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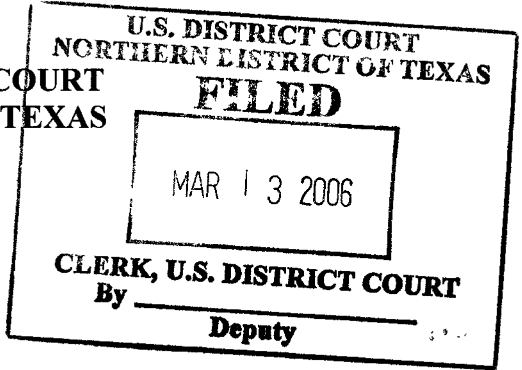

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SPINAL CONCEPTS, INC. (n/k/a Abbott Spine, Inc.),	§	
Applicant,	§	
vs.	§	CIVIL ACTION NUMBER_______ 3-06CV0448-P
CURASAN, AG,	§	
Respondent.	§	

BRIEF IN SUPPORT OF SPINAL CONCEPTS, INC.'S MOTION TO VACATE ARBITRATION AWARD AND REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF

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DLI-5984274v4

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Spinal Concepts, Inc. n/k/a Abbott Spine, Inc. ("Spinal Concepts"), pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 6, 9, 10, and 12, files this Brief in support of its Motion to Vacate the arbitration award ("Award") entered in favor of curasan, AG ("curasan") and against Spinal Concepts on the basis of errors of law in the Award.[1] This Court is expressly authorized by the arbitration agreement between Spinal Concepts and curasan to conduct a plenary, *de novo* review of the Award's legal conclusions and to vacate the Award based on legal errors. Although arbitration awards are typically subject to highly deferential review, the Fifth Circuit and other courts have recognized the parties' right, by contract, to reserve their right to petition the courts for resolution of questions of law. *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995); *Roadway Package Sys. Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001). curasan and Spinal Concepts expressly reserved this right in their contract.

FACTUAL BACKGROUND

While the challenges raised in this motion relate solely to legal issues, a brief summary of the undisputed facts that led up to the arbitration is necessary.

curasan makes and sells a bone-graft substitute called Cerasorb. Cerasorb is used by surgeons to help human bones regenerate after certain types of surgical operations.

Spinal Concepts entered into an agreement with curasan, effective October 23, 2002, that gave Spinal Concepts the exclusive right to market, sell, and distribute Cerasorb for use in spine surgeries in the United States and Costa Rica. International Distribution and Marketing Agreement ("IDMA" or "Agreement") [App. 12] (Ex. 1). The term of the agreement was for five years, and the Agreement specified the minimum quantities of Cerasorb that Spinal

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[1] No one can dispute that the FAA applies because the transaction between Spinal Concepts and curasan involved interstate commerce.

Concepts was required to purchase from curasan for distribution for the first two years of the term (2003 and 2004). *Id.* §§ V.3, VIII.1 [App. 15, 17] (Ex. 1).

However, the Agreement did not specify the minimum quantities for the subsequent three years (2005, 2006, and 2007) beyond a precatory statement that such subsequent quantities "shall be negotiated in good faith and mutually agreed upon in writing." *Id.* § V.3 [App. 15] (Ex. 1). Thus, the parties explicitly declined to agree upon a quantity term with respect to any period beyond 2003 and 2004. Specifically, the IDMA's "Purchase Minimums" clause provided:

> [Spinal Concepts] shall achieve the mutually agreed upon yearly minimum purchase quantities ("Quotas") established in Exhibit B in the Exclusive Territory during the first two year period of the Agreement [2003 and 2004], unless the achievement of such Quotas is not possible because of any regulatory processes arising in connection with this Agreement. Subsequent yearly minimum Quotas following this first two-year period shall be negotiated in good faith and mutually agreed upon in writing.

Id. Exhibit B to the IDMA set "Purchase Minimums" of $500,000 for 2003 and $625,000 for 2004. *Id.* Ex. B [App. 23] (Ex. 1). It is undisputed that Spinal Concepts and curasan were thereafter unable to agree on the amounts of the "yearly minimum Quotas" for 2005, 2006, and 2007. Arbitration Award ("Award") [App. 35] (Ex. 2).

