Case Nos. 86438 & 86817

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPEAL

from the Eighth Judicial District Court, Clark County, Nevada
The Honorable JOANNA S. KISHNER, District Judge
District Court Case No. A-22-854413-B

RESPONDENT SHAWN BIDSAL'S ANSWERING BRIEF ON APPEAL

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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.

SHAWN BIDSAL is an individual, and accordingly there are no parent corporations or publicly-held companies owning 10 percent or more of a party's stock.

The following two law firms, and the referenced attorneys, have appeared as counsel for SHAWN BIDSAL before the District Court and/or in this appeal.

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SHAWN BIDSAL is a pseudonym for Sharam Bidsal.

RESPONDENT'S ROUTING STATEMENT

Respondent SHAWN BIDSAL ("Bidsal") agrees with the routing statement of Appellant CLA PROPERTIES LLC ("CLA"), as set forth in Appellant's Opening Brief ("Opening Brief").

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II.

STATEMENT OF ISSUES PRESENTED

1. Can CLA meet the *extremely high standard* to vacate a binding arbitration award under the Federal Arbitration Act ("FAA"), by establishing that Judge David Wall (the "Arbitrator") *manifestly disregarded the law* in arriving at his determination that: (i) Bidsal remained a member of Green Valley Commerce, LLC (the "Company") (with all associated rights to receive distributions required under the Company's operating agreement) until CLA performed its obligation to make payment of the purchase price; (ii) Judge Haberfeld's April, 2019 arbitration award ("First Arbitration Decision") did not find that the sale transaction had already been completed and was thus retroactively effective to a date over a year earlier in September, 2017; and (iii) the effective date of the sale had not yet occurred because *CLA had never paid the purchase price* to acquire Bidsal's membership interest.

2. Can CLA meet the extremely high standard to vacate a binding arbitration award under the Federal Arbitration Act ("FAA"), by establishing that the Arbitrator *manifestly disregarded the law* in determining Bidsal was the prevailing

party in the arbitration and thus entitled to the award of his attorney's fees and costs, as mandated by the Company's operating agreement.

III.

STATEMENT OF THE CASE

Bidsal and CLA, as the sole owners of a limited liability company, executed an operating agreement ("Agreement") which contained a poorly-worded and ambiguous buy-sell provision. When Bidsal offered to buy CLA's membership interest, a dispute arose about the meaning of the buy-sell provision, which resulted in the matter being submitted to a binding arbitration, ("First Arbitration"), as required by the Agreement.

CLA rejected Bidsal's offer to purchase CLA's membership interest, and exercised its right under the buy-sell provision to instead proceed with a purchase of Bidsal's membership interest. Although CLA had elected to purchase Bidsal's membership interest, CLA never performed its obligations to complete the purchase transaction - by actually making payment of the purchase price to Bidsal. This critical fact is at the heart of the dispute in this appeal. In contravention of the Agreement and the controlling law, CLA incredibly argues it is entitled to be treated as the owner of Bidsal's membership interest without satisfying the condition precedent of making payment to Bidsal for his membership interest. **CLA never made any attempt to actually pay Bidsal the purchase price required under the**

Agreement when it elected to purchase Bidsal's membership interest, nor did Bidsal ever indicate he would refuse to accept a payment from CLA.

Indeed, there was a later dispute between the parties regarding what the amount of the purchase price would actually be using the Agreement's ambiguous buy-sell purchase price formula, which resulted in a second binding arbitration before Judge David Wall, a well-respected former jurist from the Eighth Judicial District Court ("Second Arbitration"). Importantly, CLA **never paid Bidsal anything** under the buy-sell provision of the Agreement until after Judge Wall had determined the amount of the purchase price in the Second Arbitration. CLA was always free to pay Bidsal whatever amount CLA believed the purchase price to be under the buy-sell provision, but CLA chose not to do so.

The Agreement's formula for calculating the purchase price under the buy-sell provision was: "(FMV – COP) x 0.5 + capital contribution of the [selling member] at the time of purchasing the property minus prorated liabilities." (No. 1, Vol. 1, pp. 57-85 at p. 68, ¶ 4.2).[1] "FMV" is defined in the Agreement as "fair market value" as specified in Section 4.2 of the Agreement. *Id*. "COP" is defined

[1] Where possible the citations refer to the Chronological Index of Appellant's Appendix to Appellant's Opening Brief, references are by chronological number, volume number, and page number.

as "cost of purchase" as specified in the escrow closing statement at the time of purchase of each property owned by the Company. *Id.*

The sole issue in the First Arbitration was whether the buy-sell provision required Bidsal to sell his membership interest to CLA without having the right to have the FMV number established through an independent appraisal. This is confirmed by CLA's Demand for Arbitration to begin the First Arbitration, which stated the sole issue for the arbitration as follows:

> The relief sought is as follows: Respondent be ordered to transfer his interest in Green Valley Commerce, LLC ("Green Valley") to Claimant *upon payment of the price determined in accordance with Section 4 of the Operating Agreement* for Green Valley using five million dollars as the fair market value of Green Valley. (Emphasis added).

(No. 20, Vol. 36, pp. 8185-8190 at p. 8189).

The arbitrator in the First Arbitration was never asked to determine an effective date for the uncompleted sale transaction, nor was the arbitrator asked to determine if the sale could be treated as having been completed despite CLA having never paid the purchase price (which would be contrary to both controlling law and the Agreement). In fact, the First Arbitration Award directed that the sale was to be closed *following* the issuance of the award, (within 10 days of the award becoming final), not retrospectively as if CLA had performed by making payment several years earlier (which of course never happened). (No. 20, Vol. 36, pp. 8191-8212 at p. 8210).

In the Second Arbitration, the issues were: (i) determining "the purchase price of Bidsal's membership interest in [the Company], using the formula provided for in the [Agreement] with the fair market value component fixed at $5,000,000 based on [the decision in the First Arbitration Award]", (ii) determining if Bidsal had "made distributions to himself in excess of that to which he is entitled"; (iii) determining "the effective date of any purchase of [Bidsal]'s interest in [the Company]"; and (iv) and depending on the effective date, determining if Bidsal was entitled to management fees and interest (if the effective date was September, 2017 as claimed by CLA, Bidsal was entitled to interest on the purchase price from September, 2017 to the time of actual payment and management and leasing fees for continuing to manage the Company's property up to the date the sale was actually completed). (No. 20, Vol. 36, pp. 8277-8308 at p. 8283). Additionally, Judge Wall was to determine the appropriateness of more than a half million dollars in offsets against the purchase price being claimed by CLA.

After extensive briefing and a nearly week-long arbitration hearing with more than 6 witnesses, Judge Wall determined that CLA's positions, regarding the amount of the purchase price CLA was obligated to pay to acquire Bidsal's membership interest *and whether distributions made by Bidsal to himself and CLA had been proper*, **were not reasonable** and that testimony of CLA's principal, Benjamin Golshani, **was not credible** (*Id*. at pp. 8291, 8295). Judge Wall further determined

that Bidsal had treated CLA far more favorably than he needed to under the Agreement (*Id.* at p. 8293), that Bidsal's method of calculating the purchase price was both reasonable and more favorable to CLA than required by the Agreement, (*Id.* at pp. 8297-8299), that CLA's method of determining the purchase price was not as reasonable as Bidsal's method, (*Id.*), that CLA was not entitled to any offsets against the purchase price because Bidsal's distributions were neither improper or excessive, (*Id*. at pp. 8294, 8300), **and that the effective date of the sale had not yet occurred because CLA had never paid the purchase price to Bidsal**. (*Id.* at p. 8300).

Judge Wall determined the purchase price CLA was required to pay Bidsal was more than $426,000 higher than the amount CLA was claiming it was obligated to pay, (*Id.* at pp. 8298-8299), and determined that Bidsal was the prevailing party in the Second Arbitration and entitled to an award of his attorney's fees and costs. (*Id.* at pp. 8302-8307). Critically important to this appeal, Judge Wall determined that Bidsal properly made all distributions of ongoing profits from operations of the Company in accordance with the Agreement, (50% to himself and 50% to CLA), and that this could continue until CLA completed the purchase of Bidsal's membership interest by ***paying the purchase price that had still never been paid.*** (*Id.* at p. 8300). As Judge Wall correctly determined, CLA had only elected to purchase Bidsal's interest, but had never taken the necessary actions to complete the

purchase by making payment to Bidsal and thus could not claim to have already completed the sale transaction. *Id.*

Importantly, CLA did not even know the correct amount to pay Bidsal for his membership interest in September, 2017, as evidenced by the need for the Second Arbitration to determine the correct amount for CLA to pay to complete the buy-sell transaction, and the amount CLA later claimed the purchase price to be was expressly rejected by Judge Wall as unreasonable. (*Id.* at pp. 8297-8299).

