SUPREME COURT OF THE STATE OF NEVADA

GREGORY GARMONG,

Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE BRENT T. ADAMS, DISTRICT JUDGE,

Respondents,

and

WESPAC; GREG CHRISTIAN,

Real Parties in Interest.

_____/

CASE NO.:

DISTRICT COURT CASE NO: CV12-01271

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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Under the authority of NRS 34.160 Petitioner/Plaintiff petitions for a Writ of Mandamus requiring the District Court to vacate its order requiring arbitration in this case, and/or a Writ of Prohibition, NRS 34.330, prohibiting the District Court from acting in excess of its permissible jurisdiction by ordering arbitration in this case.

1.

BRIEF SUMMARY

Following a Motion to Dismiss and Compel Arbitration ("Motion to Compel, Appendix ("App") 12-16) by the Respondents/Defendants, the District Court ordered arbitration of the dispute in this case. NRS 38.221(1) sets forth the two jurisdictional prerequisites for a District Court to order arbitration: "On motion of a person [1] showing an agreement to arbitrate and [2] alleging another person's refusal to arbitrate pursuant to the agreement." Respondents' Motion to Compel (App. 12-16) had no showing of a complete, valid agreement to arbitrate, and admittedly made no allegation that Petitioner refused to arbitrate. Although arbitration is favored under appropriate circumstances, it is not sufficient that Petitioner signed a piece of paper. The statutory requirements of NRS 38.221(1) must be met. The District Court therefore had no jurisdiction to enter such an order, nor did it ever address the matter of its own jurisdiction in its orders (App. 121-122, 201-204), even though Petitioner challenged that jurisdiction (for example, App. 32: 2-3). Because the district court had no jurisdiction to compel arbitration, issuance of a writ of prohibition is appropriate.

Respondents unsuccessfully attempted three times to present a complete, valid agreement between the parties. The purported agreement (App. 21-28) cannot serve as a basis for arbitration as it is incomplete and contains illegal and unconscionable provisions. Issuance of a writ of mandate to require the District Court to vacate its order compelling arbitration is consequently appropriate.

2.

WHY THE SUPREME COURT SHOULD CONSIDER THIS PETITION

The District Court's Order (App. 121-122) compelling arbitration was clearly erroneous, because neither of the jurisdiction-conferring prerequisites of NRS 38.221(1) were met and because there was no valid agreement that could serve as the basis for arbitration. Despite Petitioner's multiple requests, the District Court refused to make any findings as to whether these jurisdictional requirements were met or the purported agreement put forward by Respondents was a valid contract. Nor did the district court make any finding that it had jurisdiction to issue the Order compelling arbitration. An order made without a showing of proper subject matter jurisdiction is void. Additionally, the papers relied upon by the Respondents do not comprise a valid contract and the provisions are improper and invalid under the Constitution.

This Petition presents a question of first impression for this Court – the interpretation and application of the jurisdictional prerequisites of NRS 38.221(1).

3.

RELIEF SOUGHT

Petitioner requests that this Court order the District Court to vacate its order compelling arbitration or, in the alternative, prohibit the District Court from acting in excess of its statutory jurisdiction to order arbitration, which will allow the dispute to be resolved in that forum.

The most fundamental public policy of the State of Nevada is that every citizen, including judges, must follow and obey the law. In the case of judges, their duty is to apply the law in their rulings. This fundamental public policy, as announced by this Court, is rooted in the Nevada Constitution. *In re Raggio*, 87 Nev. 369, 370, 487 P.2d 499 (1971) unequivocally declared:

> The obligation of this court to follow and apply controlling

> decisions of the United States Supreme Court is written in our Nevada Constitution Article 1, Section 2, and that obligation must be discharged fearlessly and without regard to consequences [FN1] Indeed, every citizen, including the District Attorney, is similarly bound. Were it otherwise, ours would be a government of men rather than a government of law. The controlling authority of law must be recognized if we are to endure as a nation. The courts are the symbolic representatives of law and must be allowed to do their duty.
>
> FN1. Art. 1, § 2: [B]ut the Paramount Allegiance of every citizen is due to the Federal Government in the exercise of all its Constitutional powers as the same have been or may be defined by the Supreme Court of the United States.

As *Raggio* states, if the controlling authority of law is not recognized and followed, the State and the nation rapidly degenerate.

The District Court had a duty to apply NRS 38.221 as written, and it failed to do so. Similarly, this Court has a duty to require the District Court to follow the letter of NRS 38.221.

A writ to the District Court permitting the Respondents to bring another motion to compel arbitration would be unavailing. Respondents have unsuccessfully attempted three times to submit to the District Court a valid agreement to arbitrate. Each of the attempts was sworn to be the "true and correct" agreement. There are now in the record multiple different "true and correct" versions of the purported agreement, none of which is a valid contract containing an arbitration provision. If additional agreements are submitted, there is no way to determine which is the actual "true and correct" agreement. Nor would it be possible in arbitration to determine which version controls, if any.

Moreover, the purported agreement that Respondents seek to enforce is both constitutionally defective and invalid under the controlling statutes and case authority.

4.

ISSUES PRESENTED

1. Whether the District court had jurisdiction to compel arbitration.
2. Whether Respondents must show as a jurisdictional prerequisite to an

order compelling arbitration a valid agreement that contains an arbitration provision.

3. Whether Respondents must allege as a jurisdictional prerequisite to an order compelling arbitration Petitioner's refusal to arbitrate pursuant to a valid agreement.

4. Whether the papers filed by Respondents were sufficient under Nevada law to constitute a valid contract with a valid agreement to arbitrate.

5. Whether the papers filed by Respondents meet the constitutional, statutory and case-authority requirements to be a valid agreement to arbitrate.

6. Whether the District Court erred in ordering arbitration in this case.

7. Whether the District Court's orders violated Petitioner's Constitutional rights.

5.

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction

The Supreme Court has original jurisdiction over petitions for writs of prohibition and mandamus pursuant to NRS 34.150-34.350 and NRAP 21. *Schuster v. Dist. Ct.*, 123 Nev. 187, 190, 160 P.3d 873 (2007). Specifically,

"Writ petitions are the appropriate means to challenge district court orders compelling arbitration." *Gonski v. Second Judicial Dist. Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1168 (2010). See also *Attorney General v. Dist. Ct. (Philip Morris)*, 125 Nev. 37, 44, 199 P.3d 828 (2009); *Kindred v. Second Judicial Dist. Court ex rel. County of Washoe*, 116 Nev. 405, 996 P.2d 903 (Nev. 2000) (discussing both writs of mandamus and writs of prohibition).

Issuance of a writ is discretionary, not mandatory. *DOT v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). However, action is required where the Court has previously identified a writ petition as the proper way to challenge an invalid order to arbitrate.

Standard of Review

The Petition requires interpretation of the jurisdictional prerequisites of NRS 38.221(1), a question of first impression for this Court.

The interpretation of, and compliance by the District Court with, the pertinent statute, NRS 38.221(1), is a question of law reviewed *de novo*. *Cable v. State ex rel. its Employers Insurance Company of Nevada*, 122 Nev. 120, 124, 127 P.3d 528, 531 (2006) ("Likewise, we review de novo a district court's statutory interpretation"); *Labor Comm'r of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28 (2007) (holding that compliance with statutes or rules is a question of law reviewed *de novo*).

Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) held, "The construction of a statute is a question of law subject to review de novo. If the plain meaning of a statute is clear on its face, then [this Court] will not go beyond the language of the statute to determine its meaning." See also *Irving v. Irving*, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006). As stated in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms."

"Orders compelling arbitration typically involve mixed questions of law and fact, which this court reviews under different standards, even in the context of a writ petition. [Citations omitted]. The district court's factual findings are given deference, but questions purely of law are reviewed de novo." *Gonski v. Second Judicial Dist. Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1168 (2010).

