Case Nos. 80427 & 80831

In the Supreme Court of Nevada

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

APPEAL

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

COMBINED REPLY BRIEF IN DOCKET NO. 80427 AND ANSWERING BRIEF IN DOCKET NO. 80831

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NRAP 26.1 DISCLOSURE

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

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

DATED this 23rd day of July, 2021.

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REPLY BRIEF IN DOCKET NO. 80427

INTRODUCTION

CLA urges this Court to rubber stamp the arbitrator's final award, but concedes the key premise of Bidsal's appeal: that the arbitrator displaced the terms of the governing contractual provision (Section 4.2) with his personal understanding of a typical "Dutch auction" provision.[1] CLA also fails to answer the key question presented by Bidsal's opening brief: Why does the final award apply the arbitrator's personal understanding of typical "Dutch auction" provisions (including his understanding that typical Dutch auction provisions achieve "rough justice") to resolve a dispute governed by Section 4.2?

Vacatur is necessary because this question has no satisfactory answer. The final award shows that the arbitrator set aside Section 4.2 and relied instead on his personal understanding of how forced buy-sell ("Dutch auction") agreements **should** work. Specifically, in paragraph eight of the Final award ("Paragraph Eight"), he **explicitly** engrafts his

[1] *See* Respondent CLA's Answering Brief ("RAB") at 35 ("Paragraph 8 merely provided Judge Haberfeld's general understanding of Dutch auction provisions.").

understanding of a typical "Dutch auction" provision on to Section 4.2. Reasoning that a typical Dutch auction achieves "rough justice," he concludes that Section 4.2 must achieve the same result. But not even a scintilla of evidence shows that Section 4.2 is equivalent to, or was intended by the parties to be, a typical Dutch auction.

CLA has no credible explanation for Paragraph Eight. Its arguments are inconsistent and paper-thin. These arguments only confirm what is clear from the plain language of Paragraph Eight: the concepts on which the arbitrator relied to rule in CLA's favor are not derived from Section 4.2 and genuinely lack any basis in the evidence. The arbitrator's explicit reliance on these extrinsic concepts (typical "Dutch auction") and standards ("rough justice") to resolve a contractual dispute epitomizes manifest disregard of the law.

Nor could any reasonable jurist conclude that Section 4.2 is a typical "Dutch auction." Section 4.2. incorporates an appraisal procedure devised by the parties to protect themselves against inequitable results. Bidsal relied on these atypical terms to demand an appraisal. The parties requested that the arbitrator resolve the meaning of these terms,

but the arbitrator instead erased the terms altogether by reducing Section 4.2 to a typical "Dutch auction"—then doled out his personal brand of extra-contractual "rough justice."

Paragraph Eight warrants vacatur of the Final award. That the arbitrator predetermined the outcome is further evident, however, from his determination that Bidsal was the "principal drafter" of Section 4.2. This determination enabled the arbitrator to construe the key terms against Bidsal, erasing them from Section 4.2. But no evidence in the record even arguably supports this determination.

It is further evident that the arbitrator predetermined the outcome from his conscious disregard of the rudimentary legal principle that a counteroffer operates as a rejection. He recognizes this principle in the final award, but does not apply it. Applying this basic principle to Section 4.2 is straightforward: once CLA counteroffered, Bidsal became the Remaining Member. The operation of Section 4.2 is then clear: Bidsal may invoke the appraisal procedure before the sale of his membership interest because he is the Remaining Member. CLA has no credible defense for the arbitrator's conscious disregard of the term "counterof-

fer"—yet evades the argument by contending, without explanation or citation to the record, that "the words 'offer' and 'counteroffer' . . . did not have their common meaning." (RAB 7-8.)

STANDARD OF REVIEW

A. An Issue of First Impression: Whether Manifest Disregard of the Law Remains Grounds for Vacatur Under the Federal Arbitration Act

CLA raises an apparent issue of first impression in Nevada: Does "manifest disregard of the law" survive *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578-85 (2008), as grounds for vacatur of an arbitration award under the Federal Arbitration Act ("FAA")?

CLA argues that, even if the arbitrator manifestly disregarded Section 4.2, this Court should not vacate the Final award because *Hall Street* eliminates manifest disregard of the law as a ground for vacatur under FAA § 10. (*See* RAB 24-25.) For this argument, CLA relies on *Citigroup Global Markets, Inc. v. Bacon*, 652 F.3d 349, 350-58 (5th Cir. 2009) and *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1323-24 (11th Cir. 2010), which interpret *Hall Street*. (*See* RAB 25.)

CLA misconstrues *Citigroup* and *Frazier*. Neither holds that an arbitration award is immune from scrutiny *under the FAA* for manifest

disregard of the law. *Citigroup* and *Frazier* hold instead that manifest disregard does not constitute an *independent* ground for vacatur that is separate from the FAA, as the Fifth and Eleventh Circuits had historically held. *See Citigroup*, 562 F.3d at 355 ("[T]o the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA."); *Frazier*, 604 F.3d at 1324 ("We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*.").

CLA brashly and erroneously urges this Court, "[i]n light of *Hall Street*," to "ignore [Bidsal]'s entire discussion of manifest disregard of the law" and "citations to various federal cases." (RAB 24-25.) But CLA not only misapprehends *Citigroup* and *Frazier*, it also makes a second error by presuming that "manifest disregard of the law" has a universal, consistent meaning in federal cases. It does not. As explained in *Hall Street*, federal courts have historically applied "manifest disregard of the law" as shorthand for FAA § 10(a)(3) and/or (4). *See id.*, 552 U.S. at 585. CLA ignores this nuance.

Because federal courts have used "manifest disregard of the law" as shorthand for FAA § 10(a), the Second, Sixth and Ninth Circuits hold

that manifest disregard remains grounds for vacatur under the FAA after *Hall Street*. *See Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 414 (9th Cir. 2011); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418 (6th Cir. 2008); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93 (2d Cir. 2008), *rev'd and remanded sub nom. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

The interpretation of the Second, Sixth, and Ninth Circuits is well-reasoned: *Hall Street* provides no reason to discount federal cases applying the manifest disregard standard unless the cases analyze manifest disregard as an independent, non-FAA ground for vacatur. As the Sixth Circuit reasons, "every federal appellate court has allowed for the vacatur of an award based on an arbitrator's manifest disregard of the law" since the standard was first articulated by the U.S. Supreme Court in 1953. *Coffee Beanery, Ltd.*, 300 F. App'x at 419. *Hall Street* nowhere rejects manifest disregard as grounds for vacatur under the FAA, and so "it would be imprudent to cease employing such a universally recognized principle." *Id.*

Though this is an issue of first impression in Nevada, it is clear that manifest disregard remains grounds for vacating an arbitration

award under the FAA. This Court should so hold in resolving this appeal, to foreclose the confusion reflected by CLA's arguments.

B. FAA § 10(a)(4) Guarantees Meaningful Judicial Review of Arbitrator Misconduct

Eager for this Court to rubber-stamp the final award, CLA next argues that the operating agreement prohibits any and all judicial review of an arbitration award. (*See* RAB 3-4, 15, 18-20.) Not so.

The FAA "ensure[s] a minimum level of due process for parties to an arbitration" by authorizing courts to vacate arbitration awards for arbitrator misconduct. *In re Wal-Mart Wage & Hour Emp. Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013). By enacting FAA § 10(a), Congress mandated "limited, but critical, safeguards" that bar courts from confirming arbitration awards "tainted by partiality, a lack of elementary procedural fairness," or similar misconduct. *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 64 (2d Cir. 2003)*, overruled on other grounds by Hall Street*, 552 U.S. 576 (2008).

The basic safeguards guaranteed by FAA § 10(a) may not be voided by agreement. *See In re Wal-Mart*, 737 F.3d at 1267 n.7 ("[P]arties may not contract to preclude judicial review of manifest disregard for law."); *Zurich Am. Ins. Co. v. Team Tankers A.S.,* 811 F.3d 584, 591

(2d Cir. 2016) (parties may not divest courts of authority to "review both the substance of the awards and the arbitral process for compliance with § 10(a) and the manifest disregard standard"); *see also infra* Bidsal's RAB in Dkt. No. 80831 at A.3.

