ADDENDUM

----- Original Message -----
From: Tom Bradley
To: carl@cmhebertlaw.com
Cc: Tom Bradley
Sent: Tuesday, August 12, 2014 2:48 PM
Subject: RE: Garmong v Wespac--Response to petition for writ 080114

Carl,

I am going to file an appendix which includes the Agreement with Wespac that your client attached to his initial complaint. The Agreement, however, contains his social security number. I intend to black out the social security number in my appendix unless you object. Please inform me if you object before Thursday at 10 am when I plan to file my opposition and appendix.

Thanks,

Tom

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill St.
Reno, NV 89501
tel: (775) 323-5178
fax: (775) 323-0709
tom@stockmarketattorney.com

EXHIBIT A

Carl Hebert

From: "Carl Hebert" <carl@cmhebertlaw.com>
To: "Tom Bradley" <tom@stockmarketattorney.com>
Sent: Friday, August 15, 2014 1:55 PM
Subject: Garmong v Wespac; Christian--"new" agreement 081514

Tom:

Yesterday morning we discussed the purported investment management agreement referenced in your e-mail to me of August 12, 2014, which you stated was "attached to his [the plaintiff's] initial complaint." As I pointed out to you in my e-mail and a following telephone call yesterday morning, the District Court records reflect the fact that there were no attachments to the complaint, which Mr. Garmong filed in *proper person*, nor has any other document been filed in the case containing Plaintiff's social secruity number. This appears to be an attempt by defendants Wespac and Christian to introduce key evidence into the writ proceeding that was never before the District Court. If there is another form of the agreement, as referenced in your e-mail, it is critical to the case. Its existence calls into question the multiple assertions, under oath, made in previous filings in the District Court, that each version of the agreement was true and correct.

I requested that you forward me the document via e-mail, but I have not received it yet. Please e-mail the document to me immediately so that Mr. Garmong and I may review it for whatever action may be necessary in the District Court or Supreme Court.

Regards,

Carl

8/15/2014

EXHIBIT B

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.: 65899

DISTRICT COURT CASE NO: CV12-01271

PETITIONER'S REPLY TO ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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

Counsel for Petitioner

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the follow are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

There are no corporate entities involved with the Petitioner. The undersigned has been counsel for the Petitioner in the District Court and now in this Court. There have been no other counsel representing the Petitioner. The undersigned is a sole practitioner and has no partners or associates who have appeared for the Petitioner at any time in the life of this case.

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

Attorney of record for Petitioner Garmong

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1.

INTRODUCTION

Respondents ask this Court to uphold a District Court arbitration order where the moving party has admittedly not met the jurisdictional requirements of NRS 38.221(1), has refused to submit the complete underlying contract and has crafted an arbitration provision offending the dictates of prior authority and Constitutional protections. Respondents' Answer includes numerous authorities, but none of the authorities are based upon facts where the party who drew up the contract has advanced multiple different versions of the purported contract and absolutely refuses to make the entire contract of record. That is, all of the authority presumes that a complete, valid contract has been proffered and is of record prior to addressing the question of validity of the arbitration provision found within. Nevada has long held that an incomplete document may not be enforced as a contract. *Dodge Bros., Inc. v. Williams Estate*, 52 Nev. 364, 287 P. 282, 283-4 (1930).

Petitioner appreciates that courts would like to lighten their dockets by sending cases to arbitration. Yet the legislature has established jurisdictional requirements and procedures for doing so and this Court has established requirements that must be met before arbitration can be ordered. The Respondents have not met those essential conditions for arbitration.

2.

THE JURISDICTIONAL PREREQUISITES OF NRS 38.221(1) WERE NOT MET BY RESPONDENTS.

In the District Court the parties and the Court agreed that the controlling statute was NRS 38.221(1), see Answer 3:22-26; 25:6. 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 . . . the court shall . . . order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

A. The plain language of NRS 38.221(1) requires that the Motion to Compel allege a refusal to arbitrate; Respondents admit they made no such allegation.

(1) Respondents' Motion to Compel and Respondents' admissions before the District Court establish that this mandatory requirement was not met.

Inspection of the Motion to Compel (App. 12-16) reveals that Respondents did not even attempt to make this jurisdiction-conferring allegation required by NRS 38.221(1), nor did they ever claim that they made such an allegation. Respondents were fully aware of the jurisdictional mandate of NRS 38.221(1), as their Motion to Compel explicitly refers to the statute (App. 013:19). Yet they did not make the allegation.