The review here also involves interpretation of material that Respondents contend is a valid contract, which is a mixed question of law and fact. On the one hand, "[T]he question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009). On the other hand, "Whether the parties have 'described their essential

obligations in [sufficiently] definite and certain terms' to create an enforceable contract presents a question of law that an appellate court reviews de novo." (Internal quotation marks omitted). *Grisham v. Grisham*, 128 Nev. Adv. Op. 60, 289 P.3d 230, 236 (2012); *Cogswell v. CitiFinancial Mortg. Co., Inc.,* 624 F.3d 395, 398 (7th Cir.2010).

In the present case, the district court's two orders (App. 121-122 and 201-204) made no findings of fact as to whether Respondents proffered a valid agreement to arbitrate, whether Respondents alleged that Petitioner refused to arbitrate, and whether the material submitted by Respondents was a valid contract, despite multiple requests by Petitioner that the district court make such findings of fact. Accordingly, there are no findings of fact of the District Court to which this Court can defer, and reversal is required for this reason alone.

6.

HISTORY OF THE CASE

Respondents offer services to the public as investment managers. Petitioner, a senior citizen, entrusted a portion of his life savings to Respondents to manage. Petitioner gave explicit instructions to Respondents as to how to conservatively manage his life savings. Respondents acted directly contrary to those instructions and wasted a portion of those life savings.

After Respondents mishandled his assets, Petitioner brought this lawsuit (App. 1-9) including claims for breach of contract, breach of the Nevada Deceptive Trade Practices Act and breach of fiduciary duty, among other causes of action.

Respondents filed a Motion Compelling Arbitration (App. 12-16). Petitioner opposed it (App. 29-83). The District Court granted (App. 121-122) Respondents' Motion, but made no findings of fact that Respondents showed a valid agreement to arbitrate and that Respondents alleged that Petitioner refused to arbitrate, and made no pertinent conclusions of law. Petitioner moved for reconsideration (App. 123-133), requesting multiple times that the District Court make such findings of fact and

conclusions of law. That motion was denied (App. 201-204), and still no findings of fact or conclusions of law were made.

This Petition follows.

7.

REASONS WHY A WRIT SHOULD ISSUE

A. The District Court had no jurisdiction to order arbitration

(1) A District Court must have subject matter jurisdiction before it can order arbitration.

Argentena Consolidated Mining Company v. Jolley Urga Wirth Woodbury & Standish, 125 Nev. 527, 532, 216 P.3d 779, 782 (2009) provides: "'A district court is empowered to render a judgment either for or against a person or entity only if it has jurisdiction over the parties and the subject matter.' *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) ("There can be no dispute that lack of subject matter jurisdiction renders a judgment void."); *Landreth v. Malik*, 127 Nev. Adv. Op. 16, 251 P.3d 163, 166 (Nev. 2011) ("whether a court lacks subject matter jurisdiction can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties. [Citation omitted]. However, if the district court lacks subject matter jurisdiction, the judgment is rendered void.").

(2) NRS 38.221(1) establishes the statutory jurisdictional prerequisites for considering and/or deciding a motion compelling arbitration.

NRS 38.221(1) directs:

> On a motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement . . . the court shall . . . order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

NRS 38.221(1) is a statutory requirement. There is no basis for refusal of the Respondents to comply or for exercise of discretion by the Court. No Court has discretion to ignore the failure of a party to meet such a statutory mandate. *AA Primo Builders, LLC v. Washington*, 126 Nev. Adv. Op. 53, 245 P.3d 1190, 1197 (2010).

Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560 (1993) holds: "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. . . . Disregarding rules or principles of law to substantial detriment of a party litigant constitutes abuse of discretion." Where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

(3) The district court lacked subject matter jurisdiction to issue an order compelling arbitration.

NRS 38.221(1) has two statutory prerequisites to confer subject matter jurisdiction on the district court, before it may order arbitration. Respondents' Motion to Compel did not meet either requirement. Subsections (a) and (b) address these two requirements.

(a) Respondents made no allegation of "another person's refusal to arbitrate pursuant to the agreement," nor did the district court make any such finding.

A review of Respondents' brief Motion to Compel (App. 12-16) reveals that Respondents did not even attempt to make this jurisdiction-conferring allegation required by NRS 38.221(1), nor did they ever argue that they did make such an allegation. There is a good reason that Respondents made no such allegation of a refusal to arbitrate, because Respondents never requested Petitioner to arbitrate, either directly (App. 194, ¶ 2 and ¶ 3) or through his attorney (App. 198, ¶ 2).

Respondents' Opposition (App. 134-45) to Petitioner's Motion for Reconsideration (App. 123-33) admits (App. 140: 5-13; see also 86: 26-28) that Respondents never made this critical allegation. The Opposition seeks to dismiss their failure to comply with NRS 38.221(1) as an "oversight" and the mandatory compliance with the statutory requirement as "form over substance." Respondents present their speculation as to why they think Petitioner would refuse to arbitrate if they asked him to do so. But this is not what the public policy of Nevada, as expressed in NRS 38.221(1), requires. The plain language of NRS 38.221(1) is clear

that the motion itself must make the allegation of the refusal of the other party to arbitrate. There is no provision in the statute that the movant's later speculative arguments provide a substitute for the required allegation in the motion.

Despite Petitioner's multiple requests (App. 125: 2-26; 133: 6-7) that the district court enter findings concerning the failure of Respondents to allege a refusal to arbitrate, the district court failed to do so (App. 121-22; 201-04).

(b) Respondents made no showing of a valid contractual "agreement to arbitrate," nor did the district court make any such finding.

NRS 38.221(1) requires that the Respondents show a valid agreement that includes an arbitration provision. *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*, 101 Nev. 105, 107-08, 693 P.2d 1259, 1260-61 (1985) holds: "Since appellant set up the existence of the agreement [to arbitrate] to preclude the lawsuit from proceeding, it had the burden of showing that a binding agreement existed . . . As the moving party, appellant had the burden of persuading the district court that the arbitration agreement which it wished to enforce was a valid contract." In the present case it was the Respondents who "set up the existence of the agreement," but the principle otherwise applies.

A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite for a court to ascertain what is required of the respective parties and to compel compliance if necessary. *Grisham v. Grisham*, 128 Nev. Adv. Op. 60, 289 P.3d 230, 234-5 (2012).

In § B below, Petitioner will demonstrate in detail that the purported agreement filed as Exhibit 1 (App. 21-28) by Respondents with their Motion to Compel, described under oath to be "true, correct, and complete," cannot be a valid contract. No complete agreement was shown in the Motion to Compel or has ever been tendered to the District Court, and no complete agreement appears in the present record. Petitioner's Opposition to Defendants' Motion to Compel pointed out (App.

39:21 - 40:13) that Exhibit 1 (App. 21-28) was incomplete. Respondents replied under oath that it only appeared to be incomplete due to "word-processing and/or computer error" in pagination (App. 100:1-7). When Petitioner persisted, Respondents finally admitted that some of Exhibit 1 had not been provided, and under oath (App. 144:10-13) provided a blank preprinted form of a document called a Confidential Client Profile (App. 146-59) that they claimed is the first eleven pages of the as-filed Exhibit 1 (App. 21-28). (That is, the earlier sworn statement (App. 100:1-7), that Exhibit 1 was incomplete only because of a "word processing and/or computer error, was admittedly false.) However, Exhibit 1 itself states (App. 22-23, ¶ 3.2, and 27, ¶ 12) that this Confidential Client Profile must be completed for any agreement to be complete. As of now, only the blank preprinted form (App. 146-59) is in the record. Additionally, Petitioner pointed out (App. 39: 21-40: 13; 131: 18-132: 3; 38:10-23) that six other required exhibits have not been submitted and which Exhibit 1 expressly states must be included, and Respondents have refused to even address this matter.

Lastly, Exhibit 1 refers (App. 27-28, ¶ 16) to the "JAMS Rules" (App. 48-83), but Respondents did not disclose that there are two sets of JAMS Rules with differing provisions and did not provide or identify the applicable set of JAMS rules.