Arbitration may be "a creature of contract," but the court's authority to review an arbitration award does not derive from a private agreement, so may not be eliminated by contract. *See Hoeft*, 343 F.3d at 65-66. Even if the operating agreement purported to foreclose all judicial review of the final award, therefore, it would be unenforceable.

C. FAA § 10(a)(4) Requires Vacatur of an Award If the Arbitrator Disregards the Contract and Dispenses His Personal Brand of Justice

CLA agrees, however, that pursuant to FAA § 10(a)(4), an arbitration award must be vacated "when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice." (*See* RAB 25 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672, 130 S. Ct. 1758, 1767, 176 L. Ed. 2d 605 (2010).)

Thus, an arbitration award "must draw[] its essence from" the controlling agreement. *United Steelworkers of Am. v. Enter. Wheel &*

Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 1361, 4 L. Ed. 2d 1424 (1960). "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.*; *see Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.,* 713 F.3d 797, 802-3 (5th Cir. 2013) (arbitrator exceeds his powers under FAA § 10(a)(4) when he "utterly contort[s] the evident purpose and intent of the parties—the "essence" of the contract").

D. CLA's Remaining Arguments Are Unpersuasive

CLA also unpersuasively purports to distinguish several cases cited in Bidsal's opening brief. For instance, CLA argues that *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010), is "inapplicable" because *Stolt-Nielson* held that "[i]t is **only** when an arbitrator strays from interpretation of the agreement and effectively 'dispenses his own brand of industrial justice' that his decision may be unenforceable." (RAB 25.) But this is a point of agreement—not disagreement. Here, the final award should be vacated because the arbitrator set aside Section 4.2 and administered "rough justice" based on his personal understanding of how typical "Dutch auction" provisions **should** work.

CLA also argues that *Xpress Nat. Gas, LLC v. Cate St. Cap., Inc.*, 144 A.3d 583 (Me. 2016), and *Jordan v. California Dep't of Motor Vehicles*, 123 Cal. Rptr. 2d 122, 133 (Ct. App. 2002), are distinguishable because they do not apply the FAA. (RAB 26-27.) CLA argues that these cases are inapplicable, but also that they favor CLA's position. (*See id.*) It cannot be both. But in any event, Bidsal cited these cases as persuasive authority because the state statutes interpreted are materially identical to FAA § 10(a). *See* ME. REV. STAT. tit. 14, § 5938 ("Vacating an Arbitration Award"); CAL. CIV. PROC. CODE § 1286.2 ("Grounds for vacation of award."). Quoting from these cases, CLA argues that the circumstances justifying vacatur of an arbitration award are limited. But that has never been disputed.

CLA further argues that, in *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508, 121 S. Ct. 1724, 1727, 149 L. Ed. 2d 740 (2001), the U.S. Supreme Court affirmed an arbitration award notwithstanding the arbitrator's "inexplicable" and "bizarre" findings. (RAB 27-28.) Thus, CLA continues its misguided effort to frame Bidsal's appeal as a challenge to the arbitrator's legal reasoning and factual determinations.

The Final award should be vacated, however, because Paragraph Eight explicitly resolves a contractual dispute based on the arbitrator's personal belief that forced/buy sell agreements (i.e., "Dutch auction[s]") **should** achieve "rough justice." The arbitrator's conscious disregard of basic legal concepts (e.g., that a counteroffer operates as a rejection) and his arbitrary and capricious factual determinations (e.g., that Bidsal was the "principal drafter" of Section 4.2) demonstrate that he predetermined the outcome—just as he explicitly states in Paragraph Eight.

ARGUMENT

I.

BY ORDERING A FORCED SALE TO ACHIEVE ROUGH JUSTICE, THE ARBITRATOR MANIFESTLY DISREGARDED THE GOVERNING PROVISIONS OF THE OPERATING AGREEMENT

The arbitrator knows the legal meaning of the terms "offer," "rejection," and "counteroffer", but consciously and manifestly disregarded these meanings and rewrote Section 4.2 to comport with his understanding of a typical Dutch auction provision. (*See* AOB 32, 37-43.)

The legal definition of the word "**offer**" is "[t]o bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a

proposal to; to exhibit something that may be taken or received or not." *Black's Law Dictionary* (11th ed., 2019).

The legal definition of the word "**rejection**" is "the act or an instance of rejecting: as a refusal to accept an offer." *Merriam-Webster's Dictionary of Law* (1996).

The legal definition of the word "**counteroffer**" is "a return offer made by one who has rejected an offer." *Id.*

Once the Offering Member offers to purchase under Section 4.2, the Remaining Member can elect to determine the fair market value of his interests through an appraisal, or waive that right. Whether the appraisal option is elected or the fair market value from the offer is used, the offeree (Remaining Member) then has only two options under Section 4.2. He may either:

> (i) **Accept** the Offering Member's purchase **offer**, or
> (ii) **Reject** the purchase **offer** and make a **counteroffer** to purchase the interest of the Offering Member based upon the same fair market value (FMV) according to the [formula in the Agreement].

These terms in Section 4.2—"offer", "reject[]" and "counteroffer"—have specific, well-understood legal meanings. By **rejecting** Bidsal's

purchase offer (which means it no longer existed) and making a **counteroffer** (a new and independent offer) to purchase Bidsal's membership interest, CLA elected option (ii), above.

The legal significance of the bolded terms (offer, rejection, counteroffer) cannot be overstated because they shift the parties' positions. Once Bidsal's offer was rejected, he no longer met the definition of an "Offering Member" under Section 4.1 (Offering Member means "the member who offers to purchase the Membership Interest(s) of the Remaining Member(s)"). Once CLA counteroffered, CLA became the Offering Member and Bidsal became the Remaining Member, as defined by Section 4.1 (Remaining Member means "the Members who received an offer (from Offering Member) to sell their shares"). Nothing in Section 4.2 indicates that the recipient of a counteroffer cannot invoke the appraisal procedure. Bidsal, as the Remaining Member, had every right to invoke the appraisal procedure.

By consciously disregarding the plain meaning of these terms (offer, rejection, counteroffer), the arbitrator rewrote Section 4.2 to reflect what he believed a "Dutch auction" should look like. This enabled him to administer the "rough justice" he believed a typical Dutch auction

would provide. The final award must be vacated because the arbitrator, in this way, "stray[ed] from interpretation and application of the agreement and effectively dispense[d] his own brand of industrial justice." *Stolt-Nielsen SA*, 559 U.S. at 671.

The plain language of the agreement, applied in a literal manner, unambiguously provides Bidsal the right to demand an appraisal before he can be compelled to sell his interest. (*See* AOB 29-38.) CLA characterizes this argument as "a bizarre 'exchange hats' theory." (RAB 45.) CLA's arguments are unpersuasive; each presumes that Section 4.2 operates as a stripped-down forced buy-sell provision, or typical Dutch auction. But the language and terms of Section 4.2 cannot support that conclusion.

First, CLA sidesteps by arguing that Bidsal has raised this argument for the first time on appeal. (RAB 43.) The record shows, however, that Bidsal argued this position from the outset, and raised the argument numerous times during arbitration. The August 5, 2017, letter Bidsal's counsel sent to CLA invoking Bidsal's right to an appraisal under the Section 4 is titled, "Response To Counteroffer To Purchase Membership Interest." (4 App. 954.) And as the arbitrator recounts in

the Final award, Bidsal insisted during arbitration that, "as a contractual and apparently legal consequence of [] having been made the recipient of a 'counteroffer,' he became entitled, as a seller, now, to Section 4.2 optional appraisal rights." (5 App. 1222-3, ¶ 16.)

That is what CLA derides as "bizarre 'exchange hats' theory," in a nutshell. It is simply that, **once counteroffered by CLA**, Bidsal became a seller—and ceased to be a buyer. *See* RESTATEMENT (SECOND) OF CONTRACTS § 39, cmt. a (1981) (a counteroffer and a rejection "have the same effect in terminating the offeree's power of acceptance"). Pursuant to the definitions in Section 4.1, this means that, once counteroffered by CLA, Bidsal became a "Remaining Member" entitled to invoke Section 4.2's appraisal procedure.

