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THE SUPREME COURT OF THE STATE OF NEVADA

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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; AND GREG T CHRISTIAN, Real Parties in Interest.	**Supreme Court No. 65899** **District Court Case No. CV12-01271**

ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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I. History of the Case

In or about July 2005, Petitioner Gregory Garmong, a patent attorney, met with Real Party in Interest Greg Christian, who was then an investment advisor at Real Party in Interest Wespac Advisors, LLC, to discuss the possibility of Garmong becoming a client. (App. at 99 ¶2). During that meeting, Garmong was given a copy of Wespac's "Investment Management Agreement" ("Agreement"). (App. at 99 ¶3). 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.**" (App. at 27 ¶16). Garmong took this copy of the Agreement with him when he left the meeting. (App. at 99 ¶3). When Garmong returned to Wespac with his copy of the Agreement, every page of the Agreement bore notes, underlinings, or other handwritten marks. (App. at 102-109). At that time, Mr. Garmong requested that Mr. Christian make various changes to the Agreement, and Mr. Christian agreed to do so. (App. at 99 ¶4).

When Mr. Garmong presented the second draft of the Agreement, there were again handwritten notes and marks on nearly every page of the Agreement, and Mr. Garmong requested that further changes be made to the Agreement. (App. at 111-118 and App. at 99 ¶4). Mr. Christian agreed to do so and subsequently incorporated them into the final draft of the Agreement. (App. at 99 ¶4). 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." (App. at 99 ¶4).

On or about August 31, 2005 Garmong, and Defendant Wespac entered into an "Investment Management Agreement" whereby Garmong retained Wespac as his investment advisor. (App. at 22- 28).

At approximately the end of 2008, Garmong terminated the services of Wespac. (App. at 3 ¶10)

Over three years later, on May 9, 2012, Gregory Garmong filed a *pro se Complaint* with the District Court. In his *Complaint*, Mr. Garmong alleged that Defendants had breached the "Investment Management Agreement." (App. at 4 ¶¶11-14). He 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. (App. at 4-7) . In his prayer, Plaintiff sought general and special damages, punitive damages, and attorney's fees and costs. (App. at 7-9).

In response to the *Complaint*, 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. (App. at 12-13).

On September 19, 2012, Mr. Garmong, represented by attorney Carl Hebert, filed *Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration.* (App. at 29-42). In his *Opposition*, Mr. 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. (App. at 41-42).

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("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."). *Id.*

On December 3, 2012, Defendants below filed a *Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration.* (App. at 84-95).

On December 13, 2012 the District Court filed an *Order* granting Defendants' motion to compel arbitration and denying Defendants' motion to dismiss. (App. at 121). In its *Order*, the Court stated that it "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." The Court further ordered the parties to "engage in binding arbitration in conformance with the arbitration agreement entered into by the parties." *Id.*

On December 31, 2012, Mr. Garmong filed *Combined Motions For Leave To Rehear And For Rehearing Of The Order Of December 13, 2012 Compelling Arbitration.* (App. at 123-133). Defendants filed an *Opposition* to Mr.Garmong's *Combined Motions* on January 9, 2013. (App. at 134-142). Over a year later, on February 3, 2014, Mr. Garmong filed a *Reply*. (App. at 160-191). On April 2, 2014, the District Court filed an *Order* denying Mr. Garmong's *Combined Motions*. (App. at 201-203). In it's *Order*, the Court restated both parties arguments, including Wespac's claim that the refusal requirement of NRS 38.221(1) had been met when Mr. Garmong filed a complaint seeking damages and when he subsequently opposed Wespac's motion to compel arbitration. *Id.*

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Thereafter, on July 18, 2014, Defendants were served with Gregory Garmong's *Petition For A Writ of Mandamus Or Prohibition* and directed to serve and file an answer within 30 days.

II. Standard of Review

As this Court recently stated:

> A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. (Citation omitted) A writ of prohibition may be warranted when the district court exceeds its jurisdiction.

