Case Nos. 80427 & 80831

In the Supreme Court of Nevada

In the Matter of the Petition of CLA PROPERTIES LLC.
SHAWN BIDSAL, Appellant, *vs.* CLA PROPERTIES LLC, Respondent.
CLA PROPERTIES LLC, Appellant, *vs.* SHAWN BIDSAL, Respondent.

APPEAL

from the Eight Judicial District Court, Clark County, Nevada
The Honorable JOANNA S. KISHNER, District Judge
District Court Case No. A-19-795188-P

APPELLANT SHAWN BIDSAL'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Shahram Bidsal aka Shawn Bidsal is an individual. James E. Shapiro and Aimee M. Cannon of Smith & Shapiro, PLLC represent him here and in the district court. Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith at Lewis Roca Rothgerber Christie, LLP represent Bidsal before this Court.

Dated this 24th day of November, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Treatises

Other Authorities

JURISDICTION

Shawn Bidsal appeals from the December 6, 2019 order granting a petition for the confirmation of an arbitration award and denying Bidsal's opposition and counterpetition to vacate the arbitrator's award. The award constitutes a final, appealable judgment under NRAP 3A(b)(1) and NRS 38.247(c).

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court because it involves the extent to which an arbitrator's award is insulated from judicial review when it imposes a specific-performance remedy that the parties expressly rejected and when the parties' arbitration agreement prohibits the arbitrator from entering such an award. The assumption among some of the district courts that such an award merits little or no review is an issue of statewide public importance (NRAP 17(a)(12)) that requires guidance from this Court.

ISSUES PRESENTED

1. Does an arbitrator manifestly disregard the law when he substitutes for the parties' written agreement a rough concept of "Dutch

auction," divorced both from the language of the contract and in disregard of the parties' express rejection of such a provision?

2. Considering the overwhelming evidence that Bidsal did not draft Section 4.2, was the arbitrator's determination that ambiguity must be construed against Bidsal as the drafter arbitrary and capricious?

3. Is an arbitrator's award insulated from review even when the parties' arbitration agreement expressly limits the kinds of damages awards the arbitrator can make, and the specific-performance award here exceeds the arbitrator's powers?

STATEMENT OF THE CASE

Bidsal appeals from a district court order confirming an arbitration award and entering judgment, the Honorable Joanna S. Kishner, District Judge of the Eighth Judicial District Court, Clark County, presiding. That judgment confirmed the Final Award entered by the Honorable Stephen E. Haberfeld, in arbitration proceedings.

This dispute arises from Bidsal's desire to buy out CLA, the other member of GVC, a real estate investment LLC that has two members: Bidsal and CLA. GVC's operating agreement contains a provision, Article V, Section 4, governing this scenario, where one member wishes to buy out the other. Negotiations over this provision lasted several months. During these negotiations, GVC's counsel drafted "Dutch Auction" language on numerous occasions, and each time Bidsal and CLA rejected that language. CLA then took control from GVC's counsel and drafted the buy-sell language that appears in GVC's final operating agreement. Bidsal reviewed CLA's draft language, but never revised it. In the final GVC operating agreement, Article V, Section 4 sets forth a procedure ensuring that an initial offer from one member to buy out the other results in **someone** buying the interest of the other, subject to an

appraisal procedure that protects members from having to sell their interests for an unfair price.

In 2017, after leveraging his experience and expertise to realize profits for the LLC over the course of several years, Bidsal offered to purchase CLA's interest in GVC for a price based on a $5 million valuation. Having offered to buy CLA's interest, Bidsal understood that, pursuant to the operating agreement, CLA could either accept the offer, agree to sell at an appraisal-determined valuation, or counteroffer to purchase Bidsal's interest. Bidsal hoped to purchase CLA's interest and become sole owner of GVC, but took comfort from the operating agreement's appraisal procedure. This procedure ensured that, even if CLA counteroffered to buy Bidsal's interest, he could not be compelled to sell his interest without the benefit of the appraisal procedure.

CLA had other plans. After receiving the offer from Bidsal, CLA commissioned an appraisal in secret, without invoking the operating agreement's appraisal procedure. Upon learning GVC's property was worth more than originally thought, CLA demanded that Bidsal sell his interest to CLA at a price based on a $5 million valuation. CLA insisted

the operating agreement required Bidsal to sell at that price, then demanded arbitration when Bidsal invoked the appraisal procedure.

The arbitrator concluded the disputed operating agreement provision was ambiguous and, finding that Bidsal was the principal drafter, construed the disputed provision against him. Relying on that finding and an extrinsic "rough justice" standard derived from typical Dutch Auction provisions, the arbitrator ordered specific performance of the purportedly ambiguous agreement—ordering Bidsal to sell his GVC interest to CLA at a price based on a $5 million valuation. The district court confirmed the award and entered judgment.

Bidsal appeals.

STATEMENT OF FACTS

Benjamin Golshani and Appellant Shawn Bidsal are cousins. (8 App. 1930:18-23.) Golshani is the sole manager and member of Respondent CLA Properties, LLC. (1 App. 9, ¶ 3.) CLA and Bidsal are the members of Green Valley Commerce, LLC ("GVC"). (*Id.*)

A. The Joint Venture

By 2010, Bidsal had established himself in the real estate investment and management business and developed an infrastructure for

purchasing, selling, and managing commercial real estate. (9 App. 2243:15-2244:16.) In 2010, Golshani, a real estate novice, approached Bidsal to discuss real estate business opportunities. (9 App. 2246:14-2247:8.)

Bidsal later agreed to partner with Golshani—through Golshani's LLC, CLA—to purchase real estate properties and mortgaged back deeds of trust and notes (the "Joint Venture"). (9 App. 2248:18-2249:11; 1 App. 9, ¶ 3.) CLA would invest seventy percent (70%) of the funds for the Joint Venture, but agreed that the profit from the venture would be split equally. (8 App. 1942:21-1944:12.) Bidsal would invest the remaining 30%, but also contribute valuable sweat equity by finding deals, subdividing properties to maximize value, and managing the properties. (9 App. 2006:13-2008:6.)

After agreeing to the Joint Venture, Bidsal located a commercial property at 3 Sunset Way, Henderson, Nevada 89014 (the "Green Valley Commerce Center"). (10 App. 2256:9-2257:3.) The loan against the Green Valley Commerce Center was in default, which presented an opportunity to obtain the loan and the underlying collateral at an exceptional value. (9 App. 2250:3-10 App. 2251:2.) However, these types of

deals require a great deal of work and experience to convert the note to fee simple title—experience that Bidsal had. (*Id.*)

On May 26, 2011, Bidsal formed Green Valley Commerce Center, LLC ("GVC"). (1 App. 219; 10 App. 2253, 356:13-357:15.) Shortly thereafter, GVC purchased the note secured by a deed of trust against the Green Valley Commerce Center. (10 App. 2253, 357:21-358:6.) Bidsal was ultimately successful in converting the note into a deed-in-lieu of foreclosure for the underlying property (10 App. 2255, 358:4-6, 10 App. 2260, 363:20-25) and, on September 22, 2011, GVC obtained title to the Green Valley Commerce Center. (1 App. 221-224.)

B. The Draft GVC Operating Agreement

In June 2011, Bidsal and CLA contacted David LeGrand, an attorney, for assistance preparing a GVC operating agreement. (10 App. 2257, 360:9-361:8.) After discarding a template operating agreement originally provided by Jeff Chain, a business associate of Bidsal, LeGrand created his own proposed operating agreement for Bidsal and CLA to consider. (*Compare* 1 App. 226-250 *with* 2 App. 252-271.) The template operating agreement thereafter went numerous revisions.

On June 17 and June 27, 2011, LeGrand prepared revisions to the membership interest transfer provision reflecting his discussions with Bidsal. (2 App. 252-271; 2 App. 273-326). On July 22, 2011, LeGrand emailed another revision to Bidsal and CLA. (2 App. 382-411.) LeGrand advised that the revision added right of first refusal language, but that he was "unclear as to the discussion at the end of the meeting about buy sell." (2 App. 382.)

But LeGrand's initial drafts were rejected. On August 18, 2011, LeGrand emailed Bidsal and CLA a revision to the draft operating agreement "based on my conversation with Ben [Golshani] this morning." (2 App. 413.) LeGrand advised that, in this revision, he "added a 'Dutch Auction' provision." (*Id.*) Section 7.1 of the August 18, 2011, draft operating agreement provides:

> **Section 7.1 Purchase or Sell Procedure.**
>
> Any Member ("Offering Member") may give notice to the remaining Member(s) that he or it is ready, willing and able to sell his or its Member Interests for fair market value based upon the net fair market value of the Company's assets divided by the offering Member's proportionate interest in profits and losses of the Company. The Offering Member shall obtain an appraisal in writing from a qualified real estate appraiser and provide a copy of such appraisal to the other Member(s) attached to a notice setting forth the proposed offer to

> sell. The other Member(s) shall have ten (10) business days within which to respond in writing to the Offering Member by either (i) accepting the Offering Member's offer to sell; or, (ii) rejecting the offer to sell and counteroffering to sell his or its Member Interest to the Offering Member based upon the same appraisal and fair market value formula as set forth above. The specific intent of this provision is that the Offering Member shall be obligated to either sell his or its Member Interests to the remaining Member(s) or purchase the Member Interest of the remaining Member(s) based upon the fair market value of the Company's assets.

(2 App. 425.)