By characterizing Bidsal as the Offering Member **even after he was counteroffered by CLA**, the arbitrator disregarded the universally-understood meaning of "counteroffer." (*See* 5 App. 1225-6, ¶ 20(E).) In the final award, he restates Bidsal's argument that CLA's counteroffer converted him (Bidsal) to a "Remaining Member." (*See* 5 App. 1222-3, ¶ 16.) The arbitrator never refutes this argument, meaning that he recognized it, but he never applies it. (*See* 5 App. 1222-7, ¶¶ 16-20.) To

achieve the outcome predetermined in Paragraph Eight ("rough justice"), he consciously disregards that CLA rejected Bidsal's offer when it extended a counteroffer. This is manifest disregard of the law.

Second, CLA argues "Bidsal's roundelay would never end," and "[t]his process could go on for an eternity." (RAB 46.) Not so. The offer-counteroffer sequence may continue for a time, but iterations of the offer-counteroffer sequence are not "circular," as CLA contends, because each counteroffer must exceed the preceding offer.

A protracted process could theoretically result from members counteroffering in consistently small increments. But Section 4.2 reasonably assumes members will not waste their own time. Either member may also interrupt such a sequence and accelerate the process by counteroffering for an amount significantly higher than the preceding offer, though lower than his actual valuation.

The offer-counteroffer sequence also resets every 30 days. Each reset, the Remaining Member has the option, if the offered price is unappealing but he wishes to sell, to invoke the appraisal procedure. This compels the Offering Member to purchase his interest at the fair market value price determined by a third party appraiser. The notion that

the process *could* go on for "an eternity" is not a valid reason to ignore the plain language of Section 4.2.

Third, CLA argues that:

> 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, than ***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 say that.

(RAB 47 (emphasis original).)

But this argument ignores that Section 4.1 defines the terms "Offering Member" and "Remaining Member." CLA's proposed alternative language for Section 4.2 is cumulative of, and rendered superfluous by, by the definitions in Section 4.1. (*See* AOB 29-38.)

Fourth, CLA argues that if a Remaining Member cannot offer to buy, as Bidsal contends,[2] then "the Remaining Member can never be the Offering Member." (*See* RAB 47-47.) So, CLA argues, Bidsal could never become a Remaining Member. (*See id.*)

[2] Bidsal's argument is actually that a Remaining Member cannot offer to buy *and remain a Remaining Member*. (*See* AOB 31-33.)

CLA trivializes Bidsal's plain-language reading of Section 4.2 as "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." (RAB 45.) Though clever, this more aptly describes CLA's fourth argument, which dives headlong into circular reasoning.

CLA argues: "If a Remaining Member cannot make an offer to buy, he could never fit the definition of an Offering Member," and so Bidsal could never have become the Remaining Member (with the right to demand appraisal). (RAB 48.) But CLA provides the answer to this conundrum: "[T]he Remaining Member does not 'offer' to purchase, he makes a **counteroffer**"—which, by its very definition, constitutes a new offer. (*Id.* (emphasis original).)

Because a counteroffer operates as a rejection, the Remaining Member ceases to be a Remaining Member under the definitions of Section 4.1 once he makes a counteroffer. (*See* AOB 32-33.) CLA's fourth argument ("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 . . .") is tautological. It ignores

that a Remaining Member changes status upon extending a counteroffer.

Fifth, CLA argues that Bidsal's purported admission from the witness stand that he (Bidsal) is the "offering member," defeats Bidsal's construction of Section 4.2. (RAB 48.) Not so. Even if Bidsal momentarily conflates the terms Offering Member and Remaining Member in the testimony CLA identifies, this does not alter the plain meaning of Section 4.2. Moreover, it is easy to conflate the terms Offering Member and Remaining Member when responding to imprecise questions during cross-examination. That Bidsal may have done so in one instance is immaterial.

Sixth, CLA argues that the statement in Section 4.2, "If the offered price is not acceptable to the Remaining Member . . .", cannot be squared with Bidsal's position because, "[H]ow can the Offering Member legitimately claim the price he established is not acceptable to him?" (RAB 48.) CLA's argument is unclear. If the insinuation is that a member could not "legitimately" reject an offer to buy at a price he himself previously offered to buy, CLA is simply feigning ignorance.

Nevertheless, even if CLA is arguing that Section 4.2 requires a member to sell at the same price he offers to buy, this is a conclusion, not an argument. Section 4.2 sets forth a procedure to be followed after an initial offer. Bidsal delineated each possible outcome under this procedure. (*See* AOB 35-38.) CLA treats Section 4.2 as a typical Dutch auction, and urges this Court to do the same. But doing so requires the Court to disregard the terms and language that distinguish Section 4.2 from a typical Dutch auction. (*See* AOB 29-38.) This cannot be done without obviating the parties' intent.

CLA also argues that Bidsal's reading of Section 4.2 is untenable for a variety of additional reasons. (*See* RAB 49-52.) None are persuasive.

For instance, CLA argues that Bidsal's "Scenario One" (*see* AOB 35) fails because "FMV" cannot be determined "when the sale is consummated" because the sale cannot be consummated until FMV is determined. (RAB 51.) This criticism is fair, if nit-picky. Bidsal intended to point out in Scenario One that the Offering Member's estimate of fair market value (i.e., his offer amount) becomes "FMV" when his offer is accepted by operation of the Remaining Member's failure to respond.

"When the sale is **consummated**" implies that "FMV" solidifies only when the sale is completed. That would be too late, as CLA observes. But Scenario One stands.

Additionally, CLA identifies a purported contradiction between Bidsal's position and his offer letter, which described his offer amount as his best estimate of fair market value – "***FMV***." (RAB 52.) This echoes the feigned ignorance of CLA's sixth argument. CLA claims that Bidsal failed to explain in the letter that "the $5,000,000 FMV would be inapplicable if CLA counteroffered, as [he] now argues." (*Id.*) But Bidsal was under no obligation to point out to CLA that this was so. That Bidsal did not make this observation in his letter is immaterial. Bidsal does not dispute that he wanted CLA to accept the offer.

The arbitrator is an experienced attorney and former judge. He knows the legal meaning of the terms used by the parties in Section 4.2. He also knows that the law does not permit him to "interpolate in a contract what the contract does not contain." *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 176, 87 P.3d 1054, 1059 (2004) (internal quotation marks and citation omitted); *see id.* ("[T]he court should not revise a contract under the guise of construing it."). Yet, the

arbitrator consciously disregarded the legal meaning of key terms in Section 4.2 (offer, rejection, counteroffer) and set aside the appraisal procedure to construe Section 4.2 as a typical "Dutch auction." Because this epitomizes manifest disregard of the law, the Final award must be vacated.

II.

THE ARBITRATOR MANIFESTLY DISREGARDED THE CONTRACT TO DISPENSE HIS OWN BRAND OF "ROUGH JUSTICE"

Section 4.2 controls this dispute, yet the arbitrator found ambiguity in Section 4.2 where none exists. (*See* 5 App. 1219, ¶ 7.) Then, in the next sentence of the final award, he displaced Section 4.2 with his understanding of a "common" (i.e., typical) "Dutch auction" provision:

> 8. The forced buy-sell" agreement, or so-called "Dutch auction," is common among partners in business entities like partnerships, joint ventures, LLC's, close corporations --- a primary purpose of which is to impose fairness and discipline among partners considering maneuvering, via pre-agreed procedures and consequences. If not careful and fair, the Dutch auction imposes a risk of "overplaying one's hand" --- such that an intended buyer might end up becoming an unintended seller, at a price below, possibly well below, the price at which the partner was motivated to buy the same Membership Interest, under the "buy-sell" procedures which he/she/it initiated. If the provisions work,

> as intended, the result might not be expertly authoritative or precise, but nevertheless a form of cost-effective "rough justice," when one partner "pulls the trigger" on separation, by initiating Section 4.2 procedures.