To assist curasan with planning its production schedule, the IDMA required that "[S]pinal Concepts, at least 90 days prior to the beginning of each calendar quarter, shall deliver to [curasan] a sales forecast and estimated quantity of purchase of the Products for the next four (4) consecutive quarters." IDMA § V.1.(i) [App. 15] (Ex. 1). The IDMA further provided that "[Spinal Concepts] agrees to purchase quantities of Product each quarter equal to no less than eighty percent (80%) of the first forecasted quarter," and that curasan is obligated to supply no more than 120% of the first forecasted quarter. *Id.* §§ V.1.(ii), V.3 [App. 15] (Ex. 1).

Because of complaints from physicians that Cerasorb was not performing as expected and, consequently, lack of market demand for Cerasorb, Spinal Concepts did not purchase the

amount of Cerasorb in 2004 that curasan believed Spinal Concepts was required to purchase. As a result, in January 2005, curasan terminated the IDMA and initiated arbitration proceedings against Spinal Concepts, claiming, *inter alia*, that Spinal Concepts had failed to satisfy its minimum purchase requirements under the Agreement for the years 2004, 2005, 2006, and 2007. curasan did not confine its claim to a declaration of breach or a request to terminate, but rather included a request for money damages. Notably, the IDMA specifically provided that, "[i]n case [Spinal Concepts] fails to achieve minimum Quotas for the first two-year period of this Agreement, [curasan] may terminate or modify the terms of [Spinal Concepts'] exclusive distribution rights," *id.* § IX.1 [App. 17-18] (Ex. 1), and also expressly included a "Limitation of Liability" clause that provided:

> UNLESS OTHERWISE EXPRESSLY STATED IN THE AGREEMENT, IN NO EVENT SHALL EITHER PARTY HERETO BE LIABLE TO THE OTHER PARTY HERETO OR TO ANY THIRD PARTY FOR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS, LOST PROFITS OR ANY OTHER SPECIAL, CONSEQUENTIAL, INCIDENTAL, OR INDIRECT DAMAGES, HOWEVER CAUSED, AND WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCTS LIABILITY OR ANY OTHER THEORY OF LIABILITY, REGARDLESS OF WHETHER SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THIS LIMITATION OF LIABILITY SHALL NOT APPLY TO THE INDEMNIFICATION OBLIGATIONS OF [CURASAN] AND [SPINAL CONCEPTS] PURSUANT TO SECTION XII OF THIS AGREEMENT.

Id. § IV.3 [App. 14] (Ex. 1).

On March 9, 2006, the arbitrator signed the Award in favor of curasan and against Spinal Concepts, which incorporates an interim award signed on December 16, 2005. The arbitrator awarded curasan approximately $2 million—specifically, $1,892,962.49—in damages both for Spinal Concepts' alleged failure to meet the stipulated minimum purchase requirement for 2004, 2005, 2006, and 2007 and for "lost profits" for the quantities supposedly to be sold in those

years, as projected and estimated by the arbitrator in the absence of any agreed or forecasted quantity as between the parties themselves. Award [App. 34, 37–38, 44–45, 2587] (Ex. 2 & 3).

In the Award, the arbitrator concluded that he could rely on Section 2.204(c) of the Texas Business and Commerce Code to estimate and read into the Agreement the minimum quantities for the years 2005, 2006, and 2007. *Id.* [App. 35-38] (Ex. 2). The arbitrator did so despite acknowledging that the provision covering 2005, 2006, and 2007 in the "Purchase Minimums" clause "might be unenforceable as an agreement to agree" and that the parties in fact made no agreement as to the quantity of "yearly minimum Quotas," so as to satisfy the Statute of Frauds and, in particular, its demand for a specified quantity term pursuant to Section 2.201 of the Texas Business and Commerce Code. *Id.* [App. 35] (Ex. 2).

The arbitrator concluded, notwithstanding the inapplicability of the "gap-filler" provision of Section 2.306 of the Texas Business and Commerce Code to quantity terms, that he could fill in the open term for the minimum purchase quotas for these years by relying on the clause providing that "[Spinal Concepts] agrees to purchase quantities of Product each quarter equal to no less than eighty percent (80%) of the first forecasted quarter in Section V.1.(i)." *Id.* [App. 37-38] (Ex. 2). The arbitrator also concluded that he could award "lost profits" damages despite the IDMA's "Limitation of Liability" clause. *Id.* [App. 38-41] (Ex. 2). Finally, the arbitrator concluded that the IDMA's clause specifically providing that, "[i]n case [Spinal Concepts] fails to achieve minimum Quotas for the first two-year period of this Agreement, [curasan] may terminate or modify the terms of [Spinal Concepts'] exclusive distribution rights," did not limit curasan to an exclusive remedy of termination or modification of Spinal Concepts' exclusive rights. *Id.* [App. 41] (Ex. 2).