Las Vegas Sands Corp. v Eighth Judicial District Court, __P.3d. __, 2014 WL 3882743 at *2

(Nev.) "[T]he decision as to whether a petition will be entertained lies within the discretion of this court." *State Dept. Of Transportation v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983).

Under Nevada law,"the question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence," while "'[t]he construction of a statute is a question of law subject to review de novo.'" *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257, (2005); *Beazer Homes Nevada, Inc. v. Eighth Judicial District Court*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004)(quoting *Diamond v. Swick*, 117 Nev. 671, 674, 28 P.3d 1087, 1089 (2001)).

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III. Jurisdiction

Petitioner claims that the district court lacked subject matter jurisdiction to order arbitration because Real Parties in Interest (hereinafter "Wespac") failed to allege that Petitioner had refused to arbitrate and had also failed to provide an enforceable arbitration agreement. (App. at 32). These contentions are addressed below.

NRS 38.221, the statute relied upon by Petitioner, states in pertinent part:

> (1) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
> (a) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitration; and
> (b) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.
>
> (2) On motion of a person alleging that an arbitral proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.
>
> (3) If the court finds that there is no enforceable agreement, it may not, pursuant to subsection 1 or 2, order the parties to arbitrate.

NRS 38.221(1), (2) and (3).

In the circumstances described in the statute, an action to compel arbitration is initiated by motion, either by a person claiming that an agreement to arbitrate exists or by a person claiming that there is no such agreement but that an arbitral proceeding has been initiated or has been threatened. Only a person initiating an action pursuant to subsections (1)(a) and (1)(b) is required to allege a refusal to arbitrate. There is no such requirement for an action initiated pursuant to subsection (2). However, whether the motion is brought

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pursuant to subsection (1) or (2), the statute directs the district court to order the parties to arbitrate if the court finds there is an enforceable agreement to arbitrate.

In the instant case, the action was not commenced by the filing of a motion to compel arbitration but was instead initiated by the filing of a complaint by the Petitioner against Wespac. (App. at 1-9). In the *Complaint,* Petitioner alleged seven claims against Wespac, including breach of contract, Breach of Nevada Deceptive Trade Practices Act, Breach of Implied Covenant of Good Faith and Fair Dealing, Unjust Enrichment, Breach of Fiduciary Duty, Malpractice, and Negligence. In his prayer, Petitioner sought general and specific damages, punitive damages, as well as attorney's fees and costs for each claim. Although Petitioner acknowledged in his *Complaint* that prior to 2007 he and Defendants had entered into a contract whereby Defendants agreed to manage Petitioner's investment accounts, Petitioner made no mention of the provision in their agreement regarding arbitration. (App. at 2 ¶7). Instead, he filed a lawsuit.

While Petitioner would prefer that the District Court had chosen to extend NRS 38.221(1) to include the requirement of an allegation of failure to arbitrate in situations such as this, that is not what the statute states, and Nevada law simply does not permit a court to imbue a statute with new meaning. *Libby, D.O. v. Eighth Judicial District Court*, 130 Nev. Adv. Op. 39, 325 P.3d 1276, 1279 (2014)("If the statute is clear on its face, we will not look beyond its plain language."); *Dornbach v. Tenth Judicial District Court*, 130 Nev. Adv. Op. 33, 324 P.3d 369, 372 (2014)(Refusing to find the word "answer" to be synonymous with the word "appearance" when interpreting court rules.); *Orr Ditch &*

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Water Co. v. Justice Court of Reno, TP., Washoe Co., 64 Nev. 138, 171-172, 178 P.2d 558, 574 (1947)("A new meaning may not be given the words of an old statute in consequence of changed conditions. The fact that events probably not foreseen by the legislature have occurred, does not permit the court to undertake to enact new law.").