(5 App. 1219, ¶ 8.)

From the plain language of Paragraph Eight, it is apparent that the arbitrator displaced Section 4.2 with his understanding of a "common" Dutch auction provision. This is not background detail: the arbitrator states in Paragraph Eight that, "when one partner 'pulls the trigger' on separation, **by initiating Section 4.2 procedures**," the outcome is the same as under a "common" "Dutch auction" provision: "rough justice." (*Id.* (emphasis added).)

Paragraph Eight prompts a key question: What basis does the arbitrator have to conclude that Section 4.2 is equivalent to a typical Dutch auction provision?

A. No Evidence Shows That Section 4.2 Is a "Dutch Auction" Provision

Section 4.2 is not equivalent to a typical Dutch auction provision. (*See* AOB 38-43.) Nowhere in the final award does the arbitrator determine that they are equivalent, and nothing in the record supports a finding of equivalence.

CLA argues that the arbitrator construed Section 4.2 as a typical "Dutch auction" provision because "**the parties** and LeGrand" characterized Section 4.2 as a "Dutch auction." (RAB 33 (emphasis added).) CLA advances this argument repeatedly. (*See* RAB 16 ("So the meaning of Dutch auction that [the arbitrator] used was what **the parties** and their joint attorney used, not a 'typical' meaning."); RAB 33-34 ("There is abundant evidence that LeGrand and **the parties** had used the term 'Dutch auction' . . ." (emphasis added).)

CLA's argument fails for two reasons. The first is that CLA admits that Paragraph Eight sets forth the arbitrator's "general understanding of Dutch auction provisions." (RAB 35.) Does Paragraph Eight provide the arbitrator's general understanding of Dutch auction provisions—or does it reflect the parties' statements characterizing Section 4.2? It cannot be both. (It is the former.)

Second, neither CLA nor Bidsal ever characterized Section 4.2 as a "Dutch auction."[3] CLA contends that the record contains "abundant

[3] CLA contends 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. (RAB 16.) This betrays the weakness of CLA's position. An arbitration brief is not evidence. Nor can it displace the evidentiary record, which contains no evidence that either party

evidence" that **the parties** used the term "Dutch auction." (RAB 33-34.) But no evidence shows that either party ever described their agreement as a "Dutch auction."

CLA does not identify the "abundant evidence," but instead moves the goalposts. It argues that an email in which **LeGrand** characterizes **a rough draft** of Section 4.2 as a "Dutch auction" establishes that **the parties** intended Section 4.2 to be a Dutch auction. (*See* RAB 34 n.7.) But the parties rejected LeGrand's drafts of Section 4.2. LeGrand's characterization of these drafts is, therefore, irrelevant.

Despite having insisted repeatedly that "LeGrand and **the parties** had used the term 'Dutch auction,'" (*see, e.g.,* RAB 33-34) CLA ultimately abandons any pretense that the parties themselves described Section 4.2 as a "Dutch auction," asserting: "Whether the parties ever uttered the words 'Dutch auction' is irrelevant." (RAB 34 n.7.)

CLA tries an audacious sleight of hand, but again misses the point. Paragraph Eight shows that the arbitrator derived a "rough justice" standard from "common" "Dutch auction" provisions, then applied

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used the term "Dutch auction" to characterize their agreement. The arbitration brief also referenced a *rough draft* of Section 4.2.

that standard to determine the outcome of a contractual dispute under Section 4.2. (*See* 5 App. 1219, ¶ 8.) Because the arbitrator applied an extrinsic, equitable standard to resolve a contractual dispute, he has by definition failed to draw the essence of final award from the agreement. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569, 133 S. Ct. 2064, 2068 (2013) (arbitrator exceeds his authority by issuing an award that "reflects his own notions of economic justice rather than drawing its essence from the contract").

Whether the parties ever described Section 4.2 as a "Dutch auction" is, therefore, highly relevant. Paragraph Eight cannot even arguably constitute contractual analysis of Section 4.2 unless some evidence shows that Section 4.2 is equivalent to a "common" "Dutch auction." But no such evidence is identified in the final award—because none exists.

1. LeGrand's Email Is Not Evidence of the Parties' Understanding of Section 4.2

CLA argues that LeGrand's email provides the evidentiary basis for the arbitrator to conclude that Section 4.2 is a "common" "Dutch auction." (RAB 34 n.7.) This argument fails.

First, LeGrand's statements in email do not reflect the parties' understanding of Section 4.2 because LeGrand himself is not a party to

the agreement. LeGrand drafted early versions of Section 4.2, but his drafts were rejected and CLA replaced him as draftsman. CLA thereafter re-drafted Section 4.2 from scratch. (*See* AOB 10.) LeGrand's email characterizing his earlier, rejected draft as a "Dutch auction" is simply irrelevant.

CLA tries to salvage the relevance of LeGrand's email by arguing that it (CLA) "used the LeGrand draft for language and structure." (RAB 55; *see also* RAB 17.) Nothing could be further from reality. LeGrand's final draft of Section 4.2 contains no appraisal procedure. CLA's re-draft uses completely different language and structure. (*Compare* AOB 9 (LeGrand Sept. 20, 2011 draft) *with* AOB 10 (CLA Sept. 22, 2011 draft).)

2. The Arbitrator Had No Basis In Evidence to Assume the Parties Intended Section 4.2 to be a Typical "Dutch Auction" Provision—or Even to Know What "Dutch Auction" Meant to Them

Second, even assuming LeGrand's email reflected the parties' understanding of Section 4.2 as a "Dutch auction" (which it does not), a pair of key questions remain unanswered: What does "Dutch auction" mean? And did LeGrand, the parties, and the arbitrator share a common understanding of the term?

There is no evidence in the record that a singular definition of "Dutch auction" was ever proposed, much less agreed upon. LeGrand testified that Section 4.2 was *not* a "Dutch auction" within his understanding of that term, but merely "contained some elements" of a Dutch auction. (*See* 9 App. 2212:18-2213:15.) LeGrand emphasized that the language "definitely [] changed over time" from the draft he characterized as a "Dutch auction." (*Id.*)

The typical "Dutch auction" concept in Paragraph Eight is extrinsic, therefore, because no evidence supports a shared definition of "Dutch auction." CLA disputes this point, but misapprehends the argument. CLA claims Bidsal "attacks [the arbitrator] for not using a 'Dutch auction' definition consistent with Black's Law Dictionary." (RAB 35.) Not so.

The arbitrator treats "Dutch auction" as having a singular meaning, but Black's Law Dictionary provides *five* definitions for "Dutch auction." All are different. (*See* AOB 40 n.8.) Not a single piece of evidence shows that Bidsal understood the term "Dutch auction" or agreed that Section 4.2 was a Dutch auction. Even if the parties intended Section

4.2 to be a "Dutch auction" provision, therefore, there is no basis in evidence for the arbitrator to have known what *the parties* meant by "Dutch auction."

3. Paragraph Eight Applies the Arbitrator's Understanding of a Typical Dutch Auction

CLA further argues that Paragraph Eight does not describe a "typical" Dutch auction provision because the paragraph "does not contain the word 'typical.'" (RAB 34.) However, CLA admits that Paragraph Eight provides the arbitrator's "general understanding of Dutch auction provisions." (RAB 35.) It is axiomatic that a *general* understanding of Dutch auction provisions reflects the characteristics of a *typical* Dutch auction provision.[4]

B. The Arbitrator's "Rough Justice" Standard Is Extrinsic and Improper

Because Section 4.2 is not a typical Dutch auction, the arbitrator's conclusion that Section 4.2 must achieve "rough justice" manifestly disregards the parties' agreement.

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[4] Miriam-Webster's Dictionary defines "General" as "involving, relating to, or applicable to every member of a class, kind, or group." "Typical" is defined as "combining or exhibiting the essential characteristics of a group."

