IN THE SUPREME COURT OF THE STATE OF NEVADA

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CLA PROPERTIES LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, Appellant, vs. SHAWN BIDSAL, AN INDIVIDUAL, Respondent.	**No. 86438**
CLA PROPERTIES LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, Appellant, vs. SHAWN BIDSAL, AN INDIVIDUAL, Respondent.	**No. 86817**

APPEAL FROM ORDER AND RELATED JUDGMENT CONFIRMING ARBITRATION AWARD
Eighth Judicial District Court, Hon. Joanna Kishner, District Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

It is a matter of established fact, determined in an arbitral hearing confirmed by the District Court and affirmed by this Court, that Respondent Shawn Bidsal ("Bidsal") was obligated by contract to sell his interest in Green Valley Commerce, LLC ("Green Valley" or "GVC") by September 3, 2017. It is a further matter of fact that Bidsal was obliged by contract to honor the $5 million valuation of Green Valley that Bidsal offered and Appellant CLA Properties, LLC ("CLA") accepted.

It is also a matter of established fact that Bidsal refused to sell.

It is undisputed that between the time he refused to sell his interest and the time he exhausted his appeals and was forced to honor his obligations, Bidsal took for himself $500,500 in distributions from the profits of Green Valley – money that would have gone to CLA, had the sale of his interest closed in September 2017. At issue is whether he can justly keep those distributions.

The correct answer is "no."

In an attempt to avoid this simple and just conclusion, Bidsal argues CLA was at fault for his refusal to sell and he was not. Not one single finder of fact has ever sided with his arguments, because they are untrue.

Nevertheless, Bidsal in his brief seeks again to blame CLA for his refusal. His position remains contradicted by the record, the express findings of the arbitrators, the confirmation of their findings by the District Court, and the prior ruling of this

Court. His arguments are contrary to well-settled law in this State and elsewhere. CLA respectfully submits the factual assertions in his brief should be viewed with great skepticism by this Court and his arguments rejected in their entirety.

The facts are these: Bidsal scuttled the deal in 2017. CLA did not. Under Nevada law, Bidsal cannot obtain an advantage by his refusal to sell; and his arguments before this Court notwithstanding, the arbitral process that eventually forced him to sell did not entitle him to walk away with an extra half-million in his pockets as a reward.

ARGUMENT[1]

A. BIDSAL'S BRIEF MISSTATES THE FACTS: BIDSAL, NOT CLA, REFUSED TO CLOSE THE SALE.

The Respondent's Answering Brief on Appeal ("RAB") begins with an alternate history of the sale of Bidsal's interest in Green Valley that portrays Bidsal as an innocent bystander and claims CLA was at fault when their deal did not close. In this reimagining, Bidsal flatly insists he did not "ever indicate he would refuse to accept a payment" to sell his interest and says CLA "never made any attempt" to pay. RAB, pp. 2-3 (emphasis omitted). As this Court and others have determined, none of his claims are true.

[1] CLA's opening brief contains a section identifying several ways in which Judge Wall exceeded his legal authority as an arbitrator. AOB 18-25. CLA will not repeat those arguments in this reply brief.

Bidsal nevertheless labels CLA's supposed perfidy the "critical fact … at the heart of the dispute in this appeal." RAB, p. 2. Because his appellate position is so heavily invested in this tale, it is necessary to review the facts actually established in the arbitrations and at the court below.

1. Bidsal Initiated the Sale, Then Reneged When CLA Invoked Its Right to Buy.

Green Valley's Operating Agreement ("Agreement" or "OA") provided a mechanism for either member to buy the interest held by the other. Either member could demand a sale and propose a fair market value for the company to become the starting point for the eventual sale price using a formula set forth in the Agreement. OA, pp. 10-11, Art. V, Sec. 4.2 (1A.App.67-68). After such an offer, the receiving member had 30 days to accept the valuation and sell; demand an independent appraisal; or accept the initiating party's valuation, but instead of selling, use that value to buy out the initiating party. *Id.*

Bidsal triggered this "buy-sell" provision on July 7, 2017, offering a fair market value of $5 million. Letter dated Jul 7, 2017 (5A.App.1084). CLA accepted Bidsal's valuation, but exercised its right to buy rather than sell. Letter dated Aug 3, 2017 (5A.App.1086). Under the terms of the Agreement, this began a 30-day countdown to sale of Bidsal's interest. OA, pp. 10-11, Art. V, Sec. 4.2 (1A.App.67-68).

a. Bidsal Refused to Honor His Valuation.

