IN THE SUPREME COURT OF THE STATE OF NEVADA

NUVEDA, LLC, Appellant, v. JENNIFER GOLDSTEIN, Respondent.	**SUPREME COURT NO. 79806** District Court Case No. A-15-728510-B **RESPONDENT'S ANSWERING BRIEF**

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable ELIZABETH GONZALEZ, District Judge
District Court Case No. A-15-728510-B

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RESPONDENTS' ANSWERING BRIEF

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DISCLOSURE STATEMENT

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 Justices of this Court may evaluate possible disqualification or recusal.

1. No such entities exist. Jennifer Goldstein is an individual. The law firm of Dickinson Wright, PLLC, represented Jennifer Goldstein below.

DATED this 13th day of April, 2020.

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/s/ Brian R. Irvine

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ROUTING STATEMENT RESPONSE

Respondent agrees with Appellant that, as this action originated in business court, the Supreme Court shall hear and decide this appeal pursuant to NRAP 17(a)(9).

I. STATEMENT OF THE CASE

Although the factual and procedural history of this case is somewhat tortured, the issues before this Court are straightforward.

Appellant NuVeda, LLC ("NuVeda") is a Nevada company, which, through its various subsidiaries, holds several Nevada licenses to cultivate, process and dispense marijuana. Disputes between the NuVeda members led to the initiation of the subject arbitration and litigation in the District Court. Respondent Jennifer Goldstein ("Goldstein") was a member of NuVeda until she was expelled from the company. Pursuant to the terms of the NuVeda Operating Agreement ("Operating Agreement"), Goldstein's expulsion entitled her to "receive from the Company, in exchange for all of the former Member's Ownership Interest, the fair market value of that Member's Ownership Interest, adjusted for profits and losses to the date of expulsion…" (V JA 914). The arbitration focused on determining the fair market value of Goldstein's interest. Goldstein ultimately obtained a favorable arbitration award, as the arbitrator interpreted the Operating Agreement so as to require her to

reject NuVeda's artificially low valuation of Goldstein's ownership interest in NuVeda and award a much higher value.

NuVeda subsequently filed a Motion to Vacate the Arbitration Award in the proceedings below, and argued that the Arbitration Award should be vacated because (1) the Arbitrator improperly considered an expert report in violation of the Arbitrator's scheduling order, and (2) the Arbitrator misinterpreted the Operating Agreement.

After NuVeda filed its Motion to Vacate, Goldstein's newly retained counsel, who did not participate in the arbitration, communicated with NuVeda's counsel regarding a stipulation to extend the briefing deadlines related to the Motion to Vacate so that new counsel could get up to speed on the case. The parties could not reach an agreement, and Goldstein moved the District Court for an order continuing the hearing on the Motion to Vacate and extending the corresponding briefing deadlines.

NuVeda subsequently filed an opposition to Goldstein's motion to continue the hearing on the Motion to Vacate, arguing that Goldstein had failed to establish excusable neglect in failing to move for a continuance before the opposition to the Motion to Vacate was due. In response, Goldstein recognized that she had failed to timely move the District Court for a continuance, but nonetheless argued that the error was the result of excusable neglect.

After the Motion to Vacate and Goldstein's motion to continue the hearing and extend the briefing deadlines were fully briefed and submitted, the District Court held a hearing on both issues. The District Court ultimately considered Goldstein's motion to continue, and her opposition to NuVeda's Motion to Vacate, and confirmed the Arbitration Award.

Now, NuVeda appeals the District Court's decision, and argues that the Motion to Vacate should have been granted as unopposed under the Eighth Judicial Court's Local Rules. However, in doing so, NuVeda does not make a colorable argument, fails to cite any proper legal authority in support of its position, and wholly ignores the arguments Goldstein made below in support of its request to continue the hearing and extend the briefing deadlines.

As such, the District Court's order should be affirmed.

II. STATEMENT OF FACTS

1. Background on NuVeda and the Underlying Dispute

In July 2014, seven individuals executed an Operating Agreement for NuVeda to engage in the "research, design, creation, management, licensing, advertising and consulting regarding the legal medical marijuana industry, as such matters shall be lawfully allowed under applicable state laws." (V JA 905; IV JA 864). The NuVeda members consisted of: (1) Pejman Bady ("Bady"); (2) Pouya Mohajer ("Mohajer");

(3) Shane Terry ("Terry"); (4) Ryan Winmill ("Winmill"); (5) Joseph Kennedy ("Kennedy"); (6) John Penders ("Penders"); and (7) Goldstein. (V JA 925). The members of NuVeda formed several wholly-owned subsidiary companies and, through the subsidiaries, applied for and received six (6) licenses from the State of Nevada to cultivate, process and dispense marijuana. (IV JA 865).

Subsequent disputes between the NuVeda members led to the initiation of the subject arbitration and litigation in the District Court. (IV JA 865). During the pendency of the arbitration, on August 8, 2017, the requisite number of voting members voted to expel Goldstein from NuVeda pursuant to Section 6.2 of the Operating Agreement. (IV JA 866). Pursuant to Section 6.2 of the Operating Agreement, Goldstein's expulsion entitled her to "receive from the Company, in exchange for all of the former Member's Ownership Interest, the fair market value of that Member's Ownership Interest, adjusted for profits and losses to the date of expulsion…" (V JA 914). In the event that the fair market value could not be agreed upon, "the Voting Members shall hire an appraiser to determine fair market value." (*Id*.)

2. <u>NuVeda's Purported Valuation of the Company</u>

After Goldstein's expulsion, Michael R. Webster of the Webster Business Group was retained to provide an appraisal on behalf of NuVeda. (IV JA 867). The Arbitrator found that Mr. Kennedy, on behalf of NuVeda, asked Mr. Webster "to

establish the value of NuVeda LLC in accordance with procedure in the removal of its Manager Jennifer Goldstein whose total compensation is seven percent (7%)." (*Id*.) (internal quotation marks omitted). The Arbitrator further found that Mr. Kennedy prepared a document for Mr. Webster titled "Assets and Liabilities as of 8-8-2017" (the "Aug. 8 Document"), which Mr. Kennedy testified that he prepared "by looking at NuVeda's (actual) balance sheets and profit & loss statements." (*Id*.)

As noted by the Arbitrator:

> Mr. Kennedy provided to Mr. Webster the Aug. 8 Document. The information contained in the Aug. 8 Document was then copied into a letter dated August 19, 2017, which purported to be a Certified Business Appraisal of NuVeda (the "Webster Appraisal"). Although Mr. Webster claims to have spent a total of four (4) hours working on the Webster Appraisal, he testified that he spent "[m]aybe 10 minutes" simply adding up the assets Mr. Kennedy provided in the Aug. 8 Document, and subtracting from the total amount of the assets the liabilities that were also provided by Mr. Kennedy in the Aug. 8 Document. Mr. Webster did not undertake any effort to verify any of the information provided by Mr. Kennedy in the Aug. 8 Document. Nor did Mr. Webster inquire about whether NuVeda was generating any revenue. Nevertheless, after performing this elementary calculation, Mr. Webster concluded in the Webster Appraisal that the fair market value of NuVeda on August 8, 2017, was $1,695,227.00.

(*Id*.) (citations and footnote omitted).