Application of the "rough justice" standard to Section 4.2 manifestly disregards the agreement itself also because it is inconsistent on its face with Section 4.2's terms. The parties negotiated Section 4.2's appraisal procedure as a "protection for the remaining member." (8 App. 1921:8-1922:18.) A procedure intended to protect parties from unfair outcomes is antithetical to "rough justice."

1. The Arbitrator's Findings Confirm He Administered an Extralegal, Equitable Resolution

CLA argues that this Court should not vacate the final award because the application of the "rough justice" standard to Section 4.2 in Paragraph Eight was not "an acknowledgment of law followed by a decision not to follow that law." (RAB 36.) But the Court should consider what "rough justice" means.

"Rough justice" means an outcome motivated by moral or pragmatic judgments that is not strictly legal. *See, e.g.*, *Garrett v. Garrett*, 111 Nev. 972, 976, 899 P.2d 1112, 1115 (1995) (J. Rose, dissenting) (district court's deviation from statutory child support payment requirements reflected "a meaningful attempt to do rough justice" but violated statute); *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d

1035, 1044 (7th Cir. 1990) ("Generally courts are not supposed to do rough justice—they are supposed to do legal justice . . ."); *Stevens v. Highway, City & Air Freight Drivers, et al*, 794 F.2d 376, 377 (8th Cir. 1986) (grievance proceedings not subject to the rules of evidence "produce rough justice"); *see also* Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 763 (2001) (describing "rough justice" theory of judicial resolution for contractual disputes "when there is not a negotiated and well-drafted contract").

Rough justice is not only extralegal, but imprecise. *See, e.g.*, *Fox v. Vice*, 563 U.S. 826, 838 (2011) (because the goal in shifting fees is to do "rough justice, not achieve auditing perfection," courts "may take into account their overall sense of a suit, and may use estimates . . ."); *United States v. Ferdman*, 779 F.3d 1129, 1133 (10th Cir. 2015) (precision required when calculating restitution; "[s]peculation and rough justice are not permitted"); *Cohn v. Comm'r*, 101 F.3d 486, 487 (7th Cir. 1996) ("But the aim is not precision . . . [i]t is rough justice.").

By introducing the "rough justice" standard immediately after concluding that Section 4.2 was "not a model of clarity," the arbitrator

unequivocally signaled his intent to resolve the parties' dispute without determining the meaning of Section 4.2.

III.

THE ARBITRATOR'S INDEFENSIBLE DRAFTSMANSHIP DETERMINATION ENABLED HIM TO DISPENSE "ROUGH JUSTICE"

This case is unique because the arbitrator explicitly applied an extrinsic equitable standard ("rough justice") to resolve a contract dispute. But if further proof is needed that the arbitrator intentionally disregarded Section 4.2, it may be found in the arbitrator's "material" determination that Bidsal—who, it is undisputed, never put pen to paper—was the "principal drafter" of Section 4.2.

A. The Arbitrator Predetermined That Draftsmanship Would Decide the Outcome

The arbitrator predicted before the hearing that the draftsmanship determination would be dispositive. (8 App. 198:13-17 ("[W]ho the drafter is or isn't may tip the balance.").) CLA argues that the arbitrator's prediction should not be credited because he said that it "may" tip the balance. (RAB 54.) But that does not dispel the clear import of his statement. And if the arbitrator's statements must be interpreted literally and at face value, then Paragraph Eight requires vacatur.

B. The Determination That Bidsal Drafted Section 4.2 Is Unsupported by the Evidence

CLA unpersuasively argues that the draftsmanship determination was supported by "ample" evidence. (RAB 55.) CLA points to Golshani's (i.e., CLA's) testimony that he and Bidsal discussed revisions to Section 4.2. (*See* RAB 55-57.) This is undisputed; Bidsal provided input on Section 4.2 during meetings with CLA. Even so, the determination that **Bidsal** was the "principal drafter" of Section 4.2 is genuinely inexplicable. Bidsal never once proposed terms or language in writing. Any input he provided was reduced to writing by CLA. Not a shred of evidence shows otherwise.

Ambiguity is construed against the draftsman because the draftsman determines how the parties' intent is reduced to writing. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206, cmt. a (1981). Because Bidsal **never** drafted language for the operating agreement, much less Section 4.2, this rationale has no application to Bidsal. But without the draftsmanship determination, the arbitrator would have been required to interpret and apply the language of Section 4.2.

The draftsmanship determination is especially egregious because there is undisputed evidence that CLA drafted Section 4.2, and that the

phrase the arbitrator deemed ambiguous—"or FMV if appraisal is invoked"—was incorporated at the eleventh hour by LeGrand at CLA's direction.[5] (AOB 54-56.) LeGrand emailed the final draft to Bidsal, stating that it had "Ben's [CLA] 'Dutch auction' language." (6 App. 1338.) But the arbitrator disregarded the Section 4.2 appraisal procedure language based on his inexplicable determination that Bidsal drafted Section 4.2. (*See* 5 App. 1223, ¶ 17.)

C. The Arbitrator's Uncritical Adoption of CLA's Proposed Findings Cannot Insulate the Final Award From Review

CLA contends that the arbitrator's draftsmanship determination was correct, but argues, in any event, that it was not key to the outcome and cannot support vacating the award even if it was arbitrary, capricious, and unsupported by evidence. (*See* RAB 53-57.) In so arguing, CLA relies on the following statement from the final award:

> [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 draftsmanship is not dispositive. For the reasons set

[5] CLA contends that LeGrand characterized the draft as "Ben's [CLA] 'Dutch auction' language" **only** because CLA forwarded the draft he and Bidsal prepared to LeGrand. (RAB 12 (citing 6 App. 1338).) But no evidence supports CLA's contention. CLA cites to LeGrand's email and nothing more. (*See* 6 App. 1338.)

> out herein the determinations and award would be made even if Mr. Bidsal's contention that Mr. Golshani [CLA] was the draftsman of Section 4 were correct.

(RAB 54.)

But this statement does not reflect the arbitrator's independent judgment because he adopted it verbatim from CLA's Proposed Interim Award. (*Compare* 4 App. 967-81 (Merits Award No. 1) *with* 4 App. 991 (CLA Proposed Interim Award, ¶ 17) *with* 5 App. 1223 (Final Award, ¶ 17).) For that reason, it should not insulate the final award from review. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572-3, 105 S. Ct. 1504, 1511 (1985) (stringent appellate review of findings required if court "uncritically accepted findings prepared without judicial guidance by the prevailing party").

It is apparent from context that the arbitrator adopted this statement "uncritically." *See Anderson*, 470 U.S. at 572-3. Incredibly, when the arbitrator adopted CLA's proposed finding that the determinations in the award "are based upon the testimony and exhibits"—he **at the same time** adopted CLA's proposed deletion of **all findings** from Merits Award No. 1 (more than 300 words) that identified evidence and testimony purporting to show that Bidsal drafted Section 4.2. (*See* AOB 48-

51.) He even deleted, at CLA's urging, the key finding purporting to support the draftsmanship determination: that the term "FMV" "found its way into Section 4.2 late in the process, while it was apparently under Mr. Bidsal's control." (*See* AOB 49.)

The determination that Bidsal was the "principal drafter" of Section 4.2 appears irrational and baseless because the evidence the arbitrator cited in Merits Award No. 1 to support the determination was so plainly irrelevant or non-existent that CLA's Proposed Interim Award deleted all of it. The arbitrator then followed suit. Even though this rendered the final award incoherent, the arbitrator adopted additional language CLA proposed to insulate the final award from review. CLA now relies on that language (block-quoted above) to oppose vacatur.

No reasonable arbitrator could have ignored the obvious error that is the draftsmanship determination. While the draftsmanship determination may not provide an independent basis for vacatur, it is clear evidence that the arbitrator predetermined the outcome, as he says in Paragraph Eight. *See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 92 (2d Cir. 2008) ("[K]nowledge and intentionality on the part of the

arbitrator" may be inferred from "an error that is so obvious that it would be instantly perceived as such by the average" arbitrator).

IV.