However, while subsection (1) of NRS 38.221 is clearly inapplicable to the circumstances of this case, subsection (2), which addresses situations where a person alleges that although there is no agreement to arbitrate, an arbitration proceeding has been, or may be initiated, is more closely aligned to facts of this case. Unlike subsection (1), subsection (2) does not require an allegation of "refusal to arbitrate," but instead merely requires the court to determine if an enforceable agreement to arbitrate exists. That is precisely what the district court did: "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." (App. at 121).

Further, courts in other jurisdictions with statutes similar to Nevada's have found that it was not necessary that a "refusal to arbitrate" be expressly stated as such a refusal could be implied by the party's action or inaction. Thus, in *Jackson State Bank v. Homar*, 837 P.2d 1081 (Wy. 1992) a landlord had filed a complaint in which it referenced the arbitration provisions in the parties' lease agreement and sought to compel arbitration.[1] In

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[1]Wyoming's analogous statute, Wyo.Stat. §1-36-103(a) provides: "On application of a party showing an arbitration agreement and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to determine

its complaint, the landlord failed to allege that the defendants had refused to arbitrate, and the district court found the complaint to be deficient. *Homar*, 837 P.2d at 1085. In reversing the lower court, the Wyoming Supreme Court stated that:

> [I]n light of the strong public policy favoring arbitration, we find it unnecessary to engage in extensive parsing of the clause at issue in Wyo. Stat. §1-36-104(a). To read the statute to require the moving party's complaint to include the opposing party's refusal to arbitrate frustrates the legislative intent, negates the public policy favoring arbitration and is simply pointless. We agree with appellant that filing the complaint to compel arbitration is self evident of the opposing party's refusal to arbitrate and find that appellant's complaint was sufficient as an application to compel arbitration under Wyo.Stat. §1-36-104(a).

Id. at 1086.

Similarly in *Loscalzo v. Federal Mutual Ins. Co.*, 228 Cal.App.2d 391, 39 Cal.Rptr. 437 (1964) the insureds had filed a petition to compel arbitration under their contract of insurance. In their petition, the Petitioners alleged that there was a written agreement to arbitrate, that a controversy existed and that the respondent claimed that there was no arbitrable controversy. *Loscalzo*, 228 Cal.App.2d at 392, 39 Cal. Rptr. at 438-39.[2] Although Petitioners had not specifically alleged that the respondent had refused to arbitrate, the court of appeals found that the refusal implied in the petition was sufficient

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the issue raised and shall order or deny arbitration accordingly."

[2] California's statute provides in relevant part: "'On the petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . '" *Loscalzo*, 228 Cal.App.2d at 394, 39 Cal.Rptr. at 440 (quoting Section 1281.2 of the Code of Civil Procedure.

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to satisfy the statute. *Loscalzo*, 228 Cal.App.2d at 396, 39 Cal. Rptr. at 441. *See also*, *Benoay v. E.F. Hutton & Co., Inc.*, 699 F.Supp. 1523, 1526 (S.D.Fla. 1988)(Observing that "the mere fact that plaintiff has filed this lawsuit belies any inference that the plaintiff is amenable to arbitration." Here, Petitioner, although he was well aware of the parties' agreement and its provision requiring arbitration, chose to ignore that provision and simply filed a lawsuit. (App. at 22-28; App. at 102-108 and App. at 111-118). Petitioner's action, as the *Benoay* Court found "belies any inference that [he was] amenable to arbitration." In addition, Petitioner's subsequent statement in his *Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* that he "opposes forced mandatory arbitration pursuant to the unconscionable ¶16 of the Management Agreement," confirms his earlier refusal to arbitrate. (App. at 41-42). Because Petitioner made his rejection of arbitration clear at the outset, the District Court proceeded to determine if there was an enforceable agreement to arbitrate and thereafter ordered the parties to arbitrate. (App. at 121 and App. at 201-203). In Nevada, as in Wyoming, strong public policy favors arbitration. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004)("Strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation."); *Clark Co. Public Employees Ass'n v. Pearson*, 106 Nev. 587, 591, 708 P.2d 136, 138 (1990) ("'Nevada courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration.'")(quoting *Int'l Assoc. of Firefighters v. City of Las Vegas*, 104 Nev. 618, 764 P.2d. 478, 480 (1988). As the *Homar* Court stated: "To read the statute to require the moving party's complaint to

include the opposing party's refusal to arbitrate frustrates the legislative intent, negates the public policy favoring arbitration and is simply pointless." *Jackson State Bank v. Homar*, 837 P.2d at1086.