SUMMARY OF ARGUMENT

Although ordinarily a federal court cannot vacate an arbitration award on the grounds of legal error, the court has authority to review the award's legal conclusions and to vacate the award if it finds error where, as here, the parties' arbitration agreement explicitly allows for judicial review of the arbitration award's conclusions of law. *Gateway Techs., Inc.*, 64 F.3d at 996. The arbitration agreement between Spinal Concepts and curasan provides the Court with this authority: "[e]ach party agrees that the award may be appealed in the courts of the place of arbitration for errors of law but not for findings of fact." IDMA § XIII.2 [App. 20] (Ex. 1).

The Award rested on several legal errors in the interpretation and application of the Texas law governing the IDMA. Specifically, the arbitrator committed legal error (1) by awarding damages despite the IDMA's exclusive-remedy provision, (2) by awarding damages for breach of provisions of the IDMA that are unenforceable as a matter of law because they violate the Statute of Frauds, (3) by awarding damages for "lost profits" that are barred as a matter of law, and (4) by awarding damages that are purely speculative and therefore barred under Texas law.[2]

These errors each independently require an order vacating the Award in whole or in part.

ARGUMENT

I. THE ARBITRATOR COMMITTED LEGAL ERROR BY AWARDING DAMAGES FOR THE BREACH OF UNENFORCEABLE PROVISIONS OF THE PARTIES' AGREEMENT THAT VIOLATE THE STATUTE OF FRAUDS.

The arbitrator reached a legally erroneous conclusion in interpreting the IDMA, under governing Texas law, to permit an award of damages for breach of provisions that do not specify quantity, that simply memorialize an agreement to agree, and that are therefore unenforceable

[2] The IDMA contained a "Governing Law" clause that provided that the rights and obligations under the agreement, and any corresponding legal issues, "shall be governed by and construed under the law of Texas." IDMA § XIII.1 [App. 19] (Ex. 1).

under the Statute of Frauds. In giving relief to curasan not only for 2004, but also for 2005, 2006, and 2007, the arbitrator noted that the Agreement failed to specify a quantity for these last three years. Indeed, the IDMA clearly memorializes only an agreement *not to agree* as to those years, and, instead, to defer any agreement: "Subsequent yearly minimum Quotas following this first two-year period shall be negotiated in good faith and mutually agreed upon in writing." IDMA § V.3 [App. 15] (Ex. 1). Nevertheless, the arbitrator relied on Section 2.204(c) of the Texas Business and Commerce Code and legally erroneous conclusions regarding an inapplicable provision of the IDMA to estimate and read into the Agreement the minimum quantities for the years 2005, 2006, and 2007. Award [App. 35–38, 44–45] (Ex. 2).

A. There Is No Agreement With Respect to the Years in Question.

Contrary to the arbitrator's holding, Texas law clearly forecloses the prospect of any claim of breach of contract for the years 2005, 2006, and 2007, as the parties did not have a binding agreement. An agreement to agree in the future is not enforceable, under the Uniform Commercial Code ("UCC") or otherwise. *See, e.g.*, *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). When the parties "have contracted and negotiated a specific agreement, the Code's provisions do not control." *Jon-T Chem., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1416 (5th Cir. 1983). Thus, the Fifth Circuit applying the same Texas law has held that, where a sales contract provided that delivery was "by rail unless otherwise agreed" to by the parties, those provisions were not controlled by the UCC, and there was no "gap" to fill by the UCC, because the parties agreed to agree later on the mode of delivery. *Id.* at 1416-17. So, too, here, the parties agreed to agree later on the minimum quantity for the years 2005, 2006, and 2007, IDMA § V.3 [App. 15] (Ex. 1)—but, as the arbitrator himself concluded, they were never able to do so. Award [App. 35] (Ex. 2).