There is a good reason that Respondents did not allege a refusal to arbitrate. There is evidence of record that Respondents never requested arbitration either directly with Petitioner (App. 194, ¶ 2) or through his attorney (App. 198, ¶ 2), and

evidence of record that Petitioner never refused to participate in arbitration with Respondents (App. 194, ¶ 3). Respondents' Opposition (App. 134-45) to Petitioner's Motion for Reconsideration (App. 123-33) admitted (App. 140:5-13; see also 86:26-28) that Respondents never made this statutorily required allegation.

Respondents sought to brush aside (App. 140:5-13) their failure to comply with the legislative command expressed in NRS 38.221(1) as an "oversight" and the mandatory compliance with the statutory requirement as "form over substance." Respondents present their speculation as to why they think Petitioner would refuse to arbitrate if they asked him to do so. But this is not what the public policy of Nevada, as expressed by the Legislature in NRS 38.221(1), directs. The plain language of NRS 38.221(1) requires that the motion itself must make the allegation of the refusal of the other party to arbitrate. There is no provision in the statute that the movant's later speculative arguments or the implications of other actions provide a substitute for the required allegation in the motion. To advance their theory by relying upon factually inapposite, legally non-relevant authority, Respondents attempt (Answer 5:23-10:3) to confuse a person who brings a "motion", the subject of NRS 38.221(1), with a person who brings an "action", the subject of its cited authority (Answer 7:17-9:4). Had the legislature intended that the mandatory jurisdiction-conferring requirement of NRS 38.221(1) could be satisfied other than by an allegation in the motion, it would have said so. The District Court had no discretion to ignore, and erred in its failure to follow, this mandate of NRS 38.221(1).

Seeking to avoid the plain language of the statute, in the District Court

Respondents argued (App. 140:10-13) that Petitioner's opposition to their Motion to Compel demonstrated a refusal to arbitrate. The Opposition was based upon, among other arguments, Respondents' failure to follow the statutory requirements and the absence of any complete contract to arbitrate and did not state any "refusal to arbitrate" as the Respondents allege.

(2) Respondents advance three new theories.

In their Answer to the Petition Respondents have stated three new and diametrically opposed theories: First, (Reply, 7:17-9:16) that somehow the required allegation may be inferred from the fact of the filing of Petitioner's complaint, directly contrary to the language of the statute requiring the motion to make the allegation; second, (Reply, 5:20-6:5) that "Only a person initiating an action pursuant to subsections 1(a) and 1(b) [of NRS 38.221(1)] is required to allege a refusal to arbitrate; and, third, (Reply 7:5-16) that "subsection (1) of NRS 38.221 is clearly inapplicable to the circumstances of this case." These theories were never raised in the District Court.

Defendants may not shift the course of their arguments before the Supreme Court for two reasons. First, they cannot present entirely new, inconsistent theories of their case before this Court that were not presented in the District Court. As this Court held in *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. Adv.Op. 42, 245 P.3d 542, 544-5 (2011):

> Parties 'may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.' " *Dermody v. City of Reno,* 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (quoting

> *Powers v. Powers,* 105 Nev. 514, 516, 779 P.2d 91, 92 (1989)). This rule is not meant to be harsh, overly formalistic, or to punish careless litigators. Rather, the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties . . . . Here, it would be unfair to credit Schuck's bailment claim for the first time on appeal . . . These are potentially game-changing issues, not mere refinements of points already in play. Schuck's bailment theory raises substantial new issues, factual and legal, that were not presented to the district court and that neither SFS nor the district court had the opportunity to address.

Second, Respondents are estopped from taking their new positions. *Delgado v. American Family Insurance Group*, 125 Nev. 564, 571, 217 P.3d 563, 568 (2009) stated the standard for judicial estoppel, which is "invoked to protect the integrity of the justice system when a party argues two conflicting positions to abuse the legal system." The conjunctive elements of the test are:

> (1) [T]he same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Applying elements (1) and (2) to the present facts, in the District Court Respondents proceeded under NRS 38.221(1), repeatedly asserting rights pursuant to a non-existent contract. Element (3) is satisfied because the District Court expressly adopted Respondents' position. The new positions are totally inconsistent with the "oversight" and "form over substance" positions taken in the District Court, element (4). The first position in the District Court was taken

intentionally, element (5), in order to prevail.

