SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of CAPITAL ENTERPRISES CO., Petitioner, -and- ALVIN DWORMAN, Respondent.	Index No. 653961/2016 Mot. Seq. No. 005

PETITIONER CAPITAL ENTERPRISES CO.'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO CONFIRM, AND IN SUPPORT OF ITS CROSS-MOTION TO VACATE, THE CORRECTED PARTIAL FINAL ARBITRATION AWARD

Y. David Scharf
David A. Piedra
Alvin C. Lin
Thomas B. Gardner
MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
(212) 735-8600
Attorneys for Petitioner Capital Enterprises Co.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

STATUTES

PRELIMINARY STATEMENT

It is highly unusual when an experienced Arbitrator renders an award that so greatly muddles a set of facts that are, at their essence, straightforward. Faced with the unusual circumstance where one of the parties [redacted], the Arbitrator took a zigzagged approach that relieved Respondent of common standards for evidentiary proof, replaced uncontroverted evidence with supposition, and constructed a decision that was wrought with legal and factual contradictions. The award was wrong, irrational and must be overturned.

More than thirty-five years ago, Alvin Dworman asked Mickey Palin to join Capital Properties Company (the "Partnership") as a fifty-percent partner to help turn around the Partnership's midtown properties. The partners made major business decisions together, and Palin (later through Petitioner Capital Enterprises Co. ("Enterprises")) conducted the day-to-day property management pursuant to the partners' agreement (the "Partnership Agreement"). The arrangement worked to the benefit of both partners for decades, during which time the management strategy remained unchanged and the business always profitable. In 2015, the partners decided to wind up the Partnership. However, immediately after reaching a dissolution agreement involving a tax-advantaged swap of the assets, their relationship suddenly broke down. Instead of carrying out the agreement, Dworman vanished, and his attorneys sued his long-time partner, alleging mismanagement, disavowing his participation in any Partnership decisions during the past thirty-five years, and seeking over $30 million in damages.

These disputes were referred to arbitration ("Capital Enterprises Co. v. Alvin Dworman," JAMS No.1425022927, hereinafter, the "Arbitration") to decide whether the partners had breached any obligations toward each other and how the assets should be accounted for in a

final dissolution. On July 30, 2018, a Corrected Partial Final Award (the "Award") issued, holding that, among other things, Petitioner had breached its fiduciary duties toward Dworman by mismanaging the Partnership assets without Dworman's knowledge or consent, and had diminished the value of the Partnership assets by over $20 million. The Award rejected the partners' 2015 dissolution agreement and ordered that the Partnership assets be sold at public auction. Respondent now moves to confirm the Award.

Enterprises respectfully submits that the motion to confirm must be denied, and that the Award should be vacated and thrown out because it is unfounded, unreasonable and fundamentally irrational. An arbitration award must be cast aside "where the arbitrator rendered an irrational decision." *Sweeney v. Herman Mgt., Inc.*, 85 A.D.2d 34, 38 (1st Dep't 1982). As the Courts have explained, an arbitration award is irrational if the arbitrator "gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties." *National Cash Register Co. v. Wilson*, 8 N.Y.2d 377, 383 (1960); *see Rochester City Sch. Dist. v. Rochester Teachers Ass'n*, 41 N.Y.2d 578, 582 (1977).

The Award is irrational because it rewrote the parties' agreement and course of conduct in favor of a scenario that never existed, and ignored the very requirements of the Partnership Agreement. The Arbitrator recognized that Dworman was the managing partner under that agreement and an "extraordinarily sophisticated person" – yet also concluded that Dworman remained oblivious of the Partnership's operations for decades. Incredibly, the Award then found that Dworman did not violate his fiduciary duties as managing partner despite that he was (according to the Award) completely uninvolved in the business for over 30 years. There is no rational way to reconcile these findings with the Partnership Agreement, which appointed Dworman the managing partner, or the parties' decades-long relationship.

The Award is irrational because the Arbitrator rejected the commercial realities of the partners' longstanding relationship. There was no evidence from Dworman or any other person with knowledge to support the Arbitrator's finding that Dworman was unaware of the Petitioner's day-to-day management. Contrary to the Award's unsupported findings, the uncontroverted evidence, including from non-parties, was that Dworman actively participated in Partnership decision-making and was fully apprised of the Partnership's financial progress. Dworman submitted no evidence of his own and chose not to testify at the hearing. Yet the Arbitrator rejected the only competent evidence in the record, and did so by citing selected snippets of Dworman's [redacted] deposition testimony. Dworman's own attorneys had strenuously argued (and Dworman's physicians confirmed) that [redacted]. The deposition corroborated this. The Arbitrator nevertheless used selected parts of the [redacted] to overturn otherwise uncontroverted record evidence. (And in the height of irrationality, the Arbitrator refused to credit Dworman's separate deposition statements that revealed [redacted] The Arbitrator's reliance on select portions of Dworman's [redacted] as the only basis for his finding that Dworman was uninvolved in Partnership affairs was irrational.

