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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

HALLIBURTON ENERGY SERVICES, INC.,

Petitioner,

v.

AARON CARTER and MICHAEL LUNDY,

Respondents.

Case No.

HALLIBURTON ENERGY SERVICES, INC.'S NOTICE OF PETITION AND PETITION TO VACATE ARBITRATION AWARD

Date:

Time:

Place:

TO RESPONDENTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Petitioner Halliburton Energy Services, Inc. will and hereby does petition and move this Court, pursuant to 9 U.S.C. §§ 6 and 10, for an order vacating arbitration awards served on February 14, 2019, in favor of respondents Aaron Carter and Michael Lundy. Notice of the date and time of the hearing on this matter, which will be heard at the Robert E. Coyle United States Courthouse, 2500 Tulare Street, Room 1501, Fresno, CA 93721, will be provided as soon as the above-referenced Court assigns this matter to a judge so that Petitioner may request a hearing.

The Petition is based on this Notice, the attached Petition to Vacate, the Declaration of Michael S. Helsley in support of the Petition, the complete files and records in this matter, and upon such further oral and documentary evidence as may be presented at the time of the hearing in this matter.

DATED: March 1, 2019

WANGER JONES HELSLEY PC

By: /s/ Michael Helsley
Michael Helsley
Attorneys for Halliburton Energy Services, Inc.

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INTRODUCTION

Halliburton Energy Services, Inc. employs highly-skilled and highly-compensated employees to direct drilling operations at oil well sites throughout the country. These employees are known as "Directional Drillers" because they are responsible for deploying sophisticated technology and engineering techniques to navigate a large drill to a position located thousands of feet underground. Drilling is an underground exploration, affected by a multitude of unpredictable factors, and therefore requires Directional Drillers to use their skill, experience, mathematical formulas, judgment, and discretion to achieve successful drilling results for Halliburton customers.

Once a customer engages Halliburton to drill a well, the drilling operation continues around the clock from the start of the project to the end, as time is of the essence due to significant costs and public safety concerns. The Directional Drillers worked alternating 12-hour shifts to provide 24-hour coverage. As compensation, they received a base salary plus a "day rate" for working a 12-hour shift. Here, Halliburton paid respondents and Directional Drillers Aaron Carter and Michael Lundy six-figure sums on an annual basis, including the day-rate amounts that explicitly compensated them for working the 12-hour shifts. Because of their unique skills and judgment and the complexities of the job, they earned more in one year than about 95 percent of U.S. income earners in exchange for their services.

Because the Directional Drillers exercised judgment and discretion to carry out critical business operations on behalf of Halliburton and its customers, Halliburton previously classified them as "exempt" employees for purposes of state and federal overtime laws (it has since re-classified them as "non-exempt," effective this year). In 2017, a number of Directional Drillers, including Carter and Lundy, commenced arbitration proceedings against Halliburton, claiming that Halliburton misclassified them as "exempt" and that, as a result, they were entitled to unpaid overtime wages, among other claims. Following several hearings, the arbitrator issued final awards in favor of the Directional Drillers, including Carter and Lundy.

The arbitrator agreed with the Directional Drillers that although Halliburton paid them hundreds of thousands of dollars per year for their professional services, the law regarded them as manual laborers that Halliburton should have classified as non-exempt. Having determined that the

Directional Drillers were not exempt from California's overtime-wage laws, the arbitrator's next task was to calculate the amount of unpaid overtime to which they were entitled. And while the arbitrator's classification decision (exempt vs. non-exempt) was wrong in many respects,[1] his calculation of unpaid overtime was completely irrational. He decided that the Directional Drillers were entitled to be paid *twice for the same hours worked*, plus an overtime premium, plus prejudgment interest. His resulting unlawful award bestowed a windfall of millions of dollars *per claimant*, vaulting them into the wealthiest echelons of American society. To the best of our knowledge, it is by far the largest per-claimant unpaid overtime award in entire history of unpaid overtime awards.[2]