As Bidsal conceded at arbitration, the parties fully understood their obligations: "under the terms of the operating agreement, it's very specific about what is supposed to happen. They're supposed to close escrow within 30 days." Second Arb. Hearing Tran. ("Second Arb. Tr.") 43:8-10 (25A.App.5594). But Bidsal disavowed his offered valuation, demanding the value instead be set by appraisal. Letter dated Aug 5, 2017 (5A.App.1088).

As the starting component in calculating the sale price, the valuation was essential to closure. Without a valuation for the company, it was not possible to set a price. OA, pp. 10-11, Art. V, Sec. 4.2 (1A.App.67-68). Bidsal insisted, however, that he could not be held to his valuation and "could not be compelled to sell" to CLA "without the benefit of [an] appraisal." *See e.g.*, Appellant Shawn Bidsal's Opening Brief, Case Nos. 80427 & 80831 ("Bidsal's First App. Brf."), p. 2 (35A.App.7872).

Bidsal could of course have sought to obtain his own appraisal before initiating the sale.[2] Once he offered a value and CLA accepted it, however, the value was set: he had no right to change the value via appraisal. OA, pp. 10-11, Art. V,

[2] Indeed, he testified at the First Arbitration that he had a broker's valuation in hand before he made his offer. First Arb. Hearing Tran. ("First Arb. Tr.") 239:4-10 (23A.App.5307). That valuation was significantly higher than the one Bidsal proposed to CLA. *Id.*

Sec. 4.2 (1A.App.67-68); *see also* First Arbitration Final Award ("Final Award"), p. 10, para 19 ("Mr. Bidsal had no right to demand an appraisal to determine the price to be paid by CLA"). Instead, the Agreement required him to honor his offer. *Id.* But Bidsal refused to do so.

b. Bidsal Refused to Open Escrow.

Although Bidsal disavowed his own valuation for Green Valley and insisted he could not be forced to sell, he now says CLA is at fault. According to Bidsal, CLA had the option of paying him anyway. "[C]ertainly," he argues, "nothing prevented CLA from sending [him] whatever amount CLA believed the purchase price to be." RAB, p. 46. This is not true. Under the Agreement, the parties were required to complete their deal via escrow. OA, pp. 10-11, Art. V, Sec. 4.2 (1A.App.67-68) (requiring the parties "to close escrow").

CLA attempted to open an escrow, telling Bidsal when it elected to buy his interest that it would work with him to that end. Letter dated Aug 3, 2017 (5A.App.1086). Shortly thereafter, CLA sent a follow-up suggesting the parties should use a local escrow firm. Email dated August 15, 2017 (9A.App.2033). Bidsal once again refused, insisting no escrow was permitted until CLA agreed to set the

company value by appraisal: "we can not [*sic*] open any escrow, since we do not agree." Email dated August 16, 2017 (9A.App.2033).[3]

Although Bidsal today argues "CLA could clearly have unilaterally opened an escrow and deposited … whatever money it believed it was obligated to pay," RAB, p. 46, n. 5, that is not what he told CLA in 2017. Given his refusal to honor his valuation or open escrow, CLA was not obliged to adopt a strategy of "send Bidsal a lot of cash and hope for the best."[4]

c. Bidsal Sought to Avoid Honoring His Valuation.

From 2017 through late 2020, Bidsal claimed he had a right to stop the sale because he no longer wanted to be bound by his valuation. *See e.g.*, Appellant Shawn Bidsal's Opening Brief ("Bidsal's First App. Brf."), p. 30 (35A.App.7900) (arguing the Agreement provided "the right to have the fair market value of his membership interest determined through [a] third-party appraisal … before he may be compelled to sell"). Now, Bidsal claims he never gave any indication he would refuse. RAB, p. 2. Bidsal's claims are again untrue.

