiring trial judges to apply R.C. 2711.09 *in pari materia* with R.C. 2711.13, is well reasoned and entirely consistent with the Ohio Arbitration Act, which affords parties to an arbitration the statutory right to file a motion to vacate an arbitration award "within three months after the award is delivered to the parties in interest." Contrary to Appellants' position, the Court of Appeals' decision is neither unique nor unprecedented and does not undermine Ohio's policy favoring arbitration or the Legislature's statutory scheme for confirming, vacating, modifying or correcting arbitration awards. In fact, the Court of Appeals' decision gives effect, as it must, to both sections of the Ohio Arbitration Act governing confirmation and vacation of arbitration awards under the well settled rules of statutory construction that this Court has consistently followed for decades. As a result, and as explained in greater detail below, the Court of Appeals' decision was undoubtedly correct under settled Ohio law and should be affirmed by this Court.

STATEMENT OF CASE AND FACTS

I. The Underlying Arbitration Was Between California Members of a Delaware Limited Liability Company That Owned Commercial Property in Ohio.

This appeal arises from a commercial arbitration between members of a Delaware limited liability company, Prophecy Massillon, LLC (the Company), which owns industrial property in Massillon, Ohio. The members of the Company reside mostly in California and states other than Ohio. On about February 14, 2017, Appellants here (as Claimants and, ultimately, Counter-Respondents, in the arbitration) commenced the arbitration against appellees Evan Gary Wolgang and Massillon Management Co. (as Respondents and Counter-Claimants in the arbitration)

(together, "Wolgang")[1] before the American Arbitration Association (AAA), by filing their Demand for Arbitration. On March 14, 2017, Wolgang timely filed an Answering Statement and Counterclaim against Appellants.

In sum, the arbitration concerned the validity of a Third Amended and Restated Limited Liability Company Operating Agreement (the TOA), by which Appellants unlawfully amended the Company's Second Amended and Restated Limited Liability Company Operating Agreement (the SOA), and wrongfully seized control of the Company by unlawfully ousting Wolgang as the Company's sole Manager. Because they had improperly taken control of the Company, Appellants had every reason to try to remain in power and delay for as long as they could the evidentiary hearing by which Wolgang could prove, and did prove, the invalidity of the TOA and Appellants' unlawful conduct ousting Wolgang from his position as sole Manager of the Company. After systematically delaying the final evidentiary hearing in arbitration for nearly two years, it is remarkable, indeed, that Appellants now complain that complying with the statutory three month period after an arbitration award is delivered for Wolgang to file a motion to vacate that award under R.C. 2711.13 somehow undermines one of the goals of arbitration to provide a speedy and inexpensive method of conflict resolution.

1. Because both sides in this case have, at different times, been appellants and appellees, and because it is clearer to do so, Appellees refer to themselves as "Wolgang" to help minimize the potential for confusion, including the type of confusion that enabled the Court of Appeals to erroneously state that the final arbitration award included a monetary award against "appellants" – *i.e.*, Wolgang in the Court of Appeals – when it was in fact against "Appellees" there (as Counter-Respondents in the arbitration) and Appellants here, **not** Wolgang.

II. Appellants Delayed the Arbitration for Two Years After They Unlawfully Ousted Wolgang and Seized Control of the Company.

AAA did not conduct the first scheduling or "preliminary" conference until June 2017, about **four months** after the dispute was submitted to arbitration. Because Appellants claimed unavailability to conduct an evidentiary hearing on the merits for **well over a year**, that merits or evidentiary hearing was not scheduled to take place until fifteen months later, at the end of May and beginning of June 2018. This, of course, enabled Appellants to remain in control of the Company, unlawful as it was, for the entire time the arbitration was pending. It was not until Wolgang forced the issue, by seeking interim relief declaring the TOA to be null and void, that AAA was compelled to set a preliminary evidentiary hearing in December 2017 (over Appellants' vehement objections) on the threshold question of whether the TOA and Appellants' unilateral removal of Wolgang as sole Manager was lawful. After three days of hearings in December and months of post-hearing briefing, on March 7, 2018, AAA issued the first Case Order on the merits (No. 21), declaring that the TOA, having been unlawfully adopted, was a nullity, and that the Company's only lawful Operating Agreement was the SOA, with Wolgang as the Company's sole Manager. As a result of that finding in Wolgang's favor, Case Order 21 reinstated Wolgang as the Company's sole Manager, ultimately entitling him to recover over $214,000 in back pay that Appellants had wrongfully withheld.

As stated, the final evidentiary hearings were held in the last week of May and first week of June in 2018. After that, the parties submitted several rounds of post-hearing briefs, the last of which were submitted some **five months later** in November 2018. Finally, on December 6, 2018, AAA issued its Final Award – **nearly two years after the arbitration commenced**.

III. After Delaying the Arbitration for Nearly Two Years, Appellants Raced to the Courthouse to Preclude Wolgang from Effectively Challenging the Final Arbitration Award.