The Petitioner will briefly address these three new arguments, taking first that the filing of the complaint demonstrates a refusal to arbitrate. As *Schuck* recognizes, it would be unfair to allow Respondents' to present this new theory now, because Petitioner never had an opportunity to respond in the District Court with argument or submission of evidence. Had Respondents made this argument in the District Court, Petitioner would have submitted evidence that several years had passed without the Respondents requesting arbitration of the continuing dispute, and that Petitioner filed the complaint in this case to avoid loss of rights under a statute of limitations. If Respondents really had wanted to conduct arbitration, they knew where Petitioner could be reached, and they could have written him a letter requesting that he join them in arbitration. Respondents having slept on their rights by failing to request arbitration, Petitioner filed the complaint to preserve his rights. The filing of the complaint, which does not mention arbitration, cannot be interpreted to suggest refusal to arbitrate.

The second new argument is plainly contrary to the language of the statute. NRS 38.221(1) requires the person making a motion, not the person filing a complaint, to allege refusal to arbitrate.

The third new argument stretches the bounds of credibility. Elsewhere in the Answer (3:22-26; 25:6), Respondents admitted that their argument in the District Court had been based upon application of NRS 38.221(1). NRS 38.221(2) was never mentioned in the District Court by either party or the Court.

(3) The decision must be based upon the theories as advanced in the District Court.

In the present case, Respondents' position must be taken as that argued in the District Court, that the failure to make the required allegation was an "oversight" and that mandatory compliance with the statutory requirement is merely "form over substance." Such arguments are not convincing reasons for refusing to follow a statutory directive.

B. Respondents have not shown a contract to arbitrate, and there is no complete contract to arbitrate in the record.

(1) An itemization of usages of the term "Entire Investment Management Agreement" is presented to keep Respondents' stories straight.

This itemization is provided to aid in keeping straight Respondents' different stories about what constitutes the "Investment Management Agreement" that they seek to enforce. Respondents have described six different, inconsistent versions of the purported contract, none of which is consistent with the actual requirements that may be gleaned from the fragmentary materials now available. Respondents' six versions (R1-R6) are set forth next, followed by the form (P1) that the available fragments of the contract itself require. To understand the content of the "Entire Agreement" is critical, since the case authority, discussed below, requires that Respondents prove that they have placed a "valid contract" in the record. Respondents refuse to explain the inconsistencies in the various sworn and unsworn versions of the purported contract, and refuse to submit to the court a complete

"Investment Management Agreement."

R1. Respondent Christian's first description of "Entire Agreement." 7-page Exhibit 1 (App. 022-028) starting with "page 12" (Source: Sworn to be "true, correct, and complete" at App. 017, ¶ 2).

R2. Respondent Christian's second description of "Entire Agreement." 7-page Exhibit 1, and swearing to a page-numbering error as reason that the starting number is "page 12" (App. 100 ¶ 2).

R3. Respondent Christian's third description of "Entire Agreement." 7-page Exhibit 1, plus blank Confidential Client Profile consisting of 13 pages sworn to be the "first eleven pages" of the Agreement, implicitly revoking sworn claim of page-numbering error (App. 144, ¶ 2); App. 147-159).

R4. Respondents' attorney's first description of "Entire Agreement." 7-page Exhibit 1 giving page numbers (Source: Answer 15:9).

R5. Respondents' attorney's second description of "Entire Agreement." "Agreement with Wespac that your client attached to his initial complaint [which] contains his social security number" (Respondent refuses to produce--not of record in this case) (Source: Exhibit A to this Reply).

R6. Respondents' attorney's third description of "Entire Agreement," referring to "there is no agreement to arbitrate," from NRS 38.221(2) (Answer 7:5-16).

P1. The Agreement itself expressly defines the required parts of the entire Investment Management Agreement: 7-page Exhibit 1, plus completed Confidential

Client Profile (App. 22, ¶ 3(2); 27, ¶ 12), plus three different Exhibits A (App. 22, ¶2; App. 23, ¶ 4(a); App. 149), plus three different Exhibits B (App. 023-024, ¶3(3); App. 023-024, ¶4(a); App. 149). The Respondents refused to produce the three exhibits A and the three exhibits B; they are not of record in this case to date.

(2) Respondents have not demonstrated a "valid contract."

The second jurisdictional requirement of NRS 38.221(1) is "showing an agreement to arbitrate." This Court has set forth the burden of proof on this point in *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*, 101 Nev. 105, 107-08, 693 P.2d 1259, 1260-61 (1985) holding:

> Since appellant set up the existence of the agreement [to arbitrate] to preclude the lawsuit from proceeding, it had the burden of showing that a binding agreement existed . . . . <u>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.</u>

(Emphasis added).

