Exhibit B

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

SUTEY OIL COMPANY, INC., Plaintiff, v. MONROE HIGH COUNTRY TRAVEL PLAZA, LLC, a Montana Limited Liability Company; and MARVIN MONROE, Defendants.	Cause No.: DDV-2015-126 **ORDER DENYING MOTION TO AMEND OR VACATE ARBITRATION AWARD**

Defendants Monroe High Country Travel Plaza, LLC, and Marvin Monroe (collectively, "Monroe"), represented by Greg W. Duncan, move this Court to either modify or vacate the October 27, 2019, arbitration award in this matter. Plaintiff Sutey Oil Company, Inc. ("Sutey"), represented by David H. Bjornson, Thomas C. Orr, and Gregory A. McDonnell, opposes the motion.

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The motion is fully briefed and ready for decision. For the reasons stated below, Monroe's motion will be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Sutey is a Butte-based Conoco fuel distributor and Monroe operates a gas station and convenience store in Helena. Sutey and Monroe entered into an agreement for Sutey to supply fuel to Monroe and in exchange receive certain proceeds from Monroe's sales. In 2015, Sutey brought this action alleging Monroe was in arrears. Monroe counter-claimed, and the matter was submitted to an arbitrator pursuant to the parties' agreement.

An arbitration hearing was held before arbitrator Tracy Axelberg in Helena on August 6 and 7, 2020. The arbitrator issued a ten-page Arbitration Determination ("Determination") on October 27, 2020. The Determination recited the procedural and factual history, summarized the evidence presented, and set forth the arbitrator's analysis of the case. Ultimately, the arbitrator awarded Sutey damages of $220,750.43, which he found to be the amount of five unpaid invoices for fuel deliveries from Sutey. The arbitrator declined to apply a "prompt pay" discount or any other credits to the amount and rejected Monroe's counterclaims. The arbitrator also awarded simple interest of 18% per annum from July 1, 2014, to the date of determination.

On October 29, 2020, Sutey applied to this Court to confirm the judgment, and on November 5, 2020, the Court entered judgment for Sutey. Monroe filed the instant motion on December 1, 2020. On December 17, 2020, this Court entered a partial stay on execution of the judgment to permit briefing on Monroe's motion.

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APPLICABLE LEGAL STANDARD

District courts do not sit as courts of appeal over private arbitrators. *Nelson v. Livingston Rebuild Ctr., Inc.*, 1999 MT 116, ¶ 18, 294 Mont. 408, 981 P.2d 1185. As the Supreme Court has explained:

> [A]rbitration confers significant benefits on parties who agree to utilize this alternative dispute resolution process. Arbitration allows parties to engage decision-makers who are technically skilled or trained in the specific area of industry that is subject to dispute and to expedite the resolution of disputes by avoiding many of the formalities inherent in civil litigation. Arbitration also provides a more stringent finality to disputes than traditional litigation by limiting the scope of judicial review of an arbitration award.

Dick Anderson Constr., Inc. v. Monroe Constr. Co., LLC, 2009 MT 416, ¶ 38, 353 Mont. 534, 221 P.3d 675.

As a consequence of the public policy favoring finality of binding arbitration, judicial review is strictly limited by statute. *Dick Anderson*, ¶ 26.[1] The Uniform Arbitration Act permits courts only to confirm, vacate, modify, or correct an arbitration award to the limited extent permitted by Mont. Code Ann. §§ 27-5-311, -312, and -313. *Dick Anderson*, ¶ 11. The exceptions set forth in statute are intentionally narrow. Courts may not review the merits of an arbitration decision, and they may not substantively modify an award. *Nelson*, ¶¶ 11–13. Indeed, a court may not vacate or modify an award even if it concludes the amount of the arbitrator's award was legally erroneous, provided the arbitrator's award was "rationally derived" from the arbitration agreement. *Nelson*, ¶¶ 17–19; *see also* Mont. Code Ann. § 27-5-312(2) ("The fact that the relief could not or would not be granted by a court of law or equity is not grounds

[1] Indeed, some courts have described the standard of review of arbitration awards "one of the narrowest standards of judicial review in all of American jurisprudence." *TD Ameritrade, Inc. v. McLaughlin*, 953 A.2d 726, 732 (Del. Ch. 2008) (quoting *Way Bakery v. Truckdrivers, Local No. 164*, 363 F.3d 590, 593 (6th Cir. 2004)).

for vacating or refusing to confirm the award."). The party challenging the award bears the burden of establishing a statutory basis to vacate or modify the award. *Dick Anderson Constr.*, ¶ 26.[2]

DISCUSSION

Monroe claims the arbitrator award should be amended to correct several claimed errors, or in the alternative, the award should be vacated due to partiality, distraction, and a claimed refusal to hear certain evidence on the arbitrator's part. As discussed below, none of these claims have merit.

A. Modification

Monroe contends the award must be modified to correct several alleged errors by the arbitrator, including failure to apply certain discounts and credits and awarding prejudgment interest.

