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

DOUGLAS D. GERRARD (SBN 4613)
GARY C. MILNE (SBN 3653)
GERRARD COX LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

JAMES E. SHAPIRO (SBN 7907)
AIMEE M. CANNON (SBN 11780)
SMITH & SHAPIRO, PLLC
3333 E. Serene Avenue, Suite 130
Henderson, Nevada 89074
(702) 318-5033

Attorneys for Shawn Bidsal

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.

DOUGLAS D. GERRARD (SBN 4613)
GARY C. MILNE (SBN 3653)
GERRARD COX LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000
dgerrard@gerrard-cox.com
gmilne@gerrard-cox.com

JAMES E. SHAPIRO (SBN 7907)
AIMEE M. CANNON (SBN 11780)
SMITH & SHAPIRO, PLLC
3333 E. Serene Avenue, Suite 130
Henderson, Nevada 89074
(702) 318-5033
jshapiro@smithshapiro.com
acannon@smithshapiro.com

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.

GERRARD COX LARSEN

/s/ Douglas D. Gerrard
DOUGLAS D. GERRARD (SBN 4613)
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000
dgerrard@gerrard-cox.com

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.

GERRARD COX LARSEN

/s/ Douglas D. Gerrard

DOUGLAS D. GERRARD (SBN 4613)
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000
dgerrard@gerrard-cox.com