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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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**Case No. 80376**

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**GREGORY GARMONG,**

*Appellant*

--against--

**WESPAC; GREG CHRISTIAN,**

*Respondents*

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Appeal from the Second Judicial District Court of Washoe County, Nevada  
Judge Lynne Simons, Case No. CV12-01271

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**JOINT APPENDIX VOLUME 7**

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1 Strike, p. 2. On February 21, 2017, this Court entered its *Order Appointing Arbitrator*,  
2 appointing Judge Phillip M. Pro ("Judge Pro").

3 On March 27, 2017, Mr. Garmong filed *Plaintiff's Objection Pursuant to NRS*  
4 *38.231(3) and 38.241(e) That There is No Agreement to Arbitrate; Notification of Objection*  
5 *to the Court*. Despite prior determinative orders from this Court, Mr. Garmong again  
6 objected to arbitration on the basis there was no agreement to arbitrate.

7  
8 On May 23, 2017, this Court entered its *Order to Show Cause Why Action Should not*  
9 *be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)*, finding "Mr. Garmong and  
10 Defendants were ordered numerous times to participate in arbitration as early as December  
11 13, 2012. The Court held no evidence was presented establishing the parties had  
12 proceeded to arbitration as ordered. *Order*, p. 4. Accordingly, the Court ordered the parties  
13 to show cause why the action should not be dismissed for want of prosecution. *Order*, p. 4.

14  
15 The parties had their first arbitration conference in April 2017. On June 22, 2018,  
16 without asking for leave of Court, Mr. Garmong filed his *Motion to Disqualify Arbitrator Pro*,  
17 *Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator ("Motion*  
18 *to Disqualify")*.

19  
20 Defendants thereafter filed the *Defendants' Motion for Limited Relief From Stay to*  
21 *File Motion for Attorney's Fees and Sanctions ("Motion for Sanctions")* requesting limited  
22 relief from this Court's order staying the proceeding pending the outcome of arbitration.  
23 However, on October 22, 2018, Defendants filed their *Notice of Completion of Arbitration*  
24 *Hearing*. The Court held that, with completion of the arbitration, Defendants' *Motion for*  
25 *Sanctions* was moot. Additionally, the Court took notice of Defendants' *Notice of*  
26  
27  
28



1 *Completion of Arbitration* and determined there are no additional decisions to be rendered  
2 regarding the *Notice*.

3 **II. PENDING MOTIONS.**

4 **A. Motion to Confirm Final Award**

5  
6 In its *Motion to Confirm Final Award*, Defendants petition the Court for an order  
7 confirming the arbitration award pursuant to Rule 38.239 of the Nevada Revised Statutes.  
8 *Motion to Confirm Final Award*, p. 5. Defendants assert the arbitration Final Award in JAMS  
9 Arbitration Case No. 1260003474 was entered April 11, 2019, in favor of Defendants and  
10 against Mr. Garmong in the total sum of \$111,649.96, including reasonable attorney's fees  
11 and costs. Defendants further request interest accrued on the total sum at the legal rate of  
12 7.5% per annum, from the date this Court enters judgment until the date judgment is  
13 satisfied in full. *Motion to Confirm Final Award*, p. 5.

14  
15 Mr. Garmong opposed the *Motion to Confirm Final Award* on the grounds he did not  
16 enter into a "binding contract including an agreement providing for arbitration" as required  
17 by NRS 38.221(1). *Opposition to Motion to Confirm Final Award*, p. 1. Mr. Garmong argues  
18 if Defendants "cannot identify one, and only one, true, complete, correct, certain,  
19 unambiguous, definite, verified and binding Contract in the record as it now exists, the  
20 arbitrator's Final Award cannot be confirmed because there was no agreement to arbitrate."  
21 *Opposition to Motion to Confirm Final Award*, p. 2. Mr. Garmong further argues Defendants'  
22 *Motion to Confirm Final Award* must be denied because Defendants perpetrated fraud upon  
23 the Court, arbitrator, and Plaintiff by falsely representing the first version of the Investment  
24 Management Agreement was correct.

25  
26 In their *Reply*, Defendants assert the parties entered into a valid and enforceable  
27  
28

1 Investment Management Agreement (the "Agreement"), the final version of which was  
2 executed on August 31, 2005. *Reply to Motion to Confirm Final Award*, p. 5. Defendants  
3 maintain the Arbitration Clause is included in the Agreement at paragraph 16, pages 17 and  
4 18. *Reply to Motion to Confirm Final Award*, p. 5. Moreover, the fully executed Agreement  
5 was submitted in support of Defendants' *Motion to Dismiss and to Compel Arbitration*, and is  
6 therefore part of the record. *Reply to Motion to Confirm Final Award*, p. 9.