The Agreement calls for arbitration "of any dispute or disagreement between the Members as to the interpretation of any provision" thereof "or the performance of obligations [under the Agreement]...". (No. 1, Vol. 1, pp. 57-85 at p. 64, ¶ 14.1). The Agreement also provides "[t]he award rendered by the Arbitrator shall be final and not subject to judicial review …". *Id.*

All of Judge Wall's determinations in the Second Arbitration were based upon his reasonable interpretation of the Agreement under Nevada law, and were binding on CLA.

Any arbitration under the Agreement is governed by the Federal Arbitration Act ("FAA"). *Id.* As this Court noted in its Order of Affirmance from the First Arbitration, "[t]he vacatur standard under the FAA is *extremely high*," and "[s]o long as the arbitrator was arguably construing the contract[,] … a court may not correct his mistakes under [the FAA]." (No. 19, Vol. 35, pp. 7976-7981 at p. 7979). Judge

Wall was clearly interpreting the Agreement, and determining what he considered reasonable given the ambiguities in the Agreement. Judge Wall's decision cannot be overturned absent a manifest disregard of the law, which simply does not exist.

This appeal is nothing more than CLA's attempt to re-litigate the same issues it lost in the Second Arbitration, and lost again when it made these same arguments to the District Court. However, CLA is not permitted to expand this Court's review in its attempt to re-litigate issues decided in the final and binding arbitration. *See Lagstein v. Certain Underwriters at Lloyd's*, 607 F.3d 634, 640 (9th Cir. 2010) ("Unless the award is vacated as provided in § 10… "confirmation is required even in the face of erroneous findings of fact or misinterpretations of law." *Kyocera*, 341 F.3d at 997…. But § 10 of **the FAA "does not sanction judicial review of the merits**," *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007)."); *Bosack v. Soward*, 586 F.3d 1096, 1104 (9th Cir. 2009) ("Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard." *Kyocera*, 341 F.3d at 994."). CLA does not get to relitigate the case under the guise of judicial review, and CLA certainly has not come even remotely close to satisfying the *extremely high burden* of showing that Judge Wall completely disregarded the law.

IV.

STATEMENT OF FACTS

A. BACKGROUND FACTS.

Bidsal and his first cousin, Benjamin Golshani ("Golshani"), formed a joint venture through a limited liability company known as Green Valley Commerce, LLC ("GVC" or "Company"). (No. 20, Vol. 36, pp. 8277-8308 at p. 8279). Golshani's interest was held by CLA, of which Golshani was its sole member and manager. *Id.*

Prior to the Company being formed, Bidsal was the successful bidder for a promissory note in a defaulted status, secured by a deed of trust against two parcels of commercial property, which was comprised of eight buildings and a parking lot. *Id.* After Bidsal became the successful bidder to purchase the promissory note, the Company was formed. *Id.* The Operating Agreement ("Agreement") for the Company continued to be negotiated and modified for many months after the Company was formed, but was ultimately signed by both parties.

According to the Agreement, Bidsal contributed $1,215,000 towards the purchase price of the promissory note, and Golshani, through CLA, contributed $2,834,250. *Id.* Although CLA contributed 70% of the initial capital and Bidsal contributed 30%, Bidsal also contributed his right to purchase the promissory note and his expertise in managing commercial real estate properties. *Id.* The result was

that both members received a 50% membership interest in the Company, with Bidsal acting as the day-to-day manager of the Company and its assets. *Id.*

Within a few months of acquiring the promissory note, Bidsal negotiated a deed-in-lieu of foreclosure which resulted in the Company obtaining fee title to the 8 buildings and parking lot which previously served as collateral for the note. (No. 20, Vol. 36, pp. 8277-8308 at p. 8280). The Company then divided each building into its own legal parcel, and had a cost segregation study completed that divided the cost paid for the note between each of the new parcels, creating a cost basis for each parcel. *Id.*

1. <u>How Profits Of The Company Are To Be Divided</u>.

The Agreement contained an Exhibit "A" which states that "all items of income, gain, loss, deduction or credit (or items thereof) shall be allocated among the members in proportion to their Percentage Interests as set forth in Exhibit B, subject to the Preferred Allocation schedule contained in Exhibit B…". (No. 1, Vol. 1, pp. 57-85 at p. 80, ¶ 5.1). **This meant in the absence of some other provision of the Agreement, all profits and gains were to be distributed 50% to Bidsal and 50% to CLA, as long as they each remain a member of the Company.**

The Agreement contained an Exhibit B, which stated that "cash distributions from "capital transactions" were to be distributed (after paying Company expenses) 70% to CLA and 30% to Bidsal until their capital accounts were brought to zero.

(No. 1, Vol. 1, pp. 57-85 at p. 85). Exhibit B reiterated that "Cash Distributions of Profits from operations" were to be allocated and distributed 50% to Bidsal and 50% to CLA. *Id.* The Agreement did not define "capital transactions" which created an ambiguity, but it did distinguish between distributions arising from operations resulting in ordinary income, and those "arising from capital transactions or non-recurring events such as a sale of all or a substantial portion of the Company's assets…". *Id.*

As the Company sold individual parcels, Bidsal divided and distributed the sale proceeds by distributing (i) the cost basis portion of the proceeds 70% to CLA and 30% to Bidsal, and (ii) the profits portion of the proceeds 50% to CLA and 50% to Bidsal. (No. 20, Vol. 36, pp. 8277-8308 at pp. 8287-8288). Bidsal interpreted Exhibit B of the Agreement to mean that the proceeds from parcel sales would only be divided on a 70-30 split *for all the proceeds* if there was a sale of "all or a substantial portion of the Company's assets...". (No. 20, Vol. 36, pp. 8277-8308 at pp. 8287-8289).

A central issue in the Second Arbitration was CLA's contention that the Agreement "required Bidsal to distribute all of the sales proceeds on a 70-30 basis until all of the capital contributions of the parties were recouped." *Id*. CLA contended to Judge Wall, the same thing it is contending in this appeal, *that Bidsal had made inappropriate distributions to himself* by distributing the profit portion of

each sale on a 50-50 basis between himself and CLA. Judge Wall found CLA's "position is belied by the [Agreement] and the evidence presented in this proceeding." *Id.* Judge Wall determined that:

> Both parties agree, and have argued in this proceeding, that the [Agreement] is ambiguous and not well drafted. As set forth above, an interpretation of the relevant provisions of the [Agreement] requires the Arbitrator to determine the intent of the parties at the time of the execution of the agreement, Anvui, supra, to harmonize the inconsistent or ambiguous provisions to reach a reasonable solution consistent with the parties' intentions. Eversole, supra, Mohr Park Manor, supra.

Id. at p. 8289.

Judge Wall determined that because the preferred allocation language of Exhibit B of the Agreement was ambiguous, the Arbitrator was required to interpret these provisions to effectuate the intent of the parties to the Agreement (No. 20, Vol. 36, pp. 8277-8308 at pp. 8290), and that the intention of the parties was to allocate parcel sale profits (the amount over the tax basis of each parcel) on a 50-50 basis, unless all or a substantial portion of the Company's property was sold in one transaction. *Id.* Most importantly, Judge Wall determined that the testimony of Golshani about the parties' intent regarding these ambiguous provisions **was not credible**. *Id.*

Judge Wall also determined that the manner in which Bidsal distributed the proceeds from sales of parcels "**was more favorable to CLA than required by the terms of [the Agreement] and does not constitute any improper or excessive**

distribution to [Bidsal]." (No. 20, Vol. 36, pp. 8277-8308 at p. 8294) (emphasis added).

2. <u>The Ambiguous Buy-Sell Provision</u>.

Article V, Section 4 of the Agreement contained a provision permitting one member ("Offering Member") to initiate a purchase of the other member's ("Remaining Member") interest or potentially a sale of the Offering Member's interest in the Company. (No. 20, Vol. 36, pp. 8277-8308 at p. 8281). "The substance of this "buy-sale" provision allowed for one of the members to offer to buy out the interest of the other member based on an offered fair market value of [the Company], which would then be inserted into a mathematical formula set forth in the [Agreement] to subsequently arrive at a final purchase price." *Id.* Once the offer is made by the Offering Member, the Remaining Member has the option to either (i) sell his interest using the fair market value number in the original offer, (ii) buy the Offering Member's interest using that same fair market value number, or (iii) demand an appraisal to set a fair market value number to be inserted into the purchase price formula. *Id.*

Section 4.2 of the Agreement provides the formula to be used for calculating the purchase price as follows:

> (FMV – COP) x 0.5 + capital contribution of the Offering Member(s) at the time of purchasing the property minus prorated liabilities.

(No. 20, Vol. 36, pp. 8277-8308 at p. 8282; No. 1, Vol. 1, pp. 57-85 at p. 68).