The Award is irrational because the Arbitrator unwound the partners' 2015 agreement to consent to dissolution through a tax-advantaged swap of partnership interests. That agreement was reached at an in-person meeting, the details of which were corroborated by three of the four witnesses to the agreement, with only Dworman himself (the fourth witness) choosing not to testify. The parties documented the agreement in a contemporaneous non-legal

memorandum prepared by the Partnership's tax accountant. Yet, without any contradictory evidence by Dworman, the Arbitrator backhandedly rejected the agreement. The Arbitrator also discounted written evidence and testimony by Dworman's own representatives that there was a deliberate, written plan to prevent Dworman from complying with the Agreement.

Finally, the damages conclusion is patently irrational. The Award determined that the value of the Partnership properties was diminished by approximately $21.5 million as a result of Petitioner's alleged mismanagement. But the Arbitrator also ordered that the properties be sold, and their values thus be determined, through a future public sale. In so doing, the Arbitrator determined that Petitioner caused a diminution in value of the Partnership properties ***even before their current value could be determined through the ordered sale***. This contradiction is irreconcilable and irrational.

Petitioner is not advancing a garden-variety arbitration award challenge. Here, the Award layers irrational finding upon irrational finding, colored by irrelevant, disparaging statements concerning Petitioner, revealing an animus that appears to have influenced the Arbitrator's assessment of liability and damages.[1] The Award is ultimately premised on pure supposition that Dworman had been unaware of Petitioner's management of the Partnership, because he did not testify. The resulting Award is punitive to Petitioner because it applies a higher standard of duty to Petitioner than to Dworman and directs liquidation in a manner that will inflict enormous financial harm on Petitioner. For the reasons set forth below, the motion to confirm should be denied and the cross-motion granted.

---

[1] For example, on the very first page of the Award, the Arbitrator notes that "Palin made no capital contribution" to the Partnership, an assertion that, whether true or not, is utterly irrelevant to any claim or defense raised by either party, but which seems intended to disparage Mickey Palin's contributions to the Partnership.

PROCEDURAL BACKGROUND

The Arbitration was commenced, pursuant to Court order dated January 12, 2017, and by Statement of Claim dated January 27, 2017. The Arbitration hearing was held on December 4-8, 2017 and January 3, 2018. The Arbitrator issued a corrected partial final Award on July 30, 2018 (Ex.A)[2] and a clarification of the corrected Award on September 27, 2018 (Ex.B).

ARGUMENT

I. THE AWARD IS IRRATIONAL AND SHOULD BE VACATED BECAUSE THE ARBITRATOR IMPERMISSIBLY REWROTE THE PARTNERSHIP AGREEMENT AND THE PARTIES' DECADES-LONG RELATIONSHIP

New York courts will vacate an arbitration award where "the arbitrator exceeds his power…[and] gives a completely irrational construction to an agreement, thereby effectively creating a new contract between the parties." *Sweeney*, 85 A.D.2d at 38. An arbitration award predicated upon an irrational construction of the parties' agreement is subject to vacatur under CPLR § 7511(b)(iii). *See Riverbay Corp. v. Local 32-E*, 91 A.D.2d 509, 510 (1st Dep't 1982). Here, the Arbitrator's contradictory determinations that Dworman (1) was managing partner under the Partnership Agreement (*see* Ex.A at 51), (2) did not participate in, or even know about, the management of the Partnership properties for thirty-five years, but (3) bore no responsibility to participate in Partnership decision-making even though he was the managing partner under the Partnership Agreement, are utterly irreconcilable. The Arbitrator's contradictory conclusions only became possible because the Arbitrator re-wrote the parties' contractual obligations and

---

[2] All exhibits referenced herein are attached to the Affirmation of Y. David Scharf dated November 12, 2018.

ignored the uncontradicted evidence of their 35-year relationship. This renders the Award irrational and requires its vacatur.

A. The Arbitrator Improperly Rewrote The Partnership Agreement To Remove Dworman's Duties As Managing Partner While Holding Enterprises To The Strict Letter Of The Agreement

The Award rewrote the Partnership Agreement to relieve Dworman of his written Partnership obligations. It is undisputed that Dworman was managing partner under the Partnership Agreement: "[t]he business and affairs of the Partnership shall be carried on and managed by Dworman" (Ex.C §4.1). The parties' written agreement thus charged Dworman with the fiduciary obligation to "carry on and manage" the affairs of the Partnership. This provision was never amended by the parties.[3]

Despite Dworman's managerial obligations, the Arbitrator accepted Dworman's argument that for thirty-five years he was unaware of, and uninvolved in, the management of the Partnership. (Ex.A at 5). And yet Enterprises submitted substantial uncontradicted evidence that Dworman *was* directly involved in making all key Partnership decisions jointly with Petitioner during the course of the Partnership, and that Dworman was constantly apprised of the financial performance of the investment (*See* Ex.Q Tr.819:3-820:12, 870:14-871:25 (Hoffman), 67:15-68:2, 75:20-77:10, 81:18-82:8 (M.Palin); Ex.O at 13:11-14:5). Dworman never testified to contradict Petitioner's evidence that Dworman was directly and actively involved in the Partnership's affairs until 2015. Importantly, the only witness called by Dworman's counsel with first-hand knowledge of the Partnership history – Mitch Waxman – confirmed that Dworman proactively reviewed the Partnership's financials on a regular basis (*see infra* at 8).