IV. Agreement to Arbitrate

Petitioner asserts that because the district court never received a complete contract, the court should not have determined that the arbitration provision in the parties' agreement was enforceable. (*Petition For Writ* at 13:21-27). Petitioner further claims that because the arbitration provision was both procedurally and substantively unconscionable, the district court should not have ordered the parties to engage in binding arbitration. (*Petition For Writ* at 31:15-19). Each of these contentions are addressed below.

1. The "Investment Management Agreement"

In his *Opposition To Defendants' Motion To Dismiss And To Compel Arbitration*, and in his instant *Petition For Writ Of Mandamus Or Prohibition*, Petitioner repeatedly claims that neither he nor the court has ever been furnished with a complete copy of the parties' agreement. *E.g.* (App. at 40); (*Petition For Writ* at 13:25-27 and 19:17-18); (App. at 45 ¶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." *Id.*

Despite Petitioner's vehement protestations regarding the completeness of the Agreement submitted to the court, Petitioner has failed to inform this Court that on at least two occasions before he entered the Agreement with Wespac, Petitioner was provided with

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copies of the Agreement to review and edit. (App. at 99; App. at 102-108; and App. at 111-117). There is no evidence that Petitioner complained at that time that he had not been given the entire Agreement to take home for review.

Further, Petitioner has failed to point to any essential terms that are missing from the "Investment Management Agreement" or to any terms in the Agreement that are so indefinite that the Agreement must be declared invalid. Instead, Petitioner has suggested that because the page numbers on the "Agreement" are inaccurate, Respondents must be attempting to conceal important information that is contained on these missing pages. *Petition For Writ* at 17:17-19. As can be seen from the "missing" pages of the Agreement, which Wespac attached, in blank, to their *Opposition To Plaintiff's Combined Motions*, these pages concerned only Petitioner's Client Profile. (App. at 147-159). They did not contain any terms or information necessary to the Agreement. *Id.* While Wespac agrees that the page numbering may be somewhat confusing, it has always been clear that the"Investment Management Agreement," that was signed by both parties and submitted to the District Court, is contained on pages numbered 12-18. (App. at 22-28). Presumably, the many changes that Mr. Garmong requested may have contributed to the page number confusion.

Because Petitioner was clearly given at least two draft copies of the parties' Agreement, Petitioner's later protestations that he had "never received even a partial copy of the Agreement . . . until it was sent to [him] as Exhibit 1 to the Motion brought by the defendants," is clearly untrue. (App. at 45). It is also obviously untrue that the District

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Court never received a copy of the parties' Agreement.

On December 13, 2012 , ten days after Wespac's *Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* was filed, the court 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." (App. at 121). As this Court has made clear, "the question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009). Although the district court did not enter further finding of fact and conclusions of law, this Court has long held "that in the absence of express findings, this court will imply findings where the evidence clearly supports the judgment." *Obstetrics and Gynecologists v. Pepper*, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985); *IAMA Corp. v. Wham*, 99 Nev. 730, 734, 669 P.2d 1076, 1078 (1983). Further, while Petitioner suggests that possibly the District Court did not consider the issues or even read Petitioner's briefs, the Court's *Order* of April 2, 2014 makes clear that the Court did indeed consider and read Petitioner's brief. (*Petition For Writ* at 33:7:10)(App. at 201-203).

Here, because the evidence, including the signed "Investment Management Agreement" as well as the two draft agreements with Petitioner's handwritten notations all support the district court's ruling, this Court is required to imply any necessary findings. (App. at 22-28; App. at 102-108; and App. at 111-117).

