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 EN BANC RECONSIDERATION (NRAP 40A)

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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

Appellant Gregory O. Garmong ("Garmong") petitions this Court pursuant to NRAP 40A for *en banc* reconsideration of the Panel's Order Denying Petition entered on December 14, 2014 and Order Denying Rehearing entered on February 27, 2015 (collectively, "Panel Orders").

1.

INTRODUCTION

NRAP 40A allows a petition for *en banc* reconsideration where reconsideration by the full court is necessary to secure or maintain uniformity of its decisions, or the proceeding involves a substantial precedential, constitutional or public policy issue. The following §§2-5 demonstrate the presence of these issues, and §6 demonstrates the adverse impact of the errors of the Panel dispositions beyond the present litigants.

2.

THE PANEL ORDERS REFUSED TO ADDRESS THE ISSUES 1-7 PRESENTED BY PETITIONER.

A. Judges and Courts must uphold and apply the law. (Public Policy)

The Nevada Code of Judicial Conduct ("NCJC") sets forth the public policy of this state concerning the performance of judges. NCJC Canon 1/Rule 1.1 provides: "Compliance With the Law. A judge shall comply with the law, including the Code

of Judicial Conduct." NCJC Canon 1/Rule 1.2 states: "Promoting Confidence in the Judiciary. A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."

Comment [1] to Rules 1.1 and 1.2 states: "Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge." Comment [2] states: "A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code." Comment [5] states in part: "Actual improprieties include violations of law, court rules, or provisions of this Code."

NCJC Canon 2/Rule 2.2 provides: "Impartiality and Fairness. A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."

Judges swear in their judicial oath that they will "support, protect, and defend the constitution and government of the United States, and the constitution and government of the State of Nevada" and will "well and faithfully perform all the duties of the office of Justice of the Supreme Court of the State of Nevada." Although granting relief by writ is discretionary, the failure to give reasons for a

decision is an abuse of discretion and a Due-Process violation. See §1.E. below.

A review of the two Panel Orders shows that, by failing to address any of the Issues and matters raised in the Petition for Writ of Mandamus or Prohibition ("Writ Petition"), the Panel did not meet these public policies and violated Due-Process Constitutional protections.

B. <u>The proper approach to seek review of an order for arbitration is a writ petition. To ignore the issues and matters raised therein violates the NCJC and Due-Process protections. (Public Policy, Constitutional)</u>

"Writ petitions are the appropriate means to challenge district court orders compelling arbitration." *Gonski v. Second Judicial Dist. Court*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1168 (2010). Writ Petition 4:18-23. Issuance of a writ is discretionary, not mandatory. *DOT v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). However, action is required where the Court has previously identified a writ petition as the proper way to challenge an invalid order to arbitrate. Writ Petition 4:24-27.

The Panel may not exercise its discretion by ignoring all of the Issues and giving no reasons for ignoring those Issues. Petitioner presented 7 issues on appeal. Writ Petition 3:25-4:11. By refusing to address any of issues 1-7, the Panel Orders do not uphold and apply the law; see NCJC provisions quoted in §2A. It is error not to address the issues raised. See *Diaz v. Golden Nugget*, 103 Nev. 152, 154-55, 734

P.2d 720, 722 (1987). Writ Petition 35:2-6.

C. The Panel Orders fail to uphold and apply the law requiring *de novo* review of aspects of the District Court's disposition. (Precedential, Uniformity)

The Court is required to conduct a *de novo* review of the District Court's interpretation of a statute such as NRS 38.221(1). Writ Petition 5:2-6:12. See, for example, *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). The Panel Orders do not conduct the mandatory *de novo* reviews.

D. The refusal to address a challenge to subject-matter jurisdiction is a procedural Due Process violation of the Fourteenth Amendment to the United States Constitution and Art. 1, Sec. 8, ¶5 of the Nevada Constitution. (Precedential, Constitutional)

The Panel Orders failed to uphold and apply the law of Constitutional procedural due process, in that Petitioner was denied the right to be heard and to have his Petition decided on the applicable facts and law. *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972) and *Baltimore & Ohio R. Co. v. United States*, 264 U.S. 258, 265-66 (1924). Writ Petition 32:24-33:18.

E. The Panel Orders refuse to provide reasons for their dispositions, a substantive Due Process violation (Constitutional)

The District Court and this Court must provide valid reasons for their

dispositions, including those that deprive a person of property interests. See *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (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) and *Mainor v. Nault*, 120 Nev. 750, 759, 101 P.3d 308, 315 (2005) *cert. den.*, 546 U.S. 873 (2005). The Panel Orders did not give any reasons at all. Writ Petition 33:19-35:6.

3.