The very same day the Final Award was delivered, December 6, 2018, Appellants filed in the Cuyahoga County Court of Common Pleas their bare-bones Application for an Order Confirming an Arbitration Award (the Application to Confirm) under R.C. 2711.09. The next day, Wolgang filed a Petition to Vacate the Arbitration Award in the California Superior Court in the County of Los Angeles, where he and most of the Appellants resided.[2] On December 22, 2018, the Saturday before Christmas, the Cuyahoga County Court of Common Pleas (the Trial Court) set a hearing on Appellants' Application to Confirm for December 27, 2018, a mere two business days later (one of which was Christmas Eve).

On Christmas Eve day, December 24, 2018, the first business day after receiving notice of the hearing, Wolgang prepared, filed and served a motion to stay the confirmation proceedings or, in the alternative, for continuance of the hearing on the Application to Confirm (the Motion to Stay) until after the expiration of the three month period in which a party may file and serve a motion to vacate or correct an arbitration award under R.C. 2711.13. In that Motion to Stay, Wolgang notified the Trial Court that he intended to file and serve a motion to vacate under R.C. 2711.13 within the three-month period therein set forth for such a motion. The Trial Court did not rule on the Motion to Stay before the scheduled December 27, 2018 hearing on Appellants' Application to Confirm, but tacitly denied it when it proceeded with the hearing on that date. The

2. The SOA authorizes any court of competent jurisdiction to enter judgment upon the arbitration award and, unlike the venue provisions for the arbitration hearing itself, does not limit the venue for such a post-award proceeding to Cuyahoga County, Ohio, or require that post-award proceedings be brought in that, or any other county, or even this State of Ohio. (*See* SOA, Ch. 16, entitled "Arbitration.")

Trial Court took the motion under submission without setting any deadline by which Wolgang should file his intended motion to vacate. Later, by Journal Entry dated January 14, 2019, the Trial Court, apparently deciding arbitrarily that it had waited long enough, formally denied the Motion to Stay, without explanation, and also confirmed the Final Award in arbitration, also without explanation and before the expiration of the statutory three-month period in which Wolgang could file his motion to vacate, modify or correct the Final Award.

On March 5, 2019, within three months of the December 6, 2018 issuance of the Final Award, Appellees filed their Complaint to Vacate or Correct Arbitration Award, together with their Motion to Vacate or Correct Arbitration Award under R.C. 2711.13 (the Motion to Vacate), in the Cuyahoga County Court of Common Pleas, just as they represented they would in their Motion to Stay and at the December 27, 2018 hearing before the Trial Court.[3] This Motion to Vacate remains pending, and the underlying Trial Court proceedings are stayed, pending final resolution of proceedings in the Eighth District Court of Appeals and now this Supreme Court.

ARGUMENT

I. The Policy Favoring Arbitration Does Not Permit Courts to Disregard the Mandatory Three-Month Period Within Which to Challenge an Arbitration Award Under R.C. 2711.13

Appellants' position is that arbitration proceedings are so favored by Ohio courts that they are obligated to ignore the limited path for review prescribed by the Legislature and to confirm

3. Because the Trial Court had already entered Judgment confirming the Final Award in arbitration, and because Wolgang had already filed a Notice of Appeal from that Judgment, the Trial Court was divested of jurisdiction to adjudicate Wolgang's Motion to Vacate. Therefore, Wolgang commenced a new action in the Cuyahoga County Court of Common Pleas, which assigned the action to the same Judge, who eventually stayed it until the appeal in the Court of Appeals was decided and further Order of the Trial Court. That Motion to Vacate is now pending in the Cuyahoga Court of Common Pleas as Case No. CV-19-912046.

awards immediately, and that they must do so for the express purpose of eliminating the possibility of seeking even that extremely limited review. According to Appellants, confirming arbitration awards is such a high priority that it should always be done, even where, as here, the very procedure for limited review the Legislature prescribed is followed as written. What is more, any motion to vacate, modify or correct an arbitration award, for which the Legislature has prescribed a three-month period to submit, apparently should be prepared in less than five days – even where, as here, those five days are Saturday, Sunday, Christmas Eve, Christmas day, and the day after Christmas. (It appears that this particular five-day period was deliberately chosen to coincide with a weekend and a major holiday specifically in order to hamper Wolgang's ability to respond effectively, as there was no apparent justification for choosing the worst five calendar day period possible.)

Appellants argue that an application to confirm must be granted immediately, even before what this Supreme Court has called the "mandatory" three-month period of R.C. 2711.13 has expired[4] because, otherwise, the losing parties' assets purportedly could be dispersed before the monetary award against them is confirmed as a judgment, or because injunctive relief delayed would somehow mean no relief ever. This is all just idle speculation, of course, because there was no evidence presented that either of these things is actually a concern in the present case. There was no money judgment against Wolgang – to the contrary, the only parties found to have breached their fiduciary duties by misappropriating money from the Company were the Appellants, against whom multiple monetary awards were imposed. (Unlike the award against Appellants, the declaratory relief award against Wolgang did **not** involve any financial malfeasance.)

4. "In our view, the language of R.C. 2711.13 is clear, unmistakable and, above all, ***mandatory***." *Galion v. American Fed. of State, County and Muni. Employees, Ohio Council 8,* 71 Ohio St.3d 620, 622, 646 N.E.2d 813 (1995) (emphasis added).