THE ARBITRATOR MANIFESTLY DISREGARDED THE LAW AND EXCEEDED HIS POWERS UNDER THE ARBITRATION AGREEMENT BY ORDERING SPECIFIC PERFORMANCE

The linchpin of the final award is the arbitrator's determination that Section 4.2 is ambiguous, or "not a model of clarity." This conclusion, and the inexplicable determination that Bidsal drafted Section 4.2, freed the arbitrator to disregard the appraisal procedure of Section 4.2 and administer "rough justice" to Bidsal. Yet, this Court has held that specific performance is available only when the terms of the contract are definite and certain. *Serpa v. Darling*, 107 Nev. 299, 305, 810 P.2d 778, 782 (1991). Moreover, the arbitration agreement bars remedies not authorized therein, and specific performance is not authorized. (*See* AOB 58-59.)

CLA vigorously disputes whether Bidsal may argue this point by alleging the argument is unpreserved. Bidsal argued that the arbitrator exceeded his powers with respect to aspects of the specific performance award, including the transfer of membership interests "free and clear of

all liens and encumbrances," both before the arbitrator (5 App. 1093) and before the district court (1 App. 103), to which CLA did not object on grounds of waiver. (*See, e.g.*, 6 App. 1316.) On appeal, Bidsal has made clear that all aspects of the specific performance award were *ultra vires*, a jurisdictional argument. CLA focuses intently on preservation because its arguments on the merits are unpersuasive.

The arbitrator manifestly disregarded the law and exceeded his powers by ordering specific performance of an agreement that *he* (the arbitrator) deemed ambiguous. Astonishingly, CLA argues that Bidsal's argument in this regard fails because *Bidsal* argues that the agreement is not, in fact, ambiguous. (RAB 63.) CLA's argument defies reason. The arbitrator's award in CLA's favor is premised on *the arbitrator's own* finding of ambiguity. Section 4.2 is not ambiguous, but the arbitrator could not achieve the outcome predetermined in Paragraph Eight without finding ambiguity. By manufacturing ambiguity to achieve a predetermined outcome ("rough justice"), however, the arbitrator foreclosed a specific performance remedy.

CLA also points to *White v. Baum*, 2018 WL 4697257 (Nev., Sept. 28, 2018), arguing that, in *Baum*, this Court "did not require absolute

clarity in the contract" to affirm an arbitrator's specific performance order. (RAB 62-63.) But *Baum* does not address whether specific performance may be ordered on an ambiguous contract. Nor was the contract in *Baum* found by the arbitrator or this Court to be ambiguous. *Baum* is inapposite.

CONCLUSION

Confident that this Court will rubber-stamp the final award, CLA avoids and misconstrues Bidsal's core argument. CLA, however, admits that the final award resolves a contractual dispute by applying the arbitrator's "general understanding of Dutch auction provisions" to Section 4.2. This Court need not **infer** that the arbitrator set aside Section 4.2 to dispense his own brand of justice because he does so **explicitly** in Paragraph Eight, as CLA admits. This could be viewed as dicta or a non sequitur—except for the arbitrator's unequivocal statement that Section 4.2 should result in "rough justice."

Paragraph Eight does not even arguably interpret of Section 4.2. It provides the arbitrator's view that the party who initiates separation under a typical Dutch auction deserves "rough justice." But not only does Section 4.2 clearly require a different result, there is no evidence in

the record that Section 4.2 is a typical "Dutch auction" provision. Because the arbitrator **explicitly** "stray[ed] from interpretation and application of [Section 4.2] and effectively dispenses his own brand of [rough] justice," *Stolt-Nielsen S.A.*, 559 U.S. at 672, this Court should vacate the final award under FAA § 10(a).

ANSWERING BRIEF IN DOCKET NO. 80831

INTRODUCTION

CLA argues that the district court erroneously denied its motion to recover attorneys' fees incurred in post-arbitration proceedings. The district court concluded that neither the Green Valley Commerce, LLC operating agreement (the "Agreement") nor the Federal Arbitration Act (FAA) authorized recovery of post-arbitration attorneys' fees. On cross appeal, CLA argues that the Agreement authorizes recovery of post-arbitration attorneys' fees—but CLA does not identify any provision of the Agreement which actually and expressly permits post-arbitration attorney's fees. Alternatively, CLA argues that NRS 38.243 gave the district court discretion to award post-arbitration attorneys' fees.

Both arguments fail. First, CLA's contractual argument is entirely untethered from and unsupported by the Agreement itself. Because the language of the Agreement obviously does not permit post-arbitration attorney's fees, CLA attempts to read into the Agreement language that clearly does not exist. In this way, CLA implicitly and unpersuasively argues for reformation of the Agreement. Second, NRS 38.234 does not

confer discretion on the district court to award post-arbitration fees because the Agreement provides that the FAA, not Nevada law, governs. CLA misconstrues *WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. 884, 360 P.3d 1145 (2015), in arguing to the contrary. For these reasons and others explained herein, the district court's denial of CLA's motion for post-arbitration attorneys' fees was plainly correct and should be affirmed.

ARGUMENT

A. The Agreement Does Not Authorize Recovery of Post-Arbitration Attorneys' Fees

CLA's contractual argument is chimerical. At first, CLA contends that the arbitration clause of the Agreement ("Section 14.1") authorizes a district court to award attorneys' fees incurred by the prevailing party in post-arbitration proceedings. (*See* CAOB 71.) It argues that Section 14.1 should be "construed" to authorize recovery of post-arbitration attorneys' fees because no other construction harmonizes all of its terms. (*See* CAOB 70, 72-73.)

Yet CLA cannot, and does not, point to any language of the Agreement that specifically authorizes post-arbitration attorneys' fees. This is because such language plainly does not exist. Instead, the crux of

CLA's argument is that Section 14.1 should be **reformed** to authorize an award of post-arbitration fees. CLA argues, in effect, that the parties **would have** authorized recovery of post-arbitration fees in Section 14.1—but did not because they agreed to "eliminate all judicial attacks on an arbitration award." (CAOB 71.)

CLA's contractual arguments fail. Section 14.1 plainly does not authorize an award of post-arbitration attorneys' fees. To the extent CLA argues for reformation, its argument fails because CLA has failed to show that the parties intended for post-arbitration attorneys' fees to be recoverable. And no matter how CLA's contractual arguments are framed, they depend on the premise that Section 14.1 **completely** forecloses **all** judicial review of an arbitration award. But that is not so—and even if it were, such an agreement would be unenforceable.

1. Because Section 14.1 Does Not Authorize Recovery of Post-Arbitration Attorneys' Fees, CLA Seeks to Reform—Not Harmonize—Section 14.1

CLA argues that Section 14.1 should be "harmonized" to authorize recovery of post-arbitration attorneys' fees. (*See* CAOB 70, 72-73.) But the language is clear and there is no inconsistency that requires harmonization. There is a singular provision permitting attorney's fees in one

specific situation, and none other. Section 14.1 authorizes the arbitrator to award attorneys' fees incurred in arbitration to the prevailing party—and that is all. (*See* 3 App. 545-46 ("At the conclusion of the arbitration, the arbitrator shall award . . .").) Section 14.1 contemplates no other fees awards.

Tellingly, while CLA insists that it would be "absurd to interpret the Agreement so narrowly that it would preclude" recovery of post-arbitration attorneys' fees, it fails to identify any language from Section 14.1 that even contemplates an award of post-arbitration fees. (*See* CAOB 71-74.) Its contractual argument turns exclusively on the phrase: "The award rendered by the arbitrator shall be final and not subject to judicial review . . ." (*See* CAOB 71-72.) CLA argues that this phrase shows the parties intended to foreclose any and all judicial review—and that Section 14.1 does not authorize post-arbitration attorneys' fees because any and all post-arbitration proceedings were foreclosed by mutual agreement. (*See id.*)

CLA's initial contractual argument is missing a key step. Even if the parties intended to foreclose all judicial review, Section 14.1 contains no language that can be interpreted or construed to authorize an

award of post-arbitration attorneys' fees. Section 14.1 cannot authorize an award of post-arbitration fees unless this Court modifies the Agreement by inserting new terms. But Nevada law does not permit a court to interpolate new terms into a contract. *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 175-76, 87 P.3d 1054, 1059 (2004) ("[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain."); *The Power Co. v. Henry*, 130 Nev. 182, 189, 321 P.3d 858, 863 (2014) ("[C]ontracts will be construed from their written language and enforced as written.").

