IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA 21-0140

SUTEY OIL COMPANY, INC.

Appellee/Cross-Appellant,

vs.

MONROE'S HIGH COUNTRY TRAVEL PLAZA, LLC, a Montana Limited Liability Company, and MARVIN MONROE,

Appellants/Cross-Appellees.

Appellants' Reply Brief

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, the Honorable Christopher Abbott Presiding

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Introduction

Sutey does not address, or appear to contest, the primary legal issue Monroe's raised in this appeal: That the District Court erred in holding that it could not look at extrinsic evidence to determine whether an arbitrator made an "evident miscalculation" of the arbitration award. As Monroe's explained, a miscalculation will rarely be evident from the arbitration award itself, and this Court's precedent supports that courts may review documents submitted in the arbitration to determine whether the arbitrator miscalculated the award. Monroe's Opening Br., pp. 11-16. Sutey evidently agrees.

Sutey's primary contention is that the Arbitrator did not miscalculate the award, even though its own evidence and expert testimony compel a contrary conclusion. For example, Sutey's expert, Benjamin Yonce, conceded that the "net discrepancies/corrections" in the Master Report constituted "a reduction to the balanced owed by Defendant to Plaintiff." Monroe's App. 29. The Arbitrator concluded that Sutey's Master Report was correct, but then miscalculated the award by not decreasing the balance Monroe's owed to Sutey to account for this reduction established by the Master Report. The Court should reverse the District Court's erroneous legal conclusion that it cannot review extrinsic evidence and remand for correction of the arbitration award to accurately reflect what Sutey claimed it was owed.

Sutey also does not contest that it rushed to confirm the arbitration award immediately after Monroe's informed the Arbitrator that it believed he made a "scrivener's error" in the arbitration determination. That makes its cross-appeal claim to attorney's fees and costs for "multiplication of proceedings" under § 37-61-421 unreasonable, if not ironic. Had Sutey allowed the Arbitrator to review whether he made a miscalculation, as the Arbitrator had committed to do, there would have been no need for litigation in the District Court or this Court. As the District Court noted when rejecting the claim, Sutey's rush to confirm the award, enter final judgment, and enforce that judgment by levying Monroe's bank accounts precipitated a flurry of filings in the District Court to protect Monroe's right to challenge the miscalculated award. The District Court correctly rejected Sutey's claim for fees and costs under § 37-61-421, MCA.

I. Sutey does not defend the District Court's holding that review of extrinsic evidence is prohibited, which in this case shows that Monroe's was entitled to a reduction in the amount it owed to Sutey.

Sutey does not defend the District Court's holding that review of whether an arbitrator made an "evident miscalculation" under § 27-5-313, MCA is limited to the face of the arbitration determination. As Monroe's noted, review of intrinsic evidence is necessary because a miscalculation will rarely be evident from the face

of the award (Monroe's Opening Br., pp. 11-17.), and Sutey apparently does not disagree.[1]

That legal error by the District Court was an abuse of discretion. A "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Wohl v. City of Missoula*, 2013 MT 46, ¶ 28, 369 Mont. 108, 300 P.3d 119. This Court's precedent, the public policy governing arbitration, and precedent from other jurisdictions all support that district courts may review extrinsic evidence to determine whether an arbitrator miscalculated the award. Monroe's Opening Br., pp. 14-15; *Dick Anderson Construction, Inc. v. Monroe Construction Co., LLC*, 2009 MT 416, ¶ 25, 353 Mont. 534, 221 P.3d 675. Sutey's claim that Monroe's has not argued that the District Court abused its discretion (Resp. Br., p. 27) misunderstands this point. The District Court abused its discretion by basing its ruling on an incorrect view of the law.

