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

Petition for Writ of Mandamus or Prohibition to the Second Judicial District Court Judge Brent T. Adams, Case No. CV12-01271

PETITION FOR REHEARING (NRAP 40)

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following 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

Petitioner Gregory O. Garmong ("Garmong"), through his attorney, Carl Hebert, Esq., petitions this Court pursuant to NRAP 40 for rehearing on the grounds that the Order of Affirmance dated December 12, 2014 ("Order") overlooks or misapprehends matters of law and fact that warrant reversal of the District Court's orders.

1.

INTRODUCTION

NRAP 40 provides for a Petition for Rehearing where the Court's Panel Order has overlooked or misapprehended a material fact or question of law. As discussed below, the Order fails to address the issues presented to it for decision, overlooks and/or misapprehends all of the material facts and questions of law and fails to uphold and apply controlling Constitutional provisions, statutes, rules, and decisional authority. Appellant requests that the Court properly address these overlooked or misapprehended issues, material facts and questions of law.

2.

THE ORDER OVERLOOKS MATERIAL FACTS AND QUESTIONS OF LAW BY FAILING TO ADDRESS ANY OF THE ISSUES

By failing to address any of Issues 1-7 set forth in Petition for Writ of Mandamus or Prohibition ("Petition") at 3:25-4:11 the Order does not uphold and apply the law. This Court has held that it is error not to address the issues raised. See *Diaz v. Golden Nugget*, 103 Nev. 152, 154-155, 734 P.2d 720, 722 (1987), discussed at Petition 35:2-6.

Petitioner asks that the court address these issues 1-7 as requested in the

Petition.

3.

THE ORDER OVERLOOKS OR MISAPPREHENDS MATERIAL FACTS AND QUESTIONS OF LAW

A. The Order overlooks and fails to uphold and apply the law requiring *de novo* review of aspects of the District Court's disposition

The Court is required to conduct a *de novo* review of the District Court's interpretation of NRS 38.221(1). *Cable v. State ex rel. its Employers Insurance Company of Nevada*, 122 Nev. 120, 124, 127 P.3d 528, 531 (2006). Aspects of contract interpretation must also be reviewed *de novo*. *Grisham v. Grisham*, 128 Nev. Adv. Op. 60, 289 P.3d 230, 236 (2012). See also related case authority discussed at Petition 5:2-6:12. The Order does not conduct any such mandatory *de novo* reviews.

B. The Order overlooks the facts and fails to uphold and apply the law establishing that the District Court had no jurisdiction to order arbitration

The Petition, at 7:6-11:18, demonstrates that the District Court did not have jurisdiction to render a valid judgment, for the following reasons

(1) A District Court must have subject matter jurisdiction before it can order arbitration. *Argentena Consolidated Mining Company v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 532, 216 P.3d 779, 782 (2009). The Order fails to uphold and apply this law. Petition 7:7-18.

(2) NRS 38.221(1) establishes the statutory jurisdictional prerequisites for considering and/or deciding a motion compelling arbitration. No court may

ignore such statutory jurisdictional prerequisites. *AA Primo Builders, LLC v. Washington*, 126 Nev. Adv. Op. 53, 245 P.3d 1190, 1197 (2010). *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560 (1993). The Order fails to uphold and apply this law. Petition 7:18-8:6.

(3) Respondents made no allegation of "another person's refusal to arbitrate pursuant to the agreement," which is required by NRS 38.221(1) as a jurisdictional prerequisite to arbitration, nor did the district court make any such finding. Respondents' Opposition (App. 134-45) to Petitioner's Motion for Reconsideration (App. 123-33) admits (App. 140: 5-13; App. 86: 26-28) that respondents never made this mandatory allegation. See also App. 194, ¶ 2 and ¶ 3, and App. 198, ¶ 2. The Order overlooks these material facts and fails to uphold and apply this law.

(4) Respondents made no showing of a valid contractual "agreement to arbitrate" which is required by NRS 38.221(1) as a jurisdictional prerequisite to arbitration. See *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), nor did the district court make any such finding. Petition 9:7-11:18. The Order fails to uphold and apply this law.

The Order overlooks or misapprehends the fact that respondents' refusal to provide a complete Investment Management Agreement was designed to gain an advantage in arbitration, but that it also prevents the possibility of arbitration pursuant to NRS 38.221(1). Petition 11:19-12:14.

The Order overlooks or misapprehends the fact that Petitioner sought factual findings and conclusions from the District Court, which were not forthcoming. Petition 12:15-13:18.

Because the District Court had no jurisdiction, this Court also has no jurisdiction to affirm an order compelling arbitration.

