IN THE SUPREME COURT OF THE STATE OF NEVADA

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IN THE MATTER OF THE PETITION OF CLA PROPERTIES LLC.	Electronically Filed Case No. 80427 Feb 17 2021 01:25 p.m. Elizabeth A. Brown Clerk of Supreme Court
SHAWN BIDSAL, AN INDIVIDUAL, Appellant, vs. CLA PROPERTIES LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, Respondent.	
CLA PROPERTIES LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, Appellant, vs. SHAWN BIDSAL, AN INDIVIDUAL, Respondent.	**Case No. 80831**

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA
HONORABLE JOANNA S. KISHNER

*****

RESPONDENT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record for respondent 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 justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

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3. If litigant is using a pseudonym, the litigant's true name: Not applicable.

DATED this 22 day of February, 2021.

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ANSWERING BRIEF ON APPEAL

INTRODUCTION[1]

Creating an exit plan for a business relationship, where one party sets a value and the other chooses to buy or sell at that value, is hardly new. By whatever name–"forced buy-sell," "Dutch auction," "put-call," or no name at all–the critical features are the same. The party wanting out of the relationship (here called "Offering Member") is under no compulsion to initiate a process. But if he does, the other party (here called "Remaining Member") gets to choose whether to buy or sell, using the amount of the Offering Member's value in the offer. This gives protection to both members. The Offering Member is protected because he has no time constraints in determining the amount of the offer; he can use all of his available resources to appraise and pinpoint the value of the property; and he can make an offer in any amount he deems fair. The Remaining Member is protected, because if the Offering Member's value is fair or perhaps too high, then the Remaining Member can elect to sell at that value; and if the Remaining Member believes the Offering Member's value is too low, the Remaining Member can elect to buy at that same value.

1/

For ease of reading, this introduction will largely omit appendix citations, but citations will be provided later.

Here, Bidsal made an offer that he **represented** was the fair market value, but which CLA determined was less than the actual value. CLA therefore elected to purchase, instead of sell, using the same value Bidsal had asserted as the fair value. Bidsal then searched for a way out of the Operating Agreement's (Agreement) application.

This appeal is truly no more than Bidsal's quarreling with Judge Haberfeld's determinations of facts and law.[2] Bidsal is essentially asking this court to retry the arbitration, wholly ignoring law establishing that even if Judge Haberfeld made errors on the facts or law, this would still not entitle Bidsal to an order vacating Judge Haberfeld's decision.

Judge Haberfeld carefully considered the extensive evidence presented at the arbitration hearing, and he thoroughly evaluated the multiple briefs submitted by the parties. He did exactly what he was hired to do, namely, interpret the buy-sell agreement, then apply it.

Bidsal's appeal is largely premised on his own testimony, while refusing to acknowledge important facts and contradictory evidence. Judge Haberfeld, who was the sole judge of Bidsal's credibility, found that Bidsal's testimony and arguments

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2/

The JAMS arbitrator was retired U.S. Magistrate Judge Stephen Haberfeld, who will be referred to as Judge Haberfeld in this brief.

were "outcome determinative" in his own favor, and Bidsal's testimony could not always be logically applied to the Agreement.

When, contrary to Bidsal's expectations, CLA responded to his offer by electing to buy at the value Bidsal's offer established, Bidsal then refused to proceed without an appraisal, which he contended (at the arbitration) was the only way to establish FMV, despite the fact that the appraisal procedure was to provide protection only for the Remaining Member, who could request an appraisal to set the FMV.

With all the e-mails and all the drafts, there is not one writing in which it was said that if the Remaining Member chose to buy rather than sell, then the fair value amount offered by the Offering Member could not be used as the FMV, but rather, an appraisal was required to establish the fair market value. And there is no evidence that this was ever said by Bidsal, CLA's owner (Golshani), or the attorney for the parties (LeGrand), during drafting of the Agreement. It was only said in Bidsal's subsequent self-serving testimony at the arbitration.

In summary, Bidsal thought CLA lacked sufficient funds to buy Bidsal's interest. Bidsal therefore offered a lowball figure to purchase CLA's interest. But when CLA instead responded that it would buy Bidsal's interest, at the amount (Buyout Amount) using the fair market value Bidsal himself had set in his offer for CLA's interest, Bidsal desperately tried to extract himself from the dilemma he

created for himself. The arbitrator rejected Bidsal's unfounded position. The parties agreed that any award rendered by the arbitrator "shall be final and not subject to judicial review." Bidsal nevertheless sought judicial review. The district court ruled against Bidsal and found no basis for vacating the arbitration award. This court should affirm.

ISSUES PRESENTED

CLA disagrees with Bidsal's statement of issues. The true issues are:

1. In a case governed by the Federal Arbitration Act (FAA) are Nevada's common law grounds for vacating an award also available?

2. If so, did Bidsal demonstrate by clear and convincing evidence that (a) Judge Haberfeld's award was arbitrary, capricious, or unsupported by the Agreement or (b) Judge Haberfeld acknowledged that a law compelled a result but then refused to follow the law?

3. Regardless of whether this court's review is governed by the FAA or Nevada law, did Bidsal demonstrate that Judge Haberfeld's award was so baseless that it should be disregarded?

STANDARD OF REVIEW

A judgment confirming an arbitration award is reviewed de novo. *Sylver v. Regents Bank, N.A.*, 129 Nev. 282, 286, 300 P.3d 718, 721 (2013).

STATEMENT OF FACTS

I. Initial events.

Contrary to AOB 4, CLA's owner, Benjamin Golshani, was not a real estate novice, but had already invested in Nevada real estate when Bidsal and he began discussions for a joint business. 8 App. 1932:10-1933:7. In one of those meetings Bidsal expressed being short on cash. 8 App. 1934:7-13. The two parties therefore agreed that Bidsal would invest only 40 percent of the necessary money, later reduced to 30 percent, but he would receive 50 percent of the profits. 8 App. 1936:9-1937:11; 1943:9-1944:10.

Before Green Valley Commerce, LLC (Green Valley) had been formed, Bidsal and Golshani had already orally agreed that there should be a way to disassociate, by including in the Agreement a provision "that for whatever reason, if we don't want to be together or somebody is not–doesn't want to work in Las Vegas or whatever, there should be a way to separate without having to go into court." 8 App. 1937:23-1938:18.

Golshani provided his credit card for expenses relating to properties being purchased at auctions. 8 App. 1939:9-1940:11. To purchase the initial property for Green Valley, Golshani put up the required initial amount of around ten percent of the bid. 8 App. 1941:4-1942:7.

After Golshani had already deposited $404,000 (8 App. 1944:20-1946:6), Bidsal formed the Green Valley entity listing himself alone as manager. 1 App. 219. When Golshani questioned why he had not been included as a co-manager, Bidsal falsely told him that by law an LLC could have only one manager. 8 App. 1944:20-1945:14.

II. Development of the buy/sell provision.

On June 3, 2011, escrow closed on Green Valley's initial purchase. 8 App. 1946:7-11. On June 17, 2011, and again on June 27, 2011, an attorney engaged by Bidsal (David LeGrand) sent a proposed Agreement to Bidsal. 2 App. 252-273.

On July 21, 2011, introduced by Bidsal, Golshani first met LeGrand. 8 App. 1950:1-4. They discussed adding Golshani as a manager. 8 App. 1950:8-21. During the meeting, LeGrand was told by both parties that they wanted the Agreement to provide that either member could, without the need for court intervention, for any reason or for no reason at all, force the other either to buy or sell his interest at an offered price, a process LeGrand characterized as a Dutch auction or forced buy/sell. 8 App. 1950:1-1953:17, 1954:19-1955:9; 9 App. 2179:7-2180; 2181:11-20; 2183:1-7; 2186:8-13. Discussions between Bidsal, Golshani, and LeGrand regarding the buy/sell provision, went on for several months thereafter, from July until December of 2011. 9 App. 2174:23-25.

On August 10, 2011, LeGrand sent Golshani a draft Agreement, and Golshani called LeGrand to complain about the lack of the buy/sell provision. 8 App. 1959:12-17; 9 App. 2182:6-21. In response, LeGrand began to prepare what he called a "Dutch auction" provision. 9 App. 2182:22-25. He described it as follows:

> What I meant was the proposition that if a member 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. 2183:3-7.

On August 18, 2011, LeGrand sent the parties another draft, which he said included a Dutch auction provision. 2 App. 412. None of it was drafted by Golshani. 8 App. 1967:19-1968:13.

From this very first draft that included a buy/sell provision, these elements were present: (1) the process started with an offer; (2) regardless of whether the offer was stated just to sell, the Remaining Member could either buy the Offering Member's interest or sell his interest based on the same amount stated in offer; and (3) while the words "offer" and "counteroffer" were used, they did not have their common meaning (where the offeree can expressly reject the offer or stand silent, and nothing happens), but rather, for this Agreement the offeree had various options, but

doing nothing had consequences (impliedly accepting the offer), all made clear in the "specific intent" provision.

That draft called for the fair market value used in the offer to be determined by an appraiser the Offering Member selected – obviously in an amount approved by the Offering Member, because otherwise the member hiring the appraiser would either simply not make an offer at all or get another appraiser. That way of determining fair market value was LeGrand's idea. 9 App. 2184:17-2185:1. But it was not what the parties wanted or had discussed with LeGrand. 8 App. 1964:21-25. Rather, what was desired and told to LeGrand was a provision where the offeror simply set the amount, and the offeree chose to buy or sell based on that amount. 8 App. 1965:3-13; 1966:4-1967:1.

III. Additional changes in the provision.

On September 16, 2011, LeGrand told the parties that they had discussed "that you want to be able to name a price and either get bought or buy at the offer price," and "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]." 2 App. 472. With it was a draft where the August 18, 2011, Section 7 (of Article V) with the buy/sell provision, was totally eliminated. 2 App. 473. Golshani spoke with Bidsal, and they agreed that somehow it had to be addressed. 8 App. 1971:3-11.

Three days later, LeGrand wrote to the parties saying, "I talked with Shawn about the issue that because your capital contributions are so different, you should consider a formula or other approach to valuing your interests." 3 App. 501. In other words, LeGrand called the parties' attention to the fact that they had to vary the simple Dutch auction provision, to take into account their unequal capital contributions, and he proposed a formula be created to do so.

LeGrand's next attempt to deal with the issue was in §5 of Article V. 3 App. 503. This time it started with the offering member offering to sell or buy. It still provided that the Remaining Member could force the Offering Member to use the price in the offer either to buy or sell, meaning the Offering Member could end up being required to do the opposite of what his offer said, but attempted to take into account the parties "capital ownership." 3 App. 515.

Golshani and Bidsal discussed that this draft was not satisfactory because Section 5 bound only the Offering Member and not the Remaining Member, and the language regarding ratio of capital language had not been discussed and was unfamiliar. 8 App. 1973:12-1974:20.

With the elapse of so much time since both parties had put in their money and had already purchased the property, Golshani and Bidsal were both unhappy about the fact that the Agreement had not been completed. 9 App. 2074:6-14. They met

to come up with a formula. 8 App. 1974:23-1975:18. Bidsal said that the buy/sell provision had to provide additional protection for a Remaining Member receiving what he believes to be a low offer, but who does not have the cash to buy. 8 App. 1975:19-1977:13. Bidsal proposed that the Remaining Member should be able to have the property value set by appraisal instead of the amount in offer. *Id.* Golshani asked if Bidsal wanted to type up what they had talked about, and after that take it to LeGrand, and Bidsal responded that he was busy and that Golshani should do so. 8 App. 1977:20-22.