In summary, Respondents admit that the original Exhibit 1 (App. 21-28) was not a complete, valid "agreement to arbitrate," as required by NRS 38.221. Moreover, to this day the Respondents have not submitted such a document and the record contains no complete, valid "agreement to arbitrate."

Any "agreement to arbitrate" must be a complete contract for any portion of it to be valid and enforceable. NRS 38.221(3). An incomplete collection of paper purporting to be a contract cannot be enforced. *See Dodge Bros., Inc. v. Williams Estate*, 52 Nev. 364, 287 P. 282, 283-4 (1930) ("There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite."); *All Star Bonding v. State*

of Nevada, 119 Nev. 47, 49, 62 P.3d 1124 (2003) ("[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain."); *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite.").

NRS 38.219(2) requires that the District Court "shall decide whether an agreement to arbitrate exists." NRS 38.219(1) requires that the District Court may not approve an agreement to arbitrate if there is a ground at law or in equity for revocation of a contract. Further, NRS 597.995 does not permit an arbitration clause absent specific authorization in the agreement. The purported agreement at issue in this case (App. 21-28) does not support an arbitration provision under these statutory requirements. See *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*, 101 Nev. at 108, 693 P.2d at 1260. The District Court did not perform this mandatory function in the only way supported by the evidence before it – rejection of the purported agreement.

Despite Petitioner's multiple requests to enter findings regarding the sufficiency of the alleged Investment Management Agreement, the District Court failed to do so.

(4) Respondents' refusal to provide a complete Investment Management Agreement was designed to gain an advantage in arbitration.

Respondents have steadfastly refused to disclose any of the required exhibits or attachments of the purported Investment Management Agreement (App. 021-028). The result was to deprive the District Court, this Court and Petitioner of the facts. To further insulate themselves, the alleged Investment Agreement itself (App. 27-28, ¶ 16) provides that in arbitration "discovery shall not be permitted except as required by the rules of JAMS." [emphasis added]. Neither of the sets of JAMS rules (App. 48-83) requires any discovery. Consequently, in Respondents' scheme, neither an arbitrator nor Petitioner will ever be able to obtain from Respondents a complete copy

of the entire alleged Investment Management Agreement.

By avoiding legitimate discovery Respondents seek to prevent a full and fair disclosure of the facts. Arbitration may not be used to conceal the facts. Respondents refused to produce the three Exhibits A, the three Exhibits B, and the completed Confidential Client Profile (App. 40:1-6; paragraph bridging 45-46), and identify the applicable JAMS Rules (App. 38:10-23). The as-filed Exhibit 1 itself provides (App. 27, ¶14) that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties." (Emphasis added). By refusing to provide the document set for each offered "agreement," the Respondents' obvious strategy was to get past the District Court and force this proceeding to arbitration without providing the "entire agreement of the parties," and then refuse to produce the completed Confidential Client Profile and "all Exhibits attached hereto" because the JAMS rules do not "require" any production in discovery under arbitration.

(5) Petitioner sought factual findings and conclusions from the District Court, which were not forthcoming.

In the prior discussion, Petitioner pointed out that the District Court had not made any factual findings or legal conclusions. The party seeking to enforce an arbitration agreement, here Respondents, did not seek findings of fact and conclusions of law from the District Court. In *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*, 101 Nev. at 105, 693 P.2d at 1259, this Court cautioned: "Since appellant's counsel failed to pursue the entry of findings of facts and conclusions of law, we are bound to presume that the district court found that respondent did not give a knowing consent to the arbitration agreement prepared by appellant clinic." In this case, it was Respondents' counsel that failed to pursue entry of findings of facts and conclusions of law and it must be presumed that there was no valid agreement to arbitrate.

Petitioner took that cautionary statement to heart. After the District Court

entered a very brief Order Compelling Arbitration (App. 121-22) without findings and conclusions of law on the pertinent matters, Petitioner did everything he could to obtain findings and conclusions from the District Court. Petitioner repeatedly pointed out the absence of findings of facts and conclusions of law by the district court on the pertinent matters. See App. 125: 21-23; 126: 6-8; 128: 1-4; 128: 17-19; 128: 24-25; 129: 8-10; 129: 12-14; 129: 16-18; 129: 27-28; 130: 8-9; 130: 14-15; 130: 18-19; 131: 3-6; 131: 12; 131: 14-16; 131: 27-132: 3; 132: 18-19; 132:27-133:1. Petitioner expressly requested that the District Court make such findings and conclusions. See App. 133: 6-7, stating "If it declines to deny the Motion [for reconsideration of the order compelling arbitration], Plaintiff requests that the Court make the required findings."

The District Court ignored all of Petitioner's requests, and made no such findings in its order denying reconsideration (App. 201-04).

That there were no findings of fact and conclusions of law is not for Petitioner's lack of trying, as suggested by *Obstetrics*.

Neither Petitioner nor this Court knows the basis for the District Court's order compelling arbitration. This Court has no pertinent findings of fact or conclusions of law from the District Court.

B. <u>Respondents did not submit a complete, valid enforceable contract having an arbitration provision despite three attempts, and no such agreement is in the record.</u>

Respondents failed to "show an agreement to arbitrate." Respondents' Motion to Compel (App. 12-16) attached what they claimed was an Agreement requiring arbitration (App. 21-28). The history of the inquiry into this document at this early stage is tortuous, but suffice it to say that Respondents have attempted three times to put forth or explain a valid contract and have failed. It cannot be overemphasized that no complete, valid agreement between Petitioner and Respondents was submitted to the District Court or is part of the record.

Respondents' Motion to Compel (App. 12-16) included as Exhibit 1 (App. 21-

28) a collection of paper entitled "Investment Management Agreement," and an Affidavit of Greg Christian stating (App. 17, ¶2), "Attached is a true, correct, and complete copy of the Investment Management Agreement."

Petitioner's Opposition (App. 29-83) pointed out (App. 39:21-40:13) that Exhibit 1 (App. 21-28) included no Confidential Client Profile and no exhibits, as required by Exhibit 1 itself (App. 27, ¶14):

> 14. This Agreement, <u>including the Confidential Client Profile and all Exhibits attached hereto</u>, constitutes the entire agreement of the parties.

(Emphasis added).

Exhibit 1 calls for several exhibits as well as the completed (not a blank form) Confidential Client Profile and two different documents termed "Exhibit A" (App. 22, ¶2 and App. 23, ¶ 4(a)) and two different documents termed "Exhibit B" (App. 023-024, ¶3(3) and ¶4(a)). None of this material was part of original Exhibit 1 (App. 21-28).

Petitioner's Opposition (App. 39:21-40:13) also pointed out another peculiarity of original Exhibit 1 (App. 21-28). Its page numbering began on page 12 (App. 22, lower right hand corner). Something is clearly missing.

Respondents' Reply (App. 93:18-28) did not address the missing Confidential Client Profile or the missing Exhibits A and B at all. It did, however, speak to the page numbering:

> Plaintiff also claims that . . . only a portion of the Agreement was provided with his [Defendants'] motion . . . While plaintiff may speculate as to what nefarious and/or underhanded reasons Defendants had for submitting a document with peculiar page numbering, the simple answer is that word processing glitches occurred and as a result, the pages were mis-numbered.

For support Respondents' Reply referenced paragraphs 5-6 of the supporting second Affidavit of Greg Christian (App. 100:1-7):

> 5. The copy of the Investment Management Agreement which was attached as Exhibit 1 to my affidavit filed September 19, 2012 was a true, correct, and complete copy of the Investment Management Agreement signed by me and Gregory Garmong.

> 6. I am informed, believe and therefore allege that the incorrect page numbering on the Investment Management Agreement attached to my September 19, 2012 affidavit occurred solely as the result of a word processing and/or computer error.

Thus, Respondents again claimed under oath that the Agreement version 2 with "incorrect page numbering" was a complete document and asserted that its only deficiency was mis-numbered pages.