Nor was there any injunctive relief supposedly at risk of being rendered ineffective by delay in confirmation. Appellants obtained their declaration that there was "cause" under the Company's Operating Agreement to remove Wolgang as manager – and they **immediately** removed him as the Company's sole manager the very next day after the Final Award was issued. In doing so, they again helped themselves by ousting Wolgang and seizing control of the Company before their Application to Confirm was even adjudicated. There was never any danger whatsoever to Appellants that delay would render their relief ineffective – to the contrary, they had already implemented their relief by the time they could make their obviously bogus argument that delay could render it ineffective.

This concern is not only not present here, it is a false issue. Trial courts have inherent powers to prevent parties before them from taking actions that render a court's eventual judgment ineffective, and the law against fraudulent transfers, R.C. 1336.01 *et seq*., protects a prevailing party's ability to collect a money judgment. Moreover, in a case, **unlike this one**, where the evidence presented to the trial court shows that a prevailing party is likely to suffer irreparable harm if the award is not confirmed in less than three months, presumably a trial court can make the appropriate temporary restraining order to preserve the *status quo* and maintain the effectiveness of any eventual relief. No such provisional relief was requested here, nor could there have been, because there was absolutely no emergency or exigent circumstances, or any possibility of irreparable harm, requiring shortened time: the Final Award was fully executed before the Application to Confirm was heard or granted.

It is perhaps conceivable, in an appropriate case of emergency, that a trial court could require the challenging party to file a motion to vacate in some reasonable amount of time (that is, on more than a mere five calendar days' notice during the Christmas holiday season) short of three

months from the award. The Trial Court here imposed no such fixed date, nor was it asked to do so, nor did circumstances exist that would have justified a shortened time for hearing Wolgang's challenge to the Final Award. In short, Wolgang does not contend that at all times, in every case, there is an absolute, inviolable three-month period in which to bring a motion to vacate, but only that this is not a case requiring departure from the time period prescribed by the Legislature. There was no emergency requiring immediate confirmation. Moreover, no shorter period was prescribed by the Trial Court for Wolgang's challenge, and, in any event, there was no basis for prescribing such a shorter period in this particular case, nor any authority for making such an order.

II. Courts Must Read R.C. 2711.09 Together with R.C. 2711.13 and May Not Write One Section of the Same Statutory Scheme Out of Existence in Favor of Another Section.

In any event, it seems obvious that if the Legislature had intended that, in response to an application to confirm, a challenging party could be required to file a motion to vacate within some period of time less than three months after the delivery of an arbitration award, presumably it would have added such a provision to the Ohio Arbitration Act. It is not so difficult to say, "or prior to a hearing on a motion to confirm held less than three months after the date of the award." That the Legislature chose not to include such an exception to the "**mandatory**" three-month period it did prescribe for filing a motion to vacate means that the Legislature did not intend to create such an exception. If the Legislature did so intend, presumably, it would have done so - but it did not. That the Legislature prescribed such an unusually short notice period of only five days within which to hear an application to confirm an arbitration award merely reinforces the conclusion that it did not intend to require a challenging party to prepare and file a motion to vacate in less than five calendar days, including holidays and weekends, but rather within the three-month period it expressly promulgated. Given this extremely short five-day notice period, it is obvious

that the Legislature did not intend to require an opposing party to file a substantive brief in support of that opposition. In fact, Ohio courts have uniformly held that grounds to challenge an award must be stated in a separately filed motion to vacate and not in opposition to an application to confirm. That five-day period, which finds no equivalent in the Federal Arbitration Act, must be seen for what it is: strong evidence of the Legislature's intent to **preclude** substantive opposition when faced with a confirmation application (unlike federal arbitration law which **requires** substantive opposition), and instead to require only a timely motion to vacate, *i.e.*, one that is served at any time before (and not after) the three-month statutory period expires.

III. The Federal Arbitration Act Differs Significantly from the Ohio Arbitration Act on the Issue Before this Court and Federal Cases Construing the Federal Arbitration Act Have No Application to the Ohio Arbitration Act.

Because the federal courts' interpretation of the Federal Arbitration Act differs significantly from the interpretation by Ohio courts of the Ohio Arbitration Act on precisely this point, federal cases decided under the Federal Arbitration Act are wholly inapposite and irrelevant, despite Appellants' repeated reliance on them. The difference could not be more stark: federal law **requires** substantive opposition in response to a motion to confirm, which is heard on regular notice in federal court; but Ohio state law **precludes** it in response to an application to confirm, which is heard on shortened five (5) calendar days' notice in state court. For this reason, there is absolutely no reason to follow the unpersuasive reasoning of different courts applying different rules of procedure. Under the Ohio Arbitration Act, as passed by the Ohio Legislature and applied by the Ohio courts, the unanimous decision of the Eight District Court of Appeals was correct. Indeed, given Ohio precedent that grounds for opposing an application to confirm an arbitration award must be set forth in a separately filed motion to vacate the arbitration award, and not in a response or opposition to an application to confirm, the result reached by the Court of Appeals

below is the **only** rational result that any court concerned with the proper administration of justice could possibly reach. Appellants' argument completely, and erroneously, disregards clear and unambiguous Ohio law on this point.