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V. Unconscionability

Petitioner has also claimed that because the arbitration provision contained in the "Investment Management Agreement" is both procedurally and substantively unconscionable, Nevada law required the district court to refuse to order arbitration. *Petition For Writ* at 23:5-10. As explained below, Petitioner is mistaken.

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 v. Second Judicial District Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1169 (2010).

As explained below, because the facts of the two cases extensively relied upon by Petitioner, *Gonski*, 245 P.3d 1164 and *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 96 P.3d 1159 (2004) are in no way comparable to the facts of the instant case, these cases provide no support for Petitioner's claim for either procedural or substantive unconscionability.

A. Procedural Unconscionability

In explaining procedural unconscionability, the *D.R. Horton* Court explained that:

> A clause is procedurally unconscionable when a party lacks a 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.

D.R. Horton, 120 Nev. at 554, 96 P.3d at 1162.

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.

After noting that neither the arbitration provision in the purchase agreement nor the arbitration provision in the limited warranty were called out by the use of all capital letters or by the use of a larger than normal font, coupled with the circumstances that existed when plaintiffs signed the agreements, the *Gonski* Court found the procedural unconscionability to be "slight." *Gonski*, 245 P.3d at 1170 and 1173.

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. *Horton*, 120 Nev. at 556, 96 P.3d at 1164. The signature lines, however, were on the front page of the agreements. *Id.* At the time the plaintiffs signed the agreements, the builder's agent informed them that the provisions on the back page were "standard provisions." *Id.*

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The Court found the arbitration provision to be procedurally unconscionable, explaining that:

> [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, 120 Nev. at 557, 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. (App. at 99 ¶3). When Petitioner returned to Wespac's office, he presented Mr. Christian with an annotated copy of the Agreement and requested that Mr. Christian make certain changes to the "Agreement," including changes to ¶16, the arbitration provision, which Mr. Christian agreed to do. (App. at 99 ¶4 and App. at 102-108). Petitioner later returned with a second annotated copy of the Agreement and requested that additional changes be made to the Agreement, including changes to ¶16. (App. at 99 ¶4). Again, Mr. Christian agreed to make the requested changes. (App. at 99 ¶4). At no time has Petitioner claimed that he did not make the handwritten cross-outs and notes on the two copies of the "Investment Management Agreement submitted to the court by Wespac.

Further, unlike the situations in *Gonski* and *Horton*, the arbitration clause was not hidden away in tiny print, buried in hundreds of pages, or downplayed by Defendants. Instead, the arbitration provision had a clear heading in bold print stating: "**Arbitration. The parties waive their right to seek remedies in court, including any right to a jury**

trial." (App. at 22-28 ¶16). Petitioner now claims that due to the statements contained in ¶14 of the Agreement, the conspicuousness of the caption of ¶16 must be ignored, and because the remaining text of ¶16 is not in bold or large print, the arbitration provision is not conspicuous. *Petition for Writ* at 21:18:22:3; (App. at 17-18). This new argument is without merit – the purpose of a bold or large font size in the caption of an arbitration provision is to draw attention to the arbitration provision and its waiver of the right to a jury trial. *D.R. Horton*, 120 Nev. at 557, 96 P.3d at 1164 ("[A]n 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."). That is exactly what the bold heading of paragraph 16 did – it drew attention to the arbitration provision.

In addition, Petitioner claims that because the Agreement's arbitration provision did not have the "specific authorization for the provision" required under NRS 597.995(1), the arbitration provision is void and unenforceable. *Petition for Writ* at 24:20-25. However, as made clear from the date on the Agreement, the "Investment Management Agreement" was entered into by the parties on August 31, 2005, and because NRS 597.995 was not adopted until 2013, the statute is inapplicable. (App. at 28).

Finally, because of the notes, underlines and cross-outs contained in the draft copies of the Agreement, it is clear that Petitioner 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 if he so desired. (App. at 102-108 and App. 111-117). As a result, the procedural unconscionability described in *Gonski* and *Horton* is simply not present.