Obstetrics and Gynecologists requires that the party seeking to avoid litigation and pursue arbitration, here Respondents, must show that there is a "valid contract."

A valid contract must be a complete contract. *Dodge Bros.,* 52 Nev. 364, 287 P. at 283-4, holding "There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is <u>incomplete</u>, uncertain, or indefinite." (Emphasis added).

Petitioner's Writ Petition (10:23-11:5) demonstrated that no valid contract has

been produced. The Answer failed to respond, consequently admitting that there is no valid contract as required to establish jurisdiction pursuant to NRS 38.221(1).

The Answer blithely speaks of the "Investment Management Agreement" as though such a complete document is of record. The shaky history of Respondents' first four attempts to misrepresent the content of this purported contract is found at Writ Petition 9:22-10:1 and summarized above in the itemization of the various versions.

Now the story of Respondents' parceling out versions of the contract becomes even more suspect. A few days before Respondents' Answer was to be filed, Respondents' counsel sent Petitioner's counsel an e-mail, copy attached as Exhibit A to this Reply, stating: "I am going to file an appendix which includes the Agreement with Wespac that your client attached to his initial complaint. The Agreement, however, contains his social security number. I intend to black out the social security number in my appendix unless you object." Petitioner's counsel responded, Exhibit B, that the initial complaint has no such attachment. Exhibit 1 to the Motion to Compel has no place for a social security number; therefore, Respondents' counsel must have been referring to yet another document which includes a space for a social security number. The only place that called for insertion of Petitioner's social security number was the Confidential Client Profile, a blank form of which is found at App. 150: ¶ 4. That is, recognizing that no complete agreement to arbitrate is in the present record, Petitioner's counsel was tacitly admitting that he had a more complete contract than he had been willing to produce

up to this point, and that he was attempting to insert a new document into the appellate record. He retreated when the attempt was discovered.

Petitioner's counsel requested (Exhibit B) that Respondents' counsel furnish a copy of the referenced document, but Respondents' counsel has so far refused to provide it.

Respondents have advanced at least six different stories (R1-R6) about the purported contract, two of which have been sworn to be "true, correct, and complete" and which are neither true, correct, nor complete; a version with a sworn attempt to explain away the missing pages as a numbering error, now discredited; a more-complete version that they refuse to produce; and, bewilderingly, an argument based on a statute which assumes that there is no agreement. *See* NRS 38.221(2).

By stating that there is yet another document in existence, one with a Social Security number on it, Respondents essentially admit that no "complete" Investment Management Agreement is to be found in the record.

Respondents have not met their burden under *Obstetrics and Gynecologists*: "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." At this point, we do not know what paper the Respondents claim is the actual Investment Management Agreement.

NRS 38.219(2) requires that the District Court "shall decide whether an agreement to arbitrate exists." The District Court never made any factual finding that Exhibit 1 was a "valid contract." NRS 38.219(1) requires that the District Court may

not approve an agreement to arbitrate if there is a ground at law or in equity for revocation of a contract. The purported contract at issue in this case (App. 21-28) does not support an arbitration provision under these statutory requirements. The Answer did not respond to these points.

Answer 10:4-12:25 argues that "It is also obviously untrue that the District Court never received a copy of the parties' Agreement" (Answer 11:26-12:1), but never points to any location in the record of a complete contract. This argument is based upon playing fast and loose with word usage. The Answer refers to the incomplete "7-page Agreement to Arbitrate" as the "Agreement", but neglects to mention that Respondent Christian's Affidavit (App. 144, ¶ 2) finally admitted that there were at least 13 more pages. Respondents have never produced a completed Confidential Client Profile, any of the three different Exhibits A or any of the three different Exhibits B, and such documents are not found in the record. The Answer claims that Petitioner received a 7-page Agreement to Arbitrate to mark up, but as established by evidence at App. 45, ¶ 2, Petitioner never received a copy of the complete purported document that could constitute a "valid contract."

At 12:2-13, the Answer quotes the District Court's Order referring to the "arbitration agreement contained in paragraph 16 of the 'Investment Management Agreement'[.]" This clearly is not a ruling that there was before the District Court a complete contract including a filled-out Confidential Client Profile, three different Exhibits A, and three different Exhibits B, and was not a ruling that the District Court had found that a "valid contract" existed, as required by *Obstetrics and Gynecologist*.

As discussed at Writ Petition 10:23-11:5, this Court has long held that an incomplete document cannot be a contract. *Dodge Bros., supra*.