Thus, CLA argues for **reformation**—not harmonization—of Section 14.1. *See Reformation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining reformation as "an equitable remedy by which a court will modify a written agreement to reflect the actual intent of the parties."). *But see Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 483, 376 P.3d 151, 156 (2016) ("Rightfully, we have long refrained from reforming or 'blue penciling'[] private parties' contracts." (footnote omitted)).

For instance, CLA does **not** argue that language in Section 14.1 authorizes recovery of attorneys' fees incurred in post-arbitration pro-

ceedings when construed in light of the parties' intent to foreclose judicial review.[6] Rather, CLA argues that, because "Bidsal decided not to comply with" the Agreement, Section 14.1 **should** authorize CLA to recover attorneys' fees incurred in defending against "Bidsal's failed and improper effort to obtain post-arbitration judicial review." (CAOB 72-73.) Because nothing in Section 14.1 authorizes such a fees award, CLA argues for equitable reformation of Section 14.1—not for a construction of existing contractual language. For the reasons below, this reformation argument also fails.

If CLA's goal is truly to harmonize the different provisions of the Agreement, its argument falls flat because it fails to recognize that the Agreement expressly limits awards of any damages of any kind other than those expressly enumerated in the Agreement. Section 14.1 states:

> The arbitrator shall not be empowered to award to any party any damages of the type not permitted to be recovered under this Agreement in connection with any dispute between or among the parties arising out of or relating in any way to this Agreement or the transac-

[6] CLA references, but does not incorporate, its contractual argument from its district court motion for fees and costs. (*See* CAOB 73 (citing 11 App. 2626-27).) In its district court motion, CLA argued that it was entitled to post-arbitration fees under Section 14.1, but did not identify any supporting language from Section 14.1. (*See* 11 App. 2626.)

> tions arising hereunder, and each party hereby irrevocably waives any right to recover such damages.

This language is unmistakable and clear in providing that the only damages which can be awarded are those expressly provided for by the Agreement. Attorney's fees are special damages, and are limited by the Agreement to only those attorneys' fees incurred through the conclusion of the arbitration. If the parties intended to permit post-arbitration attorneys' fees, they would have so stated. But instead they included the limitation provision above to make clear that only those damages called out by the Agreement were permitted. Post-arbitration attorneys' fees are not authorized by the Agreement.

2. There Are No Grounds for Reformation of Section 14.1

Nothing in the record supports reformation of Section 14.1 to authorize an award of post-arbitration attorneys' fees, as CLA urges. Reformation is available "as an equitable remedy to a party seeking to alter a written instrument which . . . fails to conform to the parties' previous understanding or agreement." *Helms Const. & Dev. Co. v. State, ex rel. Dep't of Highways,* 97 Nev. 500, 503, 634 P.2d 1224, 1225 (1981).

Importantly, a party "must show what the actual agreement of the parties was in order to be entitled to reformation." *Realty Holdings, Inc. v. Nevada Equities, Inc.*, 97 Nev. 418, 420, 633 P.2d 1222, 1224 (1981).

CLA's reformation argument fails because there is no evidence in the record that the parties **would have** agreed to authorize recovery of additional attorneys' fees, but for their purported agreement to foreclose all judicial review of the final award.[7] CLA insists the parties intended to "eliminate all judicial attacks on an arbitration award." (CAOB 71.) But even assuming that to be true, it is not enough. Reformation is unavailable in these circumstances because the court "cannot know what the parties would have agreed to but for the mistake." *Reformation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting Douglas Laycock, *Modern American Remedies* 613 (4th ed. 2010)).

CLA's argument for reformation is also self-defeating. If, as CLA contends, the parties agreed to foreclose all judicial review of the final

[7] Reformation, in fact, requires a showing that the parties **did** agree to authorize recovery of post-arbitration attorneys' fees. *See Realty Holdings, Inc. v. Nevada Equities, Inc.,* 97 Nev. 418, 420, 633 P.2d 1222, 1224 (1981). But CLA nowhere attempts to make that showing.

award, then the parties *would have* provided a remedy (such as post-arbitration attorney's fees) as a sanction against such unintended conduct. Instead, the parties inserted a limitation provisions that put strict limits on the damages (including attorneys' fees) which were permitted, and post-arbitration attorneys' fees were specifically not included as an element of permitted damages.

3. Agreements Foreclosing All Judicial Review of Arbitration Awards Are Unenforceable

No matter how CLA's contractual arguments are framed, however, they also fail because Section 14.1 does not foreclose all judicial review of the final award, as CLA contends. (*See* CAOB 72.) Section 14.1 would be unenforceable if it had that effect. The Second and Ninth Circuits have squarely addressed this question and held that parties may **not** eliminate all judicial review of an arbitration award by contractual agreement. CLA has not identified any legal authority that meaningfully supports the contrary proposition.

In *Wal-Mart Wage & Hour Emp. Practices Litig.*, 737 F.3d 1262 (9th Cir. 2013), the Ninth Circuit held that parties may **not** eliminate all judicial review of an arbitration award by contractual agreement.

See id. at 1267 n.7 ("[P]arties may not contract to preclude judicial review of manifest disregard for law."). In so holding, the Ninth Circuit applied *Hall Street*,[8] which held that parties may not *expand* the grounds for judicial review of an arbitration award under the Federal Arbitration Act ("FAA") by contractual agreement. The Ninth Circuit reasonably concluded that the *Hall Street* rationale also prohibits any restriction or elimination of FAA grounds for judicial review by contractual agreement. *See* 737 F.3d at 1267 ("Just as the text of the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract."). As the Ninth Circuit explained, "[i]f parties could contract around this section of the FAA, the balance Congress intended would be disrupted, and parties would be left without any safeguards against arbitral abuse." *See id.* at 1268. This Court should adopt the Ninth Circuit's well-reasoned conclusion.

The Second Circuit has also held that parties desiring to enforce an arbitration award in district court "may not divest the courts of their

[8] *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

statutory and common-law authority to review" the "arbitral process for compliance with [FAA] § 10(a) and the manifest disregard standard." *See Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 66 (2d Cir. 2003), *overruled on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). In *Hoeft*, the Second Circuit reasoned that while arbitration itself may be "a creature of contract," a district court's authority to review an arbitration award may not be eliminated by contract because that authority does not derive from a private agreement. *See id.* at 65-66.

Wal-Mart and *Hoeft* reflect the prevailing and well-reasoned rule that parties may not foreclose all judicial review of an arbitration award by private agreement. CLA's contractual arguments depend on the premise that Section 14.1 forecloses *all* judicial review of the final award. But this premise fails, and so CLA's contractual arguments fail with it.

For the proposition that parties **may** eliminate "all" judicial review of an arbitration award by contractual agreement, CLA relies on three esoteric and decades-old cases: *Aerojet-General, Lieberman*, and *Nat'l Airlines.*[9] (*See* CAOB 71.) These cases have either been overruled

[9] *Lieberman v. Cook*, 343 F. Supp. 558 (W.D. Pa. 1972); *Nat'l Airlines,*

or are contrary to CLA's position.

CLA's reliance on *Aerojet-General* (9th Cir. 1973) is unpersuasive because the statement relied upon appears only in dicta, and was expressly disavowed by the Ninth Circuit in *Wal-Mart* (9th Cir. 2013). The Ninth Circuit in *Aerojet-General* mentions, without analysis, that parties may agree to eliminate all court review of arbitration proceedings if their intention to do so "clearly appear[s]." 478 F.2d at 251. But this statement appears only **in dicta**. *See In re Wal-Mart*, 737 F.3d at 1268 n.8 ("In *Aerojet-General* . . . we noted in dicta . . . 'that parties to an arbitration can agree to eliminate all court review of the proceedings . . ."). Dicta is not binding. Nor is dicta persuasive when unaccompanied by any analysis. Furthermore, the Ninth Circuit in *Wal-Mart* recently rejected the *Aerojet-General* dicta and endorsed the contrary rule. *See id.* ("That dicta is not controlling, and we do not elect to follow its reasoning."). *Aerojet-General* has threadbare persuasive value, if any at all.