But LeGrand's August 2011 "'Dutch Auction' provision" was rejected. On September 16, 2011, LeGrand emailed Bidsal and CLA another revision to the draft operating agreement that removed the "Dutch Auction" provision. (2 App. 472.) In the email, LeGrand wrote, "I do not know how to address the concept of the 'Dutch Auction' after much thought. We discussed that you want to be able to name a price and either get bought or buy at the offer price. I can write that provision, but I am not sure it makes sense because Ben [Golshani] has put in more than double the capital of Shawn [Bidsal]." (*Id.*)

LeGrand added, "Another approach would be to have an appraiser value your respective interests and capital and establish a price for both

of you. Then Ben could say to Shawn, 'Buy my units for XX$ or I can buy your units for Y$', all based on an independent appraisal?" (*Id.*)

On September 19, 2011, LeGrand emailed Bidsal and CLA, writing, "I got Ben's [Golshani] voice mail Saturday regarding Buy-sell and I talked with Shawn [Bidsal] about the issue that because your capital contributions are so different, you should consider a formula or other approach to valuing your interests. A simple 'Dutch Auction' where either of you can make an offer to the other and the other can elect to buy or sell at the offered price does not appear sensible to me." (3 App. 501.)

LeGrand added, "But you are the clients and I will write it up as you jointly instruct. I know Ben wants to get this finished." (*Id.*)

On the afternoon of September 20, 2011, LeGrand emailed Bidsal and CLA a revised draft operating agreement, writing, "Ben and Shawn- attached please find the revised OPAG with the new Article 5 Section 5 which sets forth the 'dutch Auction'." (3 App. 503.) Article 5, Section 5 of the September 20, 2011, draft operating agreement provides:

> **Section 5. Sales Between Members.**
>
> In the event that a Member desires to sell his Membership Interests to the other Members or purchase the Membership Interests of the other Members, the Offering Member shall give notice (for purposes of this Section 5.1, the "Notice") in writing to each of the other Members, stating his or its bona fide intention to transfer such Interest and the purchase price for which such Offering Member's Interest is proposed to be transferred. The purchase price expressed as a percentage of capital in the Company shall also be an offer to purchase the other Member's Interests on the same terms proportionate to the other Member's capital ownership.

(3 App. 515.)

> **5.2**
>
> Upon receipt of the Notice, each of the other Members shall have the first right and option to agree to purchase all (subject to Article 5 hereof) of the Offering Member's Interest proposed to be transferred, at the price set forth in the Notice, exercisable for a period of fifteen (15) days form the date of receipt of the Notice. In the alternative, each of the other Member's shall have the right to sell their interests to the Offering Member on the terms set forth in the Notice and at the same price as set forth in the Notice proportionate to the other Member's capital ownership.

(*Id.*)

But LeGrand's September 2011 "dutch Auction" provision was also rejected. (3 App. 535.) On the morning of September 22, 2011, CLA emailed Bidsal a two-page draft of Section 7 ("Purchase or Sell Right

among Members."), with "ROUGH DRAFT" in large letters at the top of the page. (3 App. 535-37.) Golshani wrote, "Enclosed please find a rough draft ***of what I came up with***. I tried to make it reciprocal. See if you like it. Comments are appreciated." (3 App. 535.) (Emphasis added.)

CLA's September 22, 2011, "ROUGH DRAFT" first modeled the structure and language of Section 4.2, completely departing from both the language and structure of LeGrand's drafts. For comparison, the table below shows CLA's "ROUGH DRAFT" (3 App. 536-37) side-by-side with Section 4.2 (3 App. 548-49).

"ROUGH DRAFT" (Sept. 22, 2011):	**Final Operating Agreement:** Section 4.2 Purchase or Sell Procedure.
Any member ("Offering Member") may give notice to the Remaining Member(s) that he or it is ready, willing and able to sell his or its Member Interests for a price the Offering member thinks is the fair market value.	Any Member ("Offering Member") may give notice to the Remaining Member(s) that he or it is ready, willing and able to purchase the Remaining Members' Interests for a price the Offering Member thinks is the fair market value. The terms to be all cash and close escrow within 30 days of the acceptance.
If the offered price is not acceptable to the Remaining member(s), Within 30 days of receiving the offer, the Remaining member can request to establish a fair market value based on the following procedure.	If the offered price is not acceptable to the Remaining Member(s), within 30 days of receiving the offer, the Remaining Members (or any of them) can request to establish FMV based on the following procedure. [*space added*]
The Remaining member must provide the offering Member the complete information of 3 MIA appraisers within 30 days of receiving the offer. The Offering Member must pick one of the appraisers to appraise the property and furnish a copy to all members. The Offering Member also must provide the Other Members with the complete	The Remaining Member(s) must provide the Offering Member the complete information of 2 MIA appraisers. The Offering Member must pick one of the appraisers to appraise the property and furnish a copy to all Members. The Offering Member also must provide the Remaining Members with

information of 3 MIA approved appraisers. The Other Members must pick one of the appraisers to appraise the property and furnish a copy to all members. The medium of these 2 appraisals constitute the fair market value of the property which is called (FMV).	the complete information of 2 MIA approved appraisers. The Remaining Members must pick one of the appraisers to appraise the property and furnish a copy to all Members. The medium of these 2 appraisals constitute the fair market value of the property which is called (FMV).
The offering party may offer to sell his share Remaining Members based on the following formula.	The Offering Member has the option to offer to purchase the Remaining Member's share at FMV as determined by Section 4.2,, based on the following formula.
(FMV- cost of purchase stated in the escrow closing statement) x interest percentage of Remaining member(s) + the amount of capital account of the Remaining Member(s).	(FMV - COP) x 0.5 plus capital contribution of the Remaining Member(s) at the time of purchasing the property minus prorated liabilities.
The Remaining Member(s) shall have 30 days within which to respond in writing to the Offering Member by either:	The Remaining Member(s) shall have 30 days within which to respond in writing to the Offering Member by either
(i) accepting the Offering Member's offer to sell; or,	(i) Accepting the Offering Member's purchase offer, or,
(ii) rejecting the offer to sell and counter offering to sell his or its Member Interest to the Offering Member based upon the same fair market value (FMV) according to the following formula.	(ii) Rejecting the purchase offer and making a counteroffer to purchase the interest of the Offering Member based upon the same fair market value (FMV) according to the following formula.
(FMV- cost of purchase stated in the escrow closing statement) x interest percentage of offering Member + capital account of the Offering Member.	(FMV - COP) x 0.5 + capital contribution of the Offering Member(s) at the time of purchasing the property minus prorated liabilities.
The specific intent of this provision is that the Offering Member shall be obligated to either sell his or its Member Interests to the remaining Member(s) or purchase the Member Interest of the remaining Member(s) based upon the fair market value established above.	The specific intent of this provision is that once the Offering Member presented his or its offer to the Remaining Members, then the Remaining Members shall either sell or buy at the same offered price (or FMV if appraisal is invoked) and according to the procedure set forth in Section 4.. In the case that the Remaining Member(s) decide to purchase, then Offering Member shall be obligated to sell his or its Member Interests to the remaining Member(s).

On October 26, 2011, CLA emailed Bidsal a revised draft Section 7 ("Purchase or Sell Right among Members."), with "ROUGH DRAFT 2" in large letters in the header. (3 App. 568-70.) Golshani wrote, "Shawn, here is the agreement we discussed. Please take a look to see if you like it." (3 App. 568.)

CLA's October 26, 2011, "ROUGH DRAFT 2" is nearly identical to Section 4.2. For comparison, CLA's "ROUGH DRAFT 2" (3 App. 569-70) appears below side-by-side with Section 4.2 (3 App. 548-49).

"ROUGH DRAFT 2" (Oct. 26, 2011) Section 7.2 ("Purchase or Sell Procedure")	**Final Operating Agreement:** Section 4.2 Purchase or Sell Procedure.
Any member ("Offering Member") may give notice to the Remaining Member(s) that he or it is ready, willing and able to purchase the Remaining Members' Interests for a price the Offering member thinks is the fair market value. The terms to be all cash and close escrow within 30 days of the acceptance.	Any Member ("Offering Member") may give notice to the Remaining Member(s) that he or it is ready, willing and able to purchase the Remaining Members' Interests for a price the Offering Member thinks is the fair market value. The terms to be all cash and close escrow within 30 days of the acceptance.
If the offered price is not acceptable to the Remaining Member(s), Within 30 days of receiving the offer, the Remaining member can request to establish a fair market value (FMV) based on the following procedure. The Remaining Member(s) must provide the offering Member the complete information of 2 MIA appraisers. The Offering Member must pick one of the appraisers to appraise the property and furnish a copy to all members. The Offering Member also must provide the Remaining Members with the complete information of 2 MIA approved appraisers. The Remaining Members must pick one of the appraisers to appraise the property and furnish a copy to	If the offered price is not acceptable to the Remaining Member(s), within 30 days of receiving the offer, the Remaining Members (or any of them) can request to establish FMV based on the following procedure. The Remaining Member(s) must provide the Offering Member the complete information of 2 MIA appraisers. The Offering Member must pick one of the appraisers to appraise the property and furnish a copy to all Members. The Offering Member also must provide the Remaining Members with the complete information of 2 MIA approved appraisers. The Remaining Members must pick one of the appraisers to appraise the property and furnish a copy to