3.

RESPONDENTS CANNOT NOW ATTEMPT TO DENY THE APPLICABILITY OF NRS 38.221(1) IN FAVOR OF NRS 38.221(2)

Respondents' Answer at 7:5-16 argues that "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 . . . there is no agreement to arbitrate . . . is more closely aligned to facts of this case." Elsewhere in the Answer (3:22-26; 25:6), Respondents admit that they proceeded in the District Court presuming that NRS 38.221(1) is the governing statute. There was not a single mention of NRS 38.221(2) by either of the parties or the District Court in the prior proceedings. The sudden switch of emphasis in favor of NRS 38.221(2) is an entirely new theory being advanced by Respondents for the first time on appeal.

Defendants may not make this abrupt change of direction in their case before the Supreme Court for the two reasons stated above, specifically that a new and completely different course may not be taken on appeal (*Schuck*) and Respondents are estopped from taking this different position (*Delgado*).

Respondents' new position has important implications. NRS 38.221(2) states: "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 to summarily decide the issue." Respondents now assert that their Motion to Compel effectively alleged "that an arbitral proceeding has been initiated or threatened"

without any evidence at all to support this allegation. As described above, Respondents have put forward six different stories (R1-R6) about the nature of a purported contract without ever providing a complete contract in the record. Yet now they assert (Answer 7: 5-16) that NRS 38.221(2), premised on the claimed absence of an arbitration agreement, "is more closely aligned to facts of this case."

4.

THE ARBITRATION PROVISION IS UNCONSCIONABLE

Respondents entered into the business arrangement with Petitioner to be his investment advisor (Answer 1:3). This special relation imposes duties upon the investment advisor, which duties are ignored in Respondents' Answer. Nevada law recognizes a duty owed in "confidential relationships," where "one party gains the confidence of the other and purports to act or advise with the other's interests in mind." *Perry v. Jordan,* 111 Nev. 943, 900 P.2d 335, 338 (1995). The duty owed is comparable to a fiduciary duty: "When a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party." Investment advisors have such a "confidential relationship." *Randono v. Turk*, 86 Nev. 123, 129, 466 P.2d 218, 222 (1970). Such a person has the obligation of faithfulness and full disclosure to his principal. *Id.* Having had a confidential relationship to Petitioner, Respondents cannot reject their duties to Petitioner.

A. Procedural unconscionability was established in the Writ Petition, and not countered in Respondents' Answer.

The indicia of procedural unconscionability were discussed in the Writ Petition (23:22-27:2) and include the following.

(1) Respondents have refused to provide the entire contract.

Petitioner established by evidence (App. 045, para. 2) that he was never given a copy of the entire purported contract, and Respondents do not claim otherwise.

Answer 15:8-21 argues that Petitioner had a chance to revise the incomplete assortment of papers given him. But the viability of the revisions were limited by the fact that Respondents hid much of the purported contract from Petitioner. (That a portion of the purported contract was signed does not mean that it can be enforced, because it is incomplete, see prior discussion from *Dodge Bros.*). As *Gonski v. Second Judicial Dist. Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1169 (2010) states, "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.'" It is difficult to imagine a more unfair and unconscionable situation than where the party having the confidential relation refuses to provide the complete contract to its principal.

(2) The arbitration provision is not conspicuous in the sense mandated by *Gonski*.

Gonski stated 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.

Respondents argue (Answer 15:21-16:12) that their arbitration clause was conspicuous because it was not in fine print and had the same type size and heading as the other sections. That position is contrary to *Gonski's* requirements that a valid arbitration provision must be printed in a different type font and manner so that it "draws the reader's attention" from other paragraphs and is not one of "identically formatted paragraphs and sentences."

(3) The purported contract had no direct arbitration provision approval of the type found in *Gonski.*

Gonski, 245 P.3d at 1167, presents an acceptable arbitration provision in which the parties must initial to draw their attention to (indicate their affirmative agreement) the arbitration provision:

> **ARBITRATION:** Any controversy, claim or dispute arising out of or relating to this Agreement or Your purchase of the Home (other than claims under the Limited Warranty) shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (AAA) and the Federal Arbitration Act (Title 9 of the United States Code) and judgment rendered by the arbitrator(s) may be confirmed, entered and enforced.
>
> Purchaser's Initials___Purchaser's Initials___Seller's Initials___

In the present case, the purported contract (App. 27-28) gave no such

opportunity for affirmative assent to the arbitration provision, lending further support to a finding that it is void for procedural unconscionability.