Petitioners Motion for Reconsideration (App. 128: 5-19) persisted in pointing out the shortcomings and inconsistencies in Respondents' story about the "Investment Management Agreement."

As it turned out, paragraphs 5-6 (App. 100: 1-7) of the second Christian Affidavit were completely false. There were pages prior to page 12. Respondents' Opposition to the Motion for Reconsideration included (App. 146-59) an incomplete, blank copy of a "Confidential Client Profile" that was represented to be the earlier pages 1-11. This blank document was introduced by a third Affidavit of Greg Christian (App. 144:10-12), stating:

> 2. Attached hereto is a true, correct, and complete copy of the Confidential Client Profile which comprised the first eleven pages of the document which included the Investment Management Agreement (See Exhibit 1).

This sworn statement was also false, because the Table of Contents (App. 149) called for Exhibit A and Exhibit B as part of the Confidential Client Profile. Exhibit A and Exhibit B were not provided, and accordingly the Confidential Client Profile was not "complete."

The Confidential Client Profile must be completed, not a blank-form preprinted document. The original Exhibit 1 provided:

> 2. Custody of Portfolio Assets. The Portfolio Assets subject to WA's supervision will be maintained in street name in Client's account at Charles Schwab & Co., Inc. or at a brokerage house, bank, trust company or other firm ('the Custodian') selected by Client as set forth in the attached Confidential Client Profile.

12. All written notices to . . . Client at the address set forth in Confidential Client Profile attached hereto.

(Emphasis added) (App. 22, ¶ 3(2)); 27, ¶ 12).

These requirements cannot be met with a blank, preprinted, incomplete Confidential Client Profile, App. 146-59. That is, any actual Investment Management Agreement must include three different Exhibits A, three different Exhibits B, and a completed Confidential Client Profile. None of these parts of the alleged Investment Management Agreement have been submitted by Respondents, and they are not part of the record.

Recognizing their predicament, Respondents then frantically backpedaled to argue that the Confidential Client Profile is not part of the Investment Management Agreement and that both the Investment Management Agreement and the Confidential Client Profile are part of some larger and unidentified "document." (App. 144: 10-12). But Exhibit 1 states in part (App. 27, ¶14) that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties." (Emphasis added).

Even in submitting the incomplete form Confidential Client Profile (App. 146-59), Respondents were still not being fully candid. First, it was submitted in blank, even though the above-quoted paragraphs 2 and 12 of Agreement version 1 identify information that would necessarily be found in the completed Confidential Client Profile. Further, the Affidavit of Greg Christian stated (App. 144:11) that the attachment is "the first eleven pages of the document which included the Investment Management Agreement." The Exhibit Index (App. 145) stated that the document is 13 pages, as a page count verifies, not the 11 pages as sworn. One must ask whether the "Confidential Client Profile" submitted as Exhibit 1 is really the first 11 pages of the Investment Management Agreement, or whether something else is really the first 11 pages. In any event, the Petitioner is now certain that such a thing as the Confidential Client Profile referenced in paragraphs 2, 12, and 14 of the Agreement

version 1 does exist and was withheld from the Exhibit 1 that was initially submitted with Defendants' Motion to Compel. Consequently, the prerequisite of NRS 38.221(1), "On motion of a person showing an agreement to arbitrate." is not met in the original Exhibit 1 (App. 21-28).

It gets worse. Comparing the Table of Contents (App. 149) of the Confidential Client Profile with the content of the document shows that the material described in the Table of Contents has not been supplied. The Table of Contents stated that numbered pgs. 5-11 (App. 153-59) were "Exhibit A: Fee Schedule" and "Exhibit B: Portfolio Appraisal/Security Cost Basis Form." In fact, a brief inspection shows that numbered pgs. 5-11 (App. 153-59) were nothing of the sort. Those pages appear to be an incomplete "Investment Policy Questionnaire"; see the title on numbered page 5 and the content of the documents on numbered pgs. 6-11. Respondents provided no Exhibit A or Exhibit B as called for in the Table of Contents of the Confidential Client Profile.

Moreover, Respondents expected the District Court to believe that the actual Confidential Client Profile referenced in paragraphs 2 and 12 quoted above was incomplete. The reason that Respondents sought to conceal the information that would be found on the completed Confidential Client Profile was that it is substantively important to the case, and they hope to avoid its production in a lop-sided arbitration proceeding where "discovery shall not be permitted except as required by the rules of JAMS." App. 27-28, ¶16. Of course, the rules of JAMS (App. 48-83) do not require any discovery, so Petitioner will never be able to find out what information the Respondents have concealed. A review of the incomplete Confidential Client Profile (App. 146-59) reveals that a completed form it would set forth, among other things, the instructions that Petitioner gave to the Respondents to conservatively manage his retirement savings (App. 151 and 154-59), which the Respondents blatantly ignored in wasting a significant portion of his life savings. If the Respondents can force this matter to an arbitration with substantially no discovery

and without the possibility of punitive damages (App. 27, ¶ 16), they will have saved themselves a huge amount of money and successfully completed their wasting of a significant portion of Petitioner's life savings.

Any "agreement to arbitrate" must be a complete contract for the agreement, and specifically the arbitration clause at ¶16, to be valid and enforceable. NRS 38.221(3). An incomplete collection of paper purporting to be a contract cannot be enforced. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite."). Indeed, JAMS itself, a third party, could not alter the contract to supply the missing material terms. *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136 (1990); *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 633, 189 P.3d 656 (2008), *Flyge v. Flynn*, 63 Nev. 201, 236-37, 242, 166 P.2d 539 (1946) ("Neither the district court, nor this court, is empowered or authorized to make a new contract, as between the parties, which they did not themselves make."); *Harmon v. Tanner Motor Tours*, 79 Nev. 4, 17, 377 P.2d 622 (Nev. 1963); *City of Reno v. Silver State Flying Serv.*, 84 Nev. 170, 175, 438 P.2d 257 (1968); American Jurisprudence 2d "Specific Performance", Sec. 34-37 and 47. Neither a party, nor the Court, nor an arbitrator may force upon Petitioner provisions that are not found in the purported agreement.

Respondents have not submitted an "entire agreement of the parties" to the District Court or to Petitioner, as they themselves define "entire agreement" at App. 27, ¶14, and no such "entire agreement" is present in the record.

C. <u>The purported Investment Management Agreement contains multiple provisions that are objectionable under the Constitution</u>.

The interpretation of the arbitration provision (App. 27-28, ¶16) raises the question of whether Petitioner waived Constitutionally guaranteed rights "knowingly and voluntarily."

(1) Petitioner did not waive his right to jury trial "knowingly and voluntarily."

The purported Agreement (App. 27-28, ¶16) provides that Petitioner waives a jury trial. A jury trial is a Constitutionally guaranteed right, but it may be waived under appropriate circumstances. *Lowe Enterprises v. Eighth Judicial District Court*, 118 Nev. 92, 101, 40 P.3d 405, 410-11 (2002), sets forth the standard for establishing whether a waiver was entered "knowingly and voluntarily":

> The factors to consider whether a contractual waiver of the right was entered into knowingly and voluntarily include (1) the parties' negotiations concerning the waiver provision, if any; (2) the conspicuousness of the provision; (3) the relative bargaining power of the parties; and (4) whether the waiving party's counsel had an opportunity to review the agreement . . . Accordingly, we conclude that a court may consider, but is not limited to, the above factors when determining whether a jury trial waiver should be enforced.

The purported waiver provision is found at App. 27-28, ¶16. The primary consideration here is factor (4), " whether the waiving party's counsel had an opportunity to review the agreement." Keeping in mind that under the purported agreement, App. 27, ¶14, "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties," Petitioner never had a copy of the "entire agreement," and even now neither the Court nor Petitioner have a copy of the "entire agreement." (App. 194-5, ¶¶ 5-8). It was impossible for any counsel of Petitioner to review the "entire agreement." Similarly, it is impossible for this Court to review the "entire agreement," as it has never been furnished by Respondents and is not part of the present record.