all members. The medium of these 2 appraisals constitute the fair market value of the property which is called (FMV). [*space added*] The offering party has the option to offer to purchase the Remaining Member's share at FMV specified above, based on the following formula.	all Members. The medium of these 2 appraisals constitute the fair market value of the property which is called (FMV). The Offering Member has the option to offer to purchase the Remaining Member's share at FMV as determined by Section 4.2, based on the following formula.
(FMV- COP) x 0.5 plus capital contribution of the Remaining Member(s) at the time of purchasing the property minus prorated liabilities.	(FMV - COP) x 0.5 plus capital contribution of the Remaining Member(s) at the time of purchasing the property minus prorated liabilities.
The Remaining Member(s) shall have 30 days within which to respond in writing to the Offering Member by either	The Remaining Member(s) shall have 30 days within which to respond in writing to the Offering Member by either
(i) accepting the Offering Member's purchase offer, or, (ii) rejecting the purchase offer and counter offering to purchase the interest of the Offering Member based upon the same fair market value (FMV) according to the following formula.	(i) Accepting the Offering Member's purchase offer, or, (ii) Rejecting the purchase offer and making a counteroffer to purchase the interest of the Offering Member based upon the same fair market value (FMV) according to the following formula.
(FMV- COP) x 0.5 + capital contribution of the Offering Member(s) at the time of purchasing the property minus prorated liabilities.	(FMV - COP) x 0.5 + capital contribution of the Offering Member(s) at the time of purchasing the property minus prorated liabilities.
The specific intent of this provision is that once the Offering Member presented his or its offer the Remaining Members have the right to either sell or buy at the same offered price and according to the above manner. In the case that the remaining member(s) decide to purchase, the Offering Member shall be obligated to sell his or its Member Interests to the remaining Member(s).	The specific intent of this provision is that once the Offering Member presented his or its offer to the Remaining Members, then the Remaining Members shall either sell or buy at the same offered price (or FMV if appraisal is invoked) and according to the procedure set forth in Section 4.. In the case that the Remaining Member(s) decide to purchase, then Offering Member shall be obligated to sell his or its Member Interests to the remaining Member(s).

CLA thereafter sent "ROUGH DRAFT 2" to LeGrand. (6 App. 1333.) On November 10, 2011, LeGrand emailed Bidsal and CLA, writing, "Shawn, I received fax from Ben [Golshani] and am rewriting it to be more detailed and complete. I will send it out to both of you shortly." (3 App. 574.) On November 10, 2011, LeGrand sent Bidsal and CLA his "DRAFT 2," in which LeGrand made only non-substantive revisions to CLA's "ROUGH DRAFT 2." (6 App. 1333.)

On November 11, 2011, CLA responded to LeGrand by email, writing, "Hi, it looks good, please complete and send it to us." (6 App. 1333.)

On November 29, 2011, LeGrand emailed Bidsal and CLA, writing, "Ben [Golshani] and Shawn [Bidsal]. ***This version has Ben's 'dutch auction' language*** and a buy-sell at FMV on the death or dissolution of a member." (6 App. 1338.) (Emphasis added.) LeGrand enclosed a draft that was identical to the final version of Section 4.2. (*Compare* 6 App. 1349-50 *with* 5 App. 548-49.)

C. Management and Operation of GVC

After GVC acquired the Green Valley Commerce Center, Bidsal and CLA decided to sell some of the buildings. (10 App. 2262:3-2266:5.)

As part of this process, Bidsal subdivided the Green Valley Commerce Center into separate buildings, creating a building association, and commissioning survey work. (*Id.*) Bidsal did most of the work in handling the subdivision process and working with the surveyors. (9 App. 2007:4-15.) Bidsal, alone, also handled the management and leasing of the Green Valley Commerce Center. (9 App. 2007:19-21.)

Bidsal was able to sell buildings B, C, and E of the Green Valley Commerce Center for a profit, and used proceedings from the sale to purchase a new parcel in Arizona. (10 App. 2266:3-2267:22.) Proceeds from the sale that were not used to purchase the Arizona parcel were paid to CLA and Bidsal. (*Id.*) Following this, GVC owned five buildings in the Green Valley Commerce Center, and the in Arizona, Greenway Plaza. (*Id.*)

D. GVC Purchase Negotiations

On July 7, 2017, Bidsal, through his attorney, made a written offer to purchase CLA's membership interest in GVC based on a $5,000,000 valuation of the company. (3 App. 711.) Without disclosure

to Bidsal, CLA engaged Petra Latch, MAI[1], to appraise the Green Valley Commerce Center. (9 App. 2049:7-2052:13; 3 App. 713-24.) On July 31, 2017, Ms. Latch provided her appraisal to CLA, showing the property was worth more than originally thought. (3 App. 726-750; 4 App. 751-947.)

On August 3, 2017, CLA sent Bidsal a letter, "electing and exercising" his option, "in accordance with section 4, Article v of the agreement," to purchase Bidsal's 50% membership interest "based on your $5,000,000 valuation of the Company." (4 App. 952.)

On August 5, 2017, Bidsal responded, invoking, "in accordance with Article V, Section 4 of the Company's Operating Agreement," his "right to establish the FMV by appraisal." (4 App. 954.) On August 28, 2017, CLA replied through counsel, insisting that Bidsal sell his membership interest. (4 App. 956-59.)

[1] MAI is a membership designation from a professional appraisal organization. Section 4.2 refers to "MIA appraisers," but presumably intended to refer to "MAI appraisers."

E. The Arbitration

On September 26, 2017, CLA submitted to JAMS a demand for arbitration. (4 App. 961-65.) CLA's demand for arbitration was made pursuant to operating agreement Section 14.1 ("Dispute Resolution"). (4 App. 963.) The arbitration demand quoted language from Section 4.2 and stated Bidsal has "refused to sell his interest, but instead has demanded an appraisal to determine FMV." (4 App. 962.)

On May 8-9, 2018, the arbitrator conducted the merits hearing, at which Golshani, Bidsal, and LeGrand testified in person. (*See* 8 App. 1894-2000; 9 App. 2001-2250; 10 App. 2251-2320.)

On October 9, 2018—**five months** after the merits hearing—the arbitrator issued Merits Order No. 1. (4 App. 967-81.) In Merits Order No. 1, the arbitrator determined that Section 4.2 was ambiguous and that Bidsal, as the "principal drafter of Section 4.2," must "bear[] the burden of risk of ambiguity or inconsistency within the disputed provision." (4 App. 969 ¶ 4 n.3.) In determining that Bidsal drafted Section 4.2, the arbitrator found that Bidsal was responsible for the "addition of what became the 'FMV' ambiguity." (*Id.*)

In Merits Order No. 1, the arbitrator resolved the dispute in CLA's favor. (4 app. 979.) Specifically, he concluded that Bidsal "contractually agreed and can be legally compelled to sell his 50% Membership Interest in [GVC] to" CLA at a price computed "via the contractual formula set forth in Section 4.2" and "based on Mr. Bidsal's undisputed $5 million 'best estimate' of Green Valley's fair market valuation . . . without regard to a formal appraisal." (*Id.*)

On October 30, 2018, CLA submitted a Proposed Interim Award. (4 App. 983-997.) CLA's Proposed Interim Award revised the analysis and findings set forth in Merits Order No. 1, (*See id.*) The same day, CLA and sought an award of $255,403.75 for attorneys' fees and $29,200.07 in costs. (4 App. 999-1000; 5 App. 1001-90.) The Proposed Interim Award modified Merits Order No. 1 by, among other things, deleting the findings that supported the determination that Bidsal was the "principal drafter" of Section 4.2. (*Compare* 4 App. 969, ¶ 4 n.3 *with* 4 App. 986, ¶ 7 n.5.)

On January 21, 2019, the arbitrator issued the Interim Award, appearing to adopt the modified analysis and findings set forth in CLA's Proposed Interim Award and awarding CLA $249,078.75 for attorneys'

fees. (5 App. 1159-79.) The Interim Award, like CLA's Proposed Interim Award, omits the findings that were set forth in Merits Order No. 1 that support the draftsmanship determination. (*See* 5 App. 1164, ¶ 9, n.6.)

On April 5, 2019, the arbitrator entered the Final Award. (5 App. 1215-35.) The Final Award ordered Bidsal to transfer his 50% membership interest to CLA within ten days of the award, at a price computed in accordance with the Section 4.2 formula, with FMV having a value of $5,000,000. (5 App. 1233.)

F. District Court Proceedings

On May 21, 2019, CLA filed a petition in the district court requesting confirmation of the Final Award and entry of judgment. (1 App. 1-56.) Bidsal opposed. (1 App. 76-115.) After briefing was complete, a hearing was held on November 12, 2019. On December 6, 2019, the district court confirmed the Final Award and entered judgment. (11 App. 2610-19.)

STANDARD OF REVIEW

This court reviews a district court's decision to vacate or confirm an arbitration award de novo. *Thomas v. City of N. Las Vegas,* 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006).

Arbitration awards are not immune from judicial review. *See Wichinsky v. Mosa*, 109 Nev. 84, 89, 847 P.2d 727, 731 (1993). Although a court's review of an award is limited, *id*., an arbitrator is not afforded roving authority to exact his or her own "brand of industrial justice." *Coast Trading Co. v. Pac. Molasses Co.*, 681 F.3d 1195, 1198 (9th Cir. 1982) (internal quotation marks omitted) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 1361 (1960)).

A. Statutory Grounds for Vacating an Arbitration Award

For awards governed by the Federal Arbitration Act[2], the Act enumerates certain statutory grounds for vacatur. *See* 9 U.S.C.A. § 10(a). As relevant here, an award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C.A. § 10(a)(4).

[2] Article III, Section 14.1 of GVC's operating agreement provides that the arbitration "shall be governed by United States Arbitration Act, 9 U.S.C. § 1 et seq." (3 App. 545-46.)