(4) The purported contract was buried in a stack of papers.

In *Gonski* an additional reason for the finding of procedural unconscionability was that the contract containing the arbitration clause was presented to the Gonskis in a "stack of other papers." 245 P.3d at 1170. (Writ Petition 24:26-25:7) As discussed above under the itemization of versions, Respondents failed to put forward the entire contract and the other papers included in the stack of papers they were discussing. Had Respondents been straightforward and furnished the entire contract with their motion, their credibility would not now be taking on water.

(5) Petitioner had no meaningful opportunity to agree to the terms of the purported contract, as the entire contract was not provided.

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. (Writ Petition 25:8-14). Respondents' Answer argues that this requirement was met because they gave Petitioner a part--well under half--of the purported contract for review. But they concede that they never gave Petitioner the complete contract to review. (Answer 16:21-17:3) As a matter of law and as held in *Hoopes v. Hammargren,* 102 Nev. 425, 725 P.2d 238, 242 (1986): "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, since the person in whom trust and confidence is reposed and who accepts that trust

and confidence is in a superior position to exert unique influence over the dependent party." The parties agreed that the Respondents would be the investment advisers for the Petitioner. After the formation of the relationship, Respondents presented the Petitioner with a form of agreement to sign. At this point Respondents had the legal responsibilities of fiduciary, held all the cards, refused to disclose parts of the purported contract to Petitioner, and consequently had superior bargaining power. Under these facts, Petitioner had no meaningful opportunity to negotiate or agree to the terms of the purported contract.

(6) The purported contract did not warn Petitioner that he was agreeing to forego important rights under Nevada law.

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[.]" (Writ Petition 25:15-27). An "investment advisor" having a "confidential relationship" has the fiduciary obligation as a matter of law of disclosing this attempt to obtain an advantage to the principal. Respondents' Answer does not respond to this point, conceding procedural unconscionability.

(7) The effects of the arbitration clause could not be ascertainable because no complete version of the contract was ever provided.

Gonski, 245 P.3d at 1169, also found that "An arbitration clause is procedurally unconscionable when . . . its effects are not readily ascertainable upon a review of the contract" (Writ Petition 25:28-26:11). In the present case the effects

were not ascertainable because Respondents did not, and do not now, provide a copy of the entire contract. The Answer does not respond, conceding procedural unconscionability.

(8) The purported contract does not clearly state the governing law.

Another basis for procedural unconscionability is the absolute lack of clarity on governing law. (Writ Petition 26:12-28). The Answer does not respond.

The Answer relies (Answer 3:7-12) almost entirely on the statement found in the District Court's Order (App. 121). This statement was conclusory only and lacks any factual basis; further, at the time of the Court's order the Respondents had not finished supplying additional versions of the agreement (see R1-R6 above). The lack of a factual basis was challenged in the Request for Reconsideration (3:20-26 and multiple other locations; 10:6-7), and again the District Court refused to explain the basis for its conclusion (App. 201-203).

B. The purported contract and arbitration clause are substantively unconscionable.

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

(1) The arbitration provision effectively denies the right to appeal.

As discussed at Writ Petition 27:8-19, the right to appeal is fundamental and granted by statute. The arbitration provision effectively denies this right by

prohibiting findings of fact and conclusions of law. Respondents' Answer does not address this prohibition, thus conceding substantive unconscionability.

Respondents' Answer 19:10-19 asserts that this provision, like other provisions held improper under the principles of *Gonski*, are acceptable because both parties are similarly affected. That argument does not address the "oppressive" nature of the terms. The right to appeal is fundamental and guaranteed by the Nevada Constitution, *Coffin v. Coffin*, 40 Nev. 345, 163 P. 731 (1917), and an arbitration provision that imposes unreasonable burdens on that right is "oppressive," whether it affects both parties or not.

(2) The arbitration provision violates public policy and denies statutory rights.

As pointed out at Writ Petition 27:20-28:15, the arbitration paragraph violates public policy by attempting to prohibit punitive damages. Respondents' Answer concedes this point. Because the prohibition against punitive damages applies to both parties does not make it any less oppressive or less in violation of public policy.

(3) The arbitration provision violates public policy by requiring payment of arbitration fees up front.

The JAMS Rules provide that a party who does not pay fees up front may not offer any evidence, thereby preventing him from effectively arbitrating, see discussion at Writ Petition 28:16-29:15. *Gonski* addressed this very point, finding unconscionability as a result.