8 **B. Plaintiff's Motion to Vacate Arbitrator's Final Award**

9 In his *Motion to Vacate Final Award*, Mr. Garmong first maintains the Final Award  
10 must be vacated pursuant to NRS 38.241(1) because there is no agreement to arbitrate.  
11 *Motion to Vacate Final Award*, p. 5. Second, Mr. Garmong contends the arbitration  
12 provision contained in the Agreement is void pursuant to NRS 597.995 because it has no  
13 "specific authorization." *Motion to Vacate Final Award*, p. 8. Mr. Garmong argues the  
14 arbitration provision is also void because it is not conspicuous and does not warn the  
15 consumer he is foregoing important rights under Nevada law. *Motion to Vacate Final*  
16 *Award*, p. 9.

19 Mr. Garmong further contends the award was procured by corruption, fraud or other  
20 undue means. *Motion to Vacate Final Award*, p. 10. Additionally, Mr. Garmong maintains  
21 the arbitrator refused to consider evidence material to the controversy and that the arbitrator  
22 showed partiality. *Motion to Vacate Final Award*, p. 15. Lastly, Mr. Garmong contends the  
23 Final Award may be vacated on nonstatutory grounds, such as disregard of facts or  
24 manifest disregard of legal authority. *Motion to Vacate Final Award*, p. 43.

26 **C. Motion to Vacate MSJ Decision**

27 In his *Motion to Vacate MSJ Decision*, Mr. Garmong requests an order from this  
28



1 Court vacating Judge Pro's decision denying his *Motion for Partial Summary Judgment*, filed  
2 in the course of arbitration, and to further consider the *Motion for Partial Summary*  
3 *Judgment* and grant it *de novo*. *Motion to Vacate MSJ Decision*, p.1. In support, Mr.  
4 Garmong contends Judge Pro disregarded the applicable substantive legal principles.  
5 *Motion to Vacate MSJ Decision*, generally.

7 Defendants oppose the *Motion to Vacate MSJ Decision* on the following grounds:  
8 First, Defendants argue it is well established that an order denying summary judgment is not  
9 appealable after a hearing on the merits because it is not a final judgment. *Opposition to*  
10 *Motion to Vacate MSJ*, p. 2. Second, Defendants assert Judge Pro properly denied Mr.  
11 Garmong's *Motion for Partial Summary Judgment*. *Motion to Vacate MSJ Decision*, p. 5.  
12 Lastly, Defendants assert Judge Pro did not evaluate witness credibility when he ruled on  
13 the MSJ. *Opposition to Motion to Vacate MSJ*, p. 6.

15 **D. Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees**

16 In his *Motion to Vacate Award of Fees*, Mr. Garmong argues Rule 68 of the Nevada  
17 Revised Statutes does not apply to this case because the parties did not agree it would  
18 apply. *Motion to Vacate Award of Fees*, p. 5. In support, Mr. Garmong argues JAMS Rule  
19 24 provides the award of the arbitrator may include attorney's fees if agreed to by the  
20 parties. *Motion to Vacate Award of Fees*, p. 6. Moreover, Mr. Garmong argues the award  
21 was procured by corruption, fraud, or other undue means.

24 In their *Opposition to Motion to Vacate Fees*, Defendants maintains Judge Pro's  
25 award of attorney's fees and costs was proper pursuant to NRCP Rule 68 and JAMS Rule  
26 24(g). Defendants assert, Judge Pro set forth:

28 There is no dispute that the issues in this case are governed by Nevada law,  
and procedurally by JAMS Rules and the provisions of the Nevada Rules of

1 Civil Procedure enumerated in the Stipulation for arbitration entered by the  
2 Parties on February 8, 2017. However, the agreement of the Parties to  
3 specific NRCP rules relating to discovery does not automatically exclude the  
4 applicability of others, particularly where the Arbitrator determines that  
5 necessary.

6 *Opposition to Motion to Vacate Award of Fees*, p. 3; citing *Arbitrator's Final Award*.

7 In addition to arguing the award is proper under NRCP Rule 68 and JAMS Rule  
8 24(g), Defendants argue the evidence supports Judge Pro's determination that the fees are  
9 reasonable. *Opposition to Motion to Vacate Award of Fees*, p. 14.