Review of the extrinsic evidence submitted in the arbitration—namely Sutey's Master Report and its experts' testimony—shows that the Arbitrator made

[1] Sutey argues that Monroe's appeal was somehow untimely because it did not file its notice of appeal within thirty days of entry of final judgment. Sutey Resp. Br., p. 16, n. 4. Sutey misunderstands the appellate rules. Monroe's timely filed a motion to amend the judgment, which Sutey does not dispute. Under Rule 4(5)(a)(iv), Monroe's notice of appeal was due within 30 days of the District Court's denial of the motion to amend, and was timely filed.

two primary miscalculations, neither of which Sutey persuasively rebuts. First, the Arbitrator miscalculated the amount owed by not including Sutey's credit to Monroe's for "discrepancies and corrections" to the account balance. Second, the Arbitrator erred in not crediting Monroe's for early pay discounts that Sutey acknowledged Monroe's had earned but was not given. Sutey's argument that these were not miscalculations by the Arbitrator ignores its own accounting (which it never even addresses), its experts' explicit statements that it reduced the balance due, and the Arbitrator's ruling confirming the Master Report was correct.

A. Sutey's Master Report and its experts affirmed that Monroe's should be credited for discrepancies and corrections in the account balance.

Sutey's argument that it was not really claiming the amounts Monroe's owed should be reduced by the corrections and discrepancies defies its own evidence. As Monroe's showed in its opening brief, the Master Report constituted the grand total Sutey claimed Monroe's owed. Monroe's Opening Br., pp. 4-5; Arbitration Determination, pp. 8-9. That Master Report unambiguously gives Monroe's a $33,892.93 credit for errors, corrections, and discrepancies for credit card receipts for which there was no evidence Monroe's received credit. App. 27.

Sutey's claim that "none of the experts who testified agreed that those unreconciled items should be deducted from the five unpaid invoices" does not hold up against the record and its experts' explicit statements to the contrary. For

example, the Master Report was prepared by Colleen Vallely—Sutey's Chief Financial Officer and expert witness. Arb. Transcr., 118:5-9.[2] Vallely reviewed all transactions between the parties to resolve the dispute and because it was important to her, as a former retail fuel dealer herself, to make sure the "records were accurate and fair." Arb. Transcr., 135:7-18. She reviewed every credit card payment Sutey received to make sure Monroe's had been credited for it. *Id.* In conducting that review Vallely found "that some credit cards were not applied. So . . . I added the credit cards and gave them credit." Arb. Transcr. 175:25-176:3. She testified that she gave Monroe's credit because she could not find any evidence they had been given credit for amounts that Sutey received from credit card receipts collected from Monroe's:

> Counsel: You gave the credit because you couldn't find any evidence in Sutey's records that they had given credit to Monroe's previously, isn't that correct?
>
> Colleen Vallely: Correct.

Arb. Transcr., 258:2-6.

Vallely also affirmed that after giving those credits for corrections and discrepancies in the accounting, it changed the balance from $220,750.43 to

[2] Monroe's did not submit the arbitration transcript because it was not submitted to the District Court and thus not part of the record the District Court reviewed. Monroe's has no objection, however, to including it in the appeal, and it supports Monroe's arguments.

$186,857.50.

> Counsel: So when you give them the adjustments for the mistakes that were found in there, it goes down to $186,857?
>
> Colleen Vallely: Correct.

Arb. Transcr., 260:10-13; *see also id.* 258:7-15.

Vallely's testimony was consistent with Sutey's other expert, Benjamin Yonce, who submitted an expert report affirming that the Master Report was correct, including the amounts credited to Monroe's for corrections and discrepancies. Monroe's App. 29. Yonce was unambiguous on that point: the discrepancies and corrections resulted in "a reduction to the balance owed by Defendant to Plaintiff" precisely as reflected in the Master Report. App. 29, 32. Yonce had initially determined that Monroe's was entitled to a credit of $89,966.38, but amended that amount to $33,892.93 after Vallely determined some amounts had been credited to Monroe's. App. 29.

Sutey cites testimony from Yonce where he states that Monroe's unpaid invoices as of July 17, 2015 totaled $220,750.43. Sutey Resp. Br., p. 12. That is beside the point. Monroe's is not contesting there were unpaid invoices that grew from the dispute about what Monroe's actually owed. Monroe's Resp. Br., p. 3. But the corrections and discrepancies, in Yonce's words, reduced "the balanced

owed" to Sutey. App. 28-29. That point, according to Colleen Vallely's testimony and the Master Report she prepared, in indisputable.