In addition, and as further demonstrated below, the unanimous Court of Appeals' Opinion (the Opinion) faithfully follows well-established arbitration precedent and gives credence, as it must, to all provisions of the very same statutory scheme, the Ohio Arbitration Action. In this regard, the Opinion follows this state's well-established authority that one section of a statutory scheme must be read *in pari materia* with other sections of the same statutory scheme. Nor will the Opinion (contrary to Appellants' position) have a negative impact on arbitrations and their awards, but rather will have the very positive impact of requiring parties to arbitrations to comply with all sections of the Ohio Arbitration Act when seeking to confirm, vacate, modify or correct arbitration awards, and not to try to enforce one provision to the exclusion of another equally applicable and sound provision devised by the Legislature. Finally, the Court of Appeals' unanimous Opinion is not in direct conflict with any decisions of other Districts of the Court of Appeals, considering factual circumstances that are clearly distinguishable from the situation of the case *sub judice*. For these and other reasons explained below, this Court should affirm the unanimous Opinion of the Eighth District Court of Appeals.

Appellant's Proposition of Law No. I:

By its express language, and consistent with established Ohio arbitration policy, R.C. 2711.09 permits a party to seek confirmation of an arbitration award 'at any time' within one year of the award, and absent a motion to vacate, modify, or correct the award pursuant to R.C. 2711.13, the statute requires confirmation by the trial court.

A. Ohio Law Requires a Trial Court to Wait Three Months Before Confirming an Arbitration Award Under R.C. 2711.09 When the Parties Opposing Confirmation Appear and Inform the Court that They Intend to File a Motion to Vacate Within the Three-Month Statutory Period Expressly Set Forth in R.C. 2711.13.

While Appellants are correct that a party to an arbitration may seek to confirm an arbitration award at any time within one year of its issuance is correct, Appellants are **incorrect** that an application to confirm an award must be granted before the three-month period of time within which a motion to vacate may be filed. The actual controlling rule, as stated by this Court in *Warren Edn. Assn. v. Warren Cty. Bd. Of Edn.* 18 Ohio St. 3d 170 (1985), is that "when a motion is made pursuant to R.C. 2711.09 to confirm an arbitration award, the court must grant the motion if it is timely, ***unless a timely motion for modification or vacation has been made*** and cause to modify or vacate is shown." *Id.*, syllabus (emphasis added). The problem for Appellants here is that the *Warren* rule, by its express terms, applies only **after** the expiration of the three-month period prescribed by the Legislature in R.C. 2711.13. Because an act prescribed by statute may be made "at any time within" the limitations period of that statute (*Amanda Scott Pub. V. Legacy Marketing Group, Inc.,* 10th Dist. Franklin No. 92AP-233, 1992 WL 203232, *2 (Aug. 11, 1992); *Goldsmith v. On-Belay, Inc.,* 10th Dist. Franklin No. 90AP-301, 1990 Ohio App. LEXIS 4114 (Sept. 20,1990), there is no way to determine that no "timely" motion has been made until the period prescribed in RC 2711.13 expires, as application of the *Warren* rule requires. Appellants "solve" this problem by simply eliminating the crucial modifier "timely." But the *Warren* rule is the law, and it requires a trial court to determine that no "timely" motion to vacate has been made, which is conceptually (and actually) impossible to do in less than three months after the award is delivered. Appellants have cited no Ohio cases where, as here, an application to confirm was

granted even though a timely motion to vacate was also filed, as such a result is obviously contrary to law.

As the Eight District Court of Appeals noted at the outset of its unanimous Opinion:

> The question presented in this case is whether R.C. 2711.13 requires a trial court to wait three months before confirming an arbitration award under R.C. 2711.09 ***when the party opposing confirmation appears and informs the trial court that he or she intends to file a motion to vacate within the three-month time frame set forth in R.C. 2711.13***.

Opinion ¶ 1 (emphasis added). This specific question had been previously addressed by Ohio's Eleventh District Court of Appeals, *albeit* not in the actual holding of the case, but in its well-reasoned analysis, in which it stated:

> ***Read together***, R.C. 2711.09 and 2711.13 set forth an intelligible procedural scheme. To wit, R.C. 2711.09 requires a hearing on an application to confirm. As a matter of law, a motion to confirm must be granted unless a timely motion to modify or vacate is made and cause to modify or vacate is demonstrated. ***A party seeking to modify or vacate an arbitration award has up to three months from the date of the award to file its motion***. ***Therefore, the proper way to approach a situation such as the one* sub judice*, is to conduct a hearing after an adverse party files a motion to modify or vacate***. However, if three months have elapsed since the award and a motion to modify or vacate has not been filed, a court should continue forward with a hearing on the motion to confirm.

Schwartz v. Realtispec, Inc., 11th Dist., Lake No. 2002-L-098, 2003-Ohio-6759 ¶¶ 9-10 (citations and quotations omitted; emphasis added). As *Schwartz* notes, R.C. 2711.09 and 2711.13 must be "[r]ead together" – that is, the rule of *in pari materia* applies to the interpretation and application of both these sections of the same statutory scheme, the Ohio Arbitration Act. In the present case (which is the only case *sub judice*), the Court of Appeals' unanimous decision essentially adopted the *Schwartz* court's correct and well-reasoned application of the rules of statutory interpretation as its holding.