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Gonski, 245 P.3d at 1169 (quoting *D.R. Horton*, 120 Nev. at 553, 96 P.3d at 1162); *See also Obstetrics and Gynecologists*, 101 Nev. at 107, 693 P.2d at 1261 ("The distinctive feature of an adhesion contract is that the weaker party has no choice as to its terms.").

B. 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.

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.* NRS 40.665 however, 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

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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." *Horto*n, 120 Nev. at 552, 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*, 120 Nev. at 558, 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, the 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, Petitioner claims 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. *Petition For Writ* at 27:12-14.

(2) It violates public policy and Petitioners statutory rights by prohibiting punitive damages. *Petition For Writ* at 27:28 - 28:4.

(3) Petitioner was unable to estimate the cost of arbitration because he was not given a copy

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of the rules of the Judicial Arbitration and Mediation Service. *Petition for Writ* at 28:28-29:2.

(4) The Agreement lacked mutuality because Plaintiff could not breach the agreement, and the terms favored only the Defendants. *Petition For Writ* at 29:24-30:3.

(5) The arbitration provision did not specify which set of Judicial Arbitration and Mediation Service ("JAMS") rules governs arbitration. *Petition For Writ* at 30:14-19.

(6) The discovery allowed is illusory as no discovery at all may be permitted. *Petition For Writ* at 30:25-26.

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. *D.R. Horton*, 120 Nev. at 558, 96 P.3d at 1165 (An arbitration agreement is not unconscionable if it contains a "'modicum of bilaterality.'")(citing *Ting v. AT & T*, 319 F.3d 1126 and 1149(9th Cir. 2003) *cert. denied.*, 540 U.S.811, 124 S.Ct.53 (2003).

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*, 120 Nev. at 559, 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 . . ."); *Lyman v. Mor Furniture For Less, Inc.*, 2007

WL 2400683 at *5 (D.Nev) (Plaintiff claimed an arbitration agreement was substantively unconscionable because it did not disclose the potential arbitration costs. The court found that the arbitration agreement was not substantively unconscionable "[b]ecause the cost of arbitration could easily have been recognized by reading the JAMS' rules . . .").

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 applicable, that fact alone does not render the effects of the arbitration clause unascertainable. (App. at 46 ¶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*, 2007 WL 2400683 at *5 (D.Nev) (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.").

While there are two sets of JAMS Rules, as Petitioner claims, which set will apply depends on whether the amount of the claim or counterclaim exceeds the amount of $250,000. (App. at 53)("JAMS Comprehensive Arbitration Rules & Procedures" at Rule 1(a)) and App. at 73)("JAMS Streamlined Arbitration Rules & Procedures") Rule 1(a). Claims that are above $250,000 are governed by the "JAMS Comprehensive Arbitration Rules & Procedures" while those that are for less than $250,000 are governed by the "JAMS Streamlined Arbitration Rules & Procedures." *Id.* According to both sets of Rules,

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if the parties provided for arbitration by JAMS in their arbitration agreement, "[t]he parties shall be deemed to have made these Rules a part of their Arbitration agreement . . . without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule." (App. at 53 and 73, Rule 1(b)).

Thus, the amount of the claim determines which set of JAMS Rule apply and, pursuant to the JAMS Rules themselves, the parties need not specify which set of rules are applicable. As the federal district court suggested, the Petitioner could easily have found the Rules on-line.

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. *Harmon v. Tanner Motor Tours of Nevada, LTD.*, 79 Nev. 4, 18-19, 377 P.2d 622, 629-30 (1963)(rejecting the necessity of "mutuality of remedy"); *See also, 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, 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)).