B. Resort to UCC Gap Filling Is Not Permitted Where Quantity is the Missing Term.

Moreover, even if there was a "gap," the UCC provides no "gap filler" for a quantity term left out of an agreement. *OKC Corp. v. UPG, Inc.*, 798 S.W.2d 300, 304-05 (Tex. App.—Dallas 1990, writ denied) (citing TEX. BUS. & COM. CODE §§ 2.305, 2.308-310), *overruled on other grounds*, *Spangler v. Jones*, 861 S.W.2d 392 (Tex. App.—Dallas 1993, writ denied). To be sure, a contract can be made in any manner sufficient to show agreement, even if the moment of its making is undetermined and even though certain terms are left open. TEX. BUS. & COM. CODE § 2.204. However, although the UCC under certain circumstances will permit the filling of certain "gaps" in the expressed agreement, like missing price or time and place of delivery terms, *e.g.*, *id.* §§ 2.308-2.310, one term that cannot be left "open" and that the UCC will not permit to be filled is quantity—unless the contract is a requirements or outputs contract. *Id.* § 2.201 cmt. 1; *OKC Corp.*, 798 S.W.2d at 305. The IDMA is not such a contract. Award [App. 35] (Ex. 2).

Thus, the IDMA's "Purchase Minimums" provision, which is silent on the minimum quantity for 2005, 2006, and 2007, is unenforceable as a matter of law for those years, and its enforcement as the basis for a damage award violates the Statute of Frauds. *See* TEX. BUS. & COM. CODE § 2.201; *OKC Corp.*, 798 S.W.2d at 304-05. The arbitrator erred as a matter of law by seeking to divine a quantity term for 2005, 2006, and 2007 that was not written or agreed upon by the parties.

C. The Borrowed "Quantity" Term Compounded the Legal Error.

The arbitrator's attempt to identify a quantity term involves yet further legal error, as the arbitrator was forced to "borrow" from other parts of the contract and to rewrite the affected provision in the process. Specifically, in creating a quantity term, the arbitrator relied on the IDMA's provision that Spinal Concepts "agrees to purchase quantities of Product each quarter

equal to no less than eighty percent (80%) of the first forecasted quarter in Section V.1.(i)." IDMA § V.3 [App. 15] (Ex. 1). The arbitrator interpreted "first forecasted quarter" as a static period throughout the life of the Agreement—the first quarter of 2003—rather than as the first quarter of the dynamic four-quarter forecast in effect at any given time. Based on this reasoning, the arbitrator held that the quantity terms for 2005 through 2007 were 80% of forecast for the first quarter of 2003 (multiplied by four to annualize the amount). Award [App. 38] (Ex. 2).

This interpretation of the Agreement was plainly wrong. As an initial matter, the provision requiring Spinal Concepts to purchase on a quarterly basis 80% of the "first forecasted quarter" applied throughout the Agreement, not just to the years in which no quantity had explicitly been specified. Thus, under the arbitrator's reasoning, the Agreement has two conflicting purchase quantities for each of 2003 and 2004—the quantities explicitly set forth in Exhibit B to the IDMA, and the product of the calculations based on the first quarter 2003 forecast. Of course, this conflict is not present when the 80% purchase requirement is interpreted merely as the forecasting tool it was intended to provide. It is legal error to construe contract provisions as conflicting when an alternative interpretation would harmonize them. *See Frost Nat'l Bank v. L&F Distrib., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) ("We consider the entire writing and attempt to harmonize and give effect to all the provisions of the contract by analyzing the provisions with reference to the whole agreement."); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (finding that courts "must examine and consider the entire writing in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless").

Further, if the parties truly intended the "first forecasted quarter" to mean the static forecast given for the first quarter of 2003, and that Spinal Concepts would purchase between

80% and 120% of that amount each quarter for the life of the Agreement, there would have been no need for Spinal Concepts to provide a rolling four-quarter forecast every quarter of the Agreement. A purchase forecast for the third quarter of 2005, for example, would be useless if Spinal Concepts was nonetheless obligated to purchase between 80% and 120% of its first quarter 2003 quantity in that time period. Yet the IDMA clearly calls for a rolling forecast for its entire term. IDMA § V.1 [App. 15] (Ex. 1). The arbitrator committed legal error by interpreting the Agreement to render the rolling forecast provision superfluous. *Balandran v. Safeco Ins. Co.*, 972 S.W.2d 738, 741 (Tex. 1998) (noting that a court "must read all parts of the contract together" and "striv[e] to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative").