3. NuVeda's Motion to Strike the Parker Report

During the course of arbitration, on December 14, Goldstein submitted a Supplemental Valuation and Expert Report, which analyzed the overall value of NuVeda and assigned a value to Goldstein's interest. (VI JA 1346-60) (the "Final Parker Report")). On December 27, 2018, shortly before the Arbitration hearing, NuVeda filed a Motion to Strike the Final Parker Report. (VI JA 1362-67) ("Mot. to Strike"). In its Motion to Strike, NuVeda argued that the Final Parker Report was untimely under the Arbitrator's October 30, 2017 Preliminary Hearing and Scheduling Order #2, which provided, in part: "On or before December 8, 2017, the Parties shall file and serve any supplemental expert witness reports. . . . There shall be no additional discovery of experts, except on good cause shown to the Arbitrator or an agreement between the Parties." (VI JA 1363). NuVeda further argued that "[a]t the time that Scheduling Order #2 was issued, the parties had already made various expert disclosures, and the initial expert disclosure deadline was closed. . . . [and] no order was entered by the Arbitrator opening the deadline for disclosure of an initial expert report." (*Id*.) NuVeda further argued that Goldstein disclosed the Final Parker Report, for the first time, on December 14, 2018, in violation of the arbitration scheduling orders. Thus, NuVeda argued that the Final Parker Report "should be stricken and Mr. Parker should be prohibited from testifying at the arbitration regarding his conclusions set forth therein." (VI JA 1365). NuVeda also

submitted an expert report rebutting the Final Parker Report that was not disclosed by the December 29, 2018 deadline for rebuttal expert reports, and Goldstein argued that NuVeda's untimely rebuttal report should not be permitted. (VI JA 1369-70).

On January 9, 2019, the Arbitrator distributed an email summarizing her ruling on both NuVeda's Motion to Strike and Goldstein's argument to preclude NuVeda's rebuttal report, each of which were addressed during a telephonic hearing. (*Id*.) The Arbitrator concluded that "Respondent NuVeda's Motion to Strike Supplemental Valuation & Expert Report of Donald Parker dated December 14, 2018 is **DENIED**." (*Id*.) Moreover, the Arbitrator ruled that "the opinions offered in Respondents' rebuttal to this report will not be stricken on the basis that the report was not disclosed on or by the December 29 deadline." (*Id*.) Thus, the Arbitrator exercised her discretion to allow **all** of the expert reports submitted by all parties and to consider all expert testimony at the arbitration hearing.

4. January 2019 Arbitration Final Hearing and Award

With consideration of the Arbitrator's January 9 Order, on January 10, 2019, the parties agreed to narrow the issues for the final hearing, and further agreed "that the only issue that remain[ed] [was] the valuation of Ms. Goldstein's shares of August 8, 2017 and whether Ms. Goldstein [was] entitled to her attorneys' fees because she was never offered the actual fair market value of her shares of that date." (IV JA 868).

The Arbitrator determined, for several, independent reasons, that NuVeda did not meet its express obligations under NuVeda's Operating Agreement to have an appraiser determine fair market value based on the deficiencies in the Webster Report. (IV JA 869-71). More specifically, the Arbitrator found that the Webster Report did not appraise the "fair market value" of Goldstein's interest in NuVeda, as required in Section 6.2 of the Operating Agreement, because the Webster Report established instead only included a "book value" or "liquidation evaluation" of Goldstein's interest rather than fair market value. (IV JA 869-70).

Then, in order to determine the actual fair market value of NuVeda, the Arbitrator adopted the definition of "fair market value" utilized by both Parker and NuVeda's expert, Dr. Clauretie, "as the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." (IV JA 869). She then determined that the fair market value of NuVeda was $27,243,520.00, (IV JA 873), that the fair market value of Goldstein's 7% Ownership interest in NuVeda as of August 8, 2017, was $2,051,215.38, and that NuVeda owes Goldstein that amount. (IV JA 874). On March 19, 2019, the Arbitrator issued the Final Award, which incorporated the findings set forth in the Interim Award. (IV JA 875-79). The Final Award awards Goldstein $2,051,215.38

for her ownership interest in NuVeda, plus prejudgment interest and attorneys' fees and costs. (*Id*.)

5. NuVeda's Motion to Vacate Arbitration Award

On June 17, 2019, NuVeda filed its Motion to Vacate Arbitration Award ("Motion to Vacate"). (V JA 880-902). NuVeda's arguments were twofold. First, NuVeda argued that the Arbitrator exceeded her powers and manifested a disregard for the law when she allowed Goldstein to disclose an untimely expert witness and report. (V JA 893-97). Second, NuVeda argued that the Arbitrator manifested a disregard for the law in interpreting the Operating Agreement and determining that NuVeda had not complied with the terms of the Operating Agreement because NuVeda's appraiser calculated Goldstein's ownership interest based on NuVeda's book value, rather than its fair market value. (V JA 897-900).

On July 25, 2019, Goldstein filed her Opposition to NuVeda, LLC's Motion to Vacate Arbitration Award ("Opposition to Motion to Vacate"). (VIII JA 1539-61). In her Opposition to Motion to Vacate, Goldstein explained that, notwithstanding NuVeda's arguments to the contrary, (1) the Arbitrator did not exceed her powers by considering the Final Parker Report, and (2) the Arbitrator's interpretation of the Operating Agreement was legally sound and did not constitute a manifest disregard for the law. (*Id*.)

6. Goldstein's Motion to Extend Deadlines

Prior to filing her Opposition to Motion to Vacate, Goldstein filed a Motion to Continue Hearing on NuVeda, LLC's Motion to Vacate Arbitration Award and to Extend Briefing Deadlines ("Motion to Extend"). (VII JA 1467-70). In her Motion to Extend, Goldstein explained that "the need to continue the hearing and modify the briefing deadlines became apparent in light of recent events. Specifically, Goldstein [had] engaged new counsel to oppose the Motion to Vacate Arbitration Award, and counsel [was] in the process of obtaining the file from Goldstein's prior counsel so they [could] review it in order to prepare Goldstein's opposition." (VII JA 1469). Goldstein further explained that "counsel for Goldstein [had] discussed with opposing counsel the possibility of a mutual agreement and stipulation to continue the hearing date and extend the deadline for a responsive filing" but "an agreement could not be reached, thus necessitating the filing of the instant Motion." (*Id*.)

On July 11, 2019, NuVeda filed its Opposition to Goldstein's Motion to Extend. (VII JA 1483-1507). In its Opposition to Goldstein's Motion to Extend, NuVeda argued that the Motion to Extend should be denied because it (1) "solely relied on EDCR 2.22 which relates to the continuation of hearings as the lone points and authorities in support of Goldstein's request to extend the deadline dates within which to oppose the motion to vacate," (2) "does not cite any points and authorities in support of its petition to extend the briefing schedule," and (3) "provides analysis

under a 'good faith' standard when applicable court rules require the demonstration of excusable neglect." (AOB at 5; VII JA 1483-92).