C. The Order overlooks the facts, and fails to uphold and apply the law, showing that respondents did not submit a complete, valid and enforceable contract having an arbitration provision, despite three attempts, and no such agreement is in the record

Obstetrics and Gynecologists requires that the party asserting a contract as the basis for arbitration "had the burden of persuading the district court that the arbitration agreement which it wished to enforce was a valid contract." Petition 9:8-18. The Order overlooks the facts, and fails to uphold and apply the law, specifically that respondents in this case have not presented any evidence that the papers that they wish to enforce as an arbitration agreement constitute a valid contract See Petition 9:7-11:18 and 13:19-18:22. Moreover, the Order overlooks the multiple different versions of the purported contract that were proffered.

The Order overlooks, and fails to uphold and apply the law, that an incomplete collection of papers purporting to be a contract cannot be enforced. *Dodge Bros., Inc. v. Williams Estate*, 52 Nev. 364, 287 P. 282, 283-4 (1930); *All Star Bonding v. State of Nevada*, 119 Nev. 47, 49, 62 P.3d 1124 (2003); *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

The Order also overlooks, and fails to uphold and apply the law, set forth in

other governing statutes including:

(1) NRS 38.219(2) which requires that the District Court "shall decide whether an agreement to arbitrate exists";

(2) NRS 38.219(1) which provides 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, and

(3), NRS 597.995 which does not permit an arbitration clause absent specific authorization in the agreement to that specific clause.

The purported agreement at issue in this case (App. 21-28) does not support an arbitration provision under any of these three statutory requirements. The Order does not uphold and apply any of these three statutes, discussed at Petition 10:23-11:16.

The Order also overlooks other important material facts, including the tortured attempt by the respondents to set forth a complete contract. Respondents' Motion to Compel, App. 12-16, included as Exhibit 1, App. 21-28, a collection of papers entitled "Investment Management Agreement" and an Affidavit of Greg Christian stating:, "Attached is a true, correct, and complete copy of the Investment Management Agreement." App. 17, ¶ 2.

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

Exhibit 1 called for several exhibits as well as the completed (not a blank form) Confidential Client Profile and three different documents termed "Exhibit A,"

App. 22, ¶ 2 and App. 23, ¶ 4(a), and three different documents termed "Exhibit B." App. 23-24, ¶ 3(3) and ¶ 4(a). None of this material was part of original Exhibit 1. App. 21-28.

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

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

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

For support respondents' Reply referenced paragraphs 5-6 of the second Affidavit of Greg Christian, App. 100:1-7:

> 5. The copy of the Investment Management Agreement which was attached as Exhibit 1 to my affidavit filed September 19, 2012 was a true, correct, and complete copy of the Investment Management Agreement signed by me and Gregory Garmong.
>
> 6. I am informed, believe and therefore allege that the incorrect page numbering on the Investment Management Agreement attached to my September 19, 2012 affidavit occurred solely as the result of a word processing and/or computer error.

Thus, respondents again claimed <u>under oath</u> that the Agreement version 2 with

"incorrect page numbering" was a complete document and asserted that its only deficiency was mis-numbered pages.

Petitioners Motion for Reconsideration, App. 128: 5-19, persisted in pointing out the shortcomings and inconsistencies in respondents' story about the "Investment Management Agreement." As it turned out, paragraphs 5-6, App. 100: 1-7, of the second Christian Affidavit were completely false. There were pages prior to page 12. Respondents' Opposition to the Motion for Reconsideration included, at App. 146-59, an incomplete, blank copy of a "Confidential Client Profile" that was represented to be the earlier pages 1-11. This blank document was introduced by a third Affidavit of Greg Christian, App. 144:10-12, stating:

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

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

The Confidential Client Profile must be completed; a blank-form preprinted document is insufficient. The original Exhibit 1 provided:

> 2. Custody of Portfolio Assets. The Portfolio Assets subject to WA's supervision will be maintained in street name in Client's account at Charles Schwab & Co., Inc. or at a brokerage house, bank, trust company or other firm ('the Custodian') selected by Client as set forth in the attached Confidential Client Profile.
>
> 12. All written notices to . . . Client at the address set forth in Confidential Client Profile attached hereto.

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

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

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

Even in submitting the incomplete form Confidential Client Profile, App. 146-59), respondents were still not being fully candid. First, it was submitted in blank, even though the above-quoted paragraphs 2 and 12 of Agreement version 1 identify information that would necessarily be found in the completed Confidential Client Profile. Further, the third Affidavit of Greg Christian stated, at App. 144:11, that the attachment is "the first eleven pages of the document which included the Investment Management Agreement." The Exhibit Index, App. 145, stated that the document was 13 pages, as a page count verified, not the 11 pages as sworn. One must ask whether the blank "Confidential Client Profile" submitted as Exhibit 1 is really the first 11 pages of the Investment Management Agreement or whether something else is really the first 11 pages. In any event, the Petitioner is now certain that such a thing as the Confidential Client Profile referenced in paragraphs 2, 12, and 14 of the Agreement version 1 does exist and was withheld from the Exhibit 1 that was initially submitted with Defendants' Motion to Compel. Consequently, the prerequisite of NRS 38.221(1), "On motion of a person showing an agreement to arbitrate" was not met in the original Exhibit 1. App. 21-28 (Emphasis added).