The Agreement provides the following definitions for terms in the mathematical formula. ""**FMV**" means "fair market value" obtained as specified in section 4.2." *Id.* ""COP" means "cost of purchase" as [sic] specified in the escrow closing statement at the time of purchase of each property owned by the Company." *Id.*

Judge Wall determined "the parties agree that the language contained in the formula is ambiguous." (No. 20, Vol. 36, pp. 8277-8308 at p. 8296). Judge Wall found that:

> The definition of COP is unclear and ambiguous. Read literally, it would require taking information from an escrow closing statement at the time of purchase of Company property. However, the parties agree that there is no escrow closing statement reflecting a purchase of the [Company] properties, which were acquired by GVC pursuant to a Deed in Lieu agreement … not contemplated by the ... formula."

Id. Judge Wall also determined that "[s]imilarly, the formula is unwieldy in using the "capital contribution of the Offering Member(s) at the time of purchasing the property," as it fails to account for capital contributions recouped at any point prior to the application of the formula." (No. 20, Vol. 36, pp. 8277-8308 at p. 8297).

Thus, Judge Wall determined each primary component of the purchase price formula contained ambiguities. **This is precisely what made it difficult, if not impossible, for Bidsal and CLA to come to any agreement on the amount CLA was required to pay to acquire Bidsal's membership interest, which is**

presumably why CLA never attempted to tender the purchase price, and is why the Second Arbitration was needed to resolve this dispute before the transaction could be consummated.

3. <u>CLA's Right To Purchase Bidsal's Membership Interest</u>.

On July 7, 2017, Bidsal sent an offer to CLA to buy CLA's membership interest in the Company using a fair market value, to be inserted into the formula, of $5,000,000. (No. 20, Vol. 36, pp. 8277-8308 at p. 8282). CLA responded on August 3, 2017, electing to buy Bidsal's interest using Bidsal's $5,000,000 fair market value number. *Id.* On August 5, 2017, Bidsal sent notice he was invoking his right to have the fair market value determined by appraisal. *Id.* On August 28, 2017, CLA responded claiming Bidsal had no right to an appraisal and suggesting it was ready to close an escrow to purchase Bidsal's membership interest. *Id.* **However, this letter does not indicate what CLA claims the purchase price of Bidsal's membership interest will be, (it merely recites an FMV number to be used as the first element in the purchase price formula), nor does it send any payment of whatever CLA believed the purchase price to be**. (No. 8, Vol. 5, pp. 1089-1093).[2]

[2] Although the Chronological Index to Appellant's Appendix indicates this reference for the August 28, 2017 letter, no such document exists in Volume 5 Part 1 or Part 2. However, the Chronological Index to Appellant's Appendix also identifies this document as Exhibit 156 to Movant CLA Properties, LLC's Motion to Vacate

4. Binding Arbitration Provision Of The Agreement.

Article III, Section 14.1 of the Agreement contains a dispute resolution clause which states, in relevant part that:

> . . . any controversy, dispute or claim arising out of or relating in any way to the Agreement or the transactions arising hereunder shall be settled exclusively by arbitration in the City of Las Vegas, Nevada. Such arbitration shall be administered by JAMS in accordance with its then prevailing expedited rules, by one independent and impartial arbitrator selected in accordance with such rules. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. § 1 et seq…. **The 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.

(No. 1, Vol. 1, pp. 57-85 at pp. 64-65, ¶ 14.1). To resolve the dispute regarding whether Bidsal was required to sell his interest to CLA without first exercising what he believed to be his right to have the FMV determined through an appraisal, an arbitration was required.

B. THE FIRST ARBITRATION.

On September 26, 2017, CLA initiated JAMS Arbitration No. 1260004569 for the purpose of having Bidsal "be ordered to transfer his interest in Green Valley Commerce, LLC ("Green Valley") to Claimant ***upon payment of the price determined in accordance with Section 4 of the Operating Agreement*** for Green

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Arbitration Award (NRS 38.241) and for Entry of Judgment (Vol 7 of 18) and as such, that document has been included in Chronological Index to Respondent's Appendix at Volume 40. (No. 38, Vol. 40, pp. 8932-8933 at p. 8933).

Valley using five million dollars as the fair market value of Green Valley." (No. 20, Vol. 36, pp. 8185-8190) (emphasis added). The matter was assigned to Stephen Haberfeld, a former California magistrate judge ("Judge Haberfeld"). Judge Haberfeld **was not asked** to determine:

1. The purchase price to be paid by CLA to Bidsal;
2. Any offsets against the purchase price;
3. Whether Bidsal was entitled to be considered an ongoing member and receive his 50% of profit distributions from the Company until the purchase price was actually paid for his interest; or
4. Whether the date of sale could be made retroactive to the date CLA offered to buy Bidsal's interest, even though CLA never actually performed its obligation to purchase Bidsal's interest (by paying for the interest). *Id.*

On April 5, 2019, Judge Haberfeld issued his final award from the First Arbitration ("First Arbitration Decision"). The First Arbitration Decision was limited to a determination that CLA had the right to purchase Bidsal's membership interest using $5,000,000 for the FMV of the purchase price formula.

1. <u>No Breach Found</u>.

In an obvious attempt to disparage Mr. Bidsal, CLA's Opening Brief argues that Judge Wall's Final Award should be vacated because, Judge Wall "…awarded Bidsal the benefit of Bidsal's own breach…and in so doing…exceed

his authority and manifestly disregarded the law." *See* Opening Brief at p. 17. This statement is patently false. Neither the First Arbitration Decision, the Confirmation Order, nor the Order of Affirmance on the subsequent appeal ("Affirmation Order") makes any finding that Bidsal ever breached the Agreement. *See* First Arbitration Decision (No. 3, Vol. 2 pp. 246-267); Confirmation Order (No. 3, Vol. 2, pp. 268-278) and Affirmation Order (No. 19, Vol. 35 pp. 7976-7981). Certainly, Judge Wall made no determination that Bidsal ever breached the Agreement. Quite the opposite, Judge Wall determined Bidsal had at all times treated CLA more fairly than the Agreement required, and that he had no obligation to transfer his interest until he received payment. (No. 20, Vol. 36, pp. 8277-8308 at p. 8300). **As CLA never tendered any payment to Bidsal, it is legally impossible for him to have breached an obligation that never arose (i.e. he had no obligation to transfer his interest until he was paid)**.

If no breach was found in the First Arbitration Decision (there clearly was no such finding), it is impossible to argue Judge Wall manifestly disregarded a nonexistent finding in the First Arbitration Decision.

2. <u>No Finding That The Sale Would Become Effective Prior To The Purchase Price Actually Being Paid</u>.

The crux of this entire appeal, is CLA's rather incredible argument that the First Arbitration Decision determined CLA would become the sole member of the Company as of September, 2017, irrespective of when CLA actually completed

the transaction by paying the purchase price for Bidsal's membership interest. CLA argues that "[b]y modifying the effective date of sale specified in the [First Arbitration Decision], Judge Wall exceeded his authority and usurped the authority of this Court which ultimately affirmed [the First Arbitration Decision]. *See* Opening Brief at p. 20. Of course, CLA's Opening Brief points to no place in the record of the First Arbitration where Judge Haberfeld ever determined that CLA would become the sole member of the Company retroactively as of September, 2017, even if CLA had never paid the purchase price. Such a finding simply doesn't exist.

The First Arbitration Decision, states, in pertinent part,

> Mr. ***Bidsal's obligation to transfer*** his 50% interest to CLA pursuant to Section 4.1 of the Green Valley Operating Agreement's [sic], as well as CLA's request for relief in its arbitration demand, necessarily imply and contemplate that the subject interest at the time of transfer must be 'free and clear of all liens and encumbrances' --- as the price for that interest under Section 4.1 is to be calculated on the same ---plus via means ***and within a time after a final arbitration award is issued***, by which Mr. Bidsal must effect ***and complete*** that transfer --- here, within ten (10) days of the issuance of the final award, ***pursuant to the execution and delivery of all documents necessary to effectuate the sale*** and transfer of Mr. Bidsal's 50% interest in Green Valley, LLC.

See First Arbitration Decision (No. 3, Vol. 2, pp. 246-267 at p. 260) (emphasis added).

This language certainly does not specify a retroactive effective date of the uncompleted sale. Instead, the First Arbitration Decision quite clearly identified the membership interest transfer date would occur *after* the First Arbitration Decision

was issued and only after execution and delivery of all documents necessary to effectuate the sale. *Id.* Clearly, one of the documents necessary to effectuate the sale of Bidsal's membership interest was CLA's transfer of a check made payable to Bidsal for the purchase price of Bidsal's membership interest in the Company. The check for the purchase price was not issued until March 24, 2022, which was ***after*** the Second Arbitration Decision was issued. *See* Cashier's Check (No. 20, Vol. 36 pp. 8322-8323 at p. 8323); Second Arbitration Decision (No. 20, Vol. 36, pp. 8277-8308).

Judge Wall certainly did not modify a prior date of sale, as none existed because CLA had never performed its obligation to complete the sale by paying the purchase price, and thus Judge Wall could not have exceeded his authority or usurped the authority of this Court.