On July 16, 2019, Goldstein filed her Reply in Support of her Motion to Extend ("Reply"). (VII JA 1510-19). In her Reply, Goldstein explained that, under the "excusable neglect" standard within EDCR 2.25(a) and NRCP 6(b), Goldstein's Motion to Extend should be granted. Goldstein argued that, under the framework adopted by this Court in *Moseley v. Eighth Judicial Dist. Court ex rel. Cty. Of Clark*, 124 Nev. 654, 188 P.3d 1136 (2008), Goldstein had shown excusable neglect because (1) she acted in good faith, (2) she exercised due diligence, (3) there was a reasonable basis for not complying within the specified time, and (4) NuVeda would not suffer prejudice. (VII JA 1514-19).

Specifically, Goldstein argued that she acted in good faith because "as soon as Goldstein retained new counsel after NuVeda filed its Motion to Vacate, new counsel immediately reached out to opposing counsel to discuss a continuance of the hearing on the Motion to Vacate and an extension of the briefing deadlines." (VII JA 1515). Thus, Goldstein argued that the correspondence between counsel clearly shows 'an honest belief, the absence of malice, and the absence of design to defraud.'" (*Id*. (quoting *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 273, 849 P.2d 305, 309 (1993)).

Second, Goldstein argued that she was diligent in filing her Motion to Extend because "Goldstein's counsel was in constant communication with NuVeda's counsel from the time Goldstein's counsel was retained until the time Goldstein filed" her Motion to Extend. (VII JA 1516). Moreover, "NuVeda did not confirm that it would not stipulate to an extension of the briefing deadlines until July 1, 2019, and Goldstein filed her Motion [to Extend] the same day." (*Id*.)

Third, Goldstein argued that she had a reasonable basis for not complying within the specified time because her "anticipated deadline for her opposition to NuVeda's Motion to Vacate was based on an apparent conflict between the Eighth Judicial District Court Rules and the new Nevada Rules of Civil Procedure, which became effective on March 1, 2019." (*Id*.) Goldstein further pointed out that "[w]hile the recently amended NRCP ha[d] recently been completely overhauled . . . by increasing days for response from 10 days up to 14 days, the Eighth Judicial District Court Rules ha[d] not yet been amended to align with the change." (VII JA 1517).

Finally, Goldstein explained that NuVeda would not suffer any prejudice it the Motion to Extend was granted because she "filed her Motion [to Extend] four (4) calendar days and two (2) judicial days after the deadline to file an opposition to NuVeda's Motion to Vacate." (VII JA 1518). Moreover, Goldstein pointed out that "the parties had stipulated that the Motion to Vacate [would] be heard . . . only three weeks after the originally scheduled hearing." (*Id*.)

7. Hearing and Order Denying Motion to Vacate Arbitration Award

The District Court held a hearing on Goldstein's Motion to Extend and NuVeda's Motion to Vacate on August 12, 2019. (XI JA 2364). At the outset of the hearing, the District Court first addressed the Motion to Extend. The District Court inquired to Goldstein's counsel: "So you don't know half the [EDCR] rules were suspended because the Supreme Court hasn't acted on the petition to amend the Eighth Judicial District Court Rules." (XI JA 2346). The District Court's statement with respect to the suspension of "half the [EDCR] rules" was in reference to a March 12, 2019 Administrative Order entered by the Eighth Judicial District court, which "had suspended EDCR 1.14(a) though (c)" and "had the effect of reducing Goldstein's time to respond to the Motion to Vacate." (XI JA 2369).

The District Court and Goldstein's counsel then engaged in the following exchange:

> The Court: So you didn't realize that because you were up north.
>
> . . .
>
> Mr. Irvine: I'm used to the ADKTs doing the rule amendments. We looked at those. We didn't see it.
>
> The Court: Well, it's a different process for local rules, and it is much slower than anything you've ever been involved in.
>
> . . .

> Mr. Irvine: So we didn't know that the rule had been suspended by the administrative order. We were certainly aware that the Supreme Court had amended the NRCP Rule 6 to eliminate the non-counting of the nonjudicial days and to get rid of the three day for efiling. Obviously that was done in conjunction with trying to harmonize the Nevada rules with the federal rules. But that also is noted in the Advisory Committee notes to the amendment to NRCP 6. Generally extended out the response time.
>
> The Court: So let's get past that issue and get to why you need more time to oppose the motion [to vacate], since you - -
>
> Mr. Irvine: Well, we filed our opposition.
>
> The Court: I read it.
>
> Mr. Irvine: It's fully briefed.
>
> The Court: Do you still need more time?
>
> Mr. Irvine: No. We're ready, Your Honor.
>
> The Court: Okay. Great. Thanks. The motion's granted.

(XI JA 2346-47).

Following this exchange, the parties addressed the merits of NuVeda's Motion to Vacate, tracking the arguments contained in Motion to Vacate and Goldstein's Opposition. (XI JA 2348-60). Ultimately, the District Court determined: "It is not appropriate for me to substitute my judgment on the management of the docket and expert disclosures by the arbitrator. . . . It does not appear in this case that there's any abuse of discretion or that the actions of the arbitrator were arbitrary and capricious." (XI JA 2360). Significantly, with respect to valuation, the District Court

stated that "[f]air market value is a factual determination to be made by the arbitrator. And while I certainly understand [NuVeda's] position, book value is not typically used as fair market value." (*Id*.)

On September 6, 2019, the District Court entered its Findings of Fact, Conclusions of Law and Order: (1) Granting Plaintiff Jennifer M. Goldstein's Motion to Continue Hearing on NuVeda, LLC's Motion to Vacate Arbitration Award and to Extend Briefing Deadlines; (2) Denying Defendants NuVeda, LLC's Motion to Vacate Arbitration Award; and (3) Confirming the Arbitration Award ("Order"). (XI JA 2364-73).

In its Order, the District Court concluded that "Goldstein ha[d] demonstrated excusable neglect in failing to file the Motion to Continue or the Opposition to the Motion to Vacate prior to the expiration of the deadline established by EDCR 2.20(e)." (XI JA 2369). The District Court further determined "that there was no prejudice to NuVeda due to the late filing of the Motion to Continue, as NuVeda was able to file its Opposition to the Motion to Continue, Goldstein filed her Opposition to the Motion to Vacate well in advance of the hearing, NuVeda was able to file a Reply in support of the Motion to Vacate, and th[e] Court reviewed and considered all of those pleadings prior to the hearing." (XI JA 2370). Finally, the District Court determined that its "decision to allow Goldstein to file her Opposition to the Motion to Vacate and to consider that Opposition is consistent with this Court's stated policy

that its Rules 'must be liberally construed to promote and facilitate the administration of justice' (EDCR 1.10), and the Nevada Supreme Court's long recognized and 'basic underlying policy to have each case decided upon its merits." (*Id*. (quoting *Hotel Last Frontier Corp. v. Frontier Props., Inc.*, 79 Nev. 150 155, 380 P.2d 293, 295 (1963)).

With respect to the Motion to Vacate, the District Court determined that (1) the Arbitrator did not exceed her powers or manifestly disregard the law by allowing Parker's expert witness testimony and the Final Parker Report, and (2) the Arbitrator did not exceed her powers or manifestly disregard the law in interpreting the Operating Agreement. (XI JA 2371).