To illustrate what happened here, consider the following. An employee works 12-hour shifts. He agrees that he will receive a base salary plus $500 for each 12-hour shift that he works. The employer pays him the base salary plus $500 for working the 12-hour shift. The employee and the employer mutually understood and agreed at all times that the $500 would compensate the employee for working a 12-hour shift. After all, the employer had stated in writing that it would provide $500 in compensation for working the 12-hour shift, the employer's projects always involved 12-hour shifts, and the employee always worked such 12-hour shifts on the employer's projects. The employee never once claimed, during years of employment, that the employer had not paid him for all hours worked. Nevertheless, after meeting with an attorney, the employee returns to the employer

[1] *See Parrish v. Premier Directional Drilling, L.P.*, No. 17-51089, Slip Op. (5th Cir. Feb. 28, 2019) (holding that directional drillers with job duties similar to those at issue here were properly classified as independent contractors, such that they were not entitled to overtime).

[2] To put these awards in context, consider a recent report concerning an unpaid wages settlement in which the New York Times reported that car wash workers received a "spectacular sum"—*i.e.*, an average of "more than $80,000 per worker." Tracy Tullis, *A Multimillion-Dollar Payday, at the Carwash*, N.Y. TIMES (Feb. 22, 2019), www.nytimes.com/2019/02/22/nyregion/car-wash-wage-dispute.html. Similarly, 2009 study of class action settlements of wage-and-hour claims found that the average individual potential recovery in an employee misclassification suit was $18,233. *See* Samuel Estreicher and Kristina Yost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment*, 6 J. OF EMPIRICAL LEGAL STUDIES 768, 777, 780 (Dec. 2009). Here, the arbitrator awarded Aaron Carter $1,479,052 in unpaid overtime damages based on alleged misclassification, then added prejudgment interest and other sums for a total award of $2,524,498. And Michael Lundy's total award even more—an unprecedented $4,178,515.

and claims that the $500 payment compensated him *only* for an 8-hour shift and that the employer had *never* paid him the amounts he was owed for working more than eight hours. This is what happened in this case.

The arbitrator never found that Halliburton and the Directional Drillers agreed that the 12-hour shift rate would compensate the Directional Drillers for working an 8-hour shift. Nor could he; the very idea is self-contradictory and nonsensical. Instead, he completely and irrationally disregarded the parties' agreement and concluded that the Directional Drillers should be paid *twice* for all hours worked in excess of eight hours per day *in spite of the agreement*. This conclusion had the effect of multiplying the Directional Drillers' unpaid overtime award many times over, and is the principal reason why its size is unprecedented. Nothing in the law or common sense requires an employer to pay its employees twice for overtime hours; rather, if an employee is entitled to overtime pay, he is entitled to an overtime premium of half the hourly wage.

To see how the arbitrator's irrational "pay them twice" determination resulted in an overtime award that was many multiples of what the law allows, another simplified illustration may be useful (the actual amounts Carter and Lundy received are set out in the statement of facts below and exhibits submitted with this Petition and Motion). Suppose a Directional Driller received $120,000 in compensation for working 240 12-hour shifts at $500 per 12-hour shift (240 * $500 = $120,000). If the Directional Driller is exempt, his total day-rate compensation for working the 12-hour shifts is $120,000. If the Directional Driller is non-exempt, then he should have received an overtime premium for working hours in excess of a regular 8-hour day. In this example, one third of the hours worked are overtime hours, *i.e.*, hours 8 to 12. The hourly wage for the 12-hour shifts was $41.67 ($500 / 12 = $41.67). The employee already received payment of $41.67 per hour but, if non-exempt, should have received an additional overtime premium equal to one half of the regular wage, or $20.83 per hour. The total overtime premium in this example would be $20,000 (240 days * 4 hours overtime/day * $20.83 = $20,000).

The arbitrator's irrational methodology for calculating overtime more than quadrupled the unpaid overtime premium, so that in the above example the Directional Driller would receive an *additional* $90,000 instead of an additional $20,000. The arbitrator decided that he would assume

that Halliburton had not paid the Directional Drillers a single cent for working overtime hours; in other words, the base $120,000 in the example compensated them only for working 8-hour shifts. This nonsensical assumption has two effects. First, the base hourly wage in the example rises from $41.67 ($500 / 12 = $41.67) to $62.50 ($500 / 8 = $62.50) and, correspondingly, the overtime premium also rises from $20.83/hour to $31.25/hour. Second, because this methodology irrationally assumes that the employee has never paid been anything for overtime hours, it adds compensation at the increased base rate *and* the premium amount. Thus, in this irrational scenario, the employee receives the base rate for each of the overtime hours (240 days * four hours overtime/day * $62.50 = $60,000) plus the overtime premium, which half of the regular amount, or an additional $30,000, for a total of $90,000.