Appellants again erroneously rely on the inapposite case, *Amanda Scott Pub. V. Legacy Marketing Group, Inc.*, 10th Dist. Franklin No. 92AP-233, 1992 WL 203232 (Aug. 11, 1992) which the Court of Appeals effectively distinguished in its unanimous Opinion. In *Amanda Scott*, the opposing **corporate** party had proceeded improperly when an employee, rather than an attorney (as in the present matter), appeared at the hearing to confirm an arbitration award. The *Amanda Scott* court found this attempted appearance to be a "nullity." The Court of Appeals here, by contrast, specifically noted that Wolgang here had proceeded in the "proper" manner. Opinion ¶ 23 ("Here, however, the proper parties moved to stay the proceedings or, in the alternative, for a continuance. They also appeared at the December 27th hearing and expressed their explicit intent to file a motion to vacate the arbitration award with[in] the three-month statutory timeframe.").

Despite the fact that Wolgang's counsel appeared at the hearing and opposed the Application to Confirm in the proper manner, Appellants argue that it is somehow improper for a court to follow R.C. 2711.13 as written, but instead should write it out of existence. The response Appellants demand here, a substantive statement of the grounds for vacation, is exactly that which would have been "improper," as it is a procedure specifically "not authorized" by Ohio courts. *Brookdale Senior Living v. Johnson-Wylie,* 8th Dist., Cuyahoga No. 95129, 2011-Ohio-1243, ¶ 10. (R.C. 2711 "***does not authorize an answer in response to the application***" to confirm) (emphasis added). The Eighth District Court of Appeals was unquestionably correct in distinguishing *Amanda Scott,* which has no application here.

Appellants are also incorrect in contending that R.C. 2711.13 requires a motion to vacate to be filed "in the same court" as an application to confirm (although here, this argument is irrelevant because the statutorily proscribed time to file such a motion had not yet passed). The plain language of R.C. 2711.13, however, says no such thing. The language, "in the same court,"

refers to the rule that a **motion to stay** (**not to vacate**) should be filed in the same court as an application to confirm. Indeed, this is the precise language with which Wolgang in fact complied when filing his Motion to Stay in the same court in which Appellants filed their Application to Confirm. In any event, Wolgang did in fact file a timely motion to vacate in the same court as the Application to Confirm, so this argument is ultimately irrelevant.

Actual Rule of Law No. I:

> **R.C. 2711.09 permits a party to seek confirmation of an arbitration award at any time within one year of the award, and absent a *timely* and meritorious motion to vacate, modify, or correct the award pursuant to R.C. 2711.13, R.C. 2711.09 requires confirmation by the trial court. A motion to vacate is timely under R.C. 2711.13 when it is filed and served within three months of the delivery of the award.**

Under this true rule of law, the Court of Appeals correctly held that the Trial Court committed reversible error when it granted Appellants' Application to Confirm in less than three months after the award was issued, even though Wolgang timely notified the Trial Court, in response to the Application to Confirm, that he intended to file a timely motion to vacate under R.C. 2711.13 in the Cuyahoga County Court of Common Pleas and had, in fact, already filed a petition to vacate in California. Consequently, the Eighth District Court of Appeals was correct in its application of the Ohio Arbitration Act and its decision should be affirmed.

Appellants' Proposition of Law No. II:

R.C. 2711.13 is a limitation period within which a party may file a motion to vacate, modify, or correct an award; it is not intended as a stay of confirmation proceedings.

A. The Doctrine of *In Pari Materia* Mandates that R.C. 2711.13 Operates to Stay Arbitration Confirmation Proceedings Under R.C. 2711.09 Where a Party Seeks to Challenge the Award Within the Statutorily Prescribed Time Period.

R.C. 2711.13 operates in practice as a stay of confirmation proceedings, at least where, as here, there are no facts to justify the conclusion that an award must be confirmed in less than three

months, and no evidence that the Legislature intended any different result.

The Legislature has determined that a party seeking to challenge an arbitration award should do so within three months of the award. Absent some extraordinary circumstances, not presented here, there is no reason to conclude that this legislatively prescribed three-month period is excessive or otherwise improper. As Appellants have speculated, in some other cases with different facts and different circumstances not present here, perhaps, three months may be too long to wait to confirm an arbitration award. Appellants have not demonstrated, however, either here or below, that this is such a case, as indeed it is **not**. Appellants did not need confirmation to execute the award in their favor; they immediately removed Wolgang from his office as the Company's sole Manager the very next day. The **only** thing early confirmation would accomplish in a case like this one, where there is no emergency justifying early confirmation, is to preclude review of the arbitration award, with no apparent justification. Early confirmation was not at all necessary here to preserve the effectiveness of the judgment, nor did the Trial Court so conclude. The Trial Court simply waited an arbitrary and undisclosed amount of time and then decided, with no notice to Wolgang, that it had waited long enough. As it was, with no other deadline imposed by the Trial Court, there was only one rule of law in any statute or court decision that applied to the timing of Wolgang's motion to vacate: **the three-month period prescribed by R.C. 2711.13**. No shorter specified period was ever imposed on Wolgang or even suggested by Appellants; not by the Legislature, not by the Trial Court, and certainly not by the Ohio Arbitration Act. Instead, the Trial Court simply determined arbitrarily when to eradicate Wolgang's statutory right of review for reasons it apparently could not justify in print.