While the Affirmation Order settled the question of whether or not CLA was entitled to purchase Bidsal's interest in the Company, a question still remained regarding the amount CLA was required to pay Bidsal to exercise its right to purchase. The First Arbitration Decision did not determine the amount of the purchase price to be paid by CLA, but instead determined that:

> Mr. Bidsal contractually agreed to sell and can be legally compelled to sell and transfer his fifty percent (50%) Membership Interest in Green Valley to CLA ***at a price computed via the contractual formula set forth in Section 4.2 of the Green Valley Operating Agreement, based on Mr. Bidsal's undisputed $5 million 'best estimate' of Green Valley's fair market valuation***…

See First Arbitration Decision (No. 3, Vol. 2, pp. 246-267 at p. 252, ¶ 10(C)). (emphasis added).

The First Arbitration Decision then granted the following relief to CLA:

> Within ten (10) days of the issuance of this Final Award, Respondent…Shawn Bidsal…shall (A) transfer his fifty percent (50%) Membership Interest in Green Valley Commerce, LLC…free and clear of all liens and encumbrances, to Claimant CLA Properties, LLC ***at a price computed in accordance with the contractual formula set forth in Section 4.2 of the Green Valley Operating Agreement with the 'FMV' portion of the formula fixed as Five Million Dollars and No Cents***…"

See First Arbitration Decision (No. 3, Vol. 2, pp. 246-267 at p. 265, ¶ 1) (emphasis added).

C. CONFIRMATION OF THE FIRST ARBITRATION DECISION.

Following issuance of the First Arbitration Decision, CLA petitioned the District Court for confirmation of the First Arbitration Decision. The District Court confirmed the award but found that the purchase transaction contemplated under the Agreement, had yet to occur ("Confirmation Order"). *See* Confirmation Order (No. 3, Vol. 2, pp. 279-293).The Confirmation Order stated that Bidsal must "[w]ithin fourteen (14) days of the Judgment, (A) transfer his fifty percent (50%) Membership Interest in Green Valley Commerce ('Green Valley'), free and clear of all liens and encumbrances, to CLA, LLC, **at a price computed in accordance with the contractual formula set forth in Section 4.2 of the Green Valley Operating Agreement**, with the 'FMV' portion of the formula fixed as Five Million Dollars

and No Cents ($5,000,000.00)…" *Id.* at p. 291, ¶ A. (emphasis added). The Confirmation Order did not state that once CLA paid the purchase price, the sale would become effective retroactively to September, 2017. The Confirmation Order did not order that Bidsal must relinquish his membership interest to CLA before receiving payment from CLA. *See* Confirmation Order (No. 3, Vol. 2, pp. 279-293).

Bidsal then appealed the Confirmation Order and sought a stay of the enforcement of the Confirmation Order, pending the outcome of the appeal. The stay was granted upon Bidsal posting a bond, which was done. *See* Confirmation Order. (No. 3, Vol. 2, pp. 279-293). *See also* Order Granting Respondent's Motion for Stay Pending Appeal (No. 11, Vols. 10-11, pp. 2161-2325).

D. THIS COURT'S AFFIRMATION RELATED TO THE FIRST ARBITRATION.

On March 17, 2022, this Court affirmed the results from the First Arbitration ("Affirmation Order"), and in so doing stated "The arbitrator's construction holds, however good, bad, or ugly," [citation omitted], provided the arbitrator does not manifestly disregard the law, *Sanchez*, 878 F.3d at 1223 (stating that an arbitrator manifestly disregards the law when it is "clear from the record that the arbitrator[] recognized the applicable law and then ignored it" (quoting *Biller v. Toyota Motor Corp*., 668 F.3d 655, 665 (9th Cir. 2012)." *See* Affirmation Order (No. 19, Vol. 35, pp. 7976-7981).

The standard for vacating an arbitration award announced in the Affirmation Order related to the First Arbitration Decision, now applies to CLA's present appeal of Judge Wall's Second Arbitration Decision.

E. <u>THE SECOND ARBITRATION</u>.

After the First Arbitration Decision, CLA did nothing to complete the sale by performing its obligation of paying the purchase price. In fact, it became apparent that the parties could not agree upon what the purchase price for Bidsal's membership interest was under the buy-sale purchase price formula, when inserting $5,000,000 as the fair market value number, as decided by the First Arbitration Decision. This resulted in Bidsal initiating a second arbitration ("Second Arbitration") assigned to Judge Wall, to determine several issues described by Judge Wall as follows:

> The parties tacitly agree that among the issues presented in this proceeding is a calculation of the purchase price of Bidsal's membership interest in [the Company], using the formula provided for in the [Agreement] with the fair market value component fixed at $5,000,000 based on Judge Haberfeld's Award. Additionally, [CLA] alleges that [Bidsal] has, while managing the properties, made distributions to himself in excess of that to which he is entitled. Also at issue is the effective date of any purchase of [Bidsal]'s interest in [the Company], which begets additional issues to be determined (potential interest to be awarded, [Bidsal]'s entitlement to management fees, the propriety of and accounting for any distributions made to [Bidsal] after such effective date, etc.).

(No. 20, Vol. 36, pp. 8277-8308 at p. 8283).

1. <u>Determination Of The Purchase Price</u>.

The first issue for the Second Arbitration was a determination of the actual purchase price to be paid by CLA to Bidsal. CLA claimed the purchase price for Bidsal's interest should be $1,462,998. (*Id.* at p. 8299).

Bidsal pointed out that under the express language of the formula, he could claim the purchase price to be $2,146,784.50 because the formula would allow him to recover all of his initial capital contribution, even if part of it had been repaid, and because the COP number excluded the value of all but one parcel owned by the Company. (*Id.* at pp. 8297-8298). However, Bidsal took the position that it was unreasonable to require the return to him of capital he had already received back, and it was unreasonable to exclude the tax basis of each parcel owned by the Company just because there was no escrow closing statement related to the deed-in-lieu of foreclosure through which the Company acquired its property. Bidsal's position was that a literal reading of the ambiguous buy-sale formula would dramatically benefit him but it would thwart the parties' true intent and pay him more than he should be entitled to receive. Bidsal argued that following the parties' actual intentions, he should be paid $1,889,010.50 instead of the $2,146,784.50 a literal reading of the formula would require.

Judge Wall agreed that Bidsal's position applied the formula in a "fair and reasonable manner" and was consistent with the parties' intent, and determined the

purchase price to be $1,889,010.50, which was **$426,012.00 more than the unreasonable position taken by CLA** regarding what CLA considered the purchase price to be. (*Id.* at pp. 8297-8298).

2. <u>All Distributions Made By Bidsal Were Determined To Be Appropriate</u>.

Another primary issue in the Second Arbitration was whether Bidsal had appropriately distributed (i) the proceeds from sales of Company property, and (ii) the profits from operations.

With respect to distribution of sale proceeds, Judge Wall determined CLA's position, that all sale proceeds should have been distributed 70% to CLA and 30% to Bidsal, "is not a reasonable interpretation of this ambiguous and poorly drafted provision, in light of the substantial evidence in the record regarding the intent of the parties as it relates to these distributions." (*Id.* p. 8293). Judge Wall further found that Golshani's testimony about these distributions "is simply not credible," (*Id.* at p. 8295), and that the manner in which Bidsal distributed sale proceeds between himself and CLA "was more favorable to CLA than required by the terms of Exhibit B to the [Agreement] and does not constitute any improper or excessive distribution to [Bidsal]." (*Id.* at p. 8294).

With respect to distributions of profits from operations, Judge Wall determined that:

> [Bidsal] has continued to act as a member (and Manager) of [the Company] since September of 2017, and [CLA] cannot now divest [Bidsal] of his membership interest because it has not yet paid him for his interest pursuant to the [Agreement]. Bidsal has appropriately received distributions since 2017, and since he remains a member of [the Company], he cannot be required to divest himself of those distributions.
> . . .
> Additionally, treating the sale as having an effective date of September of 2017 would require [CLA] to compensate Bidsal for his services [as] a property manager over the past four years.

(*Id.* at p. 8300). Thus, Judge Wall determined that all distributions made by Bidsal to himself and CLA had at all times been both appropriate under the Agreement and fair to both Bidsal and CLA.

3. <u>Effective Date Of The Membership Purchase</u>.

As to CLA's claim that the effective date of the uncompleted purchase of Bidsal's membership interest was September, 2017, Judge Wall determined CLA's "contention is without merit." (*Id.* at p. 8299).

Specifically, Judge Wall ruled that "*[t]he transaction has never been completed*" and that Judge Haberfeld "did not find an effective date of the transaction to have occurred over a year earlier." (*Id.* at p. 8300) (emphasis added). Judge Wall determined that [t]he [Agreement] provides for a procedure for completing a sale of a membership interest, which procedure *has not yet been completed*." (*Id.* at p. 8300) (emphasis added).

