No. 19-56222

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPTIMUM PRODUCTIONS, a California corporation, et al.,

Plaintiffs and Appellees,

v.

HOME BOX OFFICE, a Division of Time Warner Entertainment L.P. a Delaware Limited Partnership, et al.,

Defendant,

and

HOME BOX OFFICE, INC., a Delaware corporation,

Defendant and Appellant.

On Appeal from the United States District Court
for the Central District of California (Hon. George H. Wu)
No. 2:19-cv-01862

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Estate's brief is premised on a fundamental misunderstanding of the role of the courts in deciding "gateway" issues under the Federal Arbitration Act ("FAA"). On the one hand, the Estate correctly recognizes, as it must, that it is for the court, not an arbitrator, to decide the threshold issues (1) whether a valid, enforceable arbitration agreement exists and, if so, (2) whether the arbitration agreement applies to the dispute (*i.e.*, arbitrability) unless the agreement clearly and unmistakably delegates the arbitrability issue to the arbitrator. *See* Estate Brief ("EBr.") 25, 32. Here, the district court ruled that the parties did not "clearly and unmistakably" delegate the arbitrability issue, ER 87, 100, so there is no question that both of these issues—validity and arbitrability—must be decided by the courts. *See Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

But for the remainder of its brief the Estate goes off the rails, erroneously arguing that, in deciding these issues, courts are barred from analyzing the contract as a whole to determine the validity, enforceability, and scope of the arbitration agreement. EBr. 33–66. Instead, according to the Estate, if a party produces a contract—any contract—that contains an arbitration clause and merely alleges a dispute relating to that contract, that is the end of the story. *Id.* at 41. In other words, under the Estate's misreading of the FAA, the district court is powerless to

analyze the substantive terms of the contract to determine whether the contract has been fully performed (and thus no longer imposes enforceable obligations), whether the contract created a right in perpetuity, whether the parties intended to be bound forever by the arbitration provision, and whether the dispute arises under the arbitration agreement—*i.e.*, anything that the Estate merely *alleges* touches on the contact must be sent to arbitration.

As shown below, the Estate's deeply flawed arguments on this and other issues contradict decades of precedent from the Supreme Court and this Court, and this serious error permeates its brief from start to finish. Indeed, the Estate's attempt to nullify the court's threshold role fails because "[i]t is the court's ***duty*** to interpret the agreement and to determine whether the parties intended to arbitrate [these particular] grievances." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651 (1986) (emphasis added); *see also Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 209 (1991) (stating courts "cannot avoid th[e] duty [to determine arbitrability] because it requires [them] to interpret a provision of a[n] [] agreement"). Here, the district court erred by failing to go beyond the Estate's allegations to interpret the contract, and then compounded that error by misapplying an obsolete presumption of postexpiration arbitrability from *Nolde Bros., Inc v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 252 (1977)—an error the Estate urges on

this Court as well, EBr. 60. In *Litton,* 501 U.S. at 209, the Supreme Court clarified *Nolde* and "refuse[d] to apply that presumption [in favor of arbitration] wholesale in the context of an expired [] agreement, for to do so would make limitless the contractual obligation to arbitrate."

What the Estate seeks is radical, unsupported, and unprecedented: compelled arbitration of its "disparagement" claim relating to HBO's exhibition of the award-winning 2019 documentary *Leaving Neverland* based on an arbitration clause contained in a more than 27-year-old contract relating to a completely different film featuring Michael Jackson, *Live in Bucharest*, which was long ago fully performed, did not recite any intent to apply the arbitration language beyond performance of the underlying contract, did not create a perpetual non-disparagement right, and has nothing to do with *Leaving Neverland*. The Estate cannot cite a single case compelling arbitration in circumstances that are even remotely comparable.

In short, as the district court itself found in granting a stay, "the provision that is called for in arbitration, is a 27-year-old contract that doesn't have anything to do with anything. . . ." ER 35. This Court should reverse.

ARGUMENT

A. The Estate Failed to Meet Its Burden to Establish the Existence of a Valid, Enforceable Arbitration Agreement.

As the Supreme Court recently reiterated, "before referring a dispute to an arbitrator, ***the court*** determines ***whether a valid arbitration agreement exists***." *Henry Schein, Inc.*, 139 S. Ct. at 530 (emphases added). The Estate does not dispute this legal principle and concedes that it must prove "by a preponderance of the evidence" "the existence of an agreement to arbitrate," but contends that "[i]t discharged that burden by producing the Agreement with its embedded agreement to arbitrate." EBr. 25, 33 (internal quotations omitted). The Estate is wrong for several reasons.