THE DISTRICT COURT AND THIS COURT HAVE NO JURISDICTION TO ORDER ARBITRATION

A. "Jurisdiction" is indispensable to action by any court. Courts must have subject-matter jurisdiction before they can order arbitration. (Precedential, Constitutional)

Any court must have subject matter jurisdiction before it can make any decision or order, including ordering arbitration. *Argentena Consolidated Mining Company v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 532, 216 P.3d 779, 782 (2009). The Panel Orders fail to uphold and apply this law. Writ Petition 7:7-18.

When subject-matter jurisdiction is challenged, the Court must address the challenge. See, for example, *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). Writ Petition 31:20-32:21.

The Writ Petition (7:6-11:18) demonstrates that the District Court, and subsequently the Supreme Court, did not have jurisdiction to render a valid judgment, for the following reasons 3.B-E.

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

NRS 38.221 sets forth the statutory subject-matter jurisdictional prerequisite for a court to order arbitration: "On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement." No court may ignore this statutory subject-matter jurisdictional mandate. *AA Primo Builders, LLC v. Washington*, 126 Nev. Adv. Op. 53, 245 P.3d 1190, 1197 (2010;. *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560 (1993). The Panel Orders fail to uphold and apply this law. Writ Petition 7:18-8:6.

C. Respondents made no allegation of "another person's refusal to arbitrate pursuant to the agreement," nor did the district court or the Panel Orders make any such finding. (Precedential, Constitutional, Uniformity)

Respondents' brief Motion to Compel (Appendix to Writ Petition, ("App."), 12-16) did not make this jurisdiction-conferring allegation required by NRS 38.221(1). Nor did Respondents ever argue that they made such an allegation, for good reason.

Respondents never requested Petitioner to arbitrate, either directly (App. 194, ¶2 and ¶3) or through his attorney (App. 198, ¶2). Writ Petition 8:14-20.

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. Writ Petition 8:21-9:6. The Panel Orders fail to take account of the material facts and fail to uphold and apply this law. See *Baltimore & Ohio R. Co.*, 264 U.S. at 265-66, holding: "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." Writ Petition 33:11-18.

D. 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. (Precedential, Uniformity, Constitutional)

NRS 38.221(1) requires that the party seeking arbitration, here Respondents, demonstrate a valid agreement that includes an arbitration provision. Writ Petition 9:7-19. *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*, 101 Nev. 105, 107-08, 693 P.2d 1259, 1260-61 (1985) holds: "Since appellant set up the existence of the agreement [to arbitrate] to preclude the lawsuit from proceeding, it had the burden of showing

that a binding agreement existed . . . As the moving party, appellant had the burden of persuading the district court that the arbitration agreement which it wished to enforce was a valid contract." In the present case it was the Respondents who "set up the existence of the agreement," but the principle otherwise applies.

The Panel Orders do not recognize 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). Writ Petition 11:19-12:14. The Panel Orders also refuse to acknowledge the fact that Petitioner sought factual findings and conclusions from the District Court and the District Court refused to provide such findings and conclusions. Writ Petition 12:15-13:18.

Because the District Court had no jurisdiction, this Court also has no jurisdiction to affirm an order compelling arbitration. Writ Petition 31:22-32:21.

E. <u>The Panel Orders refuse to recognize the facts, and fail to uphold and apply the law, establishing that Respondents did not submit a complete, valid and enforceable contract having an arbitration provision, despite three attempts; no such agreement is in the record. (Uniformity, Precedential)</u>

Obstetrics and Gynecologists held 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." Writ Petition 9:8-18.

The Respondents, who assert an arbitration agreement, have not presented any evidence that the papers that they wish to enforce as an arbitration agreement constitute a valid contract, Writ Petition 9:7-11:18 and 13:19-18:22. Moreover, the Panel Orders ignore the multiple different, inconsistent versions of the purported contract that were proffered.

The Panel Orders refuse 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); *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

The Panel Orders also refuse 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 that exists at law or in equity for revocation of a contract," and

(3) NRS 597.995(1)-(2) which does not permit an arbitration clause absent specific authorization in the agreement to that arbitration clause.

The purported agreement at issue in this case (App. 21-28) does not support an

arbitration provision under these three statutory requirements. The Panel Orders do not uphold and apply these three statutes. Writ Petition 10:23-11:16.

The Panel Orders also refuse to recognize other important material facts, including the tortured, but unsuccessful, attempt by the Respondents to set forth a complete contract. (Writ Petition 13:19-18:22) 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 included in 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 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 ¶¶ 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 was a complete document and asserted that its only deficiency was "mis-numbered" pages.

Petitioner's 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, ¶¶ 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') <u>selected by Client as set forth in the attached Confidential Client Profile</u>.
>
> 12. All written notices to . . . Client at the <u>address set forth in Confidential Client Profile attached hereto.</u>

(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, <u>including the Confidential Client Profile and all Exhibits attached hereto</u>, 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 ¶¶2, 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 ¶¶ 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).