That is how Golshani essentially became the stenographer, to capture what Bidsal and he wanted in their Agreement.

Based on the discussions between Golshani and Bidsal, and based on LeGrand stating that either a formula or some other approach had to take into account the differing capital contributions, Golshani attempted to type his understanding of his conversation with Bidsal, and on September 22, 2011, Golshani typed and sent it to Bidsal, saying "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.

Golshani used LeGrand's August 18, 2011 draft from which to work. 8 App. 1978:10-16. Seeing that this rough draft was injurious to the arguments he had

raised, Bidsal at first denied ever receiving it, only to concede at the arbitration hearing that in fact he had received it. 8 App. 1817:17; 9 App. 2072:11-2073:2.

Bidsal wanted changes to the Rough Draft 1, and he and Golshani discussed the changes multiple times. 8 App. 1980:7-1981:17; 10 App. 2276:17-20. One of the changes Bidsal requested was a reduction in the number of appraisers. 10 App. 2279:12-2280:4. Additionally, the formula for the ultimate purchase/sale price was fair market value (FMV) less the cost of purchase (COP) multiplied by the selling member's interest percentage; but as of the last draft they had received from LeGrand, Bidsal's "percentage interest" was 30 percent. 3 App. 533. Bidsal wanted 50 percent of the profit if he ended up selling, so he wanted the multiplier changed to 0.5. 8 App. 1982:2-1983:19.

Using comments by Bidsal (8 App. 1984:15-1985:6; 1992:19-25) or, as stated by Bidsal, he and Golshani "massaged the language in our conversations" (10 App. 2280:8), and as a result of those conversations (10 App. 2276:1-4), Golshani typed Rough Draft 2 and on October 26, 2011, sent it to Bidsal for review and approval. 3 App. 568.

Just as with the first rough draft, Bidsal initially denied receipt of Rough Draft 2 and used the exhibit he created to prove the lie, only to concede his receipt when

it became useful to do so at the arbitration hearing. 8 App. 1817:17-21; 9 App. 2087:7-15.

IV. Finalization of the Agreement.

After his receipt of Rough Draft 2, Bidsal told Golshani that he would talk to LeGrand about it, and he said to send a copy to LeGrand, which Golshani did. 8 App. 1989:9-24. On November 10, 2011, LeGrand sent the parties a revised version of what Golshani had sent him, numbered as Section 7. 6 App. 1332; 1335. LeGrand then inserted that Section 7 into a draft of the Agreement, now as Section 4 of Article V, and on November 29, 2011, sent it to the parties; as Bidsal acknowledged, it was "the last revised operating agreement that David send to both of us." 6 App. 1430; 1442; 1461; 9 App.2197:18-2198:1; 2220:14-25. Since the draft created by Bidsal and Golshani was forwarded to LeGrand by Golshani, LeGrand characterized what he had received as "Ben's 'Dutch auction' language." 6 App. 1338.

Bidsal held onto the Agreement, telling Golshani that he was going to review it and revise it if "any revision required" and told LeGrand that he was going to revise it. 8 App. 1995:11-1996:5. On December 12, 2011, Bidsal wrote the Agreement is finished and signed. 9 App. 2129:13-15; 2131:25-2132:7.

The Agreement provides exactly what the parties had said they wanted. After an offer by the Offering Member proposing a fair market value of their property, the

Remaining Member could respond either by accepting or "rejecting the purchase offer and making a counteroffer to purchase the interest of the Offering Member **based upon the same fair market value (FMV).**" 1 App. 39 (emphasis added). And to clarify their intent, LeGrand had written a "specific intent" provision, which the parties accepted when they signed the Agreement. *Id.* This provision stated:

> 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).

1 App. 39. LeGrand's purpose in adding this provision was to make sure there was no question about the intent of the parties. 9 App. 2194:4-10.

V. Bidsal's offer to purchase.

The next relevant date was in early 2017. Bidsal inquired if Golshani was interested in making another investment; Golshani answered that he had another project, and therefore "I don't have cash available" to invest with Bidsal. 8 App 2000:5 - 9 App. 2001:4.

Armed with this information, on July 7, 2017, Bidsal offered to buy CLA's membership interest in Green Valley, and stated his "best estimate of the current fair market value of the Company is $5,000,000 (the 'FMV')," and that "the foregoing FMV shall be used to calculate the purchase price of the Membership Interest to be sold." 3 App. 711. On August 3, 2017, with an improved cash position, CLA exercised its right to buy, rather than sell, using the same $5,000,000 that Bidsal's offer had represented as the fair market value. 4 App 952.

On August 5, 2017, Bidsal's attorney responded by demanding an appraisal to determine the FMV. 4 App. 954. CLA then demanded that Bidsal proceed to close escrow to sell Bidsal's interest (4 App. 956), to which Bidsal responded that he refused to proceed without an appraisal. 6 App. 1490.

On September 26, 2017, CLA filed an arbitration claim. 4 App. 961.

VI. The arbitration.

After various pre-arbitration proceedings, a two-day arbitration hearing was held on May 8-9, 2018. 8 App. 1894; 9 App. 2119. The parties submitted post-arbitration briefs. 10 App. 2325, 2371, 2407, 2455. Judge Haberfeld issued his final award in CLA's favor on April 5, 2019. 1 App. 7.

VII. District court proceedings.

The Agreement provided that any award rendered by the arbitrator "**shall be final and not subject to judicial review** and judgment thereon may be entered in any court of competent jurisdiction." 1 App. 36 (emphasis added). On May 21, 2019, CLA filed a petition to confirm the award and for entry of judgment on the award, as allowed by the agreement. 1 App. 1. Contrary to the agreement's prohibition against a judicial challenge to the award, Bidsal filed an opposition to entry of judgment, and he included a counter-petition to vacate the award. 1 App. 76. The parties submitted arbitration documentation and legal briefs, after which the district court affirmed the award. 11 App. 2610. This appeal followed.[3]

VIII. Incorrect "facts" in Bidsal's opening brief.

The AOB contains several incorrect alleged facts, some material and others irrelevant. Although this answering brief will not attempt to identify all of the incorrect facts in the AOB, we will identify some. We request the court to use caution when relying on facts recited in the AOB.

- Bidsal alleges that after his offer, CLA secretly obtained an appraisal. AOB 15-16. It was hardly a secret. Golshani wrote to Bidsal, disclosing that Golshani

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3/ Additional facts relating to CLA's cross-appeal on an attorneys' fee issue will be discussed below.

wanted to obtain an appraisal, and asking that their broker cooperate with him. 9 App. 2052:8-10. Golshani then met with Bidsal and provided Bidsal with the amount of the appraisal. *Id.*, lines 13-19. Bidsal never asked for a copy of the report. 9 App. 2053:25-2054:9.

- Bidsal repeatedly claims that Judge Haberfeld relied on a finding that Bidsal was the principal drafter. *E.g.*, AOB 3. That is the opposite of what Judge Haberfeld ruled. Specifically, he ruled that the identity of the principal drafter was "not dispositive." 5 App. 1219, n. 5. He further ruled that his determinations and award were based upon testimony and exhibits, and "the determination of draftsman is not dispositive." 5 App. 1223 ¶ 17. And: "[T]he determinations and award would be made even if Mr. Bidsal's contention that Mr. Golshani was the draftsman of Section 4 were correct."*Id.*

- Bidsal states that the award was premised on a finding that "rough justice" derived from "typical Dutch Auction provisions." AOB 3. But the award says that those provisions were referred to **by the parties and their joint attorney, David LeGrand**, as "forced buy/sell" and "Dutch auction" provisions. 5 App. 1217 ¶ 4. So the meaning of Dutch auction that Judge Haberfeld used was what the parties and their joint attorney used, not a "typical" meaning. Beyond that, Bidsal's counsel in

an arbitration brief himself used the words "Dutch auction" to describe the buy-sell provision that was contained in a rough draft. 8 App. 1826:12-15.

- At AOB 10, Bidsal contends that CLA's September 22, 2011 rough draft of Section 4.2 completely departed from LeGrand's rough drafts. He provides side-by-side "comparison" cells, but the cells actually compare CLA's rough draft to the "Final Operating Agreement." AOB 10 (right side cell heading).

- At AOB 46, Bidsal asserts that no evidence shows drafting or proposing Section 4.2 language by Bidsal, and that CLA never alleged in post-hearing briefing that Bidsal had drafted or proposed any Section 4.2 language. Bidsal cites 10 App. 2345-50. Those pages contain CLA's arbitration closing argument brief, including: "Using comments by Bidsal the language of the Rough Draft 1 was, as admitted by Bidsal, 'massaged' by both Bidsal and Golshani . . .Bidsal, when questioned by his own counsel, admitted ... the joint composing of Rough Draft 2." 10 App. 2347:21-28. "The changes in Rough Draft two from Rough Draft one were the result of [Bidsal's] conversation [with Golshani]." 2348:13-15. "It is abundantly clear that Bidsal as much as Golshani was the composer/drafter of Rough Draft 2." 2350:8-9. And "Bidsal acknowledged that what Golshani had typed was actually the product of the two of them." 10 App. 2360:7-8.

ARGUMENT

I. Summary of argument.

The burden to vacate an arbitration award is extremely high, regardless of whether a court applies the FAA or Nevada standards. When parties enter into a contract calling for binding arbitration, the parties are agreeing that the arbitrator will make the ultimate binding determination regarding interpretation of the contract's provisions, as well as determinations regarding breach or compliance with the contract, and remedies that should be allowed.

Here, the parties agreed to binding arbitration, with an award that would be "final and not subject to judicial review." This gave the arbitrator – and only the arbitrator – the authority to take evidence and make binding determinations. That is exactly what the arbitrator did. As a seasoned former federal magistrate and experienced JAMS arbitrator, Judge Haberfeld considered two days of testimony, dozens of exhibits, and extensive arguments of counsel. He determined that CLA's interpretation was correct, and Bidsal's interpretation was wrong. The contract and the evidence support Judge Haberfeld's decision. The district court's decision to confirm the award was correct under any standard of review. Bidsal's AOB has not established reversible error, and this court should affirm.

II. Judicial review of an arbitration award is extremely limited.

The Agreement contains three provisions with sources of law for the arbitration, none of which deal with judicial review – presumably because the agreement prohibits judicial review. Before considering these provisions, however, the court should first consider the arbitration paragraph, which sets the stage for the other provisions.

Art. III, Section 14.1, establishes arbitration as the sole method for dispute resolution if the parties cannot resolve a dispute themselves. 1 App. 35-36. The parties entrusted the arbitrator with broad powers and wide discretion over any arbitrated dispute, with the arbitrator having the last word. Specifically, the arbitration paragraph states that the arbitrator's award "**shall be final,**" and that the award is "**not subject to judicial review.**" 1 App. 36 (emphasis added). This language is crystal clear, and nobody has challenged its validity.

Where an arbitration clause provides that the award shall be final and binding on the parties, the award is not subject to judicial review, and it cannot be attacked in the absence of fraud, corruption or misconduct by the arbitrator. *See Lieberman v. Cook*, 343 F. Supp. 558, 562 (W.D. Pa. 1972); *see also Natl. Airlines, Inc. v. Metcalf*, 114 So. 2d 229, 232 (Fla. App. 1959) (contract provided arbitration decision shall be final and binding on the parties; court held that attacks on the award going

to errors of law or fact are not subject to judicial review); *Aerojet-General v. American Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973) (holding that an arbitration provision can eliminate all court review of an award if the intention to do so clearly appears).