In assuming that Carter and Lundy had never been paid for working hours in excess of 8 hours, the arbitrator directly contradicted the parties' agreement, which provided that the day rate payment compensated them for working 12 hours. As a result, the award here directly contradicts the parties' agreement, is completely irrational, and fundamentally unjust. This Court should vacate the arbitration awards.

PARTIES

Petitioner Halliburton Energy Services, Inc. is a corporation organized under Delaware law with its principal place of business in Houston, Texas. It has registered with and is in good standing to do business in the State of California.

Halliburton is informed and believes, and based thereon alleges, that respondent Aaron Carter is an individual residing in Kern County, California. In the Final Award for the first arbitration hearing, the arbitrator awarded Carter $2,524,498.

Halliburton is informed and believes, and based thereon alleges, that respondent Michael Lundy is an individual residing in Kern County, California. In the Final Award for the second arbitration hearing, the arbitrator awarded Lundy $4,178,515.

JURISDICTION AND VENUE

This Court has subject matter jurisdiction over this Petition because the amount in controversy exceeds $75,000 and because Halliburton and Carter and Lundy are citizens of different

States. 28 U.S.C. § 1332(a). A district court has proper venue to adjudicate a petition to vacate an arbitration award in any district in which venue is proper under the general venue statute, 28 U.S.C. § 1391. *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195 (2000); *Textile Unlimited, Inc. v. A. BMH Co., Inc.*, 240 F. 3d 781, 784 (9th Cir. 2001). Venue is proper in this Court because a substantial part of the events or omissions giving rise to Carter's and Lundy's claims occurred in this district. 28 U.S.C. § 1391(b)(2).

STATEMENT OF FACTS

Ten claimants filed arbitration claims and the parties agreed to consolidate those claims before arbitrator Robert A. Meyer. The arbitrator subdivided the proceedings into two parts. First, he heard claims from Carter, a Directional Driller, and Preston Epps, an employee who performed "Measure While Drilling" (MWD) tasks. After issuing interim awards to Carter and Epps, the arbitrator heard the remaining claims (including Michael Lundy's claims) in a second proceeding, at which he explicitly incorporated and relied upon the evidence offered in the first. Ex. H (Final Award, 2d Hearing, at 2, 8).[3] He also found that Lundy "essentially performed the same duties as Carter." Ex. H (Final Award, 2d Hearing, at 6); *see also* Ex. S (Arb. 2, Vol. I, 111:15-112:3). After the second proceeding, the arbitrator issued the final awards. The relevant evidence introduced at these hearings is set out below.

A. Carter and Lundy Worked 12-Hour Shifts

Aaron Carter testified that the Directional Drillers worked alternating 12-hour shifts, with one working from 6:00 a.m. to 6:00 p.m. and the other working from 6:00 p.m. to 6:00 a.m. Ex. R (Vol. II, 256:4-12, 269:23-270:1, 276:7-18). If more than two Directional Drillers were available for a job, they could take turns working days and nights. Ex. R (Vol. II, 321:3-10). As Carter unambiguously described the working arrangement, "We're there to cover a 12-hour shift." Ex. R (Vol. II, 271:1; *see also id.* at 262:6-11, 420:9-13 (Tornstrom)).

Preston Epps likewise testified at the first hearing that shifts were "12 and 12" (Ex. R (Vol. I., 75:13)), meaning that each worker would perform alternating 12-hour shifts. The day shift was

[3] All exhibit ("Ex.") citations refer to exhibits attached to the Declaration of Michael S. Helsley, submitted herewith, unless otherwise noted.

the "Daylight Tour" and the night shift was the "Morning Tour." Ex. R (Vol. I, 76:10-17). The day shift ran from 6:00 a.m. to 6:00 p.m. and the night shift ran from 6:00 p.m. to 6:00 a.m. Ex. R (Vol. I, 76:19-77:10). Epps repeatedly explained that a shift was 12 hours long. Ex. R (Vol. I, 107:4-6, 111:20-23, 112:24-25, 123:10, 143:3. To the extent that Epps worked longer than 12 hours, that longer period of work occurred because of "changeover" time in between 12-hour shifts. Ex. R (Vol. I, 186:8-20).