First, it engages in a tortured discussion, at times bordering on the metaphysical, regarding the difference between the meaning of the words "validity" and "existence" that is both misguided and beside the point. *Id.* at 40–41. The Estate cites cases like *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006), *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) to argue that a challenge to the "existence" of the agreement can only mean a challenge to contract formation and is for the arbitrator. But none of these cases prevents a court from its carrying out its threshold role to determine whether "a valid arbitration agreement exists," *Henry Schein*, 139 S. Ct. at 530, which is precisely

what HBO asked the district court, and now this Court, to do.[1] Indeed, none of *Buckeye*, *Rent-A-Center*, nor *Prima Paint* addressed the extraordinary and unique situation here, where a party has unearthed a nearly three-decades-old contract relating to a completely different subject matter than the actions at issue, and which does not include any language expanding the application or life of the arbitration provision, and invoked that contract's arbitration clause. No case cited by the Estate rules out the kind of challenge to the validity and enforceability of the 1992 Agreement's arbitration clause that HBO levels here: that it was part of a fully performed, one-shot deal that was over in 1993, which includes no recitation of continuing applicability, and thus has no continuing vitality, validity, or legal force and effect.

HBO's position is consistent with the plain meaning of "valid," which is "having legal efficacy or force." Valid, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/valid (last accessed Aug. 31, 2020); Valid, Black's Law Dictionary (11th ed. 2019) ("Legally sufficient; binding."). Here, no arbitration agreement "having legal efficacy or force" exists because the arbitration provision is part of the 1992 Agreement that is a dead letter, as it was

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[1] Thus, contrary to the Estate's assertion, HBO does not contend that the Supreme Court in *Henry Schein* "somehow overruled" these other cases, EBr. 47—"*sub silientio* [sic]," *id.* 49, or otherwise—nor does it seek to revive the "wholly groundless" exception rejected in *Henry Schein*.

fully performed and expired nearly 30 years ago. Valid, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/valid (last accessed Aug. 31, 2020). Indeed, after a contract is "fully performed" it has "no vitality." *Hidden Harbor v. Am. Fed'n of Musicians*, 134 Cal. App. 2d 399, 402 (1955); 30 Williston on Contracts § 75:2 (4th ed.) ("After a written contract has [] expired by its terms . . . ***the contract ceases to exist***. . . ." (emphasis added)); *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 429 (2015) (describing general rule that "contractual obligations will cease, in the ordinary course, upon termination of the [] agreement" (internal quotations omitted)); *see* HBO Opening Br. ("HBO Br.") 22–28. In the face of this authority, the Estate fails to cite any case for its remarkable assertion that "[t]he contract continues to this day and the contract is still in force to this day. . . . we're not talking about an old contract that doesn't exist anymore." ER 46–47.[2]

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[2] Lacking case law—and without any post-performance conduct over multiple decades to evidence an understanding of continuing validity, *see* HBO Br. 10–12, 40–41—the Estate offers several inapposite hypotheticals. EBr. 56–59. But none illuminates the question of whether, in 1992, the parties intended for the arbitration clause to last in perpetuity. *Cf. Just Film, Inc. v. Merchant Servs., Inc.*, No. C 10-1993 CW, 2011 WL 2433044, at *4 (N.D. Cal. June 13, 2011) ("[t]he dead hand of a long-expired arbitration clause cannot govern forever" (internal quotations omitted)). The Estate's hypotheticals also suggest that the only remedy the parties have is under the 1992 Agreement—but the law recognizes other causes of action, particularly for a number of the hypotheticals the Estate raises. There is no reason to believe that upon contract expiration a party is left entirely without recourse.

Second, as it did below, the Estate incorrectly suggests that HBO is challenging the validity of the 1992 Agreement as a whole, not the arbitration agreement within it, and that *Buckeye*, *Rent-A-Center*, and *Prima Paint* therefore mandate the validity issue be decided by the arbitrator. EBr. 45–51. But that misstates HBO's arguments. In this Court, *see* HBO Br. 22–28, and in the district court, *see* ER 79–81, 112, 116–120, HBO has made clear it is challenging the *arbitration agreement itself* as expired and therefore invalid because the arbitration provision does not provide for its survival and because it was part of the 1992 Agreement, which had been fully performed decades before.

HBO's point is not that the district court should have decided the validity of the 1992 Agreement as a whole but rather that, in deciding whether the arbitration provision still had any legal effect in 2019 when the Estate rediscovered it and attempted to invoke it, the court should have considered the arbitration provision in the context of the rest of 1992 Agreement. This is a basic canon of California law that applies in evaluating arbitration agreements, as this Court recently recognized. In *International Brotherhood of Teamsters v. NASA Services, Inc.*, 957 F.3d 1038, 1042 (9th Cir. 2020) ("*NASA Services*"), this Court explained that, in determining whether a valid agreement to arbitrate exists, "most importantly, 'the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' Cal. Civ. Code § 1641."