---

[3] Importantly, the Arbitrator concluded that the Partnership Agreement could only be amended in writing (Ex.A at 24), and there was no writing submitted to suggest that Dworman was relieved of his managing partner duties.

The Arbitrator incongruously relieved Dworman of the contractual obligation to manage the Partnership while rejecting Petitioner's uncontroverted evidence of Dworman's involvement. The Arbitrator recognized that Dworman was an "extraordinarily sophisticated person" (Ex.R Tr.18:12-16) with extensive real estate holdings, and ruled that the Partnership Agreement could not be altered without written amendment. (*See* Ex.A at 24). Yet, the Arbitrator still concluded "that...most – if not all – important Partnership decisions were made by Palin, without either any disclosure or without full and complete disclosure to Dworman" – notwithstanding that Dworman never testified to what he knew or didn't know. (*Id.* at 5).

The Arbitrator's conclusion that Dworman could fulfill his fiduciary duties while completely ignoring his managing partner duties was similarly irrational. (Ex.A at 51-55). The Arbitrator's recognition that Dworman had abandoned his managing partner duties should have instead led inexorably to the conclusion that he breached his fiduciary duties to the Partnership. *See, e.g.*, *Bunton v. Houze*, 40 Misc. 3d 1212(A) (Sup. Ct. N.Y. Cty. 2013) (sustaining breach of fiduciary duty claim based on, inter alia, allegations that a partner "abandoned his position and responsibilities"). Yet, the Arbitrator irrationally concluded the exact opposite – without ever hearing any explanation from Dworman.

Reconciling the Arbitrator's contradictory holdings required the Arbitrator to erase Dworman's legal obligations from the Partnership Agreement. This requires vacatur of the Award as "effectively re[writing]" the partnership agreement "in a manner that was unjust and in violation of the spirit of the agreement." *Kudler v. Truffelman*, 93 A.D.3d 549, 550 (1st Dep't 2012) (vacating portion of arbitration award because arbitrator exceeded her powers and "gave a completely irrational construction to the provisions of [a] partnership agreement"); *see also*

Matter of City of N.Y. v. District Council 37, 161 A.D.3d 435 (1st Dep't 2018) (affirming vacatur of award because the award "rewrote the contract for the parties").

B. Dworman Submitted No Evidence To Support That Dworman Was Uninvolved In Partnership Business

Dworman submitted no evidence contradicting Petitioner's evidence that Dworman was fully aware of Petitioner's Partnership decision-making. The Arbitrator nevertheless found that Dworman was completely unaware. This finding was predicated on *no* evidence, because Dworman declined to testify at the hearings despite the overwhelming evidence of his extensive involvement in the Partnership business, including:

- Dworman's personal accountants handled the Partnership's finances for decades. (Ex.Q Tr.2097:9-2102:17 (Waxman); Ex.H).
- Mitch Waxman, Dworman's longtime accountant and trusted advisor, confirmed that Dworman actively monitored the Partnership finances. (Ex.Q Tr.2114:21-2118:20, 2119:8-2123:13).
- Mickey Palin testified that Dworman met him on a regular basis to discuss Partnership issues, and Dworman was involved in all major Partnership-related decisions. (*See supra* at 6).
- Alan Hoffman testified that Dworman tasked key individuals with receiving and reviewing financial reports, and with remaining in contact with the accountants and Palin's staff. (Ex.Q Tr.842:25-843:19, 870:14-871:25; Ex.O at 77:12-79:19).

It also absolutely defies the evidence that Dworman lacked knowledge of the building management, when he made sure that his family members, friends and business associates were given free or reduced rents in one of the buildings for decades. (Ex.Q Tr.1405:8-1406:10, 1432:13-24; 1440:8-23 (D. Palin); Tr.86:23-87:9 (M. Palin); Tr.2052:9-24 (Hoppe)). None of this evidence was controverted in any way by Dworman or any other witness with first-hand knowledge. Yet, the Arbitrator disregarded this uncontroverted evidence and concluded Dworman was unaware of the Partnership business for decades.

The Arbitrator's conclusion that 969 Third Avenue (the commercial portion of 200 East 58th Street) should be excluded from accounting is further evidence that he erased Dworman's involvement in and responsibilities to the Partnership. The Arbitrator admitted that Dworman contractually agreed to convey 969 Third Avenue to the Partnership. (Ex.A at 57-58; *see also* Exs. M-N, Ex.Q Tr.101:16-102:12). Instead, Dworman sold it to a third party, kept the proceeds for himself, and promised Palin that he would later make the Partnership whole. (Ex.Q Tr.109:6-110:14; Ex.L). Rather than holding Dworman to his contractual and fiduciary duties to reimburse the Partnership, the Arbitrator concluded that 969 was never a Partnership asset. (Ex.A at 58). But the only reason 969 did not become a Partnership property was because Dworman broke his promise and instead sold it *for his own personal gain*. This conclusion was irrationally circular.