III. ISSUES PRESENTED

1. Did the District Court err in granting Goldstein's Motion to Extend?

2. Did the District Court err in denying NuVeda's Motion to Vacate?

IV. ARGUMENT

1. Standard of Review

At the outset, Goldstein notes that NuVeda has cited the wrong standard of review in its Opening Brief. While it is true that this Court reviews a district court's conformation of an arbitration award *de novo*, *Sylver v. Regents Bank, N.A.*, 129 Nev 282, 286, 300 P.3d 718, 721 (2013), this Court reviews a district court's decision to

grant a motion to enlarge time under NRCP 6(b) and EDCR 2.25 for an abuse of discretion. *Eldan LLC v. Gordana*, 132 Nev. 965 (2016) (unpublished); *Moseley v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008) ("[T]he district court may exercise its discretion to grant an enlargement of time to take an action that is otherwise required to be done within a specified time when excusable neglect is shown.").

Moreover, a district court's decision whether to consider an untimely motion as unopposed pursuant to EDCR 2.20(e) is similarly reviewed for an abuse of discretion. *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 278 n.15, 182 P.3d 764, 768 n.15 (2008).

2. The District Court did Not Abuse its Discretion in Refusing to Strike Goldstein's Opposition to NuVeda's Motion to Vacate

NuVeda argues, with nearly no citation to authority outside of EDCR 2.20(e), that "the District Court should have stricken the [Opposition to the Motion to Vacate] and refrained from considering the arguments set forth therein." AOB at 10. In support of its argument, cites to EDCR 2.20(e) as it existed prior to amendment on January 1, 2020:

> Within 10 days after the service of the motion, and 5 days after service of any joinder to the motion, the opposing party must serve and file written notice of nonopposition or opposition thereto, together with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing why the motion and/or joinder should be denied. Failure of the opposing party to serve

> and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.

AOB at 8-9 (citing EDCR 2.20(e)). Thus, according to NuVeda, under the plain language of EDCR 2.20(e), the Opposition to the Motion to Vacate should have been stricken and the Motion to Vacate should have been granted. AOB at 9. However, NuVeda's argument is unpersuasive and is contrary to this Court's case law.

In *Eberle v. State ex rel. Nell J. Redfield Tr.*, appellants contended that respondents' request for extraordinary expert witness fees and costs below was filed beyond the time prescribed under NRS 18.110(1). 108 Nev. 587, 589, 836 P.2d 67, 69 (1992). Thus, appellants argued that the district court should have denied the fee motion as untimely. *Id*. This Court disagreed.

Specifically, this Court explained that "NRS 18.110(1) provides that a memorandum of costs must be filed by the prevailing party within five days after the entry of judgment or within 'such further time as the court or judge may grant.'" *Id.* at 590, 836 P.2d at 69. This Court determined that "[a]lthough no further time for filing a motion for costs was specifically granted by the district court, by granting the motion for expert witness fees and costs, the district court either considered the motion to be timely, or impliedly granted respondents additional time within which to move for expert witness fees and costs." *Id*. Thus, this Court held that "[i]n either

case, the district court's exercise of discretion to reach the merits of the motion w[ould] not be disturbed on appeal." *Id*.

Here, as with the appellants in *Eberle*, NuVeda ignores that a district court's decision to consider an untimely motion is discretionary. Indeed, pursuant to EDCR 2.20(e), "[f]ailure of the opposing party to serve and file written opposition **may** be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same." (emphasis added). Moreover, unlike *Eberle*, this Court does not have to guess as to whether the District Court "impliedly granted [Goldstein] additional time" to oppose the Motion to Vacate. *Eberle* at 590, 836 P.2d at 69. To the contrary, the District Court's Order explicitly provides that "Goldstein ha[d] demonstrated excusable neglect in failing to file the Motion to Continue or the Motion to Vacate prior to the expiration of the deadline established by EDCR 2.20(e), and [the District Court would] therefore consider Goldstein's Opposition to the Motion to Vacate and decide that Motion on the merits." (XI JA 2369). And, the District Court's Order is wholly consistent with this Court's long recognized and "basic underlying policy to have each case decided upon its merits." *Hotel Last Frontier Corp. v. Frontier Props., Inc.*, 79 Nev. 150 155, 380 P.2d 293, 295 (1963).

In sum, the District Court did not abuse its discretion in refusing to strike Goldstein's Opposition to NuVeda's Motion to Vacate, and was well within its discretion in considering the same.

3. The District Court Acted Within its Discretion in Granting Goldstein's Motion to Extend

NuVeda next argues that the Motion to Extend should have been denied because Goldstein initially moved the District Court pursuant to EDCR 2.22(d) instead of EDCR 2.25 and NRCP 6(b). AOB at 10-14. Specifically, NuVeda argues that (1) Goldstein's Motion to Extend did not cite the proper authorities necessary to support an extension of time, and (2) Goldstein did not establish that her failure to timely oppose the Motion to Vacate was the result of excusable neglect pursuant to EDCR 2.25 and NRCP 6(b). *Id*. at 12-14. Each of NuVeda's arguments will be addressed in turn.

a. NuVeda has Failed to Cogently Argue its Position

At the outset, Goldstein again notes that, as with its argument regarding the District Court's decision to consider the Opposition to the Motion to Vacate, NuVeda cites next to no authority in support of its position. Indeed, the complete list of NuVeda's authorities are as follows: EDCR 2.22; EDCR 2.25; NRCP 6; and *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 188 P.3d 1136 (2008), for the proposition that "the concept of 'excusable neglect' applies to instances where some external factor beyond a party's control affect the party's ability to act or respond as required." AOB at 10-14. Moreover, NuVeda makes no mention of the fact that Goldstein cited to EDCR 2.25, NRCP 6, and numerous authorities regarding the "excusable neglect" standard in her Reply in support of her Motion to Extend. *See*

id. "In this way, [NuVeda] neglected [its] responsibility to cogently argue, and present relevant authority, in support of [its] appellate concerns. Thus, [this Court] need not consider these claims." *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006).

b. Goldstein Cited the Proper Authorities to Support Extension

Goldstein moved the District Court, pursuant to EDCR 2.22, to continue the hearing on NuVeda's Motion to Vacate, and grant an enlargement of time to prepare a responsive filing to the same. (VII JA 1468). Specifically, Goldstein explained that "Goldstein ha[d] engaged new counsel to oppose the [Motion to Vacate], and counsel [was] in the process of obtaining the file from Goldstein's former counsel so they [could] review it in order to prepare Goldstein's opposition." (VII JA 1469). Goldstein further explained that she had "discussed with opposing counsel the possibility of a mutual agreement and stipulation to continue the hearing date and extend the deadline for a responsive filing [but] an agreement could not be reached, thus necessitating the filing of the [Motion to Extend]." (*Id*.)

In its Opposition, NuVeda levied the identical arguments that it now raises on appeal. In fact, Sections IV(C)-(D) of NuVeda's Opening Brief contain almost a word-for-word repurposing of Sections III(A)-(B) of NuVeda's Opposition to Goldstein's Motion to Extend. *Compare* AOB at 10-14 *with* VII JA 1488-91.

What NuVeda fails to address before this Court is that Goldstein filed her Reply in support of her Motion to Extend, wherein she explained that the Motion to Extend should be granted pursuant to the excusable neglect standards contained within EDCR 2.25(a) and NRCP 6(b). (VII JA 1514-19). Thus, NuVeda's argument that Goldstein relied exclusively on EDCR 2.22 in support of her Motion to Extend is flatly belied by the record, and is a blatant misrepresentation of the factual and procedural history of the proceedings below.