Appellants go through a good deal of sophistic gymnastics trying to demonstrate that an application to confirm is a completely different and unrelated animal to a motion to vacate, and

that they exist wholly independently of each other. In fact, it is difficult to imagine two statutes **more related to and dependent on each other** than R.C. 2711.09 and R.C. 2711.13. They are as related as heat and cold, as odd and even; one is merely the negation of the other. Just as cold is defined as the absence of heat, and odd is simply not even, a meritorious application to confirm is simply one where there is no meritorious motion to vacate. The very definition of R.C. 2711.09 makes it clear that the only grounds for not granting an application to confirm is the existence of grounds for modification or vacation under R.C. 2711.10 and 2711.11, respectively – which grounds Ohio courts have consistently held **can only be stated in a motion to vacate** under R.C. 2711.13. The only way to oppose an application to confirm under Ohio law is to file a timely motion to vacate, the statutory deadline for which is three months from delivery of the award. If the courts are to enforce a "uniform time limit," this statutory three-month period is the only one even conceivably applicable here.

Absent some countervailing exigencies not present here, the only logical assumption is that a motion to confirm cannot be granted until three months after the award is delivered – simply going by the face of the relevant statutes. Otherwise R.C. 2711.09 completely negates R.C. 2711.13, with no evidence that the Legislature intended such a harsh interpretation and no rule of statutory construction to support it. Nothing in R.C. 2711.09 explicitly triggers any different statutory deadline for a motion to vacate, which is governed by the three-month rule of R.C. 2711.13. Given the five calendar day statutory notice for an application to confirm, which requires no legal argument, merely an arbitration agreement and an award, it seems obvious that the Legislature did not intend to import this five day deadline into the three month period prescribed by R.C. 2711.13, which requires a thoroughly researched and well-reasoned brief on the merits of the dispute. (Wolgang presumes that, in the interest of deciding cases on their merits,

the Legislature and the courts prefer thoroughly reasoned and researched memoranda of points and authorities over slapdash briefs, hence the longer period for filing a motion to vacate.)

The Court of Appeals correctly decided this issue as a matter of facial statutory construction. To the extent that the language "at any time" conflicts with the language "three months after delivery of the award," the two statutes, because they relate to **exactly** the same subject matter, must be read *in pari materia*, giving effect to each. By applying this well-known rule of statutory construction, the Court of Appeals correctly concluded that, at least where a challenging party informs the trial court of the intent to file a timely motion under R.C. 2711.13, a motion to confirm can only be granted after the expiration of the three month period if no challenge is filed, or after denial of a timely filed motion to vacate. Given this correct application of the rules of statutory construction, R.C. 2711.13 does indeed operate as a stay of confirmation proceedings under R.C. 2711.09. There is no evidence that the Legislature intended otherwise.

Appellants' position seems to be that having to wait three months to confirm an arbitration award is just the most outrageous and unjust thing in the world, that no sentient being could possibly believe that three "full" months is an appropriate amount of time to wait for confirmation of an award that took nearly two years of arbitration proceedings – dragged out by the very parties seeking immediate confirmation – to obtain. What is another three months? According to the Legislature, not much, or at least not too much. Wolgang's main response to Appellants' complaint is that they should take it up with the Legislature (or perhaps the National Conference of Commissioners on Uniform State Laws), which created the three-month period within which motions to vacate must be filed. If the Ohio Legislature agreed with Appellants that three months is just much too long to wait to confirm an arbitration award, then presumably it would not have given parties to an arbitration three months within which to challenge such an award. It is not the

job of courts to second-guess the Legislature.

Appellants mislead this Court, moreover, and have presented absolutely no evidence whatsoever, either here or below, to support their contention that waiting to confirm the Award here constituted any type of threat to the effectiveness of the eventual judgment in this particular case. They merely speculate that Wolgang **could have** interfered with the management of the Company, but they did not and could not present any actual evidence that he **did** interfere – because he did not – with the management of the Company, which was immediately taken over by Appellants to the exclusion and removal of Wolgang. Appellants presented absolutely no evidence of even the slightest threat of irreparable harm to them from waiting the statutory three-month period to confirm the Award. Appellants **now** contend that, "If permitted to delay enforcement of the Award and effectively remain in control of Prophecy, Appellee would have been left free to continue his transgressions." Appellants' Merits Brief at 16. This is intentionally misleading, as such a result was never even a possibility, and Appellants have presented no evidence to support this recently-contrived fiction (nor were any of Wolgang's purported (and denied) "transgressions" "continuing" or even existing at the time of the Award).

In fact, Appellants **did not delay** enforcing the Award and they did not allow Wolgang to "effectively remain in control of Prophecy." They helped themselves to it, by immediately removing Wolgang from his position as sole Manager of the Company, and immediately installing appellant Fred Westheimer as that Manager, thereby taking over the day-to-day operations of the Company. Wolgang was not even permitted on the Company's property and remained in California. Appellants are simply gaslighting the Court on this subject. Ultimately, Appellants can only speculate that three months might be too long in different cases with different facts, not even close to those present here. Presumably, the courts will decide those different cases with

those different facts when they are presented with supporting evidence, but this is not such a case.