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[3] Unfortunately, Bidsal's brief neglects to mention this 2017 correspondence, and offers no rationale why CLA should be held responsible for his refusal. RAB, *passim*.

[4] As discussed further *infra*, CLA did ask Bidsal for his sale price. When he refused to provide one, CLA was forced to estimate the number and assemble the necessary funds. CLA put more than $2 million on deposit – a number in excess of the actual sale price. But Bidsal still would not open escrow.

At the conclusion of the first arbitration, Judge Haberfeld found Bidsal had been obliged to sell his interest in GVC by September 3, 2017, but "refused to sell" so he could get an appraisal valuation. Final Award, pp. 3-4, para 4 (2A.App.249-50); *id.* at p. 11, para 20C (2A.App.257). Reviewing the record in the first confirmation proceedings, Judge Kishner likewise found Bidsal "refused to sell his interest." Order Granting Petition for Confirmation of Arbitration Award and Entry of Judgment and Denying Respondent's Opposition and Counterpetition to Vacate the Arbitrator's Award ("Conf."), pp. 3-4 ("Conf. Order") (2A.App.286-87).

Reviewing the record of the first arbitration and the first District Court decision, this Court rejected Bidsal's appeal and affirmed the District Court and the Final Award. *In re Petition of CLA Properties LLC*, No. 80831, March 17, 2022 ("Aff. Order"), *passim* (35A.7977-81). Bidsal's claim in this appeal – that he did not refuse to sell, and that he did not "ever indicate he would refuse," RAB, p. 2 – is simply at odds with the facts.

2. CLA Was Not at Fault for Bidsal's Refusal.

In his first visit to this Court, Bidsal explained he did not sell because he felt he "could not be compelled to sell … without the benefit of [an] appraisal." Bidsal's First App. Brf., p. 2 (35A.App.7872). Now, however, Bidsal contends the real reason the deal did not go through was because "**CLA never made any attempt**" to pay him. RAB, pp. 2-3 (emphasis in original). This is not true.

a. CLA Secured Funding for the Sale.

Setting the company value was the first step in determining a price under the Agreement, and accepting Bidsal's valuation was CLA's first step toward closing the deal. OA, pp. 10-11, Art. V, Sec. 4.2 (1A.App.67-68). CLA next asked Bidsal to specify what he expected to pay as buyer or to receive as seller. This would ensure agreement on a final price. Second Arbitration Hearing Transcript ("Second Arb. Tr.") 794:7-22 (29A.App.6514).

Bidsal did not answer, instead providing documents he said CLA could use to calculate the price on its own. Bidsal did not give a reason for his refusal. *Id.* Despite his lack of cooperation, CLA estimated the price and assembled sufficient funds to close the deal. By late August 2017, CLA had placed over $2 million on deposit with Wells Fargo Bank – more than $100,000 in excess of the actual sale price.[5] CLA then notified Bidsal that it had these funds available and suggested the parties proceed to escrow and close the sale. Letter dated August 28, 2017 (36A.App.8181-83).

Bidsal, however, refused to change his position, insisting that CLA "must" incur the additional time and expense of hiring appraisers before the parties would

[5] The ultimate price for Bidsal's interest came to just under $1.9 million. Second Arbitration Final Award ("Second Award"), p. 22 (1A.App.47). CLA was able to comfortably exceed that figure despite liquidity issues earlier in the year. *See* First Arbitration Hearing Transcript ("First Arb. Tr.") 108:18-109:4 (23A.App.5173-74).

"be able to move forward." Letter dated August 31, 2017 (19A.App.4329).[6] Notably though, Bidsal did not claim CLA's funds on deposit were insufficient, nor claim any other impediment to the sale. *Id.*

b. The First Arbitration Found No Fault with CLA.