Nevada's Uniform Arbitration Act, NRS 38.241(1)(d), also provides for vacatur of an arbitration award where "[a]n arbitrator exceeded his or her powers." Interpreting the standard under NRS 38.241(1)(d), this Court has explained that "[a]rbitrators exceed their powers when they address issues or make awards outside the scope of the governing contract." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 697, 100 P.3d 172, 178 (2004). The question a reviewing court must answer then is whether the arbitrator's decision is "rationally grounded in the agreement"—namely, was the arbitrator construing or applying the contract. *Id*. at 698, 100 P.3d at 178.

B. Judicial Grounds for Vacating an Arbitration Award

Review is not limited to the statutory grounds in NRS 38.241(1). *Graber v. Comstock Bank*, 111 Nev. 1421, 1426, 905 P.2d 1112, 1115 (1995). There are also two common-law grounds: "(1) whether the award is arbitrary, capricious, or unsupported by the agreement; and (2) whether the arbitrator manifestly disregarded the law."[3] *Clark*

[3] The Ninth Circuit also follows the "manifest disregard" standard. *See G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1105 (9th Cir. 2003); *JPMorgan Chase Bank v. KB Home Nev., Inc.*, 478 Fed. App'x 398 (9th Cir. 2012).

Cnty. Educ. Ass'n v. Clark Cnty. Sch. Dist., 122 Nev. 337, 341, 131 P.3d 5, 8 (2006).

"The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." *Health Plan of Nev., Inc. v. Rainbow Med., LLC,* 120 Nev. 689, 695, 100 P.3d 172, 176 (2004).

1. Manifest Disregard of the Law

An arbitrator's *legal conclusions* are reviewed under the "manifest disregard" standard. *City of N. Las Vegas v. Ruiz*, No. 63320, 2015 WL 3916058, at *1 (Nev. Jun. 23, 2015) (citing *Clark Cnty. Educ. Ass'n*, 122 Nev. at 341, 131 P.3d at 8). The manifest disregard standard requires that an arbitrator know the law and consciously disregard it. *Clark Cnty. Educ. Ass'n*, 122 Nev. at 342, 131 P.3d at 8; *see also Graber*, 111 Nev. at 1426, 905 P.2d at 1115 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986)) ("[F]or a manifest disregard for the law, a court should attempt to locate arbitrators who appreciate the significance of clearly governing legal principles but decide to ignore or pay no attention to those principles.").

2. Arbitrary, Capricious, or Unsupported Findings

Comparatively, *factual decisions* by an arbitrator are reviewed under the "arbitrary, capricious, or unsupported" standard. *Ruiz*, 2015 WL 3916058, at *1 (citing *Clark Cnty. Educ. Ass'n*, 122 Nev. at 341, 131 P.3d at 8). An arbitrator's decision is arbitrary, capricious, or unsupported when it lacks "support[] by substantial evidence in the record." *Clark Cnty. Educ. Ass'n*, 122 Nev. at 344, 131 P.3d at 9–10. "Substantial evidence is defined as evidence that a reasonable mind might accept as adequate to support a conclusion." *Franchise Tax Bd. of Cal. v. Hyatt,* 130 Nev. Adv. Op. 71, 335 P.3d 125, 144 (2014) (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

The Final Award must be vacated. The reasons are three-fold and compounded. First, the arbitrator manifestly disregarded the law. Despite ostensibly interpreting a contractual provision that underwent no fewer than **eight** revisions and which the parties themselves never described as a "Dutch Auction," the arbitrator premised the Final Award on an **unsourced** discussion of **typical** "Dutch Auction" provisions, and

in doing so incorporated into the Final Award an **extrinsic** "rough justice" standard. Second, the arbitrator relied on arbitrary and capricious findings in the Final Award. After finding ambiguity in Section 4.2 where none exists, the arbitrator concluded, without **any** supporting evidence and notwithstanding overwhelming evidence to the contrary, that **Bidsal** drafted Section 4.2, and so construed Section 4.2 against him. Third, the arbitrator's awarded relief exceeds his powers under the arbitration agreement. After relying on the purported ambiguity of Section 4.2 to rule against Bidsal, the arbitrator ordered specific performance, which the parties' arbitration agreement prohibited. For these reasons—independently and because of their compounding effect—this Court should vacate the Final Award.

ARGUMENT

The arbitrator lacked the energy and/or desire to interpret Section 4.2 of the GVC operating agreement, so he construed Section 4.2 to reach a result based on his understanding of a **typical** "Dutch Auction" provision. From this end result, he worked backward to find support. For instance, despite conclusive evidence that CLA drafted Section 4.2, the arbitrator determined **Bidsal** was the "principal drafter" of Section

4.2, and therefore construed Section 4.2 against him. This finding defies rational explanation, but conveniently supported the outcome the arbitrator felt embodied the "rough justice" Bidsal should expect from a Dutch Auction provision. That standard—"rough justice"—was introduced by the arbitrator at a hearing and appears in the Final Award. However, the standard does not derive from GVC's operating agreement or the evidence; it is altogether extrinsic. The arbitrator then ordered specific performance of a provision he determined to be ambiguous, in breach of the arbitration agreement's prohibition on such relief. For each and all of these reasons, the award must be vacated.

I.

THE ARBITRATOR MANIFESTLY DISREGARDED THE GOVERNING PROVISIONS OF THE OPERATING AGREEMENT BY ORDERING A FORCED SALE WITHOUT APPRAISAL

The arbitrator manifestly disregarded Section 4.2 of the operating agreement. Relying on his understanding of "Dutch Auction" provisions, and incorporating into the Final Award a "rough justice" standard that derives from his personal understanding of Dutch Auction provisions but which has no basis in the agreement or evidence, the arbitrator

"stray[ed] from interpretation and application of the agreement and effectively dispense[d] his own brand of industrial justice." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010); *see Xpress Nat. Gas, LLC v. Cate St. Capital, Inc.*, 2016 ME 111, ¶ 11, 144 A.3d 583, 587–88 ("Arbitrators may not travel outside the agreement and base the award on their own individual concept of justice in the particular area involved.").

A. The Arbitrator was Required to Follow the Operating Agreement as the Law Governing the Sale of Membership Interests

In Nevada, an LLC's operating agreement has the force and effect of law. *See* NRS 68.286. An arbitrator must follow the agreement; to ignore it is to manifestly disregard applicable law. *Cf. Jordan v. Dep't of Motor Vehicles*, 100 Cal. App. 4th 431, 443 (2002) ("[A]n arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law.").

B. Operating Agreement Section 4 Governs the Sale of Membership Interests

1. Section 4 ("Purchase or Sell Right among Members")

The GVC operating agreement constitutes the controlling law. Within the operating agreement, Article V, Section 4 controls the sale of membership interests between GVC's members—CLA and Bidsal.

Section 4 provides that, "[i]n the event that a Member is willing to purchase the Remaining Member's interest in the Company then the procedures and terms of Section 4.2 shall apply."

Sections 4.1 and 4.2 provide:

> **Section 4.1 Definitions**
>
> Offering Member means the member who offers to purchase the Membership Interest(s) of the Remaining Member(s). "Remaining Members" means the Members who received an offer (from Offering Member) to sell their shares.
>
> "COP" means "cost of purchase" as it specified in the escrow closing statement at the time of purchase of each property owned by the Company.
>
> "Seller" means the Member that accepts the offer to sell his or its Membership Interest.
>
> "FMV" means "fair market value" obtained as specified in section 4.2

Section 4.2 Purchase or Sell Procedure

Any Member ("Offering Member") may give notice to the Remaining Member(s) that he or it is ready, willing and able to purchase the Remaining Members' Interests for a price the Offering Member thinks is the fair market value. The terms to be all cash and close escrow within 30 days of the acceptance.

If the offered price is not acceptable to the Remaining Member(s), within 30 days of receiving the offer, the Remaining Members (or any of them) can request to establish FMV based on the following procedure. The Remaining Member(s) must provide the Offering Member the complete information of 2 MIA appraisers. The Offering Member must pick one of the appraisers to appraise the property and furnish a copy to all Members. The Offering Member also must provide the Remaining Members with the complete information of 2 MIA approved appraisers. The Remaining Members must pick one of the appraisers to appraise the property and furnish a copy to all Members. The medium of these 2 appraisals constitute the fair market value of the property which is called (FMV).

The Offering Member has the option to offer to purchase the Remaining Member's share at FMV as determined by Section 4.2, based on the following formula.

> (FMV - COP) x 0.5 plus capital contribution of the Remaining Member(s) at the time of purchasing the property minus prorated liabilities.

The Remaining Member(s) shall have 30 days within which to respond in writing to the Offering Member by either

(i) Accepting the Offering Member's purchase offer, or

> (ii) Rejecting the purchase offer and making a counteroffer to purchase the interest of the Offering Member based upon the same fair market value (FMV) according to the following formula.
>
> > (FMV - COP) x 0.5 + capital contribution of the Offering Member(s) at the time of purchasing the property minus prorated liabilities.
>
> The specific intent of this provision is that once the Offering Member presented his or its offer to the Remaining Members, then the Remaining Members shall either sell or buy at the same offered price (or FMV if appraisal is invoked) and according to the procedure set forth in Section 4. In the case that the Remaining Member(s) decide to purchase, then Offering Member shall be obligated to sell his or its Member Interests to the remaining Member(s).