This Court found that "California case law consistently reaffirms the primacy of this principle," *id.* at 1042, and then went on to conduct a detailed analysis of the substantive provisions of the contract and decided, based on that analysis, that no valid arbitration agreement existed, *id.* at 1044–50. *See also Cnty. of Marin v. Assessment Appeals Bd.*, 64 Cal. App. 3d 319, 325 (1976) ("the contract must be construed as a whole and the intention of the parties must be ascertained from the consideration *of the entire contract*, not some isolated portion" (emphasis added)).

Third, the Estate faults HBO for relying on general contract cases interpreting and applying California law, EBr. 36, 50, but as this Court held in *NASA Services*, 957 F.3d at 1042, "[f]undamental precepts of contract interpretation under California law (and not unique to California) guide our disposition of this case." *See also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015) (confirming that, in assessing an arbitration provision, "California case law itself clarifies any doubt about how to interpret the language"); *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) ("State contract law controls whether the parties have agreed to arbitrate."); ER 211 (1992 Agreement states it is "governed by, and construed in accordance with, the laws of the State of California").

These "fundamental precepts" include that "[a] contract will be construed to impose an obligation in perpetuity only 'when the language of the agreement

compels that construction.'" *Nissen v. Stovall-Wilcoxson Co.*, 120 Cal. App. 2d 316, 319 (1953) (emphasis in original); *M & G Polymers*, 574 U.S. at 441 (confirming "the traditional principle that courts should not construe ambiguous writings to create lifetime promises"); *Aspex Eyewear, Inc. v. Vision Serv. Plan*, 472 F. App'x 426, 427 (9th Cir. 2012) ("'[A] construction conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract.'" (quoting *Nissen*)), and that "[f]ull performance of an obligation, by the party whose duty it is to perform it . . . extinguishes it." Cal. Civ. Code § 1473; *see, e.g.*, *Giles v. Horn*, 100 Cal. App. 4th 206, 228 (2002) (noting contracts were fully performed and expired). As HBO demonstrated in its Opening Brief, at 28–32, these principles mandate reversal.

Fourth, the Estate fails to distinguish HBO's cases where courts confirmed the validity of arbitration provisions where the parties *specifically* provided for post-performance survival. *See* HBO Br. 31 n.8. For example, In *Microchip Technology Inc. v. U.S. Phillips Corp.*, 367 F.3d 1350 (Fed. Cir. 2004), the Federal Circuit concluded "that under the Supreme Court's precedent the question of whether an arbitration agreement has expired *is for the court to decide*, even if this requires interpretation of the language of the agreement." *Id.* at 1358–59 (emphasis added) (collecting cases). The court went on to determine that the arbitration clause had not expired because it specifically stated that it covered

"disputes arising out of or in connection with the interpretation or execution of [the] Agreement *during its life or thereafter*." *Id.* at 1359 (emphasis in original) (internal quotations omitted).

In an attempt to distinguish *Microchip Technology*, the Estate cites *Huffman v. Hilltop Companies, LLC*, 747 F.3d 391 (6th Cir. 2014) for the proposition that courts may find arbitration clauses survive "even if the arbitration clause is *not* listed in a contract's survival clause." EBr. 54 n.12 (emphasis in original). But this argument only proves HBO's point. It stands to reason—as *Huffman* found—that courts must consider the "contract as a whole" and that an arbitration clause may have some post-expiration validity where a "survival clause" states that other contract rights and obligations endure after expiration. *Huffman*, 747 F.3d at 397 ("[w]e believe that *considering the contract as a whole*—the survival clause and its relationship to the other clauses in the agreement—is the correct way to determine" expiration of the arbitration clause (emphasis added)). Here, by contrast, the 1992 Agreement does not contain a survival clause. *See* ER 203–18. This only confirms the limited nature of the 1992 Agreement, which was about a one-time exhibition of *Live in Bucharest* that was fully performed after the Holdback Period expired, one year later. Therefore, *Huffman* only supports HBO's argument and undermines the Estate's.