Here, the Agreement states that the arbitrator's award "shall be final" and the award "**is not subject to judicial review.**" 1 App. 36 (emphasis added). This is perfectly clear—thereby showing the parties' intent to eliminate all judicial attacks on an arbitration award.

A. The three sources of governing authority in the Agreement.

As noted above, the Agreement contains three provisions establishing sources of governing authority. First, the Agreement refers to JAMS procedural rules for arbitrations. 1 App. 35-36. Neither party in this case has contended that JAMS procedural rules govern post-arbitration review.

Second, the Agreement states that "[t]he arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. § 1 et seq. [FAA]." 1 App. 36. This provision is limited to "the arbitration," which would include post-arbitration judicial review (as explained below).

And third, the Choice of Law provision in the Agreement—which is an umbrella provision that broadly covers the entire agreement—states in all capital

letters that the agreement shall be governed "in all respects" by Nevada law. 1 App. 44. In fact, the Choice of Law provision was so important to the parties that it is the **only** paragraph in the entire 28-page Agreement in all capital letters:

> **IN ALL RESPECTS** THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEVADA INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY, PERFORMANCE AND THE RIGHTS AND INTERESTS OF THE PARTIES UNDER THIS AGREEMENT WITHOUT REGARD TO THE PRINCIPLES GOVERNING CONFLICTS OF LAWS, UNLESS OTHERWISE PROVIDED BY WRITTEN AGREEMENT.

1 App. 44 (capitalization in original; bold added).[4]

Although these three provisions might seem inconsistent, they really are not. The Agreement essentially provides that arbitration procedures (*e.g.*, arbitrator selection, discovery, scheduling, evidence, and the like) are governed by JAMS rules; the arbitration itself, such as whether a dispute is arbitrable, and standards for confirming or vacating an award, is governed by the FAA; and everything else is governed "in all respects" by Nevada law.

4/ The use of all capitalization in a contract clause clearly demarcates the clause from the rest of the document, and emphasizes the clause. *See Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1138–39 (11th Cir. 2010); *cf. Marquez v. Weinstein, Pinson & Riley, P.S.*, 836 F.3d 808, 813 (7th Cir. 2016) (all capital letters used in part of summons for emphasis of that part).

Reconciliation of similar provisions was resolved in *WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. 884, 360 P.3d 1145 (2015). The contract in *WPH* contained two choice-of-law clauses. The first clause, found in the contract's "Arbitration" section, stated that the arbitration would be governed by American Arbitration Association (AAA) rules. *Id.* at 887, 360 P.3d at 1147. The second clause was in a "Miscellaneous Provisions" section, stating that the contract was governed by the law of one party's place of business, which was Nevada. The prevailing party moved for attorneys' fees based upon an offer of judgment. The arbitrators and the district court denied attorneys' fees, ruling that no Nevada case law exists for the availability of offers of judgment in arbitration proceedings. *Id.* at 886, 360 P.3d at 1146. The *WPH* court held that, in order to give effect to both provisions in the contract, the substantive provisions of the contract would be determined by Nevada law, and the procedural aspects of the arbitration would be governed by the AAA. *Id.* at 888, 360 P.3d at 1147-48.

B. The FAA applies to Bidsal's petition to vacate the award.

When Bidsal filed his district court petition to vacate the award, he contended that his petition should be governed by the FAA. 1 App. 92. After asserting that the FAA should apply, and after reciting the federal statute's language (1 App. 92), he cited a handful of cases dealing with Nevada common law grounds for vacating

arbitration awards. 1 App. 93-94. He never articulated why he cited those cases or why Nevada common law would apply to a petition governed by the FAA. He subsequently filed a reply in support of his petition, in which he reiterated his contention that the FAA provides the applicable source of law for post-arbitration judicial review in this case. 10 App. 2495-96. He did not argue for application of Nevada grounds for vacating an arbitration award. *Id.*

On appeal, Bidsal has not taken a clear position on whether his petition to vacate the award should be reviewed under FAA grounds or Nevada common law grounds. He seems to be arguing for both. AOB 20-26.

CLA agrees with Bidsal's district court position that the FAA applies to the petition to vacate the award. The Agreement requires "the arbitration" to be governed by the FAA. 1 App. 36. The Agreement does not specifically address whether post-arbitration judicial review is governed by FAA, because the Agreement prohibits such review in the first place. *Id.* (arbitrator's award "is not subject to judicial review"). If there is such review, however, it must be governed by the FAA. Otherwise, the FAA provision in the Agreement would be rendered meaningless. It is a well-established principle of contract construction that all parts of an arbitration contract must be harmonized, rendered consistent, and given effect – so as not to render any terms meaningless. *WPH*, 131 Nev. at 888, 360 P.3d at 1147. This principle applies

to arbitration provisions dealing with sources of applicable law. *Id.* Because Bidsal's brief discusses both the FAA and Nevada law, this answering brief will similarly discuss both. Bidsal's burden is extremely high under either source of law.

C. The burden to vacate an award under the FAA is extremely high.

The FAA allows an arbitration award to be vacated on four very limited grounds. 9 U.S.C.A. § 10 (a) (1)-(4). Bidsal only relies on the fourth, which applies "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." AOB 20. Bidsal largely fails to analyze this subsection, other than citations to a few inapplicable cases.

Bidsal's AOB repeatedly asks this court to apply a "manifest disregard of the law" standard for reviewing the award. *E.g.*, AOB 22, 56. As noted above, Bidsal's position in the district court was that the FAA provided the applicable grounds for vacating the award. Assuming his position is the same on appeal as it was in the district court – that the FAA supplies the grounds for vacating the award – this court can ignore his brief's entire discussion of manifest disregard of the law. Such a ground does not apply under the FAA. *See Hall Street Associates, L.LC., v. Mattel, Inc.*, 552 U.S. 576, 578-85, 128 S.Ct. 1396, 1400-1404 (2008) (holding that FAA grounds for vacating an arbitration award are exclusive, and **manifest disregard of**

the law is not an FAA ground for vacating an award); *see Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 350-58 (5th Cir. 2009) (recognizing *Hall Street's* holding that manifest disregard of the law is not a ground for vacating an arbitration award under the FAA); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1323-24 (11th Cir. 2010) (same). In light of *Hall Street*, this court can also ignore Bidsal's citations to various federal cases, which he contends allow manifest disregard of the law as a ground for vacating an award under the FAA.

Bidsal relies on other inapplicable cases. For example, he relies on *Stolt-Nielsen, S.A. v. AnimalFeeds International*, 559 U.S. 662, 130 S.Ct. 1758 (2010) at AOB 26. There, the Supreme Court recognized the high burden for a party challenging an arbitration award under the FAA. The Court held that the challenger must "clear a high hurdle." *Id.* at 671, 130 S.Ct. at 1767. "**It is not enough for petitioners to show that the panel committed an error – or even a serious error.**" *Id.* (emphasis added). The task of an arbitrator is to interpret and enforce a contract. *Id.* "It is **only** when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable."[5] *Id.* (emphasis added).

5/ In *Stolt-Nielsen*, the arbitrators allowed the case to proceed as a class arbitration. The Supreme Court held that neither the contract nor the FAA authorized class arbitration in the unusual circumstances of the case. Instead, the arbitration panel had

Bidsal then cites *Xpress Nat. Gas, LLC v. Cate St. Capital, Inc.*, 144 A.3d 583 (Me. 2016). AOB 26. That case, however, did not involve the FAA. It involved arbitration review under Maine statues. *Id.* at 587. And *Xpress Nat.* favors CLA's position here. *Xpress Nat.* held that a court's review of an arbitration decision "is much more limited than a review of a court decision," and the standard for determining whether an award exceeds the arbitrator's power "is an extremely narrow one." *Id.* An arbitrator exceeds his or her powers only "if no rational construction of the agreement could support the award." *Id.* "It is, after all, the arbitrator's construction of the contract that was bargained for" by the parties. *Id.* Courts afford arbitrators "a high degree of deference," and "all doubts [are] generally resolved in favor of the arbitrator's authority." *Id.*

Bidsal cites *Jordan v. Dep't of Motor Vehicles*, 123 Cal.Rptr.2d 122 (Ct. App. 2002), which was decided under California arbitration law, not the FAA. AOB 26. Once again, Bidsal has cited a case that favor's CLA's position regarding the extremely high standard for vacating an arbitration award. *Jordan* held that arbitration awards are final and conclusive because the parties have agreed they should be so. *Id.* at 443. "The arbitrator's decision should be the end, not the

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imposed its own view of judicial policy regarding class certification, without any support in the agreement or the law. *Id.* As such, the Court reversed the arbitration panel's determination. Nothing similar occurred with Judge Haberfeld's award here.

beginning, of the dispute." *Id.* "To ensure the arbitration decision is final and conclusive, only limited judicial review is available," and courts "**may not review the merits of the controversy, the validity of the arbitrator's reasoning, or the sufficiency of the evidence.**"[6] *Id.* (emphasis added).

Under the FAA, confirmation of an arbitration award is required even in the face of "erroneous findings of fact or misinterpretations of law." *French v. Merrill Lynch, Pierce, Fenner & Smith,* 784 F.2d 902, 906 (9th Cir. 1986) (confirming arbitration award in its entirety). "Because the question is essentially one of contract interpretation, we defer to the arbitrator." *George Day Construction Co., v. United Brotherhood of Carpenters*, 722 F.2d 1471, 1479 (9th Cir. 1984). When an arbitrator has determined the parties' intent in a contract, a court "may not substitute our own preferred interpretation." *Id.*

In *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 121 S.Ct. 1724 (2001), applying the FAA, the Supreme Court noted that the Ninth Circuit had found portions of the arbitration award "inexplicable," bordering on "irrational," and actually "bizarre." *Id.* at 508, 121 S.Ct. at 1727. Yet the Court affirmed the

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Jordan was a unique case involving a challenge to a state DMV fee. After a court decision declaring the fee invalid, the class plaintiffs requested attorneys' fees. The parties entered into an arbitration agreement, and the arbitrators awarded $88 million in fees against the state. The *Jordan* court vacated the award, finding that it violated California statutory and constitutional provisions dealing with state funds.

arbitration award anyway, holding that even "serious error" on an arbitrator's part does not justify overturning the decision, where the arbitrator is construing a contract and acting within the scope of his or her authority. *Id.* at 510, 121 S.Ct. at 1729. Improvident or even "silly" fact finding does not provide a basis for a reviewing court's rejection of an arbitration award. 532 U.S. at 509, 121 S.Ct. at 1728; s*ee also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569, 133 S.Ct. 2064, 2068 (2013) (holding that the sole question is whether the arbitrator, even arguably, interpreted the parties' contract, "not whether he got its meaning right or wrong").

In summary, Bidsal's own authorities, and the other authorities discussed above, show that FAA standards are high hurdles that do not allow courts to second guess arbitrators, except in extraordinarily rare circumstances.