Moreover, although Goldstein cited to EDCR 2.25 and NRCP 6(b), and the excusable neglect standards therein in her Reply brief, the District Court was well within its discretion in considering Goldstein's argument, given the legal arguments made in NuVeda's Opposition. *See GemCap Lending I, LLC v. Mann*, No. CV 19-2499 PSG (RAOx), 2019 WL 7945597, *5-6 (C.D.Cal. Oct. 30, 2019) ("the Ninth Circuit has recognized that a moving party is permitted to rebut arguments raised in an opposition brief by, for instance, providing a fuller context of surrounding facts"); *see also Samson v. Nama Holdings, LLC*, No. CV 09–01433 MMM (PJWx), 2009 WL 10674355, at *3, n. 4 (C.D. Cal. May 13, 2009) ("[w]here, as here, the non-moving party raises new issues in its opposition, ... the reply provides the moving party sufficient opportunity to respond to any new issues raised by the non-moving party"); *United States v. Taibi*, No. 10–CV–2250 JLS, 2012 WL 553143, *4 (S.D.Cal. Feb.21, 2012) ("[B]ecause the [ ] documents respond directly to

Defendant's allegations made in his opposition brief, the Court finds it may properly consider this rebuttal evidence even though it was offered for the first time in Plaintiff's reply brief," citing *EEOC v. Creative Networks, LLC and Res–Care, Inc.*, No. CV–05–3032–PHX–SMM, 2008 WL 5225807, *2 (D.Ariz. Dec.15, 2008) (reviewing the rule that a party may not provide "new" evidence in reply and deprive the opposing party of an opportunity to respond, but denying a motion to strike because the challenged evidence was not "new," as it properly rebutted arguments raised in opposition to a motion for summary judgment)). [1]

Based on the foregoing, NuVeda's assertion that Goldstein relied solely on EDCR 2.22 in support of her Motion to Extend is not supported by the record below. And, the District Court was well within its discretion when it considered the

[1] Other courts that have considered this issue are in accord. *See Aguirre v. Munk,* No. C 09–763 MHP, 2011 WL 2149087, *13 (N.D.Cal. June 1, 2011) ("There was no new evidence in defendants' reply. Any shift in focus between the motion and the reply was responsive to Aguirre's arguments and 'evidence' in opposition that were different from the allegations in the amended complaint"); *QBAS Co., Ltd. v. C Walters Intercoastal Corp.,* No. SACV 10–406 AG, 2010 WL 7785995, *3–4 (C.D.Cal. Dec. 16, 2010) ("Defendants argue that new evidence submitted for the first time with a Reply brief should not considered. This issue arises frequently, and it's sometimes tricky to distinguish between impermissible 'new' evidence in a reply and evidence that is permissibly responsive to an argument made in the opposing party's opposition. In this case, the issue is not so tricky. Plaintiffs' evidence . . . submitted with their Reply is clearly permissible evidence responsive to Defendants' . . . arguments. Thus, the . . . objections are OVERRULED"); *Bell v. Santa Ana City Jail,* No. SA CV 07–1218–ODW, 2010 WL 582543, *1 n. 3 (C.D.Cal. Feb.16, 2010) ("The Court concurs with defendant that the evidence adduced in her Reply raises no new issues and consists solely of a response to the arguments that plaintiff first raised in his Opposition").

arguments Goldstein made in her Reply in rebuttal to NuVeda's arguments in its Opposition.

c. Goldstein Established Excusable Neglect

As it did in the proceedings below, NuVeda argues that Goldstein failed to establish excusable neglect pursuant to NRCP 6(b) and EDCR 2.25. Specifically, NuVeda argues that because "there were no external factors beyond Goldstein's control affecting her ability to act or respond" to the Motion to Vacate, the District Court should have denied the Motion to Extend. (AOB at 14.) However, NuVeda again fails to discuss, or even cite to, each of the factors that this Court considers in determining whether a party has demonstrated excusable neglect pursuant to EDCR 2.25 and NRCP 6(b). Contrary to NuVeda's position below, and on appeal, Goldstein established excusable neglect, and the District Court did not abuse its discretion in granting Goldstein's Motion to Extend.

i. Legal Standard

The Eighth Judicial District Court Rules "must be liberally construed . . . to promote and facilitate the administration of justice." EDCR 1.10. This Court has also long recognized "the basic underlying policy to have each case decided upon its merits." *Hotel Last Frontier Corp. v. Frontier Props., Inc.,* 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).

Pursuant to NRCP 6(b)(1)(B): "When an act may or must be done within a specified time . . . the court may, for good cause, extend the time . . . with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or . . . on motion made after the time has expired if the party failed to act because of excusable neglect." Similarly, EDCR 2.25(a) provides, in part: "Every motion or stipulation to extend time shall inform the court of any previous extensions granted and state the reasons for the extension requested. A request for extension made after the expiration of the specified period shall not be granted unless the moving party, attorney or other person demonstrates that the failure to act was the result of excusable neglect."

This Court has established that, where a party seeks to show excusable neglect under NRCP 6(b), that party "is required to demonstrate that (1) it acted in good faith, (2) it exercised due diligence, (3) there is a reasonable basis for not complying within the specified time, and (4) the nonmoving party will not suffer prejudice." *Moseley v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 124 Nev. 654, 668, 188 P.3d 1136, 1146 (2008).

Finally, "[w]hether extending time is appropriate based on excusable neglect is a factual inquiry that the district court must undertake." *In re Estate of Black*, 132 Nev. 73, 78, 367 P.3d 416, 419 (2016). And, a district court's decision to enlarge

time under NRCP 6(b) and EDCR 2.25 is reviewed for an abuse of discretion. *See id*.

ii. Goldstein Acted in Good Faith

In the proceedings below, Goldstein argued that she had established good faith pursuant to this Court's definition in *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), which defined good faith in the context of a motion to set aside judgment pursuant to NRCP 60(b). (VII JA 1515). There, this Court stated that "[g]ood faith is an intangible and abstract quality with no technical meaning or definition and encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud." *Stoecklein*, 109 Nev. at 273, 849 P.2d at 309. "In common usage the term is used to describe a state of mind denoting honesty of purpose and freedom from intent to defraud." *Id.*

In support of her position, Goldstein argued that she acted in good faith because, as soon as she retained new counsel after NuVeda filed its Motion to Vacate, new counsel immediately reached out to opposing counsel to discuss a continuance of the hearing on the Motion to Vacate and an of the briefing deadlines. (VII JA 1515). Moreover, Goldstein explained that the subsequent correspondence between her and NuVeda's respective counsel showed that Goldstein was of the belief that the parties were in the process of negotiating a stipulated continuance of the hearing and an extension of the briefing deadlines. (*Id*.) Thus, Goldstein argued

that she had shown "an honest belief, the absence of malice, and the absence of design to defraud" under *Stoecklein*. (*Id*.) In its Order granting Goldstein's Motion to Extend, the District Court made findings consistent with Goldstein's argument. (XI JA 2369).