In short, it was undisputed that employees shifts were 12-hour shifts and the employees always understood that the day rate payment was compensation for working a 12-hour shift. Ex. R (Vol. II, 271:1).

B. Carter and Lundy Received a Day Rate for Working 12-Hour Shifts

As Aaron Carter testified, Directional Drillers received a bonus based on the days that they worked, *i.e.*, for each 12-hour shift they covered. Ex. R (Vol. II, 251:11-252:8, 255:11-12). The written terms of Halliburton's compensation structure explicitly tied the "bonus day rate" to the 12-hour shift. It provided:

> Bonus day rates will be paid to Field Engineers and/or Directional Drillers for days invoiced to our customers. Field Engineers and/or Directional Drillers will receive a ½ dayrate for days when the customer pays a prorated invoice of less than 12 hours service at the start or end of a job. A full dayrate shall be paid on prorated jobs where the customer pays 12 hours or more on any calendar day.

Ex. Q (Joint Ex. 2, CARTER 233 ¶ 2).

Thus, if the Directional Drillers did not work at a well site, they received their salary. And if they worked their 12-hour shift, they received their salary plus the day rate bonus "when the customer pays 12 hours or more on any calendar day." Ex. Q (Joint Ex. 2, CARTER 227, 233 ¶ 2).

After working a 12-hour shift, the Directional Drillers would submit a bonus request form to Halliburton. Ex. R (Vol. II, 250:15-24). On the bonus request form, the employee would state his working status during each day of a one-month period and the amount of the day rate he claimed for working a 12-hour shift. Ex. P (excerpts of Aaron Carter monthly bonus request forms). Although Halliburton's compensation terms expressly provided that employees were eligible for a day rate

payment only when the customer paid for 12 hours or more on any calendar day, Carter testified that he would claim and receive a day rate payment even if he did not work the full 12-hour shift. Ex. R (Vol. II, 252:4-15).

Halliburton's written compensation terms explained the purpose and benefits of the day rate payment system to employees. The day rate bonus system enabled Halliburton to change a Directional Driller's compensation swiftly to meet rapidly changing market conditions. This allowed for compensation increases when demand for drilling services was high and mitigated the need for a reduction in force during periods of low business activity. Ex. Q (Joint Ex. 2, CARTER 237). In other words, Directional Drillers could make a lot of money by working more hours while the market was strong, and avoid layoffs when it was not. There was and is no dispute that Halliburton paid the day rate amounts that the Directional Drillers claimed on their monthly request forms.

C. In Arbitration, Carter and Lundy Claim for the First Time That They Are Entitled to Be Paid Twice for All Hours Worked in Excess of Eight Hours Per Day

Carter and Lundy at all times understood and demonstrated that their shifts were 12 hours long and that the day rate payment was compensation for working a 12-hour shift. Ex. R (Vol. II, 271:1 (Carter: "We're there to cover a 12-hour shift.")); Ex. S (Arb. 2, Vol. I, 111:24-112:2 ("Q: So was there any material difference between your job duties and Aaron Carter's job duties …? [Lundy]: No. We both do the same work.")). But after commencing arbitration, they and their counsel advanced a theory of damages in which they pretended that Halliburton had not paid them *anything* for working hours in excess of eight hours. For example, in March 2015, Aaron Carter submitted a request for day rate bonuses of $500 per 12-hour day. Ex. P (Feb./Mar. 2015 monthly bonus request). At $500, his hourly rate for those 12 hours (*i.e.*, not including his base salary or other compensation to which he was entitled) would be $41.67 per hour ($500/12 hours).