Properly interpreted, the 80% purchase requirement is plainly a forecasting tool to assist curasan in meeting Spinal Concepts' demand while avoiding inefficient overproduction, and the "first forecasted quarter" is the first quarter of the rolling forecast in effect at any given point in the life of the Agreement. No other minimum purchase requirement can be divined from this forecasting provision consistent with the rules of contract interpretation. By treating Spinal Concepts' first forecast as a *de facto* fixed quantity term, the arbitrator improperly rewrote the IDMA and rendered its terms meaningless, including, among other provisions, the very process of "forecasting" and the "agreement to agree" as to future quantities in 2005, 2006, and 2007. *See Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003) (noting that a court "may neither rewrite the parties' contract nor add to its language").

In sum, governing Texas law dictates that a provision of a contract that does not specify quantity and that simply memorializes an agreement to agree is unenforceable, violates the Statute of Frauds, and cannot, as a matter of law, form the basis for a claim of breach or, as here,

damage award. The arbitrator legally erred in concluding otherwise and in awarding damages based on Spinal Concepts' alleged failure to meet the unstated, non-quantified minimum requirements for 2005, 2006, and 2007. This legal error requires vacatur of the Award insofar as it awards damages for 2005, 2006, and 2007.

II. THE ARBITRATOR COMMITTED LEGAL ERROR BY AWARDING DAMAGES FOR "LOST PROFITS" THAT ARE BARRED AS A MATTER OF LAW.

The arbitrator legally erred in holding that curasan was entitled to an award for "lost profits," Award [App. 34, 38–41] (Ex. 2), by declaring the damages to be "direct" and not consequential damages. In fact, regardless of how the damages are described, they were expressly waived in the Agreement and are therefore barred as a matter of law.

At the outset, there can be no question that, under the UCC, curasan is not entitled as a matter of law to recover consequential damages. *Nobs Chem., U.S.A., Inc. v. Koppas*, 616 F.2d 212, 216 (5th Cir. 1980); *Gray v. West*, 608 S.W.2d 771, 780 n.3 (Tex. App.—Amarillo 1980, writ ref'd n.r.e.). Thus, as the arbitrator conceded, an award to curasan of "lost profits" could not be justified as "consequential" damages. Award [App. 31] (Ex. 2). Such damages could be not be awarded otherwise for two reasons.

First, the IDMA's language expressly states that both parties waive lost profits damages:

> Limitation of liability. UNLESS OTHERWISE EXPRESSLY STATED IN THE AGREEMENT, ***IN NO EVENT SHALL EITHER PARTY HERETO BE LIABLE TO THE OTHER PARTY*** HERETO OR TO ANY THIRD PARTY FOR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS, ***LOST PROFITS OR ANY OTHER SPECIAL, CONSEQUENTIAL, INCIDENTAL, OR INDIRECT DAMAGES,*** HOWEVER CAUSED, AND WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCTS LIABILITY OR ANY OTHER THEORY OF LIABILITY, REGARDLESS OF WHETHER SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THIS LIMITATION OF LIABILITY SHALL NOT APPLY TO THE INDEMNIFICATION OBLIGATIONS OF [CURASAN] AND [SPINAL CONCEPTS] PURSUANT TO SECTION XII OF THIS AGREEMENT.

IDMA § IV.3 [App. 14] (Ex. 1) (emphasis added).[3] In fact, by expressly excluding one provision of the IDMA (the indemnification provisions in Section XII), the lost-profits waiver by necessary implication includes the rest of the IDMA. Accordingly, it applies to all provisions of the IDMA except the indemnification obligations in Section XII—including curasan's claims for breach of the "Purchase Minimums" provision—and bars any award for lost profits. The arbitrator avoided application of this waiver by declaring it to apply only to a species of "lost profits" characterized as "consequential damages" and declared the award here to be of another species of "direct general" lost profits. Of course, the written language chosen by the parties does not attempt draw this distinction, and the UCC already foreclosed the prospect of any consequential damages, leaving one to wonder what effect this provision could have under the arbitrator's crabbed construction.