This finding is important as Bidsal was seeking interest on the money he should have been paid in September, 2017 for his membership interest if Judge Wall

was to determine that the effective date of the sale transaction was September, 2017. Judge Wall's ruling, with respect to Bidsal's claim for interest on the purchase price, was consistent with his ruling that Bidsal was still a member of the Company because the sale transaction had never been completed. Judge Wall ruled that "Bidsal is not entitled to recover interest on funds he would've received for a transaction *which has not yet occurred*." (*Id.* at p. 8301) (emphasis added). Judge Wall concluded his ruling on the "effective date" of the uncompleted sale transaction by determining that: "[Bidsal] is still a member of [the Company] and no amount should be deducted from the purchase price for any distributions [Bidsal] received after September of 2017." *Id.*

4. <u>Judge Wall Did Not Excuse CLA's Failure To Pay The Purchase Price For Bidsal's Membership Interest</u>.

In the Second Arbitration, Bidsal argued that CLA's failure to ever tender the purchase price terminated CLA's right to purchase Bidsal's membership interest. CLA mischaracterizes Judge Wall's ruling on this tender issue when it states: (i) "Judge Wall also rejected Bidsal's effort to blame CLA for not tendering the purchase price when the First Arbitration ended" (Opening Brief at page 13); (ii) "Judge Wall declined to find fault with CLA. Ruling that any "perceived failure" by CLA should have been raised in the first arbitration or "was appropriate" under the circumstances" (*Id.* at 23); and (iii) the Second Arbitration Award "found in favor of [CLA] on the issue of [CLA's] alleged failure to tender." (*Id.*).

Judge Wall specifically stated:

> [Bidsal] argues that [CLA]'s failure to tender the purchase price terminated CLA's right to purchase Bidsal's interest in [the Company]. Initially, Bidsal argues that CLA failed to tender the purchase price in the fall of 2017 when offers and counteroffers were made. It is the determination of the Arbitrator that this issue is beyond the scope of the current Arbitration proceeding, and needed to be addressed in the original Arbitration proceeding before Judge Haberfeld. In April of 2019, Judge Haberfeld determined that [Bidsal] must transfer his interest in [the Company] to [CLA]. As such, it is the determination of the Arbitrator that [Bidsal] is not entitled to relief on this issue in the current proceeding."

(No. 20, Vol. 36, pp. 8277-8308 at p. 8285).

Judge Wall also determined that the Confirmation Order issued by Judge Kishner following the First Arbitration Decision was stayed by Judge Kishner during the Appeal of the First Arbitration Decision, which excused any "perceived failure of [CLA] to tender" after the First Arbitration Decision "given the state of the proceedings." *Id.*

Judge Wall was very clear in his ruling that CLA had not *lost its purchase rights under the buy-sale provision of the Agreement* by failing to timely tender payment. *Id.*

CLA attempts to conflate and confuse this ruling with the more important issue ***of whether CLA is required to tender and pay the purchase price before it can divest Bidsal of his membership interest.*** Judge Wall **did not** excuse CLA's obligation to tender and pay the purchase price as a prerequisite to Bidsal's

obligation to transfer his membership interest. Judge Wall **did not** find Bidsal was at fault for CLA's failure to pay the purchase price. On this critical issue, Judge Wall clearly stated:

> In addition to the purchase price under the formula in Section 4.2 of the [Agreement], it is necessary to determine an effective date of the sale of Bidsal's interest in [the Company]. [CLA] avers that the effective date of sale is September of 2017, the time when [CLA] contends his counteroffer transaction should have been consummated. **This contention is without merit**.
>
> **The transaction has never been completed**. Judge Haberfeld, in his award in April of 2019, directed that the transaction take place forthwith. He did not find an effective date of the transaction to have occurred over a year earlier. The [Agreement] provides for a procedure for completing a sale of a membership interest, **which procedure has not yet been completed**. [Bidsal] has continued to act as a member (and manager) of [the Company] since September of 2017, and **[CLA] cannot now divest [Bidsal] of his membership interest because it has not yet paid him for his interest pursuant to the [Agreement]**. Bidsal has appropriately received distributions since 2017, and since he remains a member of [the Company], he cannot be required to divest himself of those distributions.
>
> . . . .
>
> It is the determination of the Arbitrator, based upon all of the relevant evidence in this matter, that **the effective date of the purchase of Bidsal's interest has not yet come to pass**.

(No. 20, Vol. 36, pp. 8277-8308 at pp. 8299-8300) (emphasis added).

Thus, although Judge Wall did not eliminate CLA's right to purchase Bidsal's membership interest due to CLA's failure to timely tender the purchase price to Bidsal, Judge Wall clearly determined that **until the purchase price was paid by CLA, Bidsal remained a member of the Company and entitled to all**

distributions associated with that membership. Likewise, Judge Wall did not rule that Bidsal in any manner prevented CLA from opening an escrow and depositing the purchase funds into the escrow, or from simply performing its obligation to directly make payment to Bidsal for his membership interest, (although this argument was repeatedly made during the Second Arbitration). (No. 18, Vol 25, pp. 5550-5797 at p. 5607-5608, 5776), (No. 19, Vol. 34, pp. 7739-7740).

F. CLA NEVER MADE PAYMENT TO BIDSAL.

The key determination of Judge Wall, which goes to the crux of CLA's appeal, is that CLA never completed its obligations under the Agreement to acquire Bidsal's interest because **CLA failed to pay the purchase price**.

CLA never paid anything to Bidsal in September of 2018, or at any time prior to the Second Arbitration Decision. Even after receiving a favorable interpretation of the Agreement in the First Arbitration Decision of April, 2019, CLA **failed to identify** what it considered the purchase price to be under the buy-sale formula of the Agreement and **failed to pay** that purchase price to Bidsal to purchase his membership interest.

CLA elected not to exercise the right granted to it under the Agreement and substantiated in the First Arbitration Decision, to complete the sale by making payment. In fact, it is undisputed that CLA **never** identified a purchase price, either in writing, by depositing the same into escrow, or by making payment of that amount

to Bidsal, until the Second Arbitration was commenced on February 7, 2020 by Bidsal to determine the sales price. *See* Demand for Arbitration (No. 2, Vol. 1, pp. 99-133). This is because CLA had no idea what the purchase price was under the ambiguous formula in the Agreement.

As Judge Wall found, "[b]oth parties agree that the formula cannot be reasonably applied pursuant to the literal terms of the [Agreement]." *See* (No. 20, Vol. 36, pp. 8277-8308 at p. 8299, ¶ 1) (emphasis added). In other words, at the conclusion of the First Arbitration, CLA (i) **never informed Bidsal of the purchase price** by inserting the $5,000,000 fair market value number into the buy-sale formula to determine a purchase price, as directed by Judge Haberfeld; and (ii) **never made payment of the purchase price** to Bidsal or into an escrow, as required to complete its obligations under the Agreement.

Ultimately, the purchase price calculated by CLA's expert in the Second Arbitration was rejected by Judge Wall as both unreasonable and inaccurate when applying the language of the Agreement. **It simply cannot be disputed that CLA never paid a penny to Bidsal until after the Second Arbitration Decision**, despite the unrefuted testimony of Bidsal that he would have accepted any payment made by CLA, while reserving his rights to challenge its accuracy. *See* Bidsal's Arbitration Testimony (No. 23, Vol. 37, pp. 8506-8511 at p. 8509, transcript pp. 681:18 – 682:5).

G. THE FIRST ARBITRATION DECISION DOES NOT SUPPORT CLA'S ARGUMENT.

CLA argues that the First Arbitration Decision determined Bidsal was required "… to close escrow and sell his 50% Membership Interest to CLA within 30 days after CLA elected to buy, i.e. by September 3, 2017.'" *See* Opening Brief at p. viii. In reality, the quoted phrase is but a mere piece of the First Arbitration decision, and is edited to infer that Bidsal was somehow required to deliver his membership interest prior to receiving payment of the purchase price.

1. The Actual Language Of The First Arbitration Decision.

The phrase quoted by CLA is preceded by the language: "If CLA elected to buy, rather than sell, CLA had the contractual option to compel Mr. Bidsal to sell his 50% Membership Interest to CLA ***at a purchase price*** computed via the Section 4.2 formula, based either on Mr. Bidsal's $5 million valuation of the LLC in his July 7, 2017 Section 4.2 offer." *See* First Arbitration Decision (No. 3, Vol. 2 pp. 246-267 at p. 257 ¶ C).

What the arbitrator in the First Arbitration never said, is that Bidsal was obligated to divest himself of his membership interest before receiving payment of the purchase price from CLA. CLA's position is not supported by the Agreement, or any determination in either arbitration, both of which required payment of the purchase price before CLA could take ownership of Bidsal's membership interest.

2. <u>What The Second Arbitrator Actually Found</u>.