It got worse. Comparing the Table of Contents, App. 149, of the Confidential Client Profile with the content of the document shows that the material described in the Table of Contents had not been supplied. The Table of Contents stated that

numbered pages 5-11, App. 153-59, were "Exhibit A: Fee Schedule" and "Exhibit B: Portfolio Appraisal/Security Cost Basis Form." In fact, a brief inspection shows that numbered pages 5-11 were nothing of the sort. Those pages appear to be an incomplete "Investment Policy Questionnaire." See the title on numbered page 5 and the content of the documents on numbered pages 6-11. Respondents provided no Exhibit A or Exhibit B as called for in the Table of Contents of the Confidential Client Profile.

Moreover, respondents expected the District Court to believe that the actual Confidential Client Profile referenced in paragraphs 2 and 12 quoted above was incomplete. The reason that respondents sought to conceal the information that would be found on the completed Confidential Client Profile was that it is substantively important to the case, and they hope to avoid its production in a lop-sided arbitration proceeding where "discovery shall not be permitted except as required by the rules of JAMS." App. 27-28, ¶ 16. Of course, the rules of JAMS, App. 48-83, do not require any discovery; as a result petitioner will never be able to find out what information the respondents have concealed. A review of the incomplete Confidential Client Profile, App. 146-59, reveals that a completed form would set forth, among other things, the instructions that petitioner gave to the respondents to conservatively manage his retirement savings, App. 151 and 154-59,

which the respondents blatantly ignored in wasting a significant portion of his life savings. If the respondents can force this matter to an arbitration with substantially no discovery and without the possibility of punitive damages, App. 27, ¶ 16, they will have saved themselves a significant amount of money by thwarting the efforts of the petitioner to recover his dissipated assets.

As noted, the Order overlooked all of these facts, including the several falsely sworn and inconsistent declarations.

D. The Order overlooks the facts, and fails to uphold and apply the law, showing that the purported Investment Management Agreement contains multiple provisions that are objectionable under the Constitution. (Petition 18:23-23:3)

(1) Right to Jury Trial

The Order overlooks the fact, and fails to uphold and apply the law, that petitioner did not waive his right to jury trial "knowingly and voluntarily." Petition 19:1-22:6 discusses and applies the factors set out in *Lowe Enterprises v. Eighth Judicial District Court*, 118 Nev. 92, 101, 40 P.3d 405, 410-11 (2002), demonstrating that petitioner did not waive his right to jury trial "knowingly and voluntarily." Among other reasons, because petitioner did not have the entirety of the purported agreement, waiver could not have been made "knowingly and voluntarily." See App. 27-28, ¶ 16; App. 27, ¶ 14; App. 194-5, ¶¶ 5-8.

(2) Right to Appeal

The Order overlooks the fact and fails to uphold and apply the law that petitioner did not waive his right to appeal "knowingly and voluntarily." See the discussion at Petition 22:7-23:3; App. 27-28, ¶ 16. Again applying the principles of *Lowe Enterprises*, petitioner demonstrated that he did not waive his right to appeal "knowingly and voluntarily." Further, "the nature and scope of review of an arbitrator's decision cannot be stipulated to by the parties." *Barnett v. Hicks*, 829 P.2d 1087, 1095 (Wash. 1992).

E. The Order overlooks the fact, and fails to uphold and apply the law, that the arbitration agreement is both procedurally and substantively unconscionable and should not be enforced. (Petition 23:4-31:19)

The law of unconscionable, unenforceable arbitration provisions is set forth in *Gonski v. Second Judicial Dist. Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1169 (2010). Petition 23:5-24:2. The Order does not mention, much less uphold and apply, this controlling authority.

(1) Procedural unconscionability

The Order does not uphold and apply law found in the principles of *Gonski* and related authority establishing procedural unconscionability due to failure to draw the reader's attention to the provision; the requirement that the provision "must include a specific authorization for the provision which indicates that the person has

affirmatively agreed to the provision." (NRS 597.995(1) and (2)); the presentation of the purported arbitration provision "in a stack of other papers"; that petitioner had no 'meaningful opportunity to agree to the clause terms . . . because of unequal bargaining power, as in an adhesion contract"; that petitioner was "agreeing to forego important rights under Nevada Law"; that the "arbitration clause is procedurally unconscionable when . . . its effects are not readily ascertainable upon a review of the contract," inasmuch as no complete "contract" was ever presented to Petitioner, and the absence of clarity of governing law.