As to factor (1), the same consideration applies, because when one party has all of the information readily available to itself and denies the information to the other party, the other party cannot negotiate fairly about the waiver provision. It is important to remember the proposed relationship between the parties, in light of Respondents' attempt to persuade Petitioner to give up his Constitutional rights, as another factor for consideration under *Lowe Enterprises*. Respondents were entering

into an agreement to manage a large portion of the life savings of Petitioner, who was over 60 years of age and approaching retirement when he would rely upon those savings. The nature of the relationship in any potential future dispute was quite one-sided, as Respondents were paid by withdrawing money from Petitioner's accounts. There was therefore substantially no likelihood that Respondents would ever bring any complaint against Petitioner--they had what they wanted. Consequently, it was likely that, as happened, only Petitioner would have grounds for a complaint against Respondents when they defrauded him of a substantial portion of his life savings, and Respondents would not have any claim that Petitioner had not paid them. It was therefore in Respondents' interest to make any recovery by Petitioner as difficult as possible, and to impose an arbitration clause as lop-sided in favor of Respondents as possible.

As investment advisor in the relationship that Respondents proposed, Respondents would have a confidential relationship to Petitioner and would then be obligated to make a full and fair disclosure to him. *Randono v. Turk*, 86 Nev. 123, 129, 466 P.2d 218, 222 (1970). In such cases of contracting to enter a confidential relationship and giving up substantial rights otherwise guaranteed by law, such as a premarital agreement, this Court has held that there must be a full and fair disclosure between the parties prior to entering the agreement, *Sogg v. Nevada State Bank*, 108 Nev. 308, 315, 832 P.2d 781, 786 (1992), as well as after the relationship has commenced. Under this principle, Petitioner was required to make a full and fair disclosure to Respondents; see the items of information demanded by Respondents in the blank-form Confidential Client Profile (App. 146-59).

On the other hand, Respondents did not make a full and fair disclosure of the information they knew to Petitioner. Respondents made a major point in their Opposition at App. 139: 2-140: 3 of quoting extensively from the JAMS Rules in support of their attempt to persuade the District Court that it should side with Respondents to take away from Petitioner Constitutionally guaranteed rights. Yet

Respondents did not quote from the JAMS Rules in their drafts or in the purported Agreement. App. 21-28. They did not otherwise make a full and fair disclosure to Petitioner by informing Petitioner that the JAMS Rules call for the drafter of the arbitration provision to specify the version of the JAMS Rules to be used, and that the drafter propose the location of the arbitration, the number of arbitrators, or the options to make other arrangements and to select other arbitrators. Such a full and fair disclosure would have allowed the parties to negotiate on the basis of equal knowledge. Nor did Respondents provide to Petitioner copies of the three Exhibits A, the three Exhibits B, or the Confidential Client Profile as part of the purported agreement (App. 21-28), and refuse to provide that information to Petitioner or to the Court even now. Consequently, Petitioner had no opportunity to negotiate on a level playing field with Respondents as required under factor (1).

As to factor (3), for the same reason Petitioner had very limited bargaining power because Respondents did not disclose to Petitioner the wide variety of provisions in the JAMS Rules quoted earlier and other critical information. Certainly the parties were not on an equal footing in their knowledge of the JAMS Rules and other information needed by both sides in a full and fair negotiation.

As to factor (2), the purported Agreement (App. 27, ¶14), prepared by Respondents, states in part: "The captions in this Agreement are otherwise for convenience of reference only and in no way define or limit any of the provisions hereof or otherwise affect their construction or effect." That is, as Respondents wrote and provided in their own Agreement version 1, the captions have no effect on the provisions of each paragraph, and are to be ignored. Factor (2) of the test of *Lowe Enterprises*, conspicuousness of the provision, therefore must exclude any consideration of conspicuousness of the caption. Excluding the caption to ¶ 16 of Agreement version 1 (App. 27-28, ¶16), paragraph 16 does not stand out in any respect, as the provisions purporting to waive Constitutionally guaranteed rights are not presented in a larger type size than the other paragraphs or in bold-faced type, or

especially called out to the reviewer. Indeed, ¶ 16 does not mention waiving the right to a jury trial at all, except in the excluded caption, which under ¶ 14 has no legal effect.

Thus, all four of the *Lowe Enterprises* factors lead to the conclusion that Petitioner cannot be said to have waived his Constitutionally protected right to jury trial "knowingly and voluntarily."

(2) Petitioner did not waive his right to appeal "knowingly and voluntarily."

The right to appeal guaranteed by the Nevada Constitution is discussed in *Coffin v. Coffin*, 40 Nev. 345, 163 P. 731 (1917), stating: "The Constitution gives the right to appeal to this Court." The cases do not discuss the factors to consider in determining whether a waiver was entered "knowingly and voluntarily," but presumably those factors would be the same as set forth in *Lowe Enterprises*. The prior discussion of waiver of right to jury trial is incorporated here, and the same conclusions would be reached. However, the language of ¶ 16 (App. 27-28, ¶16) is ambiguous as to rights on appeal, stating "the parties right to appeal or seek modification of any ruling or award of the arbitrator is severely limited," which is not a clear waiver. Yet ¶ 16 makes an appeal essentially impossible by asserting that "the arbitration award shall not include factual findings or conclusions of law." Paragraph 16 also states that "the party's right to appeal or to seek modification of any ruling or award of the arbitrator is severely limited. Any award rendered by the arbitrator shall be final and binding."

As stated above, "the nature and scope of review of an arbitrator's decision cannot be stipulated to by the parties." *Barnett v. Hicks*, 829 P.2d 1087, 1095 (Wash. 1992). Accordingly, the attempt to prevent the arbitrator from making factual findings or conclusions of law is invalid, inasmuch as the absence of such findings and conclusions block appellate review. Nor may any arbitration provision limit the right to appeal or to seek modification and state a finality that is different from that

provided by statute.

Any asserted waiver of the right to appeal was not made "knowingly and voluntarily."

D. The arbitration agreement is both procedurally and substantively unconscionable and should not be enforced.

NRS 38.221(3) provides if the court finds there is no enforceable arbitration agreement, it may not order the parties to arbitrate. An unconscionable arbitration provision may not be enforced. This Court addressed unconscionable arbitration agreements in *Gonski v. Second Judicial Dist. Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1169 (2010):

> Unconscionable arbitration agreements will not be upheld; in reviewing an agreement's unconscionability, we look for both procedural and substantive unconscionability. An arbitration clause is procedurally unconscionable when a party has no 'meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract.' [citation omitted] Thus, for example, the use of fine print and/or misleading or complicated language that 'fails to inform a reasonable person of the contractual language's consequences' indicates procedural unconscionability. [Citation omitted]. Substantive unconscionability, in contrast, is based on the one-sidedness of the arbitration terms. [Citation omitted] Generally, in considering substantive unconscionability, courts look for terms that are 'oppressive.' [Citation omitted]. Although a showing of both types of unconscionability is necessary before an arbitration clause will be invalidated, in *D.R. Horton, Inc. v. Green* [120 Nev. 549, 96 P.3d 1159 (2004)], we noted that a strong showing of procedural unconscionability meant that less substantive unconscionability was required. [Citation omitted] The reverse is true also: the stronger the showing of substantive unconscionability, the less necessary is a strong showing of procedural unconscionability. [Citation omitted].

(1) Procedural unconscionability.

The *Gonski* Court further stated, 245 P.3d at 1170:

> In *D.R. Horton*, this court provided that, 'to be enforceable, an arbitration clause must at least be conspicuous and clearly put a purchaser on notice that he or she is waiving important rights under Nevada law.' 120 Nev. at 557, 96 P.3d at 1164. In that case, we agreed that the arbitration clause was inconspicuous because nothing drew the reader's attention to its importance . . . . The clause's inconspicuousness, together with the district court's finding that the seller had misrepresented its nature and failed to put the home buyers on notice that they were foregoing certain rights under Nevada law, such as the

> right to a jury trial and NRS Chapter 40 attorney fees or other proximate damages, led us to uphold the district court's finding of procedural unconscionability.