C. The Arbitrator Irrationally Relied On [redacted] From Dworman As The Sole Evidence To Contradict The Record

During closings, the Arbitrator observed that Dworman had failed to offer any first-hand evidence to support his position concerning his involvement in the historical operations of the Partnership:

> Is there any evidence in this record besides looking at, you say, the inconsistencies of what Mr. Palin's testimony is that rebut his statement that these parties operated for 35 years a partnership between Mr. Dworman an extraordinarily sophisticated person from everything I have seen, but there is nothing to be rebutted. I am not making fun, I am asking a question.

(Ex.R Tr.17:16-18:16).

Despite acknowledging Dworman's failure to refute the evidence of his participation in Partnership affairs, the Arbitrator nonetheless found that Dworman was unaware of the Partnership's management for 35 years. The Arbitrator ignored every piece of

uncontradicted evidence proving Dworman's knowledge of the business, and instead credited the [redacted] from Dworman's videotaped deposition. This deposition was limited to two ninety-minute sessions, and Dworman's testimony was [redacted] (*See, e.g.,* Ex.P at 7:5-9:16, 95:22-97:24, 102:6-104:15). The Arbitrator ignored Dworman's [redacted], and concluded that, "Dworman's videotaped deposition, [redacted] his demeanor and statements, convincingly demonstrated that he was neither a knowing, nor a willing partner in Palin's self-interested management…" (Ex.A at 5). A review of Dworman's deposition, however, shows that Dworman was [redacted]

[redacted]

[redacted]

[redacted] And – as the Arbitrator recognized – Dworman never proffered any other first-hand fact witness testimony to rebut the testimony by Mickey and Dean Palin, Mitch Waxman, and Alan Hoffman[5], all of whom testified to Dworman's continued knowledge of and involvement in the financial operations of the Partnership. Even accepting the Arbitrator's findings regarding Petitioner's alleged misappropriation – which Petitioner categorically disputes – there was no evidence to support the Arbitrator's determination that Dworman did not agree to the Partnership management implemented by Enterprises consistently over 35 years.

Moreover, in his efforts to bolster [redacted], the Arbitrator ignored the balance of Dworman's testimony, determining that there was "no basis in the record [as Enterprises alleged], that 'Dworman Walked Away From the Partnership and Hoppe Solidifie[d] Her Control Over the Business" (Ex.A at 51 n.49). But Dworman stated [redacted] (Ex.P at 14:7-10; 21:10-14; *see id.* at 36:15-22). It was irrational for the Arbitrator to adopt some of Dworman's [redacted] but ignore the express testimony from Dworman that contradicted the Arbitrator's findings.

---

4 [redacted] (Ex.Q Tr.552:7-554:22; Ex.T).

5 Alan Hoffman was the Partnership's accountant for decades, and Mitch Waxman personally handled accounting work for Dworman's other businesses (and Dworman himself) for years. (Ex.Q Tr.2097:9-2098:15 (Waxman)). Dean Palin, Mickey Palin's son, began working for Carard in or around 1990 and eventually oversaw maintenance and repairs at the Partnership properties. (Ex.Q Tr.247:4-248:11, 320:20-322:7).

The Arbitrator's willingness to credit Dworman's [redacted] is more troubling because it required him to ignore [redacted] Dworman's attorneys chose not to call Dworman to testify at the hearing, and made clear that they objected to any further testimony because [redacted] (*See* Ex.P at 184:4-185:12. Remarkably, the Arbitrator faults *Enterprises* – not Dworman – for Dworman's failure to testify at the hearing (Ex.A at 18), despite that Dworman's deposition testimony amply demonstrated [redacted]

Indeed, Dworman's only witness with first-hand knowledge of the Partnership's historical operations was Mitch Waxman, Dworman's personal accountant and advisor whose role was to monitor the Dworman's investment. Waxman repeatedly *confirmed* that Dworman actively monitored the Partnership's finances, and knew (for example) of the 4% management fee paid to the management company, and other alleged "misconduct" on which the Award is predicated. (Ex.Q Tr.2114:21-2116:18).

The only other purported fact witness called by Dworman's attorneys at the hearing was BJ Hoppe, who worked for Dworman, but who had no historical involvement in the Partnership business, and therefore lacked first-hand knowledge of how the business or properties were run by the partners for 35 years. (Ex.Q Tr.1863:20-24). Yet the Arbitrator

credited Hoppe's second-hand testimony over the testimony of multiple fact witnesses (including Dworman's own accountant) with years of experience working for the Partnership.