Finally, the Estate incorrectly relies on *McKinney v. Emery Air Freight Corp.*, 954 F.2d 590, 594–95 (9th Cir. 1992) and several other labor cases involving termination disputes under collective bargaining agreements to sweepingly declare that "whether a contract has expired or has been terminated or repudiated . . . is for the arbitrator" if the arbitration clause is broad enough to encompass such disputes. EBr. 26 (quoting *McKinney*, 954 F.2d at 593). As a threshold matter, because the Estate did not expressly make this argument below, this Court need not consider it. *See Conservation Northwest v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013) (argument mentioned but buried in a brief at the district court level was forfeited).

Moreover, while labor arbitration cases can sometimes be useful in interpreting the FAA's application to commercial contract disputes, these cases are not. In *McKinney* itself, the employees who sued were not arguing that an arbitration agreement had expired and was no longer valid or legally enforceable, but rather had filed a lawsuit seeking a declaration that a "collective bargaining agreement was in full force and effect, and damages for breach thereof." 954 F.2d at 591. Unlike this case, it truly and explicitly *was* a case about expiration of the entire agreement itself, not the arbitration provision; *i.e.*, whether the collective bargaining agreement had been terminated literally was a merits issue. *Id.*

Moreover, while the labor agreement's arbitration clause in *McKinney* was "unquestionably broad, covering '[a]ny grievance or controversy affecting the mutual relations of [the parties],'" *id.* at 593—far beyond the provision here, which is limited to disputes concerning the 1992 Agreement—this Court did *not* rely on the clause's broad language as the basis for compelling arbitration. The Court itself first decided that "a labor contract between Local 85 and [the employer] did exist at one time," *id.* at 595, but when it then turned to the arbitrability of the issue whether "the contract remained in effect after the consolidation of the work forces," it relied on unique principles of "industrial common law" and the "particular expertise" of labor arbitrators. *Id.* (internal quotations omitted). In doing so, *McKinney* emphasized that a labor agreement is "the method of implementing our national labor policy, but *it is not a run-of-the-mill commercial contract*" and is "'essentially an instrument of government.'" *Id.* at 594 (internal quotations omitted) (emphasis added). Thus, "'the *industrial* common law'" governs, and "[t]o interpret such a[] [labor] agreement and to determine whether a contract has been terminated or abrogated, '[t]he governing criteria *are not judge-made principles of the common law* but the practices, assumptions, understandings, and aspirations of the going *industrial* concern.'" *Id.* (emphases added). The Court also emphasized that "it is the general understanding . . . that *skilled labor arbitrators, rather than judges*, are better positioned and equipped to identify and

to apply the common law of the shop." *Id.* at 595 (emphasis added). Accordingly, the Court stated its "belie[f] that [*McKinney*] is a paradigm case to refer to the particular expertise of [labor] arbitrators, who will be able to sift through the facts and apply . . . 'the industrial common law.'" *Id.*

The other labor cases the Estate cites from this Court serve it no better, as they too involve labor-specific issues regarding disputes over collective bargaining agreement termination clauses—often where the labor union and employer have an ongoing relationship notwithstanding contract expiration—rather than the issue whether full performance of an old, single-purpose contract nullified its validity and legal effect. *See Bhd. of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507 (9th Cir. 1987) ("*Interstate*") (stating that "the *real dispute* is over the proper meaning or interpretation of the *termination clause*" in a dispute arising just three months after alleged termination (emphases added));[3] *see also Int'l Alliance of Theatrical Stage Employees v. InSync Show Prods., Inc.*,

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[3] In *Interstate*, this Court relied on the fact that the arbitration clause at issue "is even broader than the ordinary 'broad arbitration clause,'" in which the parties agreed (like the clause in *McKinney*) to arbitrate "'any grievance or controversy affecting the mutual relations of the [parties],'" to find the "general rule that courts decide questions of arbitrability" to be inapplicable. 832 F.2d at 510 n.2, 511 (distinguishing it from the type of clause that "applies to any disputes or grievances arising out of the [] agreement"). In other words, the court found the arbitrability issue had been delegated to the arbitrator—further distinguishing it from the present case.

801 F.3d 1033, 1042 (9th Cir. 2015); *Camping Constr. Co. v. Dist. Council of Iron Workers*, 915 F.2d 1333 (9th Cir. 1990).

The D.C. Circuit's decision in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 758 (D.C. Cir. 1988)—which concerned whether a written agreement had expired or had "remained in effect, having been extended by numerous 'Amendment Agreements' signed by both parties"—does not help the Estate either. In fact it supports HBO. *National Railroad* dealt with an *ongoing* commercial relationship between the parties in which they disputed whether their written agreement (and its arbitration clause) governed or whether it had expired and the parties "had simply operated under an 'informal arrangement.'" *Id.* Moreover, the D.C. Circuit "recognize[d] that even a contract with a very broad arbitration clause is usually meant to have a finite duration. . . ." *Id.* at 762. And "even if the contract contains no expiration date, if the party resisting arbitration makes a clear showing that the parties have agreed to terminate the agreement containing the arbitration clause (or even just the clause itself), then *the court* must decide the contract duration issue itself, rather than sending it to arbitration." *Id.* at 763 (emphasis added). Here, HBO has made such a showing by providing evidence that the parties fully performed the 1992 Agreement and that the arbitration agreement did not include any language extending its applicability.