D. The burden to vacate an arbitration award is also extremely high under Nevada law.

Even if this court decides that Bidsal and CLA are both wrong – and that FAA grounds for vacating the award are not applicable, with Nevada grounds applying – Bidsal's burden is still insurmountable. Nevada courts may only vacate arbitration awards on very limited common-law or statutory grounds. *WPH*, 131 Nev. at 887, 360 P.3d at 1147. Under the common law, an arbitration award may be vacated if it

is arbitrary, capricious, or unsupported by the agreement, or when an arbitrator has manifestly disregarded the law. *Id.*

Review under the manifest disregard standard does not entail plenary review. *Graber v. Comstock Bank,* 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995). Manifest disregard of the law is "extremely limited." *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 342, 131 P.3d 5, 8 (2006). It exists only when "the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law." *Id.* It applies to arbitrators who appreciated the significance of clearly governing legal principles, but nonetheless decided to ignore or pay no attention to those principles. *Id.* (issue is not whether arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law, simply disregarded it).

The governing law alleged to have been ignored must be well-defined, explicit, and clearly applicable. *Graber*, 111 Nev. at 1428, 905 P.2d at 1116. Manifest disregard of the law goes beyond whether the law was correctly interpreted. *Health Plan of Nev., Inc. v. Rainbow Med., LLC,* 120 Nev. 689, 699, 100 P.3d 172, 179 (2004). "The district court's review of an arbitrator's actions is far more limited than an appellate court's review of a trial court's actions." *Bohlmann v. Bryon John Printz and Ash, Inc.*, 120 Nev. 543, 546, 96 P.3d 1155, 1157 (2004) overruled on other

grounds by *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006). A court should not concern itself with the "correctness" of an arbitration award, and thus "does not review the merits of the dispute." *Id.* 120 Nev. at 547, 96 P.3d at 1158.

Pursuant to the only applicable statutory ground, this court may vacate an arbitration award if the arbitrator exceeded his or her powers. *See* NRS 38.241(1)(d). Under this ground, arbitrators exceed their powers when they address issues or make awards outside the scope of the governing contract. *Health Plan of Nev.*, 120 Nev. at 699, 100 P.3d at 179. However, "**[a]rbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement.**" *Id.* at 698, 100 P.3d at 178 (emphasis added). "The question is whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided." *Id.*

The party seeking to vacate an award on a statutory ground has the burden of demonstrating by clear and convincing evidence how the arbitrator exceeded the agreement's authority. *Id.* at 697, 100 P.3d at 178. "Absent such a showing, courts will assume that the arbitrator acted within the scope of his or her authority and confirm the award." *Id.* Therefore, this court will only vacate an arbitration award under this ground "in very unusual circumstances." *Id.* at 698, 100 P.3d at 178.

E. Under either the FAA or Nevada law, Judge Haberfeld's award should be upheld.

The AOB reveals that challenging the validity of the arbitrator's reasoning and the sufficiency of the evidence is all Bidsal is claiming. Pursuant to the authorities discussed above, Bidsal's challenge must therefore fail. This is particularly true in light of the parties' express agreement that"the award rendered by the arbitrator shall be final and not subject to judicial review." 3 App. 546. Meaning must be given the parties' agreement that the award is final and not subject to judicial review. *WPH*, 131 Nev. at 888, 360 P.3d at 1147 (all parts of arbitration contract must be given effect); *see also Road & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 390, 284 P.3d 377, 380 (2012) (courts must avoid negating any contract provisions); *Bielar v. Washoe Health Sys, Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013) (a basic rule of contract interpretation is that every word must be given effect if at all possible).

III. Bidsal's arguments are without merit.

Bidsal begins his argument with an allegation that Judge Haberfeld "lacked the energy and/or desire to interpret Section 4.2." AOB 24. He cites nothing to support this insulting and demeaning statement about Judge Haberfeld. In fact, Judge Haberfeld read all the paperwork provided by the parties, heard two days of evidence

at the arbitration hearing, and prepared detailed, thorough written decisions. He did not give short shrift to anything, and he certainly did not lack the energy or desire to do his job.

It is difficult to determine exactly what Bidsal's claims are in this appeal, much less what grounds for vacatur he applies to each. It appears, however, that he raises four claims. He contends that Judge Haberfeld (1) relied on "rough justice" and his own view of the so-called Dutch auction provision, instead of the evidence; (2) improperly based the award on a finding that Bidsal was the principal drafter; (3) misinterpreted the Agreement; and (4) ordered specific performance in violation of the Agreement.

A. Bidsal's arguments about "rough justice" and "Dutch auction" are meritless.

Bidsal argues that the award was made on the basis of "rough justice," which the AOB repeats multiple times. He also argues that Judge Haberfeld based the award on Judge Haberfeld's "personal understanding of Dutch auction provisions." AOB 25.

The award actually stated that Judge Haberfeld evaluated what the parties had said they wanted before any meeting with LeGrand, and then told LeGrand, which

Judge Haberfeld characterized as a form of rough justice. 1 App. 11 ¶ 8. He never hinted that he was ruling for CLA to achieve rough justice, or that his own goal was to impose rough justice. Rather, he recognized that rough justice was a by-product of what the parties themselves and LeGrand had written into the Agreement for the buy/sell provision. *Id.*

In other words, Bidsal has it backwards. Judge Haberfeld at most ruled that rough justice was the impact the parties' Agreement achieved, not that he was attempting to impose some form of rough justice as a ground for his award. Bidsal's statement of what the award says (starting at AOB 38) and what it really says are not even close. First, Judge Haberfeld explained that the reason he used the terms "forced buy/sell" and "Dutch auction" was because those terms were what the parties and LeGrand used. 1 App. 9 ¶ 4. He observed that if such provisions work as intended, "the result might not be expertly authoritative or precise, but nevertheless form a cost-effective 'rough justice'" when one party invokes the provision. 1 App. 11 ¶ 8. He did not impose his view of "rough justice" on the parties. He merely observed that the parties themselves agreed to a provision that resulted in a form of rough justice.

Additionally, the name given to that kind of buy-sell provision is irrelevant. There is abundant evidence that LeGrand and the parties had used the term "Dutch

auction" six years before Judge Haberfeld ever saw the Agreement. It was LeGrand who characterized the buy-sell that the parties told him they wanted as "forced [or "mandatory"] buy/sell" no later than July 25, 2011 (2 App. 382), and a "Dutch auction" no later than August 18, 2011.[7] 2 App. 413.

Bidsal repeatedly complains about Judge Haberfeld's alleged references to "typical" Dutch auction provisions. His brief asserts at least 15 times that Judge Haberfeld characterized the provision as "typical." *E.g.*, AOB 23-24, 31, 37-43. The arbitration award, however, does not contain the word "typical," and Judge Haberfeld never characterized the provision as such. Bidsal's complaints are irrelevant and do not justify vacating the award under the FAA or Nevada law.

Bidsal also repeatedly criticizes Judge Haberfeld's discussion of the Dutch auction provision as "unsourced." *E.g,*. AOB 23, 38-39. Bidsal did not make his "unsourced" argument in the district court, and he does not explain what "unsourced" means in this context. If he means that Judge Haberfeld's award did not adequately describe the sources of information he used, Bidsal cites no law requiring such a description, and no law holding that this is a ground for vacating an arbitration award.

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Bidsal quarrels with whether the characterization as a Dutch auction reflected the parties' understanding. AOB 39 n. 5. Whether the parties ever uttered the words "Dutch auction" is irrelevant. LeGrand's e-mails using that term made clear that he was referring to a buy-sell provision that comported with what the parties told LeGrand they wanted.

If Bidsal means that there is no source of evidence for Judge Haberfeld's discussion in Paragraph 8 of the award, this still does not provide a ground for vacating the award. Paragraph 8 merely provided Judge Haberfeld's general understanding of Dutch auction provisions. His actual award, however, was based upon a careful analysis and interpretation of language in the actual provision to which the parties agreed in this case, together with his analysis of the evidence presented at the arbitration.

Bidsal attacks Judge Haberfeld for not using a "Dutch auction" definition consistent with Black's Law Dictionary. AOB 40 n. 8. He makes no showing that he raised the argument in the district court. In any event, this is simply not a ground for vacating the award.[8]

B. Judge Haberfeld's discussion of rough justice and Dutch auctions is not a manifest disregard of law.

Bidsal argues different grounds for vacating the award. AOB 23. The one on which he primarily relies with regard to his "Dutch Auction-rough justice" issue is

8/ In attacking Judge Haberfeld's alleged "unsourced" discussion of the provision, Bidsal desperately charges that Judge Haberfeld "may have also engendered a bias against Bidsal." AOB 40 n. 6. Bidsal never asserted this in the district court as a ground for vacating the award (so far as CLA can find). Further, attacking an arbitrator for an appearance of bias would tend to "disqualify the best informed and most capable potential arbitrators." *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir.1981).

the common law ground that Judge Haberfeld manifestly disregarded the law. *Id.* But what he actually argues is that "the arbitrator manifestly disregarded the plain language of Section 4.2." AOB 38. But that is not manifest disregard of the law.

To establish manifest disregard of the law, Bidsal must prove that Judge Haberfeld, knowing the law and recognizing that the law required a particular result, simply disregarded the law. *Clark Cty. Educ. Ass'n*, 122 Nev. at 342, 131 P.3d at 8. Bidsal has identified nothing to suggest Judge Haberfeld recognized the law but simply disregarded it. Also, a court is not permitted "to consider the arbitrator's interpretation of the law." *Id.* Yet that is essentially all that Bidsal has claimed. Judge Haberfeld's reference to "rough justice" was not an acknowledgment of law followed by a decision not to follow that law. Without that, there can be no manifest disregard of the law.

And even if what Judge Haberfeld said is interpreted as a reference to his experience, that is still not a basis for vacating the award. In *STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*, 648 F.3d 68, 77 (2d Cir. 2011), the court upheld confirmation of an arbitration award. The appellant argued that the arbitrators failed to disclose information showing a predisposition in favor of the other party. The court rejected this as a ground for vacating the award under the FAA. The court held that a judge's lack of predisposition regarding the relevant legal issues in a case

"has never been thought a necessary component of equal justice," because "it is virtually impossible to find a judge who does not have preconceptions about the law." *Id.* "This is all the more true for arbitrators," because the most sought-after arbitrators "are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose." *Id.*

The fact that Judge Haberfeld was familiar with the process that Le Grand called a forced buy-sell and Dutch auction is not a basis for claiming that Judge Haberfeld manifestly disregarded the law, much less met the standard for "manifestly disregarding the law." Nor is manifest disregard of the law established by Judge Haberfeld's observation that the parties agreed to a provision which may have had an impact of rough justice. Judge Haberfeld did not impose his own brand of rough justice. He merely observed that this was the result of what the parties put into their Agreement.

C. Judge Haberfeld's interpretation of the Agreement was correct.

Even if Judge Haberfeld's interpretation of the Agreement was incorrect – which it was not – this still does not constitute a ground for vacating the award. As discussed above, "arbitrators do not exceed their powers if their interpretation of an agreement, **even if erroneous**, is rationally grounded in the agreement." *Health Plan of Nev.*, 120 Nev. at 698, 100 P.3d at 178 (emphasis added). "The question is whether

the arbitrator had the authority under the agreement to decide an issue, **not whether the issue was correctly decided**." *Id.* (emphasis added).

Understanding of what the award says requires understanding of many of Bidsal's contentions in the arbitration, which Judge Haberfeld addressed, because Bidsal's arguments in the AOB are not what he contended in arbitration. Thus, the award did not address those contentions.

D. Section 4.2 entitles the Remaining Member to purchase the Offering Member's interest, using the offering price as the FMV.

After an offer from the Offering Member, in which the Offering Member states his contention regarding FMV, Section 4.2 sets out the Remaining Member's options:

> 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)**

1 App. 39 (emphasis added).

Those two options were consistent with what the parties had discussed from the beginning, and what they told LeGrand they wanted. Section 4.2 concludes with the specific intent provision:

> 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).