The Award should be vacated as irrational, since there was no rational basis for determining that Dworman was unaware of how the properties were being managed. *See Country-Wide Ins. Co. v. Radiology of Westchester, P.C.*, 147 A.D.3d 652 (1st Dep't 2017) (vacating award as arbitrary because it "irrationally ignored petitioner's uncontroverted evidence"); *Matter of BMW of N. Am., LLC v. Riina*, 149 A.D.3d 420 (1st Dep't 2017) (vacating award where there "was no basis" in the evidence presented for the conclusions reached by the arbitrator); *Matter of Geist v. City of N.Y.*, 144 A.D.3d 472 (1st Dep't 2016) (vacating award where findings were not supported by any evidence in the record).

II. THE AWARD WAS IRRATIONAL BECAUSE IT INVALIDATED THE PARTNERS' AGREEMENT CONSENTING TO AN ORDERLY DISSOLUTION

A key issue in the Arbitration was the parties' 2015 agreement consenting to dissolve and wind-down the Partnership. It was undisputed that in March 2015, the partners met and agreed to dissolve their 35-year Partnership (the "2015 Agreement"). Against the uncontroverted evidence, the Arbitrator determined that there was "no plan" to dissolve the business, a finding that ignored the evidence of a detailed agreement to do so in a tax-advantaged manner. By disregarding the parties' 2015 Agreement, the Arbitrator acted irrationally.

A. The 2015 Agreement Was Fully Enforceable And Binding

The Arbitrator wrongly determined that the partners' 2015 Agreement was not enforceable. The Partnership Agreement gave the partners broad discretion to wind up the Partnership in any manner they wished, and the Partnership Agreement did not require a writing to dissolve. Section 5.1 of the Partnership Agreement merely required that the partners consent to winding up, and Section 5.2 permitted the partners to take the actions necessary to effectuate that

consented dissolution. (Ex.C §5.1(b), 5.2). There was no requirement that consents to dissolution be set forth in writing, or that the parties execute final written agreements before rendering the consents binding.

The overwhelming record evidence demonstrated that the partners had, in fact, consented to dissolve the Partnership, and that they had agreed to a specific framework for doing so:

- Palin and Dworman had multiple conversations about how best to wind up the business (Ex.Q Tr.114:20-117:15);
- Palin advised the Partnership accountant that dissolving the Partnership in a tax efficient manner was critical to Enterprises (Ex.Q Tr.128:15-129:8; Tr.909:17-23 (Hoffman);
- Dworman independently advised the Partnership accountant that he wanted to wind-up the Partnership in a tax-efficient manner (Ex.Q Tr.909:17-23, Tr.922:4-24 (Hoffman));
- Palin, Dworman and the Partnership's accountant met in March 2015 and the material terms of dissolution were agreed upon. (Ex.Q Tr.911:5-914:13 (Hoffman), Tr.117:16-118:11);
- The Partnership's accountant confirmed that the partners "did agree" to a plan to wind up the business at this meeting (Ex.Q Tr.916:9-10);
- The Partnership's accountant drafted a memorandum summarizing the agreement's material terms (Ex.D);
- This memorandum was circulated to Dworman's advisors and attorneys. No representative of Dworman ever attempted to challenge or refute the terms of the memorandum before litigation was underway. (Ex.Q Tr.2151:6-2155:24).

The Arbitrator acknowledged the existence of this evidence of the 2015 Agreement. (Ex.A at 12-13). Despite receiving no contrary evidence (and no evidence from Dworman himself), the Arbitrator nevertheless concluded that the 2015 Agreement was simply discussion of a "potential transaction." (Ex.A at 16). This finding fundamentally mischaracterized the evidence, which confirmed that Palin and Dworman agreed to the terms of

dissolution and Dworman never testified to the contrary. (*See, e.g.*, Ex.Q Tr.118:8-9 (Palin: "we agreed to it and shook hands on it"); Tr.916:9-10 (Hoffman: "I know they did agree").

The evidence established a fully-realized agreement to dissolve the Partnership and divide the assets. All material terms were agreed upon except the assignment of the prices of the properties, but the agreement remains enforceable despite the lack of price term, because the partners would use appraisals to determine those values. *See Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989) ("[A] price term is not necessarily indefinite because the agreement fails to specify a dollar figure…Where at the time of agreement the parties have manifested their intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively); *Breidbart v. Wiesenthal*, 44 A.D.3d 982, 984 (2d Dep't 2007) (in partnership dissolution proceeding, directing trial court to "appoint a real estate appraiser to appraise the partnerships' real property").

B. The Arbitrator's Refusal To Recognize The 2015 Agreement Rewards Those Who Engaged In A Concerted Plan To Thwart The Agreement

The 2015 Agreement would have resulted in a tax-advantaged dissolution had the Partners carried out the agreed-upon steps to effectuate the dissolution as described in the contemporaneous memorandum:

- Laying out a price differential mechanism "[o]nce the difference in values is agreed to";[6]
- Each party "would each chose an attorney who will work together to write and [sic] agreement …";
- "AD and MP will work together to select an independent managing agent who will manage 210 [East 58th Street].