Faced with Bidsal's refusal to proceed, CLA initiated the first arbitration. Demand for Arbitration Form dated September 26, 2017 (36A.App.8186-90). At no point in that arbitration did Bidsal allege CLA had failed in any of its obligations; he simply and wrongly insisted he had the right to an appraisal and to walk away from his valuation of Green Valley. Final Award, p. 4, para 6 (2A.App. 250).

As late as October 2020 – more than three years *after* the September 2017 date on which the Agreement obliged him to sell – Bidsal continued to insist that his offer invoking the buy-sell provision had merely been "the first attempt to negotiate a purchase price" for his interest. Letter dated October 19, 2020, p. 4 (16A.App.3624) (emphasis in original). Given his position *then* that the parties were in negotiations, Bidsal could not have believed CLA failed in any obligation to pay him. This stands in stark contrast to his position *now*. RAB, pp. 2-3.

The findings of the first arbitration were simple: Bidsal made his offer and reneged when CLA accepted it. He did not sell in 2017 because he did not want to abide by his offer. Final Award, pp. 8-9, para 16 (2A.App.254-55) ("Bidsal …

[6] Bidsal's letter calls for hiring several appraisers. *Id.*

repeatedly refused to acknowledge that CLA had and duly exercised a Section 4.2 option, alternatively to either sell or buy … based on Mr. Bidsal's offering $5 million as the value"). Bidsal did not, when appealing those findings, allege that any other issue scuttled the deal.[7] CLA was, as he well knew, not at fault for his refusal to sell.

c. The Second Arbitration Likewise Found No Fault with CLA.

From late 2017 through late 2019, Bidsal drained $500,500 in distributions[8] from Green Valley – money he would not have been able to take had he lived up to his obligation to sell his interest in September 2017.[9] Not until *after* he had taken that money did Bidsal initiate a second arbitration, alleging it was needed to resolve a dispute over the purchase price. Demand for Arbitration Form dated February 7, 2020 (1A.App.100-05).[10] Notably, Bidsal did *not* allege CLA had failed any duties owed him, under the Agreement or otherwise. *Id.*, *passim.*

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[7] *See* Respondent's Opposition to CLA's Petition for Confirmation of Arbitration Award and Entry of Judgment and Counterpetition to Vacate Arbitration Award ("Bidsal's Mot. to Vacate"), *passim* (35A.App.7935-75) (District Court); *see also* Bidsal's First App. Brf., *passim* (35A.App.7861-934) (Supreme Court).

[8] *See* Green Valley Commerce Distribution 2011-2019, p. 2 ("Distr. List") (35A.App.7984); *see also* Appellant's Opening Brief, pp. 9-10 (summarizing distributions to Bidsal after the required September 2017 sale date).

[9] Final Award, p. 11, para 20C (2A.App.257) ("Bidsal was obligated to close escrow and sell his 50% Membership Interest to CLA 30 days after CLA elected to buy, i.e. by September 3, 2017").

[10] Curiously, when asked the price he contended was owed for his interest, Bidsal responded – months after initiating the second arbitration – that he still was "unable

CLA answered and counterclaimed for repayment of the distributions taken by Bidsal after September 3, 2017 – the date on which he had been obliged by the Agreement to sell his interest. Respondent's Answer and Counterclaim (1A.App.151-57). The second arbitration proceeded slowly, compromised by various delays due to the COVID pandemic. Roughly eight months after CLA answered,[11] Bidsal filed an amended demand arguing for the first time that CLA "never tendered the purchase price" and so forfeited its right to buy. Bidsal's First Amended Demand for Arbitration, pp. 1-2, paras 4a & 4b (1A.App.201-02).[12] As Bidsal later clarified, he now was challenging CLA's right to buy, dating back to

to calculate" that price and claimed any response would be "conjectural" until after the end of the arbitration. Bidsal's Responses to Respondent CLA Properties, LLC's First Set of Interrogatories, dated June 22, 2020 ("Bidsal First Rog Resp."), at 1:24-2:7 (14A.App.3255-56).