1 App. 39 (emphasis added).

Based on what the Agreement said, along with evidence of what had been discussed and written from May through December, 2011, Judge Haberfeld determined that CLA was entitled to purchase Bidsal's interest using Bidsal's offered price as the FMV.

FMV was one of the elements in the buy-out formula, as discussed above. In the arbitration, Bidsal made the following contentions about how FMV would be determined.

- When the Offering Member sends a notice with the amount "he thinks is the fair market value" that is merely the "offered price," but the offered price is not the FMV. *E.g.*, 7 App. 1502:4-18.

- If the offer is accepted or deemed accepted by silence, then the offered price will be used to determine the Buyout Amount. 7 App. 1502-04.

- The fair market value can be obtained solely by appraisal. *E.g.*, "[T]he term 'FMV' . . .means '[t]he medium of these 2 appraisals [being the appraisal described . . .in Section 4.2].'" 7 App. 1505:12-13.

- "If the remaining member decides to communicate a counteroffer, the appraisal process is not optional . . .it is mandatory." 10 App. 2463:17-18.

- "[A]ny time the defined term FMV is used, it is referencing the last sentence of [identified portion] of Section 4.1, which states: "'[t]he medium of these 2 appraisals constitutes the fair market value of the property **which is called (FMV).**'" 10 App. 2393:1-4 (emphasis in Bidsal's original).

- "If CLAP had accepted Bidsal's initial purchase offer there would be no need to define a value for 'FMV.'" 10 App, 2473:24-2474:13.

Thus, Bidsal's argument was that the offered price was never the FMV, and appraisal was the sole method to determine FMV. The upshot of that was there was

no FMV if the Remaining Member accepted the offer (or did nothing). But the buyout formula required FMV, along with other elements of the formula. This fact made Bidsal's contention impossible to apply if the Remaining Member accepted the offer. Bidsal could not claim that the offered price could be then used in the formula, because he claimed that it was never the FMV.

That explains why Judge Haberfeld determined that Bidsal's arguments and testimony were "outcome determinative," and Bidsal's position "cannot be logically applied in all instances," especially in instances in which CLA either accepted Bidsal's offer or failed to respond. 1 App. 12 ¶ 10.B. Judge Haberfeld emphasized this determination a second time in the award. 1 App. 15-16 ¶ 18. In ¶ 18.B, Judge Haberfeld addresses a second independent reason why Bidsal's contention made no sense. 1 App. 12. The final paragraph of Section 4.2 (the specific intent provision) in part provides,

> 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)**.

1 App. 39 (emphasis added).

Bidsal acknowledged (and acknowledges) that only the Remaining Member can "invoke" appraisal. 9 App.2155:18-22; AOB 33, 43. Yet he argued that CLA could not "buy at the same offered price." He argued that the parenthetical phrase meant that there had to be an appraisal. But that made no sense, because the parenthetical phrase is stated as an alternative to offered price, using the word "or." Bidsal had no answer for that problem. He offered no meaning for the word "if" in the phrase "if appraisal is invoked," as he contended, appraisal was always required for the Remaining Member to buy. That left the only meaning possible for the phrase: **if** the **Remaining** Member does **not** invoke appraisal, then the offered price must be used.

Finally, Bidsal has contended that the "same offered price" in the specific intent provision applies if the Remaining Member sells, but not where he buys. That likewise made no sense. The only way to interpret the provision is to attach the phrase "at the same offered price" to the word "buy," which it follows, meaning the same offered price as when the Remaining Member accepts the offer and sells. The phrase could not apply when the Remaining Member sells. There would be nothing to which it would be the "same."

Thus, in ¶ 18.B, Judge Haberfeld added reference to this specific intent provision and noted that the Buyout Amount could not be computed without using

the $5,000,000 in the offer (the offered price) as the FMV. 1 App. 16 ¶ 18.B. Judge Haberfeld properly concluded that the offered price was the FMV unless appraisal was invoked, and here, it had not been invoked.

Recognizing that his position made no sense, Bidsal has now abandoned his contentions in arbitration, changing to a new theory on appeal. He essentially argues that the offered price **can** be the FMV, and appraisal is **not** required to set the FMV, but the **Offering Member** can request appraisal as though he were the Remaining Member, if the true Remaining Member counteroffers. AOB 32-33.

Nowhere in the hundreds of pages of Bidsal's briefs in the arbitration did he argue that the parties not only switched positions, but also hats, as he now argues on appeal. As such, the new argument should not be considered. Bidsal is not entitled to argue points never presented to the arbitrator. *See Washoe County v. Seegmiller*, 2020 WL 7663451 n .1 (Nev.; December 23, 2020; No. 78837; unpublished) (affirming arbitration award and holding that supreme court will not consider issue that was not raised before the arbitrator); *see also Gateway Techs, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 998 (5th Cir. 1995) (a party "cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in federal court"); *United Steelworkers of Am., AFL-CIO-CLC v. Smoke-Craft, Inc.,* 652 F.2d 1356, 1360 (9th Cir. 1981) (parties to

arbitration "cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator").

Bidsal takes issue with Judge Haberfeld's conclusion that the specific intent provision prevails over earlier ambiguities about the parties's rights and obligations. AOB 29. He offers no explanation for why the parties and attorney LeGrand would add such provision, other than to make absolutely certain that if someone thought there were ambiguities in the provision, the intent would be clear.

The first sentence of the specific intent paragraph provides that the Remaining Member (here CLA) can buy or sell at the offered price. It concludes with the words "according to the procedure set forth in Section 4." The reference to "procedure" means first there is an offer, then within 30 days there has to be a response; the terms will be all cash; and escrow is to close within 30 days. Bidsal's argument would render the entire specific intent language meaningless.

That Judge Haberfeld did not accept Bidsal's argument is hardly a ground for vacating the award. Bidsal does not tie his argument to any ground for vacating the award, instead arguing that Judge Haberfeld did not interpret the provision correctly or disregarded some of the Agreement's language (AOB 30), as contrasted with disregarding the law. And Bidsal does not provide any compelling legal reasons

why Judge Haberfeld's interpretation of the provision was so extreme that it should be vacated.

But starting at AOB 32, Bidsal presents a bizarre "exchange hats" theory, which was never raised in the arbitration. Recognizing he had previously conceded that only a Remaining Member could request an appraisal, he presents an adaptation of Abbot & Costello's "Who's On First" routine, where instead of asking who's on first, one asks who's the Offering Member. He argues that by virtue of the definition of "Offering Member," if the Remaining Member elects to buy rather than sell, then the parties switch not only "hats," but also their rights and obligations. And it follows, so he claims, that he and CLA exchanged hats, and Bidsal became the Remaining Member and could elect to "invoke" appraisal. Virtually everything that follows in the AOB regarding interpretation of Section 4.2 is dependent on acceptance of that argument.

E. Bidsal's "exchange hats" argument is fundamentally baseless.

There are several independent reasons why the hat switch theory is not viable, any one of which should eliminate its consideration.

First, this theory was never advanced in the briefs presented to Judge Haberfeld. 5 App. 1091; 5 App. 1211; 6 App. 1495; 8 App. 1762, 1815; 10 App.

2371, 2455. Nor was it even raised with the district court in Bidsal's opening brief in support of his motion to vacate. 1 App. 76.

Second, Bidsal's roundelay would never end. In Bidsal's hat switch scenario, if the Remaining Member counteroffers, then he switches hats and becomes an Offering Member, and the original Offering Member becomes the Remaining Member. Then the newly-reconstituted Remaining Member has the election that the original Remaining Member had, i.e., to invoke appraisal, even though the member with the new Remaining Member hat made the original offer at an amount he established as his own FMV. But invoking appraisal is just one of the four alternatives Bidsal identifies for the Remaining Member. AOB 35-36. If the new Remaining Member elects the option to counteroffer, then he once again switches hats and becomes the Offering Member. Then, the other member gets his old hat back and once again becomes the Remaining Member. And as a new Remaining Member, he could once again elect to counteroffer. This process could go on for eternity, especially when, as here, the Offering Member initially sets a lowball figure for the fair market value such that either member with financial wherewithal would always want to buy rather than sell. Judge Haberfeld would not have been required to adopt this circular and unreasonable interpretation of the agreement, even if Bidsal had raised it during the arbitration.

Third, if, as Bidsal argues, the Offering Member becomes a Remaining Member, then the new Remaining Member could counteroffer and would not be obligated to sell his interest. But that would be contrary to the last sentence of Section 4.2, which read: "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)." Bidsal's hat switch would deprive the Remaining Member (here CLA) of the corollary right expressed in that sentence. If Bidsal's hat switch were what Section 4.2 intended, that sentence would have read: "In the case that the Remaining Member(s) decide to purchase, then ***he shall be deemed to be the Offering Member and the Offering Member shall be deemed to be the Remaining Member.***" But it does not read that way.

Fourth, Bidsal's argument is premised on the assertion that the words in the definition of "Offering Member" cover a Remaining Member who rejects an offer. Bidsal argues that the words must be taken "in a literal manner." AOB 32. The definition of "Offering Member" is "the member who offers to purchase the Membership Interest(s) of the Remaining Member(s)." 1 App. 38 § 4.1. But the response of the Remaining Member (here CLA) who chooses not to accept the offer is worded "(ii) Rejecting the purchase offer and making a counteroffer to purchase

the interest of the Offering Member. . ." 1 App. 39. Thus, the Remaining Member does not "offer" to purchase, he makes a **counteroffer**.

Indeed, Bidsal argues: "[H]ow can a Remaining Member offer to buy? He can't." AOB 32. If a Remaining Member cannot make an offer to buy, he could never fit the definition of Offering Member. But if the Remaining Member can never be the Offering Member, then the members cannot switch hats and make the Offering Member (here Bidsal) into a Remaining Member.

Fifth, Bidsal's claim is contradicted by his own testimony. He answered yes to "you are the offering member, right?" 9 App. 2153:3-5. He also testified that once the "Remaining Member" selects option (ii) and "counteroffers," he must "cooperate with the offering member" and in such case "the offering member would sell it to the remaining member." 9 App. 2154:25 - 2155:10. Bidsal's hat switch would, according to that testimony, have the Remaining Member cooperating with himself as the new Offering Member.

Sixth, the appraisal provision begins with: "If the offered price is not acceptable to the Remaining Member. . ." 1 App. 39 (top full paragraph). But how can the Offering Member legitimately claim the price he established is not acceptable to him?

F. Bidsal's other "exchange hats" arguments are also baseless.

Bidsal attempts to hide what is said in option (ii) regarding "counteroffer." It provides that the Remaining Member has 30 days to respond to the Offering Member "by either" of two responses. What follows are choices for the Remaining Member. The first choice is "(i) Accepting the Offering Member's purchase offer." 1 App. 39. The acceptance is the Remaining Member agreeing to the offered price. Bidsal acknowledges this. AOB 34.

The provision then gives the Remaining Member's second choice. He can act by accepting the offer "or" (in the alternative of the word "either") rejecting the Offering Member's purchase offer and making a counteroffer to purchase the interest of the Offering Member. The counteroffer must be "based upon the same fair market value (FMV)." The same as what? Considering the fact that, by definition, FMV is initially determined by the Offering Member in the offer, the only possible answer is that "the same fair market value" refers to the same as the offered price used in the first option. As such, the counteroffer amount is "the same fair market value (FMV)" as the FMV in the original offer.