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 ¶¶ 2 and 12 quoted above was complete. 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 hoped 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. 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 Panel Orders failed to recognize these facts, including the several falsely sworn and inconsistent declarations.

4.
THE "ARBITRATION AGREEMENT" IS UNCONSCIONABLE, AND CONSTITUTIONALLY OBJECTIONABLE

A. THE "ARBITRATION AGREEMENT" IS PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE (UNIFORMITY, PRECEDENT)

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). Writ Petition 23:5-24:2. The Panel Orders do not mention, much less uphold and apply, this controlling authority.

1. Procedural unconscionability

The Panel Orders do not uphold and apply the law found in *Gonski* 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 Panel Orders do not uphold, and do not apply, any of these factual and legal grounds of procedural unconscionability set forth in the Writ Petition at 23:22-27:2; App. 22-28.

2. Substantive unconscionability

The Panel Orders do not uphold and apply law found in the principles of *Gonski* and related authority establishing substantive unconscionability due to attempted denial of a 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 and inconsistent governing rules and illusory discovery rules.

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

3. Sliding scale of unconscionability

The Panel Orders do not uphold and apply the law requiring consideration of

a sliding scale of unconscionability, as required by *Gonski*, 245 P.3d at 1169. Writ Petition 31:7-19.

B. The purported "Investment Management Agreement" contains multiple provisions that are objectionable under the Constitution. (Writ Petition 18:23-23:3) (Precedent, Uniformity, Constitutional)

1. Right to Jury Trial

The Panel Orders overlook the fact, and fail to uphold and apply the law, that petitioner did not waive his right to jury trial "knowingly and voluntarily." Writ 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 Panel Orders overlook the fact and fail to uphold and apply the law that petitioner did not waive his right to appeal "knowingly and voluntarily." See the discussion at Writ 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).

5.

THE PANEL ORDERS VIOLATE CONSTITUTIONAL PROTECTIONS

A. The failure to follow the controlling statutes, and factually and legally indistinguishable precedents, is a denial of equal protection under the Fourteenth Amendment (Uniformity, Precedent, Constitutional)

The failure to follow the controlling statutes, and factually and legally indistinguishable precedents, is a denial of equal protection under the Fourteenth Amendment, as well as being a violation of the NCJC set forth in §2A above. See the following authority set forth and discussed at Writ Petition 35:7-36:6: *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).

B. The District Court and Panel Orders offend Constitutional protections (Writ Petition 31:20-36:18). (Public Policy, Precedent, Constitutional)

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

and the Panel Orders fail in this obligation.

6.

IMPACT OF THE PANEL ORDERS BEYOND THE LITIGANTS INVOLVED

Nevada provides a right of appeal, *Coffin v. Coffin*, 40 Nev. 345, 348, 163 P. 731, 73 (1917). *Evitts v. Lucey*, 469 U.S. 387, 387-88, 401 (1985), *reh. den.*, 470 U.S. 1065 (1985) requires that when the state provides such a right, the appeal must be conducted "in accord with the dictates of the Constitution, and, in particular, in accord with the Due Process Clause."

The Panel Orders refused to address any of the Issues presented (§2), took action in the absence of subject-matter jurisdiction of the District Court and the Supreme Court (§3), implicitly approved an "arbitration agreement" that was procedurally and substantively unconscionable (§4), and violated Constitutional protections (§5).

Unless they are corrected by the *en banc* Court, the adverse impact of the Panel Orders in failing to adhere to basic public policies, precedent, and Constitutional protections will cause an immeasurable loss of public confidence and respect for the Nevada courts generally and the Supreme Court specifically. The Panel Orders, unless corrected, will throw considerable doubt on the role of judges under the Nevada Code

of Judicial Conduct, the viability and role of precedent, whether Nevada follows the Nevada and United States Constitutions, and whether the courts and the public must follow statutes such as those at issue here, NRS 38.221(1), NRS 38.219(1) and (2), NRS 38.247, NRS 597.995 (1) and (2). Corrective action by the *en banc* Court may avoid these adverse consequences.

7.

SUMMARY AND CONCLUSION

The *en banc* Court should reconsider and reverse for the reasons set forth above.

DATED this 13th day of March 2015.

/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 4459 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 13th day of March, 2015.

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

Counsel for Petitioner

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned certifies that he has filed this PETITION FOR EN BANC RECONSIDERATION (NRAP 40A) with the Nevada Supreme Court under its electronic filing system, as permitted by the Nevada Electronic Filing and Conversion Rules. Service was automatically made on Thomas C. Bradley, Esq., SBN #1621, 448 Hill Street, Reno, Nevada 89501; telephone 775-323-5178; telefax 775-323-0709, counsel for real parties in interest Wespac and Christian, who is a registered user of the system. See NEFCR 9(b).

DATED this 13th day of March 2015.

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

Counsel for Petitioner Garmong