CLA also relies on *Lieberman* (W.D. Pa. 1972) for the proposition that parties may agree to eliminate all judicial review of an arbitration

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Inc. v. Metcalf, 114 So. 2d 229 (Fla. Dist. Ct. App. 1959); *Aerojet-General v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973).

award. But *Lieberman* addressed judicial review requirements under a Pennsylvania arbitration statute—not the FAA. *See* 343 F.Supp. at 559-60. Even so, *Lieberman* held that arbitration awards remain subject to judicial review for arbitrator misconduct, including manifest disregard. *See id.* at 562. *Lieberman* fails to support CLA's position, therefore, because it does not concern the elimination of FAA grounds for review of an arbitration award and does not hold that parties may eliminate *all* judicial review of an arbitration award by agreement, even under the Pennsylvania arbitration statute.

CLA's reliance on *Nat'l Airlines* is also unpersuasive. *Nat'l Airlines* addressed judicial review requirements under the Railway Labor Act—not the FAA. *See* 114 So.2d at 231-2. In *Nat'l Airlines*, the parties' agreement provided that "decisions of the [National Railroad Adjustment] Board . . . shall be final and binding upon the parties hereto." *See id.* at 232. The Florida state appeals court held that this agreement precludes judicial review of "the merits of the controversy," but "does not preclude a review of due process and jurisdictional limitations." *Id.* Thus, similar to *Lieberman*, *Nat'l Airlines* has no persuasive value because it does not concern the FAA grounds for review of an arbitration

award and does not hold that parties may contract to eliminate *all* judicial review, even under the circumstances of that case.

CLA's contractual arguments for harmonization and reformation fail, therefore, because they rest on the erroneous premise that Section 14.1 eliminates all judicial review of the final award. The Second and Ninth Circuits have squarely held that such an agreement is unenforceable. Further, *Lieberman* and *Nat'l Airlines* held that similar contractual language does not foreclose judicial review for due process or manifest disregard. All that is left for CLA to rely upon is a cursory statement in dicta (*Aerojet-General*) that the Ninth Circuit recently disavowed in a thoroughly-reasoned opinion (*Wal-Mart*). CLA's contention that Section 14.1 "eliminates all judicial attacks on an arbitration award," and CLA's contractual arguments which build on that premise, are therefore unsupported and directly contrary to established law.

B. NRS 38.243 Does Not Authorize Recovery of Post-Arbitration Attorneys' Fees Because It Does Not Apply

Next, CLA argues in the alternative that the district court erroneously failed to apply NRS 38.243, which conferred discretion upon the district court to award reasonable attorneys' fees incurred in post-arbi-

tration proceedings. (CAOB 74-78.) CLA's argument relies on a misreading of *WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. 884, 886, 360 P.3d 1145, 1146 (2015). The district court properly concluded that the FAA, not NRS 38.243, controls whether post-arbitration attorneys' fees are recoverable.

a. CLA MISCONSTRUES THIS COURT'S DECISION IN *WPH*

CLA plainly misconstrues *WPH*.[10] *WPH* held that Nevada attorneys' fees statutes are substantive laws. By applying principles of contract interpretation to the parties' agreement, *WPH* concluded that Nevada law governed substantive questions, including attorneys' fees awards. *See* 131 Nev. at 888. Without applying the same analysis or principles of construction to the operating agreement **in this case**, CLA cites *WPH* for the proposition that, when an arbitration agreement provides numerous sources of law (as in *WPH* and here), state law must govern attorneys' fees awards. (*See* CAOB 76.) From that erroneous

[10] CLA's misconstruing of *WPH* is implicit because CLA never actually applies *WPH* to this case. CLA merely summarizes *WPH* before concluding that, "[i]n light of *WPH*, Nevada substantive law applies to [its] claim for post-arbitration attorneys' fees." (*See* CAOB 76.)

reading of *WPH*, CLA argues that Nevada law must govern its claim for post-arbitration attorneys' fees. (*See id.*)

CLA's reading of *WPH* is fundamentally flawed. In *WPH*, this Court did not conclude that Nevada law should control attorneys' fees in every case. Rather, it concluded that, pursuant to the terms of the parties' agreement, Nevada law controlled substantive questions of law, including attorneys' fees. Specifically, this Court interpreted the parties' agreement in light of the principle that "a document should be read to give effect to all its provisions and to render them consistent with each other." *See id.* at 888. The parties' agreement (in *WPH*) provided that any controversy must be settled by arbitration in accordance with AAA rules. Separately, it provided that the agreement was governed by Nevada law. *See id.* This Court held that Nevada law applied to substantive questions of law, while AAA rules applied to procedural questions, because that construction was the only way to harmonize the parties' agreement. *See id.* The alternative—that AAA rules applied to substantive questions of law—was untenable.

b. *WPH* SUPPORTS THE DISTRICT COURT'S ORDER

Applying *WPH* here compels the conclusion reached by the district court: that the FAA controls attorneys' fees awards. The Agreement provides for three sources of law (not just two, as in *WPH*). Specifically, Section 14.1 provides that the arbitration shall be "administered" in accordance with JAMS rules but "governed by" the FAA. Separately, Article X provides that the Agreement shall "in all respects" be governed and construed in accordance with Nevada laws "unless otherwise provided by written agreement." Harmonizing these provisions does not compel a conclusion that Nevada law controls substantive questions of law, as was the case in *WPH*. To the contrary, applying Nevada law to determine a substantive question of attorneys' fees would render Section 14.1's FAA clause meaningless. If JAMS rules govern procedural questions, while Nevada law governs substantive questions, the FAA would have no application. For this reason, the district court properly concluded that the parties intended for the FAA to govern substantive questions of law, including attorneys' fees.[11] (*See* 13 App. 3053.)

[11] The district court's order was further supported by CLA's petition to confirm the award, which cited to and relied on the FAA—not Nevada's Arbitration Act (which includes NRS 38.243). (*See id.* at 3054.)

CLA unpersuasively argues that the district court's ruling violates *WPH* because it renders meaningless Article X, which provides that Nevada law governs the Agreement. (CAOB 77.) Not so. Article X provides that Nevada law governs "unless otherwise provided by written agreement." Section 14.1 constitutes a written agreement, and it provides that JAMS rules and the FAA govern. Applying Nevada law (i.e., NRS 38.243) to determine whether CLA may recover post-arbitration fees would contravene *WPH* by rendering meaningless the language in Section 14.1 stating that the FAA is the governing law. Article X is not rendered meaningless because it provides that the remainder of the Agreement is governed by Nevada law. Thus, the district court properly construed the Agreement in accordance with *WPH*.

c. SECTION 14.1 AND ARTICLE X DO NOT CONFLICT, BUT EVEN IF THEY DID, ARTICLE 14.1 SHOULD PREVAIL

CLA's argument that NRS 38.243 should control attorneys' fees awards is further belied by the principle of contractual interpretation that specific language (Section 14.1) prevails over general language (Article X) when they conflict. *See* § 32:9, 11 WILLISTON ON CONTRACTS § 32:9 (4th ed.) ("[S]pecific words will limit the meaning of general

words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate."). Section 14.1 concerns dispute resolution and identifies the JAMS rules as controlling administration of the arbitration but identifies the FAA as the governing law. In contrast, Article X states a general rule that applies "unless otherwise provided by written agreement." Thus, there is no conflict. But even if there were a conflict, the specific language of Section 14.1 should prevail over the general language of Article X.

CONCLUSION

For these reasons, the district court's order denying CLA's request to recover attorneys' fees incurred in post-arbitration proceedings should be affirmed.

DATED this 23rd day of July, 2021.

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CERTIFICATE OF COMPLIANCE

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

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 11,156 words.

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

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