2. Section 4.2 Provides Bidsal the Right to Demand Appraisal Before Selling His Interest

The arbitrator manifestly disregarded the plain language of Article V, Section 4.2 ("Section 4.2"). Though he purported to interpret Section 4.2, it is apparent that he leapt to the final paragraph (the "Specific Intent Paragraph") and disregarded the remainder of Section 4.2. Reasoning that the Specific Intent Paragraph "could not be more clear," the arbitrator concluded it "prevails over any earlier ambiguities about the contracting parties' Section 4.2 rights and obligations." (4 App. 1220, 1221-22 ¶¶ 10(A), 13.) But this cannot be. The Specific Intent Paragraph does not stand on its own—it incorporates "the procedure set

forth in Section 4." By elevating the Specific Intent Paragraph above the remainder of Section 4.2 ("earlier ambiguities"), the arbitrator disregarded the controlling operating agreement language.

Section 4.2 provides Bidsal—and any member in his shoes—the right to have the fair market value of his membership interest determined through the third-party appraisal procedure set forth therein before he may be compelled to sell his interest to another member. This is apparent from the plain language of Section 4.2, and is the only interpretation that harmonizes all of its terms.

Section 4.2 does not sit in a vacuum, however. Section 4.1 defines the terms appearing in Section 4.2. These definitions are instructive. To begin with, Section 4.1 defines "FMV" as the "'fair market value' obtained as specified in section 4.2." Additionally, Section 4.1 defines "Offering Member" and "Remaining Member" based on whether the member offers to buy (Offering Member) or instead receives an offer to sell (Remaining Member). Whether a member is an Offering Member or Remaining Member is controlled by whether he/it offers to buy or instead receives an offer to sell. Pursuant to Section 4.1, nothing else is relevant.

Read with these definitions in mind, the import of Section 4.2 becomes clear. "FMV" is defined as the result of an appraisal procedure. Section 4.2 contemplates that the initial offering member may be required to sell his interest to the other member—but in both instances where Section 4.2 contemplates such a sale, it is defined in terms of "FMV." For instance, in the paragraph that begins, "The Remaining Member(s) shall have 30 days . . .," option "(ii)" contemplates that a counteroffer to purchase the interest of the initial offering member may be made "based upon the same fair market value (**FMV**)." (Emphasis added.) And the Specific Intent Paragraph provides that "once the Offering Member presented his or its offer . . . then the Remaining Members shall either sell or buy at the same offered price (**or FMV if appraisal is invoked**)." (Emphasis added.)

Thus, Section 4.2 contemplates no scenario in which the initial offer to purchase can be converted to forced sale at the offered price. While a typical Dutch Auction provision may provide for such a result, Section 4.2 is not a typical Dutch Auction provision.

The definitions for "Offering Member" and "Remaining Member" are also instructive. Reading the Specific Intent Paragraph with these

definitions in mind, it becomes clear that, when a counteroffer is made, the Offering Member and Remaining Member exchange hats—the Offering Member becomes the Remaining Member, and vice versa. This is apparent from the Specific Intent Paragraph, which contemplates that "the Remaining Members shall either sell **or buy** . . ." (Emphasis added.) When Section 4.1 defines the Offering Member as the member who offers to buy, and defines the Remaining Member as the member who receives an offer to sell, how can a Remaining Member offer to buy? He can't. When he does, he becomes an Offering Member ("the member who offers to purchase . . ."). And the recipient of his offer becomes a Remaining Member ("the Members who received an offer . . .").

This interpretation, which merely applies Section 4.1's definitions in a literal manner to Section 4.2, harmonizes Article V, Section 4. Consider that, when Bidsal offered to purchase CLA's interest based on a $5,000,000 valuation, CLA did not seek to secure a higher amount from Bidsal—he **counteroffered** to purchase Bidsal's interest. It is well-established that a counteroffer operates as a rejection. *See* Restatement (Second) of Contracts § 39, cmt. a (1981) (a counteroffer and a rejection "have the same effect in terminating the offeree's power of acceptance").

By making a counteroffer, CLA forfeited its power to accept Bidsal's offer. When that happened, CLA ceased to be a Remaining Member and effectively became an Offering Member. And when Bidsal received CLA's offer to buy his interest, he became a Remaining Member. As a Remaining Member, Bidsal was entitled to invoke Section 4.2's appraisal procedure—which, on August 5, 2017, he did.

This interpretation of Article V, Section 4, is fully grounded in the plain language and conforms to Section 4. The arbitrator found that Section 4.2 is ambiguous ("not a model of clarity"). Not so. Section 4.1 unambiguously defines the terms that appear in Section 4.2, and applying those definitions inescapably leads to the conclusion set forth herein: Any member who receives an offer from another member to buy his interest is entitled to invoke Section 4.2's appraisal procedure, if desired.

This last point (". . . entitled to invoke Section 4.2's appraisal procedure, **if desired**.") was lost on the arbitrator when he determined Bidsal's position had "an unanswered logical flaw." (5 App. 1223-24 ¶ 18.) That unanswered logical flaw was that Bidsal's interpretation—specifically, his interpretation of "FMV"—cannot account for scenarios

in which CLA "accepted or deliberately or inadvertently failed to respond" to Bidsal's initial offer. (*Id*.)

Not so. Pursuant to Section 4.2, the Remaining Member is in the uniquely advantageous position where he can either accept the initial offer or request an appraisal to determine FMV. If the Remaining Member accepts the initial offer, he waives his right to determine "FMV" through the appraisal procedure and accepts the "price the Offering Member thinks is the fair market value" as "FMV." Indeed, the arbitrator described this interpretation of "FMV" as "logical[]" and "fair[]" under Section 4.2. (5 App. 1224 ¶ 19.)

Bidsal's interpretation—a plain language reading of Section 4.2, informed by the definitions set forth in Section 4.1—is in no way belied by a Remaining Member's failure to respond to the initial offer. Pursuant to Section 4.3, if a Remaining Member fails to respond "within the thirty (30 day) period," that failure to respond "shall be deemed to constitute an acceptance of the Offering Member['s]" offer. The only reason the arbitrator believed these scenarios were inconsistent with Bidsal's interpretation is that the arbitrator failed to apply Section 4.1's defini-

tions to Section 4.2. The "unanswered logical flaw[s]" with Bidsal's position are, therefore, answered by the plain language of Article V, Section 4.

Even an unambiguous membership transfer provision, such as Article V, Section 4, may become confused the longer it is discussed. For clarity and reference, each potential outcome under Section 4.2 after an initial offer to purchase is made is described below.

a. SCENARIO ONE: NO RESPONSE

If, after the Offering Member makes an initial offer, the Remaining Member fails to respond for 30 days, the Remaining Member's failure to respond operates as an acceptance of the initial offer pursuant to Section 4.3. When the sale is consummated, the Offering Member's estimate of fair market value becomes "FMV."

b. SCENARIO TWO: INITIAL OFFER ACCEPTED

If the Offering Member makes an initial offer and the Remaining Member accepts the initial offer within 30 days, the sale is consummated and the Offering Member's estimate of fair market value becomes "FMV."

c. SCENARIO THREE: APPRAISAL PROCEDURE INVOKED

After the Offering Member makes an initial offer, the Remaining Member may elect to sell but request to establish "FMV" through the Section 4.2 appraisal procedure. If the Remaining Member does so, "FMV" is determined pursuant to the appraisal procedure. The Remaining Member then sells his interest to the Offering Member based on the established "FMV."

d. SCENARIO FOUR: COUNTEROFFER

After the Offering Member makes an initial offer, the Remaining Member may counteroffer to buy the Offering Member's interest at the same offered price. Having rejected the initial offer and elected to buy, the Remaining Member ceases to be a Remaining Member. Pursuant to the definitions in Section 4.1, he becomes the Offering Member and the recipient of his counteroffer becomes the Remaining Member. The Remaining Member may then accept the counteroffer or else invoke the Section 4.2 appraisal procedure. The Remaining Member then sells his interest to the Offering Member, either based on the initial offer price, if the appraisal procedure is not invoked, or based on the "FMV" determined through the appraisal procedure.

A version of "Scenario Four" gave rise to this dispute. On August 3, 2017, CLA counteroffered to buy Bidsal's interest. (4 App. 952.) As of August 3, 2017, therefore, CLA became an Offering Member, and Bidsal a Remaining Member. On August 5, 2017, Bidsal invoked the Section 4.2 appraisal procedure. (4 App. 954.) CLA insisted, however, that Bidsal sell his interest at a price based on the initial offer, and refused to recognize Bidsal's invocation of the appraisal procedure. (4 App. 956.) CLA's interpretation of Section 4.2 is self-serving and contrary to the plain language of Section 4.2—language that CLA drafted.

The plain language of Article V, Section 4 contemplates the four scenarios described herein, but no others. But rather than interpret Section 4, the arbitrator found a shortcut: he found it ambiguous.[4] Finding ambiguity where none existed enabled the result—"rough justice"—the arbitrator believed Bidsal should expect from a typical

[4] The arbitrator describes Section 4.2 as "not a model of clarity," and characterizes the provision as ambiguous on numerous occasions. But the only ambiguity he identifies relates to whether or not "FMV" is limited to "third-party expert-appraised fair market value." (5 App. 1223 ¶ 17.) However, for the straightforward reasons the arbitrator describes in the Final Award and which are described herein, the operation of the term "FMV" is not ambiguous. (*See* 5 App. 1224 ¶ 19.)

"Dutch Auction" provision. But this manifestly disregards the plain language of Section 4, which is **not** a typical Dutch Auction provision and instead contains an appraisal procedure as protection for members. And Section 4.2 affords that protection to any member who "received an offer (from Offering Member) to sell their shares"—including Bidsal.