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As stated above, 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,* 120 Nev. at 553, 96 P.3d at 1162 (2004)(quoting *Burch v. Dist. Ct.*, 118 Nev. 438, 443, 49 P.3d 647, 650). While a strong showing of one type of unconscionability lessens the required showing of the other type, because Petitioner has been unable to demonstrate the existence of either procedural or substantive unconscionability, the district court's ruling should be upheld and Petitioner's *Petition For Writ Of Mandamus Or Prohibition* denied. *Gonski,* 245 P.3d at 1169.

VI. Alleged Constitutional Violations

In his *Petition For Writ*, Petitioner claims that the "Investment Management Agreement contains multiple provisions that are objectionable under the Constitution." *Petition for Writ* at 18:23-24. These claims are addressed below.

A. Waiver of the right to a jury trial and to appeal

As this Court has previously acknowledged, "[m[ost courts addressing the issue [of waiver of jury trial] have held that such waiver provisions are enforceable if they are knowingly, voluntarily and intentionally made." *Lowe Enterprises Residential Partners, L.P.*,118 Nev.92, 97, 40 P.3d 405, 408. To determine if a contractual waiver to jury trial was entered into knowingly, voluntarily and intentionally, the *Lowe* Court set forth a list of four factors that a court may consider: (1) whether the parties participated in negotiations concerning the waiver; (2) the conspicuousness of the waiver; (3) the bargaining power of each of the parties; and (4) whether the waiving party's attorney was given an opportunity

to review the agreement. *Lowe Enterprises*, 118 Nev. at 101, 40 P.3d at 410-11.

Here, as evidenced by the two annotated "Investment Management Agreements" and by Mr. Christian's statements regarding Petitioner's requests that changes be made to the Agreement, it is clear that Petitioner did participate in negotiations with Wespac concerning the Agreement, including paragraph 16. (App. at 99 ¶4; App. at 102-108; and App. at 111-117). Although Petitioner indicated on the draft Agreements that he wanted other changes made to the Agreement, including to ¶16, he "never requested that the terms requiring Arbitration be removed" and instead just joked that "JAMs was full of retired Judges who were bozos." (App. at 99 ¶4).

As explained above, the arbitration provision was not hidden away in tiny print, buried in hundreds of pages, or downplayed by Defendants. Instead, the arbitration provision had a clear heading in bold print stating: "**Arbitration. The parties waive their right to seek remedies in court, including any right to a jury trial,"** and as such, clearly and conspicuously notified Petitioner that he was waiving his right to a jury trial. (App. at 27-28 at ¶16). *See*, *Mall, Inc. v. Robbins*, 412 So.2d 1197, 1199 (Ala. 1982)(Finding that a contractual jury trial waiver was enforceable where the section was "titled to call attention to the waiver of jury trial . . .[and] the waiver [was] not inconspicuously buried deep in the contract;" *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624,627 (Mo. 1997)(Finding a jury trial waiver enforceable where "[t]he provision used clear, unambiguous, and unmistakable language" and "[t]he print size of the waiver provision was the same size as that found throughout the lease.").

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As previously discussed, Petitioner is a patent attorney, who took the draft Agreement home after first meeting with Mr. Christian. (App. at 99 ¶3). As a result, Petitioner had every opportunity to review the Agreement himself, or with an attorney, before signing it. He also had ample opportunity, and ability, to review the JAMS Rules if he chose to do so. It is clear, as required by *Lowe*, that Petitioner "knowingly, voluntarily and intentionally" waived his right to a jury trial. *Lowe*,118 Nev. at 100, 40 P.3d at 410.

Applying the factors listed in *Lowe* to a waiver of right to appeal, as Petitioner has suggested, would lead to the same result – Petitioner participated in negotiations concerning a paragraph in their Agreement which clearly notified him that by agreeing to arbitration, the parties "right to appeal or to seek modification of any ruling or award of the arbitrator [would be] severely limited." *Petition For Writ* at 22:11-14; (App. at 27-28 ¶16). Further, Petitioner had the opportunity to make changes to the Agreement and to consult with counsel. As a result, it is clear that Petitioner "knowingly, voluntarily and intentionally" agreed to severely limit his right to appeal an award or ruling by the arbitrator. *Lowes*,118 Nev. at 100, 40 P.3d at 410.