Likewise, Judge Wall did not find that "…the first arbitrator had authority to determine when performance was due under the 'buy-sell' provision," as was asserted by CLA in its Introduction. *See* Opening Brief at p. x. Judge Wall actually found that "Judge Haberfeld, in his award in April of 2019, directed that the transaction take place forthwith" and "he did not find an effective date of the transaction to have occurred over a year earlier." *See* Subject Arbitration Decision (No. 20, Vol. 36, pp. 8277-8308 at p. 8300).

3. <u>The Actual Language Of The Agreement</u>.

CLA's Opening Brief goes on to state that there was "unanimous agreement of the parties that the Agreement required a sale 30 days after CLA exercised its option to buy." *See* Opening Brief at p. x. This statement is partially accurate.

After the entry of the Confirmation Order, Bidsal conceded that once CLA exercised its option to buy, which included providing Bidsal with the accurate amount of funds to purchase his interest in GVC, *then the Agreement required* Bidsal to transfer his GVC interest within 30 days. However, the Agreement has no language governing what is to happen if CLA never makes payment within 30 days as was the case here.

The First Arbitration handled this issue by requiring the date of transfer to be in the future…within 10 days of issuance of the First Arbitration Decision and when CLA paid for the interest which would then require Bidsal to transfer the interest. (No. 3, Vol. 2 pp. 246-267 at p. 260). This date was extended by the District Court in the Confirmation Order, which again required CLA to make payment of the purchase price before Bidsal was required to transfer his interest. (No. 3, Vol. 2, pp. 268-278 at p. 276).

CLA's insurmountable problem is that CLA could never claim to own Bidsal's interest until it paid the purchase price. Once the purchase price was finally paid, on March 24, 2022, Bidsal immediately transferred his membership interest to CLA. *See* Cashier's Check (No. 20, Vol. 36 pp. 8322-8323 at p. 8323).

4. <u>CLA's Fictional Final Award</u>.

In the Opening Brief, CLA repeatedly argues that Judge Haberfeld made an express finding in the First Arbitration Decision that the uncompleted sale was retroactively effective as of September 3, 2017. CLA's support for this alleged finding is the following single sentence of 41 words, taken from the 20-page, single-spaced, First Arbitration Decision, comprised of 8,048 words:

> Thus, Mr. Bidsal had no right to demand an appraisal, and under Section 4.2 Mr. Bidsal was obligated to close escrow and sell his 50% Membership Interest to CLA within 30 days after CLA elected to buy, i.e. by September 3, 2017.

(No. 20, Vol. 36, pp. 8191-8212 at p. 8266).

Noticeably absent from this statement is any finding that CLA had fulfilled its obligation to make payment to Bidsal or any reference to the sale transaction being treated as if it had closed on September 3, 2017, despite CLA having never paid Bidsal anything for his membership interest. In other words, there is no finding that the uncompleted sale will be retroactively treated as having closed on September 3, 2017, nor is there any discussion about an "effective date" of September 3, 2017 in the 20-page decision, or any legal authority cited in the Decision to support such an outcome when CLA had never performed its obligation to pay the purchase price. It was simply never addressed or decided in the First Arbitration.

What was decided in the First Arbitration Decision at the Section entitled "**RELIEF GRANTED AND DENIED**," was very specific in stating:

> ***Within ten (10) days of the issuance of this Final Award***, Respondent…Shawn Bidsal…shall (A) transfer his fifty percent (50%) Membership Interest in Green Valley Commerce, LLC…free and clear of all liens and encumbrances, to Claimant CLA Properties, LLC ***at a price computed in accordance with the contractual formula set forth in Section 4.2 of the Green Valley Operating Agreement with the 'FMV' portion of the formula fixed as Five Million Dollars and No Cents***…"

See First Arbitration Decision (No. 3, Vol. 2 pp. 246-267 at p. 265) (emphasis added).

Again, the First Arbitration Decision contains no finding that Bidsal was no longer a member of the Company, or that he had no right to retain his membership interest after September, 2017, despite CLA having never paid him anything. With

respect to closing the sale transaction, the First Arbitration Decision made the transaction prospective, to be completed "[w]ithin ten (10) days…," not retrospective, as if it had already been completed. *Id.* In short, Bidsal was under no obligation to divest himself of his membership in the Company until he received the purchase price.

V.

STANDARD OF REVIEW

While a district court's confirmation of an arbitration award is reviewed *de novo*, this Court also considers that "[s]trong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." *Sylver v. S, V. Regents Bank, N.A.*, 129 Nev. 282, 286, 300 P.3d 718, 721 (2013) *citing to D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004). Further, this Court has held that "[w]e apply a **clear and convincing evidence standard** when parties seek to vacate an arbitration award." *Sylver*, 129 Nev. at 286, 300 P.3d at 721 (emphasis added), *citing to Health Plan of Nevada v. Rainbow Med.*, 120 Nev. 689, 695, 100 P.3d 172, 178 (2004).

VI.

ARGUMENT

A. CLA HAS NOT SATISFIED THE EXTREMELY HIGH BURDEN OF ESTABLISHING, BY CLEAR AND CONVINCING EVIDENCE, THAT JUDGE WALL MANIFESTLY DISREGARDED THE LAW.

This Court's Affirmation Order, arising out of the appeal of the First Arbitration Decision ("First Appeal"), determined that the FAA governs disputes under the Agreement, and that it governed this Court's review of the District Court's review of the First Arbitration Decision. (No. 19, Vol. 35, pp. 7976-7981 at p. 7978, fn. 1).

In this case, the District Court determined that the FAA also applied to its review of the Second Arbitration Decision. *See* 2nd Confirmation Order (No. 24, Vol. 37, pp. 8512-8521 at p. 8515) (Both parties agreed the arbitration was governed by the FAA but the outcome is the same under the FAA or Nevada law). Obviously, for the same reason the FAA governed this Court's review in the First Appeal, it also governs this Court's review of the District Court's order confirming the Second Arbitration Decision ("2nd Confirmation Order").

Although there is a consensus between the parties that the FAA governs this Court's review of the 2nd Confirmation Order, there is considerable disagreement over the standard for this Cout's review under the FAA. Ironically, CLA's

arguments in this appeal regarding the proper standard of review are dramatically different and directly contrary to the arguments it made in the First Appeal.

In the First Appeal, CLA argued to this Court as follows:

> 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.

See Respondent's Answering Brief in Case Nos. 80427 and 80831. (No. 39, Vol. 40, pp. 8934-9028 at p. 8963). In the First Appeal, CLA also argued to this Court that:

> Art. III, Section 14.1 [of the Agreement], establishes arbitration as the sole method for dispute resolution if the parties cannot resolve a dispute themselves. 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**.'

See Respondent's Answering Brief in Case Nos. 80427 and 80831. (*Id.* at p. 8964). (internal citations omitted) (emphasis in the original). Thus, in the First Appeal, CLA vociferously argued that the Agreement permitted no judicial review of any arbitrator's decision.

Not surprisingly, **CLA is now making an argument which directly refutes the position it took in the First Appeal** and argues in this appeal, that a judicial review is permitted. *See* Opening Brief at pp. 15-20.

In the First Appeal, CLA asked this Court to ignore Bidsal's entire brief because Bidsal had argued that "manifest disregard of the law" was the correct standard to be used when evaluating a request to vacate an arbitrator's decision under the FAA.[3] *See* Respondent's Answering Brief in Case Nos. 80427 and 80831 (No. 39, Vol. 40, pp. 8934-9028 at p. 8959). In the First Appeal, CLA vigorously argued to this Court that the "manifest disregard of the law" standard did not apply under the FAA. (*Id.* at p. 8969).

CLA is now making an argument which directly refutes the position it took in the First Appeal, and argues in this appeal that "manifest disregard of the law" is the correct standard that should be used to review the Second Arbitration Decision, (the very standard it previously argued was not permitted under the FAA). *See* Opening Brief at p. 25.

These wildly inconsistent positions demonstrate that CLA will say whatever is necessary to advance its position, whether that position has any basis in the law.

[3] In the First Appeal, this Court used the "manifest disregard of the law" standard, (which had been argued by Bidsal as the appropriate standard), as set forth in *Sanchez v. Elizondo*, 878 F.3d 1216 (9th Cir. 2018) and *Biller v. Toyota Motor Corp.*, 668 F.3d 655 (9th Cir. 2012). *See* Affirmation Order (No. 19, Vol. 35, pp.7976-7981, at pp. 7978-7979).

Nevertheless, in the Affirmation Order this Court previously adopted the "manifest disregard of the law" standard and explained this extremely high standard as follows:

> The [United States] Supreme Court has made clear that courts have only a limited role to play when the parties have agreed to arbitration.' *In re Sussex*, 781 F.3d 1065, 1072 (9th Cir. 2015). '[T]he Federal Arbitration Act (FAA…) establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.' *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (internal citation omitted). Sections 9 through 11 of the FAA provide a narrow scope of judicial review of private arbitration awards and decisions. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). Accordingly, an arbitration award may not be vacated on other common-law grounds outside the statutory scheme enacted by Congress. *See Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 640 (9th Cir. 2010). **One such ground occurs when the arbitrator exceeded his or her powers. 9 U.S.C. § 10(a)(4) (2002)**. An arbitrator exceeds his powers if he 'strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice.' *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (alteration in original) (internal quotation marks omitted). **The vacatur standard under the FAA is extremely high**. *Sanchez v. Elizondo*, 878 F.3d 1216, 1221 (9th Cir. 2018). (Emphasis added).