C. The Arbitrator Displaced Operating Agreement Section 4.2 with His Expectations for Dutch Auction Provisions

The arbitrator manifestly disregarded the plain language of Section 4.2, displacing its terms with his personal understanding of a typical Dutch Auction provision. This is apparent from the Final Award which prominently features an **unsourced** discussion of "[t]he 'forced buy-sell' agreement, or so-called 'Dutch auction'" and a notion of "rough justice" that derives from typical Dutch Auction provisions. (*See* 5 App. 1219 at ¶ 8.) The context for this unsourced discussion is instructive. Right after the arbitrator finds that Section 4.2 is "not a model of clarity," he moves into the following discussion of what Dutch Auction provisions do, and how they work:

> The "forced buy-sell" agreement, or so-called "Dutch auction," is common among partners in business entities like partnerships, joint ventures, LLC's, close corporations -- a primary purpose of which is to impose

> fairness and discipline among partners considering maneuvering, via pre-agreed procedures and consequences. If not careful and fair, the Dutch auction imposes a risk of one "overplaying one's hand" - such that an intended buyer might end up becoming an unintended seller, at a price below, possibly well below, the price at which the partner was motivated to buy the same Membership Interest, under the "buy-sell" procedures which he/she/it initiated. If the provisions work, as intended, the result might not be expertly authoritative or precise, but nevertheless a form of cost-effective "rough justice," when one partner "pulls the trigger" on separation, by initiating Section 4.2 procedures.

(*Id.* at ¶ 8.)

This description of Dutch Auction provisions is **unsourced**. The quoted phrases do not appear in hearing testimony or record evidence—much less in the operating agreement itself.[5] These are the arbitrator's **personal ideas** about how a Dutch Auction provision operates; there is no other reasonable inference. And the arbitrator sets forth, among

[5] The arbitrator's discussion of "Dutch Auction" provisions is not only unsourced, but altogether irrelevant. As described herein, LeGrand drafted multiple buy-sell provisions that he characterized as "Dutch Auction" provisions. Each was rejected by CLA and Bidsal. While LeGrand wrote described the draft he circulated on November 29, 2011, as including "Ben's 'dutch auction' language," there is no evidence that LeGrand's description reflected CLA or Bidsal's understanding or intent with respect to the draft language that became Section 4.2.

other things, a concept of "rough justice" that permits—or even relishes—an inequitable result for the partner making the initial offer if he "overplays [his] hand." From this analysis, which does not belong in the Final Award, it is unsurprising that the arbitrator pejoratively mischaracterized Bidsal's position as "seller's remorse."[6][7] (5 App. 1219 ¶ 9.)

The arbitrator purports to connect this discussion to Section 4.2 in the final sentence of paragraph eight of the Final Award, but the "rough justice" Dutch Auction provisions he discusses therein are untethered from and unrelated to Section 4.2. Problematically, a "Dutch Auction provision" is completely undefined.[8] Nor does the arbitrator discuss

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[6] The arbitrator's mischaracterization of Bidsal's position as "seller's remorse" is also squarely at odds with the fact that Bidsal had offered to **buy** CLA's interest, not sell his interest to CLA, and suggests the arbitrator's reliance on typical "Dutch Auction" provisions may have also engendered a bias against Bidsal.

[7] The Final Award includes several findings which demonstrate that the arbitrator viewed Bidsal's arguments and testimony through the lens of a typical "Dutch Auction" provision. For instance, the arbitrator charged Bidsal with "ignoring, disregarding and . . . resisting strict application" of Section 4.2's Specific Intent Paragraph. (5 App. 1222-23 ¶ 16.) This characterization of Bidsal's position is plainly incompatible with the arbitrator's own conclusion that Section 4.2 is ambiguous, or "not a model of clarity." (*Id.* at 5 App. 1219 ¶ 7.)

[8] The arbitrator purports to describe a generic form of Dutch Auction provision ("The . . . 'Dutch Auction' provision is common among partners in business entities . . ."), but does not contemplate that Dutch Auction

whether, or why, the interpretation of Section 4.2 should be informed by a typical Dutch Auction provision.

Because a leap of faith is required to conclude the "rough justice" Dutch Auction provisions are relevant (similar/identical) to Section 4.2, the Final Award explicitly runs afoul of the rule that "an arbitrator is confined to interpretation and application of the . . . agreement; he does not sit to dispense his own brand of industrial justice." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 1361, 4 L. Ed. 2d 1424 (1960); *see id.* (an arbitrator may "look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the [] agreement.").

LeGrand, who introduced the term "Dutch Auction" to describe an August 2011 draft, testified to his definition of "Dutch Auction" at the hearing. He recognized that "Dutch Auction" is susceptible to several interpretations, explaining that his usage of the term differed from "the way Google defines it." (9 App. 2212:6-15.) By "Dutch Auction," however, LeGrand meant to refer to a provision whereby, "if a member

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provisions can take several forms. Black's Law Dictionary sets forth five separate definitions for "Dutch Auction," none of which read squarely onto this case. *See* AUCTION, Black's Law Dictionary (11th ed. 2019).

makes an offer, that is an offer to buy or sell at that price. And the other member could either buy or sell at that price." (9 App. 2183:1-7.)

But LeGrand did not agree that Section 4.2 was a Dutch Auction provision within that definition. Instead, he testified the Dutch Auction language he drafted in August 2011 "is not exactly the language that appears in the final executed document," and had "changed over time." (9 App. 2212:23-2213:15.) LeGrand testified that he believes Section 4.2 "contained some elements" of a Dutch Auction, but qualified that testimony by emphasizing, again, that the language had "definitely [] changed over time."[9] (*Id.* at 2213:18-20.) Indeed, after LeGrand drafted the initial "'Dutch Auction' provision" in August 2011, the buy-sell language was revised no fewer than five times, including by CLA, which drafted new language on a blank sheet of paper.

Thus, nothing in the record suggests that a typical Dutch Auction provision, as described in the Final Award, should relate to or inform the arbitrator's interpretation of Section 4.2. The reasonable inference

[9] In any event, LeGrand's definition of Dutch Auction is immaterial. The evidence shows CLA drafted Section 4.2 anew after rejecting the language and structure of the drafts that LeGrand characterized as "Dutch Auction" provisions.

is that the arbitrator nevertheless felt they were "close enough." This is misguided. For instance, Section 4.2 provides a right for members to demand a third-party appraisal. That appraisal procedure was inserted into Section 4.2 as a "protection for the remaining member." (8 App. 1921:8-1922:18.) Do typical or "rough justice" Dutch Auction provisions also include protections to safeguard against inequitable results? On their face, such protections appear antithetical to the notion of **rough** justice.

Without a definition of a Dutch Auction provision or evidence that Section 4.2 is such a Dutch Auction provision, the arbitrator's discussion of "rough justice" Dutch Auctions taints the Final Award. *See United Steelworkers*, 363 U.S. at 597, 80 S. Ct. at 1361 ("When the arbitrator's words manifest an infidelity to this obligation [to draw the essence of the award from the contract], courts have no choice but to refuse enforcement of the award."). While this **unsourced** discussion of typical Dutch Auction provisions and "rough justice" in paragraph eight of the Final Award clearly supports the arbitrator's decision, it has no basis in evidence.

II.

THE ARBITRATOR'S DRAFTSMANSHIP DETERMINATION WAS ARBITRARY AND CAPRICIOUS AND TWISTED THE EVIDENCE TO REACH A PREORDAINED RESULT

Having resolved that a "rough justice" Dutch Auction allowed CLA to force Bidsal to sell at the price Bidsal had offered to buy, the arbitrator twisted the evidence to support that result. To that end, he determined, **without any supporting evidence**, that Bidsal was "**the principal drafter** of Section 4.2 of that agreement and therefore bears the burden of risk of ambiguity or inconsistency within the disputed provision." (5 App. 1223 ¶ 17, emphasis added.) This determination was arbitrary and capricious, and a transparent means to an end result the arbitrator already had in mind.

A. Contractual Ambiguities are Construed Against the Drafter ("Contra Proferentem")

As a rule of contract interpretation, ambiguity is construed against the drafter ("contra proferentem"). *See Easton Bus. Opp. v. Town Exec. Suites*, 126 Nev. 119, 131, 230 P.3d 827, 835 (2010); *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 216, 163 P.3d 405, 407 (2007). This is because

> [w]here one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert.

RESTATEMENT (SECOND) OF CONTRACTS § 206, cmt. a (1981).

The rule that ambiguity is construed against the drafter is "a rule of last resort," applicable only when a contract is genuinely ambiguous or unconscionable. *Easton*, 126 Nev. at 131 n.5 (quoting *Thompson v. Amoco Oil Co.,* 903 F.2d 1118, 1121 n.3 (7th Cir. 1990)). For this reason,

> the rule does not justify a court in adopting an interpretation contrary to that asserted by the drafter simply because of its status as the drafter. Rather, it is only when, consistent with the general rules of contract interpretation, the meaning proposed by the non-drafter (or an altogether different meaning determined by the court) is reasonable—when there is a true ambiguity and the court must choose between two or more reasonable meanings—that the rule of *contra proferentem* is properly invoked.

11 WILLISTON ON CONTRACTS § 32:12 (4th ed.).

B. The Arbitrator's Draftsmanship Determination Was Key to the Outcome

The arbitrator's determination that Bidsal was the "principal drafter" of Section 4.2 was material to the outcome of the arbitration, if

not dispositive. The arbitrator recognized the materiality at the outset of the hearing and in the Final Award. Before evidence or testimony was presented at the hearing, he predicted that draftsmanship would be dispositive. He explained that, "sometimes, if something isn't perfect equipoints, who the drafter is or isn't may tip the balance. And so that's what I'm – I'm sort of hearing might be the case in our case." (8 App. 1908:13-17.)