B. Equal Protection

Petitioner now claims that because the district court did not apply NRS 38.221(1) "according to its terms," that statute "was not applied to all alike" and as a result, "[t]he requirements of equal protection were not met." *Petition For Writ* at 35:15-18.

As this Court has explained, "[t]he Fourteenth Amendment of the United States Constitution forbids an enactment that 'den[ies] . . . any person . . . equal protection of the

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laws.'" *Candelaria v. Roger*, 126 Nev. Adv. Op. 40, 245 P.3d 518, 523. This Court further explained that "[a] statute that treats similarly situated people differently implicates equal protection." *Id.*

Here, Petitioner has not claimed that he was treated differently than someone else under NRS 38.221(1) or that NRS 38.221(1) improperly creates disparate requirements. Instead, Petitioner has claimed that the district court did not follow Petitioner's interpretation of that statute. As a result, Petitioner's claim that he was denied equal protection is without merit.

C. Substantive Due Process

Petitioner also claims that "[t]he district court's order deprived Petitioner of portions of property interest such as the right to seek punitive damages." *Petition For Writ* at 33:20-21. Because the district court did not provide sufficient reasons in its *Order*, Petitioner asserts that his right to due process was violated. *Petition For Writ* at 34:12-23.

Petitioner is mistaken. The district court did nothing of the sort–the lower court merely determined that the parties' agreement to arbitrate was enforceable. (App. at 121). It was the parties, not the court, who contractually agreed that neither would be awarded punitive damages in the event of a dispute. (App. at 22-28). Further, the mere possibility that one might be awarded punitive damages in the future is not a vested property right that is protected by the Fourteenth Amendment. *Cheatham v. Pohle*, 789 N.E.2d 467, 473 (Ind. 2003)("[I]t is . . . well settled in Indiana and elsewhere that no one has a right to recover punitive damages." And "any interest the plaintiff has in a punitive damages award is a

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creation of state law. The plaintiff has no property to be taken except to the extent state law creates a property right."); *Sierra Nevada SW Enterprises, Ltd., v. Douglas Co.*, 506 Fed. Appx. 663, 665, 2013 WL 414447 at *1 (C.A.9 (Nev.)) ("To state a [substantive due process claim] a plaintiff must allege (1) 'that a state actor deprived it of a constitutionally protected . . . property interest, (citation omitted) and (2) that the governmental action was 'arbitrary and capricious.'"(quoting *Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1261 (9th Cir. 1995). Because Petitioner had no protected property right in an expectation of punitive damages, Petitioner's claim that the district court deprived him of a protected property right is without merit.

VII. Conclusion

For the reasons stated above, Real Parties in Interest, Greg Christian and Wespac respectfully request that Petitioner's *Petition For Writ Of Mandamus Or Prohibition* be denied.

DATED this 15 day of August 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using WordPerfect 13 point Times New Roman.

I further certify that this petition complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionately spaces, has a typeface of 13 points or more, contains 7,087 words, and does not exceed 26 pages.

Finally, I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all Appellatae Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15 day of Aug., 2014.

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed.

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_____ A specific state of federal law, to wit:

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– OR –

_____ For the administration of a public program

_____ For an application for a federal or state grant

Date August 15, 2014

_____
Attorney

CERTIFICATE OF SERVICE

I certify that on the 15th day of August, 2014, I served a copy of the completed ***ANSWER to PETITION FOR WRIT OF MANDAMUS OR PROHIBITION***

by Hand-delivering to

The Honorable Brent T. Adams
District Judge
Second Judicial District Court
75 Court Street
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Sandra Brown

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CERTIFICATE OF ELECTRONIC SERVICE

The undersigned certifies that she has filed the ***ANSWER to PETITION FOR 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

Carl M. Hebert, Esq., SBN #250,
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See NEFCR 9(b).

DATED this 15th day of August, 2014.

Sandra M. Brown