Under the doctrine of *in pari materia*, then, R.C. 2711.13 does in fact appear to operate as a stay on confirmation proceedings under R.C. 2711.09. It would be perfectly consistent with proper jurisprudence to say that this is a "blanket" stay in all cases. The Ohio Courts of Appeals, whose decisions do not bind this Court, have held otherwise in easily distinguishable cases where no appearance was made in opposition to an application to confirm heard less than three months from the award. *Amanda Scott*, 1992 Ohio App. LEXIS 4267; *Goldsmith*, 1990 Ohio App. LEXIS 4114. Whether or not these cases are correctly decided makes no difference here, as this is not such a case and is distinguishable by the crucial fact that Wolgang **did** appear on five days' notice, did notify the Trial Court of his intent to file a timely motion to vacate in Ohio under R.C. 2711.13, and had already filed a Petition to Vacate in California.[5] Where, as here, the trial court is properly informed of the challenging party's intention to file a timely motion to vacate in Ohio (after having already filed a Petition to Vacate elsewhere), there is nothing in the statutory scheme of the Ohio Arbitration Act that deprives that party of the benefit of the three-month period prescribed by the Legislature for his challenging motion. Whether a different, more compelling case might require a different result and a shorter period than the Legislature has prescribed – and clearly a case must be highly compelling to allow a court to justify its departure from the Legislative scheme – is simply not before the Court at this time.

Actual Rule of Law No. II (and Actual Holding of the Court of Appeals):

R.C. 2711.13 requires a trial court to wait three months before confirming an arbitration award under R.C. 2711.09 when the parties opposing confirmation appears and informs the trial court that they intend to file a motion to vacate within the three-month statutory time frame of R.C. 2711.13.

5. While Wolgang had already filed a challenge in California, the Trial Court told him that he should file a challenge in Ohio and Wolgang informed the court that he intended to do so, which he subsequently did within the three-month period prescribed by R.C. 2711.13.

Under this true rule of law, the Trial Court certainly erred, as the Court of Appeals correctly held, when it granted Appellants' Application to Confirm less than three months after the Award issued, even though Wolgang timely notified the Trial Court, in response to Appellants' Application to Confirm, that he intended to file a timely motion to vacate under R.C. 2711.13, and had already filed a Petition to Vacate in California.

Appellants' Proposition of Law No. III:

Federal law interpreting the Federal Arbitration Act and Ohio law interpreting the Ohio Arbitration Act support the proposition that an arbitration award may be confirmed within three months after its issuance.

A. Federal Law Interpreting the Federal Arbitration Act Has No Relevance to Ohio Law Interpreting and Applying the Ohio Arbitration Act on the Issue Under Review

"May" is the operative word in Appellants' proposed statement of law. Significantly, it is not "must." It is of no significance to Wolgang **if**, in other cases with other facts and proceedings, and where no appearance is made in opposition to an Application to Confirm, such cases "may" be confirmed within three months after the award. Indeed, other cases with other facts and proceedings have so held. This is not such a case, however. Wolgang does not contend that an arbitration award may **never** be confirmed within three months after its issuance, only that it was clear error to do so **in this case** because, unlike the cases in which it was done previously, Wolgang appeared and notified the Trial Court of his intention to file a motion to vacate within the prescribed statutory three month period.

Federal arbitration law, however, does not support Appellants' position because Ohio and federal law are completely and exactly opposite on this procedural issue. Under federal law, opposing parties **must** include their grounds for vacation in their opposition to a motion to confirm

an arbitration award (which is heard on regular, not five days, notice), and need not file a separate motion to vacate. *The Hartbridge,* 57 F.2d 672, 673 (2d Cir. 1932). Under the Federal Arbitration Act, as federal courts have construed and applied it, "[a] separate motion … to vacate the arbitrators' award is ***not necessary***. Such relief may properly be requested in the papers submitted in opposition to a motion to confirm an arbitrators' award*."* *Catz Am. Co. v. Pearl Grange Fruit Exch., Inc.,* 292 F. Supp. 549, 551 (S.D.N.Y. 1968) (emphasis added)

Ohio law is exactly the opposite: Opposing parties must include their grounds for vacating an arbitration award in only a **separate motion to vacate** and **not** in an answer or opposition to an application to confirm. "R.C. Chapter 2711 creates a special proceeding to confirm arbitration awards and ***does not authorize an answer in response to the application***. … Appellants should have filed a motion to vacate or modify the arbitration award in order to challenge the arbitration award." *Brookdale Senior Living,* 8th Dist., Cuyahoga No. 95129, 2011–Ohio–1243, ¶ 10 (emphasis added). "The relevant statutes … ***do not allow a party to challenge an arbitration award within the confirmation proceeding*** …; rather, the ***only*** method by which appellee was permitted to challenge the validity of the award was through a motion to vacate the award". *American Church Builders v. Christian Fellowship Ctr.,* 10th Dist. Franklin No. 05AP-219, 2005-Ohio-6056, ¶ 24 (emphasis added); *see also Brooklyn Estates Homeowners' Ass'n v. Miclara, LLC,* 2018–Ohio–2012, 113 N.E.3d 9, ¶¶ 14-15 (4th Dist.) (same); *Fraternal Order of Police, Ohio Labor Council, Inc. v. Halleck,* 143 Ohio App. 3d 171, 175, 757 N.E.2d 831 (7th Dist. 2001) (same); *Land & Lake Dev., Inc. v. Lee Corp.,* 3d Dist. Defiance No. 4–99–10, 1999 WL 1072694, *4 (Nov. 29, 1999) (same).