[11] The second arbitration proceeded slowly, compromised by various delays due to the COVID pandemic. *See* Bidsal First Rog Resp. at 2:4-7 (14A.App.3256) (asserting Bidsal could not provide complete answers due to "restrictions imposed by the COVID-19 inhibiting and preventing access to the needed records"); *see also* Bidsal counsel letter dated July 24, 2020 (15A.App.3334-41) (recounting COVID delays, asserting "it is now clear that all of the deadlines previously set are unrealistic and should be extended" (15A.App.3334) and requesting an indefinite stay in the proceedings "until such time as Bidsal's staff is able to return to the office" (15A.App.3341)).

[12] Bidsal also added unsuccessful demands for management fees and indemnification arising after 2017, as well as a demand that Green Valley "immediately pay some or all" of his expenses in the second arbitration. *Id.*

2017. Second Arb. Tr. 43:7-15. Bidsal was thus attacking the result of the first arbitration.

Judge Wall rejected this challenge *in toto*. Ruling on whether CLA should have paid prior to the first arbitration, he concluded this question "needed to be addressed in the original … proceeding before Judge Haberfeld." Second Award, p. 8, para IV.A. (1A.App.33). The Second Award left undisturbed Judge Haberfeld's core findings that Bidsal was obligated to sell by September 3, 2017; that Bidsal refused to sell; and that Bidsal's rationale for refusing was his insistence on a nonexistent right to appraisal. Like Judge Haberfeld, Juge Wall found no wrongdoing by CLA. Second Award, *passim.*

For the time period after the first arbitration, Judge Wall likewise found no wrongdoing by CLA. Instead, he noted Bidsal had filed a motion to vacate the Final Award immediately after it was issued; that when his motion was denied, Bidsal obtained a stay of the Final Award to take an appeal to this Court;[13] and that his appeal remained pending at the time of the second arbitration.[14]

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[13] Second Award, p. 8, para IV.A. (1A.App.33).

[14] Second Award, p. 6, para I, n. 5 (1A.App. 31). Bidsal's brief claims "After the entry of the [District Court order confirming the Final Award], 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." RAB, p. 33 (emphasis omitted). As this Court is aware, Bidsal conceded nothing. His appeal challenged

Bidsal's current brief downplays these findings, saying they merely "excused any 'perceived failure'" by CLA to tender payment. RAB p. 28. In truth, however, the language of the Second Award was much broader. "Under these facts," Judge Wall wrote, "it is the determination of the Arbitrator that ***any perceived failure of [CLA]*** to tender ***was appropriate*** given the state of the proceedings, ***and*** is ***consistent with [Bidsal's] actions***" following the first arbitration. Second Award, p. 8, para IV.A. (1A.App.33) (emphasis added).[15] Given Bidsal's own machinations, there was never a time when CLA could have paid, or when doing so would have changed his position.

3. Judge Haberfeld Did Not Extend Bidsal's Contractual Deadline.

At the end its failed efforts to blame CLA for Bidsal's refusal to close the deal in September 2017, we find the centerpiece of Bidsal's brief: his claim that the first arbitration "made the transaction prospective." RAB, pp. 35-36. Once again, Bidsal's claim is untrue. The Final Award did not change the terms of the

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not only CLA's right to buy, but also raised an untimely challenge to the arbitrator's authority to order him to sell. Bidsal's Opening Brf., pp. 56-60 (35A.App.7926-30).

[15] Similarly, during the second arbitration, Judge Wall said "it would have been inappropriate" to tender funds while Bidsal's motion to vacate the Final Award was pending at the District Court, "inappropriate for there to be a tender" while Bidsal was seeking to stay Judge Kishner's confirmation of the Final Award, and "futile" once the stay was issued pending the appeal to this Court. Second Arb. Tr. 16:6-24 (19A.App.4433). Ultimately, Judge Wall ruled for CLA on the issue of tender. Second Award, p. 31 (1A.App.56). There simply is no finding anywhere that CLA acted improperly.

Agreement, and Bidsal – as shown by his prior filings in this Court and the court below – did not ever believe that it did.