Sutey also argues that it is possible that Monroe's already received credit for those amounts, and so it could conceivably receive double credit. But Vallely addressed that point, testifying that if she could not find evidence that Monroe's received credit for a payment, she "gave him the benefit of the doubt, and put the credit in there." Arbit. Trancr. 252:10-11. A credit is a credit. Vallely testified that while it was theoretically possible Monroe's already had received a credit, because there was no evidence of it, Sutey still credited Monroe's for those unreconciled amounts. *Id.*

To be clear, Monroe's is not contesting the Arbitrator's legal or factual rulings. Rather, the Arbitrator determined the Master Report was correct and "a comprehensive collection of every transaction between the parties, and that each data point is supported by tangible evidence, such as invoices, bank records and fuel delivery logs." Arbitration Determination, pp. 8-9. The Master Report unambiguously credited Monroe's for those discrepancies and corrections. App. 27. Having affirmed the Master Report was correct, the Arbitrator made an "evident miscalculation" by not reducing the total amount due to accurately reflect what Sutey was claiming Monroe's owed. Sutey cannot credibly claim otherwise, given that the Arbitrator's determination was based on Sutey's own accounting and

witness testimony. Indeed, it never even attempts to explain what the discrepancies/corrections were for, if not a credit to Monroe's to reconcile the account.

To be sure, the Arbitrator ruled that Monroe's was not entitled to other discounts, which Monroe's is not contesting. For example, Monroe's argued it was entitled to fuel discounts that Sutey received from suppliers, and that Sutey was charging an incorrect price for fuel. *See* Arbitration Determination, pp. 7-8. Monroe's is not challenging the Arbitrator's determination on those issues and understands the limited basis of its appeal. Its claim here is simple: The Arbitrator miscalculated the amount Sutey owed Monroe's by not applying the amount that Sutey's Master Report and experts acknowledged was "a reduction to the balance owed." App. 29. The District Court should have reviewed extrinsic evidence and corrected that evident miscalculation.

B. The Arbitrator determined that *Monroe's* was entitled to early pay discounts, not that neither party was entitled to them as Sutey claims.

Sutey is incorrect that the Arbitrator determined that no party is entitled to early pay discounts. Sutey Resp. Br., p. 23. Rather, the Arbitrator rejected *Sutey's* argument that it could claw back early pay discounts that had been given, even if not earned based on the parties' course of dealing:

> [P]art of Sutey's claimed damages is repayment of prompt payment discounts to Sutey that [Monroe's] High Country allegedly did not earn. The testimony at the hearing indicated that [Monroe's] High Country was receiving the prompt pay discount, even when not earned, throughout the course of the five-year contract. It appears this was another instance of an established course of dealing between these two parties. . . .

Arbitration Determination, p. 9.

The Arbitrator did not determine, as Sutey claims, that neither party was entitled to the discounts. Indeed, the Arbitrator determined Monroe's was entitled to them even if not technically earned. Based on that ruling, it was clearly entitled to the $20,025.04 that Monroe's had **earned but was not given**. Sutey acknowledged, on the face of its Master Report, that Monroe's was entitled to those discounts. Monroe's App. 27. Sutey never argued that Monroe's should not have received credit for early pay discounts it had earned. The Arbitrator, having determined Monroe's was entitled to early pay discounts, even when not earned, miscalculated the total award by not including the early pay discounts Monroe's earned.