See Affirmation Order (No. 19, Vol. 35, pp.7976-7981, at pp. 7978-7979).

This Court continued by providing that:

> It is insufficient to merely convince a court that an arbitrator erred because, "[s]o long as the arbitrator was arguably construing the contract[,] . . . a court may not correct his mistakes under [9 U.S.C.] § 10(a)(4)." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572 (2013). "The arbitrator's construction holds, however good, bad, or ugly," *id.* at 573, provided the arbitrator does not **manifestly disregard the law**, *Sanchez*, 578 F.3d at 1223 (stating that an arbitrator manifestly disregards the law when it is "clear from the record that the arbitrator[] recognized the applicable law and then ignored it" (quoting *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012)).

(*Id.* at pp. 7978-7979) (emphasis added). The *Biller* case, relied upon by this Court in the Affirmation Order, explains in greater detail the sole basis upon which an arbitrator's decision may be vacated under the FAA.

> Under § 10 of the FAA, vacatur is permitted only:
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> 9 U.S.C. § 10(a). Under the FAA:
>
> [A] federal court [may] correct a technical error, [ ] strike all or a portion of an award pertaining to an issue not at all subject to arbitration, and [ ] vacate an award that evidences affirmative misconduct in the arbitral process or the final result or that is completely irrational or exhibits a manifest disregard for the law. **These grounds afford an extremely limited review authority**, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures.

668 F.3d at 663-664 (9th Cir. 2012).

CLA's vacatur argument arises only under 9 U.S.C. § 10(4) (listed above), claiming Judge Wall exceeded his powers. Applying this very limited basis for vacating an arbitration award under the FAA, "[n]either erroneous legal conclusions

nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard." *Kyocera Corp. v. Prudential-Bache Trade Serv. Inc.*, 341 F.3d 987, 994 (9th Cir. 2003).

Federal law also explains that "manifest disregard of the law" is extremely difficult to show because "[m]anifest disregard of the law means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law." *Biller* at 665 *citing Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 641 (9th Cir. 2010) (emphasis added).

> To vacate an arbitration award on this ground, '[i]t must be clear from the record that the arbitrators recognized the applicable law and then ignored it.'" *Id.* "**An award is completely irrational 'only where the arbitration decision fails to draw its essence from the agreement.**'" *Lagstein*, 607 F.3d at 642 (quoting *Comedy Club*, 553 F.3d at 1288 (citation and alterations omitted)). "**An arbitration award 'draws its essence from the agreement if the award is derived from the agreement, viewed in light of the agreement's language and context, as well as other indications of the parties' intentions**." *Lagstein*, 607 F.3d at 642 (alterations in original) (*quoting Bosack*, 586 F.3d at 1106)).

668 F.3d at 665 (emphasis added).

> "[M]anifest disregard of the law "is a high standard for vacatur; '**[i]t is not enough . . . to show that the panel committed an error-or even a serious error.**'" *Id*. at 641 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., U.S. , 130 S. Ct. 1758, 1767, 176 L. Ed. 2d 605 (2010)).

668 F.3d at 667 (emphasis added).

In the Second Arbitration, Judge Wall determined, among other things: (i) the amount of the purchase price *under the ambiguous buy-sell formula from the*

Agreement; (ii) if Bidsal had appropriately made all distributions of sale proceeds and of profits from operations *in accordance with the purpose and intent of the Agreement*[4]; and (iii) when the yet to be completed sale transaction would become effective *under the Agreement*. In other words, all of Judge Walls' decisions "draw its essence from the Agreement" (668 F.3d at 665) and were made to resolve a "controversy, dispute or claim arising out of or relating…to [the] Agreement or the transactions arising [thereunder]" which disputes the Agreement states are to be exclusively decided through arbitration. (No. 1, Vol. 1, pp. 57-85 at p. 64, ¶ 14.1). And as this Court has already stated, "so long as the arbitrator was arguably construing the contract, a court may not correct his mistakes under 9 U.S.C. § 10(a)(4)." *See* Affirmation Order (No. 19, Vol. 35, pp. 7976-7981 at p. 7979).

There is certainly no evidence in the record to satisfy the extremely high standard that Judge Wall "recognized the applicable law and then ignored it" as would be required to vacate the Second Arbitration Decision under the FAA. 668 F.3d at 665.

[4] As set forth above, the Arbitrator actually found that if the Agreement had been followed as written, Bidsal could have distributed even more money to himself, but that the way Bidsal had interpreted and complied with the Agreement was consistent with the purpose and intent of the Agreement, even if the ambiguous language of the Agreement did not require Bidsal to benefit CLA in the manner he did.

CLA's contentions in this appeal are merely disagreements with Judge Wall's interpretation of the Agreement, but there is no basis to even remotely suggest that Judge Wall manifestly disregarded the law. To the contrary, Judge Wall expressly regarded and followed the controlling law in determining that a transaction cannot be completed without payment.

1. <u>The Controlling Law Was Followed, Not Disregarded</u>.

It has always been the law that a cash sale requires receipt of payment as a condition precedent to delivery of the thing being purchased. *Ellis v. Nelson*, 68 Nev. 410, 146, 233 P.2d 1072, 1075 (1951) ("A cash sale is generally regarded as one in which neither title nor possession is to be delivered until payment in full has been made."); 2 Williston on Sales (Revised Ed.) 324, § 341; *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 607, 427 P.3d 113, 118 (2018) ("**In addition to payment in full**, valid tender must be unconditional, or with conditions on which the tendering party has a right to insist. 74 Am. Jur. 2d Tender § 22 (2012)."). *Compare* to NRS 104.2511, part of Article 2 of the Uniform Commercial Code governing sales of goods, which states "[u]nless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery." NRS 104.2511(1).

The buy-sale provisions of the Agreement are not well drafted and do not actually provide any timeline for when a sale is to be closed if the member receiving

the offer elects to buy instead of sell; however, it does state that the terms of the initial offer are "to be all cash and close escrow within 30 days of the acceptance." (No. 1, Vol. 1, pp. 57-85 at pp. 67-68 at ¶ 4.2). Assuming these same terms applied if CLA elected to purchase rather than sell, CLA was required to make payment in cash to Bidsal within 30 days of making its counteroffer, as a condition precedent to Bidsal's obligation to transfer his membership interest to CLA. 68 Nev. at 146, 233 P.2d at 1075.

Not only did CLA fail to make any payment to Bidsal until April, 2022 (at which time Bidsal immediately transferred his membership interest to CLA), CLA never even informed Bidsal of what it considered the purchase price to be. Under the controlling law, Bidsal had no obligation to transfer his membership interest until he was paid, **which is precisely why Judge Wall determined the sale transaction had never been completed**. Thus, Judge Wall's decision followed the controlling law.

Ironically, CLA asked Judge Wall to disregard the controlling law by treating CLA as if it had performed its payment obligation back in September, 2017, even though it had never performed by making payment. Judge Wall correctly refused to do so based upon the evidence presented at the arbitration which demonstrated that CLA had never made any payment at any time to purchase Bidsal's interest.

CLA has argued that somehow Bidsal prevented CLA from tendering payment or opening an escrow, neither of which arguments are true or were accepted by Judge Wall. CLA did not need Bidsal's consent to open an escrow and deposit the purchase price,[5] and certainly nothing prevented CLA from sending Bidsal whatever amount CLA believed the purchase price to be (even though it is patently obvious the purchase price was unknown given the ambiguities in the buy-sale provision of the Agreement). Of course, CLA's argument also ignores the fact that the Second Arbitration was required to determine the actual purchase price, which Judge Wall determined was nearly half a million dollars more than what CLA later claimed it to be.

[5] NRS 645A.010(7) defines an escrow as "any transaction **wherein one person**, for the purpose of effecting or closing the sale, purchase, exchange, transfer, encumbering or leasing of real or personal property to another person or persons, **delivers** any written instrument, **money**, evidence of title to real or personal property, or other thing of value to a third person **to be held by such third person until the happening of a specified event or the performance of a prescribed condition**, when it is then to be delivered by such third person, in compliance with instructions under which he or she is to act, to a grantee, grantor, promisee, promisor, obligee, obligor, lessee, lessor, bailee, bailor or any agent or employee thereof. The term includes the performance of the services of a construction control." (Emphasis added). *See also* NRS 692A.024.

Under Nevada law, CLA could clearly have unilaterally opened an escrow and deposited into the escrow whatever money it believed it was obligated to pay Bidsal for Bidsal's interest, and Bidsal's consent was not necessary to CLA opening an escrow.