245 P.3d at 1170. The *Gonski* court continued, stating the reasons for the finding of procedural unconscionability in that case: "Like the arbitration provision at issue in *D.R. Horton*, the purchase agreement's arbitration provision here in no way draws the reader's attention: it is printed in normal sized font and located on page 15 of an 18-page document and in the midst of identically formatted paragraphs and sentences[.]" 245 P.3d at 1170.

This determination of procedural unconscionability by the *Gonski* court is precisely applicable to the facts of the present case. Paragraph 16 of the purported agreement (App. 27-28) is printed in a normal-sized font, and nothing draws the reader's attention to ¶ 16 as any different in legal consequence than paragraphs 1 through 15.

As a further requirement of conspicuousness and drawing the parties attention to an arbitration provision, NRS 597.995(1) requires that any agreement which purports to require that a party submit to arbitration "must include a specific authorization for the provision which indicates that the person has affirmatively agreed to the provision." *Gonski*, 245 P.3d at 1167, depicts an arbitration provision in compliance with NRS 597.995(1), in which the parties must initial to indicate their affirmative agreement to the arbitration provision. In the present case, the purported agreement (App. 27-28) gave no such opportunity for affirmative assent to the arbitration provision; accordingly, there is no affirmative agreement to the arbitration provision as required by NRS 597.995(1). NRS 597.995(2) provides that any agreement having an arbitration provision that fails to include the specific authorization is "void and unenforceable."

In *Gonski* an additional reason for the finding of procedural unconscionability was that the agreement containing the arbitration clause was presented to the Gonskis in a "stack of other papers." 245 P.3d at 1170. In the present case Exhibit 1 (App.

21-28) to the purported agreement (App. 27-28, ¶ 16) submitted with Respondents' Motion to Compel contained many more pages than presented in Exhibit 1 [to Petitioner?], because it is numbered pages 12-18 and the other pages are not disclosed. Moreover, they were three different exhibits "A," three different exhibits "B" and a completed "Confidential Client Profile" which were not disclosed. Declaration of Gregory Garmong (App. 46-47, ¶ 3). In any event, the agreement was buried in the midst of other pages, as in *Gonski*.

Gonski also found that "An arbitration clause is procedurally unconscionable when a party has no 'meaningful opportunity to agree to the clause terms . . . because of unequal bargaining power, as in an adhesion contract[.]" 245 P.3d at 1169. The Investment Management Agreement was a contract of adhesion. It was prepared by the Respondents and Petitioner had no opportunity to fairly bargain on the terms, primarily because he never received a complete copy of any purported agreement. See Garmong declaration (App. 45-47, ¶ ¶ 1, 2, 4, 5, 6 and 8).

Yet another reason for the finding of procedural unconscionability in *Gonski* was that the arbitration clause did not warn the Gonskis "that they were agreeing to forego important rights under Nevada Law[.]" Paragraph 16 of the agreement (App.026-27) similarly does not give notice that Petitioner was foregoing or waiving important rights under Nevada law, such as the right to appeal due to a prohibition on findings of fact and conclusions of law in the arbitrator's award, the nature of limitations on discovery rights, and the loss of the right to present evidence unless arbitration fees were paid in advance. Petitioner did not receive any notice that he was waiving such important rights. Garmong declaration (App. 46, ¶ 5). Petitioner did not have legal counsel when he signed the purported agreement (App. 45, ¶ 1), nor was he given a copy of the complete agreement to read outside of the offices of respondents and take to an attorney for advice (App. 45, ¶ 2). Moreover, as stated, the purported agreement was not complete (App. 45, ¶ 3).

Gonski also found that "An arbitration clause is procedurally unconscionable

when . . . its effects are not readily ascertainable upon a review of the contract." 245 P.3d at 1169. In this case, ¶ 16 (App.27-28) states that "in the event of any dispute . . . such dispute shall be resolved exclusively by arbitration to be conducted only in the county and state at the time of such dispute in accordance with the rules of the Judicial Arbitration and Mediation Service ('JAMS')[.]" Petitioner was not supplied a copy of these rules, either at the time of signing or later by respondents. App. 46, ¶ 4. As a consequence, Petitioner could not readily ascertain the effects of the arbitration provision because he could not know what rights he was foregoing or waiving in respect to JAMS arbitration. Had Petitioner received the JAMS rules at the time the Investment Management Agreement was presented to him, he would not have signed the purported agreement (App. 46, ¶ 4).

Another basis for procedural unconscionability is the absolute lack of clarity on governing law. Paragraph 16 states that disputes shall be resolved by the JAMS rules "applying the laws of the State where the agreement is governed and executed." The question, then, is which state's laws govern the purported agreement? Paragraph. 14 (App. 27) provides: "This Agreement shall be governed by the laws of the State where the agreement is governed and so executed." Confusingly, the governing law is of the State where the purported agreement is both "governed" and also "so executed." This is completely circular language; it did nothing to allow the Petitioner to analyze whether Nevada or California (or another state's) law would govern the Investment Management Agreement, including its arbitration clause. California law is arguably applicable since notices under the purported agreement must be sent to the Wespac Oakland, CA office (App. 27, ¶ 12), and the judgment entered on the arbitration award "in any court of competent jurisdiction in the county and state of the principal office of WA at the time such award is rendered." (App. 27, ¶ 16). Nevada law is arguably applicable because the document was executed in Nevada. Of course, the location of the "principal office" of Wespac Advisors is nowhere stated in the purported agreement.

Paragraph 16 thus meets the criteria of this Court in *Gonski* for a determination of procedural unconscionability and should be denied enforcement.

(2) Substantive unconscionability.

As stated in *Gonski* and quoted above, substantive unconscionability is based on the one-sidedness of the arbitration terms and the presence of terms that are "oppressive." The purported arbitration agreement in this case is substantively unconscionable in at least the following particulars:

Right to appeal. A right to appeal is fundamental and granted by statute. *See* NRS 38.247; *Clark County Education Association v. Clark County School District*, 122 Nev. 337, 131 P.3d 5 (2006) (bases for appealing an arbitration award). Paragraph 16 does not abolish outright an appeal from an arbitrator's award. Rather, by misdirection, it effectively denies the right to appeal by prohibiting findings of fact and conclusions of law ("the arbitration award shall not include factual findings or conclusions of law."). It would be impossible to determine whether any award was arbitrary or capricious for lack of substantial evidence without findings of fact. *Wichinsky v. Mosa*, 109 Nev. 84, 89, 847 P.2d 727, 731 (1993) ("The lack of evidence to support the arbitrator's *findings* compels us to conclude that the arbitrator abused her discretion.")(Emphasis added). No findings realistically means no right to appeal at all, something ¶ 16 failed to explain.

Public policy and denial of statutory rights. Arbitration agreements that violate public policy are unenforceable. *Picardi v. Eighth Judicial Court*, 127 Nev. Adv. Op. 9, 251 P.3d 723 (2011) (prohibition against class actions violates public policy). Paragraph 16 states: "No punitive damages shall be awarded." By this simple clause the respondents immunized themselves from any consequences for intentionally injuring or oppressing the Petitioner or consciously disregarding his rights. *See* NRS 42.005(1). In so many words, ¶16 permits the respondents to commit fraud or flagrant breaches of fiduciary duty without the civil punishment authorized by Nevada law. NRS 42.001 and .005. A prohibition against punitive

damages is patently a violation of public policy and therefore renders the arbitration provision unenforceable.