The Final Award is clear as to Bidsal's duties under the Agreement: "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." Final Award, p. 11, para 20C (2A.App.257). The Final Award is equally clear in finding that Bidsal failed to comply: "Mr. Bidsal refused to sell his Green Valley membership interest to CLA based on his $5 million valuation," instead demanding non-existent appraisal rights. *Id.* at pp. 3-4, para 4 (2A.App.249-50).

The relief granted in the Final Award differs from that stated in Bidsal's brief, in that it required Bidsal, within ten days of its issuance, to perform two tasks:

> Within ten (10) days of the issuance of the final award in this arbitration, Respondent Sharam Bidsal also known as Shawn Bidsal ("Mr. Bidsal") shall (A) transfer his fifty percent (50%) Membership Interest in Green Valley Commerce, LLC ("Green Valley"), free and clear of all liens and encumbrances, to Claimant CLA Properties, LLC, at a price computed via 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) ***and, further***, ***(B) execute and deliver any and all documents necessary to effectuate such sale and transfer***.

Final Award, p. 14, para 24 (2A.App.260) (emphasis added).

Regrettably, the Final Award's subparagraph B is omitted from Bidsal's brief. RAB, *passim*. It was, of course, impossible for a decision issued on April 5, 2019, to compel Bidsal to deliver documents in 2017. As Bidsal knew, it could only set a deadline in the future.

Though Bidsal now contends that by telling him to deliver the documents in ten days, Judge Haberfeld rewrote the parties' obligations – excusing Bidsal's already-breached duty under the Agreement to close by September 3, 2017 – the Final Award contains no such absolution. *Compare* RAB, pp. 35-36 *with* Final Award, *passim.* Nor is there any reason to conclude Bidsal believed it did.[16]

In his failed attempt to vacate the Final Award in federal court, for example, Bidsal did not argue his time to close was extended; instead, he complained the Final Award merely imposed "an arbitrary and commercially unreasonable deadline of 10 days … to complete the transfer of his membership interests." He even argued the deadline should be removed from the Final Award. Plaintiff Shawn Bidsal's Motion to Vacate Arbitration Award, filed April 9, 2019, U.S. Dist. Ct. Case No. 2:19-cv-00605 ("Fed. Mot."), p. 34 (10A.App.2152).[17] Similarly, in his first brief to this

[16] Arbitrators are, as Bidsal has previously advised this Court, not at liberty to rewrite the underlying contract. *See e.g.*, Bidsal's Opening Brf., pp. 25-26 (35A.App.7895-96) (arguing an arbitrator must simply "follow the agreement") (citations omitted).

[17] Bidsal likewise decried the delivery date as merely an "arbitrary … deadline" unconnected to the contract in his pleadings at the District Court. *See* Bidsal's Mot. to Vacate, p. 28 (35A.App.7963).

Court, Bidsal described the 10-day deadline for delivery as "a specific performance remedy," rather than a change to the Agreement. Bidsal's First App. Brf., p. 58 (35A.App. 7928).

Judge Haberfeld did not rewrite the Agreement to retroactively approve Bidsal's refusal, nor, as discussed in CLA's opening brief and below, could he have done so. The Final Award did not forgive Bidsal's prior obligations. It merely imposed additional ones.

B. IT WAS ERROR FOR THE SECOND AWARD TO PERMIT BIDSAL TO RETAIN THE DISTRIBUTIONS.

Despite Bidsal's many misstatements, the facts needed to resolve this appeal are straightforward. Bidsal triggered the buy-sell provision of the Agreement, offering a $5 million valuation which CLA accepted. CLA's acceptance triggered a 30-day countdown to closing, which expired on September 3, 2017. Rather than stand by his offer and use the 30 days to resolve any outstanding issues, however, Bidsal reneged.

CLA tried to press forward with the deal: gathering sufficient funds prior to the closing date for the purchase, seeking to verify Bidsal's final sale price, and trying to secure his agreement on an escrow company. But Bidsal refused to cooperate, insisting the parties could not move forward without hiring multiple experts to perform an appraisal to which he had no right under the Agreement. By

delaying the sale, Bidsal was able to pay himself $500,500 in distributions he would not have received had the deal closed, as the Agreement required, in 2017.

