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

APPENDIX TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION (PART 3)

CARL M. HEBERT, ESQ.
NEVADA BAR # 250
202 CALIFORNIA AVE.
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775-323-5556

Counsel for Petitioner

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Nevada Supreme Court reversed and remanded the grant of summary judgment explaining that:

> The only feature which distinguishes the second motion for rehearing from the two previous motions is the citation of additional authorities for a proposition of law already set forth and adequately supported by reference to relevant authorities in the earlier motions. We note particularly that the second motion for rehearing raised no new issues of law and made reference to no new or additional facts. Under such circumstances the motion was superfluous and, in our view, it was an abuse of discretion for the district court to entertain it.

Moore, 92 Nev. at 405, 551 P.2d at 246.

However, in the event that this Court elects to reconsider the arguments contained in Plaintiff's *Opposition*, Defendants hereby incorporate by reference their *Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* in its entirety.

In addition, Defendants would like to remind the Court that Mr. Garmong, who in his affidavit stated that: "I was given this document to sign at the office of Wespac in Reno. I was not given an opportunity to take it away and study it or obtain legal counsel to review it," was not entirely candid with the Court as evidenced by the many corrections and changes he made to the first and second drafts of the "Investment Management Agreement." (The drafts of the "Investment Management Agreement" with Mr. Garmong's handwritten notations and changes were attached to Defendants' *Reply* as Exhibit "2" and "3").

Finally, in regard to the alleged missing pages and/or mis-numbered pages of the Agreement, Defendants hereby attach pages one through eleven which preceded the Final Investment Management Agreement. *See* Exhibit 1. These eleven pages were <u>not</u> part of the Investment Management Agreement and solely concerned Plaintiff's Client Profile. Thus, the fact

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that the Agreement starts with page 12 is totally irrelevant.

A. JAMS RULES

Plaintiff also raises meritless arguments regarding JAMS rules. JAMS rules provide that the amount of the claim determines which set of JAMS Rules apply. Thus, which set of JAMS Rules apply does not need to be specified in the arbitration clause of the agreement.

JAMS Streamlined Arbitration Rules & Procedures:

Rule 1. Scope of Rules

(a) The JAMS Streamlined Arbitration Rules and Procedures ("Rules") govern disputes or claims that are administered by JAMS and...no disputed claim or counterclaim exceeds $250,000, not including interest or attorneys' fees...

(b) The parties shall be deemed to have made these Rules a part of their Arbitration agreement... or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes meet the criteria of the first paragraph of this Rule.

JAMS Comprehensive Arbitration Rules & Procedures

Rule1. Scope of Rules

(a) The JAMS Streamlined Arbitration Rules and Procedures ("Rules") govern disputes or claims that are administered by JAMS and...any disputed claim or counterclaim exceeds $250,000, not including interest or attorneys' fees...

(b) The parties shall be deemed to have made these Rules a part of their Arbitration agreement... or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes meet the criteria of the first paragraph of this Rule.

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Clearly, the amount of the claim determines which set of JAMS Rules apply and, pursuant to the JAMS rules, the parties need not specify which rules apply. Mr. Garmong's attempts to mislead the Court are disingenuous.

B. REQUEST FOR ARBITRATION

In his Opposition, Plaintiff claims that this Court lacks jurisdiction because Defendants did not specifically allege in their Motion that Plaintiff had refused to arbitrate. Despite that oversight, the filing of a Complaint by Plaintiff in which he requested that this Court award him damages for Defendants' alleged breaches of the Agreement plus Plaintiff's statement that he "opposes forced mandatory arbitration" have made it perfectly clear that he has refused to arbitrate. *Opposition* at 12:26. Moreover, the filing of an *Opposition to a Motion* to require arbitration is sufficient proof Plaintiff has refused to arbitrate. Plaintiff's request to place form over substance is meritless

III. ATTORNEY'S FEES

As previously stated, the Nevada Supreme Court has made clear that "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore*, 92 Nev. at 405, P.2d at 246 (1976). Thus, in *Moore*, when a second motion for rehearing, which raised no new issues of law or fact was filed, the Court found that the motion was "superfluous" and further stated that "it was an abuse of discretion for the district court to entertain it." *Id.*

Here, Plaintiff, instead of claiming that the Court erred in its ruling by failing to take into account a particular legal or factual matter, now simply repeats every argument contained in his *Opposition,* and requests that the Court re-review each and every argument contained in his *Opposition* to try to determine if it made an error. Such an approach is not only unduly burdensome to the Court, it also requires Defendants expend additional legal fees to oppose a

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superfluous motion, resulting in an unreasonable and vexatious extension of the current litigation.

Under Nevada law, "attorney's fees are not recoverable unless allowed by express or implied agreement or when authorized by statute or rule.'" *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727 (2005)(quoting *Schouweiler v. Yancey Co.*, 101 Nev. 827, 830, 712 P.2d 786, 788 (1985)). NRS 7.085(b) requires that this Court award attorney's fees if it finds that an attorney has "[u]nreasonably and vexatiously extended a civil action or proceeding before any court in this State." Similarly, NRS 18.010(2)(b), provides that a Court may award attorney's fees where it finds that an opposing party maintained a claim or defense "without reasonable ground or to harass the prevailing party." Because Plaintiff's instant *Combined Motions For Leave To Rehear And For Rehearing Of The Order Of December 13, 2012, Compelling Arbitration* offer no new issues of fact or law to support a contrary ruling, Defendant can only surmise that these motions were filed for the purposes of unreasonably extending the current litigation or to harass Defendants. As a result, Defendants request that they be awarded the reasonable attorney's fees they have expended in opposing the instant motions.

IV. CONCLUSION

In his *Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* to Defendants' *Motion* Plaintiff had every opportunity to make his arguments opposing Defendants' *Motion To Dismiss And To Compel Arbitration*, and after Defendants had the opportunity to reply to Plaintiff's arguments, this Court determined that the arbitration provision of the "Investment Management Agreement" was enforceable. Plaintiff's current *Combined Motions For Leave To Rehear And For Rehearing Of The Order Of December 13, 2012, Compelling Arbitration* offer no new legal or factual matters for the Court to consider, and instead only requires the Court to revisit issues it has already reviewed and decided. Such a result is in direct contrast to the Nevada

Supreme Court's insistence that "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore*, 92 Nev. at 405, 551 P.2d at 246 (1976).

WHEREFORE, for the reasons stated above, Defendant Wespac and Defendant Greg Christian respectfully request that this Court deny Plaintiff Gregory Garmong's *Combined Motions For Leave To Rehear And For Rehearing Of The Order Of December 13, 2012, Compelling Arbitration* and that the Court award Defendants the reasonably attorney's fees they have been required to expend to oppose Plaintiff's *Motions*. Upon request of the Court, Defendants will submit an affidavit detailing their attorney fees.

The undersigned does hereby affirm, pursuant to NRS 239B.030, that the preceding document does not contain the social security number of any person.

DATED this 8 day of JAN., 2013.

Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace

Thomas C. Bradley, Esq.
Attorney for Defendants

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace,* and that on the 9th day of January, 2013, I electronically filed the DEFENDANTS' OPPOSITION TO PLAINTIFF'S COMBINED MOTIONS FOR LEAVE TO REHEAR AND FOR REHEARING OF THE ORDER OF DECEMBER 13, 2012, COMPELLING ARBITRATION AND REQUEST FOR ATTORNEY'S FEES with the Clerk of Court System who will send a notice of electronic filing to the following:

CARL M. HEBERT, ESQ.

Sandra Brown

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AFFIDAVIT OF GREG CHRISTIAN

STATE of NEVADA)
) ss.
COUNTY OF WASHOE)

I, GREG CHRISTIAN, being first duly sworn, do hereby swear under penalty of perjury to the following:

1. I am the named Defendant in this case and a registered investment advisor of Wespac.

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).

GREG CHRISTIAN

SWORN and SUBSCRIBED to before me this 8th day of January, 2013.

MAUREEN MAHER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 94-2091-2 - Expires April 26, 2015

EXHIBIT INDEX

EXHIBIT 1

EXHIBIT 1

CONFIDENTIAL CLIENT PROFILE

Investment Objective Assessment/Engagment Agreement

Exhibit 1

Privacy Policy For Individual Clients

WESPAC Advisors, LLC is committed to protecting your privacy. To conduct regular business, we may collect non-public personal information from sources such as:

Information reported by you on applications or other forms you provide to us; and/or

Information about your transactions with us, our affiliates, or others.

WESPAC Advisors, LLC shares non-public information solely to service our client accounts. We do not disclose any non-public personal information about our customers or former customers to anyone, except as permitted by law. If you decide to close your account(s) or become an inactive client, we will adhere to the privacy policies and practices as described in this notice.

Information Safeguarding

WESPAC Advisors, LLC will internally safeguard your non-public personal information by restricting access to only WESPAC Advisors, LLC employees. WESPAC Advisors, LLC employees provide products or services to you and need access to your information to service your account. In addition, we will maintain physical, electronic, and procedural safeguards that meet federal and/or state standards to guard your non-public personal information.

TABLE OF CONTENTS

SUPPLEMENT CLIENT ATTACHMENT

Any additional information that relates to our duties and responsibilities as your investment advisor is required.

- Investment Policy Guidelines
- Partnership Agreement
- Corporate Resolution
- Plan/Trust Documents

  Provide the following (as applicable):
  - Title Page
  - Signature Page
  - Proxy Voting Responsibilities
  - Asset Allocation Parameters
  - Statements of Required Reports
  - Meeting Requirements
  - Investment Policy Guidelines
  - Cash Requirements
  - Restrictions on Securities
  - List of Trustees
  - Authorized Signature List

CONFIDENTIAL CLIENT PROFILE

Account Information

Answer all questions that apply

1. Account title (legal title as listed on investment management agreement)

_____

2. Primary contact person/trustee _____

3. Custodian _____ Account _____

4. Social Security/Tax ID Number Primary _____ Secondary _____

Mailing Address _____

City _____ State _____ Zip _____

Phone _____ Fax _____

E-mail _____

5. Should anyone else receive a copy of:

Quarterly reports? ☐ Yes ☐ No

Realized gain/loss reports? ☐ Yes ☐ No

Name _____ Relationship _____

Mailing Address _____

City _____ State _____ Zip _____

Phone _____ Fax _____

6. Account type

☐ Individual (taxable) ☐ IRA/IRA Rollover ☐ SEP

Account types listed below must enclose Plan Document, Partnership Agreement, Corporate Resolution, Trust Documentation, and/or Authorized *signature List.*

☐ Irrevocable Trust ☐ Profit Sharing ☐ Endowment

☐ Revocable Trust ☐ Money Purchase ☐ Foundation

☐ Public Employee ☐ Defined Benefit ☐ Taft-Hartley

☐ Corporation (taxable) ☐ Limited Liability Company ☐ 401 (K)

☐ S Corporation ☐ Partnership ☐ Other ____

☐ Non- Profit Corporation

7. Initial Investment ☐ Cash _____ or ☐ Cash/Securities* $ _____

**Please list all securities with cusip or ticker symbol. purchase date and cost basis on Exhibit A.*

8. Anticipated contributions $. ___ ☐ Monthly ☐ Quarterly ☐ Annually ☐ None

9. Anticipated withdrawals $. ___ ☐ Monthly ☐ Quarterly ☐ Annually ☐ None

CONFIDENTIAL CLIENT PROFILE

Investment Objectives

(For all accounts)

1. What is the purpose of your investment account?

_____

2. What year did you begin investing in Stocks? _____ Bonds? _____

3. Characterize your investment experience: ☐ Minimal ☐ Moderate ☐ Extensive

4. Are you currently using other money manager(s)? ☐ Yes ☐ No

5 Are you now a corporate officer, or do you now own 10 % or more of any publicly traded corporation?

☐ Yes ☐ No

6. *Account restrictions (e.g., social, religious, legal, etc.) or other specific intructions*.If left blank, it will be assumed none.* _____

_____

**WESPAC Advisors, LLC may require further information regarding account restrictions and/or specific instructions* before *proceeding with management of the account*

7. Is there any additional information which will help us more effectively manage your account?

(e.g., retirement, anticipated changes in financial circumstances, tax information, health, college expenses, etc.)

_____

_____

8. How would you broadly categorize this account's investment objective?

☐ **Aggressive Growth of Capital.** Primary objective is to produce maximum total return. Current income is not required. Can tolerate more than one year of negative absolute returns through difficult market periods.

☐ **Growth of Capital.** Production of income is secondary to capital appreciation. Can tolerate several consecutive quarters of negative absolute returns through difficult market periods.

☐ **Modest Growth of Capital.** Primary objective is to generate modest income with some capital appreciation and limited volatility. Can tolerate infrequent, moderate losses through difficult market periods.

☐ **Income.** Primary objective is income generation. Client seeks the highest income oriented rate of return consistent with a suitable level of risk.

a.____ Inflation adjusted returns modestly exceeding risk free investment. Primary objective is to keep risk low and maximize income. Emphasis on avoiding negative returns.

b.____ Income returns consistent with broad domestic bond market returns.

c.____ Custom; income generating portfolio with investment characteristics specifically related to identified client objectives on timing, maturity, quality, etc.

CONFIDENTIAL CLIENT PROFILE

Investment Objectives (cont.)

(For all accounts)

9. What percentage of your total investable assets will WESPAC Advisors be managing (e.g" stocks, bonds)? _____ %

10. How long will these funds be committed to the stated purpose?

☐ Less than 3 years ☐ 3-5 years ☐ 10 years ☐ 10 years or more

11. State of legal residence _____

Please complete the following for all accounts except corporation; if corporate, proceed to page 5.

12. Date of birth _____ Spouse's date of birth _____

13. Occupation: _____

14. What year did you start your current occupation _____ Projected retirement age _____

15. Spouse's Occupation _____

16. What year did you spouse start current occupation _____ Projected retirement age _____

17. Annual income (combined if joint account). Check which applies:

Current Year	**Last Year**	**Year Before**
☐ Under $50,000	☐ Under $50,000	☐ Under $50,000
☐ $50,000- $100,000	☐ $50,000- $100,000	☐ $50,000- $100,000
☐ $1000,000 - $250,000	☐ $1000,000 - $250,000	☐ $1000,000 - $250,000
☐ Over $250,000	☐ Over $250,000	☐ Over $250,000

For taxable accounts, please complete the following; If nontaxable, proceed to question 20.

18. Are you subject to (please check all that apply and indicate percentages):

☐ State tax? _____ % ☐ Alternative minimum tax ? _____ %

19. Marginal federal income tax bracket _____ %

20. Primary source of income: ☐ Occupation ☐ Investments ☐ Retirement Funds

21. U.S. citizen? ☐ Yes ☐ No If no: A non-resident alien? ☐ Yes Do you pay U.S. taxes: ☐ Yes

22. Net worth (excluding primary residence) $ _____

23. Spouse/Dependent

Name	Age	Relationship

Wespac Advisors LLC Asset Management Services
Investment Policy Questionnaire

Introduction:

- The following series of questions are designed to develop a better understanding of your tolerance for investment risk.
- Understanding your tolerance for investment risk relative to your investment return expectations is an important first step in designing a portfolio.
- The answers you select will indicate your comfort level with investment risk and your ability to withstand it.
- Please carefully consider each question and select the answer that most closely fits your current situation.
- Consultation with your Investment Advisor while filling out this form is key to developing a recommended portfolio that fits your comfort level and is appropriate to reach your financial goals.

Instructions for completing this form:

- Please check the box next to each appropriate answer.
- The assigned points for each answer appear in red to the left of the box.
- After the conclusion (page 11), please add up the selected points for each question (1-15).

Date: _____ Financial Advisor _____

Family Information

Client Name _____ _____

First M Last *Birthdate*

Address: _____ ( ) _____

Street City/St Zip Code Telephone

Current Assets: $ _____

Please specify the type of account:

☐ A. Taxable ☐ Individual ☐ Trust ☐ Other _____

☐ B. Tax exempt ☐ Individual ☐ Trust ☐ Other _____

Risk Tolerance Profile

1. Risk Factor

Before you make a decision on any investment, you need to consider how you feel about the prospect of potential loss of principal. This is a basic principle of investing: *the higher return you seek, the more risk you face.* Based on your feelings about risk and potential returns, your goal is to:

15 ☐ **A.** Potentially increase my portfolio's value as quickly as possible while accepting higher levels of risk.
9 ☐ **B.** Potentially increase my portfolio's value at a moderate pace while accepting moderate to high levels of risk.
6 ☐ **C.** Income is of primary concern while capital appreciation is secondary.
3 ☐ **D.** The safety of my investment principal.

2. Investment Approach

Which of the following statements best describes your overall approach to investing as a means of achieving your goals?

3 ☐ **A.** Having a relative level of stability in my overall investment portfolio.
6 ☐ **B.** Moderately increasing my investment value while minimizing potential for loss of principal.
9 ☐ **C.** Pursue investment growth, accepting moderate to high levels of risk and principal fluctuation.
15 ☐ **D.** Seek maximum long-term returns, accepting maximum risk with principal fluctuation.

3. Volatility

The value of most investments fluctuates from year to year as well as over the short term. How would you feel if an investment you had committed to for ten years lost 20% of its value during the first year?

1 ☐ **A.** I would be extremely concerned and would sell my investment.
3 ☐ **B.** I would be concerned and may consider selling my investment
5 ☐ **C.** I would be concerned, but I would not consider selling my investment.
7 ☐ **D.** I would not be overly concerned given my long-term investment philosophy.

4. Variation

Realizing that any market-based investments may move up or down in value over time with which of the hypothetical portfolios below would you feel most comfortable?

		Year 1	Year 2	Year 3	Year 4	Year 5	Average Annual Return
1	☐	3%	3%	3%	3%	3%	3%
3	☐	2%	5%	6%	0%	7%	4%
5	☐	-6%	7%	21%	2%	8%	6%
7	☐	9%	-11%	26%	3%	18%	9%
10	☐	14%	-21%	40%	-4%	31%	12%

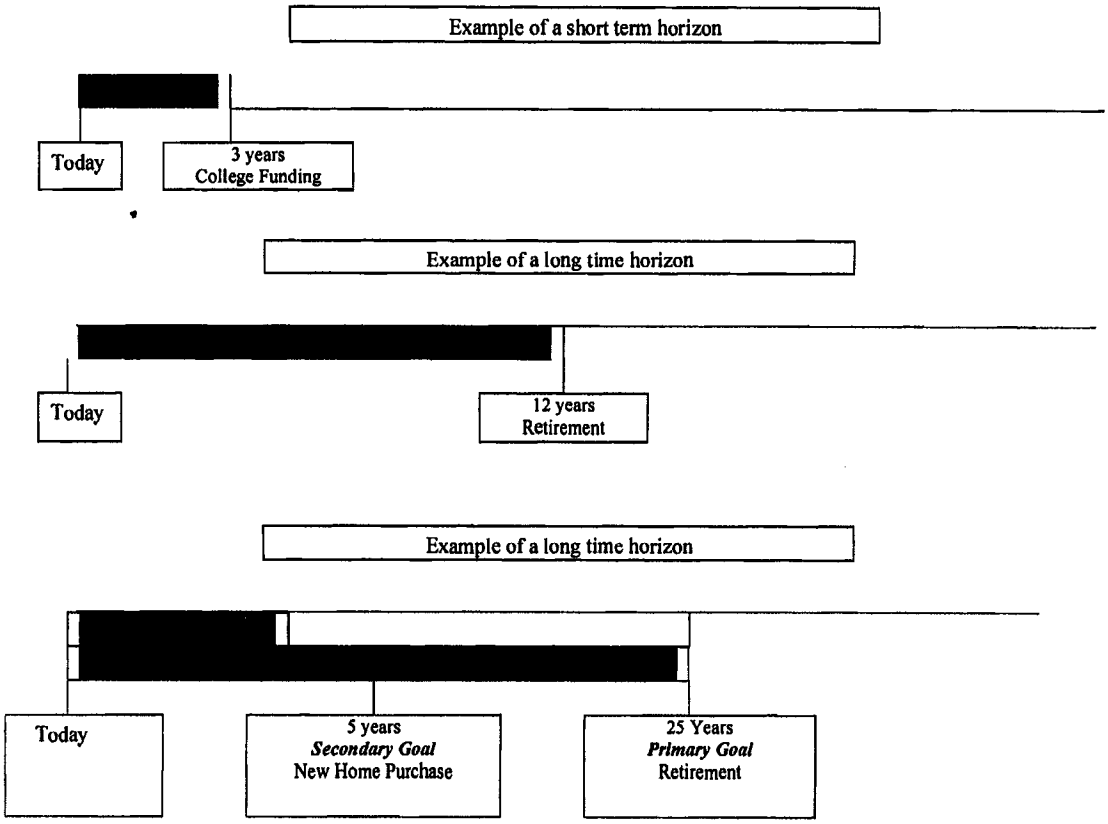
5. Investment Experience

Please select the type of security with which you have had the ***most*** investment experience?

2 ☐ **A.** U. S.Government securities.
4 ☐ **B.** Mid to high quality corporate fixed income securities.
6 ☐ **C.** Stocks of older, established companies.
8 ☐ **D.** Stocks of newer, growing companies.

6. Time Horizon

An important consideration when making investment decisions is where you are in your financial life cycle and how long you have before you will need to start withdrawing the assets. Through consultation with your Financial Advisor, please indicate your portfolio's appropriate time horizon, A multi-stage time horizon would indicate that you have several goals in the future that your investment portfolio needs to address.



1 ☐ **A.** Short(3- 5 Years).
3 ☐ **B.** Long (5-10 Years).
5 ☐ **C.** Multi-stage.

7. Primary Goal

Please indicate approximately how many years from today until you reach your primary goal.

1 ☐ **A.** Within 1 to 5 years
3 ☐ **B.** Within 5 to 10 years
7 ☐ **C.** Within 11 to 20 years
10 ☐ **D.** More than 20 years.

8. Secondary Goal

Some investors have a multi-stage time horizon with several goals for their portfolio. Please indicate approximately how many years from today until you reach your secondary goal?

1 ☐ **A.** Not applicable, I only have a single stage time horizon.
4 ☐ **B.** Within 1 to 5 years
7 ☐ **C.** Within 5 to 10 years
10 ☐ **D.** More than 10 years.

9. Age

What is your current age?

10 ☐ **A.** Under 35
8 ☐ **B.** Between 36 to 45
6 ☐ **C.** Between 46 to 55
4 ☐ **D.** Between 56 to 70
1 ☐ **E.** Over 70

10. Investment Earnings

Based on your current and estimated future income needs, what percentage of your investment earnings do you think you would be able to reinvest?

8 ☐ **A.** Reinvest 100% of my investment earnings.
5 ☐ **B.** Reinvest 20 to 80% of my investment earnings.
3 ☐ **C.** Reinvest 0% (receive all investment earnings for cash flow).
1 ☐ **D.** My investment earnings will not be sufficient and I will need to withdrawal principal.

11. Investment Value

Your portfolio design relates to your investment experience, which helps to determine your current investment philosophy. What is the current value of your total investment portfolio?

10 ☐ **A.** More than $1,000,000.
8 ☐ **B.** $500,001 to $1,000,000.
6 ☐ **C.** $300,001 to $500,000.
4 ☐ **D.** $100,000 to $300,000.
2 ☐ **E.** Less than $100,000.

12. Living Expense

Given interruptions of periodic income or other unforeseen circumstances, some individuals are forced to tap their investment resources to meet living expenses. In such an instance, how many months of living expenses could be covered by your current liquid investments?

5 ☐ **A.** More than 12 months, or not a concern.
3 ☐ **B.** Between 4 and 12 months.
1 ☐ **C.** Less than 4 months, or already withdrawing.

13. Household Income

Total earnings, which includes earned and investment income, is a requirement when assessing your risk tolerance and determining allocation of assets. What is your total annual household income (including interest and tax deferred income)

10 ☐ **A.** More than $500,000.
8 ☐ **B.** $250,000 to $499,999.
6 ☐ **C.** $100,000 to $249,999.
4 ☐ **D.** Less than $100,000 .

14. Income Saving

The percentage of your total income that you currently save is approximately:

1 ☐ **A.** I do not currently save any income.
3 ☐ **B.** Between 2% - 7%.
6 ☐ **C.** Between 7% - 12%.
9 ☐ **D.** Greater than 12%.

15. Future Earnings

In the next five years, you expect that your earned income will probably:

1 ☐ **A.** Decrease.
3 ☐ **B.** Stay about the same.
5 ☐ **C.** Increase modestly.
7 ☐ **D.** Increase significantly.

Conclusion

Comments:

To the best of my knowledge, the information contained in this investment policy questionnaire is both accurate and complete. I understand that any recommendations are based upon the information supplied by me.

Client Signature _____ Date _____

Client Signature _____ Date _____

CONFIDENTIAL CLIENT PROFILE
Target Portfolio Design

Please select one management style most describing investment objective

☐ **Aggressive Growth**
- Can use margin and short selling when market conditions warrant.
- Can invest in smaller cap and more illiquid securities than Growth Accounts
- Can overweight favored sectors to a higher degree than other portfolio styles.

☐ **Growth**
- Emphasizes total return, but does not use margin or short selling
- Raising cash is the hedging strategy most likely to be used in the portfolio.

☐ **Growth & Income**
- Emphasizes dividend-paying issues and also focuses on the blue chip securities.
- Appropriate for investors oriented toward return that includes income.

☐ **Passive Growth**
- Uses Exchange Traded Funds to create a sector rotation portfolio. May include and ETF (domestic or foreign)
- ETPs with superior intermediate to long-term relative strength characteristics are buy candidates for the portfolio.
- May use margin if consistent with a clients goals.

☐ **Balanced**
- This style combines one of the above strategies with investments in fixed income securities to achieve greater stability and income.
- Instruments used may include corporate debt, government securities, preferred stock, and high yield or convertible securities.

CLIENT ACKNOWLEDGMENT

I understand that you are relying on the information provided in this Confidential Client Profile to design my investment portfolio and confirm to you, to the best of my knowledge, that the information contained herein is current, accurate, and complete. I agree to notify WESPAC Advisors, LLC of any significant changes in my financial situation or investment objectives.

Client Signature: _____ Date _____

Client Signature _____ Date _____

To be completed only after consultation with WESPAC Advisors

☐ Custom _____

_____

_____

_____

_____

FOR WESPAC USE ONLY

Reviewed by _____

Date _____

FILED
Electronically
2014-02-03 14:01:26
Joey Orduna Hastings
Clerk of the Court
Transaction # 4287098 : melwood

3795
CARL M. HEBERT, ESQ.
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Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive,

DEPT. NO. : 6

Defendants.

_____/

PLAINTIFF'S REPLY TO "DEFENDANTS' OPPOSITION TO PLAINTIFF'S COMBINED MOTIONS FOR LEAVE TO REHEAR AND FOR REHEARING OF THE ORDER OF DECEMBER 13, 2012, COMPELLING ARBITRATION AND REQUEST FOR ATTORNEY'S FEES"

Plaintiff Gregory Garmong submits the following reply points and authorities to "Defendants' Opposition to Plaintiff's Combined Motions ('Motion for Reconsideration') for Leave to Rehear and for Rehearing of the Order of December 13, 2012 ('Order'), Compelling Arbitration and Request for Attorney's Fees ('Opposition')." This Reply is based upon the original Motion to Compel and related papers, the Opposition to the Motion for Reconsideration, all exhibits filed in this matter, the following points and authorities, the other papers on file in this case, and such other matters as the Court may wish to consider.

I.

NRS 38.221(1) PROVIDES THE REQUIREMENTS FOR SUBJECT MATTER JURISDICTION TO ADJUDICATE A MOTION TO COMPEL 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.' C.H.A. Venture v. G.C. Wallace Consulting, 106 Nev. 381, 383, 794 P.2d 707, 708 (1990)."

NRS 38.221(1) sets forth the statutory mandatory requirement for establishing the subject matter jurisdiction of the District Court to compel arbitration. NRS 38.221(1) states: "On a motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement," arbitration may be ordered. NRS 38.221(1) requires that the party seeking arbitration must demonstrate two elements in its motion to establish the Court's jurisdiction: (1) The party must show "an agreement to arbitrate" and (2) the party must allege "another person's refusal to arbitrate pursuant to the agreement." NRS 38.221(1) is a statutory requirement. There is no room for refusal of the Defendants 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 mandatory requirement. AA Primo Builders, LLC v. Washington, 126 Nev. Adv. Op. 53, 245 P.3d 1190, 1197 (2010).

NRS 38.221(3) further provides: "If the court finds that there is no enforceable agreement, it may not, subject to subsections 1 or 2, order the parties to arbitrate." Plaintiff will ask the Court to find that there is no enforceable agreement before it, and therefore the Court has no jurisdiction to order the parties to arbitrate. Additionally, Plaintiff will ask the Court to find that Defendants did not allege Plaintiff's refusal to arbitrate pursuant to any agreement, and for this additional reason the Court has no jurisdiction to order the parties to arbitrate.

These two statutory requirements are addressed in the following subsections. Neither were met by Defendants' Motion to Compel. The evidence grudgingly finally produced by Defendants in their Opposition to Plaintiff's Motion for Reconsideration demonstrates that Defendants misled the court in their initial filing.

II.

DEFENDANTS HAVE MISREPRESENTED, AND CONTINUE TO MISREPRESENT, THE CONTENT OF THE INVESTMENT MANAGEMENT AGREEMENT IN AN ATTEMPT TO GAIN THE COURT'S JURISDICTION OF ITS MOTION TO COMPEL

NRS 38.221(1) requires that the party moving to compel arbitration must show "an agreement to arbitrate." Defendants' motion made no such showing, and in fact misrepresented under oath the nature of the papers they claimed were an agreement to arbitrate. This misrepresentation was followed by two further misrepresentations under oath.

As the moving parties, Defendants were required to establish that they based their motion to compel arbitration on a valid contract. Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107-08, 693 P.2d 1259, 1260-61 (1985). In that case the Nevada Supreme Court held:

> Since the appellant set up the existence of the agreement 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.

(Emphasis added).

Defendants have certainly not met that burden, as they still have not offered a complete and even arguably valid entire Agreement calling for arbitration for the Court's record, even after three attempts. Defendants have never contended that there has ever existed, in 2005, now, or at any other time, a complete and integrated document they call "Investment Management Agreement." Inasmuch as Defendants have not been able to produce and introduce a complete and entire Agreement, it is highly doubtful that any document they might now create was the document they claimed was available in 2005. What has emerged as a convincing reason to deny the Motion to Compel is that the Defendants have not complied with NRS 38.221(1) and will not be able to provide the arbitrator with a document that constitutes the entire "Investment Management Agreement."

A. Defendants misrepresented their "agreement to arbitrate" three times, and they still have not provided the Court or Plaintiff a complete "agreement to arbitrate."