On appeal, NuVeda does not address the good faith factor in determining whether excusable neglect has been established. Instead, NuVeda merely parrots the procedural history leading up to Goldstein filing her Reply in support of her Motion to Extend, asserts that "there were no external factors beyond Goldstein's control affecting her ability to act or respond" and states, in conclusory fashion, that "Goldstein's Motion to Extend should have been denied." (AOB at 14).

Notwithstanding NuVeda's failure to address the issue, Goldstein's position below that she had acted in good faith is well grounded in federal caselaw.[2] *See, e.g.*, *Los Altos El Granada Inv'rs v. City of Capitola*, 583 F.3d 674, 683 (9th Cir. 2009) ("We cannot conclude that the district court abused its discretion in determining that counsel's neglect was in good faith and excusable. . . . [W]hatever the precise contours of counsel's failure to calendar the appeal, there is nothing to intimate that the failure was not one of mere oversight. Also, although counsel's failure to

[2] This Court looks to federal caselaw interpreting Fed. R. Civ. P. 6(b) when interpreting NRCP 6(b). *Moseley*, 124 Nev. at 665, 188 P.3d at 1144 ("[W]e turn to federal caselaw dealing with excusable neglect to consider our guidelines for NRCP 6.")

calendar the appeal was based in part on a mistake within his control, we will defer to the district court's determination that such conduct was excusable."); *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) (excusable neglect found where counsel delegated calendar duties to the paralegal, and the paralegal misunderstood the deadlines in the federal rule) *Bonavito v. Nevada Prop. 1 LLC*, No. 2:13-CV-00417-JAD, 2014 WL 5364077, at *2 (D. Nev. Oct. 21, 2014) ("[A]pproximately four days after the reply deadline, Plaintiff filed a motion for leave to file an untimely reply. Plaintiff acknowledges the reply was untimely, but asserts that it was the result of a calendar error and is excusable neglect. The Court agrees."); *Ruiz v. Carmeuse Lime, Inc.*, No. 2:10–CV21–PRC, 2011 WL 3290376, at * 1 (N.D. Ind. July 14, 2011) (finding excusable neglect for missing a response deadline due to an inadvertent calendaring error).

Based on the foregoing, Goldstein established below that she acted in good faith, and the District Court did not abuse its discretion in determining that she had established excusable neglect.

iii. Goldstein was Diligent in Filing her Motion to Extend

Goldstein explained below that she was diligent in her efforts to obtain an extension of the briefing deadlines because: (1) "Goldstein's counsel was in constant communication with NuVeda's counsel from the time Goldstein's counsel was retained until the time Goldstein field the [Motion to Extend]"; (2) "NuVeda did not

confirm that it would not stipulate to an extension of the briefing deadlines until July 1, 2019, and Goldstein filed her Motion [to Extend] on the same day"; and (3) Goldstein's communications with NuVeda were made in an effort "to resolve the issue without burdening [the District Court] with holding a hearing and deciding an unnecessary notion." (VII JA 1516).

As with all of the arguments Goldstein made in her Reply in support of her Motion to Extend, NuVeda does not articulate how Goldstein failed to act diligently on appeal, other than rehashing the identical argument it made below. (AOB at 13-14).

Again, Goldstein's position is supported by federal courts that have decided the issue. *See Ruiz,* 2011 WL 3290376, at *2 (excusable neglect found when the response was filed 17 days after it was originally due and on the same date that the inadvertent error was realized). Moreover, as explained below, the timeline of events plainly shows that Goldstein was diligent in filing her Motion to Extend:

- On June 19, 2019, Goldstein's counsel contacted NuVeda's counsel regarding continuing and rescheduling the hearing on NuVeda's Motion to Vacate, and a corresponding extension of the briefing deadlines in order to obtain Goldstein's file from her prior counsel. (VII JA 1524.) NuVeda's counsel indicated that he had "no problem" with rescheduling the hearing and allowing additional time for briefing. (*Id*.)

- Later, on June 19, 2019, NuVeda's counsel sent an email to Goldstein's counsel indicating that NuVeda was "amenable to an extension" on the condition that accrual of interest on the underlying arbitration award would be suspended. (VII JA 1529.)
- On June 28, 2019, Goldstein's counsel responded that Goldstein would not be willing to suspend the accrual of interest, unless NuVeda would agree to deposit the full amount of the arbitration award into an escrow account pending disposition of the Motion to Vacate. (*Id*.) Goldstein's counsel further stated that, if an agreement regarding the interest accrual could not be reached, Goldstein would file a motion to continue the hearing on the Motion to Vacate. (*Id*.)
- On July 1, 2019, having not received a response from NuVeda's counsel, Goldstein's counsel sent an email to follow "up on [the] email from [June 28, 2019]" and attached a draft stipulation to continue the hearing on the Motion to Vacate. (VII JA 1528). Goldstein's counsel further requested, if the parties could not agree to continue the hearing on the Motion to Vacate, that NuVeda "please let me know immediately, as we intend to file a motion to continue." (*Id*.)
- Later, on July 1, 2019, NuVeda's counsel responded: "If it was my call, I would stipulate to extend the date within which to respond but, as evidenced

by your client's response, there is a bit of bad blood between our respective clients. As such, go ahead and file your motion to extend and we will go from there." (*Id*.)

As plainly shown by the correspondence between NuVeda's and Goldstein's respective counsel, Goldstein was clearly diligent in filing her Motion to Extend. Goldstein's counsel was in constant communication with NuVeda's counsel in an effort to reach an agreement regarding continuing the hearing on the Motion to Vacate and extending the corresponding briefing deadlines. And, Goldstein promptly filed her Motion to Extend the same day it became apparent an agreement could not be reached on July 1, 2019.

Based on the foregoing, Goldstein clearly demonstrated she was diligent in filing her Motion to Extend, thus supporting the District Court's finding of excusable neglect under NRCP 6(b) and EDCR 2.25.

iv. Goldstein had a Reasonable Basis for not Complying within the Specified Time

Goldstein explained below that she had a reasonable basis for not filing her Motion to Extend within the specified time based on an apparent conflict between the Eighth Judicial District Court rules and the amended Nevada Rules of Civil Procedure, which became effective on March 1, 2019. (VII JA 1516). While Goldstein recognizes that "[a]lthough inadvertence, ignorance of the rules, or

mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997).

Under the pre-amendment version of EDCR 2.20(e), "[w]ithin 10 days after the service of the motion, . . . the opposing party must serve and file written notice of nonopposition or opposition thereto, together with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing why the motion and/or joinder should be denied." Under the pre-amendment version of EDCR 1.14(a), "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and non-judicial days must be excluded in the computation." Based upon the calculation of time under pre-amendment EDCR 1.14(a), Goldstein's Motion to Extend would have been due on the day it was filed, July 1, 2019.

However, under the recently amended NRCP 6(a)(1)(B) time is computed by "count[ing] every day, including intermediate Saturdays, Sundays, and legal holidays." On March 12, 2019, the Eighth Judicial District Court issued an Administrative Order, providing that "[f]or the benefit of the bar and to ease confusion until the EJDC amends its local rules to conform to the amended NRCP . . . the EJDC finds it necessary to suspend or modify certain District Court

Rules." Eighth Judicial District Court Administrative Order: 19-03 (issued March 12, 2019). As part of the Administrative Order, EDCR 1.14(a) through (c) was suspended. *Id*.