10 **E. Motion to File Exhibit as Confidential**

11 Defendants filed their *Motion to File Exhibit as Confidential* asking this Court for an  
12 Order to File Exhibit "4" to Defendants' *Reply to Motion to Confirm Final Award*, filed May 6,  
13 2019, as confidential. Defendants assert after filing their *Reply to Motion to Confirm Final*  
14 *Award*, Mr. Garmong informed Defendants' counsel Exhibit 4 contained his social security  
15 number. *Motion to File Exhibit as Confidential*, p. 2. Defendants maintain they immediately  
16 apologized for the inadvertent error and hand delivered a Stipulation to file the Exhibit as  
17 confidential to Mr. Garmong's counsel. *Motion to File Exhibit as Confidential*, p. 2.  
18 Defendants additionally called the Second Judicial District Court Clerk's office and  
19 requested the Exhibit be marked and filed as confidential. However, Defendants assert Mr.  
20 Garmong refused to sign the Stipulation. *Motion to File Exhibit as Confidential*, p. 2.

21 Mr. Garmong opposed the *Motion to File Exhibit as Confidential* on the grounds that  
22 he "seeks protection from the exposure by the Defendants and their attorney to potential  
23 identity or financial theft, but opposes the requested relief as insufficient and having no  
24 basis in law." *Opposition to Motion to File Exhibit as Confidential*, p. 3. Mr. Garmong further  
25  
26  
27  
28



1 maintains he "needs the Court's help in protecting his sensitive personal and financial  
2 information . . . ." *Opposition to Motion to File Exhibit as Confidential*, p. 3.

3 **III. APPLICABLE LAW AND ANALYSIS.**

4 **A. Motion to Confirm Final Award**

5 Section 38.239 of the Nevada Revised Statutes provides,

6  
7 After a party to an arbitral proceeding receives notice of an award, the party  
8 may make a motion to the court for an order confirming the award at which  
9 time the court shall issue a confirming order unless the award is modified or  
10 corrected pursuant to NRS 38.237 or 38.242 or is vacated pursuant to NRS  
11 38.241.

12 NRS 38.239. "[T]he scope of judicial review of an arbitration award is limited and is nothing  
13 like the scope of an appellate court's review of a trial court's decision." Health Plan of  
14 Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P.3d 172, 177 (2004). "A 'reviewing court  
15 should not concern itself with the 'correctness' of an arbitration award' and thus does not  
16 review the merits of the dispute." Bohlmann v. Byron John Printz, 120 Nev. at 547, 96 P.3d  
17 1158 (2004) (quoting Thompson v. Tega-Rand Intern., 740 F.2d 762, 763 (9th Cir.1984));  
18 see also Clark Ctv. Educ. Ass'n v. Clark Ctv. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8  
19 (2006). Thus, "[a] party seeking to vacate an arbitration award based on manifest disregard  
20 of the law may not merely object to the results of the arbitration." Clark Ctv. Edu. Ass'n,  
21 122 Nev. at 342, 131 P.3d at 8 (quoting Bohlmann, 120 Nev. at 547, 96 P.3d at 1158).  
22 Rather, "[t]he party seeking to attack the validity of an arbitration award has the burden of  
23 proving, by clear and convincing evidence, the statutory or common-law ground relied upon  
24 for challenging the award." Rainbow Med., 120 Nev. at 695, 100 P.3d at 176.

25  
26 Here, Mr. Garmong argues the arbitration award must be set aside pursuant to NRS  
27 38.221 because Defendants "cannot identify one, and only one, true, complete, correct,  
28



1 certain, unambiguous, definite, verified and binding Contract in the record as it now exists;"  
2 and, therefore, "the arbitrator's Final Award cannot be confirmed because there was no  
3 agreement to arbitrate." *Opposition to Motion to Confirm Final Award*, p. 2.

4  
5 This Court has repeatedly ruled, unequivocally, that an enforceable agreement to  
6 arbitrate exists in the record and that the parties were properly ordered to arbitrate pursuant  
7 to NRS 38.221. See Order, December 13, 2012 (holding the arbitration agreement  
8 contained in paragraph 16 of the Agreement is not unconscionable and is enforceable);  
9 Order, April 2, 2014 (denying motion for reconsideration, and again holding arbitration  
10 agreement to be enforceable, based on identical arguments as raised in in Mr. Garmong's  
11 *Motion to Vacate Final Award*); *Order to Show Cause Why Action Should not be Dismissed*  
12 *for Want of Prosecution Pursuant to NRCP 41(E)*) (holding Mr. Garmong was ordered  
13 numerous times to participate in arbitration.  
14

15  
16 In accordance with this Court's prior Orders, the record in this case, and the pending  
17 *Motion*, the Court, again, holds a valid and enforceable agreement exists. As such, this  
18 Court grants Defendants *Motion to Confirm Final Award* pursuant to NRS 38.239.