The Order does not uphold, and does not apply, <u>any</u> of these factual and legal grounds of procedural unconscionability set forth in the petition at 23:22-27:2; App. 22-28.

(2) <u>Substantive unconscionability</u>

The Order does not uphold and apply law found in the principles of *Gonski* and related authority establishing substantive unconscionability due to attempted denial of right to appeal, NRS 38.247; *Clark County Education Association v. Clark County School District*, 122 Nev. 337, 131 P.3d 5 (2006); public policy and denial of statutory rights, *Picardi v. Eighth Judicial Court*, 127 Nev. Adv. Op. 9, 251 P.3d 723 (2011); hidden arbitration fees, *Gonski*, 245 P.3d at 1171; lack of mutuality, *Gonski*, 245 P.3d at 1169; inconsistent governing rules and illusory discovery rules.

The Order does not uphold, and does not apply, any of these factual and legal grounds of substantive unconscionability set forth in the Petition at 27:3-31:6; App. 022-028.

(3) Sliding scale of unconscionability

The Order does not uphold and apply the law requiring consideration of a sliding scale of unconscionability, as required by *Gonski*, 245 P.3d at 1169. Petition 31:7-19.

F. The Order overlooks the fact, and fails to uphold and apply the law, that the district court's orders offend Constitutional protections (Petition 31:20-36:18)

The courts are required to follow the fundamental public policy of Nevada that the courts must apply the law, including the Constitution, statutes, and rules. *In re Raggio*, 87 Nev. 369, 370, 487 P.2d 499 (1971). Petition 2:22-3:9. The District Court and the Order fail in this obligation.

(1) The Order fails to uphold and apply the law that "jurisdiction" is indispensable to action by any court. (Petition 31:20-32:21)

The Order overlooked, and failed to uphold and apply the law, as set forth in authority such as *American Land Co. v. Zeiss*, 219 U.S. 47, 71 (1911); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998); *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984). Petition 32:22-

32:21.

(2) <u>The Order fails to uphold and apply the law that the refusal to address a fundamental issue such as jurisdiction is a procedural Due Process violation of the Fourteenth Amendment to the United States Constitution and Art. 1, Sec. 8, Paragraph 5 of the Nevada Constitution</u>

The Order overlooked, and failed to uphold and apply the law of Constitutional procedural due process, as stated in *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972) and *Baltimore & Ohio R. Co. v. United States*, 264 U.S. 258, 265-6 (1924). Petition 32:24-33:18.

(3) <u>The Order fails to uphold and apply the law that the failure of the Order to provide reasons in its disposition was a substantive Due Process violation</u>

See *County of Sacramento v. Lewis*, 523 U.S. 833, 845-846 (1998); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); as well as this Court's own holdings in *Allen v. State of Nevada*, 100 Nev. 130, 134, 676 P.2d 792, 794 (1984); *Mainor v. Nault*, 120 Nev. 750, 759, 101 P.3d 308, 315 (2005) *cert. den.*, 546 U.S. 873 (2005); *Bell Tel. Co. v. Public Service Commission*, 70 Nev. 25, 41-42, 253 P.2d 602, 610 (1953). This precedent is cited

and discussed at Petition 33:19-35:6, in support of the requirement that the District Court and this Court must provide valid reasons for their dispositions.

(4) The Order fails to uphold and apply the law that the failure to follow the controlling statutes and factually and legally indistinguishable precedents is a denial of equal protection under the Fourteenth Amendment

See the following authority set forth and discussed at Petition 35:7-36:6: *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 465 (1947); *Truax v. Corrigan*, 257 U.S. 312, 332-333 (1921); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *United States v. IBM*, 517 U.S. 843, 856 (1996) and, as to this Court, *In re Raggio*, 87 Nev. 369, 370, 487 P.2d 499 (1971).

(5) The Order fails to uphold and apply the law 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

In addition to the stated due process and equal protection violations, petitioner is hampered on appellate review by the absence of any valid reasoning regarding the issues upon which petitioner's writ petition is based. *Daniel v. State*, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003) ("Failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations."). *See also Panama Mail S.S. Co. v. Vargas*, 281 U.S. 670, 671, 50 S.Ct. 448 (1930) and *Raper v. Lucey*, 488 F.2d 748, 752-753 (First Cir. 1983). Petition 36:7-18

In summary, petitioner was denied due process under the Constitution. Such

Constitutional provisions are binding and may not be disregarded. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009).

4.

SUMMARY AND CONCLUSION

The Panel is requested to rehear this matter so that it may consider the material facts and questions of law that it overlooked or misapprehended and that it may uphold and apply the law.

DATED this 29th day of December, 2014.

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

Counsel for Petitioner

ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,764 words.

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

Rules of Appellate Procedure.

DATED this 29th day of December, 2014.

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

Counsel for Petitioner