(Ex.D).

Even if the 2015 Agreement were only a preliminary agreement, the partners still had a good faith obligation to carry out these steps to implement their agreement. *See IDT Corp. v. Tyco Group, S.A.R.L.*, 23 N.Y.3d 497, 502 (2014) ("[P]arties may enter into a binding contract under which the obligations of the parties are conditioned on the negotiation of future agreements. In such a case, the parties are obliged to negotiate in good faith."). The evidence established, however, that Dworman and those around him frustrated Palin's efforts to effectuate the 2015 Agreement. (*See, e.g.*, Ex.Q Tr.499:2-19) (Palin stating that he was unable to provide his valuation numbers to Dworman: "I tried but I was -- unfortunately, was not able to talk to him. He wouldn't accept my calls …"). (*Id.* at 502:11-17). Instead, Dworman's associates implemented a plan – documented in writing – to "isolate" Dworman from Palin to prevent the 2015 Agreement from being carried out.[7] (Ex.E).

C. The Arbitrator's Decision To Reject The Partners' Agreement To A Tax-Advantaged Exchange Was Irrational

The Arbitrator's decision that a public sale was the only method of dissolution was also irrational, because it will trigger an enormous capital gains tax liability for both

---

[6] Although the partners did not finally set the value of the properties to calculate the equalizing payment, the values they were considering were based upon fair market value appraisals, and were actually quite close. (Ex.O at 259:18-23; *see also* Ex.Q Tr.911:25-912:4 (Hoffman testifying the partners' respective valuations of three buildings "weren't much different").

[7] The "Palin Agenda" was a written plan to frustrate Dworman's performance of the 2015 Agreement. (Ex.E).

partners, decimating the value of the assets that the partners held for decades. The liquidation is especially injurious in view of the Arbitrator's broad authority to fashion other remedies, coupled with the substantial evidence presented at the hearing that both partners wished to dissolve the Partnership in a manner which would maximize the value of the distributed assets by taking into account tax considerations.

In rendering the decision, the Arbitrator erroneously stated that "Section 5.3 of the Agreement provides for the appointment of a Special Liquidator and the sale of the Partnership's assets" (Ex.A at 16). This was wrong. Section 5.3 provides for sale of assets only if necessary to pay Partnership debts and liabilities to third parties. The Arbitrator did not simply reject the 2015 Agreement – he rejected the plain language of the Partnership Agreement. The Arbitrator also wrongly stated that he was bound by the "Section 63 of the Partnership Law…since there was no enforceable dissolution agreement between the partners, this is the operative statute." (Ex.A at 15). This is not the law. *See Yonir Tech., Inc. v. Duration Sys.*, 244 F. Supp. 2d 195, 212 (S.D.N.Y. 2002). Particularly in view of the extensive evidence regarding the Partners' actual concerns about tax avoidance or minimization strategies (and the utter absence of any contradictory evidence from Dworman himself), it was irrational for the Award to disregard the parties' intentions.

There was no rational reason to reject consideration of alternative tax-advantaged methodologies for dissolution, particularly when it was clear that doing so would have no negative impact on Dworman and could in fact reap additional benefits to him, as was his expressed desire in 2015. The decision appears guided by another objective: to punish Petitioner. In rejecting Petitioner's proposed remedy to split the properties and have Enterprises maintain 155 East 55th Street, the Arbitrator wrote: "[c]learly not coincidental, is that Palin's son…and

daughter...each have been longtime tenants" at the property and that "[a]dopting this proposal would undoubtedly be of significant benefit to both of these tenants..." (Ex.A at 16 n.4). Not only was the Arbitrator's observation irrelevant, but it is nonsensical that the disposition of a building worth in excess of $50 million should be driven by the residency of two individuals in that building. Enterprises owns 50% of the Partnership, and the Arbitrator's rejection of a reasonable remedy grounded in extensive evidence presented at trial was irrational.

III. THE MOTION TO CONFIRM DAMAGES MUST BE DENIED AS PREMATURE, AND CANNOT BE CONFIRMED AS IT WAS IRRATIONAL

The Arbitrator acted irrationally by calculating damages – including purported diminution in the value of the Properties – even before the final value of the Partnership properties is known. The Court should vacate the damages calculation from the Award or, alternatively, deny the motion to confirm any award of damages as premature, because the Award contemplates a future final accounting award that will not be issued until after the disposition of the properties. The damages cannot be entered as a money judgment against Petitioner because the Arbitrator has ruled that they are the damages of the Partnership, not Dworman and are to be ultimately resolved in a final accounting after the Properties are sold (Ex. B).

A. The Determination Of Diminution Of Value Was Premature And Irrational

The Award's determination of diminution of value to the Partnership properties was premature and irrational. The Arbitrator opined that Enterprises' representatives caused the diminution in value of the Partnership assets of approximately $21.5 million, based upon findings contained in the report of Dworman's expert, Cushman & Wakefield (the "Nakleh Report", Ex.J). The diminution of value figure comprises the largest component of the damages set forth in the Award. (Ex.A at 63).