Even with Bidsal's hat change argument, the result has to be the same: CLA was entitled to purchase using the offered price of $5,000,000. Judge Haberfeld did not interpret the Agreement incorrectly.

The final paragraph on AOB 33 argues: "This last point ('. . . entitled to invoke Section 4.2 appraisal procedure, **if desired**.') was lost on the arbitrator . . ." (bold emphasis in original). Nothing was lost on Judge Haberfeld. Contrary to Bidsal's argument, his bolded phrase "if desired" is nowhere in the 28-page Agreement.

Bidsal criticizes Judge Haberfeld's observation that Bidsal's position had an "unanswered logical flaw" because Bidsal could not account for scenarios in which the Remaining Member accepted or failed to respond. AOB 33. The parties agreed to arbitration, thereby agreeing that the arbitrator would consider the evidence and make a binding, final decision on interpretation of the Agreement. That is exactly what Judge Haberfeld did. His observation that Bidsal's position had an "unanswered logical flaw" was correct, but even if incorrect, it provides no basis under the law for vacating the award.

Bidsal then argues that "the Remaining Member is in the uniquely advantageous position where he can either accept the initial offer or request an appraisal to determine FMV." AOB 34. Actually, the Offering Member is in much more advantageous position because he has unlimited time to gather information, obtain an appraisal before making an offer, determine the amount he believes is the FMV, and obtain the money to consummate the purchase. The Remaining Member has only 30 days in which to obtain and analyze information, and to respond and

close escrow. Also, the Remaining Member certainly has no "uniquely advantageous position" if the initial Offering Member gets the same right of appraisal should the Remaining Member elect option (ii) and chose to buy.

But perhaps more revealing is Bidsal's comment at the bottom of AOB 34 that "the arbitrator failed to apply Section 4.1's definition." Bidsal is presumably referring to his hat exchange theory that he never presented to Judge Haberfeld. In any event, such a failure does not constitute manifestly disregarding the law or any other legal basis for vacating the award.

Bidsal presents "Scenario One" to illustrate his arguments. AOB 35. This scenario claims that if the Remaining Member fails to respond, that is same as acceptance (agreed), and he argues that "when the sale is **consummated**, the Offering Member's estimate of fair market value becomes 'FMV.'" AOB 35 (emphasis added). He still has not solved the problem. FMV is the first element of the formula to determine Buyout Amount. There can be no **consummation** of a sale until the FMV is determined. Getting a FMV can never be "when the sale is consummated." That is too late, because until FMV is determined, no sale could ever be consummated.

Bidsal also ignores the language he used in his offer. The second paragraph reads:

> The Offering Member's best estimate of the current fair market value of the Company is $5,000,000.00 (the "***FMV***"). Unless contested in accordance with the provisions of Section 4.2 of Article V of the Operating Agreement, the foregoing FMV shall be used to calculate the purchase price of the membership Interest to be sold.

3 App. 711 (Bidsal's letter with ***"FMV"*** using all three forms of emphasis – bold, underlining, and italics – in original).

The letter did not say that the $5,000,000 FMV would be inapplicable if CLA counteroffered, as Bidsal argues now. The only time Bidsal's $5,000,000 FMV would not be used is if it were contested by the Remaining Member; but CLA never contested it. When Bidsal's letter said "the foregoing FMV shall be used," there was no qualification or limitation that it does not apply if CLA counteroffered. Moreover, it is clear that the $5,000,000 applies whether CLA elected to sell or buy, because it referred to "**the** membership interest to be sold," not just to Bidsal's membership interest.

G. Bidsal's assertions of error regarding draftsmanship are meritless.

1. The determination of draftsmanship was not dispositive.

Bidsal repeatedly contends that Judge Haberfeld was wrong in the determination of draftsmanship, for purposes of interpretation of the Agreement. AOB 44-56. Bidsal's first problem is that nowhere in those 13 pages does he plausibly tie his claim to any legal ground for vacating the award. Additionally, the determination of draftsmanship was purely a factual determination, which a court cannot use to vacate an arbitration award. *Health Plan of Nev.,* 120 Nev. at 697, 100 P.3d at 178 (an arbitrator's factual error does not support vacating an award).

Bidsal starts his argument with: "The arbitrator's determination that Bidsal was the 'principal drafter' of Section 4.2 was material to the outcome of the arbitration." AOB 45. He asserts that the arbitrator recognized materiality at the outset of the hearing, and predicted that draftsmanship would be dispositive. AOB 46. In this regard, he notes that Judge Haberfeld mentioned that "sometimes" the drafter determination "may" tip the balance, and Judge Haberfeld was "sort of" hearing that this "might be" such a case. *Id.* This was hardly the expression of a preordained conclusion by the arbitrator, as Bidsal suggests.

In truth, Judge Haberfeld expressly rejected the notion that his draftsmanship determination was dispositive. He determined:

> [T]he determinations and award contained herein are based upon the testimony and exhibits introduced at the hearing in this matter, and **the determination of draftsman is not dispositive.** For the reasons set out herein **the determinations and award would be made even if Mr. Bidsal's contention that Mr. Golshani was the draftsman of Section 4 were correct.**

1 App. 15 ¶ 17 (emphasis added).

Judge Haberfeld was the only person involved in this case who could possibly know what he considered dispositive. The AOB cites no legal authority, from any jurisdiction, for the proposition that a reviewing court may read an arbitrator's mind and may second guess an arbitrator's express determination of what findings of fact are or are not dispositive to his interpretation of a contract.

In summary, Judge Haberfeld ruled that he made his contract interpretation decision based on the testimony and exhibits at the hearing; his draftsmanship determination was not dispositive; and he would have reached the same result even if Golshani had been the draftsman. There is absolutely no legal basis for rejecting this ruling.[9]

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[9] A draftsmanship determination is merely one consideration, out of many, in contract interpretation. It is "a rule of last resort." *Easton Bus. Opp. v. Town Executive Suites*,

Had Judge Haberfeld been wrong in his determination of draftsmanship (which in any case would not be a basis for vacating the arbitration award) the only other possible result would be a determination that the draftsman was the parties' joint attorney, David LeGrand. Article XIII of the Agreement provides: "This Agreement has been prepared by David G. LeGrand." 1 App. 48. This is conclusive. NRS 47.240(2) (establishing conclusive presumption for the truth of a recital in a written contract).

2. Judge Haberfeld did not manifestly err by determining draftsmanship.

There was ample support for Judge Haberfeld's determination that Bidsal was the primary drafter. The concept of a formula to determine the Buyout Amount was first suggested by LeGrand. 3 App. 501. Upset over the length of time without any agreement, the parties decided to try it themselves, and discussed what to write. 8 App. 1974:23-1975:18; 9 App. 2074:6-14. Bidsal and Golshani both proposed provisions. 8 App. 1975:19-1977:13. Offered the choice of scrivener, Bidsal chose Golshani. 8 App. 1977:20-22. Golshani then used the LeGrand draft for language and structure. 8 App. 1978:10-24. After a first "rough" draft, Bidsal and Golshani

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126 Nev. 119, 131 n. 5, 230 P.3d 827, 835 n. 5 (2010). The rule is used after exhausting all the other ordinary methods of interpretation. *Lamps Plus, Inc. v. Varela*, ___ U.S. ___, 139 S.Ct. 1407, 1417 (2019).

spoke repeatedly about it and agreed upon certain changes (8 App. 1980:7-1981:17), at least one of which was specifically requested by Bidsal. 8 App. 1980:7-1981:17. As conceded by Bidsal, he and Golshani both "massaged the language in our conversations." 10 App. 2280:8. From those conversations sprang a second draft. 10 App. 2276:1-4. Once again, Golshani was merely the stenographer. He sent what he typed to Bidsal for review and approval. 8 App. 1989:9-24. It was then sent to LeGrand. 8 App. 1989:9-24.

LeGrand then made some revisions. 6 App. 1332. He sent the revised version to the parties. 6 App. 1338. Bidsal held onto the Agreement, telling Golshani that he was going to review it and revise it if "any revision required," and he also told LeGrand he was going to revise it. 8 App. 1995:11-1996:5; 6 App. 1367; 9 App. 2104:14-2106:21, 2194:18-2195:2. On December 12, 2011, Bidsal finally wrote that the Agreement is finished and signed. 9 App. 2129:13-2132:7.

After some additional changes, the final Agreement was printed by Bidsal at his office. 9 App. 2059:22-2061:4 and 9 App. 2059:22-25.

In summary, there was ample evidence supporting Judge Haberfeld's factual determination regarding draftsmanship. Bidsal expressly conceded that he had played

a role in the drafting. 10 App. 2280:8-10 (Bidsal testifying about the contested provision; "we massaged the language" and "there were meetings about that").

H. Bidsal's arguments regarding preliminary draft arbitration awards do not provide legal bases for vacating the final award.

Bidsal's factual recitations and his arguments in his AOB extensively discuss Judge Haberfeld's preliminary drafts of the arbitration award. *E.g.*, AOB 17-19 (discussing Merits Order No. 1 and Interim Award); AOB 48-49. Merits Order No. 1 was a draft award issued by Judge Haberfeld; and the Interim Award was issued by Judge Haberfeld after a draft proposed award had been submitted by CLA's counsel. 4 App. 967-81 (Merits Order No. 1); 4 App. 983-97 (CLA's proposed Interim Award); 5 App. 1159-79 (Interim Award).

Bidsal's discussion regarding these preliminary drafts is irrelevant. No judge or arbitrator is bound by preliminary orders or rulings. Arbitrators and judges should be encouraged to send preliminary rulings to the parties, to obtain proposed orders from the parties, and to solicit input from the parties before a final order is issued – without fear of subsequent criticism for doing so. *E.g.*, 5 App. 1092 (Bidsal's objection to CLA's proposed award); 1212 (Bidsal's objection to arbitrator's proposed Interim Award).

Bidsal seems to be suggesting that Judge Haberfeld's preliminary drafts indicate his frame of mind or his thought process for interpreting the buy-sell provision and for evaluating the draftsmanship issue. Even if this were true, it is irrelevant. There is no legal authority for the proposition that an arbitrator cannot change his or her mind after providing the parties with preliminary draft decisions. Indeed, this is the whole purpose of doing so – to obtain input from the parties, and then to make whatever changes the arbitrator thinks are necessary for the final award.

In any event, Judge Haberfeld expressly dealt with this issue in his preliminary orders and in his final award. The first order was "Merits Order No. 1," which he issued on October 9, 2018. 4 App. 967. It recognized that the arbitration proceedings were not yet finished. 4 App. 979 ¶ 2 (referring to the "not-yet-closed Merits Hearing of this Arbitration"). It established a time-line for objections by the parties. 4 App. 979-80. It also expressly provided: "This Merits Order No. 1 is not and is not intended to be or to be deemed to be an arbitration award (*e.g.*, interim award or final award, or otherwise)." 4 App. 980 ¶ 4.

After considering the arguments of the parties, Judge Haberfeld issued his final award on April 5, 2019. 1 App. 7. It contained the following determination:

> To the extent, if any, that any determinations set forth in this Award are inconsistent or otherwise at variance with any prior

> determination in the Interim Award, Merits Order No. 1 or any prior order or ruling of the Arbitrator, the determination(s) in this Award shall govern and prevail in each and every such instance.