Until they commenced arbitration proceedings, Carter and Lundy never informed Halliburton that they had never been paid *anything* for overtime hours worked. But once in arbitration, Carter and Lundy claimed that the day rate (which for Carter, for example, ranged from $450 to $698.50 (Ex. P (Carter's bonus request forms)) was payment for working *only eight* hours. Under this theory, a regular hourly rate for a $500 day-rate payment alone (not including salary and other

compensation) was actually $62.50 ($500/8 hours); the overtime rate was $93.75 ($62.50 * 1.5); and because Halliburton supposedly never paid anything for working the four overtime hours of the 12-hour shift, the Directional Driller would be entitled to an additional $375 ($93.75 *4) per 12-hour day.

1. The Directional Drillers' Expert, William Buckley, Assumes That They Have Never Been Paid Anything for Hours Worked in Excess of 8 Hours Per Day

Plaintiffs' expert witness, William Buckley, who had never calculated overtime based on a day rate bonus before this case (Ex. R (Vol. III, 604:15-19)) made clear in his testimony that he assumed that Halliburton's day rate payment compensated the Directional Drillers for only eight hours out of 12-hour shift. Thus, when calculating unpaid overtime, he assumed that all the day-rate amounts compensated the employees only for working "straight" 8-hour days or 40 hour weeks. Ex. R (Vol. III, 588:12-589:3, 614:6-616:1, 619:18-620:2). Amazingly, this irrational assumption produced such enormous unpaid overtime amounts that Buckley, Carter, and his counsel *did not even notice* when Buckley inadvertently included a clerical error in his spreadsheet that reduced the amount claimed by 33 percent and hundreds of thousands of dollars for *each employee*. Ex. R (Vol. III, 561:1-563:25); Ex. R (Vol. IV, 636:1-12). For Carter alone, the unnoticed error made a difference of half million dollars. *Compare* Ex. M (Carter Ex. 63), *with* Ex. N (Carter Ex. 63A). It was only after the arbitrator checked Buckley's simple arithmetic during the proceeding that Buckley and respondents' counsel noticed that their "get paid twice" theory would lead them to claim even more money than they initially demanded. Ex. R (Vol. III, 561:1-563:25).

Buckley began his calculation of unpaid overtime by summing the day-rate amounts for a week and then dividing by 40 hours. Ex. R (Vol. III, 557:11-558:4). (If Carter worked less than 40 hours during a week, then Buckley divided the day-rate sum by hours actually worked.) Buckley added an amount to account for base salary to the day-rate amount. Ex. R (Vol. III, 558:19-560:5). The resulting "regular rate," which appears in column 17 of Carter's trial exhibit 63A (Ex. N), is Carter's hourly wage if one assumes that Halliburton paid him only for working 8-hour days. Ex. R (Vol. III, 558:19-560:5).

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Next, Buckley multiplied the "regular rate" by the number of overtime hours worked (*e.g.*, 4 hours) and again by 1.5 to determine the unpaid overtime wages. Ex. R (Vol. III, 560:6-16). He conducted a similar calculation for hours worked in excess of 12 hours, except that instead of multiplying by 1.5, he multiplied by 2 for such hours. Ex. N (Carter Ex. 63A). These calculations resulted in unheard of overtime amounts, often totaling more than $1,000 *per day* in unpaid overtime wages alone. Ex. N (Carter Ex. 63A); Ex. O (Lundy Ex. 139).

2. Halliburton's Expert, Robert Crandall, Assumes That Halliburton Compensated the Directional Drillers for Working 12-Hour Shifts

Halliburton's expert, Robert Crandall, who had been retained as an expert in hundreds of cases involving some kind of bonus, including day rate bonuses (Ex. R (Vol. IV, 643:16-644:2)), explained during his testimony that he assumed that the day rate compensated the employees for a 12-hour shift (Ex. R (Vol. IV, 701:2-10, 703:10-704:7); Ex. R (Vol. V, 775:25-776:7). Thus, Crandall began his calculation of unpaid overtime by summing day-rate amounts and then dividing by total hours worked in a week. Ex. R (Vol. IV, 701:2-13). Crandall then added an amount to account for base salary to the day-rate amount. (Ex. R (Vol. IV, 701:15-702:1). Finally, because Halliburton had already paid the Directional Drillers the regular amount for working 12 hours and "it's just the overtime premium" that would be owed, Crandall multiplied the regular rate by the number of overtime hours worked (*e.g.*, 4 hours) and again by 0.5 to determine the unpaid overtime wages. The "0.5" multiplier accounted for the premium but avoided paying the Directional Drillers twice for the same hours worked.