But because the Arbitrator did not order appraisals of the Properties, but instead ordered that the properties be liquidated in a public sale and their values determined that way, the sale will determine whether there has been any reduction in value. Given the ordered sale, it was inappropriate for the Arbitrator to determine in advance that there were diminution damages amounting to $21.5 million because the sale will determine whether there was any diminution below the value Dworman claimed the properties should be worth. Put another way, the Arbitrator's determination the Petitioner diminished the value of the Properties is fundamentally irrational, because it effectively allocates purported losses before they are realized. Moreover, the sale will result in a windfall to Dworman if, in fact, the properties fetch a higher price than Dworman (and the Arbitrator) assumed the properties were worth. The Nakleh Report's opinion on diminution of value expressly assumed that the aggregate market value of the buildings, *absent diminution damages,* was $185.5 million.[8] (Ex.J at 24, 36, 47). Should the sale price of the properties exceed $185.5 million, no diminution would have occurred. Yet, the Arbitrator has irrationally determined this diminution without awaiting the results of the sale.[9]

At best, the statement of diminution damages is premature because the losses at issue have yet to be realized. At worst, a sale could prove that there was no damage at all, and that the Nakleh Report was fundamentally flawed and cannot be relied upon. The motion to

---

[8] The Arbitrator nearly adopted, wholesale, the Nakleh Report's conclusion, but did adjust downward the diminution damages figure from $25 million to $21.5 million. (Ex.A at 44). Accordingly, the $185.5 million but-for value would be recalculated at $182 million. Petitioner's appraisal expert actually demonstrated in her report, however, that Nakleh's assumptions were highly flawed and that adopting his analysis would have caused a collective *loss* in value of the properties of at least $5 million. (Ex.K).

[9] If the buildings sell for a combined value that is any greater than the appraisal Nakleh gave in his report of their current state (approximately $160 million), then such a result would prove that Nakleh's calculations were incorrect and that the properties are worth more than his appraised values.

confirm the damages award must be denied, if for no other reason than that the award is premature. If, on the other hand, the Award is read to require entry of an Order of damages in the amount of the damages specified, then the Award, by accepting the flawed Nakleh Report but also requiring a public sale in lieu of appraisals to liquidate the properties, created a tremendous, internal, irreconcilable inconsistency. That inconsistency renders the entire diminution damages conclusion irrational. The effect would be to exact punitive damages on Enterprises, irrespective of whether the ultimate value obtained exceeds the Nakleh assumptions. This result is wholly unjust and cannot withstand judicial scrutiny. *See Matter of Fernandez v. New York City Tr. Auth.*, 120 A.D.3d 407, 408 (1st Dep't 2014) (vacating arbitration award that "is grossly excessive and shocks our sense of fairness."); *Matter of Grynberg v. BP Exploration Operating Co. Ltd.*, 92 A.D.3d 547, 548 (1st Dep't 2012) (the "arbitrator's imposition of the $3 million award in sanctions ... was punitive in nature, regardless of the label attached. Accordingly, the award violated public policy and was properly vacated.").

B. The Arbitrator's Determination Of Management Fee Damages Was Irrational

For 35 years, the Partnership used Carard Management ("Carard") to manage the Partnership properties. Indeed, Carard is named in the Partnership Agreement. (Ex.C §4.3). The Arbitrator determined, however, that the Partnership's long-standing mechanism for estimating Carard's management fee – using a 4% cap, the evidence of which was undisputed and uncontroverted – was not disclosed to Dworman. (Ex.A at 22-23). This conclusion cannot be squared with the record evidence, which included regular financial statements delivered to Dworman over 30 years that disclosed the existence and amount of the management fee, uncontroverted testimony by the Partnership's accountant that these were disclosed to Dworman's representatives (Ex.Q Tr.870:14-871:25, 873:11-876:15, Ex.H), and verification by

Waxman that he received and reviewed these financial reports on behalf of Dworman (Ex.Q Tr.2114:21-2118:20, 2119:8-2123:13) and that Dworman periodically asked Waxman to calculate *the percentage* of Carard' fee. (*Supra* at 8). The Arbitrator's conclusion that the use of a 4% *cap* on Carard's fees constituted an impermissible modification of the Partnership Agreement (Ex.A at 23) is on its face unsupportable.

Moreover, it was irrational for the Arbitrator to conclude that "capping" estimated fees, where the cap was based on a percentage of revenues, was done in order to steal from the Partnership, because the Arbitrator simultaneously concluded that Enterprises was intentionally depressing rents by giving improper leases to friends and family. Giving away reduced-rent leases would result in *reduced* net operating income – and, thus, a drop in the management fee. These two contradictory conclusions by the Arbitrator are irreconcilable and irrational.