HBO Br. 40–43.

For all these reasons, HBO is not, as the Estate contends, challenging the present validity of the arbitration clause so as to "avoid the presumption of arbitrability." EBr. 39. It is simply seeking to enforce the principle that the presumption applies "only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 303 (2010).

B. The 1992 Arbitration Agreement Does Not Cover a Dispute Over 2019's *Leaving Neverland*.

Even assuming the 1992 Agreement's arbitration clause could be deemed "valid" because it once existed and bound the parties to long-since-performed obligations, that leaves the question whether it actually covers this particular dispute, an issue that is also for the courts to decide in this case, as the district court ruled (ER 87, 96) and the Estate does not dispute.

As with its validity arguments, the Estate takes the position that the district court had to don blinders and decide the arbitrability issue—"that is, whether the[] arbitration agreement applies to the particular dispute," *Henry Schein*, 139 S. Ct. at 527—and is forbidden from analyzing the rest of the contract to determine whether the dispute here falls within the scope of the arbitration agreement. As shown

below, that argument is flatly incorrect and, when the proper legal principles are applied, it is clear that the dispute in 2019 over *Leaving Neverland* does not fall within the scope of the 1992 Agreement's arbitration clause relating to the one-time exhibition of *Live in Bucharest.*

1. The Court Must Determine Arbitrability by Examining the 1992 Agreement as a Whole.

The Estate incorrectly contends the district court and now this Court are prohibited from analyzing the 1992 Agreement to determine the scope of its arbitration provision and whether it covers the present dispute. EBr. 38 (asserting "the dispute over whether the Agreement has expired must be arbitrated" because it goes to the merits and the court's role is "strictly limited to determining arbitrability" (internal quotations omitted)). That position is contrary to decades of Supreme Court and Ninth Circuit precedent holding that this is precisely what the Court *must* do. "It is the court's ***duty*** to ***interpret*** the agreement and to determine whether the parties intended to arbitrate [these particular] grievances. . . ." *AT&T Techs.*, 475 U.S. at 651 (emphases added); *see also Salinas Cooling Co. v. Fresh Fruit and Vegetable Workers, Local P-78-A*, 743 F.2d 705, 707 (9th Cir. 1984) (policy favoring arbitration "does not relieve the [] court of its duty to make the arbitrability determination").

In discharging this duty, courts have routinely conducted this threshold contract analysis and found certain disputes to fall outside an arbitration

provision's scope. In *Litton*, 501 U.S. at 190, the Supreme Court engaged in a substantive analysis of the contract at issue, rejecting the notion that courts could not interpret an agreement to determine whether disputes fall within its arbitration clause. When the National Labor Relations Board brought suit against Litton to enforce an order requiring arbitration, the Court looked to the contract at issue to determine whether the dispute actually "involve[d] rights which accrued or vested under the Agreement. . . ." *Id.* at 209. The labor union's argument mirrored the argument that the Estate makes in this case: that "we err in reaching the merits of the issue whether the post-termination grievances arise under expired agreement because, it is said, that is an issue of contract interpretation to be submitted to an arbitrator. . . ." *Id.* The Court squarely rejected that argument, declaring that it could not "avoid th[e] duty [to determine arbitrability] [just] because it requires [the Court] to interpret a provision of a[n] [] agreement." *Id.* After interpreting the contract, the Court found the NLRB's claims did not arise under the arbitration provision because they did not relate to any existing contractual right. *Id.* at 210.

In *Granite Rock Co.*, 561 U.S. at 287, an employer sued a union for violating a no-strike clause in a collective bargaining agreement. The parties disputed when the collective bargaining agreement was ratified, and the union further argued that the dispute was subject to the collective bargaining agreement's arbitration provision. *Id.* at 294. The Supreme Court, in deciding the arbitrability issue,

looked to the arbitration provision and the agreement's surrounding language to hold that the dispute fell "outside the scope of the parties' arbitration clause on grounds the presumption favoring arbitration [could not] cure." *Id.* at 307 (finding the arbitration provision's "'arising under'" language was not as broad as the union suggested, even if the language "could *in isolation* be construed to cover th[e] dispute" (emphasis added)).