In contrast with Buckley's calculations based on irrational assumptions that directly contracted the written bonus payment terms, when Crandall calculated unpaid overtime for a day on which Carter claimed a day rate of $545 and 4.25 overtime hours, the total amount of unpaid overtime was $170.72 for the first four hours and $21.34 for the next 0.25 hours of overtime, for a total of $192.06. Ex. R (Vol. IV, 702:15-704:7); Ex. T (Halliburton Ex. 36, May 1, 2012 entry). For the same day—May 1, 2012—Buckley calculated that Carter was entitled to $681.29 in overtime for the first four hours of overtime, or four times the amount that Crandall calculated for that same four-hour period. Ex. N (Carter Ex. 63A); *see also* Ex. I (Halliburton Ex. 66 (summarizing calculations

based on differing scenarios and assumptions)); Ex. R (Vol. V, 762:11-771:6 (reviewing Halliburton exhibit 66)).

D. The Arbitrator Awards $2,524,498 to Carter and $4,178,515 to Lundy

The arbitrator issued two final awards. One, relating to the "first hearing," determined Carter's and Epps' claims. The other, relating to the "second hearing," determined Lundy's claims and claims brought by other employees who have since settled with Halliburton and are not parties to this proceeding.

After finding that respondents were non-exempt employees and ruling on other issues, the arbitrator turned to the calculation of damages. The arbitrator viewed that task before it as one of bonus classification. If the day rate bonuses were "flat rate bonuses," he reasoned, then he would adopt respondents' expert's calculations. And if the bonuses were "production bonuses," then he would adopt Halliburton's expert's calculations. Ex. F (Final Award, 1st Hearing, at 19). On this classification point, the arbitrator concluded that the California Supreme Court's decision in *Alvarado v. Dart Container Corp.*, 4 Cal. 5th 542 (2018), was controlling and required him to calculate unpaid overtime as though all payments to the Directional Drillers compensated them for working *only* eight hours per day and *nothing* for working in excess of eight hours. Ex. F (Final Award, 1st Hearing, at 19). The arbitrator adhered to this same conclusion in his Final Award on the second hearing. Ex. H (Final Award, 2nd Hearing, at 15).

Based on his findings, the arbitrator awarded $2,524,498 to Carter. Ex. F. Of this amount, the arbitrator awarded $1,479,052 in unpaid overtime damages; the rest of the award was based on a wage statement penalty, meal and rest break premiums, and prejudgment interest. Ex. F. The arbitrator awarded $4,178,515 to Lundy. Ex. H. Of this amount, the arbitrator awarded $2,501,420 in unpaid overtime damages, with a wage statement penalty, meal and rest break premiums, and prejudgment interest accounting for the rest. Ex. O (Lundy Ex. 139).

The arbitrator's final awards became final for purposes of judicial review on February 28, 2019. This Petition and Motion to vacate followed.

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ARGUMENT

I. The Court Should Vacate an Arbitration Award When the Arbitrator Has Exceeded His Powers by Disregarding the Parties' Agreement

The district court may vacate an arbitration award when "the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). Arbitrators exceed their powers "when the award is 'completely irrational' or exhibits a "manifest disregard of the law.'" *Aspic Engineering & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1166 (9th Cir. 2019). "An award is completely irrational only where the arbitration decision fails to draw its essence from the [parties'] agreement." *Id.* (quotation marks omitted).

"An arbitration award draws its essence from the agreement if the award is derived from the agreement, viewed in light of the agreement's language and context, as well as other indications of the parties' intentions." *Id.* (quotation marks omitted). An arbitrator may enforce a *plausible* interpretation of a contract. *See id.*; *Pac. Motor Trucking Co. v. Auto. Machinists Union*, 702 F.2d 176, 177 (9th Cir. 1983). "What an arbitrator may not do, however, is disregard contract provisions to achieve a desired result." *Aspic Engineering*, 913 F.3d at 1166; *see also id.* at 1168 (vacating arbitration award because arbitrator exceeded his authority by disregarding contract provisions and entering award that directly conflicted with them). "An award that conflicts directly with the contract cannot be a 'plausible interpretation'" and should be vacated. *Pac. Motor Trucking*, 702 F.2d at 177.