In addition to violating public policy, the clause quoted above impliedly denies Petitioner's statutory rights, in this case to recover punitive damages. Considering this point in the context of attorney's fees and costs under Chapter 40 of the NRS, the Gonski court held:

> Further, even with respect to covered claims, the arbitration provisions impermissibly fail to preserve the Gonskis' statutory rights . . . Accordingly, the arbitration provisions compel the Gonskis to forfeit their statutory right to attorney fees and, potentially, costs . . . As a result, the arbitration provisions impliedly waive the Gonskis' statutory rights under NRS Chapter 40, such that substantive unconscionability exists. See *Graham Oil v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994) (invalidating an arbitration agreement that waived statutory rights).

245 P.3d at 1173. The taking of the Petitioner's statutory right to punitive damages and right to appeal found in ¶ 16 also renders the purported arbitration agreement substantively unconscionable.

Hidden arbitration fees. *Gonski* addresses the issue of fees on arbitration as a key aspect of substantive unconscionability. It states:

> Moreover, as the district court noted, the documents fail to mention the potentially high amount of the arbitration costs. While that failure alone does not amount to substantive unconscionability, *D.R. Horton*, 120 Nev. at 559, 96 P.3d at 1166 (stating that 'the absence of language disclosing the potential arbitration costs and fees, standing alone, may not render an arbitration provision unenforceable'), in this instance, the plan administrator is to determine the arbitration organization, and thus, the Gonskis were apparently unable to estimate potential costs at the time of signing, since they had to ask the plan administrator for a copy of the applicable arbitration rules. In *D.R. Horton*, this court noted its agreement with a Ninth Circuit ruling that invalidated a provision, in part because it required the arbitrating parties to split the fees. [Citation omitted]. Here, the Gonskis were not required merely to split the fees, but to pay the fees up front. Thus, the limited warranty's arbitration provision is substantively unconscionable because it required the Gonskis to pay the initial arbitration costs.

245 P.3d at 1171 (emphasis added).

In the present case, Petitioner also was not able to estimate potential costs of

arbitration at the time of signing, simply because he was not supplied with any information on the fee provisions associated with arbitration. Specifically, Petitioner was not furnished a copy of the "rules of the Judicial Arbitration and Mediation Service", as referenced in ¶ 16 (App. 027-028), at the time of signing or at any time by Respondents. Garmong declaration, App. 45-46, ¶ ¶ 4 and 6. If the Petitioner had been provided the rules he would not have signed the Investment Management Agreement. Garmong declaration, App. 46, ¶ 4.

Gonski states as a further basis for the determination of substantive unconscionability, "Here, the Gonskis were not required merely to split the fees, but to pay the fees up front. " 245 P.3d at 1171. Rule 31(b) of the Judicial Arbitration and Mediation Service, which was unknown to Petitioner because he was not given a copy of the JAMS rules, provides that a party who cannot deposit JAMS fees and expenses prior to the hearing may not offer any evidence of an affirmative claim at the hearing. That is, there is no provision for a party to proceed fairly in arbitration unless he pays fees and expenses in advance, as condemned by *Gonski*.

Lack of mutuality. *Gonski* sets out the fundamental criterion for the determination of substantive unconscionability: "Substantive unconscionability, in contrast, is based on the one-sidedness of the arbitration terms." 245 P.3d at 1169. The agreement was *de facto* one-sided and thus substantively unconscionable. There was substantially no way for Petitioner to breach the agreement. Petitioner's primary obligation was to pay a fee to the respondents. See App. 24, ¶ 4(b) of the Investment Management Agreement. Respondents arranged for their management fee to be deducted automatically from Petitioner's accounts. Garmong Declaration, App. 47,¶ 7. Consequently, there was realistically no way for Petitioner to breach the terms. On the other hand, the Respondents could breach the terms in a myriad of ways, as they did here, by failing to properly manage his accounts according to the instructions he gave respondents orally and in writing. Thus, by the Respondents' contrivance of terms which, while arguably impartial on their face (*e.g.*, both parties giving up right

to punitive damages, limited appealability, limited discovery), in application favored only the Respondents, the arbitration agreement became substantively unconscionable.

Inconsistent governing rules. Paragraph 16 of the agreement states that "arbitration is to be conducted only in the county and state at the time of such dispute in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS")." However, JAMS has two completely different sets of rules: "Comprehensive Arbitration Rules and Procedures," (App. 49-66) and "Streamlined Arbitration Rules and Procedures." (App. 67-83). The JAMS rules instruct the person preparing the arbitration clause to state in the arbitration clause which set of the rules is to govern (see page 4, left column of each set of rules), because JAMS recognizes that failure to identify the governing rules renders the arbitration clause indefinite.

Rule 1(b) of each set of JAMS rules makes that set of rules a part of the arbitration agreement. Yet no set of these rules was provided to Petitioner, and accordingly the purported agreement was incomplete. (App. 46, ¶ 4). Even had they been presented to the petitioner, he would not have known which to apply to any possible future arbitration proceeding. Lack of notice of governing rules makes the purported arbitration agreement substantively unconscionable. *See Gonski*, 245 P.3d at 1171.

Illusory discovery rules. Paragraph 16 of the purported agreement states that "discovery shall not be permitted except as *required* by the rules of JAMS[.]" (Emphasis added). The JAMS Comprehensive Rules (App. 49-66) and the JAMS Streamlined Rules (App. 67-83) do not "require" any discovery. Discovery is *permitted* and then only in an abbreviated form. In a very real sense this "promise" of discovery is illusory because it means that no discovery at all may be done. It is the Petitioner who needs the discovery; the majority of the evidence of the respondents' wrongdoing is in their hands. This makes the Petitioner's need for real

discovery all the more compelling. The denial of any discovery is completely oppressive to the Petitioner, who bears the burden of proving his case. *Gonski* states, "Generally, in considering substantive unconscionability, courts look for terms that are 'oppressive.'" 245 P.3d at 1169. While the clause from ¶ 16 quoted above may appear innocuous, it is oppressive because it severely compromises Petitioner's ability to prove his case.

(3) Finding of unconscionability.

Considering a sliding scale of unconscionability, the *Gonski* court observed:

> "Although a showing of both types of unconscionability is necessary before an arbitration clause will be invalidated, in *D.R. Horton, Inc. v. Green* [120 Nev. 549, 96 P.3d 1159 (2004)], we noted that a strong showing of procedural unconscionability meant that less substantive unconscionability was required. [Citation omitted] The reverse is true also: the stronger the showing of substantive unconscionability, the less necessary is a strong showing of procedural unconscionability. [Citation omitted]."

245 P.3d at 1169. In the present case Petitioner has demonstrated both the procedural and substantive unconscionability of the arbitration provision. Both showings are strong, persuasive and incontrovertible. Pursuant to NRS 38.221(3) and *Gonski*, the Court should find that ¶ 16 is unconscionable and deny the motion to compel arbitration.

E. The district court's orders offend Constitutional protections.

(1) "Jurisdiction" is indispensable to action by any court.

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction [citing cases], and that there shall be notice and opportunity for hearing given the parties [citing cases]." *American Land Co. v. Zeiss*, 219 U.S. 47, 71 (1911). These two requirements are "fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries." *Id.* If the District Court did not properly exercise its jurisdiction, it had no power to take any action. Although speaking specifically of federal courts the

following discussion is true for state courts as well:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception. Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

[Internal markings and citations omitted]. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998).

In Nevada, as elsewhere, a decision by a court that lacks jurisdiction is void. *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984). ("There can be no dispute that lack of subject matter jurisdiction renders a judgment void."). An absence of proper jurisdiction is fundamental to the structural framework of the case and cannot be considered a "harmless error", *Arizona v. Fulminante*, 499 U.S. 279, 291-2 (1990). The District Court orders (App. 121-122; 201-204) did not mention the jurisdictional challenge made pursuant to NRS 38.221(1) at all.

(2) The refusal to address a fundamental issue such as jurisdiction is a procedural Due Process violation of the Fourteenth Amendment to the United States Constitution and Art. 1, Sec. 8, Para. 5 of the Nevada Constitution.