Sutey also erroneously claims that the amount Monroe's actually owed was $266,891.51. Sutey Resp. Br., p. 22. ("when the principal amount is combined with all of the discounts, credits, and unreconciled amounts, the total owed by Monroe's is $266,891.51."). That total includes 1) $39,799.12 in early pay discounts that Sutey claimed should be taken back; and 2) $60,259.93 in compound

interest on past due amounts. Incidentally, this total amount also includes the credits for corrections/discrepancies that Monroe's addressed in the previous section. *See* Master Report, App. 27. The $60,259 in "finance charges" was *compound* interest. Arb. Transcr. 259:11-17. But the Arbitrator found Sutey was entitled to simple interest, not compound. Arbitration Determination, p. 9 ("the Account Agreement does not specify compound interest"). Thus, removing from the Master Report compound interest and the early pay charge back the Arbitrator held was inappropriate left a total amount of $166,832.46 that Sutey claimed was due.

Balance Due from Unpaid 2014 Invoices	$ 220,750.43
Net Discrepancies/Corrections	$ (33,892.93)
Add [early pay] Discounts Earned, Not Given	$ (20,025.04)
Total:	**$ 166,832.46**

App. 27.

That is precisely the amount Colleen Vallely testified Monroe's owed, after removing the compound interest and early pay charge backs. Arb. Transcr., 260:3-261:9. So while Sutey cites testimony from Vallely indicating that the reductions would not change the "final accounting," (Sutey Resp. Br., p. 25), in reality Vallely

acknowledged that, absent those amounts, the total due was $166.832.50. *Id.*; *see also* Arb. Transcr., 179:1-5; 259:2-17.

Having rejected that Sutey was entitled to compound interest or claw back of early pay discounts, the Arbitrator made no other ruling that would support modifying the amounts totaled in the Master Report. He simply miscalculated the total amount due by not giving Monroe's credit to which the Master Report acknowledged Monroe's was entitled. The Court should permit that scrivener's error to be corrected.

II. If the Arbitrator miscalculated the award, it also erred in awarding pre-judgment interest to Sutey because the amount due was in flux throughout the case.

Sutey implicitly recognizes that if the Arbitrator made a miscalculation in the total award, its award of interest was also erroneous. Sutey's basis for claiming the interest award was correct is based on its argument that the underlying award "was the exact amount it claimed in the Complaint." Sutey Resp. Br., pp. 25-26. That may explain why Sutey is now so steadfast in claiming that its Master Account did not in reality reduce the amount Monroe's owed Sutey.

But the inverse must also be true. If the Arbitrator miscalculated the amount of the award, the pre-judgment interest award was also in error because it would differ from the amount claimed in the complaint and thus was not "certain or capable of being made certain." § 27-1-211, MCA; *In re Marriage of Gerhart*, 245

Mont. 279, 284, 800 P.2d 698 (1990). As Monroe's detailed above and in its opening brief, the amount due was not settled until Sutey submitted its Master Report in March 2020. That Master Report verified what Monroe's had claimed from the beginning of the case—that it was unclear what Monroe's actually owed Sutey.

Sutey cites testimony from Colleen Vallely suggesting that the mistakes and discrepancies did not change the final amount due. But that was only because Vallely had concluded the total amount due was actually $266,891.51 because she had added compound interest and reclamation of early pay discounts, both of which the Arbitrator rejected. *See infra*, Section I.B. As Monroe's has detailed, both Vallely and Yonce indicated the discrepancies and corrections reflected in the Master Report reduced the amount Monroe's owed Sutey because there was no evidence that Sutey ever credited those amounts to Monroe's, as Monroe's had claimed from the beginning of the dispute. Regardless, Sutey acknowledges the amount was in flux and not readily ascertainable. Indeed, it argues the total was more than it claimed in the case, and that the net total can range from $166.832.46 to $266,891.51. Sutey Resp. Br., p. 22.

As to the delays in the case, it is fair that not every delay was Sutey's fault and that Monroe's did not object to Sutey's requests for extension. But simply because Monroe's consented to Sutey's requests for extensions for medical or

other reasons does not mean it should pay for the extraordinary delay. Those delays, including from the District Court before the parties finally consented to arbitration so that the matter could be resolved, greatly increased the amount of interest Monroe's had to pay.