Other cases from the Supreme Court and this Court have engaged in this threshold analysis and concluded the dispute was beyond the arbitration clause. *See Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241–42 (1962) (holding it is "unquestionably clear that the contract [] involved [wa]s not susceptible to a construction that the company was bound to arbitrate its claim for damages" because "the parties did not intend to commit all of their possible disputes and the whole scope of their relationship to the grievance and arbitration procedures established"); *Standard Concrete Prods., Inc. v. General Truck Drivers, Office, Food and Warehouse Union, Local 952*, 353 F.3d 668, 675 (9th Cir. 2003) (affirming determination that the employer plaintiff was not obligated to arbitrate because the arbitration provision only applied to employee grievances); *Teamsters Local 315 v. Union Oil Co. of Cal.*, 856 F.2d 1307, 1314 (9th Cir. 1988) (analyzing contract language and bargaining history to find an employer did not intend to "submit its authority to determine the medical qualification of its workforce to

arbitration"); *Winery, Distillery and Allied Workers, Local 186 v. Guild Wineries and Distilleries*, 812 F. Supp. 1035, 1037 (N.D. Cal. 1993) (holding that when determining whether the "dispute has its real source in the contract," the court "is authorized to interpret the agreement to the extent necessary to decide whether the dispute is governed by the arbitration clause," and finding a dispute that arose two years after expiration was not arbitrable).

Courts often undertake the same analysis and find disputes do, in fact, fall within the scope of the arbitration provision in question. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546–47 (1964) (stating that a court should decide whether an arbitration agreement survived a corporate merger by interpreting the agreement, and holding the employer was required to arbitrate); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (explaining that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," and finding the dispute was subject to arbitration after analyzing the agreement).

The Estate seeks to defer all such interpretive questions to an arbitrator by asserting that HBO is seeking a ruling on the merits. EBr. 38. Not so. As the cases above demonstrate, courts often must necessarily make preliminary interpretative determinations regarding the contract and the arbitration provision to decide whether a particular dispute is arbitrable and that will, as in many other

contexts, sometimes "entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. . . . Nor is there anything unusual about that consequence." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351–52 (2011) ("The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation."); *see, e.g.*, *Litton*, 501 U.S. at 210 n.4 ("[O]ur decision that the dispute does not arise under the Agreement does, of necessity, determine that as of August 1980 the employees lacked any vested contractual right to a particular order of layoff. . . .").

2. Examining the 1992 Agreement as a Whole Confirms the Estate's Claims Do Not "Arise Under" the Arbitration Clause.

Pointing to the non-disparagement sentence in the 1992 Agreement's Confidentiality Provisions addendum, the Estate asserts "there can be no question" that the arbitration clause covers this dispute because it "alleges that HBO breached the Agreement[, and] HBO disputes that." EBr. 35. But this type of superficial inquiry into arbitrability is plainly insufficient, as the numerous cases in the previous section confirm. By failing to interpret the agreement as a whole, and by relying on the Estate's bare *allegations* to assess arbitrability, the district court erred. *See* ER 27 (presuming arbitrability "because Plaintiffs' claims *allegedly* arise under the Disparagement Clause of the Agreement" (emphasis added)). Indeed, *Litton* confirmed that courts must look beyond mere allegations to the "real source" of the claims at issue. 501 U.S. at 205 ("The object of an arbitration clause

is to implement a contract, not to transcend it."). Had it gone beyond the Estate's allegations and analyzed the Agreement as a whole, the district court would have concluded—as this Court should—that the parties did not create a perpetual non-disparagement obligation, and there is thus nothing to arbitrate.[4]

As HBO explained in its Opening Brief, 9–10, the non-disparagement sentence appears in a Confidentiality addendum to the main agreement, and imposed a limited restriction that "HBO shall not make any disparaging remarks concerning Performer or any of his representatives, agents or business practices or do any act that may harm or disparage or cause to lower in esteem" Mr. Jackson's reputation. ER 217. Basic principles of contract law, and the language, structure and purpose of the Agreement, demonstrate that the parties in 1992 did not intend for this provision to apply to HBO's exhibition of *Leaving Neverland* in 2019 and thus this dispute is not arbitrable.

First, the narrow scope of the 1992 Agreement is apparent on its face—this was a limited contract to exhibit *Live in Bucharest* on HBO "one time only" on

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[4] The Estate's assertion that its breach claims are not limited to the non-disparagement sentence, EBr. 20 n.6, is groundless. The Prayer for Relief in the Estate's Petition seeks to arbitrate "claims for breach of the non-disparagement clause in the Agreement and breach of the covenant of good faith and fair dealing therein," and demands damages "caused by HBO's reprehensible *disparagement* of Michael Jackson." ER 189–90 (emphasis added).