And it was the case—but in a way that completely surprised both parties. The evidence, including emails and testimony from Golshani, LeGrand, and Bidsal, overwhelmingly shows **CLA** and/or **LeGrand** drafted Section 4.2. No evidence shows Bidsal drafted or proposed Section 4.2 language. Recognizing that the evidence of draftsmanship tilted heavily against it, CLA urged the arbitrator to presume that **LeGrand** drafted Section 4.2 and remove the draftsmanship issue from consideration at the hearing altogether. (8 App. 1905:15-1906:6.) Nor did CLA ever allege in post-hearing briefing that Bidsal had drafted or proposed any Section 4.2 language. (*See* 10 App. 2345-50.) Rather, CLA argued that, because CLA and Bidsal discussed the language that CLA and/or

LeGrand drafted or revised, "[w]ho actually typed the document is not relevant." (10 App. 2350.)

Despite this, the arbitrator inexplicably determined that **Bidsal** was the principal drafter of Section 4.2. In so determining, he noted that the draftsmanship determination was "material[]" to the result, though he cautioned it was not "not dispositive, per se."[10] (5 App. 1164 at ¶ 9 n.6; *see also id.,* ¶ 17.)

C. The Arbitrator's Draftsmanship Determination Was Unsupported by Any Evidence, Much Less Substantial Evidence

The arbitrator's determination that Bidsal was the "principal drafter" of Section 4.2 was an arbitrary and capricious distortion of the evidence. The determination was not only unsupported by any evidence, it was contrary to a mountain of evidence and testimony showing that **CLA** drafted Section 4.2.

[10] The qualifier "per se" can only be read as an acknowledgement that the draftsmanship determination was especially important to the outcome.

1. The Evolution of the Final Award from Merits Order No. 1 Reveals a Complete Lack of Evidentiary Support for the Arbitrator's Draftsmanship Determination

The evolution of the Final Award from the Interim Award and Merits Order No. 1 shows the complete erosion of evidentiary support for the arbitrator's draftsmanship determination. Merits Order No. 1 contained numerous findings purportedly supporting the determination that Bidsal drafted Section 4.2. These findings, however, were deleted from the Interim and Final Awards. As that happened, the arbitrator's determination that Bidsal drafted Section 4.2 became fully untethered from the evidence and testimony in the record.[11]

Merits Order No. 1 contains two sets of findings relating to the draftsmanship determination. The first set supports the draftsmanship determination, though the arbitrator did not expressly rely upon them. The second set largely fail to support the draftsmanship determination,

[11] While Golshani alleged that Bidsal revised the operating agreement before the agreement became final, Golshani conceded he was "drawing an assumption." (9 App. 2062.) Indeed, no evidence shows Bidsal revised any part of Section 4.2 or any other material language. The overwhelming evidence shows CLA drafted the entirety of Section 4.2.

but the arbitrator relied upon them for that purpose. Both sets were abandoned by the arbitrator, however, as Merits Order No. 1 evolved into the Interim and Final Awards.

First, in Merits Order No. 1, the arbitrator found that Bidsal had inserted the term "FMV" (a term the arbitrator regarded as ambiguous) into Section 4.2. The arbitrator found that the term "FMV" had "found its way into Section 4.2 late in the process, **while it was apparently under Mr. Bidsal's control for final revisions**." (4 App. 973-74 ¶ 9, emphasis added.) Additionally, in Merits Order No. 1, the arbitrator found "there was no discussion between Messrs. Bidsal and Golshani about 'FMV' or any other material aspect of what became the 'buy-sell' provision which is Section 4.2 of the Green Valley Operating Agreement." (4 App. 974 ¶ 9 n.9.) But neither finding appears in the Interim or Final Award. (*See generally* 4 App. 967, 982.) The reasonable inference is that the arbitrator recognized they were unsupported and so removed them.

Second, in Merits Order No. 1, the arbitrator identified four categories of evidence, concluding that "the preponderance of" this evidence established that Bidsal drafted Section 4.2:

> While not dispositive, per se, the Arbitrator has materially determined that Mr. Bidsal controlled the final drafting of the Green Valley Commerce, LLC Operating Agreement, and thus should be deemed the principal drafter of Section 4.2 of that agreement, **as shown by the following, based on a preponderance of the evidence:** (A) the operating agreement was drafted by an attorney selected and initially engaged by Mr. Bidsal, albeit on behalf of both Messrs. Bidsal and Golshani, (B) the lawyer, David LeGrand (who testified at hearing) did not even know Mr. Golshani's name until near the end of his role in drafting the operating agreement, (C) the "buy-sell" provisions of what became Section 4.2 of the operating agreement, was added to a form operating agreement provided to Mr. Bidsal by a real estate broker known to him and, in Mr. LeGrand's view, initially was form-book "vanilla", (D) Mr. Bidsal, without apparent justification, overly held or withheld his final revisions to what became the final version of the Green Valley Operating Agreement --- including his addition of what became the "FMV" ambiguity, despite Mr. Golshani's requests for and Mr. LeGrand's written inquiry to Mr. Bidsal concerning the same. See Exhibit 27 [Mr. LeGrand to Mr. Bidsal: "Shawn, Did you ever finish the revisions?"].

(4 App. 969 ¶ 4 n.3 (emphasis added).)

The evidence in categories (A), (B), and (C) is plainly irrelevant to the draftsmanship determination. To the extent categories (A) and (B) carry an implication that LeGrand favored Bidsal, that implication is unsupported and directly belied by the arbitrator's finding that "Mr. LeGrand was not shown to be biased for or against either side in this

matter." (4 App. 971 ¶ 8 n.6.) The relevance of the evidence in category (C) is unclear. Whatever "vanilla" buy-sell language existed in the original template was completely displaced when CLA drafted an entirely new buy-sell provision on a blank sheet of paper—if not before then. (*See* 3 App. 536-37.) The category (D) evidence that Bidsal inserted the "FMV" language into Section 4.2 would be relevant, if that evidence existed. However, that evidence does not exist.

None of these findings or analysis appear in the Interim or Final Award.[12] The reasonable inference is that the arbitrator removed categories (A), (B), and (C) as irrelevant, and that he removed the finding that Bidsal inserted the "FMV" term in Section 4.2 because it was unsupported.[13]

In the Final Award, the arbitrator abandoned any reliance on the evidence identified in Merits Order No. 1. The Final Award contains no

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[12] Everything after the sixth line of the block quote above was deleted. (*Compare* 4 App. 969 ¶ 4 n.3 *with* 5 App. 1219 at ¶ 9 n.5.)

[13] The arbitrator also appeared to adopt the Proposed Interim Order submitted by CLA, wherein CLA adopted Merits Order No. 1, but deleted the inaccurate findings relating to draftsmanship. (*Compare* 4 App. 969, ¶ 4 n.3 *with* 4 App. 986, ¶ 7 n.5.)

finding that Bidsal caused the "addition of what became the 'FMV' ambiguity." Instead, the draftsmanship determination is grounded in evidence that Bidsal received and reviewed the draft operating agreement before it was finalized:

> While Mr. Golshani had some role in what became Section 4, based on the evidence the Arbitrator finds that Mr. Bidsal controlled the final drafting of the Green Valley Commerce, LLC Operating Agreement, and had the last and final say on what the language was before signing the Operating Agreement, and is deemed to be the principal drafter of Section 4.2 of that agreement and therefore bears the burden of risk of ambiguity or inconsistency within the disputed provision.

(5 App. 1223 at ¶ 17.)

This is not substantial evidence that Bidsal drafted Section 4.2. The Final Award conflates the **opportunity** to propose revisions with the **authority** to unilaterally implement revisions. No evidence shows Bidsal "had the last **and final** say" on the Second 4.2 language. Even if Bidsal reviewed the final draft after CLA, Bidsal could not sign the operating agreement on CLA's behalf. Furthermore, any revisions Bidsal proposed would have been implemented through LeGrand, who jointly represented CLA and Bidsal. LeGrand could not have accepted unilateral revisions from Bidsal without breaching his duty to CLA.

The Final Award also conflates **review** with **drafting**. Reviewing and commenting on a draft is not equivalent to drafting.[14] Ambiguity is construed against the **drafter** because the drafter selects the terms for reducing the parties' intent to writing. When making these selections, the drafter "is likely to provide more carefully for protection of his own interests." *See* Restatement (Second) of Contracts § 206, cmt. a (1981). The drafter "is also more likely than the other party to have reason to know of uncertainties of meaning," and "may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert." *Id.* Thus, the rationale for construing terms against the drafter has no application to Bidsal, because he never selected or proposed terms for Section 4.2.

[14] Whether there were bilateral negotiations regarding the disputed contract terms is relevant to whether one party should be deemed the drafter of the instrument. But the question here is whether a party can be deemed the drafter of a contract of which he drafted no part.

2. The Arbitrator's Draftsmanship Determination Was Contrary to the Overwhelming Evidence

Not only is the arbitrator's determination that Bidsal was "the principal drafter of Section 4.2" (5 App. 1219, 1223 at ¶¶ 9, 17) unsupported by substantial evidence, it is belied by overwhelming evidence showing **CLA** and/or **LeGrand** drafted Section 4.2.

From the undisputed evidence, it is clear **CLA** drafted the buy-sell language that became Section 4.2. Specifically, CLA prepared two drafts—"ROUGH DRAFT" and "ROUGH DRAFT 2." Both drafts include buy-sell language materially identical to Section 4.2. For comparison, CLA's drafts are reproduced side-by-side with Section 4.2, above.