1. Neither Arbitration Could Excuse Bidsal's Duty to Sell by September 2017.

CLA showed in its opening brief that the first arbitration determined the date on which Bidsal was obliged to sell. CLA also established that the second arbitration had no authority to set aside any of findings from the first, particularly while the case was on appeal. More importantly, neither arbitrator ever had authority to rewrite the Agreement.

When "interpreting an agreement a court may not modify it or create a new or different one. A court is not at liberty to revise an agreement while professing to construe it." *Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 112, 424 P.2d 101, 104-05 (1967). Bidsal's response, as noted above, falsely asserts that Judge Haberfeld converted Bidsal's past due obligation to sell into "a prospective transaction." RAB, p, 36. But as discussed above, Judge Haberfeld could not and did not do any such thing. The Final Award affirmed by this Court was crystal clear: Bidsal was obliged to sell his interest by September 3, 2017. Bidsal simply refused.

It was the Second Award that sought to change the contract, overruling the Final Award and this Court, to conclude the date for closing the deal under the Agreement "has not yet come to pass." Second Award, p. 23, para IV.D.

(1A.App.48). But the Second Award was not empowered to change the date on which Bidsal's performance was due under the Agreement, or to disturb the finding that he refused to sell – a date, and a refusal, which were established in the first arbitration, confirmed by the District Court, and affirmed by this Court.

Bidsal's defense of the Second Award rests solely on his own obstruction: "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." RAB, p. 20. (emphasis added). This is not true, because CLA never breached its obligations. Judge Wall found no fault with CLA and concluded its actions were "appropriate" given Bidsal's efforts to forestall the sale. Second Award, p. 8, para IV.A. (1A.App.33). Bidsal was not paid prior to this Court's decision affirming the First Award because *until that decision, Bidsal still refused to sell.*

The finding touted in Bidsal's brief that he "continued to act as a member" of Green Valley[18] disregards the fact – established in the Final Award, confirmed by the District Court, and affirmed by this Court – that Bidsal held his membership interest only because *he refused to sell it in September 2017, despite the terms of the Agreement.* Final Award, p. 11, para 20C (2A.App.257). Like a defendant seeking

[18] *See* RAB p. 26 and p. 29, *citing* Second Award, p. 23, para IV.D. (1A.App.48).

absolution for parricide because he is an orphan, Bidsal says he should be excused for taking the distributions because he successfully blocked the deal from closing in 2017. But long-standing principles of contract law forbid this.

2. Bidsal Cannot Benefit from His Refusal to Sell.

"The key determination" in this appeal, Bidsal argues, "is that CLA never completed its obligations under the Agreement … because CLA failed to pay the purchase price." RAB, p. 23. This, he says, is "the crux" of his position. *Id.*

"The law is clear, however, that any affirmative tender of performance is excused when performance has in effect been prevented by the other party to the contract." *Cladianos v. Friedhoff*, 69 Nev. 41, 45-46, 240 P.2d 208, 210 (1952). "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure." *Id.*, 69 Nev. at 46, 240 P.2d at 210, *quoting* 3 Williston on Contracts (Rev. Ed.) 1952 § 677.

Physical obstruction is not required. "[W]here one party to an executory contract refuses to treat it as subsisting and binding upon him, or, by his act and conduct, shows that he has renounced it, and no longer considers himself bound by it, there is, in legal effect, a prevention of performance." *Cladianos*, 69 Nev. at 46, 240 P.2d at 210. (citation omitted). Bidsal showed he did not consider himself bound by the Agreement's obligation to honor his valuation when he demanded an appraisal

to which he had no right. When he insisted he could not be forced to sell without an appraisal, he declared his intent not to perform. By his refusal, Bidsal excused CLA's duties. *See e.g., Stratosphere Litigation LLC v. Grand Casinos Inc.*, 298 F.3d 1137 (9th Cir. 2002) (anticipatory repudiation of contract obligation discharged the other party's duty to fund escrow).