An arbitration award may be modified to correct an "evident miscalculation of figures." Mont. Code Ann. § 27-5-313. This provision refers to mathematical errors. *See Dick Anderson*, ¶ 25 (a mathematical error occurred when arbitrator "obviously" transposed number from affidavit and inadvertently awarded $110,000 more in attorney fees than the prevailing party's counsel had even requested). Not only must there be a mathematical error, but it must be "evident": other courts applying the same provision have held it applies only to obvious error that appears on the face of the award itself. *See, eg., N. Blvd. Plaza v. N. Blvd. Assocs.*, 526 S.E.2d 203, 205–206 (N.C. Ct. App. 2000) ("mathematical errors committed by arbitrators which would be patently clear."); *TD Ameritrade, Inc. v. McLaughlin*, 953 A.2d 726, 737 (Del. Ch. 2008) (modification appropriate only where "mathematical error appears on the face of the award."); *Cedillo v. Farmers Ins. Co.*, 345 P.3d 213, 221–222 (Idaho 2015)

[2] Although Monroe's motion is effectively in the nature of a Rule 59(e) motion to amend or alter the judgment, that does not alter the underlying standard for confirming, vacating, or modifying an arbitration award.

(legal error in awarding interest was not a mathematical error subject to modification by a court); *Severtson v. Williams Constr. Co.*, 220 Cal. Rptr. 400, 404–405 (Cal. Ct. App. 1985) ("evident miscalculation" can only be found if evident by review of the arbitration award itself without regard to extrinsic evidence).

None of the errors claimed by Monroe constitute an evident miscalculation of figures. All of the errors claimed by Monroe require resort to extrinsic sources, as evidenced by the extensive exhibits appended to Monroe's opening brief. Moreover, the Determination makes clear that whether to apply certain credits or discounts or to award interest were legal and factual determinations by the arbitrator—based on the evidence and argument of the parties at the arbitration hearing—and are thus decisions on the merits this Court is not empowered to review.

B. Vacatur

Monroe's opening brief never clearly states the basis for vacating the award, but Monroe appears to claim the arbitrator was partial to Sutey and "ignored" or excluded certain allegedly material evidence. To be sure, an arbitration award can be vacated based on "evident partiality" by the arbitrator, or by showing the arbitrator "refused to hear evidence material to the controversy." Mont. Code Ann. § 27-5-312(1)(b), (1)(d). Monroe, however, has the burden of proof. To show partiality sufficient to vacate an award, Monroe must have evidence that is "certain, definite and capable of demonstration." *May v. First Nat'l Pawn Brokers*, 269 Mont. 19, 25, 887 P.2d 185, 189 (1994). Conclusory allegations that the arbitrator "ignored" the testimony of Monroe's witnesses; isolated examples, shorn of context, of instances where Monroe believes the

arbitrator treated it unfairly; or even Monroe's allegations (raised for the first time in the reply brief) that the arbitrator seemed distracted at the hearing all fall far short of this standard.

Monroe also claims the arbitrator improperly excluded some of Shaunda Wilson's expert testimony based on an inadequate disclosure. Monroe, however, has not established that the arbitrator's exclusion of Wilson's opinion testimony regarding the "Master Report" (a report compiling every transaction between Sutey and Monroe) was even erroneous. The March 3, 2020, expert disclosure that Monroe has filed with the Court (Dkt. 122 at 15–17) states only that Wilson "will testify to the fact that the Master Report as well as the other reports provided are missing at least one entry." The disclosure expressly notes that Wilson may offer other opinions after depositions are completed. Monroe has not supplied the Court with anything suggesting this disclosure was ever supplemented or provided information about the specifics of the questions at the arbitration hearing to which the arbitrator sustained an objection. On this record, Monroe has not established that the arbitrator improperly applied the requirement that Wilson adequately disclose "substance of the facts and opinions to which the expert is expected to testify," *See* Mont. R. Civ. P. 26(b)(4)(A)(i), let alone "refused" to hear the evidence.

In any event, Mont. Code Ann. § 27-5-312(1)(d) is only implicated by a refusal to hear evidence "material to the controversy." The arbitrator's determination, however, states that he gave little weight to Wilson's testimony because of her lack of experience with the fuel industry, concerns with her methodology, and her reliance on an alleged oral representation that the arbitrator had excluded as contrary to the parol evidence rule. Even assuming the

arbitrator's exclusion of Wilson's opinions about the Master Report was error, Monroe has not met its burden of establishing the evidence was material.

C. Attorney Fees and Costs

Sutey's request for attorney fees and costs will be denied. Whether to award fees for "multipl[ying] the proceedings. . . unreasonably and vexatiously" is a matter of the Court's discretion. *In re Estate of Bayers*, 2001 MT 49, ¶ 9, 304 Mont. 296, 21 P.3d 3. Perhaps Monroe may not have brought some or all of its claims to this Court upon a more sober reflection of the record, but its hand was forced to some degree by Sutey's choice to obtain a judgment (and then execute on that judgment) long before the ninety-day period for challenging the arbitration award had run. Under these circumstances, the Court does not find that Monroe acted vexatiously and does not believe it equitable to award Sutey costs or fees.

ORDER

Based on the foregoing considerations,

IT IS ORDERED:

1. Monroe's Motion to Amend or in the Alternative Vacate Award (Dkt. 112), filed December 1, 2020, is **DENIED**.

2. The stay imposed by this Court on December 17, 2020 (Dkt. 129), is **DISSOLVED**.

3. Sutey's request for attorney fees and costs (Dkt. 121), filed December 7, 2020, is **DENIED**. Each party shall bear their own costs.

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4. To the extent any other motions remain pending, they are **DENIED AS MOOT**.

DATED this 22nd day of February 2021.

CHRISTOPHER D. ABBOTT
District Court Judge

cc: David H. Bjornson, via email to: (david@bjornsonlaw.com)
Thomas C. Orr/Gregory A. McDonnell, (via email to: tom@tcorrlaw.com / greg@tcorrlaw.com)
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