October 10, 1992, "and at no other time." ER 203–04. Its provisions, including the non-disparagement sentence, must be read in that context. *See* Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.").

Second, the non-disparagement obligation did not endure after the 1992 Agreement was fully performed. *See* Cal. Civ. Code § 1473 ("Full performance of an obligation, by the party whose duty it is to perform it . . . extinguishes it."); *M & G Polymers*, 574 U.S. at 441–42 ("contractual obligations will cease, in the ordinary course, upon termination of the . . . agreement" (internal quotations omitted)); *Litton*, 501 U.S. at 206 ("an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied").

Third, even if the non-disparagement obligation could have survived for a reasonable period after performance, nothing in the agreement states that it would survive after Mr. Jackson's death, and certainly not in perpetuity. As a result, it is a nullity, and there is nothing to arbitrate. *Nissen*, 120 Cal. App. 2d at 319 ("A contract will be construed to impose an obligation in perpetuity *only* 'when the language of the agreement *compels* that construction.'" (citation omitted) (first emphasis added)); *Aspex Eyewear*, 472 F. App'x at 427 ("'[A] construction conferring a right in perpetuity will be *avoided* unless compelled by the

unequivocal language of the contract.'" (quoting *Nissen*, 120 Cal. App. 2d at 319) (emphases added)).

Fourth, there is no post-performance conduct to suggest that the parties to the 1992 Agreement believed it had any force after the Holdback Period expired in October 1993 and before the Estate filed its Petition in February 2019, and the Estate cites none. On the contrary, HBO was required to return all videotapes of the Bucharest concert no later than 30 days after exhibiting the concert special, ER 204, and there is no dispute that HBO fully performed these obligations, HBO Br. 7. When the Estate sent its lengthy letter to HBO objecting to *Leaving Neverland*, on February 7, 2019, it never even mentioned the 1992 Agreement or a non-disparagement claim, despite acknowledging that HBO had previously "partnered with Michael to immense success." ER 200; HBO Br. 10–12. The first time the Estate ever mentioned the 1992 Agreement or arbitration was when it filed its Petition, *in court*, on February 21, 2019, and only *afterward* did it write HBO and ask if it would agree to arbitrate. ER 134–35. These are not the actions of a party that believed the 1992 Agreement's non-disparagement clause applied to *Leaving Neverland*; instead, they are consistent with a belief that Mr. Jackson's limited, one-time-only partnership with HBO decades earlier had nothing to do with the exhibition of an entirely separate documentary in 2019.

Fifth, the Estate cites no case providing that a non-disparagement provision—which implicates the waiver of core First Amendment rights—can constrain a party in perpetuity without language clearly and expressly so providing. *Cf. Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) (First Amendment rights may be deemed waived only "upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent."). Taking the 1992 Agreement as a whole, it is abundantly clear that HBO did not waive its right to ever comment on or exhibit newsworthy information about Mr. Jackson for all time. *See Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n*, 177 Cal. App. 3d 726, 730 (1986) (holding that California law requires courts to "view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach'"); *see also Trump v. Trump*, --- N.Y.S.3d ----, No. 22020-51585, 2020 WL 4212159, at *11, *15 (N.Y. Sup. Ct. July 13, 2020) (holding nearly 20-year-old non-disclosure agreement could not be invoked to block publication of newsworthy 2020 memoir where "the Agreement ha[d] no time limits"). Because it would be absurd to construe the non-disparagement sentence as conferring a perpetual right, there is no right for the Estate to arbitrate. *See* Cal. Civ. Code § 1638 ("The language of a

contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.").[5]

Finally, the plain meaning of the non-disparagement sentence is to constrain HBO from making disparaging "***remarks***" in the context of its exhibition of *Live in Bucharest*, for example, in marketing and promotional interviews. ER 217 (emphasis added). The Estate points to the clause that follows, which states that HBO shall not "do any act" that may harm or disparage Jackson. *Id.* But that vague catch-all must be read in the context of and informed by the limited term "remarks" that comes before it, and may not swallow it whole. *See* Cal. Civ. Code. § 3534 ("Particular expressions qualify those which are general."); *Martin v. Holiday Inns, Inc.*, 199 Cal. App. 3d 1434, 1437 (1988) (noting under *ejusdem generis* maxim that "where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable *only to persons or things of the same general nature or class as those enumerated*"

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[5] Interpreting the 1992 Agreement to confer perpetual rights would lead to other absurdities. For example, it provides that "[f]or purposes of advertising, promoting and publicizing the Program, HBO shall have the right to: (i) use and authorize others to utilize Performer's name, approved likeness; . . . [and] (ii) require [TTC] to provide a reasonable number of photographs of Performer." ER 207. Like the non-disparagement sentence, this provision does not specify that it expires, yet it would defy common sense to provide HBO rights in perpetuity. *Cf. Baine v. Cont'l Assurance Co.*, 21 Cal. 2d 1, 5 (1942) (contracts must not be interpreted to "lead to absurd and obviously unintended results").