1. Defendants' first misrepresentation with the Motion to Compel

Defendants' original Motion to Dismiss and to Compel Arbitration of September 19, 2012 ("Motion to Compel") included an Affidavit of Greg Christian ("First Christian Affidavit") stating in ¶ 2: "Attached is a true, correct, and complete copy of the Investment Management Agreement" which Defendants claimed included the "agreement to arbitrate". The document sworn to be a "complete" Investment Management Agreement ("Agreement Version 1") was Exhibit 1 to the Motion to Compel.

In considering whether the Defendants have placed an enforceable agreement to arbitrate before the Court, Plaintiff asks the Court to bear in mind ¶ 14 of the Agreement Version 1 submitted by Defendants as Exhibit 1 to their Motion to Compel, which provides

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

(emphasis added).

Plaintiff's Opposition to Defendants' Motion to Dismiss and to Compel Arbitration ("Opposition to Motion to Compel") at page 10:21-11:13 pointed out that there was clearly material missing from Agreement Version 1.

2. Defendants' second misrepresentation in their Reply to Opposition of the Motion to Compel.

Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss and to Compel Arbitration ("Defendants' Reply), 10:18-28, referring to a second Affidavit of Greg Christian ("Second Christian Affidavit") attached thereto, described the missing pages as follows:

> 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.

Paragraphs 5-6 of the supporting second Affidavit of Greg Christian (3:1-7) filed

December 3, 2012, relied upon to support the above-quoted argument, state:

> 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, Defendant again claimed under oath that the Agreement Version 2 having "incorrect page numbering" is a complete document, and asserted that its only fault was mis-numbered pages.

The assertion of "incorrect page numbering" refers to the fact that Agreement Version 1 begins on a page numbered as page 12. The point of ¶ 5 was to represent that the paper presented as the Agreement was "true, correct, and complete." The point of ¶ 6 was that there were no pages 1-11, that the page numbering of Exhibit 1 beginning at page 12 was a "word processing and/or computer error," and that there were no attachments or exhibits.

Plaintiff's Motion for Reconsideration persisted in pointing out the deficiencies in Agreement Versions 1-2, see 6:5-19.

3. Defendants' third misrepresentation in their Opposition to the Motion for Reconsideration.

Paragraphs 5-6 are completely false. There were pages prior to page 12. An incomplete, blank copy of a "Confidential Client Profile" is now provided by Defendants and represented to be the earlier pages 1-11.

Defendants' Opposition to the Motion for Reconsideration at 5:23-6:1 attaches an Exhibit 1 that is said to be some of the missing pages, leading to Agreement Version 3. Exhibit 1 is a "Confidential Client Profile," an incomplete form of document that is described in ¶ 2 of Greg Christian's Affidavit of January 8, 2013, stating (1:10-12):

> 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 is also false, because, as will be discussed subsequently, the Table of Contents calls for Exhibit A and Exhibit B as part of the Confidential Client Profile. Exhibit A and Exhibit B are not provided, and accordingly the Confidential Client Profile is not "complete."

Defendants now admit that, when they submitted their original Motion to Compel Arbitration with the attached Exhibit 1 (the Agreement Version 1), they concealed important aspects of the Confidential Client Profile from the Court and later denied its very existence. The Opposition to the Motion for Reconsideration (6:1) describes Greg Christian's misrepresentations of ¶¶ 5-6 to the Court as "totally irrelevant."

The Defendants are now backpedaling 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." In fact the Confidential Client Profile is part of the Investment Management Agreement by the very terms of the Investment Management Agreement, as stated in at least three locations in the Agreement Version 1. Recall that ¶ 14 of the Agreement Version 1 states in part that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties..." (emphasis added).

The completed Confidential Client Profile is clearly part of the Agreement Version 1, by the terms of Agreement Version 1.

Further, Agreement Version 1 contemplates that the Confidential Client Profile should be a completed document, not an incomplete, blank form as Defendants have at last provided. Paragraph. 2 of the Agreement Version 1 states:

> 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.

(emphasis added). Paragraph 12 of the Agreement Version 1 refers to sending notices to

> 12. "...Client at the address set forth in Confidential Client Profile attached

hereto."

(emphasis added).

Thus, Agreement Version 1 contemplates that the Confidential Client Profile is a completed document, not an incomplete form as Defendants have submitted. The "Confidential Client Profile," in a completed form, is most certainly a part of Agreement Version 1.

It is now clear that Affiant Greg Christian boldly misrepresented the facts about the Agreement in his Affidavit of December 3, 2012, attached as Exhibit 1 to Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss and to Compel Arbitration. No "word processing glitches occurred and as a result, the pages were mis-numbered." The undeniable purpose of Greg Christian's earlier representation to the Court was to persuade the Court to grant Defendants' Motion to Compel Arbitration based upon a misrepresented document.

There was much more to the Agreement Version 1 than Defendants previously swore. In reality, the Confidential Client Profile would have been a completed document that is possibly provided here in incomplete form to the Court as Exhibit 1 to Greg Christian's current Affidavit in order to conceal the content of the actual Confidential Client Profile.

Moreover, Defendants expect the Court to believe that the actual Confidential Client Profile referenced in ¶ 2 quoted above was incomplete. The reason that Defendants seek to conceal the information that would be found on the completed Confidential Client Profile, that ¶ 14 provides is necessarily part of the Agreement Version 1, is 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" (Agreement Version 1, para. 16). Of course, the rules of JAMS do not require any discovery, so Plaintiff will never be able to find out what information the Defendants have concealed. A review of the incomplete Confidential Client Profile reveals that in a completed form it would set forth, among other things, the instructions that Plaintiff gave

to the Defendants to conservatively manage his retirement savings (see numbered pages 3 and 6-11), which the Defendants blatantly ignored in wasting a significant portion of his life savings. If the Defendants can force this matter to an arbitration with substantially no discovery and without the possibility of punitive damages, they will have saved themselves a huge amount of money and successfully completed their wasting of a significant portion of Plaintiff's life savings.

B. The Submitted Incomplete "Confidential Client Profile" is Not Internally Self-Consistent.

Even in submitting the incomplete form Confidential Client Profile, Defendants are still not being fully candid. First, of course, it is submitted in blank, even though the above-quoted paragraphs 2 and 12 of Agreement Version 1 identify information that would be found in the completed Confidential Client Profile. Further, the Affidavit of Greg Christian states (line 11) that the attachment is "the first eleven pages of the document which included the Investment Management Agreement." The Exhibit Index that is the last page of the Opposition says 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 was really the first 11 pages. But in any event, we are 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.

And it gets worse. Comparing the Table of Contents on numbered pg. 1 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 says that numbered pages 2-4 are the Confidential Client Profile, and that appears to be the case except that the form is not completed. The Table of Contents then states that numbered pgs. 5-11 are "Exhibit A: Fee Schedule" and "Exhibit B: Portfolio Appraisal/Security Cost Basis Form." In fact, a brief inspection shows that numbered

pages 5-11 are nothing of the sort. Numbered pages 5-11 appear to be an incomplete "Investment Policy Questionnaire"; see title on numbered p. 5 and the content of the documents on numbered pages 6-11. Defendants provide no Exhibit A or Exhibit B as called for in the Table of Contents of the Confidential Client Profile.

C. Defendants Continue to Conceal the Greatest Portion of the Investment Management Agreement.

Moreover, there are still a number of missing exhibits that the Defendants did not provide to Plaintiff and concealed, and continue to conceal, from the Court. As pointed out in ¶ 3 of the Declaration of Gregory Garmong, attached to Plaintiff's Opposition to Motion, ¶ 2 on page 12 of Agreement Version 1 references an Exhibit A, and ¶ 3(4)(a) on pages 13-14 references a different Exhibit A. Paragraph 3(3) on page 13 of Agreement Version 1 references an Exhibit B, and ¶ 3(4)(a) on pages 13-14 of the Agreement Version 1 references a different Exhibit B. That is, the Agreement Version 1 references two different Exhibits A, two different Exhibits B, and the Confidential Client Profile. The index to the Confidential Client Profile also references an Exhibit A and an Exhibit B.

Summarizing, this mass of paper references three different Exhibits A, three different Exhibits B, and a Confidential Client Profile with information entered on it, none of which are provided by Defendants to the Court or to Plaintiff. As noted above, Paragraph 14 of the Agreement Version 1 states that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties..." Defendants are still concealing the three Exhibits A and the three Exhibits B, as well as a completed Confidential Client Profile as required by paragraphs 2, 12, and 14 of the Agreement Version 1, and the information required regarding the JAMS Rules.

Perhaps in the future the Defendants will relent a little further and allow the Court and Plaintiff to see the entire "agreement of the parties", including the completed Confidential Client Profile, the three Exhibits A, and the three Exhibits B. Perhaps they will even identify which form of the JAMS Rules was referenced in ¶ 16 of the Agreement, and supply the information required by the JAMS Rules. But they have not revealed this

information at the present time.

Any "agreement to arbitrate" must be a complete contract for the agreement, and specifically the arbitration clause ¶ 16, to be valid and enforceable, NRS 38.221(3). An incomplete collection of paper purporting to be a contract cannot be enforced. ; 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."). Indeed, JAMS itself, a third party, could not alter the contract to supply the missing material terms. Truck Ins. Exch. v. Palmer J. Swanson, Inc., 124 Nev. 629, 633, 189 P.3d 656 (2008), Flyge v. Flynn, 63 Nev. 201, 236-237 and 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."). City of Reno v. Silver State Flying Serv., 84 Nev. 170, 175, 438 P.2d 257. Neither a party, the Court nor an arbitrator may force upon Plaintiff provisions that are not found in the Agreement. Particularly with regard to specific performance, the Nevada Supreme Court, in Dodge Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-84 (1930), observed: "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."

> Moreover, in reviewing arbitration agreements, the issue of '[w]hether a dispute is arbitrable is essentially a question of construction of a contract. As such, 'the reviewing court is obligated to make its own independent determination on this issue, and should not defer to the district court's determination.

Kindred v. Second Judicial District Court, 116 Nev. 405, 410, 996 P.2d 903, 908 (2000). Kindred presupposes the existence of a valid, enforceable contract for the court to construe, both because NRS 38.221(1) requires that the party seeking to force arbitration must allege a valid contractual agreement and because the arbitrator requires a contract to determine whether behavior conformed to the contract.

Defendants have not submitted an "entire agreement of the parties" to the Court or

to Plaintiff, as they themselves define "entire agreement" in ¶ 14, and no such "entire agreement" is found in the Court's record. Accordingly, there is no enforceable agreement to arbitrate before the Court or in the Court's record.

The decision in Pruter v. Anthem Country Club, Inc., 2013 WL 5954817 (D. Nev. 2013) describes the type of factual pattern that permits the party moving for arbitration to satisfy the requirement of NRS 38.221(1): "On June 25, 2013, counsel for Anthem contacted counsel for Plaintiff providing him with a copy of the arbitration agreement and requesting a stipulation to stay this case and to proceed to arbitration. Counsel for the Plaintiff refused, necessitating the current motion." Nothing similar happened in the present case; see the declarations of Gregory Garmong and Carl M. Hebert attached as Exhibits 1 and 2, respectively.

III.

DEFENDANTS ADMIT THAT THEY DID NOT ALLEGE "A REFUSAL TO ARBITRATE PURSUANT TO THE AGREEMENT," AS REQUIRED BY NRS 38.221(1)

There is a good reason that Defendants made no such allegation of a refusal to arbitrate pursuant to the agreement, because Defendants never requested Plaintiff to arbitrate prior to filing their motion or otherwise. See attached Declaration of Gregory Garmong Exhibit 1 hereto ("Garmong Declaration"), ¶ 2. Further Plaintiff never refused to arbitrate pursuant to any agreement (Garmong Declaration ¶ 3).

Defendants' Opposition at 7:4-13 admits that Defendants never made this jurisdiction-conferring allegation, and 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." They present their speculation as to why they think Plaintiff would refuse to arbitrate. But none of this is what NRS 38.221(1) requires. NRS 38.221(1) requires 1) "an agreement to arbitrate" and an allegation of "another person's refusal to arbitrate pursuant to the agreement" (emphasis added) in order to invoke the subject-matter jurisdiction of the Court. The motion must make the allegation. There is no provision that the movant's later speculative arguments may provide a substitute for the

required allegation in the motion.

IV.

DEFENDANTS' NEW DISCLOSURES PROVIDE A FURTHER BASIS FOR THE RECONSIDERATION OF THE ORDER OF DECEMBER 13, 2012

Plaintiff previously pointed out that there were clearly missing parts to the alleged Investment Management Agreement upon which Defendants rely in their attempt to satisfy the first jurisdictional requirement of NRS 38.221(1), and the failure of the Motion to Compel to make the required allegations. As will be discussed next, Defendants themselves have now provided proof that their original alleged Investment Management Agreement was not a complete document, and thus could not have been a valid agreement to arbitrate. At the time the Court entered its Order of December 13, 2012, it had received only the First and Second Christian Affidavits, now both shown to be false as to the content of the Investment Management Agreement. The Court now has the Third Christian Affidavit, also shown to be false.

This new revelation provides a further basis for reconsidering the Court's Order of December 13, 2012. The standard for reconsideration by a district court was stated in Masonry and Tile Contractors Association of Southern Nevada v. Jolley, Urga & Wirth, Ltd, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997): "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." The Order was clearly erroneous, because it was based in part on the misrepresentations of the First and Second Christian Affidavits as to the content of Agreement Version 1 and Agreement Version 2.

The new "substantially different evidence" and admissions introduced by the Defendants provide a second, independent basis for reconsideration. The first item of new, substantially different evidence, the incomplete Client Confidentiality Agreement discussed in § IB, compels a reversal of the Order of December 13, 2012. It is now absolutely clear that Agreement Version 1, introduced as Exhibit 1 of Defendants' Motion to Compel, is not a "true, correct, and complete copy of the Investment Management

Agreement" as the First Christian Affidavit alleged. The reversal is compelled because of the jurisdictional requirement of NRS 38.221(1), "On a motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement"

The admission that Defendants did not allege Plaintiff's refusal to arbitrate pursuant to the agreement, discussed in § IC, also compels reversal of the order of December 13, 2012.

V.

PLAINTIFF'S REQUEST FOR FACTUAL FINDINGS REGARDING JURISDICTION

For the many reasons stated in the Motion for Reconsideration, and for those stated herein based upon the new evidence provided by Defendants, Plaintiff believes that the Order compelling arbitration is incorrect and was based upon misrepresentation under oath by the Defendants. Because an order compelling arbitration is not appealable, if the present Order is maintained Plaintiff contemplates the filing of a Writ Petition with the Supreme Court, see Attorney General v. Dist. Ct. (Philip Morris), 125 Nev. 37, 44, 199 P.3d 828 (2009). The Supreme Court will look to findings of fact and conclusions of law of the District Court for an indication of its consideration of the matter.

The earlier Order by the Court did not make jurisdictional findings of fact and conclusions of law.

In light of the new evidence and admissions, Plaintiff requests that the Court make the following findings of fact and conclusions of law regarding jurisdiction:

1. The Court finds that Defendants did not disclose to the Court or to Plaintiff the "entire agreement of the parties," and that no "entire agreement of the parties" is before the Court or in the Court's record. Defendants did disclose in their Motion to Compel an Exhibit 1, termed herein Agreement Version 1. Pursuant to ¶ 14 of Agreement Version 1, a valid and enforceable Agreement Version 1 must include "the Confidential Client Profile and all Exhibits attached hereto." Pursuant to paragraphs 2 and 12 of Agreement Version 1, the "Confidential Client Profile" must be a completed form of this document, not a blank,

incomplete form of this document. Defendants did not disclose to the Court or to the Plaintiff in the course of this action a completed form of the "Confidential Client Profile," and no completed form of the "Confidential Client Profile" is before the Court or in the Court's record. Agreement Version 1 and the Confidential Client Profile reference a total of three Exhibits A and three Exhibits B. Defendants did not disclose to the Court or to the Plaintiff in course of this action any document identified as "Exhibit A" or any document identified as "Exhibit B," and no "Exhibit A" and no "Exhibit B" is before the Court or in the Court's record. Agreement Version 1 is therefore incomplete and is not a valid agreement to arbitrate. Accordingly, no valid and enforceable agreement to arbitrate is before the Court or part of the Court's record.

Comment: If the Court declines to make such a finding, Plaintiff requests that the Court identify the location in the record of the "entire agreement of the Parties."

2. The Court finds that Defendants did not show in their Motion to Compel an agreement to arbitrate as required by NRS 38.221(1). The Court therefore has no subject-matter jurisdiction to order the parties to arbitrate.

Comment: If the Court declines to make such a finding, Plaintiff requests that the Court identify any complete, legally valid "agreement to arbitrate" shown by Defendants.

3. The Court finds that there is no enforceable agreement to arbitrate before it. Pursuant to NRS 38.221(3), the Court may not order the parties to arbitrate.

4. The Court finds that Defendants did not allege in their Motion to Compel that Plaintiff refused to arbitrate pursuant to an agreement as required by NRS 38.221(1), and accordingly the Court has no subject-matter jurisdiction to order arbitration.

Comment: If the Court declines to make such a finding, Plaintiff requests that the Court identify the exact language in the Motion to Compel alleging that Plaintiff refused to arbitrate pursuant to an agreement to arbitrate.

VI.

THE MATTERS OVERLOOKED BY THE COURT IN ITS ORIGINAL ORDER

A. The Motion for Reconsideration Specifically States the Items that Plaintiff Contends the Court "Overlooked, or Failed to Address."

The Opposition wrongly asserts (4:12-14) that "Garmong has taken the approach that the Court erred by ignoring every legal and factual matter contained in his Opposition." To the contrary, Plaintiff's Motion for Reconsideration sets out (2:9-23) a specific list of 7 items which the Order "overlooked, or failed to address." Sections 1-5 of the Motion for Reconsideration discuss in detail these 7 items that were overlooked or not addressed.

Normally, one could expect that the Opposition would point out where these 7 items were addressed or discussed in the Court's Order, to defeat Plaintiff's claim that they were overlooked or not addressed. The Opposition does not do so, because in fact the Order does not address them.

B. The Order Did in Fact Overlook or Fail to Address the Seven Items Asserted in the Motion for Reconsideration.

The seven items, the manner in which the Opposition does or does not discuss them and Plaintiff's reply follow:

1. The first item is the failure to address the statutory jurisdiction requirement of NRS 38.221(1), which has been addressed in detail above in §§ I-V, and will not be repeated here.

2. The Agreement is so lacking in critical exhibits and provisions that it cannot be a valid basis for arbitration. This item has been addressed in detail in § II and will not be repeated here.

3. In the absence of an enforceable arbitration agreement, the Court may not order the parties to arbitrate. NRS 38.221(3). This item has been addressed in detail in § II, and will not be repeated here.

4. Paragraph 16 of the Agreement is both procedurally and substantively unconscionable and should not be enforced. Although the Order makes a conclusory statement on this point at 1:16-18, there are no factual findings as to the individual points

raised by Plaintiff.

a. Procedural unconscionability: Failure to draw the reader's attention to the arbitration provision (Opposition to Motion, 4:2-17); inclusion of the "Agreement" in a stack of other papers (Opposition to Motion, 4:18-26); (On this point, now that some of pages 1-11 may have been produced, it is unclear whether there are also further pages following pages 12-19, including but not limited to the missing three Exhibits A and the missing three Exhibits B) no opportunity to agree to terms because the document given to Plaintiff was incomplete (Opposition to Motion, 4:27-5:4); warning that important rights were being given up by the party (Opposition to Motion, 5:5-16); effects not readily ascertainable upon a review of the document asserted to be a "contract" (Opposition to Motion 5:17-27); lack of clarity on governing law (Opposition to Motion, 5:28-6:13). The most significant basis for a determination of procedural unconscionability is the fact that Defendants have not been able to produce a believable version of an entire Investment Management Agreement, despite three attempts and two suspect declarations, either to Plaintiff at signing or now to the Court. Obstetrics and Gynecologists v. Pepper, *supra.*

b. Substantive unconscionability. Hidden denial of right to appeal by providing that there may be no findings of fact or conclusions of law in arbitration (Opposition to Motion, 6:21-7:3); violation of public policy (Opposition to Motion, 7:4-13); denial of statutory rights (Opposition to Motion, 7:14-25); hidden fees (Opposition to Motion, 7:26-8:23); effective lack of mutuality (Opposition to Motion, 8:24-9:9); inconsistent governing rules (Opposition to Motion, 9:10-23); illusory discovery rules (Opposition to Motion, 9:24-10:7).

c. Due to the absence of findings of fact and conclusions of law on these points in the Order of December 13, 2012, Plaintiff asks that the Court address each of these points in its decision on this Motion to Reconsider with findings of fact and conclusions of law.

5. The Agreement is not an enforceable contract, as it is incomplete and vague. The Agreement is lacking in at least 3 factual requirements (i.e., governing law,

place of arbitration, number of arbitrators) and 8 exhibits, as well as having an incomplete Confidential Client Profile, and cannot be an enforceable contract. The Opposition does not disagree that the Order does not address this point at all.

To be a complete and enforceable contract, the Agreement would necessarily include the following exhibits: a completed (not incomplete, blank) Confidential Client Profile, the three Exhibits A, the three Exhibits B, the alternatives required to be specified by the JAMS Rules, and the applicable JAMS rules. A purported "contract" having major portions omitted or provided in blank cannot be enforced. Dodge Bros., Inc., supra.

6. There was no showing of a "dispute" required for arbitration. This requirement is distinct from the jurisdictional requirement under NRS 38.221(1) of "alleging another person's refusal to arbitrate." The arbitration provision in ¶ 16 of the Agreement specifies 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')[.]" Defendants have not alleged a dispute, and have not shown the nature of any alleged "dispute." This point is not inconsequential. NRS 38.221(7) requires that the Court determine whether some claims are disputed and others are not, and permit arbitration in appropriate circumstances only on the disputed claims. In this case, the Court lacks the information to make that determination because Defendants have not specified which claims for relief of the Complaint are "disputed," if any.

7. Defendants, the parties who breached the contract, may not obtain specific performance to enforce it. The Opposition to Motion to Compel, at 12:2-23, points out that a party who first breaches an agreement may not later obtain specific performance of a provision of the agreement, specifically the arbitration provision in this case. Torke v. Federal Deposit Ins. Corp., 761 F.Supp. 754, 757 (D.Colo. 1991); Smith-Scharff Paper Co., Inc. v. Blum, 813 S.W.2d 27 (Mo. App. 1991). It is undisputed that the Defendants first breached the Agreement, because Plaintiff never breached it. The Order has no finding that the first party to breach the Agreement may then obtain specific performance of a

portion of it.

The Opposition does not address this point, and does not disagree that the Order does not address this point at all.

C. The Agreement Does Not State Which JAMS Rules Are to Be Used.

The Opposition, at 6:3-6, asserts "Thus, which set of JAMS Rules apply does not need to be specified in the arbitration clause of the agreement." The Opposition, at 6:6-7:3, then goes on to quote specific sections of the JAMS Rules, which were apparently known to the Defendants when they drafted Agreement Version 1, but which they did not make known to Plaintiff. According to Defendants, they do not need to make a proper disclosure of this secret information to their clients. They may lure clients into signing agreements where the Defendants know the details about the arbitration provision they are seeking to require and the waiving of Constitutionally guaranteed rights, but the other party is denied this information. That is certainly consistent with the rest of their business practices and the Agreement.

However, the situation is not as simple as the Defendants misrepresent it. The JAMS Rules themselves specify, at page 4 of each version, that any arbitration agreement must set forth the place of arbitration, the number of arbitrators, the selection of governing rules, optional allocation of fees and costs, and optional expedited procedures, and provide a wide range of options that were known to Defendants but were not disclosed to Plaintiff. Quoting from the JAMS Comprehensive Arbitration Rules:

> **Standard Commercial Arbitration Clause***
> Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules & Procedures (Streamlined Arbitration Rules & Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.
> (Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.
> (Optional) Expedited Procedures: The parties agree that the Expedited

Procedures set forth in JAMS Comprehensive Rules 16.1 and 16.2 shall be employed.

Sometimes contracting parties may want their agreement to allow a choice of provider organizations (JAMS being one) that can be used if a dispute arises. The following clause permits a choice between JAMS or another provider organization at the option of the first party to file the arbitration.

Standard Commercial Arbitration Clause JAMS or Another Provider*
Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). At the option of the first to commence an arbitration, the arbitration shall be administered either by JAMS pursuant to its (Comprehensive Arbitration Rules & Procedures) (Streamlined Arbitration Rules & Procedures), or by (name an alternate provider) pursuant to its (identify the rules that will govern). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.
(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.
(Optional) Expedited Procedures: The parties agree that the Expedited Procedures set forth in JAMS Comprehensive Rules 16.1 and 16.2 shall be employed.

*The drafter should select the desired option from those provided in the parentheses.

(emphasis added).

The JAMS Streamlined Arbitration Rules offer a different wide range of options that were known to Defendants but not disclosed to Plaintiff. Quoting from the Streamlined Arbitration Rules:

Standard Commercial Arbitration Clause*
Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules & Procedures (Comprehensive Arbitration Rules & Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.
(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

Sometimes contracting parties may want their agreement to allow a choice

of provider organizations (JAMS being one) that can be used if a dispute arises. The following clause permits a choice between JAMS or another provider organization at the option of the first party to file the arbitration.

> **Standard Commercial Arbitration Clause Naming JAMS or Another Provider***
> Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). At the option of the first to commence an arbitration, the arbitration shall be administered either by JAMS pursuant to its (Streamlined Arbitration Rules & Procedures) (Comprehensive Arbitration Rules & Procedures), or by (name an alternate provider) pursuant to its (identify the rules that will govern). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.
>
> (Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.
>
> *The drafter should select the desired option from those provided in the parentheses.

(emphasis added).

Both sets of JAMS Rules contemplate that the information concerning the options will be fairly available to both parties. As stated in both sets of JAMS Rules, "Sometimes contracting parties may want ...." To know what they "may want", both parties must be aware of their options.

The JAMS rules themselves require that the drafter of the Agreement, here Defendants, select which set of rules will be used and provide the details of arbitration alternatives to the other party so that both parties will have full and fair knowledge of the options available to them, so that the options may be negotiated as necessary, and so that the arbitration agreement is definite. Defendants failed to make known to Plaintiff any of this information and the alternatives available to him.

Defendants wrote the Agreement Versions 1-3. Any failures of disclosure or ambiguities must be construed against them. By their very nature, the JAMS rules are ambiguous, if the "desired option from those provided in parentheses" is not specified as JAMS itself requires. Failure to specify these missing items, when details of the JAMS

rules are known to the drafter, here Defendants, but not to the other party, here Plaintiff, is unconscionable. Easton Bus. Opp., Inc. v. Town Executive Suites-Eastern Marketplace, LLC, 126 Nev. Adv. Op. 13, 230 P.3d 827, 834 (2010).

In the Opposition, at 5:15-22, Defendants accuse Plaintiff of being "not entirely candid with the Court." As they do elsewhere, Defendants short quote a document, here Plaintiff's Declaration, in an attempt to misrepresent it. Here is the entire paragraph in question, ¶ 1 to the Declaration of Gregory Garmong signed and filed on October 29, 2012:

> 1. At the time I signed the Wespac Investment Management Agreement ("Agreement"), a portion of which is Exhibit 1 to the Motion to Dismiss and to Compel Arbitration ("Motion"), I did not have legal counsel regarding the Agreement. I was given this document to sign at the office of Wespac in Reno. I was not given an opportunity to take it away and study it or obtain legal counsel to review it. Exhibit 1 was prepared entirely by the Defendants, who upon information and belief had the benefit of legal counsel. If I had had the opportunity to review the Agreement with legal counsel prior to or at the time of signing the Agreement, in light of what I have now learned from my present legal counsel about the terms of the Agreement, I would not have signed the Agreement.

(emphasis added).

All of this sworn statement is true, and Plaintiff stands by it. This paragraph refers to the Wespac Investment Management Agreement, "a portion of which is Exhibit 1," which in its entirety would necessarily include the completed Confidential Client Profile, the three different Exhibits A, the three Exhibits B, and the governing JAMS rules, a total of 8 attachments that have never been provided to Plaintiff or to the Court as part of "entire agreement of the parties." According to the JAMS rules quoted in the Opposition, 6:2-27, the place of arbitration, the number of arbitrators, and which set of JAMS Rules are to govern must be stated in the arbitration provision. The Agreement does not state any of these required elements. Indeed, none of these attachments or factual matters have been provided to the Court, although a blank, incorrect and incomplete version of the Confidential Client Profile has now been provided as Exhibit 1 to the Opposition.

Defendants do not dispute Plaintiff's statement. Instead, they argue that because they provided copies of drafts of an incomplete document (missing the 8 required attachments that they will not provide even today) that were marked up, they have met the

requirement of providing Plaintiff a copy of the "entire agreement of the parties" to be taken away for review by an attorney.

VII.

CONSTITUTIONAL ISSUES

The interpretation of the arbitration provision at ¶ 16 raises the question of whether Plaintiff waived Constitutionally guaranteed rights "knowingly and voluntarily."

1. Plaintiff did not waive his right to jury trial "knowingly and voluntarily."

The Agreement Version 1 provides that Plaintiff 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, 410-411 (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 in ¶ 16 of Agreement Version 1. 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 ¶ 14, "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties," Plaintiff never had a copy of the "entire agreement" and even now neither the Court nor Plaintiff have a copy of the "entire agreement." See ¶¶ 5-8 of the Garmong Declaration. It was impossible for waiving party's counsel to review the "entire agreement." Similarly, it is impossible for the Court to review the "entire agreement," as it has never been furnished to the Court by Defendants.

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 keep in mind the proposed relationship between the parties, in light of Defendants' attempt to persuade Plaintiff to give up his Constitutional rights, as another factor for consideration under Lowe Enterprises. Defendants were entering into an agreement to manage a large portion of the life savings of Plaintiff, 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 Defendants were paid by withdrawing money from Plaintiff's accounts. There was therefore substantially no likelihood that Defendants would ever bring any complaint against Plaintiff--they had what they wanted. Consequently, it was likely that, as happened, only Plaintiff would have grounds for a complaint against Defendants when they defrauded him of a substantial portion of his life savings and Defendants would not have any claim that Plaintiff had not paid them. It was therefore in Defendants' interest to make any recovery by Plaintiff as difficult as possible, and to obtain an arbitration clause as lopsided in favor of Defendants as possible.

As investment advisor in the relationship that Defendants proposed, Defendants would have a confidential relationship to Plaintiff, 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, the Supreme 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). Under this principle, Plaintiff was required to make a full and fair disclosure to Defendants. See the items of information demanded by Defendants in the blank-form Confidential Client Profile. Even if Defendants were not required to make a full and fair disclosure to Plaintiff prior to signing as in Sogg, they certainly were required to do so immediately after the relationship commenced, as provided by Randano, so that Plaintiff could have terminated the relationship before Defendants had the chance to harm him (¶ 11 of Exhibit 1 to original Motion). They did not make such a disclosure then or to this

very day.