II. The Arbitrator Disregarded the Parties' Agreement, Which Explicitly Provided That the Day Rate Bonus Compensated Directional Drillers for Working a 12-Hour Shift

Halliburton compensated the Directional Drillers in accordance with their written "terms of bonus payment." Ex. Q (Joint Ex. 2, CARTER 233 ¶ 2). The undisputed terms of the bonus payment plan, to which employees demonstrated their acceptance and adherence by submitting monthly bonus request forms in accordance with those terms for years on end, unambiguously provided that "[a] full dayrate shall be paid on prorated jobs where the customer pays 12 hours or more on any calendar day." Ex. Q (Joint Ex. 2, CARTER 233 ¶ 2). And the Directional Drillers at all times understood that the day rate applied to a 12-hour shift and not an 8-hour shift. Ex. R (Vol. II, 271:1 (Carter: "We're there to cover a 12-hour shift.")). There was no such thing as an "8-hour shift"; the

nature of the projects entailed alternating 12-hour shifts. If employees worked less than 12 hours, they worked a *fraction* of a "day" under the terms of the employee bonus plan, not a full day consisting of an 8-hour shift. *See* Ex. Q (Joint Ex. 2, CARTER 233 ¶ 2 ("Field Engineers and/or Directional Drillers will receive a ½ dayrate for days when the customer pays a prorated invoice of less than 12 hours service at the start or end of a job.").

The arbitrator found that the "evidence at the hearing demonstrated that the bonuses were fixed in amount and did not vary based on, for example, the number of hours worked or some other performance-based factor." Ex. F (Final Award, 1st Hearing, at 19). But this finding was and is irrelevant to the issue on which millions of dollars turned, which is whether Halliburton compensated Directional Drillers for working 12 hours when they worked a 12-hour shift or, instead, somehow forced employees to work overtime hours without any pay at all. That Directional Drillers received the same day rate bonus even if, as they claimed, they worked *more* than 12 hours has no bearing on the question whether Halliburton paid them for working a 12-hour shift, which it indisputably did.[4] In other words, if an employee worked 13 hours and Halliburton paid him for working 12 hours, he would be entitled to *one* additional hour of pay, not *five* additional hours of pay.

Here, the arbitrator's methodology for calculating damages, which treats the day rate bonus as though Halliburton paid the Directional Drillers for working only eight hours, "conflicts directly" (*Pac. Motor Trucking*, 702 F.2d at 177) with the parties' agreement and the written terms of Halliburton's bonus plan, which expressly provide that a day rate bonus compensates an employee for working 12 hours. Ex. Q (Joint Ex. 2, CARTER 233 ¶ 2). The arbitrator did not seek to interpret the parties' agreement or make any finding that the parties had amended their agreement and the bonus terms. Rather, the arbitrator simply disregarded the undisputed length of the standard 12-hour shift and the undisputed terms providing day rate compensation for 12 hours' work in a calendar

[4] Similarly, the Directional Drillers may argue that they received a day rate bonus when they worked less than 12 hours. This argument is perplexing—the complaint is that although Halliburton agreed to pay the day rate bonus only when employees completed a 12-hour shift, it was at times more generous than its written terms required it to be and paid the day rate bonus anyway. In any event, this argument would have no effect on the essential point that when employees worked a 12-hour shift, Halliburton paid them for working the 12-hour shift, as agreed.

day. Thus, his decision does not draw its essence from the parties' employment agreement, including the written terms governing the compensation to which Carter and Lundy claim entitlement. Therefore, as in other cases in which the arbitrator's decision conflicted directly with the parties' agreement, *see, e.g.*, *Aspic Engineering*, 913 F.3d at 1168; *Pac. Motor Trucking*, 702 F.2d at 177; *Food and Commercial Workers Local 1119 v. United Mkts., Inc.*, 784 F.2d 1413, 1416 (9th Cir. 1986); *Meiswinkel, Inc. v. Laborers' Union Local 261*, 744 F.2d 1374, 1377 (9th Cir. 1984), this Court should vacate the arbitration awards in this case.