19 **B. Motion to Vacate Final Award; Motion to Vacate MSJ Decision**

20 Rule 13 of the District Court Rules for the State of Nevada provides, "No motion once  
21 heard and disposed of shall be renewed in the same cause, nor shall the same matters  
22 therein embraced be reheard, unless by leave of the court granted upon motion therefor,  
23 after notice of such motion to the adverse parties." DCR 13(7).  
24

25 Well-established authority in this State governs reconsideration of previously-decided  
26 issues. In Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., the  
27 Nevada Supreme Court held:  
28

1 A district court may reconsider a previously decided issue if substantially  
2 different evidence is subsequently introduced or the decision is clearly  
3 erroneous. See *Little Earth of United Tribes v. Department of Housing*, 807  
4 F.2d 1433, 1441 (8th Cir.1986); see also *Moore v. City of Las Vegas*, 92 Nev.  
5 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which new  
6 issues of fact or law are raised supporting a ruling contrary to the ruling  
7 already reached should a motion for rehearing be granted.") (Emphasis  
8 added).

9 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (alterations and citations in original). In

10 Masonry & Tile Contractors Ass'n, the Nevada Supreme Court upheld a district court's  
11 reconsideration of a previously decided issue in light of new clarifying case law. Id.

12 Because of new case law, the decision by the prior district judge was properly determined to  
13 be "clearly erroneous." Id. When a motion for reconsideration raises "no new issues of law  
14 and [makes] reference to no new or additional facts," reconsideration is "superfluous" and  
15 constitutes an "abuse of discretion" by the district court to entertain such a motion. Moore v.  
16 City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Such motions are granted  
17 in "rare instances." Id. Further, it is well settled the decision of whether to grant  
18 reconsideration is within "the sound discretion of the court." Navajo Nation v. Confederated  
19 Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003); see also  
20 Riger v. Hometown Mortg., LLC, 104 F. Supp. 3d 1092, 1095 (D. Nev. 2015) (district court's  
21 decision to grant reconsideration after entry of an order is within its discretion).

22 Mr. Garmong filed two *Motions*, the subject of which have been previously decided by  
23 this Court and for which he does not raise new issues of law or fact. First, Mr. Garmong  
24 filed his *Motion to Vacate Final Award*, in which he argues the Final Award must be vacated  
25 pursuant to NRS 38.241(1) because there is no agreement to arbitrate. *Motion to Vacate*  
26 *Final Award*, p. 5. However, as stated, this Court has previously held a valid and  
27 enforceable arbitration agreement exists in the record pursuant to NRS 38.241. Moreover,  
28



1 Mr. Garmong does not raise new issues of law or fact. See Order, December 13, 2012  
2 (holding the arbitration agreement contained in paragraph 16 of the Agreement is not  
3 unconscionable and is enforceable); Order, April 2, 2014 (denying motion for  
4 reconsideration and again holding arbitration agreement to be enforceable based on  
5 identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); Order to  
6 Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to  
7 NRCP 41(E) (holding Mr. Garmong was ordered numerous time to participate in arbitration).

8  
9 Second, Mr. Garmong filed his *Motion to Vacate MSJ Decision*, arguing the arbitrator  
10 disregarded the applicable substantive legal principles. Again, this Court previously  
11 considered and decided this issue. See Order Denying Plaintiff's Motion to Disqualify  
12 Arbitrator Pro; Order Denying Motion to Vacate Order Denying Motion for Summary  
13 Judgment; Order Denying Motion to Appoint New Arbitrator, entered September 29, 2018.

14  
15 Accordingly, Mr. Garmong did not properly move to renew the *Motions* pursuant to  
16 DCR 13(7). Moreover, Mr. Garmong does not present the Court with any new issues of law  
17 or fact; and as such, his *Motion to Vacate Final Award* based on a lack of enforceable  
18 agreement, and his *Motion to Vacate MSJ Decision* are meritless and should be denied.