Defendants did not make a full and fair disclosure of the information it knew to Plaintiff. Defendants make a major point in their Opposition at 6:2-7:3 of quoting extensively from the JAMS Rules in support of their attempt to persuade the Court that it should side with Defendants to take away from Plaintiff Constitutionally guaranteed rights. Yet Defendants did not quote from the JAMS Rules in their drafts or in Agreement Version 1. They did not otherwise make a full and fair disclosure to Plaintiff by informing Plaintiff that the JAMS Rules call for the drafter 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. See the excerpts from the JAMS Rules quoted above in § VI(C). Such a full and fair disclosure would have allowed the parties to negotiate on the basis of equal knowledge. Nor did Defendants provide to Plaintiff copies of the three Exhibits A, the three Exhibits B, or the Confidential Client Profile as part of the Agreement Version 1. They refuse to provide that information to Plaintiff or to the Court even now. Consequently, Plaintiff had no opportunity to negotiate on a level playing field with Defendants as required under factor (1).

As to factor (3), for the same reason Plaintiff had very limited bargaining power because Defendants did not disclose to Plaintiff the wide variety of provisions in the JAMS Rules quoted earlier, as well as 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), ¶ 14 of the Agreement Version 1, prepared by Defendants, 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 Defendants 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 in Agreement Version 1, ¶ 16 is not conspicuous 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 right to 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 Plaintiff cannot be said to have waived his Constitutionally protected right to jury trial "knowingly and voluntarily."

2. Plaintiff did not waive his right to appeal "knowingly and voluntarily."

The Constitutionally guaranteed right to appeal is discussed in Coffin v. Coffin, 40 Nev. 345, 163 P. 731 (1917), stating "It is true that the Constitution gives the right to appeal." *See* Jacinto v. Pennymac Corp., 129 Nev. Adv. Op. 32, 300 P.3d 724 (2013)(headnotes 1-3); Valley Bank of Nevada, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994).

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 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."

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

VIII.

DEFENDANTS' DEMAND FOR ATTORNEYS FEES

Defendants' demand for attorneys fees (Opposition, 7:14-8:16) based upon the filing of the Motion for Reconsideration is utterly frivolous, because (A) it is not based upon any applicable law, (B) the Motion for Reconsideration is proper under the law, and (C) the

Motion for Reconsideration has the important beneficial effect of forcing Defendants to begin disclosing some of the previously concealed documentation. Absent the Motion for Reconsideration, the Court would never have known of Defendants' earlier deception regarding the content of the Agreement.

A. The Demand for Attorney's Fees is Not Based Upon any Applicable Law.

Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976), cited at Opposition 7:17-19, involves no request for, or award of, attorney's fees. Moreover, its facts are clearly distinguishable. Moore involved two, not one as in the present case, serial motions for reconsideration, before different judges and applying different court rules than are presently in effect.

But much, much worse is the fact that neither of the statutory grounds relied upon by Defendants supports their demand for attorneys fees in relation to the filing of a motion. Both statutory grounds require entirely different fact patterns.

NRS 7.085(1)(b), improperly cited at Opposition 8:5-8 as "NRS 7.085(b)," is addressed to "frivolous or vexatious claims and defenses" (emphasis added, "claims" being used in its technical sense). See NRS 7.085(2), Emerson v. Eighth Judicial District Court, 127 Nev. Adv. Op. 61, 263 P.3d 224, 229 n.3 (Nev. 2011). That is, NRS 7.085(1)(b) is directed toward claims and defenses, not motions.

NRS 18.010(2)(b), cited at Opposition 8:8-10, is equally clear and straightforward. It applies only to a "claim, counterclaim, cross-claim, or third-party complaint or defense," and also uses the same language found in NRS 7.085(1)(b), "frivolous or vexatious claims and defenses" (emphasis added).

Defendants' demand for attorneys fees is not based upon any "claims and defenses" (as required for NRS 7.085(1)(b)), or any "claim, counterclaim, cross-claim, or third-party complaint or defense" (as required for NRS 18.010(b)), but instead is expressly based upon a motion proceeding, see Opposition, 8:10-12, seeking an award for "Plaintiff's instant Combined Motions for Leave to Rehear And For Rehearing of the Order of December 13, 2012". Accordingly, the demand for attorneys fees under NRS 7.085(1)(b)

and NRS 18.010(b) is not proper.

B. The Motion for Reconsideration is Proper and Authorized by Law.

Plaintiff's Combined Motions are expressly authorized by law, see Combined Motions at 1:18-2:5. It involves a first motion to reconsider, not a second motion to reconsider as in Moore (and even in Moore no question was raised or discussed of an award of attorney's fees).

The standard for reconsideration by a district court (Motion for Reconsideration, 2:1-5; Opposition, 3:11-15) was stated in Masonry and Tile Contractors Association of Southern Nevada v. Jolley, Urga & Wirth, Ltd, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997): "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."

That standard is met here, for three reasons. First, "substantially different evidence has been subsequently introduced," here by Defendants. Their admission that they had previously withheld at least pages 1-11 of the Agreement, the Confidential Client Profile that is referenced in ¶¶ 2, 12, and 14 of the Agreement, and introduced by Defendants as a incomplete form of that document, is "substantially different evidence." Second, Plaintiff has shown that the Defendants submitted and relied upon false statements made under oath to persuade the Court to grant their Motion to Compel. Third, Plaintiff has shown that the "decision is clearly erroneous," in that it fails to address seven major issues with appropriate findings and/or conclusions, and that addressing those issues will require denial of the Motion for Arbitration.

C. The Motion for Reconsideration has forced Defendants to begin disclosing some of the previously concealed documentation. Absent the Motion for Reconsideration, the Court would never have known of Defendants' earlier deception regarding the content of the Agreement.

Legalities aside, it was only through Plaintiff's persistence in pursuing the Motion for Reconsideration that the Court learned that the Defendants' Motion to Compel filed September 13, 2012 was based upon a document, Exhibit 1, the "Investment Management Agreement," whose content was falsified by the Defendants. See § II above.

It is remarkable that Defendants, who have now grudgingly admitted the existence of the very evidence that they previously swore under oath did not exist and which by the terms of ¶ 14 of the Agreement is a part of the Agreement, the Confidential Client Profile, want attorney's fees because Plaintiff insisted that the document did exist and brought the Motion for Reconsideration that has now lifted Defendants' curtain of contrived confusion for a glimpse of the truth, although the full truth remains concealed by Defendants.

IX.

THE PREDISPOSITION TO RESOLVE DISPUTES BY ARBITRATION

Although there is a predisposition to resolve disputes by arbitration where possible, an order for arbitration under NRS 38.221 requires that the jurisdiction-conferring requirements of NRS 38.221(1) be met. Defendants did not even attempt to make the second jurisdiction-conferring allegation of NRS 38.221(1) ("motion... alleging another person's refusal to arbitrate pursuant to the agreement"), and do not argue that they did make such an allegation. Moreover, in their muddled attempt first to claim that their Exhibit 1 was "true, correct, and complete" and now to add in an incomplete blank form of an attachment that Agreements Version 1-3 requires to be complete, and without ever submitting the other attachments and exhibits and information referenced in Exhibit 1, they have made it clear that none of their Agreement Versions 1-3 approximate a valid contract that can serve as the basis for arbitration.

Defendants have an even darker motive than willful disregard of the law and filing multiple false Affidavits. By avoiding legitimate discovery Defendants seek to prevent a full and fair disclosure of the facts. Arbitration may not be used to conceal the facts. As the Court can see, it has been like pulling teeth to get Defendants to produce even an incomplete, blank-form Confidential Client Profile to the Court. Defendants refuse to produce the three Exhibits A, the three Exhibits B, and the completed Confidential Client Profile, and identify the applicable JAMS Rules. Paragraph. 14 of the Agreement Version 1 provides that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties." By refusing to provide

the three Exhibits A, the three Exhibits B, the completed Confidential Client Profile, and the applicable JAMS Rules, the Defendants' apparent strategy is to get past the 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. Several of these documents that are part of the Agreement Versions 1-3 and that Defendants refuse to produce contain much of the substance of Plaintiff's instructions to Defendant to manage his life savings conservatively, which were blatantly disregarded by the Defendants in wasting those savings.

And, for the reasons stated, the "Agreement" does not meet many other requirements of Nevada law.

So, while arbitration is desirable, Defendants have not properly invoked the jurisdiction of the Court to order arbitration, and seek to use it for an improper purpose.

X.

PLAINTIFF'S REQUEST FOR SUBSTANTIVE FACTUAL FINDINGS

In §V above, Plaintiff requested that the Court make factual findings of fact regarding its jurisdiction to order arbitration pursuant to NRS 38.221 and conclusions of law so that the Supreme Court will have a basis for interpreting the Court's decision.

In light of the new evidence and admissions, Plaintiff similarly requests that the Court make the following findings of fact and conclusions regarding substantive matters.

1. Applying the principles of Gonski v. Second Judicial Dist. Court, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1170 (2010), the Court finds that ¶ 16 of the purported agreement to arbitrate submitted by the Defendants is procedurally unconscionable and may not be enforced. It is procedurally unconscionable for each and every of the following separate reasons: (1) Failure to draw the reader's attention to the arbitration provision; (2) inclusion of the "Agreement" in a stack of other papers; (3) insufficient warning that important rights were being given up by the party; (4) effects not readily ascertainable upon a review of the document asserted to be a "contract"; and (5) lack of clarity on governing

law.

2. Applying the principles of Gonski v. Second Judicial Dist. Court, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1170 (2010), the Court finds that ¶ 16 of the purported agreement to arbitrate submitted by the Defendants is substantively unconscionable and may not be enforced. It is substantively unconscionable for each and every of the following separate reasons: (1) Hidden denial of right to appeal by providing that there may be no findings of fact or conclusions of law in arbitration; (2) violation of public policy; (3) denial of statutory rights; (4) hidden fees; (5) effective lack of mutuality; (6) inconsistent governing rules; and (7) illusory discovery rules.

3. The Court finds that the Defendants have not submitted to the Court or to Plaintiffs an enforceable contract, as it is incomplete and vague, and no enforceable contract is part of the Court's record. Consequently, the purported agreement to arbitrate of ¶ 16 is not valid and enforceable. Agreement Version 1 does not include a completed Confidential Client Profile, any of the three "Agreements A", any of the three "Agreements B", does not specify which of the two sets of JAMS Rules are to govern as required by the JAMS Rules themselves, and does not include information on the place of arbitration and number of arbitrators as required by the JAMS Rules themselves.

4. The Court finds that Defendants, the parties who first breached the Agreement Version 1, may not obtain specific performance to enforce it, and consequently may not obtain specific performance of any agreement to arbitrate found in ¶ 16.

5. The Court finds that there is a constitutionally guaranteed right to jury trial, that such a right may be waived, and that in this case Plaintiff did not waive his right to jury trial "knowingly and voluntarily." The decision in Lowe Enterprises v. Eighth Judicial District Court, 118 Nev. 92, 101, 40 P.3d 405, 410-411 (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." In this case, because Defendants never provided any "entire agreement between the parties", it was impossible under factor (4) for Plaintiff to have counsel review the "entire agreement of the parties." For the same reason, and additionally because Defendants did not disclose that there were two sets of JAMS Rules and the information that the JAMS Rules instruct the drafter to disclose, under factor (1) there were no fair negotiations between the parties. Under factor (3), because Defendants did not disclose the "entire agreement of the parties" and did not disclose the two JAMS agreements and the information that the JAMS Rules instruct the drafter to disclose, Defendants had far more bargaining power than Plaintiff. Lastly, as to factor (4), there was no waiver of the right to jury trial found in the body of ¶16. The body of ¶ 16 was not presented in a conspicuous manner and therefore such a waiver of the right to jury trial could not have been conspicuous. Accordingly, the Court finds that Plaintiff did not enter a contractual waiver of the right to jury trial knowingly and voluntarily. The agreement to arbitrate of ¶ 16 is therefore not valid.

6. The Court finds that there is a constitutionally guaranteed right to appeal, Coffin v. Coffin, 40 Nev. 345, 163 P. 731 (1917), that such a right may be waived, and that in this case Plaintiff did not waive his right to appeal "knowingly and voluntarily." The same four factors quoted above from Lowe Enterprises v. Eighth Judicial District Court, 118 Nev. 92, 101, 40 P.3d 405, 410-411 (2002) are applicable to analysis of whether the right to appeal was waived "knowingly and voluntarily." The Court reaches the same result as stated above for factors (1)-(4), which are incorporated here, with the exception that, as to factor (3), the conclusions regarding jury trial waiver are not applicable, but any attempt to state a waiver of the right to appeal in ¶ 16 is ambiguously worded and cannot be valid. Accordingly, the Court finds that Plaintiff did not enter a contractual waiver of the right to appeal knowingly and voluntarily. The agreement to arbitrate of ¶16 is therefore not valid.

XI.

SUMMARY AND CONCLUSION

For the reasons stated, Plaintiff urges the Court to reconsider its prior Order, withdraw the prior Order to arbitrate, and permit this case to go forward in the District Court with the Plaintiff retaining his full array of constitutionally guaranteed rights, including the right to a jury trial and the right to appeal, if needed.

Further, the Plaintiff requests that this Court order the defendants to disclose all the documents in their possession related to the purported Investment Management Agreement and arbitration provision, including missing exhibits and a completed Confidential Client Profile, as stated above. In the absence of producing all of the documents which should have comprised the complete Investment Management Agreement, with full exhibits, the defendants should be directed to file an affidavit with this Court explaining exactly why the documents are not produced and the reason any documents are not completely filled out.

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

DATED this 3rd day of February, 2014.

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

Counsel for plaintiff

INDEX OF EXHIBITS

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1	Declaration of Gregory Garmong	3
2	Declaration of Carl M. Hebert	1

FILED
Electronically
2014-02-03 14:01:26
Joey Orduna Hastings
Clerk of the Court
Transaction # 4287098 : melwood

EXHIBIT 1

EXHIBIT 1

DECLARATION OF GREGORY GARMONG

I, Gregory Garmong, declare the following facts, knowing them to be true and correct of my own personal knowledge:

1. I am the Plaintiff in this case, CV12-01271.

2. The Defendants never made a request to me, prior to filing their Motion to Dismiss and to Compel Arbitration ("Motion to Compel") in this case, that I participate in arbitration.

3. I never refused, prior to Defendants filing their Motion to Compel in this case, to participate in arbitration with the Defendants.

4. I have never been licensed to practice law in Nevada.

5. To my understanding from reading the portion that was furnished by Defendants in this lawsuit as Exhibit 1 to their Motion to Compel, and specifically Para. 14 thereof, a complete and entire Wespac Investment Management Agreement ("Agreement") necessarily would include a completed and filled-in (not blank) Confidential Client Profile, Exhibit A referred to in the Table of Contents of the Confidential Client Profile, Exhibit B referred to in the Table of Contents of the Confidential Client Profile, another Exhibit A referred to in Para. 2 of the incomplete Agreement, another Exhibit B referred to in Para. 3(3) of the incomplete Agreement, yet another Exhibit A referred to in Para. 4 of the incomplete Agreement, and yet another Exhibit B also referred to in Para. 4 of the incomplete Agreement.

6. I did not know at the time Defendants gave me the incomplete Agreement to sign that there are two different sets of Rules of the Judicial Arbitration and Mediation Service ("JAMS Rules"), referred to in Para. 16 of the incomplete Agreement. I learned only later that there are two sets of JAMS Rules. My understanding from reading the incomplete Agreement provided to me and the JAMS Rules, is that the complete and entire Agreement would necessarily specify which of the two sets of JAMS Rules is applicable.

7. To my understanding from reading the JAMS Rules, the complete and entire Agreement necessarily would specify the items required to be specified by the applicable JAMS Rules. These items include the place of arbitration, the number of arbitrators, the selection of governing rules, optional allocation of fees and costs, optional expedited procedures, and a wide range of options that were known to Defendants but were not disclosed to me. These items were not specified in the incomplete Agreement provided to

me.

8. The collection of paper submitted to the Court as Exhibit 1 to the Motion to Compel does not include a completed and filled-in (not blank) Confidential Client Profile, a copy of Exhibit A referenced in the Table of Contents of the Confidential Client Profile, a copy of Exhibit B referenced in the Table of Contents of the Confidential Client Profile, another Exhibit A referred to in Para. 2 of the incomplete Agreement, another Exhibit B referred to in Para. 3(3) of the incomplete Agreement, yet another Exhibit A referred to in Para. 4 of the incomplete Agreement, yet another Exhibit B also referred to in Para. 4 of the incomplete Agreement, the applicable form of the JAMS Rules referred to in Para. 16 of the incomplete Agreement, and the items specified in the applicable form of the JAMS Rules.

9. I did not in the past and cannot now understand the meaning of the incomplete Agreement that is Exhibit 1 to the Motion to Compel because it does not include the elements set forth in Para. 8 above.

10. Prior to dealing with Defendants, I never had any involvement with, or knew of, the Judicial Arbitration and Mediation Service ("JAMS"), referenced in Para. 16 of the incomplete Agreement.

11. I was given only a part of the incomplete Agreement to sign at the office of Defendants in Reno. I was not at any time given a complete and entire copy of the Agreement, including all exhibits and referenced documents as required by Para. 14 of the incomplete Agreement and listed in Para. 8, to study and obtain legal counsel to review it. If I had had the opportunity to review the entire Agreement with legal counsel prior to or at the time of signing the incomplete Agreement, I would not have signed the incomplete Agreement that is Exhibit 1 to the Motion to Compel. I use the term "entire agreement" in the sense of Para. 14 of the incomplete Agreement, stating "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties..." There was no completed Confidential Client Profile and all Exhibits attached hereto" provided to me at any time, either at the time of signing, during this litigation, or in-between.

12. I have never had a copy of the "entire agreement" asserted by Defendants to be the basis for their Motion to Compel, either before or after the date indicated on the incomplete Agreement. I do not know why Defendants did not give me a copy of the "entire agreement". To my knowledge, there is no copy of the "entire agreement" in the Court's record of this case, as of the date of signing this Declaration.

13. I was not able to conduct a negotiation with Defendants as to the terms of the incomplete Agreement, because I never had a complete copy of the entire Agreement as referenced in Para. 14 of the portion of the incomplete Agreement that Defendants allowed me to see. The Defendants apparently had a copy of the entire agreement, and I did not.

14. I trusted Defendants to be fair and honest with me, and to make a full and fair disclosure to me, both prior to signing the incomplete Agreement and afterwards.

15. Defendants arranged that they were paid the amounts set forth in the incomplete Agreement by automatic deductions from my accounts at Charles Schwab & Co. Defendants continued to take money from my Schwab accounts even as they wasted the accounts. Because Defendants were paid by automatic deductions from my accounts at Schwab, there was no chance that I would default on my obligations under a valid and complete Agreement. Restrictions contained in Para. 16 of the incomplete Agreement are therefore completely one-sided in favor of Defendants.

16. Based on the Exhibit 1 that Defendants attached to the Motion to Compel and that did not include a completed Confidential Client Profile, it is not possible to ascertain my intentions at the time I entered the incomplete Agreement, because the completed Confidential Client Profile would have expressed my intentions at the time as to my instructions to Defendants on how to manage my accounts. See especially pages 3 and 6-11 of the blank form Confidential Client Profile that was provided as Exhibit 1 of Defendants Opposition to Plaintiff's Motion to Reconsider, which in a completed form would state my intentions and instructions.

17. At the time I signed the incomplete Agreement, I did not understand the ramifications of Para. 16. I did not understand that denying the opportunity to seek punitive damages was a violation of Nevada law and public policy. I did not understand that preventing findings of fact and conclusions of law largely precluded an effective appeal.

I declare under penalty of perjury that the foregoing is true and correct.

Date: January 31, 2014
Signed at Smith, NV 89430

Gregory Garmong

FILED
Electronically
2014-02-03 14:01:26
Joey Orduna Hastings
Clerk of the Court
Transaction # 4287098 : melwood

EXHIBIT 2

EXHIBIT 2

1520
CARL M. HEBERT, ESQ.
Nevada Bar #250
202 California Avenue
Reno, NV 89509
(775) 323-5556

Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive,

DEPT. NO. : 6

Defendants.

/

DECLARATION OF CARL M. HEBERT

I, CARL M. HEBERT, declare the following facts, knowing them to be true of my own personal knowledge:

1. I am counsel of record for the plaintiff in the above-captioned case.

2. Prior to the filing by the defendants of their Motion to Dismiss and Compel Arbitration on September 19, 2012, I did not receive any request or demand for arbitration from the defendants or their counsel.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2/3/14

Carl M. Hebert

CARL M. HEBERT

FILED
Electronically
2014-02-10 12:47:22 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4298026 : pdbrown

CODE 3860
Carl M. Hebert, Esq.
Bar No: 250
202 California Ave.
Reno, NV 89509
775-323-5556
Attorney For: Plaintiff Garmong

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

Case No. CV12-01271

WESPAC; GREG CHRISTIAN,

Dept. No. 6

Defendant.
/

REQUEST FOR SUBMISSION OF MOTION

It is requested that the motion for Combined motions for leave to rehear and for rehearing of the order of December 13, 2012 compelling arbitration, which was filed on the 31st day of December, 20 12, in the above-entitled matter be submitted to the Court for decision.

The undersigned attorney certifies that a copy of this request has been mailed to all counsel of record.

DATED this 10th day of February, 20 14.

/S/ Carl M. Hebert
Carl M. Hebert, Esq.

JUD 506 (Rev 8/99)

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

Request for submission of motion

(Title of Document)

filed in case number: CV12-01271

☑ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 2/10/14

Carl M. Hebert
(Signature)

CARL M. HEBERT
(Print Name)

PLAINTIFF GARMONG
(Attorney for)

Code 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and DOES 1-10,

Defendants.

_____/

Case No. CV12-01271

Dept. No. 6

ORDER

On December 31, 2012, Plaintiff, GREGORY GARMONG, filed a combined motion for leave to rehear and rehearing of this Court's December 13, 2012 order compelling arbitration. Defendants opposed Plaintiff's motion on January 9, 2013. Plaintiff filed an untimely reply on February 3, 2014. Because the Plaintiff's reply was filed more than a year after Defendants' opposition was filed, the Court will not entertain Plaintiff's reply points and authorities. D.C.R. 13(4).

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). "Only in very rare instances in which new issues of fact or law are raised

supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

Plaintiff argues the December 13, 2012 order was erroneous. Plaintiff alleges the Court overlooked the following: 1) the Court lacked subject matter jurisdiction over this matter pursuant to N.R.S. 38.221(1) because the Defendants failed to allege Plaintiff refused to arbitrate; 2) the agreement between the parties was so lacking that no enforceable arbitration agreement existed between the parties; 3) the Court may not order parties to arbitrate when there is no enforceable arbitration agreement, pursuant to N.R.S. 38.221(3); 4) the arbitration clause of the agreement is both procedurally and substantively unconscionable and should not be enforced; 5) the agreement is an enforceable contract because it is incomplete and vague; 6) there is no showing of a dispute, which is required for arbitration; and, 7) Defendants are not entitled to obtain specific performance as they breached the contract first.

Defendants argue Plaintiff has failed to introduce any new issues of fact or law. Instead, Defendants allege Plaintiff is asking the Court to review every argument contained in the opposition Plaintiff originally filed against Defendants' motion to compel arbitration.

The Defendants further opposed Plaintiff's motion to rehear because the Court's order was not erroneous. Defendants argue the Court did have proper jurisdiction because the Plaintiff filed a complaint against the Defendants seeking damages, and opposed Defendants' motion to compel arbitration. Defendants argue these actions are enough to satisfy the allegation of refusal requirement of N.R.S. 38.221(1). Defendants argue the agreement and arbitration clause was neither procedurally nor substantively unconscionable because Plaintiff had the opportunity to review the agreement and made notations on the agreement before the final version was signed.

The Court agrees with Defendants' arguments that the Plaintiff's motion is substantively the same as his original opposition. The Plaintiff has not raised any new issues of fact or law in his present motion.

Accordingly, Defendants' combined motion for leave to rehear and rehearing of this Court's December 13, 2012 order compelling arbitration is DENIED.

DATED: This 2nd ~~day~~ of April, 2014.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 2nd day of April, 2014, I electronically filed the foregoing with the clerk of the Court:

CARL HEBERT, ESQ.

THOMAS BRADLEY, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Judicial Assistant

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned certifies that he has filed this Appendix to 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

SUPREME COURT OF THE STATE OF NEVADA

GREGORY GARMONG,
Petitioner,

vs.

CASE NO.:

DISTRICT COURT CASE NO: CV12-01271

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.
_____/

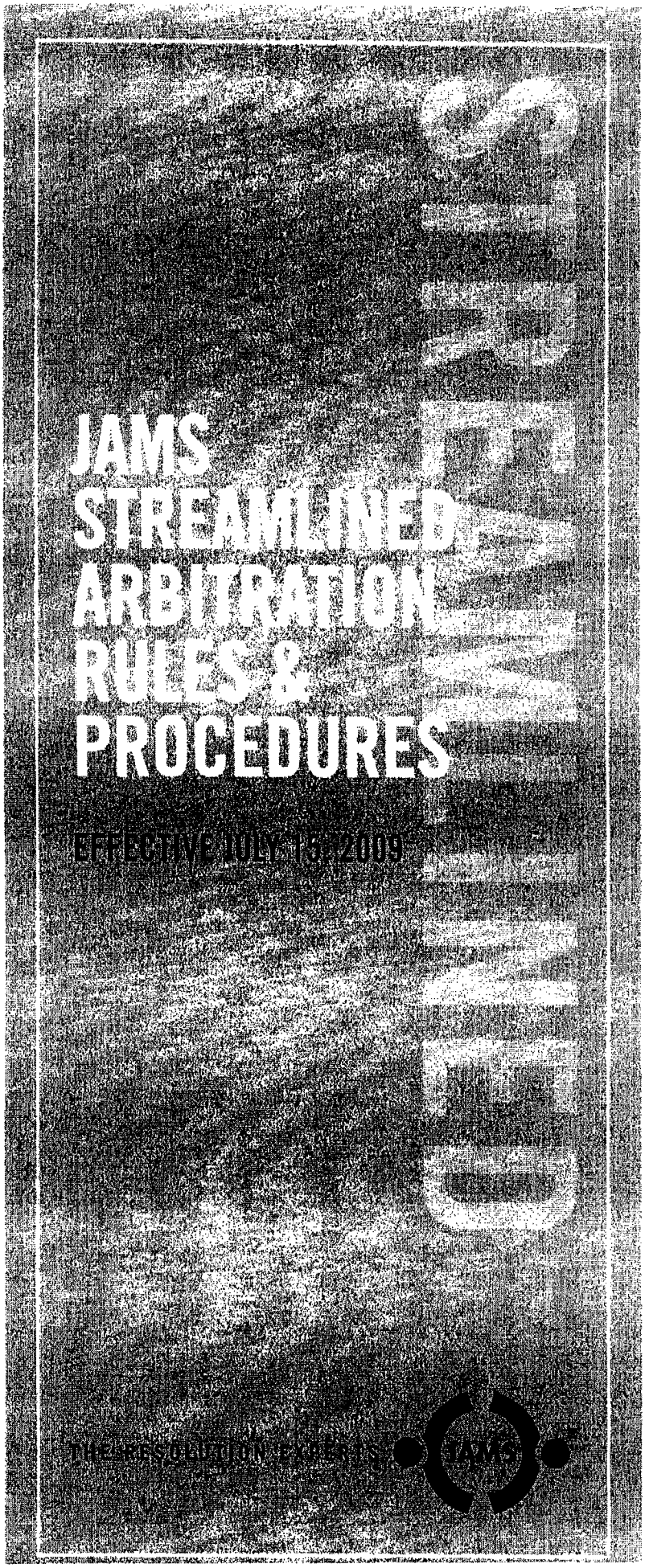
APPENDIX TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION (PART 2)

CARL M. HEBERT, ESQ.
NEVADA BAR # 250
202 CALIFORNIA AVE.
RENO, NEVADA 89509
775-323-5556

Counsel for Petitioner

EXHIBIT 3

EXHIBIT 3

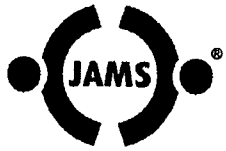

JAMS
STREAMLINED
ARBITRATION
RULES &
PROCEDURES
EFFECTIVE JULY 15, 2009
THE RESOLUTION EXPERTS
JAMS

JAMS STREAMLINED ARBITRATION RULES & PROCEDURES

JAMS provides arbitration and mediation services from Resolution Centers located throughout the United States. Its arbitrators and mediators hear and resolve some of the nation's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained and experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Parties wishing to write a pre-dispute JAMS arbitration clause into their agreement should review the sample arbitration clauses on Page 4. These clauses may be modified to tailor the arbitration process to meet the parties' individual needs.

THE RESOLUTION EXPERTS 

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Standard Arbitration Clauses Referring to the JAMS Streamlined Arbitration Rules

JAMS Streamlined Arbitration Rules & Procedures

STANDARD ARBITRATION CLAUSES REFERRING TO THE JAMS STREAMLINED ARBITRATION RULES

Standard Commercial Arbitration Clause*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules & Procedures (Comprehensive Arbitration Rules & Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

Sometimes contracting parties may want their agreement to allow a choice of provider organizations (JAMS being one) that can be used if a dispute arises. The following clause permits a choice between JAMS or another provider organization at the option of the first party to file the arbitration.

Standard Commercial Arbitration Clause Naming JAMS or Another Provider*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). At the option of the first to commence an arbitration, the arbitration shall be administered either by JAMS pursuant to its (Streamlined Arbitration Rules & Procedures) (Comprehensive Arbitration Rules & Procedures), or by (name an alternate provider) pursuant to its (identify the rules that will govern). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

*The drafter should select the desired option from those provided in the parentheses.

CASE MANAGEMENT FEES

JAMS charges a nominal Case Management Fee. For arbitrations the Case Management Fee is:

HEARING LENGTH	FEE
1 to 3 days	$400 per party, per day
(1 day is defined as 10 hours of professional time)	
Time in excess of initial 30 hours	10% of professional fees

JAMS neutrals set their own hourly, partial and full-day rates. For information on individual neutrals' rates and the Case Management Fee, please contact JAMS at 800-352-JAMS. The Case Management Fee structure is subject to change.

All of the JAMS Rules, including the Streamlined Arbitration Rules set forth below, can be accessed at the JAMS website: **www.jamsadr.com**.

JAMS STREAMLINED ARBITRATION RULES & PROCEDURES

Rule 1. Scope of Rules

(a) The JAMS Streamlined Arbitration Rules & Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, no disputed claim or counterclaim exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Streamlined Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS are prescribed in the Agreement of the Parties and in these Rules, and may be carried out through such representatives as it may direct.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

f) "Electronic filing" (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a Party, attorney or representative under these Rules.

Rule 2. Party-Agreed Procedures

The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 12(j), 25 and 26). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed on by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS confirms in a Commencement Letter its receipt of one of the following:

(i) A post-dispute Arbitration agreement fully executed by all Parties and that specifies JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and which specifies JAMS administration or use of any JAMS Rules or which the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules, confirmed in writing by the Parties; or

(iv) A copy of a court order compelling Arbitration at JAMS.