Respondents' Answer argues at 19:20-20:4, short quoting *Gonski*, that absence

of disclosure regarding fees may not render an arbitration provision unenforceable. The remainder of the quote from *Gonski* is: "Thus, the limited warranty's arbitration provision is substantively unconscionable because it required the Gonskis to pay the initial arbitration costs," which is precisely what the JAMS Rules require. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 96 P.3d 1159 (2004) holds that potentially large and undisclosed arbitration costs render the arbitration provision unconscionable:

> While an arbitration agreement's silence regarding potentially significant arbitration costs does not, alone, render the agreement unenforceable, 'the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her . .. rights in the arbitral forum . . . .' Thus, the district court properly considered Horton's failure to disclose potential arbitration costs in examining the asymmetrical effects of the provision. We agree with the *Ting* rationale and conclude that the arbitration provision was also substantively unconscionable.

Respondents' Answer at 20:5-21:10 also argues that it was up to Petitioner to chase down the JAMS rules. This argument ignores the obligations of Respondents under their fiduciary relationship with Petitioner. Respondents had an obligation under the case authority to provide everything they had that was pertinent to Petitioner, not to expect him to ferret out the information they already had. Respondents point to the provision of the JAMS Rules stating that the "parties shall be deemed to have made these Rules a part of their Arbitration agreement," yet they failed to provide a copy of the Rules to Petitioner. That strategy is certainly consistent with Respondents' refusal to provide the completed Confidential Client Profile, the three different Exhibits A, and the three different Exhibits B to Petitioner,

but it is unconscionable under *Gonski* and *D.R. Horton*.

(4) The purported contract and arbitration provision lack *de facto* mutuality of effect and are unconscionable.

Respondents' Answer at 21:11-26 addresses a different issue, mutuality of obligation in contract terms. As discussed at Writ Petition 29:16-30:3, mutuality of obligation is not the issue in determining unconscionability. The issue is whether the terms have different *de facto* effects on the parties. Respondents' Answer does not respond to the point that Petitioner made in the Writ Petition, conceding that the provision is substantively unconscionable as a result.

(5) The inconsistent JAMS governing rules were not disclosed by Respondents, rendering the arbitration provision unconscionable.

The JAMS Rules expressly require the person preparing the arbitration clause to state in the arbitration clause which set of the rules is to govern, the place of arbitration, and the number of arbitrators (see page 4, left column of each set of rules under "Standard Commercial Arbitration Clause"), because JAMS recognizes that failure to identify the governing rules, place of arbitration, and number of arbitrators renders the arbitration clause indefinite. See Writ Petition 30:4-20. The arbitration provision written by Respondents does not contain these mandatory provisions. Respondents' Answer does not address this point, conceding that the provision is substantively unconscionable as a result.

(6) The arbitration provision is substantively unconscionable as a result of the illusory discovery provision.

The discovery provision of Paragraph 16 of the purported contract is illusory for the reasons set forth at Writ Petition 30:21-31:6. Respondents' Answer does not address this point, conceding that the provision is substantively unconscionable as a result. Respondents' attempt to avoid discovery is particularly significant in view of its refusal to provide the complete contract between the parties.

5.

THE PURPORTED INVESTMENT MANAGEMENT AGREEMENT CONTAINS MULTIPLE PROVISIONS THAT ARE OBJECTIONABLE UNDER THE CONSTITUTION.

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

A. Petitioner did not waive his right to jury trial "knowingly and voluntarily."

As discussed at Writ Petition 19:1-22:6, there are four factors set forth in *Lowe Enterprises v. Eighth Judicial District Court*, 118 Nev. 92, 40 P.3d 405 (2002) to be considered. Respondents did not respond at all to Petitioner's arguments regarding factors (1), (3) and (4), conceding that these factors favor Petitioner's position. Respondents' Answer 23:2-24:7 addresses factor (2), with its primary argument (Answer 23:12-13) that "[T]he arbitration provision was not hidden away in tiny print, buried in hundreds of pages, or downplayed by Defendants." As far as

"buried in hundreds of pages," Petitioner and the Court do not know the truth or falsity of this statement because Respondents refuse to provide the entire purported contract. And as discussed above, *Gonski* has a far different requirement for conspicuousness. *Gonski* requires that the paragraph "draws the reader's attention" away from other paragraphs and must not be of "identically formatted paragraphs and sentences." The arbitration provision in *Gonski* was found unconscionable because it was "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. Although Respondents refuses to provide the entire contract, they admit that their purported arbitration provision was at pages 17-18 of a document having at least 18 pages, was printed in normal-sized font, had exactly the same formatting as the other paragraphs, and did nothing to draw the reader's attention. There was no place for the fiduciary's principal to sign and acknowledge the denial of rights.