The United States Supreme Court held in *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972), "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard . . . It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"

Petitioner was not provided with a meaningful opportunity to be heard. Formalities were observed, but the hearing given him was not "meaningful," in that (1) there is no indication in the Orders that his issues, particularly the jurisdictional issue, were considered by the District Court, (2) the District Court's orders were contrary to the applicable law and to the facts in the record, and (3) there was no oral hearing.

As to the first element, the Orders (App. 121-22 and 201-04) bear no indication that the District Court actually heard or considered the issues, and specifically the jurisdictional issues, or that it considered the relevant law and facts. There is nothing in the two Orders to suggest that Petitioner's briefs and the record were read.

As to the second element this Court has elaborated on the requirement that the court's decision must be based on both the applicable law and the facts in the record. *Baltimore & Ohio R. Co. v. United States*, 264 U.S. 258, 265-6 (1924) held "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." The District Court's orders (App. 121-22, 201-04) do not mention resolution of the issues pursuant to the governing law and pertinent evidence.

(3) <u>The failure of the District Court to provide reasons in its disposition was a substantive Due Process violation.</u>

The district court's orders deprived Petitioner of portions of property interests such as the right to seek punitive damages. Government must give valid reasons when it deprives a citizen of his property interests. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-846 (1998) held, "We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government . . . the substantive due process guarantee protects against government power arbitrarily and oppressively exercised." This principle applies to states and well as the federal government.

As stated by the Supreme Court in the context of agency, rather than judicial, action, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), "Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem [and] offered an explanation for its decision that runs counter to the evidence before the agency." Nevada's own constitutional interpretations are in agreement. "Substantive due process guarantees that no person shall be deprived of life, liberty or property for arbitrary reasons." *Allen v. State of Nevada*, 100 Nev. 130, 134, 676 P.2d 792, 794 (1984). "[S]ubstantive due process concerns the adequacy of the government's reason for depriving a person of life, liberty or property." *Mainor v. Nault*, 120 Nev. 750, 759, 101 P.3d 308, 315 (2005) *cert. den.*, 546 U.S. 873 (2005). See also the analysis presented in *Raper v. Lucey*, 488 F.2d 748, 752-753 (1st Cir. 1983): "Reasons for governmental action affecting important individual rights must be timely proffered in order to satisfy due process . . . The government has not advanced any appropriate interest that would be served by its refusal to detail reasons." Similarly, in the present case the District Court gave no reasons for refusing to address the Issues.

That procedural rules were followed is not sufficient. The constitutional substantive due process guarantee ensures that the court's actions may not be arbitrary, regardless of whether the procedures afforded were fair as required by procedural due process. See *Licari v. Ferruzzi*, 22 F.3d 344, 347 (1st Cir.1994), stating, "Procedural due process guarantees that a state proceeding which results in a deprivation of property is fair, while substantive due process ensures that such state action is not arbitrary and capricious."

The Order also ignored the dispositive effect in Petitioner's favor of uncontradicted evidence, a due process violation. *Bell Tel. Co. v. Public Service Commission*, 70 Nev. 25, 41-42, 253 P.2d 602, 610 (1953), held: "The refusal to consider this uncontradicted evidence was arbitrary and a denial of due process." The evidence that the jurisdictional prerequisites of NRS 38.221(1) were not met, and the

evidence that the purported Agreement is invalid were uncontradicted.

In departing from precedent without providing reasons, the District Court acted contrary to the intent of *Diaz v. Golden Nugget*, 103 Nev. 152, 154-155, 734 P.2d 720, 722 (1987) which held that "Diaz was aggrieved by the hearing officer's refusal to address the issue. She requested a ruling on an issue and no decision was forthcoming." See also *Boardman v. Estelle*, 957 F.2d 1523 (9th Cir. 1992).

(4) The failure to follow the controlling statute and factually and legally indistinguishable precedent is a denial of equal protection under the Fourteenth Amendment.

State of La. ex rel. Francis v. Resweber, 329 U.S. 459, 465 (1947) stated the principle: "So long as the law applies to all alike, the requirements of equal protection are met." In the present case, both statutes and case authority were ignored, so that the law was not applied to all alike.

Where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). The district court was required to enforce NRS 38.221(1) according to its terms and was further required to follow the decisions of this Court and the Supreme Court. The law was not applied to all alike. The requirements of equal protection were not met.

All courts must follow their own precedent, under the principle of *stare decisis*. "[E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *United States v. IBM*, 517 U.S. 843, 856 (1996). As to the obligation of the District Court to follow the precedent of this Court, see *Bowler v. Vannoy*, 67 Nev. 80, 107, 215 P.2d 248, 262 (1950)and *Raggio, supra*. Thus, the District Court was required to enforce the statute and follow the precedent.

As stated in *Truax v. Corrigan*, 257 U.S. 312, 332-333 (1921):

> Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is

above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.

(5) The failure of the District Court to address the issues interfered with Petitioner's ability to petition for a writ or appeal its holdings.

In addition to the stated due process and equal protection violations, Petitioner is hampered on appellate review by the absence of any valid reasoning regarding the issues upon which Petitioner's writ petition is based. *Daniel v. State*, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003) ("Failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations.") See also *Panama Mail S.S. co. v. Vargas*, 281 U.S. 670, 671, 50 S.Ct. 448 (1930) and *Raper v. Lucey*, 488 F.2d 748, 752-753 (First Cir. 1983).

In summary, Petitioner was denied due process under the Constitution. Such Constitutional provisions are binding and may not be disregarded. (*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009)).

8.

SUMMARY AND CONCLUSION

For the reasons stated, Petitioner urges the Court to grant the relief requested, reverse the District Court's order mandating arbitration and remand to the District Court for further proceedings on the merits.

DATED this 16th day of June, 2014.

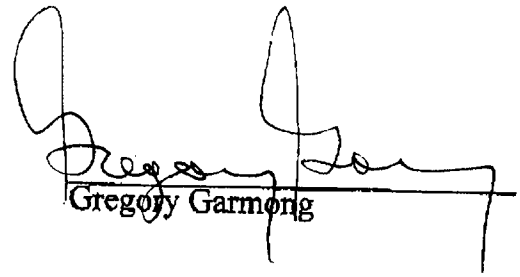
/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.

Counsel for Petitioner

VERIFICATION AFFIDAVIT

Under penalties of perjury, the undersigned declares that he is the plaintiff/petitioner named in the foregoing Petition for Writ of Mandamus and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes it to be true.

Dated this 16th day of June 2014.



Gregory Garmong

ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 petition has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 12,240 words.

3. Finally, I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of June, 2014.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.
SBN #250
202 California Ave.
Reno, NV 89509
775-323-5556

Counsel for petitioner

CERTIFICATE OF SERVICE

Pursuant to NRAP 21(a)(1) and 25(d), I certify that I am an employee of CARL M. HEBERT, ESQ., and that on June 18, 2014, I

__X__ hand-delivered

_____ mailed, postage pre-paid U.S. Postal Service in Reno, Nevada

_____ e-mailed

_____ telefaxed, followed by mailing on the next business day,

a copy of the attached

PETITION FOR WRIT OF MANDAMUS AND APPENDIX

addressed to:

The Honorable Brent T. Adams
District Judge
Second Judicial District Court
75 Court Street
Reno, NV 89501
775-328-3176

(Served on Heidi Boe, Judicial Assistant)

Respondent

Patrick Peregrin
Licensed Process Server

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned certifies that he has filed this Petition for a Writ of Mandamus or Prohibition with the Nevada Supreme Court under its electronic filing system, as permitted by the Nevada Electronic Filing and Conversion Rules. Service was automatically made on Thomas C. Bradley, Esq., SBN #1621, 448 Hill Street, Reno, Nevada 89501; telephone 775-323-5178; telefax 775-323-0709, counsel for real parties in interest Wespac and Christian, who is a registered user of the system. See NEFCR 9(b).

DATED this 18th day of June, 2014.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.

Counsel for Petitioner Garmong