(b) The Commencement Letter shall confirm which one of the above requirements for commencement has been met, that JAMS has received all payments required under the applicable fee schedule, and that the claimant has

provided JAMS with contact information for all Parties along with evidence that the Demand has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate and, pursuant to Rule 14, the Arbitrator shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter, but is not intended to be applicable to any legal requirements such as the statute of limitations, any contractual limitations period, or claims notice requirement. The term "commencement" as used in this Rule is intended only to pertain to the operation of this and other rules (such as Rule 3, 7(a), 7(c), 10(a), 26(a).)

(e) Service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. Mail. Service by any of these means is considered effective upon the date of deposit of the document. Service by electronic mail or facsimile transmission is considered effective upon transmission, but only if followed within one week of delivery by service of an appropriate number of copies and originals by one of the other service methods. In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. Mail, three (3) calendar days shall be added to the prescribed period.

(f) Electronic Filing. The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

Every document electronically filed or served shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address, telephone number, and Bar number of a signing attorney. Typographical signatures shall be treated as personal signatures for all purposes under these Rules. Documents containing signatures of third-parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper-format.

Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the party initiating e-service and that Certificate shall serve as proof of service. Any party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party which was unknown to the sending Party, (2) a failure to process the electronic document when received by JAMS Electronic Filing System, (3) the Party was erroneously excluded from the service list, or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may for good cause shown permit the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date

for any response or the period within which any right, duty or other act must be performed.

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing such factors as the subject matter of the dispute, the convenience of the Parties and witnesses and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 19 (e) and 26 (c). An administrative suspension shall toll any other time limits contained in these Rules, or the Parties' agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within 30 days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for 30 days following the conclusion of the Arbitration.

(e) Unless the Parties' agreement or applicable law provides otherwise, JAMS may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single Arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances the Arbitrator deems relevant and applicable.

Rule 7. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim, or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Within seven (7) calendar days after the commencement of an Arbitration, Claimant shall submit to JAMS and

serve on the other Parties a notice of its claim and remedies sought. Such notice shall consist of either a Demand for Arbitration or a copy of a Complaint previously filed with a court. (In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.)

(c) Within seven (7) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) or counterclaims it may have.

(d) Within seven (7) calendar days of service of a counterclaim, a claimant may submit to JAMS and serve on other Parties a response to such counterclaim and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

Rule 8. Interpretation of Rules and Jurisdiction Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Whenever in these Rules a matter is to be determined by "JAMS" (such as in Rules 6; 12(d), (e), (h) or (j); or 26(d)), such determination shall be made in accordance with JAMS administrative procedures.

(c) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(d) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(e) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may only be altered in accordance with Rule 19.

Rule 9. Representation

(a) The Parties may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to JAMS and the other Parties of the name, address, telephone and fax numbers and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers, and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

Rule 10. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5) except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and on the Arbitrator. However, the opposing Parties may, within fourteen (14) calendar days of service of notice of the withdrawal of the claim or counterclaim, request that the Arbitrator order that the withdrawal be with prejudice. If such a request is made, it shall be determined by the Arbitrator.

Rule 11. *Ex Parte* Communications

No Party will have any *ex parte* communication with the Arbitrator regarding any issue related to the Arbitration. Any necessary *ex parte* communication with the Arbitrator, whether before or after the Arbitration Hearing, will be conducted through JAMS.

Rule 12. Arbitrator Selection and Replacement

(a) JAMS Streamlined Arbitrations will be conducted by one neutral Arbitrator.

(b) Unless the Arbitrator has been previously selected by agreement of the Parties, the Case Manager may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(c) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least three (3) Arbitrator candidates. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (d) below.

(d) Within seven (7) calendar days of service by the Parties of the list of names, each Party may strike one name and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(e) If this process does not yield an Arbitrator, JAMS shall designate the Arbitrator.

(f) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(g) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(h) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(i) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. The obligation of the Arbitrator to make all required disclosures continues throughout the Arbitration process. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it.

(j) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties who may respond within seven (7) days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

Rule 13. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information (including electronically stored information ("ESI")) relevant to the dispute or claim, including copies of all documents in their possession or control on which they rely in support of their positions or which they intend to introduce as exhibits at the Arbitration Hearing, the names of all individuals with knowledge about the dispute or claim and the names of all experts who may be called upon to testify or whose report may be introduced at the Arbitration Hearing. The Parties and the Arbitrator will make every effort to conclude the document and information exchange process within fourteen (14) calendar days after all pleadings or notices of claims have been received. The necessity of additional information exchange shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(b) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-

privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(c) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute.

Rule 14. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date unless the law of the relevant jurisdiction allows for or the Parties have agreed to shorter notice.

(c) The Arbitrator, in order to hear a third party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third party witness.

Rule 15. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts, (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness's direct testimony, and (3) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other a copy of any such exhibits to the extent that it has not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit concise written statements of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties, at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 16. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 14(c) . The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 17. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise in the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as the Arbitrator deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Hearing or any portion thereof may be conducted telephonically with the agreement of the Parties or in the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date agreed upon by the Arbitrator and the Parties, to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter. If post-Hearing briefs are to be submitted the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or upon the application of a Party for good cause shown, re-open the Hearing. If the Hearing is re-opened and the reopening prevents the rendering of the Award within the time limits specified by these Rules, the time limits will be extended until the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 14, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) (i) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding unless the Party arranging for the stenographic record either agrees to provide access to the stenographic record at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 18. Waiver of Hearing

The Parties may agree to waive oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 19. Awards

(a) The Arbitrator shall render a Final Award or Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing as defined in Rule 17(h) or, if a Hearing has been waived, within thirty (30) calendar days

after the receipt by the Arbitrator of all materials specified by the Parties, except (i) by the Agreement of the Parties, (ii) upon good cause for an extension of time to render the Award, or (iii) as provided in Rule 17(i). The Arbitrator shall provide the Final Award or Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) In determining the merits of the dispute the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator will be guided by the law or the rules of law that the Arbitrator deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including but not limited to specific performance of a contract or any other equitable or legal remedy.

(c) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(d) The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(e) The Award of the Arbitrator may allocate Arbitration Fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties' agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 26(c).)

(f) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' agreement or allowed by applicable law.

(g) The Award will consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(h) After the Award has been rendered, and provided the Parties have complied with Rule 26, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. Mail. It need not be sent certified or registered.

(i) Within seven (7) calendar days after service of the Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 26(c)), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate correction to the Award within fourteen (14) calendar days of receiving a request or seven (7) calendar days after the Arbitrator's proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(j) The Award is considered final, for purposes of judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 20, fourteen (14) calendar days after service is deemed effective if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 20. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 *et. seq.* or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 21. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 22. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

Rule 23. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator, unless the Parties so agree pursuant to Rule 23 (b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 24. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses, any other costs occasioned by the actionable conduct including reasonable attorney's fees, exclusion of certain evidence, drawing adverse inferences, or in extreme cases determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 25. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside Parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, Case Manager nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, Case Manager nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including but not limited to any disqualification of or recusal by the Arbitrator.

Rule 26. Fees

(a) Each Party shall pay its *pro-rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration,

unless the Parties agree on a different allocation of fees and expenses. JAMS agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration prior to the Hearing and the Arbitrator may preclude a Party that has failed to deposit its *pro-rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may Award against any Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

Rule 27. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS, and provide to JAMS a copy of their written agreement setting forth the agreed-upon maximum and minimum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 19.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

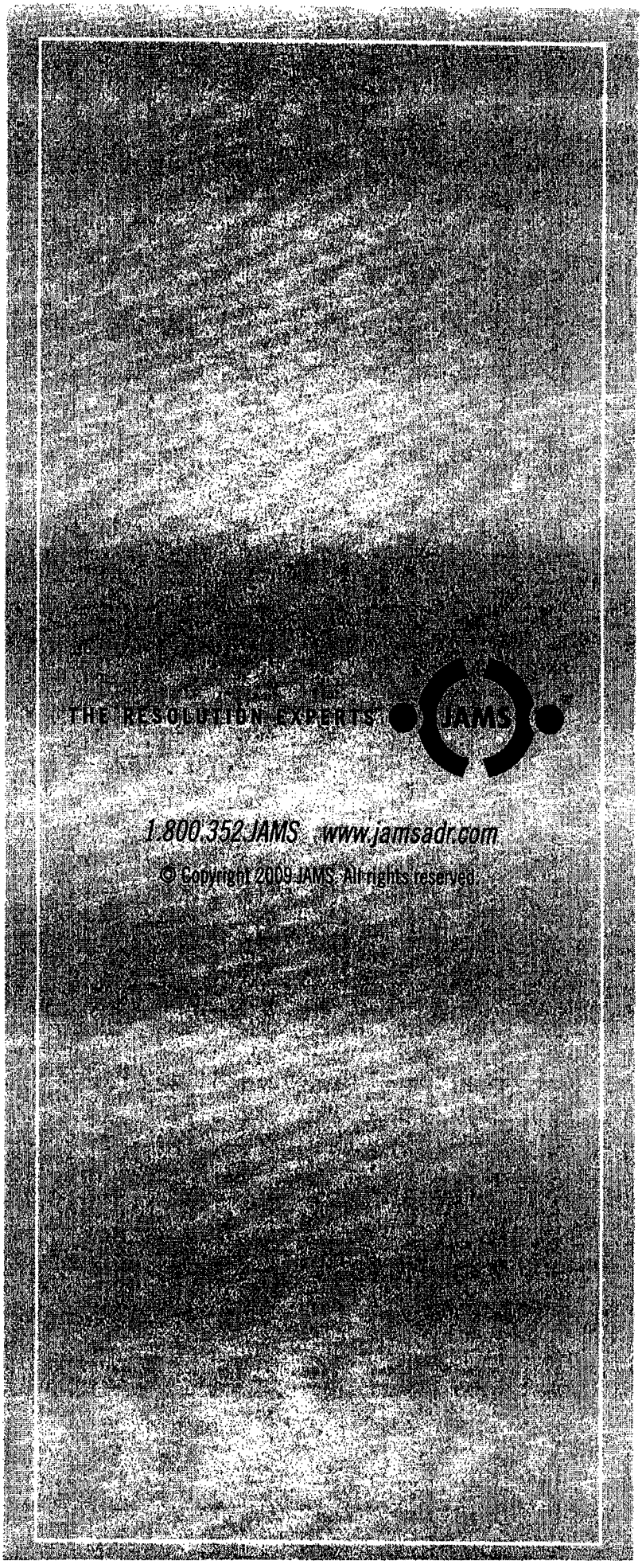
Rule 28. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 19(b). JAMS shall promptly provide a copy of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 19(b). This provision modifies Rule 19(f) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 19, except that the Award shall thereafter be corrected to conform to the closest of the last proposals, and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 19 shall be applicable.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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

_____/

Case No. CV 12-01271
Dept. No. 6

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND TO COMPEL ARBITRATION

Defendants WESPAC and GREG CHRISTIAN, by and through their attorney of record, THOMAS C. BRADLEY, ESQ., of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace,* hereby reply to *Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration.*

Defendants' Reply is made and based on the attached Memorandum of Points and Authorities, the attached exhibits, and all pleadings and papers on file herein.

DATED this 3rd day of December, 2012.

Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace

Thomas C. Bradley, Esq.
Attorney for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

Mr. Garmong was a licensed attorney in California from 1978 to 2008. He attended Massachusetts Institute of Technology and later UCLA Law School.

In or about July 2005, Plaintiff Gregory Garmong ("Garmong"), who is an experienced attorney, met with Defendant Greg Christian, an investment advisor at Defendant Wespac Advisors, LLC, to discuss the possibility of Garmong becoming a client of Defendants. (*Affidavit of Greg Christian attached as Exhibit "1"*). During that meeting, Garmong was given a copy of Wespac's "Investment Management Agreement" ("Agreement"). The final provision of the Agreement set forth the parties' understanding regarding the resolution of disputes concerning the Agreement. The heading of this section, written in bold type, stated: "**Arbitration. The parties waive their right to seek remedies in court, including any right to jury trial.**" Garmong took this copy of the Agreement with him when he left the meeting. Approximately one week later, Garmong returned to Wespac with his copy of the Agreement. On every page of the Agreement, Mr. Garmong made notes, underlinings, or other handwritten marks. (*"Investment Management Agreement" with Mr. Garmong's notations attached as Exhibit "2"*).

Mr. Garmong requested that Mr. Christian make various changes to the Agreement. Mr. Christian agreed to do so. When presented with the second draft of the Agreement, Mr. Garmong requested even more changes. *See* Exhibit 3. Mr. Christian agreed to do so and incorporated them into the final Agreement. At no time did Mr. Garmong request that the terms requiring arbitration of disputes be stricken. Mr. Garmong even joked about JAMS being full of retired judges who were bozos.

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Thus, on or about August 31, 2005, Garmong and Defendant Wespac entered into an "Investment Management Agreement" whereby Garmong retained Wespac as his investment advisor. (The August 31, 2005 Agreement is attached to Defendants' *Motion To Dismiss And To Compel Arbitration* as Exhibit "1"). But for a few changes to the Agreement that were made based on Mr. Garmong's notations, this signed Agreement is identical to the agreement Garmong reviewed.

In approximately March 2009, Garmong terminated the services of Defendants.

On May 9, 2012, over three years later, Gregory Garmong filed a *Complaint* with this Court alleging that Defendants had breached the "Investment Management Agreement." In his *Complaint*, Mr. Garmong also alleged claims of breach of Nevada Deceptive Trade Practices Act, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, malpractice, and negligence. In his prayer, Plaintiff sought general and special damages, punitive damages, and attorney's fees and costs.

In response, Defendants filed a *Motion To Dismiss And To Compel Arbitration*, in which they requested dismissal of the *Complaint* pursuant to NRCP 12(b)(1) and an order compelling arbitration pursuant to NRS 38.221.

On September 19, 2012, Plaintiff filed an opposition to Defendants' *Motion*. In his *Opposition*, Mr. Garmong claims that because the arbitration clause of the Agreement is unconscionable, he will not arbitrate his disputes with Defendants, and will instead engage in nonbinding mediation. *Opposition* at 12:26-13:1.[1]

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[1] In his *Opposition*, Plaintiff claims that this Court lacks jurisdiction because Defendants did not specifically allege in their *Motion* that Plaintiff had refused to arbitrate. Despite that oversight, the filing of a *Complaint* by Plaintiff in which he requested that this Court award him damages for Defendants' alleged breaches of the Agreement plus Plaintiff's statement that he "opposes forced mandatory arbitration" have made it perfectly clear that he has refused to arbitrate. *Opposition* at 12:26.

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II. LEGAL ARGUMENT

As the Nevada Supreme Court has made clear, "strong public policy favors arbitration, and arbitration clauses are generally enforceable." *Gonski v. Second Judicial District Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1168 (2010). While the party seeking to enforce an arbitration provision has the burden of establishing the valid existence of the provision, the party opposing arbitration must establish a defense to its enforcement. *Gonski*, 245 P.3d at 1169.

Here, Plaintiff has claimed that this Court must refuse to order arbitration as required by the parties' Agreement because that provision is both procedurally and substantively unconscionable. In so claiming, Plaintiff has relied extensively on two Nevada cases, *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 96 P.3d 1159 (2004) and *Gonski v. Second Judicial District Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164 (2010). However, since the facts of these cases are in no way comparable to those of the instant case, they provide little, if any, support for Plaintiff's argument.

In *Gonski*, the husband and wife plaintiffs had paid a $10,000 deposit to join a lottery system to purchase a home. A few days later, they were notified that a home was available and were told that they should go to the builder's office in five days. Five days later, when the Gonski's arrived at the office, "they were handed a stack of 25 preprinted forms, totaling over 469 papers, and told that if the documents were not signed and executed at that time, "'there were several other people waiting to step in and purchase the residence.'" *Gonski*, 245 P.3d at 1167. The Gonskis claimed that they were not given enough time to review the documents and were told to leave the documents in the office after signing them. *Gonski*, 245 P.3d at 1168.

In *Horton*, the plaintiffs had entered into home purchase agreements with a developer. The agreements contained a mandatory arbitration clause written in "an extremely small font" on the

back page of the two page agreements. The signature lines, however, were on the front page of the agreements. At the time the plaintiffs signed the agreements, the builder's agent informed them that the provisions on the back page were "standard provisions." *Horton*, 96 P.3d at 1164.

Under Nevada law,"'both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a . . . clause as unconscionable.'" *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004)(quoting *Burch v. Dist. Ct.*, 118 Nev. 438, 443, 49 P.3d 647, 650). While both types of unconscionability must be shown, a strong showing of one type of unconscionability lessens the required showing of the other type. *Gonski*, 245 P.3d at 1169.

Procedural Unconscionability

In explaining procedural unconscionability, the *Gonski* Court stated:

> 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.'

Id. (quoting *D.R. Horton*, 96 P.3d at 1162).

In *Gonski*, despite the circumstances that existed at the time the plaintiffs were handed over 469 pages of documents to review and sign and the fact that the arbitration provisions contained in both the purchase agreement and the limited warranty were not particularly called out by the use of capital letters or a large font size, the Court found the procedural unconscionability to be "slight." *Gonski*, 245 P.3d at 1173.

In *Horton*, the Court also found the arbitration provision to be procedurally unconscionable, explaining that:

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[t]he arbitration provision was inconspicuous, downplayed by [the developer's] representative, and failed to adequately advise an average person that important rights were being waived by agreeing to arbitrate any disputes under the contract.

Horton, 96 P.3d at 1165.

Here, in stark contrast to the situations in *Gonski* and *Horton*, Mr. Garmong was given a copy of the seven page "Investment Management Agreement" to take with him and review, and then kept the Agreement for at least a week before he returned his annotated copy to Westpac's office.[2] Exhibit "1" Affidavit of Greg Christian. The arbitration clause was not hidden away in tiny print, nor was the importance of the provision downplayed by Defendants. Further, because of the notes, underlines and cross-outs contained in Mr. Garmong's copy of the Agreement, it is clear that he was provided with every opportunity to review and/or object and to seek independent legal advice regarding any and all terms of the arbitration provision.

As a result, it cannot be said that Plaintiff had 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,'" and procedural unconscionability is not present. *Gonski*, 245 P.3d at 1169 (quoting *D.R. Horton*, 96 P.3d at 1162).

Substantive Unconscionability

In determining whether an arbitration clause is substantively unconscionable, courts look to the one-sidedness of the arbitration provision for terms that are oppressive. *Gonski*, 245 P.3d at 1169.

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[2] While Mr. Garmong states in his Declaration that "I was given this document to sign at the office of Wespac in Reno. I was not given an opportunity to take it away and study it or obtain legal counsel to review it," it is apparent that Mr. Garmong is mistaken or that he has simply forgotten that these earlier events took place. Exhibit 1 to Plaintiff's *Opposition* at ¶1.

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In *Gonski*, there were two arbitration clauses, one in the purchase agreement and one in the limited warranty. In the purchase agreement, the arbitration provision provided that the developer would advance the fees for the arbitration, although each party would be responsible for its own fees and costs. *Gonski*, 245 P.3d at 1171. The provision in the limited warranty however, provided that the party initiating arbitration had to pay the necessary fees. *Id.* On the other hand, NRS 40.665, provides that a prevailing homeowner is entitled to recover reasonable attorney fees and costs. *Id.* at 1173. Because of these discrepancies, the Court found the fee provisions to be one-sided. *Id.* at 1171 ([T]he limited warranty's arbitration provision is substantively unconscionable because it required the [plaintiffs] to pay the initial arbitration costs."). In addition, the Court found that the language in both arbitration provisions was confusing by suggesting that the remedies available to homeowners in NRS Chapter 40 would be fully available while at the same time, the terms of the provisions waived almost all Chapter 40 protections. *Id.* at 1166 and *Id.* at 1172 (Contractors may not "limit a homeowner's recovery to defects covered by contract or warranty. To allow such exculpatory terms would defeat the protective purposes behind the statutes and thwart the public policy of this state . . .").

In *Horton*, the arbitration clause provided, in part, that "[i]f Buyer does not seek arbitration prior to initiating any legal action, Buyer agrees that Seller shall be entitled to liquidated damages in the amount of ten thousand dollars." *Horton*, 96 P.3d at 1161. Because there was no such penalty placed on the developer if he elected to forgo arbitration, and because the arbitration clause did not disclose the potentially high cost of arbitration, the Court found the arbitration provision to be substantively unconscionable. *Horton*, 96 P.3d at 1165.

In so doing, the *Horton* Court also observed that while the liquidated damages provision did make the provision one-sided, that one-sidedness was not "over-whelming." *Id.* In addition,

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Court explained that while "an arbitration agreement's silence regarding potentially significant arbitration costs does not, alone, render the agreement unenforceable" it is "a factor in invalidating the provision." *Horton*, 96 P.3d at 1166.

Here, Plaintiff argues that the arbitration provision is substantively unconscionable because:

(1) It provides that the arbitration award "shall not include factual findings or conclusions of law," thus effectively denying the right to appeal. Exhibit 1 to *Motion* and *Opposition* at 6:24-28;

(2) It prohibits an award of punitive damages and thus violates public policy;

(3) Plaintiff, like the plaintiffs in *Gonski*, was unable to estimate the cost of arbitration because he was not given a copy of the rules of the Judicial Arbitration and Mediation Service; and

(4) The Agreement lacked mutuality because Plaintiff could not breach the agreement, and the terms favored only the Defendants;

(5) The arbitration provision does not specify which set of Judicial Arbitration and Mediation Service ("JAMS") rules governs arbitration; and

(6) Discovery rules are illusory as no discovery at all may be permitted.

Here, because the arbitration provision applies equally to both parties, Plaintiff can hardly complain that it is a one-sided and oppressive provision – neither party can claim punitive damages, discovery for both parties is equally limited, and neither party will have the benefit of factual findings or conclusions of law in the event of an appeal. Further, unlike the circumstances in *Horton*, where the arbitration clause penalized only the buyer, or *Gonski* where the limited warranty provided that only the party initiating arbitration had to pay the necessary fees, here,

there are no such one-sided penalties or fee requirements.

While the specific costs of arbitration were not included in the arbitration provision of the Agreement, Nevada case law makes clear that the failure to mention the potentially high costs of arbitration alone "does not amount to substantive unconscionability." *Gonski*, 234 P.3d at 1171; *Horton*, 96 P.3d at 1166("[t]he absence of language disclosing the potential arbitration costs and fees, standing alone, may not render an arbitration provision unenforceable . . ."). In addition, while Plaintiff has stated that he would not have signed the Agreement had he known that two sets of JAMS rules existed and he did not know which set was applied, that fact alone does not render the effects of the arbitration clause unascertainable. Exhibit 1 to Plaintiff's *Opposition* at ¶4; *Seasons Homeowners Assoc., Inc. v. Richmond American Homes of Nevada*, 2012 WL 2979013 at *12 (D.Nev.)("The failure to mention whether the AAA rules of the Nevada Rules of Civil Procedure would apply to a warranty dispute does not render the effects of the arbitration clauses unascertainable;" *Lyman v. Mor Furniture For Less, Inc.*, 2007 WL 2400683 at *5 (D.Nev) (Plaintiff claimed an arbitration was substantively unconscionable because it did not disclose the potential arbitration costs. The court found that the arbitration agreement was not substantively unconscionable where the agreement referenced the JAMS' rules "which are posted on-line at www.jamsadr.com" and "because the cost of arbitration could easily have been recognized by reading the JAMS' rules . . ." .).

Finally, Plaintiff appears to be claiming that because the Agreement in its entirety lacks mutuality and is therefore substantively unconscionable, the arbitration clause is likewise substantively unconscionable. Relevant case law and treatises simply do not support Plaintiff's theory. *See e.g., Dan Ryan Builders, Inc. v. Nelson*, _ S.E.2d __, 2012 WL 5834590 at FN 8, 9 and 10 (W.Va.)(In an in-depth discussion of "mutuality" the court cited numerous authorities,

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including treatises, journals and cases which all agree that the "'doctrine of mutuality of obligation has been 'thoroughly discredited'" and that "'[m]utuality is not a prerequisite to a valid arbitration agreement when the underlying contract is supported by consideration.'" (quoting Christopher R. Drahozal, 'Nonmutual Agreements to Arbitrate,' 27 J. of Corp.L 537, 539-40, 544 (2002) and *Anderson v. Delta Funding Corp.*, 316 F.Supp.2d 554, 566-67 (N.D.Ohio 2004)). While Plaintiff now asserts that the entire Agreement was one-sided and hence substantively unconscionable, he has not claimed that the Agreement is invalid for a lack consideration. Plaintiff's assessment of the Agreement in its entirety is not now at issue, rather it is simply the enforceability of the arbitration provision.

As previously stated, in determining whether an arbitration clause is substantively unconscionable, courts look to the one-sidedness of the arbitration provision for terms that are oppressive. *Gonski*, 245 P.3d at 1169. Here, because the terms in the arbitration provision apply equally to both parties, Plaintiff has failed to demonstrate that the clause is substantively unconscionable.

In addition to his arguments concerning the unconscionability of the arbitration clause, Plaintiff also claims that because the page numbers of the Agreement appear to be incorrect, that perhaps Plaintiff was actually presented with a "stack of other papers" to sign and that only a portion of the Agreement was provided with his *Motion* to make it appear otherwise. *Opposition* at 10:26 - 11:13. 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. The document submitted by Defendants as Exhibit 1 to their *Motion* is the entire "Investment Management Agreement." *Exhibit "1" Affidavit of Greg Christian.*

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Plaintiff also asserts that since Defendants did not file an answer to dispute the allegations contained in his *Complaint*, that maybe there are actually no disputes between the parties, and the arbitration provision is therefore inoperable. *Opposition* at 11:16-27. Defendants, who requested dismissal pursuant to NRCP 12(b)(1) are not required by that rule to submit an answer before filing a motion to dismiss, and will address and deny all of Plaintiff's allegations when they are submitted in the proper forum.

Plaintiff's final argument makes little sense, and appears to be that only the party who claims a breach of contract is entitled to seek enforcement of that contract's arbitration provision, while the other party is left with no recourse but to submit to the demands of the plaintiff. Here, the arbitration provision in the Agreement clearly states that: "The parties agree that in the event of any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio Assets, such dispute shall be resolved exclusively by arbitration . . .". Unless and until Plaintiff is able to establish the substantive and procedural unconscionability of the arbitration provision, Nevada law requires that it be enforced. *Gonski v. Second Judicial District Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1168 (2010).

III. CONCLUSION

Under Nevada law, "[s]trong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." *Horton*, 96 P.3d at 1162. A court may invalidate a contract provision requiring arbitration only if that provision is both procedurally and substantively unconscionable. *Id.* Here, the Plaintiff, who is an experienced attorney, was given ample opportunity to review the arbitration clause, and did in fact, take advantage of that opportunity and requested numerous changes to the Agreement. The terms of the final Agreement were negotiated by Mr. Garmong. At no time did Mr. Garmong

request that the terms requiring arbitration of disputes be stricken. Further, unlike the arbitration provisions in the cases cited by Plaintiff, the arbitration provision at issue was not hidden away in tiny type nor buried in hundreds of pages of documents. In short, none of the indicia of procedural unconscionability are present. Likewise, Plaintiff has failed to establish that the arbitration clause is substantively unconscionable as the the terms in the arbitration provision apply equally to both parties.

For the reasons stated above, Defendant Wespac and Defendant Greg Christian respectfully request that their motion to compel arbitration be granted.

The undersigned does hereby affirm, pursuant to NRS 239B.030, that the preceding document does not contain the social security number of any person.

DATED this 3rd day of December, 2012.

Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace

Thomas C. Bradley, Esq.
Attorney for Defendants

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace,* and that on the 3 day of December, 2012, I deposited for mailing in the United States Mail a true and correct copy of the foregoing document, DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND TO COMPEL ARBITRATION addressed to:

Carl M. Hebert, Esq.
202 California Ave.
Reno NV 89509

Sandra Brown
Sandra Brown

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EXHIBIT INDEX

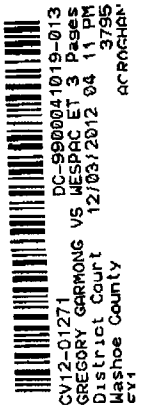

EXHIBIT 1

EXHIBIT 1

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AFFIDAVIT OF GREG CHRISTIAN

STATE OF NEVADA)
)ss
COUNTY OF WASHOE)

GREG CHRISTIAN, after being duly sworn on oath, and under penalty of perjury, does hereby swear or affirm that the assertions contained in this affidavit are true to the best of his knowledge and belief, and as to those assertions stated upon information and belief, he likewise believes those assertions to be true to the best of his belief.

1. Affiant is over the age of eighteen years, and makes this affidavit of his own personal knowledge in support of *Defendants' Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration*.

2. In or about July 2005, as a registered investment advisor with Wespac Advisors, LLC, I met with Plaintiff Gregory Garmong to discuss the possibility of Mr. Garmong becoming a client of Wespac. I recently reviewed the State Bar of California's website, which stated that Mr. Garmong was a licensed attorney in California from 1978 to 2008. He attended Massachusetts Institute of Technology and later UCLA Law School.

3. During the meeting, I gave Mr. Garmong a copy of Wespac's Investment Management Agreement. Mr. Garmong took that copy of the Agreement with him when he left our meeting.

4. Mr. Garmong requested that I make changes to the Investment Management Agreement which I agreed to do. See Exhibit 2. Mr. Garmong then requested more changes which I also agreed to incorporate within our final Agreement. See Exhibit 3. Mr. Garmong never requested that the terms requiring Arbitration be removed. He even joked that JAMS was full of retired Judges who were bozos, but at no time did he refuse to arbitrate any disputes.

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.

Further, Affiant sayeth naught.

GREG CHRISTIAN

Subscribed and sworn to before me this 3rd day of December 2012.

Notary Public

MAUREEN MAHER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 94-2091-2 - Expires April 26, 2015

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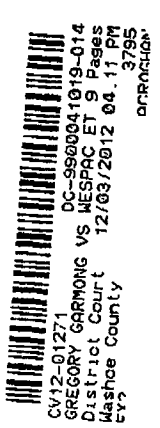

EXHIBIT 2

EXHIBIT 2

Wrong Form - California

I'll have a new Final version by end of day

INVESTMENT MANAGEMENT AGREEMENT

This Investment Management Agreement (the "Agreement") is entered into between WESPAC Advisors, LLC ("WA"), an investment advisor registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940, as amended, and _____ ("Client"). In consideration of the mutual promises, covenants, representations, and undertakings set forth herein, the parties agree as follows:

1. **Appointment.** Client appoints WA as investment adviser of the Portfolio Assets (as hereinafter defined) with sole investment authority over the Portfolio Assets, and WA agrees to serve in that capacity on the terms and conditions as set forth in this Agreement. joint-ma + WA

2. **Acknowledgments of Client.** Client represents and acknowledges that Client is the sole owner of the cash and securities described in Exhibit A (the "Initial Portfolio Assets"), and that the Portfolio Assets are and will remain at all times during the continuation of this Agreement free, clear, and unencumbered. Client acknowledges that Client has reviewed the investment policies of WA as set forth in WA's Form ADV Part II, a copy of which has been provided to Client, and that these investment policies meet Client's investment objectives. In the event Client's financial situation changes, Client agrees to notify WA in writing of the change and new investment objectives, if different from those described. Client acknowledges that in the process of active portfolio management, cash may be held in the portfolio account at the discretion of WA. Client agrees to give WA immediate notice of any deposit to or withdrawal from the Portfolio Assets and to promptly confirm the same in writing.