That aside, as Sutey seems to acknowledge, if the Arbitrator miscalculated the award, it also erred in awarding prejudgment interest. Because the total amount Sutey claimed was due fluctuated and was not finally settled until Sutey released its *final* Master Report in March of 2020, Sutey is not entitled to prejudgment interest.

Response to Sutey's Cross Appeal

I. The District Court correctly rejected Sutey's argument for fees and correctly recognized that Sutey's rush to confirm the arbitration award needlessly caused additional filings.

Sutey's claim that it is entitled to fees for "vexatious" multiplication of the proceedings under § 37-61-421, MCA is baseless. Sutey could have avoided all litigation in the District Court if it would have allowed the Arbitrator to review the award to determine whether he made a miscalculation. The District Court correctly rejected Sutey's argument for fees and costs.

This Court reviews a district court's final order granting costs and attorney fees under § 37-61-421 for an abuse of discretion. *In re Estate of Bayers*, 2001 MT

49, ¶9, 304 Mont. 296, 21 P.3d 3. A district court abuses its discretion if it "acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice." *In re G.M.*, 2009 MT 59, ¶11, 349 Mont. 320, 203 P.3d 818. Sutey bears the burden to demonstrate an abuse of discretion. *Id.* "Because the district court is in the best position to know the nature and extent of any alleged violation, we generally defer to the district court's discretion in addressing costs and fees under § 37-61-421, MCA." *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶39, 350 Mont. 538, 208 P.3d 836 (upholding district court's denial of fees); *see also In re Estate of Bayers*, ¶9.

Sutey complains about the number of briefs and motions Monroe's filed in the District Court, but ignores that Sutey forced Monroe's hand. The District Court correctly rejected Sutey's claim for fees and costs, recognizing that Monroe's "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 an arbitration award had run." See District Court Order Denying Motion to Amend or Vacate Arbitration Award, 7. After Sutey rushed to file a motion to confirm the Arbitration Determination, Sutey then immediately began garnishing Monroe's bank accounts, without first attempting to discuss payment of the judgment with Monroe's. Monroe's Opening Br., p. 8. So, of course, Monroe's

filed motions to stay enforcement of the judgment and to preserve its right to challenge the Arbitration Determination, as was its right.

All the while, Sutey knew Monroe's believed that the Arbitrator miscalculated the award because, as Sutey acknowledged, the day after the Arbitrator issued his determination, "counsel for Defendants contacted the Arbitrator and [Sutey's counsel] requesting a conference call to discuss an alleged scrivener's error." Sutey Application to Confirm Award, Doc. 106, p.2, fn1. Rather than allow the Arbitrator to review whether he made an error, Sutey instead immediately filed its motion in the district court to confirm the arbitration award, thereby depriving the Arbitrator of jurisdiction. *See* Monroe's Opening Br., pp. 7-8. Had Sutey allowed the Arbitrator to review whether he made a scrivener's error, Sutey could have saved the parties from the litigation that it now laments. The Arbitrator could have (and likely would have) concluded he had miscalculated the award. Or he could have decided there was no error. Either decision would have ended the litigation. Simply put, Sutey's claim that Monroe's ran up costs by filing motions ignores that Sutey's sharp practices necessitated those motions and needlessly multiplied the proceedings.

Sutey has not met its burden to prove the District Court abused its discretion. The District Court rightly rejected Sutey's claim for costs and attorney fees under § 37-61-421, MCA.

Conclusion

For the foregoing reasons, the Court should reverse the District Court's erroneous legal conclusion that it may only correct a miscalculation in an arbitration award that is apparent on its face, and reverse the District Court's award of prejudgment interest. The Court should remand with instructions to correct the award to accurately reflect the credits provided in Sutey's Master Report, for a total of $166,832.46 due to Sutey. The Court should uphold the District Court's decision denying fees and costs to Sutey under § 37-61-421, MCA.

Respectfully submitted December 1, 2021.

CROWLEY FLECK, PLLP

s/ Dale Schowengerdt
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Certificate of Compliance

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 3445 words including footnotes. Rule 11(4).

/s/Dale Schowengerdt

CERTIFICATE OF SERVICE

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