This distinction, where federal law is completely opposite of Ohio law on the relevant point at issue, wholly undermines Appellants' contention that federal law should apply by analogy in

construing, determining and applying Ohio statutory law. Ohio courts and federal courts have diametrically diverged on the relevant point of how oppositions to an application to confirm an arbitration award may or must be asserted. A substantive response to a motion or application to confirm, while **required** by federal law, is not only **unauthorized** by Ohio law, it is, in fact, **prohibited** by Ohio law. Essentially, Appellants argue that Wolgang should have opposed the Application to Confirm in a manner that is explicitly prohibited by controlling Ohio precedent, and that the Trial Court was correct in requiring such an unauthorized response. The Court of Appeals, unsurprisingly and correctly, however, found the Trial Court to be in error, because Ohio law not only does not authorize the type of response that federal law requires, but actually prohibits it, and which Appellants nevertheless erroneously contend should have been made here.

Wolgang submits, moreover, that the Ohio interpretation is by far the better one. (In any event, Appellants have not challenged the *Brookdale* rule.) The federal rule essentially gives trial courts the ability to override the wisdom of Congress and substitute their own various ideas on how quickly a party should or must challenge an arbitration award. There is presumably a reason that the National Conference of Commissioners on Uniform State Laws and, following their lead, the Ohio Legislature chose a three-month time period in which to allow a party to evaluate an arbitration award and prepare a proper motion to vacate that award. Whatever that reason – **presumably it is to allow the party to evaluate and prepare a well-considered and thoroughly researched motion, and not a slapdash opposition on short notice** – there is absolutely nothing in the Ohio Arbitration Act that even suggests a shorter period is ever appropriate. Moreover, the objections to confirmation, as Ohio courts require, should be stated in a motion, not an opposition, so that the party with the burden of proof can have a meaningful opportunity to consider carefully the grounds of a difficult motion, which does not occur under the federal procedure.

Under Ohio law, moreover, an application to confirm an arbitration award can be heard on a mere five days' notice. R.C. 2711.09. This is another significant departure from federal law, which contains no such short notice provision. *Cf.* 9 U.S.C. § 9. Five calendar days is clearly not enough time to prepare a well-reasoned and thorough motion and brief on the merits that the Legislature allows up to three months to prepare. Indeed, such a short period underscores the correctness of the Ohio rule that a substantive response, such as the federal courts require, is **not** contemplated by the Ohio statutory scheme, for five days is generally not considered enough time to oppose an application or other motion where there is no emergency. This is especially true where, as here, the five days were a Saturday, Sunday, Christmas Eve, Christmas Day and the day after Christmas, and where, as here, the arbitration proceeding itself occurred over two years and was delayed at every opportunity by the very parties who now claim that confirmation cannot wait even the required three-month statutory period. Even the federal decisions upon which Appellants rely are not so draconian and merciless. *See, e.g., Kanuth v. Prescott, Ball & Turben, Inc.*, 1990 WL 91579, *4 (D.D.C. 1990) (opposing party given four weeks to prepare opposition to motion to confirm). But federal law is simply inapposite here because it is so diametrically opposed to Ohio law on the subject of opposing an application to confirm an arbitration award and seeking to vacate, modify or correct it. The Court of Appeals correctly applied the Ohio statutes and rules of statutory construction in reaching its unanimous and proper conclusion.

Actual Rule of Law No. III:

> **Federal law interpreting the Federal Arbitration Act has no relevance or application to Ohio law interpreting and applying the Ohio Arbitration Act on the issue under review because the procedure for opposing an application or motion to confirm has been interpreted differently by federal courts, which require substantive opposition, than by Ohio courts, which preclude substantive opposition and require instead a motion to vacate under R.C. 2711.13.**

Under this true rule of law, the unanimous Opinion of the Court of Appeals is certainly correct in holding that, where the parties opposing confirmation appear at the hearing of the Application to Confirm and inform the Trial Court that they intended to file and serve a motion to vacate the Final Award under R.C. 2711.13 within the three-month statutory period, the Trial Court may not confirm the award before the expiration of the three-month statutory period.

CONCLUSION

The statutory interpretation rule of *in pari materia* requires a trial court to wait three months under R.C. 2711.13 before confirming an arbitration award under R.C. 2711.09 when the parties opposing confirmation properly appear and inform the trial court that they intend to file a motion to vacate, correct or modify that award within the three-month time frame set forth in R.C. 2711.13. The Trial Court erred by confirming the Final Award before the expiration of that statutorily prescribed three-month period of RC 2711.13, despite being informed of the intent to file, and actual filing of, a motion to vacate. As such, the unanimous Eighth District Court of Appeals correctly reversed the Trial Court's order prematurely confirming the Final Award in arbitration. Because this holding was correct, this Court should affirm the unanimous decision of the Eight District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *Appellees' Brief on the Merits* has been filed electronically with the Supreme Court of Ohio and was served by e-mail upon all parties of record on August 12, 2020.

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