3. **Procedures.** The following procedures shall be followed by WA in performing the services called for by this Agreement:

   a. **Records.** WA shall keep separate and accurate records of all of the Initial Portfolio Assets and additions to, dispositions from, and changes in the Initial Portfolio Assets (the "Portfolio Assets"). WA shall provide Client with a written summary and appraisal of the Portfolio Assets at least once each calendar quarter. The portfolio appraisal statement shall list the Portfolio Assets as of the last business day of the immediately preceding quarter, and shall indicate the fair market value of the Portfolio Assets on that date as determined in Paragraph 4a hereof.

   b. **Custody of Portfolio Assets.** The Portfolio Assets subject to WA's supervision will be maintained in street name in Client's account at a brokerage house, bank, trust company, or other firm (the "Custodian") selected by Client as set forth in the attached Confidential Client Profile. Client shall be responsible for all Custodians' fees incurred in maintaining Client's account(s). In no event shall WA act as Custodian, and nothing herein shall be construed to authorize WA to take possession of any cash or securities comprising the Portfolio Assets. Client shall instruct the Custodian to provide WA with confirmations of all transactions with respect to Portfolio Assets and shall

instruct Custodian to provide to Client a monthly account statement indicating all amount dispersed from Client's accounts (including the amount of any fee paid pursuant to Client's authorization to WA), all transactions occurring in the account during the period covered by the statement and all the funds, securities, and other properties in the account as of the end of the period, with a copy to WA. Client shall instruct Custodian to provide WA with such other periodic reports concerning the status of the Portfolio Assets as WA may reasonably request. It is agreed that WA, in the maintenance of its records, does not assume responsibility for the accuracy of information furnished by Client or any other party.

c. **Brokerage.** Client may instruct WA to utilize the services of designated broker(s) in all transactions involving Portfolio Assets as set forth in Exhibit B. If no broker(s) is designated by Client for Portfolio Asset transactions, WA may select broker(s), and such broker(s) may be broker(s) that provide research or other portfolio services to WA. In making any such selection, WA will take into consideration a number of factors including, without limitation: the overall direct net economic result to the Portfolio Assets (including commissions, which may not be the lowest available but which ordinarily will not be higher than the generally prevailing competitive range), the ability to effect the transaction where large block trades or other complicating factors are involved and the availability of the broker to stand ready to execute possibly difficult transactions in the future. WA may also take into consideration other matters involved in the receipt of brokerage and research services as contemplated by Section 28(c) of the Securities Exchange Act of 1934, as amended, and the regulations and interpretations of the Securities and Exchange Commission promulgated thereunder, without having to demonstrate that any such factor is of a direct benefit to the Portfolio Assets. WA is authorized to pay a broker who provides research services commissions that are higher than the generally prevailing competitive rate, if it determines in good faith that the commissions are reasonable in relation to the value of the brokerage and research services provided. Client understands that commissions may not only benefit the Client but overall help WA perform its advisory services. If WA believes that the purchase or sale of a security is in Client's best interest along with the best interest of its other clients, WA may, but shall not be obligated to, aggregate the securities to be sold or purchased to obtain favorable execution or lower brokerage commissions, to the extent permitted by applicable laws and regulations. WA will allocate securities so purchased or sold, as well as the expenses incurred in the transactions, in the manner that it considers to be equitable and consistent with its fiduciary obligations to Client and its other clients.

Client shall be responsible for all brokerage charges in connection with the Portfolio Asset transactions. Brokers or dealers that WA selects to execute transactions may from time to time refer clients to WA. WA will not make commitments to any broker or dealer through brokerage or dealer transactions for client referrals; however, Client recognizes that a potential conflict of interest may arise between Client's interest in obtaining best price and execution and WA's interest in receiving further referrals.

4. **Services of Adviser.**

a. **Management Fee.** Client agrees to pay WA an investment management fee as determined in accordance with the schedule set forth as Exhibit B. One quarter of the annual fee due shall be payable in advance on the first day of each calendar quarter in which this Agreement is in force. All fees are determined on the basis of the market value of the Portfolio Assets as of the last day of the previous calendar quarter. In computing the market value of any investment of the Portfolio Assets, each security listed on any national securities exchange shall be valued at the last quoted sale price on the valuation date on the principal exchange in which such security is traded. Any other security or asset shall be valued in a manner determined in good faith by WA to reflect its fair market value. If the account is opened after the start of a calendar quarter, the initial fee will be prorated from acceptance by WA through the end of the quarter. Notwithstanding the foregoing, for clients who request to have their fee calculated and determined by their Custodian, it is agreed that the fee will be calculated in the manner agreed upon with such Custodian. WA agrees to send a copy of the fee computation and billing, at least quarterly, to both Client and Custodian as required. In addition, Client will receive a portfolio appraisal as set forth in Paragraph 3. The fee schedule set forth in Exhibit B may be amended from time to time by WA upon thirty (30) days written notice to Client. If Client does not notify WA of termination within thirty (30) days of such notice, this Agreement will continue in effect under the terms and conditions as set forth herein with the revised fee schedule.

b. **Fee Billing Option.** (Please INITIAL one option.)

_____A) Client authorized WA to invoice the Custodian for its fees, and Client will authorize the Custodian to pay such fees to WA directly from Client's account. WA will send a copy of its bill to Client prior to or at the time the original is sent to the Custodian.

_____B) Client authorized WA to invoice Client directly for the payment of WA fees. Any such payment will be made by Client to WA by separate check and will not be deducted from amounts held in Client's account.

c. **Proxy Voting Option.** (Please INITIAL one option.)

_____A) WA is authorized to vote all proxies on behalf of the Portfolio Assets. Client will instruct the Custodian to forward all proxy materials to WA or its agent so that it may vote them accordingly. WA will report to Client at such time and in such manner as Client may reasonably request with respect to all proxy voting responsibilities exercised by WA for Client's account. Client may revoke WA's authority to vote proxies by notifying WA in writing of the revocation of the delegation of proxy voting authority.

_____B) WA is expressly precluded from voting proxies and from taking any action or rendering any advice with respect to the voting of proxies solicited by or with respect to any issuer of securities in the Portfolio Assets. Client expressly retains the authority and responsibility for the voting of such proxies.

[Please note that accounts subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, which choose this option must provide to WA a copy of Plan Documents showing that the right to vote proxies has been reserved to the trustees or other fiduciaries.]

5. **Discretionary Authority.** WA shall have full power and authority to make all investment decisions on a discretionary basis for Portfolio Assets, including decisions to buy and sell any domestic or foreign security, except to the extent Client provides written instructions limiting such authority. Although WA may make investment decisions without prior consultation with or further consent from Client, all such investment decisions shall be made in accordance with the investment objectives of which Client has informed, and may inform, WA from time to time in writing. Client appoints WA as agent and attorney-in-fact to, and expressly authorizes WA in making its investment decisions to: a) make, order, and direct any and all transactions involving Portfolio Assets in Client's name and for Client's account and b) sell, convert, or exchange securities comprising part or all of the Portfolio Assets, to otherwise acquire and dispose of such securities; provided, however that nothing herein shall be construed to authorize WA to take custody or possession of any funds, securities or other property of which Client has any beneficial interest in any manner whatsoever. All transactions in Portfolio Assets will be done at WA's sole discretion and without obligation to first notify or consult with Client. Client agrees that WA will not advise or act for client in any legal proceedings, including bankruptcies or class actions, involving securities held or previously held as Portfolio Assets or the issuers of these securities.

6. **Representations of WA.** WA represents that it is registered with the Securities and Exchange Commission as an Investment Adviser under the Investment Advisers Act of 1940, as amended, and that such registration is currently in effect. If the Portfolio Assets are subject to ERISA, WA also acknowledges that it is a fiduciary as that term is defined in ERISA, with respect to the Portfolio Assets. In accordance with sections 405(b)(1), 405(c)(2) and 405(d) of ERISA, the fiduciary responsibilities of WA and any partner, employee or agent of WA shall be limited to his, her or its duties in managing the Portfolio Assets, and WA shall not be responsible for any other duties with respect to Client (specifically including evaluating the initial or continued appropriateness of Client's retention of WA or the diversification standard under section 404(a)(1) of ERISA).

7. **Representations of Client.** Client represents and confirms that it has full power and authority to enter into this Agreement, that the employment of WA is authorized by its governing document relating to the Portfolio Assets and that the terms hereof do not violate any obligation by which Client is bound whether arising by contract, operation of law, or otherwise, and that: a) this contract has been duly authorized by appropriate action and is binding upon Client in accordance with its terms; and b) Client will deliver to WA such evidence of such authority as it may reasonably require, whether by way of a certified resolution, trust agreement, or otherwise. Client further agrees to provide WA with copies of all documents governing the Portfolio Assets.

If the Portfolio Assets are subject to ERISA, Client hereby represents and confirms to WA that Client's employment of WA as the Investment Adviser to the Portfolio Assets, and any instruction Client has given to WA, is authorized by and does not violate any provision of any applicable plan or trust documents. Client hereby acknowledges that Client is a "named fiduciary" with respect to the control and management of the assets of Client's account, a trust qualified under Section 401(a) of the Internal Revenue Code of 1986, and Client agrees to notify WA promptly of any change in the identity of the "named fiduciary" with respect to the account. In addition, in any directed brokerage transaction Client has determined, and will monitor the Portfolio Assets to assure, that the directed broker is capable of providing best execution for the account's brokerage transactions and that the commission rates that have been negotiated are reasonable in relation to the value of the brokerage and other services received.

8. **Liability.** WA does not guarantee the future performance of the Portfolio Assets, any specific level of the performance, or the success of any investment decision or strategy. Client understands that the investment decisions made by WA are subject to various market, currency, economic and business risks and those decisions will not always be profitable. Except as may otherwise by provided by law, WA will not be liable to Client for: a) any loss Client may suffer by reason of any investment decision made or other action taken or omitted in good faith by WA with the degree of skill, care, prudence or diligence under the circumstances that a prudent person acting in a like capacity would use; b) any loss arising from WA's adherence to the Client's instructions; c) any act or failure to act by the Custodian, any broker or dealer to which WA directs transactions for the Portfolio Assets or by any other third party; or d) its failure to purchase or sell any security on the basis of information known to any principal or employee of WA where the utilization of such information might constitute a violation of any federal or state laws, rules or regulations or a breach of any fiduciary or confidential relationship between any principal or employee of WA and any other person or persons. Federal and various state securities laws impose liability under certain circumstances on persons who act in good faith and therefore nothing in this Agreement shall waive or limit any rights, which Client may have under those laws.

9. **Confidentiality.** All information and advice furnished by either party to the other shall be treated as confidential information and shall not be disclosed to third parties except as required by law or with consent.

10. **Service to Other Clients.** WA acts as adviser to other clients and may give advice and take action with respect to such other clients' accounts which may differ from the action taken by WA with respect to the Portfolio Assets. WA agrees to act in a manner consistent with its fiduciary obligations to deal fairly with all clients when taking investment actions. WA shall have no obligation to purchase, sell or recommend for the Portfolio Assets any security which may be purchased or sold by WA, its principals, affiliates, employees or for the accounts of any other client. Client recognizes that transactions in a specific security may not be accomplished for all client accounts at the same time or at the same price.

11. **Termination.** This agreement may be terminated at any time by either party giving the other written notice of termination. However, this Agreement shall continue in effect until so terminated. Termination shall be effective when a notice of termination, properly executed, is actually received. Upon termination, any fees paid in advance will be prorated to the date of termination and any excess will be refunded to Client. If this Agreement is terminated by Client within five business days of the date it is executed or accepted, such termination shall be without penalty or liability for payment of fees. If Client is an individual, this Agreement shall terminate upon the death or adjudicated incapacity of Client, but shall take effect only upon actual receipt by WA of written notice of Client's death or adjudicated incapacity. Upon notice of termination, WA shall notify Custodian to deliver all assets held pursuant to this Agreement, according to Client's written instructions.

12. **Notices.** Unless otherwise specified herein, all notices, instructions, and advice with respect to all matters contemplated by this Agreement shall be deemed duly given when received in writing at the address set forth herein. Copies of all notices affecting the Custodian shall also be directed to the Custodian at the address which Client designates. Addresses may be changed by notice to the other parties given in accordance with this paragraph. WA may rely on any notice from any person reasonably believed by WA to be genuine and to have authority to give such notice. All written notices shall be addressed to: a) WESPAC, 2001 Broadway, 2nd Floor, Oakland, California 94612; and b) Client at the address set forth in the Confidential Client Profile attached hereto.

NV

13. **Assignability.** This Agreement may not be assigned by WA without the prior consent of the Client. This Agreement may not be assigned by Client without the prior consent of WA.

haven't seen this

14. **Miscellaneous.** This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties with respect to the management of the Portfolio Assets, supersedes all prior agreements, and, except as otherwise provided herein, may be amended only with a written document signed by the parties. This Agreement shall be governed by the laws of the State of California. If any provision of this Agreement is held to be unenforceable, such unenforceability shall not affect the remainder of this Agreement. This Agreement may be signed in one or more counterparts, and when taken together shall create a valid and binding Agreement as though all signatures appeared on the same document. 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. Except as otherwise provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors. No party intends for this Agreement to benefit any third party not expressly named in this Agreement.

Nev.

Have I seen this?

15. **Acknowledgment of Receipt of Form ADV Part II.** Client hereby acknowledges that Client has received and had an opportunity to read WA's Form ADV Part II as required by Rule 204-3 of the Investment Advisers Act of 1940. WA's ADV Part II contains a clear and conspicuous notice of WA's privacy policy.

16. **Arbitration. The parties waive their right to seek remedies in court, including any right to a jury trial.** The parties agree that in the event of any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio Assets, such dispute shall be resolved exclusively by arbitration to be conducted only in the county and state of the principal office of WA at the time of such dispute in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS") applying the laws of the State of California. Disputes shall not be resolved in any other forum or venue. The parties agree that such arbitration shall be conducted by a retired judge who is experienced in dispute resolution regarding the securities business, that discovery shall not be permitted except as required by the rules of JAMS, that the arbitration award shall not include factual findings or conclusions of law, and that no punitive damages shall be awarded. The parties understand that any 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, and judgment may be entered on it in any court of competent jurisdiction in the county and state of the principal office of WA at the time such award is rendered, or as otherwise provided by law.

Nevada

Who pays for a retired judge? Cap Fees

Carson City

The effective date of this Agreement shall be the date of its acceptance by WA.

Agreed to this _____ day of _____ of the year 20___.

_____
Client Name

_____
Client Signature

_____
Client Signature

Real Solely with Reno office.

AGREED AND ACCEPTED BY INVESTMENT ADVISER: WESPAC ADVISORS, LLC

By: _____

Title: _____

Date: _____

Prior performance? Not particularly good in most models

EXHIBIT A - FEE SCHEDULE

The following fees will apply to investment management services for this account. The annual Management Fee is paid quarterly in advance. If the account is opened after the start of a calendar quarter, the initial fee will be prorated from the date of acceptance by WA through the end of the quarter. Thereafter, unless otherwise provided, the quarterly fee is based on the account's market value on the last day of the previous calendar quarter. There is an initial account set up fee of $250.

Asset Value	Annual Advisory Fee	Fee Authorization (initial below)
FUNDAMENTAL ANALYSIS MANAGEMENT		
1.☐ **Institutional Equities**		____ ____
First $1,000,000	0.75%	
Next $1,000,000	0.65%	
Over $2,000,000	Negotiable	
TECHNICAL ANALYSIS MANAGEMENT		
2.☐ **Aggressive Growth**		____ ____
First $ 500,000	1.00%	
Next $ 500,000	0.75%	
Over $1,000,000	0.50%	
(Minimum annual fee: $1,250)		
3.☐ **Growth**		____ ____
First $1,000,000	0.75%	
Next $1,000,000	0.65%	
Over $2,000,000	0.50%	
(Minimum annual fee: $2,500)		
4.☐ **Passive Growth**		____ ____
First $ 500,000	1.00%	
Next $ 500,000	0.75%	
Over $1,000,000	0.50%	
(Minimum annual fee: $1,250)		
ACTIVE MUNICIPAL MANAGEMENT		
5.☐ **Tax Preferred Income**		____ ____
First $1,000,000	1.00%	
Over $1,000,000	0.50%	

EXHIBIT 3

EXHIBIT 3

INVESTMENT MANAGEMENT AGREEMENT

This Investment Management Agreement (the "Agreement") is entered into between WESPAC Advisors, LLC (.WA"), an investment advisor registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940, as amended, and Gregory Garmong ("Client"). In consideration of the mutual promises, covenants, representations, and undertakings set forth herein, the parties agree as follows:

1. **Appointment.** Client appoints WA as investment adviser of the Portfolio Assets (as hereinafter defined) with designated investment authority over the Portfolio Assets, and WA agrees to serve in that capacity on the terms and conditions as set forth in this Agreement.

2. **Acknowledgments of Client.** Client represents and acknowledges that Client is the sole owner of the cash and securities described in Exhibit A (the "Initial Portfolio Assets"), and that the Portfolio Assets are and will remain at all times during the continuation of this Agreement free, clear, and unencumbered. Client acknowledges that Client has reviewed the investment policies of WA as set forth in WA's Form ADV Part II, a copy of which has been provided to Client, and that these investment policies meet Client's overall criterias. In the event Client's financial situation changes, Client agrees to notify WA in writing of the change and new investment objectives, if different from those described. Client acknowledges that in the process of active portfolio management, cash may be held in the portfolio account at the discretion of WA. Client agrees to give WA immediate notice of any deposit to or withdrawal from the Portfolio Assets and to promptly confirm the same in writing.

3. **Procedures.** The following procedures shall be followed by WA in performing the services called for by this Agreement:

   1. **Records.** WA shall keep separate and accurate records of all of the Initial Portfolio Assets and additions to, dispositions from, and changes in the Initial Portfolio Assets (the "Portfolio Assets"). WA shall provide Client with a written summary and appraisal of the Portfolio Assets at least once each calendar quarter. The portfolio appraisal statement shall list the Portfolio Assets as of the last business day of the immediately preceding quarter, and shall indicate the fair market value of the Portfolio Assets on that date as determined in Paragraph 4a hereof.

   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. Client shall be responsible for all Custodians' fees incurred in maintaining Client's account(s). In no event shall WA act as Custodian, and nothing herein shall be construed to authorize WA to take possession of any cash or securities comprising the Portfolio Assets. Client shall instruct the Custodian to provide WA with confirmations of all transactions with respect to Portfolio Assets and shall instruct Custodian to provide to Client a monthly account statement indicating all amount dispersed from Client's accounts (including the amount of any fee paid pursuant to Client's authorization to WA), all transactions occurring in the account during the

period covered by the statement and all the funds, securities, and other properties in the account as of the end of the period, with a copy to WA. Client shall instruct Custodian to provide WA with such other periodic reports concerning the status of the Portfolio Assets as WA may reasonably request. It is agreed that WA, in the maintenance of its records, does not assume responsibility for the accuracy of information furnished by Client or any other party.

3. **Brokerage.** Client may instruct WA to utilize the services of designated broker(s) in all transactions involving Portfolio Assets separately designated in Exhibit B. If no broker(s) is designated by Client for Portfolio Asset transactions, WA may select broker(s), and such broker(s) may be broker(s) that provide research or other portfolio services to WA. In making any such selection, WA will take into consideration a number of factors including, without limitation: the overall direct net economic result to the Portfolio Assets (including commissions, which may not be the lowest available but which ordinarily will not be higher than the generally prevailing competitive range), the ability to effect the transaction where large block trades or other complicating factors are involved and the availability of the broker to stand ready to execute possibly difficult transactions in the future. WA may also take into consideration other matters involved in the receipt of brokerage and research services as contemplated by Section 28(c) of the Securities Exchange Act of 1934, as amended, and the regulations and interpretations of the Securities and Exchange Commission promulgated thereunder, without having to demonstrate that any such factor is of a direct benefit to the Portfolio Assets. WA is authorized to pay a broker Charles Schwab & Co,. Inc. who provides research services and/or commissions that are higher than the generally prevailing competitive rate, if it determines in good faith that the commissions are reasonable in relation to the value of the brokerage and research services provided. Client understands that commissions may not only benefit the Client but overall help WA perform its advisory services. If WA believes that the purchase or sale of a security is in Client's best interest along with the best interest of its other clients, WA may, but shall not be obligated to, aggregate the securities to be sold or purchased to obtain favorable execution or lower brokerage commissions, to the extent permitted by applicable laws and regulations. WA will allocate securities so purchased or sold, as well as the expenses incurred in the transactions, in the manner that it considers to be equitable and consistent with its fiduciary obligations to Client and its other clients.

Client shall be responsible for all brokerage charges in connection with the Portfolio Asset transactions. Brokers or dealers that WA selects to execute transactions may from time to time refer clients to WA. WA will not make commitments to any broker or dealer through brokerage or dealer transactions for client referrals; however, Client recognizes that a potential conflict of interest may arise between Client's interest in obtaining best price and execution and WA's interest in receiving further referrals.

4. **Services of Adviser.**

a. **Management Fee.** Client agrees to pay WA an investment management fee as determined in accordance with the schedule set forth as Exhibit A. One quarter of the annual fee due shall be payable in arear on the last day of each calendar quarter in which this Agreement is in force. All fees are determined on the basis of the market value of the Portfolio Assets as of the last day of the

calendar quarter. In computing the market value of any investment of the Portfolio Assets, each security listed on any national securities exchange shall be valued at the last quoted sale price on the valuation date on the principal exchange in which such security is traded. Any other security or asset shall be valued in a manner determined in good faith by WA to reflect its fair market value. If the account is opened after the start of a calendar quarter, the initial fee will be prorated from acceptance by WA through the end of the quarter. Notwithstanding the foregoing, for clients who request to have their fee calculated and determined by their Custodian, it is agreed that the fee will be calculated in the manner agreed upon with such Custodian. WA agrees to send a copy of the fee computation and billing, at least quarterly, to both Client and Custodian as required. In addition, Client will receive a portfolio appraisal as set forth in Paragraph 3. The fee schedule set forth in Exhibit B may be amended from time to time by WA upon thirty (30) days written notice to Client. If Client does not notify WA of termination within thirty (30) days of such notice, this Agreement will continue in effect under the terms and conditions as set forth herein with the revised fee schedule.

b. **Fee Billing Option.**

A) Client may authorize WA to invoice the Custodian for its fees, and Client may authorize the Custodian to pay such fees to WA directly from Client's account. WA will send a copy of its bill to Client prior to or at the time the original is sent to the Custodian.

B) Client may authorize WA to invoice Client directly for the payment of WA fees. Any such payment will be made by Client to WA by separate check and will not be deducted from amounts held in Clients account.

c. **Proxy Voting Option.**

WA is authorized to vote all proxies on behalf of the Portfolio Assets. Client will instruct the Custodian to forward all proxy materials to WA or its agent so that it may vote them accordingly. WA will report to Client at such time and in such manner as Client may reasonably request with respect to all proxy voting responsibilities exercised by WA for Client's account. Client may revoke WA's authority to vote proxies by notifying WA in writing of the revocation of the delegation of proxy voting authority.

[Please note that accounts subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, which choose this option must provide to WA a copy of Plan Documents showing that the right to vote proxies has been reserved to the trustees or other fiduciaries.]

Finalmt of Schustab has these

5. **Discretionary Authority.** WA shall have designated full power and authority to make all investment decisions on a discretionary basis for Portfolio Assets, including decisions to buy and sell any domestic or foreign security, except to the extent Client provides written instructions limiting such authority. Although WA may make investment decisions without prior consultation with or further consent from Client, all such investment decisions shall be made in accordance with the

investment objectives of which Client has informed, and may inform, WA from time to time in writing. Client appoints WA as agent and attorney-in-fact to, and expressly authorizes WA in making its investment decisions to: a) make, order, and direct any and all transactions involving designated Portfolio Assets in Client's name and for Client's account and b) sell, convert, or exchange securities comprising part or all of the Portfolio Assets, to otherwise acquire and dispose of such securities; provided, however that nothing herein shall be construed to authorize WA to take custody or possession of any funds, securities or other property of which Client has any beneficial interest in any manner whatsoever. All transactions in Portfolio Assets will be done at WA's sole discretion and without obligation to first notify or consult with Client. Client agrees that WA will not advise or act for client in any legal proceedings, including bankruptcies or class actions, involving securities held or previously held as Portfolio Assets or the issuers of these securities.

6. **Representations of WA.** WA represents that it is registered with the Securities and Exchange Commission as an Investment Adviser under the Investment Advisers Act of 1940, as amended, and that such registration is currently in effect. If the Portfolio Assets are subject to ERISA, WA also acknowledges that it is a fiduciary as that term is defined in ERISA, with respect to the Portfolio Assets. In accordance with sections 405(b)(1), 405(c)(2) and 405(d) of ERISA, the fiduciary responsibilities of WA and any partner, employee or agent of WA shall be limited to his, her or its duties in managing the Portfolio Assets, and WA shall not be responsible for any other duties with respect to Client (specifically including evaluating the initial or continued appropriateness of Client's retention of WA or the diversification standard under section 404(a)(1) of ERISA).

7. **Representations of Client.** Client represents and confirms that it has full power and authority to enter into this Agreement, that the employment of WA is authorized by its governing document relating to the Portfolio Assets and that the terms hereof do not violate any obligation by which Client is bound whether arising by contract, operation of law, or otherwise, and that: a) this contract has been duly authorized by appropriate action and is binding upon Client in accordance with its terms; and b) Client will deliver to WA such evidence of such authority as it may reasonably require, whether by way of a certified resolution, trust agreement, or otherwise. Client further agrees to provide WA with copies of all documents governing the Portfolio Assets. If the Portfolio Assets are subject to ERISA, Client hereby represents and confirms to WA that Client's employment of WA as the Investment Adviser to the Portfolio Assets, and any instruction Client has given to WA, is authorized by and does not violate any provision of any applicable plan or trust documents. Client hereby acknowledges that Client is a "named fiduciary" with respect to the control and management of the assets of Client's account, a trust qualified under Section 401 (a) of the Internal Revenue Code of 1986, and Client agrees to notify WA promptly of any change in the identity of the "named fiduciary" with respect to the account. In addition, in any directed brokerage transaction Client has determined, and will monitor the Portfolio Assets to assure, that the directed broker is capable of providing best execution for the account's brokerage transactions and that the commission rates that have been negotiated are reasonable in relation to the value of the brokerage and other services received.

8. **Liability.** WA does not guarantee the future performance of the Portfolio Assets, any specific level of the performance, or the success of any investment decision or strategy. Client understands that the investment decisions made by WA are subject to various market, currency, economic and business risks and those decisions will not always be profitable. Except as may otherwise by provided by law, WA will not be liable to Client for: a) any loss Client may suffer by reason of any investment decision made or other action taken or omitted in good faith by WA with the degree of skill, care, prudence or diligence under the circumstances that a prudent person acting in a like capacity would use; b) any loss arising from WA's adherence to the Client's instructions; c) any act or failure to act by the Custodian, any broker or dealer to which WA directs transactions for the Portfolio Assets or by any other third party; or d) its failure to purchase or sell any security on the basis of information known to any principal or employee of WA where the utilization of such information might constitute a violation of any federal or state laws, rules or regulations or a breach of any fiduciary or confidential relationship between any principal or employee of WA and any other person or persons. Federal and various state securities laws impose liability under certain circumstances on persons who act in good faith and therefore nothing in this Agreement shall waive or limit any rights, which Client may have under those laws.

9. **Confidentiality.** All information and advice furnished by either party to the other shall be treated as confidential information and shall not be disclosed to third parties except as required by law or with consent.

10. **Service to Other Clients.** WA acts as adviser to other clients and may give advice and take action with respect to such other clients' accounts which may differ from the action taken by WA with respect to the Portfolio Assets. WA agrees to act in a manner consistent with its fiduciary obligations to deal fairly with all clients when taking investment actions. WA shall have no obligation to purchase, sell or recommend for the Portfolio Assets any security which may be purchased or sold by WA, its principals, affiliates, employees or for the accounts of any other client. Client recognizes that transactions in a specific security may not be accomplished for all client accounts at the same time or at the same price.

11. **Termination.** This agreement may be terminated at any time by either party giving the other written notice of termination. However, this Agreement shall continue in effect until so terminated. Termination shall be effective when a notice of termination, properly executed, is actually received. Upon termination, any fees paid in advance will be prorated to the date of termination and any excess will be refunded to Client. If this Agreement is terminated by Client within five business days of the date it is executed or accepted, such termination shall be without penalty or liability for payment of fees. If Client is an individual, this Agreement shall terminate upon the death or adjudicated incapacity of Client, but shall take effect only upon actual receipt by WA of written notice of Client's death or adjudicated incapacity. Upon notice of termination, WA shall notify Custodian to deliver all assets held pursuant to this Agreement, according to Client's written instructions.

12. **Notices.** Unless otherwise specified herein, all notices, instructions, and advice with respect to all matters contemplated by this Agreement shall be deemed duly given when received in writing at the address set forth herein. Copies of all notices affecting the Custodian shall also be directed to the Custodian at the address which Client designates. Addresses may be changed by notice to the other parties given in accordance with this paragraph. WA may rely on any notice from any person reasonably believed by WA to be genuine and to have authority to give such notice. All written notices shall be addressed to: a) WESPAC , 2001 Broadway, 2nd Floor, Oakland, California 94612; and b) Client at the address set forth in the Confidential Client Profile attached hereto.

13. **Assignability.** This Agreement may not be assigned by WA without the prior consent of the Client. This Agreement may not be assigned by Client without the prior consent of WA.

14. **Miscellaneous.** This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties with respect to the management of the Portfolio Assets, supersedes all prior agreements, and, except as otherwise provided herein, may be amended only with a written document signed by the parties. This Agreement shall be governed by the laws of the State where the agreement is governed and so executed. If any provision of this Agreement is held to be unenforceable, such unenforceability shall not affect the remainder of this Agreement. This Agreement may be signed in one or more counterparts, and when taken together shall create a valid and binding Agreement as though all signatures appeared on the same document. 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. Except as otherwise provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors. No party intends for this Agreement to benefit any third party not expressly named in this Agreement.

X? NV?