Importantly, in the Second Arbitration Bidsal testified that he would have accepted any payment from Golshani if one had ever been made, and would have considered it a partial payment if the amount was incorrect. The specific testimony was:

> Q. If Ben had delivered cash, a check, a wire transfer in any form – if Ben had delivered money to you for the purpose of purchasing your membership interest in Green Valley Commerce, what would you have done?"
>
> A: Probably would put it in a accommodative escrow account and consider the – well, if the amount was right – I would calculate, and if it was correct, then I would accept it. If not, it would be partial payment."

See Second Arbitration Transcript Day Three (No. 18, Vols. 28-30 at pp. 6401-6402, transcript pp. 681:18 – 682:5). All of this evidence was considered by Judge Wall in making his decision that "[CLA] cannot now divest [Bidsal] of his membership interest because it has not yet paid him for his interest pursuant to the [Agreement]." (No. 20, Vol. 36, pp. 8277-8308 at 8300). This decision was absolutely within the exclusive jurisdiction of Judge Wall and draws its essence from the Agreement, which requires CLA to make payment in cash. (No. 1, Vol. 1, pp. 57-85 at pp. 67-68 at ¶¶ 3) ("the payment of the purchase price shall be in cash…."). More importantly, Judge Wall clearly followed his understanding of the controlling law (rather than ignoring it), and he got it right.

Contrary to CLA's argument, there is nothing in the record demonstrating that Judge Haberfeld ever considered this issue in the First Arbitration, or that he ever

determined CLA could claim to own Bidsal's interest before performing its obligation under the Agreement to make payment. Certainly, CLA has not provided this Court with any reference to the record showing this issue was presented to Judge Haberfeld in the First Arbitration, and ruled upon by Judge Haberfeld.

2. <u>CLA Misstates The Standard For Vacatur</u>.

In the First Appeal, CLA argued "'**[a]rbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement.'"** *See* Respondent's Answering Brief in Case Nos. 80427 and 80831. (No. 39, Vol. 40, pp. 8934-9028 at p. 8982) (internal citations omitted) (emphasis in the original). CLA further argued, "[t]he 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 p. 8975) (internal citations omitted).

In this appeal, CLA makes a completely different argument which misstates the legal standard for vacatur under the FAA. CLA misstates the legal standard for "manifest disregard of the law" when it argues that "…arbitrators exceed their authority when they render decisions contrary to the contracts they have been hired to arbitrate." *See* Appellant's Opening Brief at p. 23 ¶ 4 (internal citations omitted). As set forth above, this is not the correct legal standard, and it is not the standard CLA previously represented to this Court.

Despite CLA's very strong argument in the First Appeal that courts are not able to vacate an arbitrator's decision absent extraordinary circumstances, CLA has taken a dramatically different and inconsistent position in this appeal in its attempt to relitigate what was decided by Judge Wall.

3. Judge Wall's Decision Is Rational.

CLA argues that the Arbitrator's award is "completely irrational" because, "[h]e nonetheless sought to avoid the 2017 date mandated by the Agreement." *See* Opening Brief at p. 26. However, the only irrationality is CLA's assertion the Agreement required Bidsal to transfer his membership interest prior to receiving payment from CLA.

As was addressed above, the First Arbitration Decision never mentions the sale being retroactively effective to September, 2017. Such a finding simply does not exist. The First Arbitration Decision contemplated CLA paying Bidsal for his membership interest and Bidsal then transferring his membership to CLA, both of which were to occur within ten days *after* the rendering of the First Arbitration Award, but no payment was ever made by CLA until after the Second Arbitration Decision was issued. The First Arbitration Decision did not even contemplate that CLA would refuse to identify a purchase price or a pay the purchase price within those ten days.

Regardless of whether CLA believes the Second Arbitration Decision is good or bad, there is no legitimate argument that it was irrational, manifestly disregarded the law, or that it "failed to draw its essence from the Agreement." 668 F.3d at 665. Judge Wall's decision was well reasoned, was based upon his interpretation of the Agreement, was based upon evidence in the record of the arbitration, and was based upon his understanding of the controlling law. As a result, CLA cannot meet its extremely high burden to vacate the Second Arbitration Decision.

B. BIDSAL WAS THE PREVAILING PARTY IN THE SECOND ARBITRATION AND WAS ENTITLED TO HIS ATTORNEY'S FEES AND COSTS.

Although CLA also appealed the District Court's order confirming Judge Wall's award of attorney's fees to Bidsal, the Opening Brief contains no specific argument related to the award of fees to Bidsal, and has thus waived any such argument. *See Powell v. Liberty Mut. Fire Ins. Co*., 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

NRAP 28(a)(10) requires that CLA's Opening Brief contain all of "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which appellant relies" for such arguments. *See* NRAP 28(a)(10). The Opening Brief merely argues that if Judge Wall exceeded his authority, the "award of attorney fees to Bidsal as the prevailing party on this issue,

cannot stand." Opening Brief at p. 25 (repeated on p. 28). The Opening Brief contains no legal authority or references to the record that are specifically related to the award of attorney's fees.

The Agreement specifically provides that the prevailing party is entitled to recover its attorney's fees and costs.

> The fees and expenses of JAMS and the arbitrator shall be shared equally by the Members and advanced by them from time to time as required; provided that at the conclusion of the arbitration, the arbitrator shall award costs and expenses (including the costs of the arbitration previously advanced and the fees and expenses of attorneys, accountants and other experts) to the prevailing party.

(No. 1, Vol. 1, pp. 57-85 at pp. 64-65 ¶ 14.1).

Judge Wall determined that because the Agreement is based upon Nevada law, he used the factors of *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), to determine the reasonable amount of fees and costs he would award under the Agreement, to Bidsal as the prevailing party. (No. 20, Vol. 36, pp. 8277-8308 at pp. 8303-8306). Bidsal requested attorney's fees of $444,225.00 and costs of $155,644.84. Judge Wall awarded $300,000.00 in attorney's fees and $155,644.84 in costs, all of which he explained was warranted under the *Brunzell* factors and the Agreement.

As the Opening Brief offers no argument regarding the amount or reasonableness of the attorney's fees and costs awarded, any such arguments are waived.

Inasmuch as CLA's appeal of the award to Bidsal of attorney's fees and costs is solely based upon its argument that Judge Wall acted outside of his authority, and because Judge Wall's decision did not *manifestly disregard the law* as it is clearly grounded in his interpretation of the Agreement and applicable Nevada law, there is no basis to disturb the award of attorney's fees and costs under the FAA standards for vacatur set forth in *Sanchez v. Elizondo*, 878 F.3d 1216 (9th Cir. 2018) and *Biller v. Toyota Motor Corp.*, 668 F.3d 655 (9th Cir. 2012).

VII.

CONCLUSION

CLA has not satisfied the *extremely high standard* to vacate a binding arbitration award under the Federal Arbitration Act ("FAA"), by establishing, *by clear and convincing evidence*, that Judge Wall *manifestly disregarded the law*. Judge Wall's decisions all arise out of his interpretation of the Agreement and the application of Nevada law thereto. Judge Wall's decisions are well-reasoned and even if incorrect (which they are not) cannot be vacated under the extremely high FAA standards for vacating a binding arbitration award.

DATED this 3rd day of January, 2024.

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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 a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more, and contains 12,924 words.

Finally, I hereby certify that I have read Bidsal's Answering 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)(1), which requires

every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, 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 3rd day of January, 2024.

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Case Nos. 86438 & 86817

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

RESPONDENT'S APPENDIX TO ANSWERING BRIEF

VOLUME 40

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August 28, 2017

Via email and fax
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James E. Shapiro, Esq.
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Re: Green Valley Commerce, LLC, a Nevada Limited Liability Company; **Proof of Funds to Purchase Membership Interest**

Dear Mr. Shapiro,

As you know, we represent CLA Properties, LLC. Please be advised that my client has all of the funds required to close the escrow for the purchase of Mr. Bidsal's membership interest in Green Valley commerce, LLC as shown by the attached statements. All that remains is that we agree upon escrow and your client performs as required under the Operating Agreement. We reiterate our demand that Mr. Bidsal do so without delay.

Please advise if you have any questions regarding the foregoing.

Cordially,

Very truly yours,

LAW OFFICE OF RODNEY T. LEWIN
A Professional Corporation
RODNEY T. LEWIN

RTL/b
Attachments
Cc: Client via email
Louis Garfinkel via email

F:\7157\letters\shapiro-082817

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

IN THE MATTER OF THE PETITION OF CLA PROPERTIES LLC.	Case No. 80427
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

* * * * *

IN THE MATTER OF THE PETITION OF CLA PROPERTIES LLC.	**Case No. 80427**
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**

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

---

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.

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[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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[6] *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; *see 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.

7/ 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

ROBERT L. EISENBERG

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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