Second, the lost-profits waiver references "procurement of substitute goods," which is a UCC breach of contract remedy. *See* TEX. BUS. & COM. CODE § 2.712. By expressly stating that the waiver applies to a breach of contract remedy, the provision's language mandated its application to breach of contract claims such as those alleged here (as opposed to product liability claims also included in the same paragraph) regardless of what labels are put on the claim. Indeed, the section states that the waiver will apply to liability for "lost profits" damages regardless of what the claims or theories of liability might be called and how the damages arose ("HOWEVER CAUSED, AND WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCTS LIABILITY OR ANY OTHER THEORY OF LIABILITY")—that is, whether as consequential or indirect damages or as a measure of direct contract damages.

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[3] Although this lost-profits waiver is in a section also dealing with "Product Warranty," the titles of headings do not control—the language of the contract does. *Enter. Leasing v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004); *COC Serv. v. CompUSA*, 150 S.W.3d 654, 677 (Tex. App.—Dallas 2004, pet. filed).

The waiver, on its face, thus applies to the claims here and, in conjunction with governing Texas law, bars any award for "lost profits" as a matter of law and requires vacatur of the Award insofar as it awards such damages to curasan.

III. THE ARBITRATOR COMMITTED LEGAL ERROR BY AWARDING PURELY SPECULATIVE FUTURE DAMAGES THAT ARE LIKELY TO BE AVOIDED.

The arbitrator legally erred in holding that curasan was entitled to an award of damages that are, as a matter of law, purely speculative for the years 2006 and 2007 and that curasan is likely to avoid by mitigation. Award [App. 38, 41, 45] (Ex. 2). curasan undeniably knows that Spinal Concepts is no longer selling curasan's product under the IDMA, which curasan itself terminated. curasan, likewise, has an undeniable duty to mitigate any alleged future damages that may be caused by Spinal Concepts' alleged past breach of contract. *See Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995). The arbitrator's award for Spinal Concepts' alleged failure to meet minimum purchase requirements in future years under the terminated Agreement thus necessarily rests on the purely speculative assumption at the time of the Award (December 2005) that curasan will be unable, despite its duty to mitigate, to cover *any* lost purchases of its product in the last two years of the IDMA's term (2006 and 2007). Unless curasan is to be understood as arguing that its product is incapable of being successfully marketed by anyone—in which case it could hardly justify its claim of breach—curasan cannot recover windfall damages where it has both the ability and the clear legal duty to sell its product through other means.

Purely speculative and conjectural damages of this sort are not recoverable as a matter of controlling Texas law. *See Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 164 (Tex. 1992) (holding that, if "damages are too remote, too uncertain, or purely conjectural and speculative, they cannot be recovered"); *Lakewood Pipe of Tex., Inc. v. Conveying Techniques, Inc.*, 814

S.W.2d 553, 556 (Tex. App.—Houston [1st Dist.] 1991, no writ) ("Recovery of damages cannot be based on pure speculation."). The legal error inherent in awarding such damages for 2006 and 2007 requires vacatur of the Award insofar as it awards damages to curasan for those years.

IV. THE ARBITRATOR COMMITTED LEGAL ERROR BY AWARDING DAMAGES THAT ARE BARRED AS A MATTER OF LAW BY THE EXCLUSIVE-REMEDY PROVISION OF THE PARTIES' AGREEMENT.

The arbitrator reached a legally erroneous conclusion in interpreting the IDMA, under governing Texas law, to permit an award of damages as a remedy for curasan for any alleged failure of Spinal Concepts to achieve minimum purchase quantities for the term of the IDMA. Damages are barred as a matter of law by force of the parties' Agreement, which provided that termination and modification of the IDMA is the exclusive remedy available to curasan in these circumstances. Specifically, the IDMA provided that "[i]n case [Spinal Concepts] fails to achieve minimum Quotas for the first two-year period of this Agreement, [curasan] may terminate or modify the terms of [Spinal Concepts'] exclusive distribution rights." IDMA § IX.1 [App. 17-18] (Ex. 1).

The arbitrator concluded that such a provision does not stipulate an exclusive remedy, based on Texas Business & Commerce Code § 2.719(a)(2)—which provides that "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive"—and the IDMA's use of the word "may." Award [App. 41] (Ex. 2). This legal conclusion is erroneous. The comments to Section 2.719 emphasize that this section leaves parties free to shape remedies to their particular requirements and that reasonable agreements on remedies are to be given effect. TEX. BUS. & COM. CODE § 2.719 cmt. 1; *see also Vandergriff Chevrolet Co., Inc. v. Forum Bank*, 613 S.W.2d 68, 70 (Tex. Civ. App.—Fort Worth 1981, no writ) (a construction that renders a specified remedy as exclusive can be made when it is the intent of the parties for the remedy to be exclusive). The words "sole" and "exclusive" are not "magic words" that must be

used to express the intent in a contract that a remedy or other provision is exclusive, and the use of the word "may" does not render the contractually-provided remedy optional or non-exclusive. The arbitrator's reliance on Section 2.719 to conclude otherwise was legal error.