15. **Acknowledgment of Receipt of Form ADV Part II.** Client hereby acknowledges that Client has received and had an opportunity to read WA's Form ADV Part II as required by Rule 204-3 of the Investment Advisers Act of 1940. WA's ADV Part II contains a clear and conspicuous notice of WA's privacy policy.

16. **Arbitration. The parties waive their right to seek remedies in court, including any right to a jury trial.** The parties agree that in the event of any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio Assets, such dispute shall be resolved exclusively by arbitration to be conducted only in the county and state of the principal office of WA at the time of such dispute in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS.) applying the laws of the State where the agreement is governed and executed. Disputes shall not be resolved in any other forum or venue. The parties agree that such arbitration shall be conducted by a retired judge who is experienced in dispute resolution regarding the securities business, that discovery shall not be permitted except as required by the rules of JAMS, that the arbitration award shall not include factual findings or conclusions of law, and that no punitive

Client NV CA? ? NV?

X

~~damages shall be awarded.~~ The parties understand that any 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, and judgment may be entered on it in any court of competent jurisdiction in the ~~county and state of the principal office of WA~~ at the time such award is rendered, or as otherwise provided by law.

The effective date of this Agreement shall be the date of its acceptance by WA.

Agreed to this _____ day of _____ of the year 20____.

State: ☐ California ☒ Nevada ☐ other _____

_____
Client Name

_____
Client Signature

_____
Client Signature

AGREED AND ACCEPTED BY INVESTMENT ADVISER: WESPAC ADVISORS, LLC

By: _____

Title: _____

Date: _____

Needs to be completed

EXHIBIT A - FEE SCHEDULE

The following fees will apply to investment management services for this account. The annual Management Fee is paid quarterly in advance. If the account is opened after the start of a calendar quarter, the initial feel will be prorated from the date of acceptance be WA though the end of the quarter. Thereafter, unless otherwise provided. the quarterly fee is based on the account's market value on the last day of the previous calendar quarter. There is an initial account set-up fee $250.

Fundamental Analysis Management	Asset Value	Annual Advisory Fee
1. Institutional Equities	First $1,000,000	0.75%
(Min. $100,000)	Next $1,000,000	0.65%
2. WESPAC Growth (Min. $100,000)	Over $2,000,000	0.50%
Technical Analysis Management		
3. Growth & Income	First $1,000,000	1.00%
w/individual securities	Next $1,000,000	0.75%
(Min. $500,000)	Over $2,000,000	0.60%
4. RMAP Equities	First $1,000,000	0.75%
(Min $250,000)	Next $1,000,000	0.65%
	Over $2,000,000	0.50%
5. RMAP Plus	First $ 500,000	1.00%
(Min. $250,000)	Next $ 500,000	0.75%
	Over $1,000,000	0.60%
6. Option Income.	First $1,000,000	1.00%
(Min. $500,000)	Next $1,000,000	0.75%
	Over $2,000,000	0.60%
Active Municipal Management		
7. Tax Preferred Income (Min. $500,000)	First $1,000,000	0.50%
	Next $1,000,000	0.40%

Please Initial

Client Acknowledgement: ______________

1 D.B.

2-3 Keogh

Management Agreement 8/12/05-1400h

4 - non tax qualified instant accts

5 - Roth Account.

Code No. 3860
THOMAS C. BRADLEY, ESQ.
Bar No. 1621
448 Hill Street
Reno, Nevada 89501
Telephone: (775)323-5178
Counsel for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

vs.

WESPAC, GREG CHRISTIAN, and Does 1 - 10,

Defendants.

Case No. CV 12-01271

Dept. No. 6

REQUEST FOR SUBMISSION

Defendants, WESPAC AND GREG CHRISTIAN, by and through their counsel of record, THOMAS C. BRADLEY, ESQ., OF *Sinai, Schroeder, Mooney, Boetsch, Bradley, & Pace,* hereby requests the Clerk of the Court to submit its *Defendants' Motion to Dismiss and to Compel Arbitration* and attendant pleadings to this Honorable Court for decision.

The undersigned does hereby affirm, pursuant to NRS 239B.030, that the preceding document does not contain the social security number of any person.

DATED this 4th day of December, 2012.

Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace

THOMAS C. BRADLEY. ESQ.
Attorney for Defendants

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace,* and that on the 4 day of December, 2012, I deposited for mailing in the United States Mail a true and correct copy of the foregoing document, **REQUEST FOR SUBMISSION** addressed to:

Carl M. Hebert, Esq.
202 California Ave.
Reno NV 89509

Sandra Brown

Code 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants,

_____/

Case No. CV12-01271

Dept No. 6

ORDER

On September 19, 2012, Defendants WESPAC and GREG CHRISTIAN, filed a motion to dismiss pursuant to NRCP 12(b)(1) and to compel arbitration pursuant to NRS 38.221.

The Court finds that the arbitration agreement contained in paragraph 16 of the "Investment Management Agreement" entered into by the parties is not unconscionable and is therefore enforceable. Although the Court does believe there is some truth to the assertion alleged to have been made by the plaintiff at line twenty-five (25) of page two (2) of defendants' reply, the parties shall engage in binding arbitration in conformance with the arbitration agreement entered into by the parties. In addition, in accordance with NRS 38.221(7), this judicial proceeding shall be stayed pending the arbitration.

Accordingly, defendants' motion to compel arbitration is GRANTED and the motion to dismiss is DENIED.

DATED: This 13 day of December, 2012.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 31st day of December, 2012, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

THOMAS BRADLEY, ESQ.

CARL HEBERT, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Judicial Assistant

2175
CARL M. HEBERT, ESQ.
Nevada Bar #250
202 California Avenue
Reno, NV 89509
(775) 323-5556

Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive,

DEPT. NO. : 6

Defendants.

_____/

COMBINED MOTIONS FOR LEAVE TO REHEAR AND FOR REHEARING OF THE ORDER OF DECEMBER 13, 2012 COMPELLING ARBITRATION

Plaintiff Gregory Garmong, through his counsel of record, Carl M. Hebert, Esq., moves for leave to rehear and for rehearing of that portion of the Order of December 13, 2012 ("Order") compelling arbitration. These combined motions are made under the authority of D.C.R. 13(7) and WDCR 12(8).

MOTION FOR LEAVE TO REHEAR

On December 13, 2012 this Court issued its Order compelling arbitration and staying the action pending arbitration. Plaintiff moves for leave to rehear the portion of the Order which compels arbitration. This motion for leave to rehear is made pursuant to D.C.R. 13(7), which states: "No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefore, after notice of such motion to the adverse parties." *See* WDCR 12(8).

The standard for reconsideration by a district court was stated in Masonry and Tile Contractors Association of Southern Nevada v. Jolley, Urga & Wirth, Ltd, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997): "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced *or the decision is clearly erroneous.*" (Emphasis added). The Order was clearly erroneous.

The basis of the request for leave to rehear is that the Order is clearly erroneous because it overlooked, or failed to address, important legal and factual matters which should properly govern its disposition and the ordered arbitration. Such matters include:

1. NRS 38.221(1) requires the party moving to compel arbitration to allege that the other party refuses to arbitrate. Defendants made no such allegation and admitted in their reply points and authorities that they had not. Accordingly, Defendants did not meet the jurisdictional requirements to invoke the authority of the Court, and the Court lacks jurisdiction to issue the Order compelling arbitration.

2. Paragraph 16 of the Investment Management Agreement ("Agreement") is so lacking in critical exhibits and provisions that it cannot be a valid basis for arbitration.

3. In the absence of an enforceable arbitration agreement, the Court may not order the parties to arbitrate. NRS 38.221(3).

4. Paragraph 16 of the Agreement is both procedurally and substantively unconscionable and should not be enforced.

5. The Agreement is not an enforceable contract, as it is incomplete and vague.

6. There was no showing of a "dispute" required for arbitration.

7. Defendants, the parties who breached the contract, may not obtain specific performance to enforce it.

MOTION FOR REHEARING

In accordance with WDCR 12(8) the plaintiff moves to rehear the Order on the following grounds.

1.

DEFENDANTS DID NOT PROPERLY INVOKE THE JURISDICTION OF THE COURT AND THE COURT HAS NO JURISDICTION TO GRANT THE MOTION.

Before a Court may render a decision on a matter, it must have subject matter jurisdiction. At 3:1-9 in the Opposition, Plaintiff pointed out that NRS 38.221(1) requires that the party moving to compel arbitration must allege that the other party refuses to arbitrate. NRS 38.221(1) provides, "On a motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement[.]" (emphasis added). This allegation is a precondition to arbitration which the defendants have not met. Absent such an allegation, the Court has no jurisdiction to grant the requested relief.

Defendants' Motion to Dismiss and to Compel Arbitration ("Motion") makes no such allegation. Nor is there an answer on file alleging such a fact. Consequently, there is nothing in the record alleging that plaintiff refuses to arbitrate.

Plaintiff's Opposition to Defendants' Motion to Dismiss and to Compel Arbitration ("Opposition") highlighted the absence of this allegation of "another person's refusal to arbitrate pursuant to the agreement". Defendants' Reply admitted that it had not made this required allegation to invoke the jurisdiction of the Court, describing the failure to make the required allegation as an "oversight" (Reply, 3:26-28, n. 1). The failure to meet a statutory jurisdictional requirement is not a mere "oversight"; it is a failure to follow the law.

The Order makes no finding of the basis for jurisdiction. The Court has no discretion to ignore the failure of a party to meet the statutory requirement. AA Primo Builders, LLC v. Washington, 126 Nev. Adv. Op. 53, 245 P.3d 1190, 1197 (2010).

Accordingly, the Court has no jurisdiction to consider and grant the relief sought, and should deny Defendants' Motion on the ground that it has no jurisdiction to consider the Motion.

2.

THERE IS NO ENFORCEABLE AGREEMENT TO ARBITRATE.

At 2:19-28 the Opposition points out that NRS 38.221(3) provides: "If the court finds that there is no enforceable agreement, it may not, subject to subsections 1 or 2, order the parties to arbitrate." Truck Ins. Exch. v. Palmer J. Swanson, Inc., 124 Nev. 629, 633, 189 P.3d 656 (2008). The Order made no finding on the validity and enforceability of ¶ 16 of the Agreement. Indeed, the Order erred by failing to find that ¶ 16 was not invalid, for the following reasons.

A. **The vagueness and incompleteness of the Agreement makes performance impossible**. The Order is premised upon the presumption that ¶ 16 of the alleged Agreement is a valid contract provision that binds the parties. It is not. The Court has not ruled as to whether ¶ 16 is a valid contractual provision. Failure to make such a ruling will lead to a major waste of judicial resources.

The Order, by failing to rule on the legal sufficiency of the contract that forms the Agreement yet ordering arbitration, leaves the parties with a practical problem that leads to an impossible situation. Quite simply, the parties cannot arbitrate based upon the Agreement and ¶ 16 thereof because too much critical information is missing from the Agreement.

As pointed out in the Opposition, and conceded by Defendants by their silence, the document Exhibit 1 to the Motion is missing major elements and does not specify required provisions. Perhaps most egregiously, and as discussed in the Opposition, 5:17-27, the arbitration provision ¶ 16 of the Agreement specifies 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')[.]" But, there are two sets of rules of the Judicial Arbitration and Mediation Service ('JAMS'), attached as Exhibits 2-3 of the Opposition. Paragraph 16 does not specify which of the two sets of rules is to be used in the proposed arbitration. This paragraph may not now be modified to state which set of JAMS rules is

to govern. 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."). Indeed, JAMS itself, a third party, could not alter the contract to supply the missing material terms.

Stated quite simply and legally accurately, if the Court cannot state with certainty which set of the JAMS Rules is to govern any arbitration by an examination of the four corners of the Agreement, ¶ 16 is too vague to be enforced.

This is not the only important omission from the Agreement. Also missing are the two exhibits "A," the two exhibits "B," the Confidential Client Profile, the missing pages 1-11, any pages following page 18, specification of the governing law and place of arbitration, and specification of the number of arbitrators. Opposition, 10:21-11:13; 5:17-27, and 5:28-6:13.

Defendants failed to address the question of exactly how the parties will be able to conduct an arbitration based upon an Agreement that is missing so much critical information, including a statement of which set of JAMS rules is to govern, so many exhibits, and specification of critical provisions. Perhaps in their opposition to this motion they will do so, so that the Court and Plaintiff will have some idea of where the missing terms are to be found.

B. Procedural and substantive unconscionability. As discussed at 3:11-10:19 in the Opposition, the arbitration provision found in ¶ 16 of the Agreement is both procedurally and substantively unconscionable and should not be enforced.

1. Procedural unconscionability.

a. As discussed in the Opposition, 4:1-13, one basis for a finding of procedural unconscionability is that the arbitration provision "in no way draws the reader's attention: it is printed in normal-sized font and located...in the midst of identically formatted paragraphs and sentences", Gonski v. Second Judicial Dist. Court, 126 Nev. Adv. Op. 51,

245 P.3d 1164, 1170 (2010). The Order makes no finding that ¶16 does draw the reader's attention to the fact that it is different in legal consequence from paragraphs 1 through 15, is not printed in normal-sized font and is not located in the midst of identically formatted paragraphs and sentences, thereby meeting this requirement of Gonski.

b. As discussed in the Opposition, 4:18-26, the Agreement presented as Exhibit 1 to the Motion is missing major portions. Numbered pages 12-18 and the other pages are not disclosed. Moreover, there are two different exhibits "A" and two different exhibits "B" and a "Confidential Client Profile" that are not disclosed. The Affidavit of Greg Christian, filed December 3, 2012, states at 2:4-7, ¶ 6, that he is "informed, believes, and therefore allege[s]" that there was a page numbering error to explain missing pages 1-11. This is apparently an attempt to explain away the missing pages 1-11, but it is insufficient and must be disregarded as based upon hearsay and insufficient personal knowledge. If there was a word processing error, the person who made the error must provide the explanation, especially in light of the fact that the document itself refers to at least 5 exhibits that are missing from the document provided to the Court as Exhibit 1 to the Motion. In any event, the Agreement was buried in the midst of other pages, as in Gonski. The Order makes no finding that the Agreement is complete. 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 (1930).

c. The Opposition, at 5:5-16, asserts that ¶ 16 of the Agreement did not notify Plaintiff that he was "agreeing to forego important rights," 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 are paid in advance. The Order makes no finding that ¶ 16 did notify Plaintiff that he was agreeing to forego important rights, as Gonski requires.

d. The Opposition, at 5:17-27, pointed out under Gonski that "an arbitration clause is procedurally unconscionable when ... its effects are not readily ascertainable upon a review of the contract." Paragraph 16 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')[.]" Plaintiff was not supplied a copy of these rules, either at the time of signing or later by Defendants. As a consequence, Plaintiff 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 the Plaintiff received the JAMS rules at the time the Agreement was presented to him, he would not have signed the Agreement. The Order makes no finding that Plaintiff was provided a copy of the JAMS rules at the time the Agreement was presented to him, so that he would know what rights he was foregoing or waiving in respect to JAMS arbitration.

e. At 5:28-6:13 the Opposition, showed that ¶ 16 was unclear on governing law, because the governing law to be used by an arbitrator is nowhere stated. The Order makes no finding as to the governing law to be used by the arbitrator, and that ¶ 16 is clear as to the governing law.

f. Further, the arbitration provision in ¶ 16 was unclear on the number of arbitrators to be used, as required by the JAMS rules themselves. The Order makes no finding as to the number of arbitrators to be employed, and that ¶ 16 is clear as to the number of arbitrators to be employed.

2. Substantive unconscionability.

a. The Opposition, at 5:5-16 and 6:21-7:3, points out that the arbitration provision effectively denies the fundamental right to appeal (NRS 38.247; Clark County Education Association v. Clark County School District, 122 Nev. 337, 131 P.3d 5 (2006)) by providing that "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). No findings realistically means no right to appeal at all, something ¶ 16 failed to explain. The Order makes no finding that ¶ 16 does not effectively deny the right to appeal, contrary to Nevada law.

b. The Opposition, at 7:4-25, points out that arbitration agreements that violate public policy and statutes are unenforceable. Picardi v. Eighth Judicial Court, 127 Nev. Adv. Op. 9, 251 P.3d 723 (2011). Paragraph 16 states: "No punitive damages shall be awarded." By this simple clause the defendants immunized themselves from any consequences for intentionally injuring or oppressing the plaintiff or consciously disregarding his rights. *See* 42.005(1). In so many words, ¶ 16 permits the defendants to commit fraud or flagrant breaches of fiduciary duty without the civil punishment authorized by Nevada law. NRS 42.001 and .005. The Order makes no finding that ¶ 16 does not violate public policy and statutes in denying punitive damages and the right of appeal.

c. The Opposition, at 7:25-8:23, points out that the issue of fees on arbitration is a key aspect of substantive unconscionability. In the present case, Plaintiff was not supplied with any information on the fee provisions associated with arbitration, because he was not furnished a copy of the JAMS rules (whichever set of JAMS rules were contemplated by Defendants). The Order makes no finding that Plaintiff was supplied with the fee provision information of the JAMS rules.

d. The Opposition, at 8:24-9:9, points out that the Agreement was *de facto* one-sided and thus substantively unconscionable, because of the way that the Defendants arranged the business relation. The Order makes no finding that the Agreement was fair and not *de facto* one-sided.

e. Referring to perhaps the most egregious example of substantive unconscionability, at 9:10-23 the Opposition points out that ¶ 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, exhibits 2 and 3 to the Opposition, and the two sets of JAMS rules themselves require the party invoking the JAMS rules 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 rules

makes that set of rules a part of the arbitration provision. Yet no set of these rules was provided to Plaintiff. Lack of notice of governing rules makes the arbitration provision substantively unconscionable. *See* Gonski, 245 P.3d at 1171. The Order makes no finding that the Agreement does specify which set of JAMS rules is to govern, and that Plaintiff was provided a set of the JAMS rules at the time of signing as a matter of fundamental fairness.

f. The Opposition, at 9:24-10:7, points out that the arbitration provision is illusory. One example is that ¶ 16 of the Agreement states that "discovery shall not be permitted except as *required* by the rules of JAMS[.]" (Emphasis added). The JAMS rules 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. The Order makes no finding that the discovery provision is not illusory.

3. Finding of unconscionability.

The Opposition, at 10:8-19, discusses the sliding scale of unconscionability. The Order makes no findings of the elements of procedural and substantive unconscionability, and weighs those findings under the Gonski standard.

3.

THE AGREEMENT AS PRESENTED IN EXHIBIT 1 TO THE MOTION TO COMPEL ARBITRATION IS INCOMPLETE.

The Opposition, at 10:21-11:13 and 9:10-23, points out that the Agreement is incomplete. There are missing pages 1-11, possible missing pages following page 18, the two exhibits "A," the two exhibits "B", the Confidential Client Profile, and the governing copy of the JAMS rules (whichever set of rules that may be). The Defendants never furnished plaintiff or the Court with a complete copy of the Agreement, either at the time of signing or in their court filing, Exhibit 1 to their Motion. A party may not rely on an incomplete document and maintain that it is a binding "contract" providing for arbitration, see All Star Bonding and Dodge Bros., Inc., *supra*. The Order has no finding that the document allegedly signed by Plaintiff was complete and that the document provided to the Court as

Exhibit 1 to the Motion was complete, including pages 1-11, pages following page 18, the two exhibits "A," the two exhibits "B," the Confidential Client Profile and the governing copy of the JAMS rules.

4.

A DISPUTE IS A PRECONDITION TO ARBITRATION.

As discussed at Opposition, 11:15-27, ¶ 16 states that "The parties agree that in the event of any dispute between the parties ... such dispute shall be resolved exclusively by arbitration." (Emphasis added). Plaintiff filed a complaint making certain allegations. Defendants have not answered the complaint nor have they explained in the motion what they claim is in "dispute." Accordingly, it is not possible to know if the defendants "dispute" any of the allegations of the complaint. Absent a showing of a "dispute," ¶ 16 of the Agreement has no basis for operation.

This point is not inconsequential. NRS 38.221(7) requires that the Court determine whether some claims are disputed and others are not, and permit arbitration in appropriate circumstances only on the disputed claims. In this case, the Court lacks the information to make that determination because the motion has not specified which claims for relief of the Complaint are "disputed," if any.

The Order contains no finding that the requirement of a "dispute" has been demonstrated.

5.

AS THE PARTY BREACHING THE CONTRACT, THE DEFENDANTS MAY NOT ENFORCE IT, INCLUDING THE ARBITRATION PROVISION.

The Opposition, at 12:2-23, points out that a party who first breaches an agreement may not later obtain specific performance of a provision of the agreement, specifically the arbitration provision in this case. Torke v. Federal Deposit Ins. Corp., 761 F.Supp. 754, 757 (D.Colo. 1991); Smith-Scharff Paper Co., Inc. v. Blum, 813 S.W.2d 27 (Mo. App. 1991). It is undisputed that the Defendants first breached the Agreement. The Order has no finding that the first party to breach the Agreement may then obtain specific

performance of a portion of it.

6.

CONCLUSION

For the reasons stated above, the Plaintiff respectfully requests that this Court reconsider and deny defendants' Motion.

If it declines to deny the Motion, Plaintiff requests that the Court make the required findings.

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

DATED this 31st day of December, 2012.

/S/ Carl M. Hebert
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,
Plaintiff,
v.

Case No. CV 12-01271
Dept. No. 6

WESPAC, GREG CHRISTIAN, and Does 1-10,
Defendants.
_____/

DEFENDANTS' OPPOSITION TO PLAINTIFF'S COMBINED MOTIONS FOR LEAVE TO REHEAR AND FOR REHEARING OF THE ORDER OF DECEMBER 13, 2012, COMPELLING ARBITRATION AND REQUEST FOR ATTORNEY'S FEES

Defendants WESPAC and GREG CHRISTIAN, by and through their attorney of record, THOMAS C. BRADLEY, ESQ., of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace,* hereby oppose *Plaintiff's Combined Motions For Leave To Rehear And For Rehearing Of The Order Of December 13, 2012 Compelling Arbitration.* Defendants additionally request an award of attorney fees.

Defendants' *Opposition* is made and based on the attached Memorandum of Points and Authorities, attached exhibit and affidavit, and all pleadings and papers on file herein.

DATED this 8 day of Jan., 2013.

Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace

Thomas C. Bradley, Esq.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

On or about August 31, 2005, Plaintiff Gregory Garmong ("Garmong") and Defendant Wespac entered into an "Investment Management Agreement" whereby Garmong retained Wespac as his investment advisor. (The August 31, 2005, Agreement is attached to Defendants' *Motion To Dismiss And To Compel Arbitration* as Exhibit "1").

In approximately March 2009, Garmong terminated the services of Defendants.

On May 9, 2012, Garmong filed a *Complaint* with this Court alleging that Defendants had breached the "Investment Management Agreement." In his *Complaint*, Garmong also alleged claims of breach of Nevada Deceptive Trade Practices Act, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, malpractice, and negligence. In his prayer, Garmong sought general and special damages, punitive damages, and attorney's fees and costs.

In response, Defendants filed a *Motion To Dismiss And To Compel Arbitration*, in which they requested dismissal of the *Complaint* pursuant to NRCP 12(b)(1) and an order compelling arbitration pursuant to NRS 38.221.

On October 29, 2012, Plaintiff filed an *Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* to Defendants' *Motion*. In his *Opposition*, Garmong claimed that because the arbitration clause of the Agreement was unconscionable, he would not arbitrate his disputes with Defendants, and would instead engage in nonbinding mediation. *Opposition* at 12:26-13:1.

On December 3, 2012, Defendants filed a reply to Plaintiff's *Opposition*.

On December 13, 2012, this Court filed an *Order* in which it found that "the arbitration agreement contained in paragraph 16 of the "Investment Management Agreement" entered into

by the parties is not unconscionable and is therefore enforceable." As a result of this finding, the Court ordered the parties to engage in binding arbitration and stayed further judicial proceedings pending the arbitration.

On December 31, 2012, Garmong filed a document entitled *Combined Motions For Leave To Rehear And For Rehearing Of The Order Of December 13, 2012, Compelling Arbitration.*

For the reasons set forth below, Defendants request that Plaintiff's combined *Motions* be denied in their entirety and that Defendants be awarded reasonable attorney's fees pursuant to NRS 18.010 and NRS 7.085.

II. LEGAL ARGUMENT

Under Nevada law, "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

Here, Garmong has asserted that this Court's *Order* of December 13, 2012 "is clearly erroneous because it overlooked, or failed to address, important legal and factual matters which should properly govern its disposition and the ordered arbitration." *Motions* at 2:6-8. In the body of his combined *Motions*, Garmong repeated the exact arguments contained in his *Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* but failed to introduce any new issues of law or fact.

While in the context of an appeal, reviewing courts have found a trial courts's order to be "clearly erroneous" "if the reviewing court is left with a 'definite and firm conviction that the district court's interpretation of the statute was incorrect'" or "if a review of the entire record leaves the appellate court with a definite and firm impression that a mistake was made." *United*

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States v. Grace, 504 F.3d 745, 757 (9th Cir. 2007); *Mitchell v. State of Missouri*, 50 S.W.3d 342, 343 (Mo.Ct. App. S. Dist. 2001). See also, *State of Nevada v. Lanning*, 109 Nev. 1198, 866 P.2d 272 (1993)(finding that a district court's order suppressing a defendant's confession was clearly erroneous where previous decisions by the Court had made clear that in non-critical stage proceedings a defendant's Sixth Amendment rights are not violated by a non-custodial police interview or the taking of a defendant's handwriting exemplar); *Allyn v. McDonald*, 112 Nev. 68, 910 P.2d 263 (1996)(finding that the trial court's findings of fact in its order granting summary judgment were clearly erroneous where the court's order resolved a genuine issue of material fact).

Here, instead of claiming that rehearing is necessary because the Court overlooked a particular legal or factual matter, Garmong has taken the approach that the Court erred by ignoring every legal and factual matter contained in his *Opposition*, and that as a result this Court should now review again each and every argument contained in his *Opposition* to try to determine if it made an error. This 'shot gun' approach not only over burdens limited judicial resources it is also violates the Nevada Supreme Court's rule that "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

In *Moore v. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244 (1976), the respondent had filed a motion for reconsideration after its motion for summary judgment had been denied. After the trial court denied the motion for reconsideration, the original trial judge lost his bid for re-election and the case was assigned to another judge. Respondents then filed a second motion for reconsideration, which was granted, as were their motion for summary judgment. On appeal, the

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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

APPENDIX TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION (PART 1)

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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

APPENDIX TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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Counsel for Petitioner

ALPHABETICAL INDEX TO PETITIONER'S APPENDIX

Exh. No.	Description	Pages
18	Exhibit 1 to Plaintiff's Reply to "Defendants' Opposition to Plaintiff's Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13, 2012, Compelling Arbitration and Request for Attorney's Fees" (2/3/14)	193-196
10	Exhibit 2 to Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss and to Compel Arbitration (12/3/12)	101-109
19	Exhibit 2 to Plaintiff's Reply to "Defendants' Opposition to Plaintiff's Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13, 2012, Compelling Arbitration and Request for Attorney's Fees " (2/3/14)	197-198
11	Exhibit 3 to Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss and to Compel Arbitration (12/3/12)	110-118
4	Motion to Dismiss and to Compel Arbitration (9/19/12)	012-016
13	Order (12/13/12)	121-122
21	Order (4/2/14)	201-204
7	Plaintiff's Opposition to Defendants' Motion to Dismiss and to Compel Arbitration (10/29/12)	029-083
17	Plaintiff's Reply to "Defendants' Opposition to Plaintiff's Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13, 2012, Compelling Arbitration and Request for Attorney's Fees" (2/3/14)	160-192
12	Request for Submission (12/4/12)	119-120
20	Request for Submission (2/10/14)	199-200

Code:$1425
Gregory Garmong
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Tel No. 775-465-2981
Plaintiff In Proper Person

FILED
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CLERK OF THE COURT
BY S. Martensen
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF
NEVADA IN AND FOR THE
COUNTY OF WASHOE

GREGORY GARMONG,)
Plaintiff)
vs.) Case No. CV12 01271
WESPAC, GREG CHRISTIAN,) Dept. No. C
and Does 1-10)
Defendants)

COMPLAINT

COMES NOW Plaintiff, GREGORY GARMONG, appearing In Proper Person, as and for claims for relief against Defendants Wespac, Greg Christian ("Christian"), and Does 1-10 (collectively, "Defendants"), alleges as follows:

1. At all times relevant hereto, Plaintiff was a resident of Douglas County Nevada and Lyon County Nevada.

2. At all times relevant hereto, Defendants held themselves out to the public as investment advisors and investment managers performing fiduciary and other services for customers; Christian was affiliated with Wespac.

3. Does 1-10 are owners/shareholders and/or employees and/or are otherwise associated with Defendants whose identities are unknown to Plaintiff at this time. Plaintiff will ascertain the identities of Does 1-10 during discovery and will move to add these persons to the list of named Defendants.

4. At all times relevant hereto, Defendants did business in Washoe County, Nevada.

5. The Second Judicial District Court in and for Washoe County, Nevada is a proper venue for this action because of the place of business of Defendants.

6. The Second Judicial District Court in and for Washoe County, Nevada has subject matter jurisdiction of this matter because of the dollar amount of damages alleged.

7. At a time prior to 2007, Plaintiff entered a contract ("Contract") with Defendants and became a client of Defendants. Plaintiff entrusted a major portion of his life savings and retirement savings to Defendants to manage. The life savings and retirement savings were held in accounts at Schwab, and

Defendants had signature authority and control over these accounts for management purposes. Plaintiff had other accounts with Schwab with which Defendants had no involvement.

8. In late 2007 and early 2008, Defendant Christian solicited, urged, and begged Plaintiff to allow Defendants to take over the sole management of Plaintiff's accounts because of their investment expertise, leaving all discretionary actions to Defendants. Defendant Christian proposed that Plaintiff should not be involved in the active management of his life savings and retirement accounts, and that ultimate investment decisions should be made by Defendants. Plaintiff accepted the proposal.

9. In conjunction with Defendants taking over sole management of Plaintiff's accounts, Plaintiff informed Defendants that he had recently retired. Plaintiff further established general investment guidelines with Defendants that it was therefore important that his accounts be managed to conserve capital, and that Defendants' management should be within those guidelines. Plaintiff instructed the Defendants that it was preferable to sacrifice potential gains so as not to lose capital. When losses first appeared, Defendant Christian assured Plaintiff that Defendants were following their plan to manage Plaintiff's life savings and retirement accounts to conserve Plaintiff's capital, and that Defendants should be given the opportunity to allow their plan to work out.

10. Despite Defendants' assurances to Plaintiff that they would follow his investment guidelines and manage Plaintiff's life savings and retirement accounts to conserve capital, Defendants failed to do so. Defendants mismanaged Plaintiff's

life savings and retirement accounts, and caused the loss of and wasted a significant portion of Plaintiff's life savings and retirement accounts. When it became apparent in late 2008 that Defendants were not properly managing Plaintiff's life savings and retirement accounts within Plaintiff's guidelines and had misled Plaintiff, Plaintiff ended Defendants' management of Plaintiff's life savings and retirement accounts.