The Eighth Judicial District Court Rules were then amended, effective January 1, 2020. ADKT 545-Eighth Judicial District Court Local Rules (filed Jan. 29, 2020). As part of the package of sweeping amendments, EDCR 2.20(e) was amended to read, in part: "[w]ithin ***14*** days after the service of the motion, . . . the opposing party must serve and file written notice of nonopposition or opposition thereto, together with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing why the motion and/or joinder should be denied." (emphasis added).

Based on the various amendments and suspensions of the rules relevant to Goldstein's Motion to Extend, Goldstein was caught in limbo. Indeed, because EDCR 1.14(a) was suspended to comport with the newly amended NRCP 6, but EDCR 2.20(e) had not yet been amended, Goldstein's Motion to Extend was due on June 27, 2019. However, if the 10-day window under the Eighth Judicial District Court Rules had been amended to comply with the new NRCP before January 1, 2020, Goldstein's opposition to NuVeda's Motion to Vacate would have been due 14 days after the day it was filed, or July 1, 2019, the day Goldstein filed her Motion to Extend.

As explained, *supra*, the District Court recognized this clear conflict between the pre-amendment EDCR and the amended NRCP at the August 12, 2019 hearing. Specifically, the District Court stated to Goldstein's counsel: "So you don't know half the [EDCR] rules were suspended because the Supreme Court hasn't acted on the petition to amend the Eighth Judicial District Court Rules." (XI JA 2346). The District Court further recognized the conflict in her Order granting the Motion to Extend, wherein she stated that the Administrative Order "had suspended EDCR 1.14(a) though (c)" and "had the effect of reducing Goldstein's time to respond to the Motion to Vacate." (XI JA 2369.)[3]

Based on the foregoing, Goldstein had a reasonable basis for not filing her Motion to Extend within the specified time, and the District Court acted within its discretion in determining that Goldstein had established excusable neglect.

v. <u>NuVeda was not Prejudiced</u>

In the proceedings below, Goldstein argued that NuVeda would not be prejudiced if her Motion to Extend was granted. (VII JA 1518). In its Opposition, NuVeda argued that Goldstein's assertion regarding the lack of prejudice was

[3] The Advisory Committee Note to the 2019 Amendment to NRCP 6(a) expressly recognized the problems that might be caused by the shortening of response deadlines, noting that "[i]f a reduction in the times to respond under those statutes and rules results, an extension of time may be warranted to prevent prejudice." ADKT 0522 – Order Amending the Rules of Civil Procedure, the Rule of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, filed December 31, 2018 at pp. 31-32.

incorrect, but provided no elaboration on what prejudice it would suffer if the District Court granted the Motion to Extend. (*Id*.) Similarly, on appeal, NuVeda does not address the prejudice issue, and does not argue that it suffered any prejudice as a result of the continuation of the hearing and the extension of the corresponding briefing deadlines. (AOB 10-14).

As explained below, "Goldstein filed her Motion [to Extend] four (4) calendar days and two (2) judicial days after the deadline to file an opposition to NuVeda's Motion to Vacate." (VII JA 1518). Federal courts have found that such a minimal delay does not cause prejudice to the non-moving party in examining whether the moving party has shown excusable neglect. *See, e.g., Saul v. Prince Mfg. Corp.*, No. 1:12-CV-270, 2013 WL 228716, at *2 (N.D. Ind. Jan. 22, 2013) ("And the length of the delay is also minimal, given that Saul filed his motion for leave one day after the response deadline and on the day after the inadvertent error was realized."). In addition, NuVeda was able to file a reply in support of its Motion to Vacate and to present oral argument to the District Court in support of that Motion.

Moreover, if the Motion to Extend had not been granted, and the Motion to Vacate had been granted as unopposed, Goldstein would have suffered extreme prejudice, given the merits of the Motion to Vacate and Goldstein's Opposition to the same. To that end, a brief review of the parties' respective arguments regarding the merits of the Motion to Vacate is warranted.

At the outset, it is imperative to acknowledge the standard of review regarding arbitration decisions. "[T]he scope of judicial review of an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision." *Health Plan of Nevada, Inc. v. Rainbow Med., LLC.*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004). A reviewing court does not concern itself with whether the arbitrator made the "correct" ruling; rather, it will deny relief from an arbitrator's ruling unless it was "arbitrary, capricious, or unsupported by the agreement" or the arbitrator "manifestly disregarded the law." *Bohlmann v. Printz*, 120 Nev. 543, 546-47, 96 P.3d 1155, 1157-58 (2004) overruled on other grounds by *Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006).

Reviewing whether the arbitrator's award was arbitrary, capricious, or unsupported by the agreement is to ensure only "that the arbitrator does not disregard the facts or terms of the arbitration agreement"; reviewing whether the arbitrator manifestly disregarded the law is to ensure only that the arbitrator recognizes the applicable law and does not simply disregard it—not that the arbitrator correctly interpreted and applied the law. *Clark County Educ. Ass'n v. Clark County School Dist.*, 122 Nev. 337, 341-42, 131 P.3d 5, 8-9 (2006) ("neither standard permits a reviewing court to consider the arbitrator's interpretation of the law" (citing *Bohlmann*, 120 Nev. at 547, 96 P.3d at 1157-58)); see also NRS 38.218; 38.241. Finally, "[t]he party seeking to attack the validity of an arbitration award has the

burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." *Health Plan of Nev., Inc.*, 120 Nev. at 695, 100 P.3d at 176.

In its Motion to Vacate, NuVeda only argued that the award should be vacated because (1) the Arbitrator exceeded the scope of her authority and manifestly disregarded the law by relying on Parker's expert witness testimony and the Final Parker Report, and (2) the Arbitrator's interpretation of the Operating Agreement was contrary to Nevada law. (V JA 893-900). Both arguments were unavailing.

First, NuVeda argued that the arbitration award should have been vacated based on an application of the Nevada and Federal Rules of Civil Procedure. (V JA 893-95). However, case law recognizes that, in order to provide a relatively expeditious and inexpensive dispute resolution, arbitration is not governed by the courts' strict procedural and evidentiary requirements. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (en banc); *see also, Rosensweig v. Morgan Stanley & Co.*, 494 F.3d 1328, 1333 (11th Cir. 2007) ("Arbitrators enjoy wide latitude in conducting an arbitration hearing, and they are not constrained by formal rules of procedure or evidence.") (citation and internal quotation marks omitted); *Oracle Corp. v. Wilson*, 276 F. Supp. 3d 22, 29 (S.D.N.Y. 2017) ("Arbitrators must give each of the parties

to the dispute an adequate opportunity to present its evidence and argument, but need not follow all the niceties observed by the federal courts such as the Federal Rules of Civil Procedure or the Federal Rules of Evidence, nor hear all of the evidence proffered by a party.") (internal quotation marks omitted); *Commercial Risk Reinsurance Co. v. Sec. Ins. Co. of Hartford*, 526 F. Supp. 2d 424, 428 (S.D.N.Y. 2007) ("Arbitrators generally are not bound by the rules of evidence, but possess broad latitude to determine the procedures governing their proceedings, to hear or not hear additional evidence, to decide what evidence is relevant, material or cumulative, and otherwise to restrict the scope of evidentiary submissions.").