Aside from capitalization and other typographical edits made by LeGrand, CLA's "ROUGH DRAFT 2" is distinguishable from the final Section 4.2 language only because "ROUGH DRAFT 2" does not contain the phrase "(or FMV if appraisal is invoked)"—which appears in the final paragraph of Section 4.2.

This phrase—"(or FMV if appraisal is invoked)"—was drafted by LeGrand at CLA's direction. On November 29, 2011, LeGrand emailed CLA and Bidsal a revised draft operating agreement. (6 App. 1338.) In the email, LeGrand wrote, "Ben and Shawn. This version has Ben's

[Golshani's] 'dutch auction' language and a buy-sell at FMV on the death or dissolution of a Member." (*Id.*)

The Section 4.2 draft LeGrand circulated on November 29, 2011, that includes "Ben's 'dutch auction' language" is materially identical to the final Section 4.2. For comparison, the final paragraph of Section 4.2 from the November 29, 2011, draft is reproduced below alongside the final paragraph of Section 4.2. Note that the language is identical—including typos ("Section 4..").

November 29, 2011 draft (Section 4.2 final paragraph):	**Final Operating Agreement (Section 4.2 final paragraph):**
The specific intent of this provision is that once the Offering Member presented his or its offer to the Remaining Members, then the Remaining Members shall either sell or buy at the same offered price (or FMV if appraisal is invoked) and according to the procedure set forth in Section 4.. In the case that the Remaining Member(s) decide to purchase, then Offering Member shall be obligated to sell his or its Member Interests to the remaining Member(s). **(6 App. 1350)**	The specific intent of this provision is that once the Offering Member presented his or its offer to the Remaining Members, then the Remaining Members shall either sell or buy at the same offered price (or FMV if appraisal is invoked) and according to the procedure set forth in Section 4.. In the case that the Remaining Member(s) decide to purchase, then Offering Member shall be obligated to sell his or its Member Interests to the remaining Member(s).

The undisputed evidence, therefore, establishes beyond a doubt that **CLA** drafted Section 4.2, with LeGrand contributing non-substantive revisions at CLA's direction and/or implementing revisions CLA provided.

The hearing produced a wealth of additional evidence and testimony confirming that CLA drafted Section 4.2. The arbitrator's determination that **Bidsal** was the principal drafter of Section 4.2 is not only unsupported, by is directly belied by a mountain of evidence and testimony in the record showing **CLA** selected the words that became the disputed portion of Section 4.2.[15]

D. The Arbitrator Manifestly Disregarded the Law and Exceeded His Powers Under the Arbitration Agreement by Ordering Specific Performance

1. The Arbitrator Manifestly Disregarded the Law By Ordering Specific Performance

After arbitrarily and capriciously determining that **Bidsal** was the principal drafter of Section 4.2 in order to construe the provision's

[15] At the merits hearing, Golshani testified, among other things, that he added the "FMV" term (9 App. 2039-40); testified he changed "offer to sell" draft language to "offer to buy" in order "to make sure that the person who is initiating the forced buy/sell really has thought about it and has the money ready for it" (8 App. 1987); testified he revised the language regarding identification and definition of offering member and remaining member (8 App. 1985-86); testified he discussed "the idea" of the formula with Bidsal but "Not the specifics." (9 App. 2032.) LeGrand also testified Golshani "was pushing for th[e] approach" reflected in the final operating agreement, which was an approach LeGrand testified he "had never done . . . before, so this was -- you know, took some thought" (9 App. 2193).

purported ambiguity against him, the arbitrator then compounded his misconduct by ordering specific performance, in manifest disregard of the law. The lynchpin of the Final Award is the conclusion that Section 4.2 is ambiguous, or "not a model of clarity."[16] (5 App. 1219 ¶ 7; *see also id.* at 1219, 1220, 1223 ¶¶ 7 n.4, 10(A), 13, 17 (referencing ambiguity of Section 4.2).) Yet, "[t]here is **no better established principle of equity jurisprudence** than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite." *Dodge Bros. v. Williams Estate Co.*, 52 Nev. 364, 287 P. 282, 283–84 (1930) (emphasis added). Indeed, "[s]pecific performance is available **only** when: (1) the terms of the contract are definite and certain; (2) the remedy at law is inadequate; (3) the appellant has tendered performance; and (4) the

[16] The arbitrator, upon concluding that Bidsal "bears the burden of risk of ambiguity or inconsistency within the disputed provision," went out of his way to note that "the determination of draftsmanship is not dispositive," and "the determinations and award would be made even if Mr. Bidsal's contention that Mr. Golshani was the draftsman of Section 4 were correct." (5 App. 1223 at ¶ 17.) However, even if the **draftsmanship determination** was only "material" (*id.* at 1219 ¶ 9 n.5) and not dispositive, the Final Award was underpinned by the arbitrator's conclusion that Section 4.2 was ambiguous. *See* 5 App. 1219 at ¶ 7 n.4 (explaining that the merits hearing was necessary because the ambiguity of the disputed terms precluded the arbitrator from resolving the dispute as a matter of law).

court is willing to order it." *Serpa v. Darling*, 107 Nev. 299, 305, 810 P.2d 778, 782 (1991) (emphasis added). By ordering Bidsal to transfer his GVC membership interest to CLA within ten days of the Final Award—a specific performance remedy—the arbitrator manifestly disregarded the law.

2. The Arbitrator's Specific Performance Order Exceeded His Powers Under the Arbitration Agreement, Which Prohibits Permanent Injunctive Relief, Including a Forced Sale

By ordering specific performance, the arbitrator also exceeded his powers under the arbitration agreement. *See* 9 U.S.C.A. § 10(a) (authorizing vacatur "where the arbitrators exceeded their powers"); NRS 38.241(1)(d). The arbitration agreement prohibits an arbitrator from awarding relief other than that which is contemplated by the agreement—and the agreement contemplates only that **temporary** injunctive relief may be ordered. Vacatur is warranted, therefore, because the arbitrator exceeded this authority.

The parties' arbitration agreement is set forth by Article III, Section 14.1 of the operating agreement. Section 14.1 provides, in pertinent part:

> **14.1 Dispute Resolution.**
>
> [. . . .]
>
> **The arbitrator shall not be empowered to award to any party any damages of the type not permitted to be recovered under this Agreement** in connection with any dispute between or among the parties arising out of or relating in any way to this Agreement or the transactions arising hereunder, **and each party hereby irrevocably waives any right to recover such damages**. Notwithstanding anything to the contrary provided in this Section 14.1 and without prejudice to the above procedures, either Party may apply to any court of competent jurisdiction for **temporary** injunctive or other provisional judicial relief if such action is necessary to avoid irreparable damage or to preserve the status quo until such time as the arbitrator is selected and available to hear such party's request for **temporary** relief.

(3 App. 545-46 (emphasis added).)

Section 14.1 prohibits the arbitrator from "award[ing] to any party any damages of the type not permitted to be recovered under this Agreement," and the parties expressly agreed to waive any right to such relief. This restriction on the relief available to the parties through arbitration must be given effect. *See Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) ("A basic rule of contract interpretation is that every word must be given effect if at all possible."); *see id.* ("A court

should not interpret a contract so as to make meaningless its provisions.").

There is only one provision where the GVC operating agreement contemplates injunctive relief—and that provision is Section 14.1. And the only injunctive relief Section 14.1 contemplates is **temporary**. This is not accidental. Consider the reference in Section 14.1 to "such time as the arbitrator . . . is available . . . to hear such party's request for temporary relief." There is no reason to modify "relief" in this instance with the word "temporary" unless intended to restrict the relief an arbitrator is authorized to award. If Section 14.1 is to be given effect, therefore, **permanent** injunctive relief—the forced and irrevocable sale of Bidsal's GVC membership interests to CLA—is not a type of relief "permitted to be recovered under this Agreement." For this reason, this Court should vacate the Final Award.

E. This Court Cannot "Remand" the Case to the Arbitrator; It Must Vacate the Award

The arbitrator's award must be vacated. Where the arbitrator has manifestly disregarded the law or exceeded its authority, this Court is not authorized to modify or correct the award. *Film Technicians of the Motion Picture Industry, Local 683 v. Color Corp. of Am.*, 297 P.2d 86,

88 (Cal. Ct. App. 1956). Instead "there has, in reality, been no award, and the attempted award must be vacated as a whole, and the matter left standing as if it had not been heard by the arbitrator." *Id.* Letting the arbitrator correct a decision that has manifestly disregarded the law would inevitably let him reexamine the merits, which is "not permitted under the statute or at common law." *Health Plan of Nev., Inc., v. Rainbow Med., LLC*, 120 Nev. 689, 696, 100 P.3d 172, 177 (2004).

The arbitrator could have resolved this dispute in a principled way, but he instead manifestly disregarded the law, made arbitrary and capricious determinations on material issues to support a convenient result, and ultimately ordered a remedy that exceeded his authority. The arbitrator cannot undo this by merely fixing specific errors in his award. This Court must vacate the award so the parties, if they wish, can conduct a new arbitration. *See Wichinsky v. Mosa*, 109 Nev. 84, 90, 847 P.2d 727, 731 (1993) (deficient arbitration award must be "arbitrated anew").

CONCLUSION

The Final Award comprehensively disregards the law and evidence to reach a preordained result—and does so explicitly. There is no benign explanation for the extrinsic, "rough justice" standard, or the draftsmanship determination that defies rational explanation, and all evidence. Because Article V, Section 4 plainly requires a different result, the Final Award must be vacated.

Dated this 24th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 13,278 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 24th day of November, 2020.

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