1 App. 7 (determination No. 1, second paragraph).

Arbitrators have no obligation to give detailed reasons for awards. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361 (1960). To require arbitration opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions, which would be undesirable. *Id.*

It is entirely unclear why the AOB dwells on Judge Haberfeld's preliminary/proposed rulings. They have no legal impact, and they provide no legal basis for vacating the final award. Moreover, there is no relevance to Bidsal's apparent criticism that Judge Haberfeld corrected or clarified his preliminary rulings before he entered his final award.

I. The remedy of specific performance was not a manifest disregard of the law, and was not outside Judge Haberfeld's powers.

Bidsal argues that Judge Haberfeld manifestly disregarded the law, and exceeded his powers under the contract, by awarding the remedy of specific

performance. AOB 56. There are several reasons why the argument should be rejected.

First, Bidsal did not raise the issue with the arbitrator. He filed a post-arbitration brief in which he failed to argue that Judge Haberfeld could not award specific performance due to alleged ambiguity in the Agreement. 10 App. 2371. Bidsal then filed two objections to the preliminary/proposed orders, as noted above, with objections to a proposed order submitted by CLA. 5 App. 1092. Bidsal nitpicked about the calculation of monetary distributions and deductions, and about a requirement that his transfer of his interest should be "free and clear of all liens and encumbrances." 5 App. 1092-94. But he never suggested to Judge Haberfeld that a remedy of specific performance was unavailable due to alleged ambiguity in the Agreement, or that the remedy of specific performance would be outside the scope of Judge Haberfeld's powers.

When the case reached the district court, Bidsal filed points and authorities in support of his counter-petition to vacate the award. 1 App. 76. He raised the "exceeding powers" ground, but his reasons were different from the reasons he asserts now on appeal. His primary claim in the district court was the same as he had asserted in the arbitration, namely, that the transfer of his interest should not include

a "free and clear" requirement. 1 App. 103. He also complained about the timing for the transfer and Judge Haberfeld's retention of jurisdiction. 1 App. 103:3-27. Bidsal never contended that any alleged ambiguity precluded specific performance, and that Judge Haberfeld manifestly disregarded the law or exceeded his powers by awarding specific performance as a remedy.

Under these circumstances, Bidsal's new appellate contention was not adequately preserved. *Washoe County*, 2020 WL 7663451 n .1 (supreme court will not consider issue raised for first time on appeal and not raised before arbitrator); *see also Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (holding that even in an appeal involving de novo review, a point not urged in the district court will not be considered on appeal).

Next, Bidsal primarily relies on the 1930 case of *Dodge Bros. v. Williams Estate Co.*, 52 Nev. 364, 287 P. 282 (1930), which recited a rule that specific performance is not available when the contract is incomplete, uncertain, or indefinite. AOB 57. Although *Dodge Bros.* recited that rule, the court did not apply it to deny specific performance based upon an ambiguous contract. Nor did the court state that the rule is absolute, and that any ambiguity, no matter how important or unimportant, would preclude specific performance. Rather, the court phrased the question as

whether "the contract in question is so uncertain that the intentions of the parties cannot be sufficiently ascertained to enable a court of equity to carry it into effect." *Id.* at 284. This strongly suggests that specific performance **is available** if the intentions of the parties can be sufficiently ascertained.

The *Dodge Bros.* court affirmed an award of specific performance dealing with a transfer of property. In doing so, the court did not tether itself to contract language. Instead, the court "must construe the contract," considering background evidence and "the situation existing at the time the contract was executed." *Id.* Bidsal cites no case in which a court held that specific performance should be denied where a contract is arguably ambiguous, but where the court is nevertheless able to ascertain the intent of the parties.

Equally important, Bidsal cites no case in which the rule was applied in the context of arbitration. In *White v. Baum*, 2018 WL 4697257 *1 (Nev.; September 28, 2018; No. 71199; unpublished), an arbitrator ordered one of the parties to issue LLC membership units to the other party – essential a remedy of specific performance. The district court confirmed the award, and this court affirmed. The court did not require absolute clarity in the contract. Indeed, the court noted that the contract "can be read" in support of the prevailing party; this reading was "supported by the

arbitrator's finding" on the question; and the arbitrator's decision was "based on his reasonable interpretation of the Operating Agreement." *Id.* The court held that an arbitrator has broad discretion to order "just and appropriate" remedies under NRS 38.238(2). And the court concluded that the award was neither a manifest disregard of the law nor an excess of the arbitrator's powers. *Id.*

Bidsal's argument here does not get over the high hurdle required for vacating an arbitration award. His claim of ambiguity conflicts with his discussion at AOB 27-38, which is premised on his assertion that Section 4.2 was **not** ambiguous. *E.g.*, AOB 33 ("Section 4.1 unambiguously defines the terms . . ."); AOB 35 (referring to Section 4 as "unambiguous"); AOB 37 n. 4 (arguing that the operation of the term "FMV" is "not ambiguous"). Bidsal also fails to recognize that standards for review of the arbitration award preclude vacating the award. "The question is whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided." *Health Plan of Nev., Inc.*, 120 Nev. at 698, 100 P.3d at 178. The risk that an arbitrator might construe the law imperfectly is a risk that every party to arbitration assumes, and legal or factual errors are outside of judicial review. *See Kyocera, Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1002–1003 (9th Cir. 2003) (review under FAA).

The parties agreed to entrust the arbitrator with determining disputes regarding the agreement, including "performance of obligations hereunder." 1 App. 35 ¶ 14.1. Bidsal cites no authority for the proposition that an arbitrator in such a case – as part of determining "performance of obligations" under a contract – cannot fashion a remedy of specific performance, which requires the parties to comply with their "performance of obligations" under the contract. After all, the parties requested Judge Haberfeld to interpret a contract provision that dealt solely with how a member's interest would be transferred to the other member, as part of determining "performance of obligations" under the contract.

Finally, Bidsal's argument, if accepted, would lead to a stunningly absurd result. CLA wanted to buy Bidsal's interest. When Bidsal refused, CLA instituted arbitration under the Agreement. CLA wanted enforcement of the Agreement, to purchase Bidsal's interest. It would be utterly absurd to conclude that Judge Haberfeld did not have authority to fashion a remedy of specific performance, once he determined that the Agreement allowed CLA to purchase Bidsal's interest.

J. Bidsal's argument regarding injunctive relief is also without merit.

Bidsal argues that the Agreement permits only temporary injunctive relief, not permanent injunctive relief. AOB 58-59. With his emphasis in quoting a portion of

Section 14.1 (AOB 59), he appears to be basing his claim on the provision dealing obtaining a temporary injunction. He misreads the provision. Permitting court relief for a temporary injunction does not equate to prohibiting the arbitrator from awarding specific performance or permanent injunctive relief. The purpose of such a provision is obvious. Relief may be needed on a temporary basis before the arbitrator is appointed and can act; and the contract allows an aggrieved party to seek such preliminary judicial relief. This necessarily implies that once an arbitrator is appointed and can hear the matter, he can issue equitable relief, whether an injunction or specific performance.

Bidsal points to the portion of Section 14.1 prohibiting the award of "any damages of the type not permitted to be recovered under this Agreement." AOB 59. He argues that this provision means the parties waived specific performance or injunctive relief. Once again, his premise does not support his conclusion. He identifies no portion of the Agreement that actually prohibits specific performance or, for that matter, prohibits some kind of damages. And he certainly has not established that Judge Haberfeld's decision is so extreme that it can be considered within the narrow grounds for vacating an arbitration award.

CONCLUSION

For the foregoing reasons, no legal grounds exist for vacating Judge Haberfeld's arbitration award. The district court did not err by confirming the award, and the district court's judgment should be affirmed.

OPENING BRIEF ON CROSS-APPEAL

JURISDICTIONAL STATEMENT

This cross-appeal is from a post-judgment order denying attorneys' fees and costs. The order is appealable as a special order after final judgment under NRAP 3A(b)(8). The appeal is timely under NRAP 4(a)(1), because it was filed on March 13, 2020, which was within 30 days after service of notice of entry of the order on March 5, 2020. 13 App. 3049, 3068.

ROUTING STATEMENT

This cross-appeal should be retained by the supreme court, because it is consolidated with the main appeal, which should be retained by the supreme court for the reasons set forth in Bidsal's brief. The cross-appeal also presents an issue with precedential value and statewide importance, involving choice-of-law provisions in arbitration agreements, and involving the interplay between Federal and Nevada arbitration acts relating to attorneys' fees. NRAP 17(a)(11-12).

STATEMENT OF ISSUE

Whether the district court erred in concluding it lacked authority to grant CLA's motion for costs and attorneys' fees relating to post-arbitration judicial proceedings.

STATEMENT OF THE CASE

This is a cross-appeal. After the district court confirmed the arbitration award, CLA moved from post-arbitration attorneys' fees. 11 App. 2621. The district court denied the motion. 13 App. 3050-55. CLA appealed.

STATEMENT OF FACTS

I. The arbitrator awarded attorneys' fees to CLA.

In the sections of this brief dealing with Bidsal's appeal, CLA has discussed the three sources for standards relating to post-arbitration judicial proceedings. Specifically, Article III, Section 14.1, of the Agreement contains an arbitration clause with an attorneys' fee provision. 1 App. 35-36. This section calls for arbitration with JAMS, using JAMS procedural rules. *Id.* ("Such arbitration shall be administered by JAMS in accordance with its then prevailing expedited rules,..."). Another part of the Agreement states that the arbitration is to be governed by the FAA. *Id.* And yet another part of the Agreement (Choice of Law) states that it shall be governed "in all

respects" by Nevada law. As noted above, the Nevada Choice of Law provision was so important to the parties that it was the **only** paragraph in the entire 28-page Agreement in all capital letters. 1 App. 44.

The Agreement provides for fees and expenses of the arbitration to be shared equally; but when the arbitration concludes, the arbitrator "**shall award** costs and expenses (including ... **the fees and expenses of attorneys**, accountants and other experts) **to the prevailing party**...." 1 App. 36 (emphasis added). The Agreement also states that the award rendered by the arbitrator "shall be final and not subject to judicial review" (other than entry of judgment on the award). *Id.* In other words, the Agreement contemplates that (1) the arbitrator will render an award, including mandatory attorneys' fees to the prevailing party; (2) the arbitrator's award will be final, without judicial review; and (3) the parties will not incur additional attorneys' fees after the arbitration and the final award (other than the *pro forma* steps necessary to enter judgment on the award).

At the conclusion of the arbitration here, CLA moved for attorneys' fees and costs under the mandatory prevailing-party section of the Agreement. The arbitrator awarded CLA $298,256.00. 1 App. 25. Bidsal does not challenge this award.

II. Bidsal violated the Agreement by seeking federal judicial review.

Although the Agreement clearly states that the arbitration award "is not subject to judicial review," Bidsal filed an action in federal court on April 9, 2019, seeking to vacate the award. 1 App. 77-78. CLA responded with a motion to dismiss, for lack of jurisdiction, which the federal court granted. 1 App. 119-20.

III. Bidsal tried again in state court; the award was confirmed; and attorneys' fees were denied.

CLA petitioned for confirmation of the award in the Nevada district court, as allowed by Section 14.1 of the Agreement ("judgment [on the award] may be entered in any court of competent jurisdiction"). 1 App. 1, 36. In response, Bidsal once again violated the Agreement by seeking judicial review of the arbitration award—challenging the award and seeking an order vacating it—contrary to Section 14.1 (the award "shall be final and not subject to judicial review"). 1 App. 36, 76. The district court rejected Bidsal's challenge and confirmed the award, after which CLA moved for an award of the additional attorneys' fees (approximately $87,000) incurred in opposing Bidsal's improper challenge, pursuant to NRS 38.243.[11] 11 App. 2621. The district court denied the motion, concluding that federal law applied and

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CLA's motion in the Nevada case did not seek fees for opposing Bidsal's frivolous federal court action.