(internal quotations omitted) (emphasis added)). As a result, "do any act" is limited, by law, to "remarks" that HBO might make in the context of filming, promoting, or exhibiting *Live in Bucharest*, and does not apply to the exhibition of an entirely separate documentary, *Leaving Neverland*, nearly thirty years later. ER 217; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (employing the maxim *ejusdem generis* to interpret the provisions of the FAA itself). The principles behind this maxim are particularly appropriate here, where the Estate advances a radically expansive view of the non-disparagement sentence to attempt to constrain HBO's First Amendment rights in perpetuity and evade California's ban on post-death defamation claims.

The Estate's attempt to find a link between the 2019 documentary and the 1992 concert special—by references to footage relating to the Dangerous World Tour, but not any actual filmed footage from *Live in Bucharest*, EBr. 17–18—is just grasping at straws. The two films have nothing to do with each other. Because the Agreement itself reveals that the parties did not intend to create a perpetual non-disparagement right disconnected from the one-time exhibition of *Live in Bucharest*, it is equally clear that they did not intend to agree to arbitrate unrelated non-disparagement claims in perpetuity.

3. There Is No Presumption of Postexpiration Arbitrability Here.

Throughout its brief, the Estate makes the same critical error that the district court did, quoting the Supreme Court's description of its earlier holding in *Nolde* that there is "'a presumption in favor of postexpiration arbitration of matters unless "negated expressly or by clear implication."'" EBr. 60 (quoting *Litton*, 501 U.S. at 204 (in turn quoting *Nolde*, 430 U.S. at 252)). The Estate, however, leaves off the rest of the sentence that it is quoting from *Litton*: "but that conclusion was limited by the *vital qualification* that arbitration was of matters and *disputes arising out of the relation governed by contract.*" 501 U.S. at 204 (emphases added). And *Litton* "refuse[d] to apply that presumption wholesale in the context of an expired [] agreement, for to do so *would make limitless* the contractual obligation to arbitrate." *Id.* at 209 (emphasis added); *see also id.* at 201 (noting that if "parties who favor [] arbitration during the term of a contract also desire it to resolve *postexpiration disputes*, the parties can *consent* to that arrangement *by explicit agreement*" (emphases added)); *id.* at 211 (Marshall, J., dissenting) (noting that *Litton* "turns *Nolde* on its head . . . [and] requires courts to reach the merits of the underlying posttermination dispute in order to determine whether it should be submitted to arbitration").[6]

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[6] Even before *Litton* significantly limited *Nolde*'s presumption of postexpiration arbitrability, the Seventh Circuit noted that "the presumption weakens as the

Therefore, because this dispute does not "aris[e] out of the relation governed by [the] contract," *Litton*, 501 U.S. at 204, the presumption of postexpiration arbitrability simply does not apply to this long-expired agreement.[7]

CONCLUSION

Because the 1992 Agreement lacks an arbitration clause that extended beyond performance of the underlying obligation and this dispute does not arise under its arbitration clause, the Court should reverse the district court's order compelling arbitration of the Estate's claims and remand with instructions to deny the Estate's Motion to Compel and to dismiss its Petition with prejudice.

Dated: August 31, 2020 Respectfully submitted,

s/ Theodore J. Boutrous, Jr.

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time between expiration and grievance events increases." *Local 703, Int'l Bhd. of Teamsters v. Kennicott Bros. Co.*, 771 F.2d 300, 303–04 (7th Cir. 1985) (holding that grievances raised just *six months* after an agreement's expiration were not arbitrable).

[7] The Estate's citation to cases like *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999) does not alter this conclusion, as it simply restates *Litton*'s "arising under" test, and the result is therefore the same—the Estate's postexpiration claims are not arbitrable.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Appellant's Reply Brief is proportionately spaced, has a typeface of 14 points, and contains 6839 words, excluding the portions excepted by Fed. R. App. P. 32(f), according to the word count feature of Microsoft Word used to generate this brief.

Dated: August 31, 2020

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2020, I filed the foregoing Appellant's Reply Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Theodore J. Boutrous, Jr.
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