In *Kahle v. Kostiner*, 85 Nev. 355, 455 P.2d 42 (1969), this Court held that when the seller refused to fulfill the terms of his agreement, he could not use his own conduct to escape liability. 85 Nev. at 358, 455 P.2d at 44. "The fund from which the commission was to be paid never came into existence because of the repudiation by the seller. He cannot now use his own conduct which prevented its creation to his advantage." *Id.*, 85 Nev. at 358-59, 455 P.2d at 44 (citations omitted). "It is a general principle of contract law that if one party to a contract hinders, prevents or makes impossible performance by the other party, the latter's failure to perform will be excused." Richard A. Lord, 13 *Williston on Contracts* § 39:3 (4th ed. 2023).

"For [this] prevention doctrine to apply [a party] need only show that [the other] materially contributed to the non-occurrence of the condition." *Cox v. SNAP, Inc.*, 859 F.3d 304, 308 (4th Cir. 2017). Here, valuing the company was the first component in calculating the purchase price. Bidsal concedes it would be "difficult, if not impossible" to derive a final price without each component. RAB, pp. 14-15. "The prevention doctrine is a generally recognized principle of contract law

according to which if a promisor ***prevents or hinders*** fulfillment of a condition to his performance, the condition may be waived or excused." *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 725 (4th Cir. 2000) (emphasis added); *see also Northeast Drilling v. Inner Space Services*, 243 F.3d 25 (1st Cir. 2001).

A party "whose performance of its promise is prevented by the other party is not obligated to perform and is excused from any further offer of performance. In turn, the preventing party is not allowed to recover damages for the resulting nonperformance ***or otherwise benefit from its own wrongful acts***." Richard A. Lord, 13 *Williston on Contracts* § 39:3 (4th ed. 2023) (emphasis added). "[E]lementary principles of fairness and equity" provide that "when one party to a contract unilaterally prevents the performance of a condition upon which his own liability depends, the culpable party may not then capitalize on that failure." *Apalucci v. Agora Syndicate, Inc.*, 145 F.3d 630, 634 (3d Cir. 1998). Conversely, when a party "is prevented from performing the balance of the term of his contract," he is entitled to damages, including lost profits – in this case, the distributions from Green Valley. *See Eaton v. J. H. Inc.*, 94 Nev. 446, 450, 581 P.2d 14, 17 (1978).[19]

[19] *See e.g., Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 277 Cal. Rptr. 40 (Ct. App. 1990) (where plaintiff would have had "complete and sole ownership" of a company but for defendant's refusal to sell, the lost income stream from that property is the proper measure of damages).

CLA could have performed. It was Bidsal who refused to honor his value, would not state his price, and insisted the parties could not open an escrow because they did not agree on an appraisal.[20] CLA did not refuse to buy. Instead, as Judges Haberfeld and Kishner expressly found in their rulings[21] confirmed by this Court,[22] Bidsal refused to sell. Until he agreed to sell, CLA had no obligation to tender.

CONCLUSION

Under the law, Bidsal cannot benefit, nor can CLA be allowed to be damaged, by his refusal to sell. For all the foregoing reasons, this Court should reverse the District Court's order confirming the second arbitration award.

DATED this 6th day of March, 2024

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[20] It is immaterial whether CLA could have opened an escrow on its own. When one party leads another to believe they cannot perform a certain act, it discharges the other party's duty to perform that act. *Enloe v. Blain*, 94 Nev. 198, 200, 577 P.2d 60, 61 (1978). Moreover, opening an escrow would have been futile, as Bidsal had already stated he would not sell absent an appraisal.

[21] *See* Final Award, pp. 3-4, para 4 (2A.App.249-50); Conf. Order, pp. 3-4 (2A.App.286-87).

[22] Aff. Order, *passim* (35A.7977-81).

CERTIFICATE OF COMPLIANCE

1. 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 type style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 5,542 words.

3. 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to 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: March 6, 2024

/s/ 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 document was electronically filed with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the court's Master Service List.

DATED: March 6, 2024

/s/ Margie Nevin
Margie Nevin
Employee of Lemons, Grundy & Eisenberg