To be sure, the arbitrator gave a reason for completely disregarding the parties' agreement that Halliburton would pay day rate bonuses for working 12 hours in a calendar day, just as the arbitrator in *Aspic Engineering* gave a reason for disregarding the parties' contract there. In *Aspic Engineering*, the arbitrator explicitly found that "[t]here was not a true meeting of the minds" with respect to certain subcontracts, which he then declined to enforce in his award. 913 F.3d at 1167. Of course, it is black-letter law that if there is no "meeting of the minds," then no contract is formed. Restatement (Second) Contracts § 17 cmt. c. But the Ninth Circuit did not defer to the arbitrator's contract formation finding, and instead probed his rationale, which included the presence of cultural and language barriers, to assess whether the arbitrator had an adequate ground for disregarding the parties' agreement. *See Aspic Engineering*, 913 F.3d at 1168. Because he did not, his award did not draw its essence from the parties' agreement and the Ninth Circuit affirmed the order vacating the award. *See id.* at 1168-69. If the law were otherwise, arbitrators would not be constrained by the parties' agreement, because it is almost always possible to come up with a reason why an extant contract provision should not be enforced. Because arbitration is a creature of contract, however, courts do not allow arbitrators to exceed their powers by disregarding the parties' agreement unless they have a legally adequate ground to do so.

In this case, the arbitrator essentially claimed that a California court decision—*Alvarado v. Dart Container Corp.*—gave him free rein to disregard the parties' agreement. But *Alvarado* provides no such authority. In that case, employees received an "attendance bonus" of $15 per day of weekend of work. 4 Cal. 5th at 549. In other words, the "attendance bonus" did *not* compensate employees for working 12 hours. By its terms, Dart employees were eligible to receive it even if

they worked no overtime at all. *See id.* at 549, 562. Unlike in this case, the purpose of the "attendance bonus" was *not* to compensate employees for working 12-hour days. Rather, it was "incentive pay for completing a full [8-hour] work shift on a day that is unpopular for working (a Saturday or a Sunday)." *Id.* at 554. Thus, the "attendance bonus" was compensation for working a "regular" 8-hour day, not for working 12 hours, and the Court calculated the overtime rate accordingly. *See id.* at 563-65.

Alvarado itself recognized that the result would be different if, as in this case, the bonus was a payment for overtime hours because "then it might be said that the payment of the bonus itself constitutes *base compensation*, including base compensation for overtime work." 4 Cal. 5th at 568 (emphasis added). And in discussing an earlier Court of Appeal decision, *Skyline Homes, Inc. v. Department of Industrial Relations*, 165 Cal. App. 3d 239 (1985), *Alvarado* endorsed its reasoning, which distinguished between a "weekly salary [that] was intended as compensation for the regular 40-hour workweek" and a weekly salary that was "not intended as compensation for time worked in excess of 40 hours in a week." 4 Cal. 5th at 564. Here, the day rate bonus was clearly *not* intended as compensation for an 8-hour day or a 40-hour week. And while it was not a variable reward based on each hour worked, this was because it was intended to incentivize and constituted payment for a fixed 12-hour shift. In other words, the day rate bonus was unquestionably compensation for overtime hours—because a 12-hour shift includes overtime hours—and *Alvarado* does not permit, much less require, a tribunal to disregard and void that arrangement. *See id.* at 568.

The arbitrator did not rely on anything apart from *Alvarado* for his multimillion dollar decision to disregard the parties' agreement. And because *Alvarado* provides no basis to disregard the parties' agreement and indeed affirmatively demonstrates that the arbitrator should not have done so, his decision was and remains completely irrational, not to mention fundamentally unjust. Again, the undisputed record establishes that the Directional Drillers were paid a *bonus* (on top of their base salary) for working "12 hours" in a calendar day. Ex. Q (Joint Ex. 2, CARTER 233 ¶ 2). Thus, there can be no dispute that they have already received base compensation for working "12 hours," *i.e.*, for working hours in excess of a regular work day. The arbitrator should have calculated overtime in

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accordance with the parties' agreement instead of deciding to pay the employees twice, in violation of their agreement and common sense, without any valid basis.

CONCLUSION

For the reasons stated above, this Court should enter an order vacating the arbitration awards to Aaron Carter and Michael Lundy.

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Respectfully submitted,

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