Nevada law did not apply; as a result of those determinations, the court ruled that there was no discretion to award fees under NRS 38.243. 13 App. 3050-55.

SUMMARY OF ARGUMENT

The arbitration provision contained a provision calling for the prevailing party (CLA) to be awarded arbitration expenses, including attorneys' fees. The provision should be construed with other provisions in the agreement to allow post-arbitration fees as well. Further, Nevada law should have governed the question of whether attorneys' fees can be recovered. Under Nevada law, post-arbitration fees may be awarded. The district court erred by construing the agreement incorrectly and by ruling that Nevada law does not apply.

ARGUMENT

I. Standard of review.

De novo review applies when an attorneys' fee decision implicates a question of law or application of legal requirements. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). De novo review also generally applies to issues involving interpretation of attorneys' fee provisions in contracts. *See Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012).

In the present case, the district court's ruling on attorneys' fees was based upon a combination of contract interpretation and application of state and federal statutes. This ruling should be reviewed de novo.

II. Additional fees should have been awarded under the Agreement.

As discussed above, the Agreement contains a mandatory arbitration provision in which the parties entrusted the arbitrator with broad powers and the last word on any dispute. The arbitration paragraph states that the arbitrator's award "**shall be final,**" and that the award is "**not subject to judicial review.**" 1 App. 36 (emphasis added). "Not subject to judicial review" means just what it says. The award is not subject to judicial review, and it cannot be attacked in a court (in the absence of fraud, corruption or misconduct by the arbitrator). *See Lieberman,* 343 F. Supp. at 562; *see also Natl. Airlines,* 114 So. 2d at 232 (where contract provided that arbitration decision shall be final and binding, attacks based upon alleged errors of law or fact are not subject to judicial review); *Aerojet-General,* 478 F.2d 248 at 251 (parties can contractually agree to eliminate all court review of the arbitration award).

In the present case, the Agreement states that the arbitrator's award "shall be final" and the award "**is not subject to judicial review.**" 1 App. 36 (emphasis added). This conclusively establishes the parties' intent to eliminate all judicial attacks on an arbitration award.

Therefore, in requiring costs and attorneys' fees for the prevailing party in the arbitration, the Agreement contemplates that there will not be any **post-arbitration** costs and attorney's fees incurred by the prevailing party, because an award will be "final and not subject to judicial review." If the parties both comply with their Agreement, the prevailing party will recover arbitration expenses (costs and fees) from the losing party; the award will be final; and there will be no further costs and attorneys' fees, because there will be no post-arbitration judicial review of the award (other than *pro forma* entry of judgment on the award, which the Agreement allows).

But here, Bidsal decided not to comply with the Agreement – he did not treat the award as final, and he sought post-arbitration judicial review to vacate the award. He was unsuccessful. His decision not to comply with the Agreement put pressure on CLA either to give up or go through a lengthy appeal process. The provision requiring arbitration costs and fees for the prevailing party should be harmonized and read together with the subsequent provision in the same paragraph, which requires the parties to treat an arbitration award as final and not subject to judicial review. *WPH*, 131 Nev. at 888, 360 P.3d at 1147 (courts should harmonize a contract's arbitration provisions, to give effect to all its provisions and to render them consistent with each other). It would be absurd to interpret the Agreement so narrowly that it would

preclude CLA from recovering its post-arbitration costs and fees—which were necessarily incurred in litigating against Bidsal's failed and improper effort to obtain post-arbitration judicial review. *See Washoe County Sch. Dist. v. White*, 133 Nev. 301, 305, 396 P.3d 834, 839 (2017) (contracts should not be construed to lead to an absurd results).

In its motion for fees and costs, CLA argued that the post-arbitration fees could be awarded under the Agreement. 11 App. 2626-27. In opposition, Bidsal confused the issue by conflating arguments about the agreement and the FAA. 12 App. 2757. Bidsal's opposition cited *Crossville Medical Oncology, P.C. v. Glenwood Systems*, 610 Fed. Appx. 464 (6th Cir. 2015; unpublished). 12 App. 2757. The district court did not determine whether the agreement could be construed to allow CLA's requested fees. 13 App. 3051-55. The district court did, however, cite *Crossville.*[12]

Crossville was a federal decision involving a Connecticut dispute. The Sixth Circuit did not publish the decision, thereby indicating that the court intended to

12/ Paragraph 21 of the district court's order poses the question of whether fees are allowed under the FAA. 13 App. 3054:18-20. The next paragraph states that there is no basis for fees, and citing *Crossville.* 13 App. 3054:21-23. The order is unclear as to whether the court's citation to *Crossville* is solely in reference to the order's immediately preceding question about the scope of the FAA, or if the citation is also in reference to whether fees are allowed under the language of the Agreement.

minimize the decision's weight and persuasive value. In any event, *Crossville* has no application here. The arbitration agreement in that case had no restriction precluding all judicial review—unlike the present case, where the Agreement unequivocally states that an arbitration award "is not subject to judicial review." Nor does *Crossville* indicate whether there was an applicable Connecticut statute similar to NRS 38.243, allowing post-arbitration fees. Finally, *Crossville* does not indicate that there was a Connecticut case like *WPH*, where this court held that Nevada substantive law is applicable to an attorneys' fee claim. Therefore, the district court erred by relying on *Crossville* to determine that the court lacked discretion to award additional fees.

III. An attorneys' fee award was available under NRS 38.243.

The district court confirmed the arbitration award and denied Bidsal's motion to vacate it, but the district court denied CLA's motion for post-arbitration attorneys' fees on the ground that this case is governed by the FAA (which does not allow an award of attorneys' fees), not NRS 38.243 (which does allow a fee award). This ruling was error.

NRS 38.243(3) allows a post-arbitration award:

> On application of a prevailing party to a contested judicial proceeding under NRS 38.239, 38.241 or 38.242, the court may add

> reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying or correcting an award.

The Agreement states that "**[t]he arbitration**" shall be governed by the FAA. 1 App. 36 (emphasis added). This provision deals with "the arbitration," and it includes applying the FAA to a petition to vacate an award – as both Bidsal and CLA agree. (See pages 22-23 of this brief, above). The provision says nothing about proceedings to obtain attorneys' fees after the arbitration has concluded and after any judicial review proceedings. The provision must be read in harmony with the Choice of Law provision in the Agreement, which states that the Agreement shall be governed "in all respects" by Nevada law. 1 App. 44.

Under the Agreement, arbitration procedures are governed by JAMS rules; the arbitration itself, as well as any potential judicial challenge to the award, is governed by the FAA; and everything else is governed "in all respects" by Nevada law. The Nevada choice of law provision should be deemed to include CLA's request for an award of attorneys' fees incurred in **post**-arbitration judicial proceedings.

WPH addresses this issue. There, a contract contained two choice-of-law clauses. The first clause stated that the arbitration would be governed by AAA rules; and a second clause stated that the contract was governed by the law of one party's place of business, which was Nevada. In determining whether offers of judgment were available in the arbitration, the *WPH* court held that substantive provisions of the contract would be determined by Nevada law, and procedural aspects of the arbitration would be governed by the AAA. *Id.* at 888, 360 P.3d at 1147-48. **The court then held that state laws regarding attorneys' fees are substantive, not procedural.** *Id.* at 888-89, 360 P.3d at 1148. Accordingly, Nevada rules and statutes dealing with offers of proof were deemed to be "substantive laws that apply to the arbitration proceedings in the current case." *Id.*

In light of *WPH*, Nevada substantive law applies to CLA's claim for post-arbitration attorneys' fees, and NRS 38.243 is considered a substantive law that allows fees in arbitration cases. Thus, the district court erred by ruling that it had no discretion to award fees on the basis that the fee claim was governed by the federal FAA (which does not allow fees), instead of Nevada law. *See Lund v. Eighth Judicial Dist. Ct.*, 127 Nev. 358, 363, 255 P.3d 280, 284 (2011) (the failure to exercise available discretion can itself constitute a manifest abuse of discretion).

IV. The district court erred by applying the FAA to the attorneys' fee dispute.

In denying CLA's motion for post-arbitration costs and fees, the district court recognized *WPH*, but failed to apply it correctly. The district court ruled that JAMS rules governed procedural law, and the FAA governed substantive law (including the post-arbitration attorneys' fee issue). 13 App. 3053-54. The district court refused to apply the Nevada Arbitration Act, thereby giving the Nevada choice-of-law provision in the Agreement no effect whatsoever, contrary to *WPH*. *Id.*

The district court's ruling demonstrates a misunderstanding about the Agreement's provisions establishing sources of law and procedure, as outlined above. The Agreement provides that the FAA will govern the arbitration, which would necessarily include post-arbitration judicial review of the arbitrator's determinations, and review of the arbitration award itself. The motion for post-arbitration attorneys' fees, however, did not involve any review of the arbitration award or any decision by the arbitrator. This is because the motion sought attorneys' fees incurred during judicial review proceedings, which were after the arbitration and after Judge Haberfeld had finished work on the case. As such, the Nevada choice-of-law provision should apply to the motion, and the district court erred by ruling otherwise.

The district court's order repeatedly referenced CLA's earlier reliance on the FAA, but that reliance was not in the context of recovery of post-arbitration expenses. It was only in the context of confirming the award (or defeating Bidsal's petition to vacate the award). The district court noted that CLA's initial demand for arbitration and CLA's petition for confirmation of the award both cited the FAA. 13 App. 3052-53. CLA's arbitration demand referenced Art. III, §14.1 of the Agreement, but that section says nothing about recovery of attorneys' fees and costs after the arbitration is finished, after the arbitrator has issued an award, and after a court has reviewed the case and decided not to vacate the award.[13]

Under these circumstances, the district court erred by refusing to apply Nevada law to the post-arbitration fee motion; by applying the FAA to the fee motion; and by giving no effect to the Agreement's Nevada choice-of-law provision.

13/ In determining the source of law to be applied, this court should recognize the significant difference between a petition to vacate an award and a motion for post-arbitration fees. A petition to vacate attacks the very heart of the arbitrator's award, challenging the merits of the award and its fundamental legal legitimacy. But a motion for post-arbitration fees does not challenge the award at all. The motion is filed by the party who prevailed in the arbitration and who prevailed in defeating the petition to vacate the award. In this context, it is reasonable and appropriate to apply one standard for judicial review of a petition to vacate (the FAA), and another standard for review of a motion for post-arbitration fees (the Nevada statute).

CONCLUSION

The district court's denial of CLA's motion for post-arbitration attorneys' fees should be reversed.

DATED this 22 day of February, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman in 14 point font size.

I further certify that this brief complies with the type-volume limitations of NRAP 28.1(e) because it contains 17,440 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume numbers, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22 day of February, 2021.

Robert L. Eisenberg

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of LEMONS, GRUNDY & EISENBERG, and on this date the foregoing ***Respondent's Answering Brief on Appeal and Opening Brief on Cross-Appeal*** was electronically filed with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I served a copy of the foregoing ***Respondent's Answering Brief on Appeal and Opening Brief on Cross-Appeal*** by depositing a true and correct copy, postage prepaid, via U.S. mail to:

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