Second, NuVeda argued in its Motion to Vacate that the Arbitrator exceeded her powers or exhibited a manifest disregard for the law because the Final Parker Report was disclosed by Goldstein after the deadline set forth in the Arbitrator's scheduling order. However, several courts have considered, and summarily rejected NuVeda's exact argument.

In *Selby Gen. Hosp. v. Kindig*, the Ohio Court of Appeals reviewed a trial court order vacating an arbitration award. 2006 WL 2457436 (Ohio App. 2006). The trial court vacated the arbitration award because "the arbitrators' failure to strictly enforce their deadlines resulted in manifest unfairness" and appellant's "extremely untimely designation of [appellant's expert witness] violated the orders established by the arbitrators and resulted in arbitration by ambush." *Id*. at *3 (internal quotation

marks omitted). The trial court thus "concluded that the arbitrators committed misconduct by allowing [appellant's expert witness] testimony and denying [a] request to postpone the hearing." *Id*.

On appeal, the court determined that, because appellant disclosed her expert witness beyond the deadline set in the arbitration scheduling order, her disclosure was untimely. *Id*. at *4. "However, despite this untimely disclosure, [the court was] not convinced the arbitrators committed misconduct in refusing to postpone the hearing." *Id*. Indeed, the court determined that, while appellant was tardy in disclosing her expert witness, appellant's "disclosure of her expert occurred more than a month before the arbitration hearing. While this may have been inadequate time in the litigation context, it gave [respondent] adequate time to prepare for the less formal arbitration process." *Id*. at *5. The court thus concluded: "While we might have ruled differently had we been in the arbitrators' position, we cannot say, given the evidence, that the arbitrators were guilty of misconduct in refusing to postpone the hearing. Therefore, we conclude that the trial court erred in vacating the arbitration award on this basis." *Id*. at *6.

Similarly, in *Roe v. Ladymon*, the Texas Court of Appeals reviewed a trial court confirmation of an arbitration award against Metro LLP ("Metro") and in favor of Kimberla Roe ("Roe"). 318 S.W.3d 502 (Tex. App. 2010). On appeal, Metro argued that Roe disclosed her expert witness and certain documents after the dates

set in the scheduling order, and the untimely disclosures prevented it from adequately preparing for the arbitration hearing. *Id*. at 522. Specifically, Roe filed a supplemental disclosure three days before the arbitration hearing, listing a new expert witness and additional documents supporting her claims. *Id*. The arbitrator denied Metro's written objections and request for a continuance. *Id*. Metro argued that the arbitrator exhibited partiality by denying the continuance and by a comment during a break that Metro "needed to finish presenting its evidence and set a post-hearing briefing schedule so that he could 'finally get this lady some relief.'" *Id*.

The trial court concluded that, although Metro "had raised serious concerns about the fairness of the arbitration proceedings, . . . parties to an arbitration agreement knowingly give up the procedural protections of the court system." *Id*. The Texas appellate court affirmed the trial court's judgment, determining that Metro "had not met its high burden to show the arbitrator committed misconduct in denying the continuance or engaged in evident partiality." *Id*. (citing *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410, 1413 (11th Cir. 1990) ("When the parties agreed to submit to arbitration, they also agreed to accept whatever reasonable uncertainties might arise from the process.")).

Finally, in *Controlotron Corp. v. Siemens Indus., Inc.*, the Second Circuit Court of Appeals considered an appeal from a district court order denying Controlotron Corp.'s ("Controlotron") motion to vacate an arbitration award and

granting a cross-motion by Siemens Industry, Inc., ("Siemens") to confirm that award. 465 F. App'x 8 (2d Cir. 2012). On appeal, Controlotron argued that the arbitrator exceeded her authority by allowing Siemens to add a new claim after the time to do so had expired under the arbitration scheduling order. *Id*. at *9.

The Second Circuit determined that Controlotron's argument was "without merit" because "[t]he Scheduling Order at issue in th[e] case contain[ed] a provision that explicitly empowered the arbitrator to modify the terms of the Order at any time." *Id*. Specifically, the scheduling order provided that the "order shall continue in effect *unless and until amended by subsequent order of the Arbitrator*." *Id*. (emphasis in original). Thus, the court concluded that "even if the parties had agreed not to bring new claims or amend existing ones, the plain language of the Scheduling Order makes clear that they also agreed that the arbitrator would retain authority to grant exceptions to that general prohibition. And the arbitrator's decision to permit Siemens to add a new claim was itself an exercise of her authority to amend the Scheduling Order." *Id*. (citation omitted).

Based on settled law, NuVeda's argument below that the Arbitrator abused her discretion in considering the Final Parker Report and Parker's expert testimony based on the scheduling order was clearly without merit. Thus, the District Court properly rejected NuVeda's argument, and did not err in confirming the Arbitration Award.

NuVeda also argued that the Arbitrator's interpretation of the Operating Agreement warranted vacatur of the Arbitration Award. However, NuVeda's argument was, and is, in direct conflict with this Court's settled law. This Court has stated that judicial review of an Arbitrator's interpretation of a contract is extremely limited. *Castaneda v. Palm Beach Resort Condominiums*, 127 Nev. 1124, 373 P.3d 901 (2011) ("Furthermore, to the extent the Castanedas argue that the arbitrator misinterpreted the contract provision on financing, this argument evades judicial review." (citing *Hill v. Norfolk and Western Ry. Co.,* 814 F.2d 1192, 1195 (7th Cir.1987) (The question in reviewing an arbitration award "is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. If they did, their interpretation is conclusive.") (citations omitted))). Indeed, "[a]rbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement." *Washoe Cty. Sch. Dist. v. White*, 396 P.3d 834, 838 (Nev. 2017) (internal quotation marks and citations omitted) (alteration in original).

The District Court ultimately agreed with Goldstein that NuVeda's position was untenable, and denied NuVeda's Motion to Vacate and confirmed the Arbitration Award. (XI JA 2373). The District Court did not err in doing so.

Given the lack of merit to NuVeda's Motion to Vacate, Goldstein would have suffered extreme prejudice if the Motion to Extend were denied and the Motion to Vacate had been granted as unopposed. Based on the foregoing, the District Court acted within its discretion when it granted Goldstein's Motion to Extend, and similarly did not err in confirming the Arbitration Award.

V. CONCLUSION

Based on all the foregoing, the District Court's Order (1) Granting Goldstein's Motion to Extend, (2) Denying NuVeda's Motion to Vacate, and (3) confirming the Arbitration Award should be affirmed.

Respectfully submitted this 13th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply 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:

[x] This Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Word version 14.0.6129.5000 (2010) in 14 point Times New Roman font;

2. I further certify that this Reply 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), it is:

[x] Proportionately spaced, has a typeface of 14 points or more and contains 10,192 words.

3. Finally, I hereby certify that I have read this Reply 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 13th day of April, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, PLLC, and that on this date, pursuant to NRAP 25(d), I am serving the attached **RESPONDENTS' ANSWERING BRIEF** on the party(s) set forth below by:

☒ By electronic service by filing the foregoing with the Clerk of Court using the ECF Electronic Filing System, which will electronically mail the filing to the following individual.

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