The Arbitrator compounded the irrationality of the Award by enforcing the Partnership Agreement's no-oral modification clause to reject Petitioner's proof that the partners orally agreed to use an estimated 4% fee cap to cover the actual management expenses of Carard. The Arbitrator stated that such an agreement – for which there was ample evidence – would constitute an impermissible oral modification of the Partnership Agreement (Ex.A at 24). Yet, the Arbitrator also found that Dworman's abdication of his undisputed management responsibilities in violation of the Partnership's plain text was not a violation of Dworman's managing partner duties. (Ex.A at 5, 51-55). These directly contrary rulings render the Award irrational, and require vacatur.

C. The Arbitrator's Determination Of Damages From Improperly Leased Units Was Irrational

The Arbitrator also determined that Enterprises caused damage from the allegedly "improperly leased units" totaling $5.9 million, based solely upon Dworman's expert, who

himself disavowed this estimate and made clear that he had not employed the required methodology or analysis to calculate such damages. (*See* Ex.Q Tr.806:2-807:15). The Arbitrator nonetheless adopted this figure in the Award, even though he himself clarified at the hearing that this figure had not been accurately calculated. (Ex.Q Tr.810:7-15). *See Diaz v. N.Y. Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002) ("Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force…").

There is a fundamental inconsistency in the Arbitrator's determination that Enterprises, a 50% partner in Capital Properties, would have sought to materially damage its investment to the tune of $6 million, all for the purpose of offering a few fringe benefits to friends and family. Moreover, the record evidence does not support these figures. Dean Palin and Andrea Fayer, Mickey Palin's children, who were long-time residents of the buildings and who both performed services for the buildings, paid rent. (Ex.Q Tr.91:3-93:16). The record evidence revealed that Dworman knew that Palin's son and daughter lived in combined apartments at 155 East 55th Street and knew their rental rates (Ex.Q Tr.872:9-16 (Hoffman), Tr.1427:6-15).

The undisputed evidence showed that if there were so-called "friends and family" benefits, they inured to Dworman. The hearing evidence showed that, for decades, family members, friends and business associates of *Dworman* lived at the buildings *at free or reduced rent* at his request. (Ex.Q Tr.86:23-87:9, 1405:8-1406:10, 1432:13-24, 1440:8-23, 2052:9-24; Ex.I). It was irrational for the Arbitrator to punish Enterprises for alleged below-market leases to tenants who actually paid rent, while relieving Dworman of any responsibility for the decades of free rent given at his request.

IV. DWORMAN'S REQUEST FOR STATUTORY INTEREST MUST BE DENIED

That portion of Respondent's motion that seeks confirmation of over $26 million in pre-judgment interest must be denied. (*See* NYSCEF Doc. 160 at 3-4). First, the decision to award pre-judgment interest is within the Arbitrator's discretion, and no such pre-judgment interest calculation is set forth in the Award. At best, any confirmation of interest is premature because the Arbitrator has not yet issued a final award setting forth the rate or amount of pre-judgment interest, if any, and the Arbitrator specifically "retain[ed] jurisdiction for the purpose of the final accounting." (Ex.A at 60). The Court cannot confirm any portion of the Award that has not yet been decided. Second, Respondent's motion mischaracterizes the Award, which recognized only that pre-judgment interest pursuant to CPLR 5002 is "a matter of right in an arbitration." (*Id.*). CPLR 5002 provides for interest *from the date of the Partial Award until the date of final judgment*, or post-award interest. Respondent's motion for confirmation, however, seeks several years' worth of *pre-award* interest pursuant to CPLR 5001, and asserts that such interest totals over $26 million – nearly the sum total of the Partial Award itself. The Award does not provide for pre-award interest pursuant to CPLR 5001, and the Court should not credit Respondent's attempt to confirm an Award based on Respondent's misrepresentations. *See Dermigny v. Harper*, 127 A.D.3d 685, 686 (2d Dep't 2015) (affirming vacatur of judgment "on the ground that the defendant had misrepresented…that he was entitled to recover pre-arbitration award interest").[10]

CONCLUSION

For all the foregoing reasons, Petitioner respectfully submits that the Award is irrational and cannot be confirmed, and that it must be vacated, as a matter of law.

---

[10] The Arbitrator has already rejected Respondent's prior attempts to mischaracterize the Award's damages in his favor. *See* Ex.B.

Dated: New York, New York
November 12, 2018

MORRISON COHEN LLP

By: /s/ Y. David Scharf
Y. David Scharf
David A. Piedra
Alvin C. Lin
Thomas B. Gardner
909 Third Avenue
New York, New York 10022
(212) 735-8600
Attorneys for Petitioner Capital Enterprises Co.

CERTIFICATION OF COUNSEL

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division:

The foregoing brief was prepared on a computer using Microsoft Word.

Pursuant to the word count system in Microsoft Word, the total number of words in this brief, excluding the caption, table of contents, table of authorities, and signature block, is 6,980 words.

Dated: New York, New York
November 12, 2018

/s/ Y. David Scharf
Y. David Scharf