FIRST CLAIM FOR RELIEF

(Breach of Contract)

11. Plaintiff incorporates the allegations of Para. 1-10.

12. Plaintiff fulfilled all of his obligations under the Contract.

13. The Defendants breached their obligations under the Contract, causing damage to Plaintiff.

14. Plaintiff was damaged in an amount in excess of $10,000 of general damages and special damages.

SECOND CLAIM FOR RELIEF

(Breach of Nevada Deceptive Trade Practices Act)

15. Plaintiff incorporates the allegations of Para. 1-10.

16. At all times relevant hereto, Plaintiff was at least 60 years of age.

17. When the Defendants induced Plaintiff to enter the Contract, and thereafter, Defendants failed to disclose material information to Plaintiff. Specifically, Defendants did not disclose to Plaintiff that they would not follow his investment guidelines, would conceal the fact that they would not follow

his investment guidelines, and would concentrate their energies on obtaining and providing services to other clients to the exclusion of Plaintiff's interests. Had Plaintiff known this material information, he would not have entered the Contract.

18. Plaintiff was damaged as a result of the breach by Defendants of the Nevada Deceptive Trade Practices Act in an amount in excess of $10,000.

THIRD CLAIM FOR RELIEF

(Breach of Implied Covenant of Good Faith and Fair Dealing)

19. Plaintiff incorporates the allegations of Para. 1-10.

20. By failing to follow Plaintiff's investment guidelines and not properly managing Plaintiff's life savings and retirement accounts, Defendants breached their covenant of good faith and fair dealing implied under the Contract.

21. Plaintiff was damaged as a result of the breach by Defendants of the covenant of good faith and fair dealing in an amount in excess of $10,000.

FOURTH CLAIM FOR RELIEF

(Unjust Enrichment)

22. Plaintiff incorporates the allegations of Para. 1-10.

23. Plaintiff made payments to Defendants during their business relationship, which payments were accepted and retained by the Defendants.

24. Defendants failed to provide the services for which Plaintiff was paying Defendants. Defendants were unjustly enriched by the payments that Plaintiff made to them.

25. Plaintiff was damaged as a result of the unjust enrichment of Defendants in an amount in excess of $10,000.

FIFTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty)

26. Plaintiff incorporates the allegations of Para. 1-10.

27. Defendants had a fiduciary duty to Plaintiff arising from their investment advisory and management relation to Plaintiff.

28. Defendants breached their fiduciary duty to Plaintiff by failing to exercise a fiduciary responsibility to their management of Plaintiff's life savings and retirement accounts and by deceiving Plaintiff as to their actions and inaction.

29. Plaintiff was damaged as a result of the Defendant's breach of their fiduciary duties in an amount in excess of $10,000.

SIXTH CLAIM FOR RELIEF

(Malpractice)

30. Plaintiff incorporates the allegations of Para. 1-10.

31. Defendants owed Plaintiff a duty of care as a result of their relationship. Defendants committed malpractice against Plaintiff in their mismanagement of his life savings and retirement accounts by breaching that duty, causing damage to Plaintiff.

32. Plaintiff was damaged as a result of the Defendant's malpractice in an amount in excess of $10,000.

SEVENTH CLAIM FOR RELIEF

(Negligence)

33. Plaintiff incorporates the allegations of Para. 1-10.

34. Defendants had a duty of care to Plaintiff. Defendants breached that duty of care, in that they failed to represent Plaintiff at the level of skill expected from those managing life savings and retirement accounts.

35. Plaintiff was damaged as a result of the Defendant's negligence in an amount in excess of $10,000.

Prayer and Demand for Relief.

WHEREFORE, Plaintiff prays for the Court's order, judgment and decree against the Defendants as follows:

FIRST CLAIM FOR RELIEF

1. For general and special damages according to proof in excess of TEN THOUSAND DOLLARS ($10,000).

2. For punitive and exemplary damages.

3. For Plaintiff's costs of suit and attorney's fees.

4. For such other and further relief as the Court may deem proper.

SECOND CLAIM FOR RELIEF

1. For general and special damages in excess of TEN THOUSAND DOLLARS ($10,000) according to proof.

2. For punitive and exemplary damages.

3. For Plaintiff's costs of suit and attorney's fees.

4. For such other and further relief as the Court may

deem proper.

THIRD CLAIM FOR RELIEF

1. For general and special damages in excess of TEN THOUSAND DOLLARS ($10,000) according to proof.

2. For punitive and exemplary damages.

3. For Plaintiff's costs of suit and attorney's fees.

4. For such other and further relief as the Court may deem proper.

FOURTH CLAIM FOR RELIEF

1. For general and special damages in excess of TEN THOUSAND DOLLARS ($10,000) according to proof.

2. For punitive and exemplary damages.

3. For Plaintiff's costs of suit and attorney's fees.

4. For such other and further relief as the Court may deem proper.

FIFTH CLAIM FOR RELIEF

1. For general and special damages in excess of TEN THOUSAND DOLLARS ($10,000) according to proof.

2. For punitive and exemplary damages.

3. For Plaintiff's costs of suit and attorney's fees.

4. For such other and further relief as the Court may deem proper.

SIXTH CLAIM FOR RELIEF

1. For general and special damages in excess of TEN

THOUSAND DOLLARS ($10,000) according to proof.

2. For punitive and exemplary damages.

3. For Plaintiff's costs of suit and attorney's fees.

4. For such other and further relief as the Court may deem proper.

SEVENTH CLAIM FOR RELIEF

1. For general and special damages in excess of TEN THOUSAND DOLLARS ($10,000) according to proof.

2. For punitive and exemplary damages.

3. For Plaintiff's costs of suit and attorney's fees.

4. For such other and further relief as the Court may deem proper.

The undersigned hereby affirms that this document does not contain a social security number.

Dated this 8th day of May, 2012

GREGORY GARMONG
In Proper Person
11 Dee Court, Smith, NV 89430
775-465-2981 (voice)

CODE 1067
Affidavit of Service

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

Gregory GARMONG,

Plaintiff,

vs

WESPAC, Greg CHRISTIAN,

Defendants

CASE NO.: CV 12- 01271

DEPT. NO.: 6

AFFIDAVIT of Service re:

WESPAC

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

PATRICK J. PEREGRIN, hereby states that affiant is over 18 years of age, licensed to serve civil process in the State of Nevada under Nevada License #903, and not a party to, nor interested in, the above-captioned action.

August 29, 2012, affiant received the Summons and Complaint for service upon WESPAC c/o Greg Christian at the WESPAC office, 698 Sierra Rose Dr., Ste A-2, Reno, NV.

September 4, 2012 at 11:30 a.m., Affiant served a true and correct copy of the Summons and Complaint upon WESPAC, accepted by Julie L. Miller, WESPAC Office Manager, Receptionist and Assistant to Greg Christian as Resident Agent for WESPAC at 698 Sierra Rose Drive, Suite A-2, in the City of Reno, County of Washoe, State of Nevada.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

FURTHER YOUR AFFIANT SAYETH NAUGHT

AFFIRMATION PURSUANT TO NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

EXECUTED September 7, 2012
SUBSCRIBED and **SWORN** to before me, September 7, 2012 by Patrick J. Peregrin.

NOTARY PUBLIC

Patrick Peregrin Nevada Judicial Services Lic # 903
9732 State Rte. 445, Sparks, Nv. 89442
Office: 775-329-9944 FAX 329-3055

HOPE A. BECKEL
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 12-6484-2 - Expires October 25, 2015

FILED
Electronically
09-08-2012:06:39:25 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 3203349

CODE 1067
Affidavit of Service

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

Gregory GARMONG,

Plaintiff,

vs

WESPAC, Greg CHRISTIAN,

Defendants

CASE NO.: CV 12- 01271

DEPT. NO.: 6

AFFIDAVIT of Service re:

Greg Christian

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

PATRICK J. PEREGRIN, hereby states that affiant is over 18 years of age, licensed to serve civil process in the State of Nevada under Nevada License #903, and not a party to, nor interested in, the above-captioned action.

August 29, 2012, affiant received the Summons and Complaint for service upon Greg Christian at the WESPAC office, 698 Sierra Rose Dr., Ste A-2, Reno, NV.

September 6, 2012 at 8:40 a.m., Affiant personally served a true and correct copy of the Summons and Complaint upon Greg Christian at the WESPAC office, 698 Sierra Rose Drive, Suite A-2, in the City of Reno, County of Washoe, State of Nevada.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

FURTHER YOUR AFFIANT SAYETH NAUGHT

AFFIRMATION PURSUANT TO NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

EXECUTED September 7, 2012

SUBSCRIBED and **SWORN** to before me, September 7, 2012 by Patrick J. Peregrin.

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HOPE A. BECKEL
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 12-6484-2 - Expires October 25, 2015

Code 2270
Thomas C. Bradley, Esq.
Bar No. 1621
448 Hill Street
Reno, Nevada 89501
Telephone (775) 323-5178
Fax: (775) 323-0709
Counsel for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

vs.

WESPAC, GREG CHRISTIAN, and Does 1 - 10,
Defendants.

Case No. CV 12-01271

Dept. No. 6

MOTION TO DISMISS AND TO COMPEL ARBITRATION

Defendants, WESPAC and GREG CHRISTIAN, by and through their attorney of record, THOMAS C. BRADLEY, ESQ., of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace*, hereby move to dismiss pursuant to N.R.C.P. 12(b) (1) and to compel arbitration pursuant to NRS 38.221.

This motion is based on the Points and Authorities filed herein hereto and the papers and pleading filed herein.

DATED this 19th day of Sept., 2012

Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace

Thomas C. Bradley, Esq.
Attorney for Defendants

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

POINTS AND AUTHORITIES

Defendant Greg Christian is a registered Investment Advisor for Wespac and he assists persons who wish to invest their savings. On May 9, 2012, Plaintiff Gregory Gamong, filed suit in this case against Wespac and Greg Christian alleging a breach of contract, presumably the Investment Management Agreement,. and breach of fiduciary duty to invest his Portfolio assets in a suitable manner.

Mr. Garmong, however, previously agreed to arbitrate this matter by agreeing to and signing an Investment Management Agreement. The Investment Management Agreement specifically provided that "any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio assets, such dispute shall be resolved exclusively by arbitration in accordance with the rules of the Judicial Arbitration and Mediation Service (JAMS) applying the laws of the state where the agreement is governed and executed. *See Exhibit One Investment Management Agreement.*

This Agreement is a valid and fully enforceable agreement. Accordingly, this Court should dismiss this action pursuant to N.R.C.P. 12(b) (1) and to order the parties to arbitrate their dispute as agreed by the parties pursuant to NRS 38.221.

The undersigned does hereby affirm, pursuant to NRS 239B.030, that the preceding document does not contain the social security number of any person.

DATED this 19th day of Sept., 2012

Sinai, Schroeder, Mooney,
Boetsch, Bradley & Pace

Thomas C. Bradley, Esq.
Attorney for Defendants

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace*, and that on the 19th day of Sept., 2012, I deposited for mailing in the United States Mail a true and correct copy of the foregoing document, MOTION TO DISMISS AND TO COMPEL ARBITRATION addressed to:

Gregory Garmong
11 Dee Court
Smith, NV 89430

Thomas Bradley

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

IN THE FAMILY DIVISION
OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

Motion To Compel Arbitration
(Title of Document)

filed in case number: CV12-01271

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

_____
(State specific state or federal law)

-OR-

☐ For the administration of a public program

-OR-

☐ For an application for a federal or state grant

Date: 9/19/12

(Signature)

Molly E. Stewart
(Print name)

Legal Secretary
(Attorney for)

SINAI, SCHROEDER, MOONEY, BOETSCH,
BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

EXHIBIT INDEX

Code No. 1046
Thomas C. Bradley, Esq.
Bar No. 1621
448 Hill Street
Reno, Nevada 89501
Telephone (775) 323-5178
Fax: (775) 323-0709
Counsel for Defendants

FILED
2012 SEP 19 PM 4:22

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

vs.

WESPAC, GREG CHRISTIAN, and Does 1 - 10,
Defendants.
_____/

Case No. CV 12-01271

Dept. No. 6

AFFIDAVIT OF GREG CHRISTIAN

STATE of NEVADA)
) ss.
COUNTY OF WASHOE)

I, GREG CHRISTIAN, being first duly sworn, do hereby swear under penalty of perjury to the following:

1. I am the named Defendant in this case and a registered investment advisor of Wespac.

2. Attached hereto is a true, correct, and complete copy of the Investment Management Agreement signed by me and Gregory Garmong. (See Exhibit 1).

GREG CHRISTIAN

SWORN and SUBSCRIBED to before me this 19th day of September, 2012.

MAUREEN MAHER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 94-2091-2 - Expires April 26, 2015

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE and that on the 11th day of September 2012, pursuant to N.R.C.P. 5(b), I deposited in the U.S. Mail, first class postage pre-paid, at Reno, Nevada, a true and correct copy of the foregoing document for mailing to:

Gregory Garmong
11 Dee Court
Smith, Nevada 89430

MOLLY E. STEWART

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

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AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed.

__X__ Document does not contain the social security number of any person.

- OR -

_____ Document contains the social security number of a person as required by:

_____ A specific state of federal law, to wit:

_____

- OR -

_____ For the administration of a public program

_____ For an application for a federal or state grant

Date September 6, 2012

_____
Attorney

SINAI, SCHROEDER, MOONEY, BOETSCH,
BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

EXHIBIT INDEX

EXHIBIT 1

EXHIBIT 1

INVESTMENT MANAGEMENT AGREEMENT

This Investment Management Agreement (the "Agreement") is entered into between WESPAC Advisors, LLC (.WA"), an investment advisor registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940, as amended, and Gregory Garmong ("Client"). In consideration of the mutual promises, covenants, representations, and undertakings set forth herein, the parties agree as follows:

1. **Appointment.** Client appoints WA as investment adviser of the Portfolio Assets (as hereinafter defined) with designated investment authority over the Portfolio Assets. and WA agrees to serve in that capacity on the terms and conditions as set forth in this Agreement.

2. **Acknowledgments of Client**. Client represents and acknowledges that Client is the sole owner of the cash and securities described in Exhibit A (the "Initial Portfolio Assets"), and that the Portfolio Assets are and will remain at all times during the continuation of this Agreement free, clear, and unencumbered. Client acknowledges that Client has reviewed the investment policies of WA as set forth in WA's Form ADV Part II, a copy of which has been provided to Client, and that these investment policies meet Client's overall criterias. In the event Client's financial situation changes, Client agrees to notify WA in writing of the change and new investment objectives, if different from those described. Client acknowledges that in the process of active portfolio management, cash may be held in the portfolio account at the discretion of WA. Client agrees to give WA immediate notice of any deposit to or withdrawal from the Portfolio Assets and to promptly confirm the same in writing.

3. **Procedures**. The following procedures shall be followed by WA in performing the services called for by this Agreement:

    1. **Records.** WA shall keep separate and accurate records of all of the Initial Portfolio Assets and additions to, dispositions from, and changes in the Initial Portfolio Assets (the "Portfolio Assets"). WA shall provide Client with a written summary and appraisal of the Portfolio Assets at least once each calendar quarter. The portfolio appraisal statement shall list the Portfolio Assets as of the last business day of the immediately preceding quarter, and shall indicate the fair market value of the Portfolio Assets on that date as determined in Paragraph 4a hereof.

    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. Client shall be responsible for all Custodians' fees incurred in maintaining Client's account(s). In no event shall WA act as Custodian, and nothing herein shall be construed to authorize WA to take possession of any cash or securities comprising the Portfolio Assets. Client shall instruct the Custodian to provide WA with confirmations of all transactions with respect to Portfolio Assets and shall instruct Custodian to provide to Client a monthly account statement indicating all amount dispersed from Client's accounts (including the amount of any fee paid pursuant to Client's authorization to WA), all transactions occurring in the account during the

period covered by the statement and all the funds, securities, and other properties in the account as of the end of the period, with a copy to WA. Client shall instruct Custodian to provide WA with such other periodic reports concerning the status of the Portfolio Assets as WA may reasonably request. It is agreed that WA, in the maintenance of its records, does not assume responsibility for the accuracy of information furnished by Client or any other party.

3. **Brokerage.** Client may instruct WA to utilize the services of designated broker(s) in all transactions involving Portfolio Assets separately designated in Exhibit B. If no broker(s) is designated by Client for Portfolio Asset transactions. WA may select broker(s) , and such broker(s) may be broker(s) that provide research or other portfolio services to WA. In making any such selection, WA will take into consideration a number of factors including, without limitation: the overall direct net economic result to the Portfolio Assets (including commissions, which may not be the lowest available but which ordinarily will not be higher than the generally prevailing competitive range), the ability to effect the transaction where large block trades or other complicating factors are involved and the availability of the broker to stand ready to execute possibly difficult transactions in the future. WA may also take into consideration other matters involved in the receipt of brokerage and research services as contemplated by Section 28(c) of the Securities Exchange Act of 1934, as amended, and the regulations and interpretations of the Securities and Exchange Commission promulgated thereunder, without having to demonstrate that any such factor is of a direct benefit to the Portfolio Assets. If WA believes that the purchase or sale of a security is in Client's best interest along with the best interest of its other clients, WA may, but shall not be obligated to, aggregate the securities to be sold or purchased to obtain favorable execution or lower brokerage commissions, to the extent permitted by applicable laws and regulations. WA will allocate securities so purchased or sold, as well as the expenses incurred in the transactions, in the manner that it considers to be equitable and consistent with its fiduciary obligations to Client and its other clients.

Client shall be responsible for all brokerage charges in connection with the Portfolio Asset transactions. Brokers or dealers that WA selects to execute transactions may from time to time refer clients to WA. WA will not make commitments to any broker or dealer through brokerage or dealer transactions for client referrals; however, Client recognizes that a potential conflict of interest may arise between Client's interest in obtaining best price and execution and WA's interest in receiving further referrals.

4. **Services of Adviser.**

a. **Management Fee.** Client agrees to pay WA an investment management fee as determined in accordance with the schedule set forth as Exhibit A. One quarter of the annual fee due shall be payable in arear on the last day of each calendar quarter in which this Agreement is in force. All fees are determined on the basis of the market value of the Portfolio Assets as of the last day of the

calendar quarter. In computing the market value of any investment of the Portfolio Assets, each security listed on any national securities exchange shall be valued at the last quoted sale price on the valuation date on the principal exchange in which such security is traded. Any other security or asset shall be valued in a manner determined in good faith by WA to reflect its fair market value. If the account is opened after the start of a calendar quarter, the initial fee will be prorated from acceptance by WA through the end of the quarter. Notwithstanding the foregoing, for clients who request to have their fee calculated and determined by their Custodian, it is agreed that the fee will be calculated in the manner agreed upon with such Custodian. WA agrees to send a copy of the fee computation and billing, at least quarterly, to both Client and Custodian as required. In addition, Client will receive a portfolio appraisal as set forth in Paragraph 3. The fee schedule set forth in Exhibit B may be amended from time to time by WA upon thirty (30) days written notice to Client. If Client does not notify WA of termination within thirty (30) days of such notice, this Agreement will continue in effect under the terms and conditions as set forth herein with the revised fee schedule.

b. **Fee Billing Option.**

A) Client may authorize WA to invoice the Custodian for its fees, and Client may authorize the Custodian to pay such fees to WA directly from Client's account. WA will send a copy of its bill to Client prior to or at the time the original is sent to the Custodian.

B) Client may authorize WA to invoice Client directly for the payment of WA fees. Any such payment will be made by Client to WA by separate check and will not be deducted from amounts held in Clients account.

c. **Proxy Voting Option.**

WA is authorized to vote all proxies on behalf of the Portfolio Assets. Client will instruct the Custodian to forward all proxy materials to WA or its agent so that it may vote them accordingly. WA will report to Client at such time and in such manner as Client may reasonably request with respect to all proxy voting responsibilities exercised by WA for Client's account. Client may revoke WA's authority to vote proxies by notifying WA in writing of the revocation of the delegation of proxy voting authority.

[Please note that accounts subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, which choose this option must provide to WA a copy of Plan Documents showing that the right to *vote proxies has been reserved to the trustees or other fiduciaries.*]

5. **Discretionary Authority**. WA shall have designated full power and authority to make all investment decisions on a discretionary basis for Portfolio Assets, including decisions to buy and sell any domestic or foreign security, except to the extent Client provides written instructions limiting such authority. Although WA may make investment decisions without prior consultation with or further consent from Client, all such investment decisions shall be made in accordance with the

investment objectives of which Client has informed, and may inform, WA from time to time in writing. Client appoints WA as agent and attorney-in-fact to, and expressly authorizes WA in making its investment decisions to: a) make, order, and direct any and all transactions involving designated Portfolio Assets in Client's name and for Client's account and b) sell, convert, or exchange securities comprising part or all of the Portfolio Assets, to otherwise acquire and dispose of such securities; provided, however that nothing herein shall be construed to authorize WA to take custody or possession of any funds, securities or other property of which Client has any beneficial interest in any manner whatsoever. All transactions in Portfolio Assets will be done at WA's sole discretion and without obligation to first notify or consult with Client. Client agrees that WA will not advise or act for client in any legal proceedings, including bankruptcies or class actions, involving securities held or previously held as Portfolio Assets or the issuers of these securities.

6. **Representations of WA.** WA represents that it is registered with the Securities and Exchange Commission as an Investment Adviser under the Investment Advisers Act of 1940, as amended, and that such registration is currently in effect. If the Portfolio Assets are subject to ERISA, WA also acknowledges that it is a fiduciary as that term is defined in ERISA, with respect to the Portfolio Assets. In accordance with sections 405(b)(1), 405(c)(2) and 405(d) of ERISA, the fiduciary responsibilities of WA and any partner, employee or agent of WA shall be limited to his, her or its duties in managing the Portfolio Assets, and WA shall not be responsible for any other duties with respect to Client (specifically including evaluating the initial or continued appropriateness of Client's retention of WA or the diversification standard under section 404(a)(1) of ERISA).

7. **Representations of Client.** Client confirms that it has full power and authority to enter into this Agreement, that the employment of WA is authorized by its governing document relating to the Portfolio Assets and that the terms hereof do not violate any obligation by which Client is bound whether arising by contract, operation of law, or otherwise, and that: a) this contract has been duly authorized by appropriate action and is binding upon Client in accordance with its terms; and b) Client will deliver to WA such evidence of such authority as it may reasonably require, whether by way of a certified resolution, trust agreement, or otherwise. Client further agrees to provide WA with copies of all documents governing the Portfolio Assets. If the Portfolio Assets are subject to ERISA, Client hereby represents and confirms to WA that Client's employment of WA as the Investment Adviser to the Portfolio Assets, and any instruction Client has given to WA, is authorized by and does not violate any provision of any applicable plan or trust documents. Client hereby acknowledges that Client is a "named fiduciary" with respect to the control and management of the assets of Client's account, a trust qualified under Section 401 (a) of the Internal Revenue Code of 1986, and Client agrees to notify WA promptly of any change in the identity of the "named fiduciary" with respect to the account. In addition, in any directed brokerage transaction Client has determined, and will monitor the Portfolio Assets to assure, that the directed broker is capable of providing best execution for the account's brokerage transactions and that the commission rates that have been negotiated are reasonable in relation to the value of the brokerage and other services received.

8. **Liability.** WA does not guarantee the future performance of the Portfolio Assets, any specific level of the performance, or the success of any investment decision or strategy. Client understands that the investment decisions made by WA are subject to various market, currency, economic and business risks and those decisions will not always be profitable. Except as may otherwise by provided by law, WA will not be liable to Client for: a) any loss Client may suffer by reason of any investment decision made or other action taken or omitted in good faith by WA with the degree of skill, care, prudence or diligence under the circumstances that a prudent person acting in a like capacity would use; b) any loss arising from WA's adherence to the Client's instructions; c) any act or failure to act by the Custodian, any broker or dealer to which WA directs transactions for the Portfolio Assets or by any other third party; or d) its failure to purchase or sell any security on the basis of information known to any principal or employee of WA where the utilization of such information might constitute a violation of any federal or state laws, rules or regulations or a breach of any fiduciary or confidential relationship between any principal or employee of WA and any other person or persons. Federal and various state securities laws impose liability under certain circumstances on persons who act in good faith and therefore nothing in this Agreement shall waive or limit any rights, which Client may have under those laws.

9. ***Confidentiality.*** All information and advice furnished by either party to the other shall be treated as confidential information and shall not be disclosed to third parties except as required by law or with consent.

10. **Service to Other Clients.** WA acts as adviser to other clients and may give advice and take action with respect to such other clients' accounts which may differ from the action taken by WA with respect to the Portfolio Assets. WA agrees to act in a manner consistent with its fiduciary obligations to deal fairly with all clients when taking investment actions. WA shall have no obligation to purchase, sell or recommend for the Portfolio Assets any security which may be purchased or sold by WA, its principals, affiliates, employees or for the accounts of any other client. Client recognizes that transactions in a specific security may not be accomplished for all client accounts at the same time or at the same price.

11. **Termination.** This agreement may be terminated at any time by either party giving the other written notice of termination. However, this Agreement shall continue in effect until so terminated. Termination shall be effective when a notice of termination, properly executed, is actually received. Upon termination, any fees paid in advance will be prorated to the date of termination and any excess will be refunded to Client. If this Agreement is terminated by Client within five business days of the date it is executed or accepted, such termination shall be without penalty or liability for payment of fees. If Client is an individual, this Agreement shall terminate upon the death or adjudicated incapacity of Client, but shall take effect only upon actual receipt by WA of written notice of Client's death or adjudicated incapacity. Upon notice of termination, WA shall notify Custodian to deliver all assets held pursuant to this Agreement, according to Client's written instructions.

12. **Notices.** Unless otherwise specified herein, all notices, instructions, and advice with respect to all matters contemplated by this Agreement shall be deemed duly given when received in writing at the address set forth herein. Copies of all notices affecting the Custodian shall also be directed to the Custodian at the address which Client designates. Addresses may be changed by notice to the other parties given in accordance with this paragraph. WA may rely on any notice from any person reasonably believed by WA to be genuine and to have authority to give such notice. All written notices shall be addressed to: a) WESPAC , 2001 Broadway, 2nd Floor, Oakland, California 94612; and b) Client at the address set forth in the Confidential Client Profile attached hereto.

13. **Assignability.** This Agreement may not be assigned by WA without the prior consent of the Client. This Agreement may not be assigned by Client without the prior consent of WA.

14. **Miscellaneous.** This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties with respect to the management of the Portfolio Assets, supersedes all prior agreements, and, except as otherwise provided herein, may be amended only with a written document signed by the parties. This Agreement shall be governed by the laws of the State where the agreement is governed and so executed. If any provision of this Agreement is held to be unenforceable, such unenforceability shall not affect the remainder of this Agreement. This Agreement may be signed in one or more counterparts. and when taken together shall create a valid and binding Agreement as though all signatures appeared on the same document. 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. Except as otherwise provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors. No party intends for this Agreement to benefit any third party not expressly named in this Agreement.

15. **Acknowledgment of Receipt of Form ADV Part II.** Client hereby acknowledges that Client has received and had an opportunity to read WA's Form ADV Part II as required by Rule 204-3 of the Investment Advisers Act of 1940. WA's ADV Part II contains a clear and conspicuous notice of WA's privacy policy.

16. **Arbitration. The parties waive their right to seek remedies in court, including any right to a jury trial.** The parties agree that in the event of any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio Assets, 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.) applying the laws of the State where the agreement is governed and executed. Disputes shall not be resolved in any other forum or venue. The parties agree that such arbitration shall be conducted by an arbitrator who is experienced in dispute resolution regarding the securities business, that discovery shall not be permitted except as required by the rules of JAMS, that the arbitration award shall not include factual findings or conclusions of law, and that no punitive damages shall be awarded. The parties

understand 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, and judgment may be entered on it in any court of competent jurisdiction in the county and state of the principal office of WA at the time such award is rendered, or as otherwise provided by law.

The effective date of this Agreement shall be the date of its acceptance by WA.

Agreed to this 31 day of August of the year 2005.

State: ☐ California ☒ Nevada ☐ other _____

Gregory Garmong
Client Name

Gregory Garmong
Client Signature

Client Signature

AGREED AND ACCEPTED BY INVESTMENT ADVISER: WESPAC ADVISORS, LLC

By: _____

Title: _____

Date: 8/31/05

3655
CARL M. HEBERT, ESQ.
Nevada Bar #250
202 California Avenue
Reno, NV 89509
(775) 323-5556

Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive,

DEPT. NO. : 6

Defendants.

_____/

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND TO COMPEL ARBITRATION

Plaintiff Gregory O. Garmong submits the following points and authorities in opposition to the defendants' motion to dismiss and to compel arbitration ("Motion").

INTRODUCTION

Defendant Christian is a financial advisor; his employer is defendant Wespac. The defendants solicited plaintiff to entrust a major part of his life savings to the defendants for investment management. Defendants demanded that plaintiff allow the defendants complete control over his savings, and that he not concern himself with how those savings were managed. Plaintiff, who was soon-to-be-retired and in his 60's at the time, complied with this demand. Plaintiff informed and instructed defendants that it was more important for them to conserve the capital that he entrusted to them rather than to seek large gains. He specifically instructed the defendants to act conservatively, conserve his assets, and not to lose money on his investments, even at the expense of possible gains. Defendants told the plaintiff that they would follow his instructions. Defendants then proceeded to waste a significant portion of plaintiff's assets by not properly overseeing his assets and neglecting or deliberately ignoring his instructions.

At the start of the plaintiff's relationship with the defendants, he was presented with an "Investment Management Agreement" to sign. At ¶ 16 it contained an arbitration clause, which is the subject of the defendants' motion:

> 16. **Arbitration. The parties waive their right to seek remedies in court, including any right to a jury trial.** The parties agree that in the event of any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio Assets, 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.) applying the laws of the State where the agreement is governed and executed. Disputes shall not be resolved in any other forum or venue. The parties agree that such arbitration shall be conducted by an arbitrator who is experienced in dispute resolution regarding the securities business, that discovery shall not be permitted except as required by the rules of JAMS, that the arbitration award shall not include factual findings or conclusions of law, and that no punitive damages shall be awarded. The parties understand 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, and judgment may be entered on it in any court of competent jurisdiction in the county and state of the principal office of WA [Wespac Advisors, LLC] at the time such award is rendered, or as otherwise provided by law.

Investment Management Agreement, Exhibit 1 to motion to dismiss and to compel arbitration.

Through the present motion the defendants now seek to enforce this one-sided and oppressive arbitration clause to the detriment of the plaintiff. The motion has two parts, a motion to dismiss and a motion to compel arbitration. Plaintiff opposes both parts. They will be addressed in order.

1.