Respondents' secondary argument (23:15-16) is that the caption of Paragraph 16 waives the right to jury trial. Paragraph 14 of the purported contract clearly states: "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." Because the waiver of jury trial is found only in the caption, it is not waived "knowingly and voluntarily."

Factor (4) also is in Petitioner's favor. Petitioner's attorney could not have reviewed the Investment Management Agreement because, to this day, the Respondents have not provided a complete agreement. Because each of factors 1-4

favor Petitioner's position, it must be concluded that Petitioner did not knowingly and voluntarily waive his right to jury trial.

B. Petitioner did not waive his right to appeal "knowingly and voluntarily."

As discussed at Writ Petition 22:7-23:3, Petitioner did not waive his right to appeal "knowingly and voluntarily." Respondents chose to seek waiver of this right indirectly, barring the arbitrator from making findings of fact and conclusions of law. This back-door approach directly violated the fiduciary obligation of Respondents to Petitioner. Regardless of whether Petitioner had an opportunity to make changes, the failure to provide the entire purported agreement and the indirect approach render the attempt to prevent appeal improper.

Respondents' Answer 24:8-19 briefly discusses this issue, asserting that consideration of the four *Lowe Enterprises* factors "would lead to the same result" here. Inasmuch as all four of the *Lowe Enterprises* factors support Petitioner's position, it must be concluded that a finding that Petitioner did not waive any appeal rights "knowingly and voluntarily."

6.

THE DISTRICT COURT'S ORDERS OFFEND CONSTITUTIONAL PROTECTIONS.

The Petition 31:20-33:18 establishes that the District Court neither had jurisdiction nor set forth any basis for jurisdiction to order arbitration, a procedural due process violation. The Answer does not respond, conceding this point.

Writ Petition 33:19-35:6 discusses the failure of the District Court to give reasons for its decision, a due process violation. The Answer does not respond, conceding this point.

Writ Petition 33:19-35:6 discusses the failure of the District Court to follow the controlling statute and the controlling precedent, a denial of equal protection. The Answer does not respond, conceding this point.

Writ Petition 36:7-18 points out that the failure of the District Court to address the issues interfered with Petitioner's ability to petition for a writ or appeal its holdings. The Answer does not respond, conceding this point.

7.

THE ORDER TO ARBITRATE SHOULD BE REVERSED FOR THE ADDITIONAL REASON THAT AN ARBITRATOR IS NOT WELL EQUIPPED TO DEAL WITH RESPONDENTS' SHIFTING ASSERTIONS CONCERNING THE PURPORTED CONTRACT.

An arbitrator does not have the same authority, including provisions such as discovery sanctions, NRCP 11, and contempt powers, as the District Court to deal with the disingenuous conduct of Respondents regarding the fundamental document in the case. Respondents's various papers have treated the progression in what constitutes the "Investment Management Agreement" as an exercise in creative story-telling, going from one sworn statement and argument to another without explanation. The Exhibit 1 filed under oath as "true, correct, and complete" with the Motion to Compel started on page 12. When this discrepancy was called to their attention, Respondents replied under oath that this was simply a word-processing error. Next,

when pressed by Petitioner, Respondents provided a 13-page blank Confidential Client Profile that they stated under oath constituted the missing 11 pages. Exhibit 1 stated that the Confidential Client Profile in any fully-realized Investment Management Agreement must be completed. It additionally stated that there are 3 different Exhibits A and 3 different Exhibits B that are necessarily part of any "complete" Investment Management Agreement. These have never been provided by Respondents.

And now Respondents' counsel has disclosed what appears to be yet another document that constitutes the "agreement with Wespac," yet refuses to provide that new document.

Neither an arbitrator nor Petitioner can deal with this shifting position outside of the context of a court proceeding.

8.

SUMMARY AND CONCLUSION

The arbitration provision which the Respondents seek to enforce in a contextual vacuum must be rejected. Accordingly, the Court should reverse the District Court's Order compelling arbitration.

DATED this 2nd day of September, 2014.

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

Counsel for petitioner

ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. 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 brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,667 words.

3. Finally, I hereby certify that I have read this appellate brief, 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 applicable Nevada Rules of Appellate 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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of

the Nevada Rules of Appellate Procedure.

DATED this 2nd day of September, 2014.

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

Counsel for Petitioner