Indeed, courts have repeatedly rejected just such a conclusion under similar circumstances. In rejecting the argument that the terms "sole" or "exclusive" should have been used to make a warranty exclusive under Section 2-719 of the UCC, the district court in *Lennar v. Masonite Corp.*, 32 F. Supp. 2d 396, 403 (E.D. La. 1998), stated that "the U.C.C. requires only that the exclusivity be clearly expressed, not that 'magic words' be employed." *Id.* (holding that the word "limited" when used to describe the damages available under a warranty clause had "the same effect as the terms 'exclusive' or 'sole'" and "clearly expresses the manufacturer's intent to circumscribe the available remedies").

Likewise, the Fifth Circuit in *United States ex rel. Straus Systems, Inc. v. Associated Indemnity Co.*, 969 F.2d 83 (5th Cir. 1992), construed a contractual clause as an exclusive remedy, even though the contract did not expressly state that the remedy was sole and exclusive. The contract provision noted that, if the defendant were delayed in completing the work under the contract, the date of completion of the work would be extended. *Id.* at 84. The contract did not state that the extension of time due to delay was the exclusive or sole remedy if there were a delay. In affirming summary judgment that the plaintiff was not entitled to damages for the delay, the Fifth Circuit stated that the contract, "when read as a whole . . . indicates that the parties thought about the problem of delay when they initially contracted and agreed at that time that the sole remedy for delay would be the extension of time," not damages. *Id.* at 85-86. The court further noted that "[p]arties to a contract might foresee or consider the possibility of delay and contractually provide for a remedy to be applied upon such occurrence. It is not necessary

that exclusion of delay damages be express." *Id.* at 85 (citing *City of Houston v. R.F. Ball Constr. Co., Inc.*, 570 S.W.2d 75, 77 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.)). Thus, the Fifth Circuit held that the plaintiff's sole remedy was extension of the date for completed performance, rather than damages for the delay, and that plaintiff was precluded from recovering damages for the delay even when the exclusion of damages for delay was not labeled "sole" or "exclusive." *Id.*

Similarly, here, the parties obviously considered the possibility that Spinal Concepts would fail to meet its minimum purchase obligations, and expressly provided a remedy for curasan in the event that this occurred. Governing Texas law dictates that this remedy is the exclusive remedy available to curasan under the IDMA. The arbitrator legally erred in concluding otherwise and awarding curasan $2 million in damages, including lost profits, that curasan allegedly suffered from Spinal Concepts' alleged failure to meet the stipulated minimum purchase requirement for 2004 and the requirements for 2005, 2006, and 2007, as projected and estimated by the arbitrator. These damages are barred as a matter of law, and the Award's legal error requires vacatur of all damages granted by the Award.

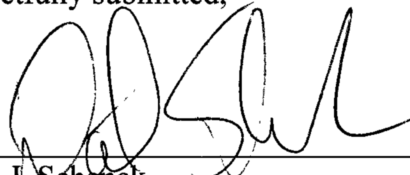
CONCLUSION AND PRAYER

The Award against Spinal Concepts and in favor of curasan rested on erroneous legal conclusions that substantially prejudiced Spinal Concepts by subjecting it to liability for approximately $2,000,000 (specifically, $1,892,962.49) in damages. This Court should vacate the Award on the basis of these errors of law, as the parties' IDMA authorizes the Court to do, and award Spinal Concepts such other and further relief as it determines to be proper.

In order to preserve both Spinal Concepts' legitimate interests and the Court's jurisdiction during this review, Spinal Concepts further requests that the Court enjoin curasan from beginning or continuing any other judicial or other proceeding to enforce the Award before

any other court or authority. Spinal Concepts also requests that the Court enter a judgment declaring (1) that the Court is a competent authority of the country in which the Award was made and (2) that the Award is not binding on the parties and is suspended until the final disposition of Spinal Concepts' Motion to Vacate.

Respectfully submitted,



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