MOTION TO DISMISS

The motion to dismiss is based upon NRS 38.221. NRS 38.221(7) provides that "if the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim." (emphasis added). That is, the Court has no jurisdiction to dismiss the current lawsuit if it orders arbitration. Instead, it may only stay the lawsuit, not dismiss the action as requested. On the other hand, if there is no basis to compel arbitration, there is no basis for staying or dismissing the present action on this ground.

Accordingly, even if the Court finds that arbitration is proper, it has jurisdiction only to stay the present case, not dismiss it as requested in the motion.

2.

MOTION TO COMPEL ARBITRATION

NRS 38.221(3) provides: "If the court finds that there is no enforceable agreement, it may not, subject to subsections 1 or 2, order the parties to arbitrate."

The second part of the defendants' motion, the motion to compel arbitration, is premised upon the enforceability of ¶ 16 of the Investment Management Agreement referenced above. Paragraph 16 does not set forth an "enforceable arbitration agreement" for the reasons stated in the following subsections. Each of these subsections, standing alone, is a sufficient reason for the Court to deny the motion to compel arbitration pursuant to NRS 38.221(3).

A. Refusal to arbitrate. NRS 38.221(1) requires the party moving to compel arbitration to allege that the other party refuses to arbitrate. Absent such an allegation, the Court has no jurisdiction to grant the requested relief.

NRS 38.221(1) provides, "On a motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement[.]" (emphasis added). This is a precondition to arbitration which the defendants have not met. The present motion makes no such allegation. There is no answer on file stating alleging such a fact. Consequently, there is nothing in the record alleging that plaintiff refuses to arbitrate.

Accordingly, the Court has no jurisdiction to consider and grant the relief sought.

B. Procedural and substantive unconscionability. The arbitration agreement is both procedurally and substantively unconscionable and should not be enforced.

As quoted above, 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. The Nevada Supreme 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 stated:

> 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 homebuyers 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 Exhibit 1 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.

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 the Investment Management Agreement, Exhibit 1, evidently contained many more pages than presented in Exhibit 1, because it is numbered pages 12-18 and the other pages are not disclosed. Moreover, they are two different exhibits "A" and two different exhibits "B" and a "Confidential Client Profile" not disclosed. Declaration of Gregory Garmong, Exhibit 1 to this opposition, at ¶ 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 defendants, and the plaintiff had no opportunity to fairly bargain on the terms. See Garmong declaration, ¶ ¶ 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 similarly does not give notice that plaintiff 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 are paid in advance. Plaintiff did not receive any notice that he was waiving such important rights. Garmong declaration, ¶ 5. Plaintiff did not have legal counsel when he signed the agreement, Garmong declaration, ¶ 1, nor was he given a copy of the agreement to read outside of the offices of defendants and take to an attorney for advice, Garmong declaration, ¶ 2. The agreement was not complete. Garmong declaration ¶ 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 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')[.]" Plaintiff was not supplied a copy of these rules, either at the time of signing or later by defendants. Garmong declaration, ¶ 4. As a consequence, plaintiff 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 the plaintiff received the JAMS rules at the time the Investment Management Agreement was presented to him, he would not have signed the agreement. Garmong declaration ¶ 4.

Another basis for procedural unconscionability is the absolute lack of clarity on

govening 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 agreement? Paragraph. 14 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 agreement is both "governed" and also "so executed." This is completely circular language; it did nothing to allow the plaintiff 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 agreement must be sent to the Wespac Oakland, CA office, ¶ 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." ¶ 16. Of course, the location of the "principal office" of Wespac Advisors is nowhere stated in the agreement.

Paragraph 16 thus meets the criteria of the Nevada Supreme 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 defendants immunized themselves from any consequences for intentionally injuring or oppressing the plaintiff or consciously disregard- ing his rights. *See* 42.005(1). In so many words, ¶16 permits the defendants 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 plaintiff's statutory right, 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 plaintiff's statutory right to punitive damages and right to appeal found in ¶ 16 also renders the 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, the plaintiff 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, the plaintiff was not furnished a copy of the "rules of the Judicial Arbitration and Mediation Service", as referenced in ¶ 16, at the time of signing or at any time by defendants Garmong declaration, ¶ ¶ 4 and 6. If the plaintiff had been provided the rules he would not have signed the Investment Management Agreement. Garmong declaration ¶ 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 the Plaintiff 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 Plaintiff to breach the agreement. Plaintiff's primary obligation was to pay a fee to the

defendants. See ¶ 4(b) of the Investment Management Agreement. Defendants arranged for their management fee to be deducted automatically from plaintiff's accounts. Garmong Declaration, ¶ 7. Consequently, there was substantially no way for plaintiff to breach the terms. On the other hand, the defendants 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 defendants orally and in writing. Thus, by the defendants' 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 defendants, 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," Exhibit 2 to this opposition, and "Streamlined Arbitration Rules and Procedures." Exhibit 3. Garmong declaration ¶ 3. 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 rules makes that set of rules a part of the arbitration agreement. Yet no set of these rules was provided to Plaintiff. Garmong declaration ¶ 4. Even had they been presented to the plaintiff, he would not have known which to apply to any possible future arbitration proceeding. Lack of notice of governing rules makes the arbitration agreement substantively unconscionable. *See* Gonski, 245 P.3d at 1171.

Illusory discovery rules. Paragraph 16 of the agreement states that "discovery shall not be permitted except as *required* by the rules of JAMS[.]" (Emphasis added). The JAMS Comprehensive Rules and the JAMS Streamlined Rules 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 plaintiff who needs the discovery; the majority of the evidence of the defendants' wrongdoing is in their hands. This makes the plaintiff's need for real discovery all the more compelling. The denial of any discovery is completely oppressive to the plaintiff, 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 Plaintiff'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 plaintiff has demonstrated both the procedural unconscionability 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.

3.

THE INVESTMENT MANAGEMENT AGREEMENT AS PRESENTED IN EXHIBIT 1 TO THE MOTION TO COMPEL ARBITRATION IS INCOMPLETE

The Affidavit of defendant Greg Christian, attached to the motion, states in ¶ 2: "Attached hereto is a true, correct, and complete copy of the Alleged Agreement signed by me and Gregory Garmong. (See Exhibit 1)." Exhibit 1 to the motion, as referenced by the affidavit of Greg Christian, is incomplete, as may be seen by inspecting the document. In the lower-right-hand corner of each page is a number that appears to be part of the original document (not a Bates or similar number). The numbering starts with "Page 12"

and ends with "Page 18." There is no explanation for missing pages 1-11 of the agreement or what they contain or if there are additional pages after "Page 18." There is no explanation that the two exhibits "A," the two exhibits "B" and the Confidential Client Profile are missing. The Defendants never furnished plaintiff with a complete copy of the agreement, Garmong Declaration ¶ 3, at the time of signing, thereafter, or in Exhibit 1. The Court and plaintiff cannot know what has been edited out.

As a matter of fundamental equity, a party may not submit and rely solely upon an incomplete document to support its motion, leaving the Court and the opposing party in the dark as to what is found in the remainder of the document that may be pertinent. This is particularly true where procedural unconscionability may be based upon a finding that the agreement was presented in a "stack of other papers." Gonski, 245 P.3d at 1170. Here the defendants submit only part of the agreement as Exhibit 1 to make it appear that there was not a "stack of other papers."

4.

A DISPUTE IS A PRECONDITION TO ARBITRATION

Paragraph 16 states that "The parties agree that in the event of any dispute between the parties ... such dispute shall be resolved exclusively by arbitration." (Emphasis added). Plaintiff filed a complaint making certain allegations. Defendants have not answered the complaint nor have they explained in the motion what they claim is in "dispute." Accordingly, it is not possible to know if the defendants "dispute" any of the allegations of the complaint. Absent a showing of a "dispute," ¶ 16 of the agreement has no basis for operation.

This point is not inconsequential. NRS 38.221(7) requires that the Court determine whether some claims are disputed and others are not, and permit arbitration in appropriate circumstances only on the disputed claims. In this case, the Court lacks the information to make that determination because the motion has not specified which claims for relief of the Complaint are "disputed," if any.

5.

AS THE PARTY BREACHING THE CONTRACT, THE DEFENDANTS MAY NOT ENFORCE IT, INCLUDING THE ARBITRATION PROVISION.

The defendants breached the Investment Management Agreement. Plaintiff repudiated his further obligations under the agreement and sued on the breach. The defendants have not alleged that plaintiff ever breached the agreement.

A fundamental principle of contract law is that when one party to a contract breaches the contract, the nonbreaching party either may (1) continue his own performance and seek a remedy or (2) may repudiate any further obligations under the contract and sue for damages resulting from the breach. When the nonbreaching party follows this course of action, the nonbreaching party may not be held to any further obligations under the contract.

Plaintiff has elected the second course of action in respect to the agreement. Generally, the party guilty of the first breach of a contract is not entitled to enforce the contract, and he or she cannot claim the benefits arising from the contract. Following this principle, the court in Torke v. Federal Deposit Ins. Corp., 761 F.Supp. 754, 757 (D.Colo. 1991), held "A party to a contract cannot claim its benefits where he is the first to violate its terms," *Accord,* Smith-Scharff Paper Co., Inc. v. Blum, 813 S.W.2d 27 (Mo. App. 1991). Therefore, the defendants may not force plaintiff to adhere to further asserted obligations under the agreement. Specifically, the defendants may not force plaintiff to adhere to ¶ 16 requiring arbitration. To hold otherwise is tantamount to a decision in the defendants' favor on the merits, namely that the defendants did not first breach the agreement. In view of the fact that the defendants have not denied the allegations of the complaint, such a holding would be improper.

6.

THE PLAINTIFF IS WILLING TO MEDIATE

Plaintiff opposes forced mandatory arbitration pursuant to the unconscionable ¶ 16 of the Management Agreement. However, the plaintiff is certainly willing to engage in

good faith, nonbinding mediation. See WDCR. 6(2).

CONCLUSION

For the reasons stated above, the plaintiff respectfully requests that this Court deny the defendants' motion to dismiss and compel arbitration.

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

DATED this 29th day of October, 2012.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.
Nevada State Bar #250
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Reno, NV 89509
775-323-5556
carl@cmhebertlaw.com

Counsel for plaintiff

INDEX OF EXHIBITS

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EXHIBIT 1

EXHIBIT 1

DECLARATION OF GREGORY GARMONG

I, Gregory Garmong, declare the following facts to be true and correct, of my own personal knowledge:

1. At the time I signed the Wespac Investment Management Agreement ("Agreement"), a portion of which is Exhibit 1 to the Motion to Dismiss and to Compel Arbitration ("Motion"), I did not have legal counsel regarding the Agreement. I was given this document to sign at the office of Wespac in Reno. I was not given an opportunity to take it away and study it or obtain legal counsel to review it. Exhibit 1 was prepared entirely by the Defendants, who upon information and belief had the benefit of legal counsel. If I had had the opportunity to review the Agreement with legal counsel prior to or at the time of signing the Agreement, in light of what I have now learned, I would not have signed the Agreement.

2. I never received even a partial copy of the Agreement for my own use until it was sent to me as Exhibit 1 to the Motion brought by the defendants. I have never received a complete copy of the Agreement including all its incorporated parts and exhibits.

3. Exhibit 1 to the Motion is represented by the Affidavit of Greg Christian to be a "true, correct, and complete copy of the Agreement." The pages of Exhibit 1 have page numbers in the lower right hand corners, which start with "Page 12" and are consecutively numbered to "Page 18." I was never furnished by Wespac with a complete copy of this Agreement. I do not know what is contained on the missing pages 1-11.

I do not know with certainty if there are additional pages to the Agreement after "Page 18." However, upon information and belief, I believe that there should be included an Exhibit A, because ¶ 2 on Page 12 of the Agreement expressly references an "Exhibit A"; and I believe that there should be an Exhibit B, because ¶ 3(3) on page 13 of the Agreement expressly references an "Exhibit B." These Exhibits A and B are not included in Exhibit 1 to the Motion.

Further, in ¶ 3(4)(a) on pages 13-14 of the Agreement, there are referenced a different "Exhibit A" and a different "Exhibit B." That is, the Agreement references two different Exhibits A, and two different Exhibits B. The other Exhibits A and B are not included in Exhibit 1. To the best of my knowledge,

Wespac did not furnish me with either of the two Exhibits A or either of the two Exhibits B at the time I signed the Agreement, or thereafter, nor are they part of Exhibit 1 attached to the present Motion.

Paragraph 12 of the Agreement refers to a "Confidential Client Profile attached hereto." This document is not included in Exhibit 1.

Paragraph 14 of the Agreement refers to "Confidential Client Profile and all exhibits attached hereto." There is no Confidential Client Profile or exhibits attached to Exhibit 1 furnished with the Motion.

4. I was never furnished by Defendants, and did not have at the time I signed the Agreement, a copy of the "rules of the Judicial Arbitration and Mediation Service ('JAMS',)" referenced in ¶ 16 of the Motion. I never had any JAMS rules until I downloaded them from the JAMS site on the internet on October 24, 2012. When I visited the JAMS site for the first time on October 24, 2012, I learned that there are really two different sets of JAMS rules: JAMS Comprehensive Arbitration Rules & Procedures, and JAMS Streamlined Arbitration Rules & Procedures. True, correct, and complete copies of these two sets of JAMS rules as I downloaded them from the JAMS web site are attached to the Opposition as Exhibits 2 and 3, respectively. I did not know at the time of signing of the Agreement, and I do not know today, which of the two sets of JAMS rules is intended to be referenced in ¶ 16 of the Motion as governing any arbitration. If I had known at the time of signing that there were two different JAMS sets of rules, and that the Agreement did not identify which set of JAMS rules was applicable, I would not have signed the Agreement until there was a specific statement in ¶ 16 as to which set of rules was referenced in ¶ 16.

5. I was not informed by Greg Christian or Wespac, or by the terms of the Agreement itself, that by signing the Agreement I would be foregoing or waiving important rights under Nevada law.

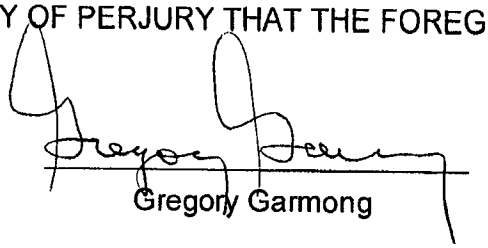
6. Rule 31 of JAMS Comprehensive Arbitration Rules & Procedures governs Fees. I had no knowledge of these fee provisions or any other provisions of the JAMS rules when I signed the Agreement, inasmuch as I was not furnished a copy of JAMS rules governing the arbitration at that time or at any time by the Defendants. If I had been furnished a copy of the fee provisions contained in either of the sets of JAMS rules, I would not have signed the Agreement because of at least the fee provisions.

7. The Defendants arranged for their fees to be deducted automatically from my accounts.

8. The Agreement was prepared by the Defendants. There was no fair negotiation of the terms of the Agreement, because of at least the following reasons: (1) The Defendants had the JAMS rules, and I did not; (2) the Defendants did not provide me with a complete copy of the Agreement at any time, and (3) I had no opportunity to have the Agreement examined by legal counsel before signing the Agreement.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

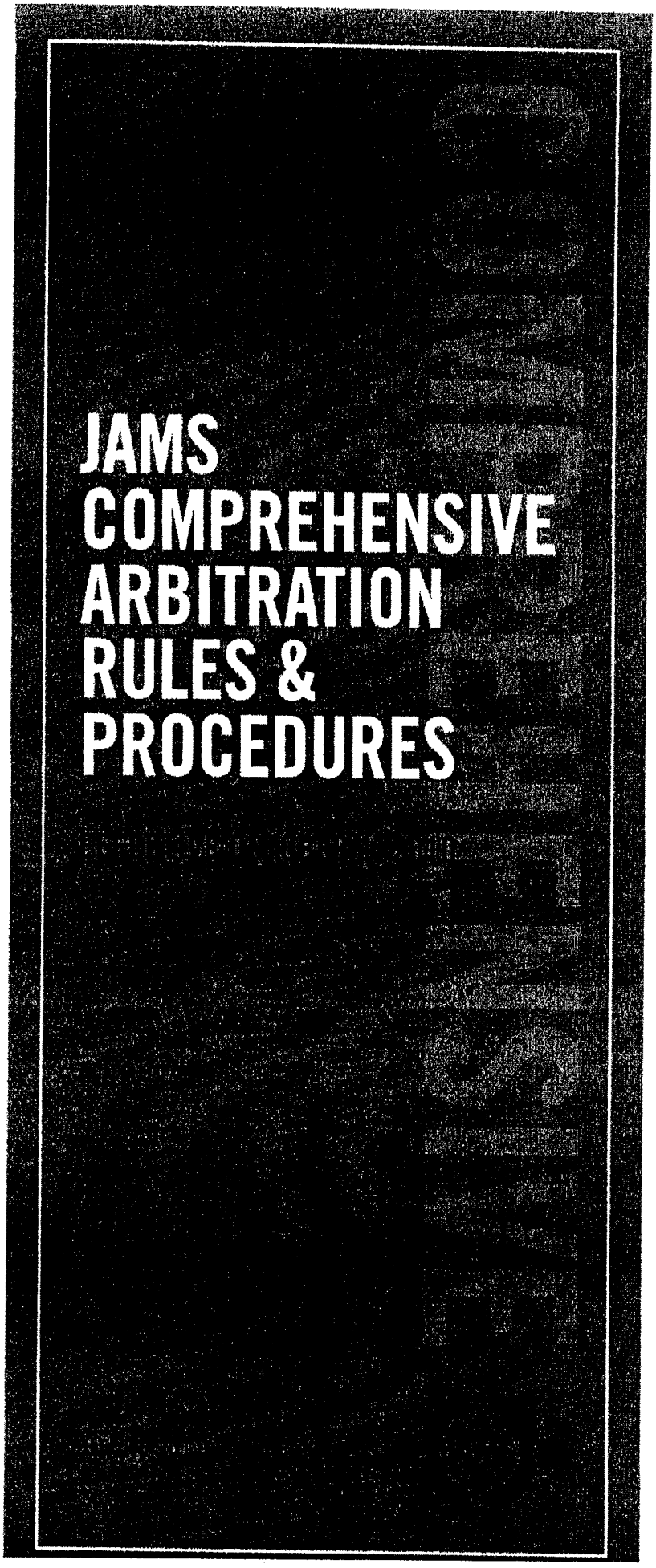
Executed at Reno, NV
on October 29, 2012



Gregory Garmong

EXHIBIT 2

EXHIBIT 2

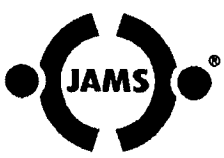

JAMS
COMPREHENSIVE
ARBITRATION
RULES &
PROCEDURES

JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES

JAMS provides arbitration and mediation services from Resolution Centers located throughout the United States. Its arbitrators and mediators hear and resolve some of the nation's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained and experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Parties wishing to write a pre-dispute JAMS arbitration clause into their agreement should review the sample arbitration clauses on Page 4. These clauses may be modified to tailor the arbitration process to meet the parties' individual needs.

THE RESOLUTION EXPERTS 

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Standard Arbitration Clauses Referring to the JAMS Comprehensive Arbitration Rules

JAMS Comprehensive Arbitration Rules & Procedures

STANDARD ARBITRATION CLAUSES REFERRING TO THE JAMS COMPREHENSIVE ARBITRATION RULES

Standard Commercial Arbitration Clause*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules & Procedures (Streamlined Arbitration Rules & Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

(Optional) Expedited Procedures: The parties agree that the Expedited Procedures set forth in JAMS Comprehensive Rules 16.1 and 16.2 shall be employed.

Sometimes contracting parties may want their agreement to allow a choice of provider organizations (JAMS being one) that can be used if a dispute arises. The following clause permits a choice between JAMS or another provider organization at the option of the first party to file the arbitration.

Standard Commercial Arbitration Clause Naming JAMS or Another Provider*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). At the option of the first to commence an arbitration, the arbitration shall be administered either by JAMS pursuant to its (Comprehensive Arbitration Rules & Procedures) (Streamlined Arbitration Rules & Procedures), or by (name an alternate provider) pursuant to its (identify the rules that will govern). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

(Optional) Expedited Procedures: The parties agree that the Expedited Procedures set forth in JAMS Comprehensive Rules 16.1 and 16.2 shall be employed.

*The drafter should select the desired option from those provided in the parentheses.

CASE MANAGEMENT FEES

JAMS charges a nominal Case Management Fee. For arbitrations the Case Management Fee is:

HEARING LENGTH	FEE
1 to 3 days	$400 per party, per day
(1 day is defined as 10 hours of professional time)	
Time in excess of initial 30 hours	10% of professional fees

JAMS neutrals set their own hourly, partial and full-day rates. For information on individual neutrals' rates and the Case Management Fee, please contact JAMS at 800-352-JAMS. The Case Management Fee structure is subject to change.

OPTIONAL EXPEDITED PROCEDURES

For matters where the parties intend to use the Comprehensive Rules and Procedures, JAMS Optional Expedited Procedures, set forth in Rules 16.1 and 16.2, are designed to ensure a swift resolution. If followed, an arbitration could be completed within 150 days of the Preliminary Conference.

STREAMLINED RULES

JAMS provides clients with the option to select a simplified arbitration process for those cases where the claims and counterclaims are below $250,000. JAMS Streamlined Arbitration Rules & Procedures are designed to minimize the arbitration costs associated with these cases while providing a full and fair hearing for all parties.

All of the JAMS Rules, including the Comprehensive Arbitration Rules set forth below, can be accessed at the JAMS website: www.jamsadr.com.

JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES

NOTICE: These Rules are the copyrighted property of JAMS. They cannot be copied, reprinted or used in any way without permission of JAMS, unless they are being used by the parties to an arbitration as the rules for that arbitration. If they are being used as the rules for an arbitration, proper attribution must be given to JAMS. If you wish to obtain permission to use our copyrighted materials, please contact JAMS at 949-224-1810.

Rule 1. Scope of Rules

(a) The JAMS Comprehensive Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, any disputed claim or counterclaim that exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS are prescribed in the Agreement of the Parties and in these Rules, and may be carried out through such representatives as it may direct.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a Party, attorney or representative under these Rules.

Rule 2. Party-Agreed Procedures

The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 15(i), 30 and 31). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed on by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS confirms in a Commencement Letter its receipt of one of the following:

(i) A post-dispute Arbitration agreement fully executed by all Parties and that specifies JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and that specifies JAMS administration or use of any JAMS Rules or that the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules; or

(iv) A copy of a court order compelling Arbitration at JAMS.

(b) The Commencement Letter shall confirm which one of the above requirements for commencement has been met, that JAMS has received all payments required under the applicable fee schedule, and that the claimant has provided JAMS with contact information for all Parties along with evidence that the Demand has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate and, pursuant to Rule 22(j), the Arbitrator, once appointed, shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter, but is not intended to be applicable to any legal requirements such as the statute of limitations, any contractual limitations period, or claims notice requirements. The term "commencement" as used in this Rule is intended only to pertain to the operation of this and other rules (such as Rules 3, 9(a), 9(c), 13(a), 17(a) and 31(a)).

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing such factors as the subject matter of the dispute, the convenience of the Parties and witnesses and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within 30 calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for 30 calendar days following the conclusion of the Arbitration.

(e) Unless the Parties' agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming Parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances the Arbitrator deems relevant and applicable.

Rule 7. Number of Arbitrators and Appointment of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator unless all Parties agree otherwise. In these Rules, the term "Arbitrator" shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator the Parties shall agree on, or in the absence of agreement JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party unless the Parties have agreed that they shall be non-neutral.

Rule 8. Service

(a) The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

(b) Every document filed with JAMS Electronic Filing System shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address, telephone number and Bar number of a signing attorney. Documents containing

signatures of third parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper format.

(c) Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the Party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the Party initiating e-service and that Certificate shall serve as proof of service. Any Party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

(d) If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party that was unknown to the sending Party; (2) a failure to process the electronic document when received by JAMS Electronic Filing System; (3) the Party being erroneously excluded from the service list; or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may for good cause shown permit the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document. Service by electronic mail or facsimile transmission is considered effective upon transmission, but only if followed within one week of delivery by service of an appropriate number of copies and originals by one of the other service methods.

(f) In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period.

Rule 9. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Within fourteen (14) calendar days after the commencement of an Arbitration, Claimant shall submit to JAMS and serve on the other Parties a notice of its claim and remedies sought. Such notice shall consist of either a Demand for Arbitration or a copy of a Complaint previously filed with a court. (In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.)

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) or counterclaims it may have.

(d) Within fourteen (14) calendar days of service of a counterclaim, a claimant may submit to JAMS and serve on other Parties a response to such counterclaim and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

Rule 10. Changes of Claims

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted except with the Arbitrator's approval. A Party may request a Hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(d).

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Whenever in these Rules a matter is to be determined by JAMS (such as in Rules 6; 11(d); 15(d), (f) or (g); and 31(d)), such determination shall be made in accordance with JAMS administrative procedures.

(c) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(d) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(e) The Arbitrator may upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may be altered only in accordance with Rules 22(i) or 24.

Rule 12. Representation

(a) The Parties may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone and fax numbers and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

Rule 13. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and on the Arbitrator. However, the opposing Parties may, within fourteen (14) calendar days of service of notice of the withdrawal of the claim or counterclaim, request that the Arbitrator order that the withdrawal be with prejudice. If such a request is made, it shall be determined by the Arbitrator.

Rule 14. *Ex Parte* Communications

(a) No Party may have any *ex parte* communication with a neutral Arbitrator jointly selected by the Parties. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written correspondence as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have *ex parte* communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts, as well as in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive *ex parte* communication between a Party and a non-neutral

Arbitrator. More extensive communications with a non-neutral arbitrator may also be permitted by applicable law and rules of ethics.

Rule 15. Arbitrator Selection and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. The obligation of the Arbitrator to make all required disclosures continues throughout the Arbitration process. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties who may respond within seven (7) calendar days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the Party who did not appoint that Arbitrator.

Rule 16. Preliminary Conference

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:

(a) The exchange of information in accordance with Rule 17 or otherwise;

(b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;

(c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;

(d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;

(e) The attendance of witnesses as contemplated by Rule 21;

(f) The scheduling of any dispositive motion pursuant to Rule 18;

(g) The premarking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits;

(h) The form of the Award; and

(i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

Rule 16.1 Application of Expedited Procedures

(a) If these Expedited Procedures are referenced in the Parties' agreement to arbitrate or are later agreed to by all Parties, they shall be applied by the Arbitrator.

(b) If the Claimant opts in to the Expedited Procedures in the Demand for Arbitration, the Respondent shall indicate within seven (7) calendar days of notice thereof whether it agrees to the Expedited Procedures.

(c) If the Respondent declines to agree to the Expedited Procedures, each Party shall have a client or client representative present at the first Preliminary Conference (which should, if feasible, be an in-person conference) unless excused by the Arbitrator for good cause.

Rule 16.2 Where Expedited Procedures Are Applicable

(a) The Arbitrator shall require compliance with Rule 17(a) prior to conducting the first Preliminary Conference. Each Party shall confirm in writing to the Arbitrator that it has so complied or shall indicate any limitations on full compliance and the reasons therefor.

(b) Document requests shall (1) be limited to documents that are directly relevant to the matters in dispute or to its outcome; (2) be reasonably restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and (3) not include broad phraseology such as "all documents directly or indirectly related to." The Requests shall not be encumbered with extensive "definitions" or "instructions." The Arbitrator may edit or limit the number of requests.

(c) E-Discovery shall be limited as follows:

(i) There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the requesting Party and convenient and economical for the producing Party. Absent a showing of compelling need, the Parties need not produce metadata, with the exception of header fields for email correspondence.

(iii) The description of custodians from whom electronic documents may be collected should be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the Arbitrator may either deny such requests or order disclosure on the condition that the requesting Party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

(v) The Arbitrator may vary these rules after discussion with the Parties at the Preliminary Conference.

(d) Depositions of percipient witnesses shall be limited as follows:

(i) The limitation of one discovery deposition per side (Rule 17(b)) shall be applied by the Arbitrator unless it is determined, based on all relevant circumstances, that more depositions are warranted. The Arbitrator shall consider the amount in controversy, the complexity of the factual issues, the number of Parties and the diversity of their interests and whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

(ii) The Arbitrator shall also consider the additional factors listed in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases.

(e) Expert Depositions, if any, shall be limited as follows: Where written expert reports are produced to the other side in advance of the Hearing (Rule 17(a)), expert depositions may be conducted only by agreement of the Parties or by order of the Arbitrator for good cause shown.

(f) Discovery disputes shall be resolved on an expedited basis.

(i) Where there is a panel of three arbitrators, the Parties are encouraged to agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.

(ii) Lengthy briefs on discovery matters should be avoided. In most cases, the submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.

(iii) The Parties should meet and confer in good faith prior to presenting any issues for the arbitrator's decision.

(iv) If disputes exist with respect to some issues, that should not delay the Parties' discovery on remaining issues.

(g) The Arbitrator shall set a discovery cutoff not to exceed 75 calendar days after the Preliminary Conference for percipient discovery and not to exceed 105 calendar days for expert discovery (if any). These dates may be extended by the Arbitrator for good cause shown.

(h) Dispositive motions (Rule 18) shall not be permitted, except as set forth in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases or unless the Parties agree to that procedure.

(i) The hearing shall commence within 60 calendar days after the cutoff for percipient discovery. Consecutive hearing days shall be established unless otherwise agreed by the Parties or ordered by the Arbitrator. These dates may be extended by the Arbitrator for good cause shown.

(j) The Arbitrator may alter any of these Procedures for good cause.

Rule 17. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

Rule 18. Summary Disposition of a Claim or Issue

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.

Rule 19. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

Rule 20. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; (3) any written expert reports that may be introduced at the Arbitration Hearing; and (4) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other a copy of any such exhibits to the extent that it has not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit concise written statements of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 21. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 22. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise in the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as the Arbitrator deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Hearing, or any portion thereof, may be conducted telephonically with the agreement of the Parties or in the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date agreed upon by the Arbitrator and the Parties in order to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, re-open the Hearing. If the Hearing is re-opened and the re-opening prevents the rendering of the Award within the time limits specified by these Rules, the time limits will be extended until the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to an Optional Arbitration Appeal Procedure (Rule 34), they shall ensure that a stenographic or other record is made of the Hearing and shall share the cost of that record.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 23. Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 24. Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing as defined in Rule 22(h) or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that the Arbitrator deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties' agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(h) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of the Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31(c)), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate correction to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after the Arbitrator's proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either an Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service is deemed effective if no request for a

correction is made, or as of the effective date of service of a corrected Award.

Rule 25. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 *et seq.* or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 26. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 27. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service of the Arbitrator.

Rule 28. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 29. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 30. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside Parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

Rule 31. Fees

(a) Each Party shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses. JAMS' agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its *pro rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

Rule 32. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 33. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and

provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide a copy of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals, and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

Rule 34. Optional Arbitration Appeal Procedure

At any time before the Award becomes final pursuant to Rule 24, the Parties may agree to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.