19  
20 **C. Motion to Vacate Attorney's Fees**

21  
22 Rule 24(g) of JAMS Comprehensive Arbitration Rules & Procedures (JAMS Rule)  
23 provides an arbitrator may award attorney's fees, expenses, and interest if provided by the  
24 Parties' Agreement or allowed by applicable law. JAMS Rule 24(g). Defendants made an  
25 Offer of Judgment in the amount of \$10,000 on February 12, 2017. *Final Award*, p. 10.

26 //

27 //

1 Rule 68 of the Nevada Rules of Civil Procedure provides, in pertinent part:

2 (a) The Offer. At any time more than 10 days before trial, any party may  
3 serve an offer in writing to allow judgment to be taken in accordance with its  
4 terms and conditions.

\* \* \* \*

5 (e) Failure to Accept Offer...Any offeree who fails to accept the offer may be  
6 subject to the penalties of this rule.

7 (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to  
8 obtain a more favorable judgment,

9 (1) the offeree cannot recover any costs or attorney's fees and shall  
10 not recover interest for the period after the service of the offer and before the  
11 judgment; and

12 (2) the offeree shall pay the offeror's post-offer costs, applicable  
13 interest on the judgment from the time of the offer to the time of entry of the  
14 judgment and reasonable attorney's fees, if any be allowed, actually incurred  
15 by the offeror from the time of the offer.

16 NRCP 68. An award of fees pursuant to NRCP 68 is discretionary with the Court and will  
17 not be disturbed absent clear abuse. Bidart v. American Title Ins. Co., 103 Nev. 175, 734  
18 P.2d 732 (1987).

19 Mr. Garmong argues Judge Pro's award of attorney's fees should be vacated  
20 because the Scheduling Order entered in Arbitration between the parties on August 11,  
21 2017 enumerated specific provisions of the Nevada Rules of Civil Procedure as applicable  
22 to discovery in Arbitration, but omitted any reference to NRCP 68.

23 However, as Judge Pro properly found, there is no dispute that the issues in this case  
24 are governed by Nevada law, and procedurally by JAMS Rules. The agreement of the  
25 Parties to specific NRCP rules relating to discovery does not automatically exclude the  
26 applicability of others to the matter, particularly where the Arbitrator determines it necessary.

27 Moreover, although Mr. Garmong argued the award was procured by corruption,  
28 fraud, or other undue means, no evidence exists to support this assertion. Accordingly, the



1 Court finds Judge Pro awarded attorney's fees, interest, and expenses in accordance with  
2 NRCP 68 and JAMS Rule 24(g).

3 **D. Motion to File Exhibit as Confidential**

4  
5 Section 205.4605(1) of the Nevada Revised Statutes provides, a person shall not  
6 willfully and intentionally post or display in any public manner the social security number  
7 of another person unless the person is authorized or required to do so by law. NRS  
8 205.4605(1). Here, it is clear that Defendants filed Mr. Garmong's social security number in  
9 their moving papers and took immediate steps to remedy the disclosure.  
10

11 Mr. Garmong opposes the *Motion to File Exhibit as Confidential* on the grounds the  
12 request is insufficient to protect his identity and has no basis in law. However, Mr. Garmong  
13 refused to sign the Stipulation which would provide for protection of his personal  
14 information. The Court further notes Mr. Garmong has offered no remedy for a clearly  
15 inadvertent disclosure of his social security number. It is clear from the parties'  
16 communications that Defendants were not aware of the disclosure and took all necessary  
17 steps to remedy the disclosure at the time they gained knowledge of such. See Motion to  
18 File Exhibit as Confidential, Exhibit 1-3. The Court finds this was not a willful and intentional  
19 disclosure. Moreover, the Court finds the inadvertent disclosure is remedied by ordering the  
20 Exhibit filed as confidential.  
21  
22

23 **IV. CONCLUSION AND ORDER**

24 Accordingly, and good cause appearing therefor,

25 IT IS HEREBY ORDERED:

26 1. *Defendants' Petition for an Order Confirming Arbitrator's Final Award and*  
27 *Reduce Award to Judgment, Including, Attorneys' Fees and Costs* is GRANTED;  
28

1           2.     Defendants are directed to submit a proposed judgment within ten (14) days  
2 from the entry of this Order;

3           3.     *Plaintiff's Motion to Vacate Arbitrator's Final Award* is DENIED;

4           4.     *Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees* is DENIED;

5           5.     *Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion*  
6 *for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for*  
7 *Partial Summary Judgment* is DENIED;

8           6.     *Defendants' Motion for an Order to File Exhibit as Confidential* is GRANTED.

9           DATED this 14 day of August, 2019.

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DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;  
that on the 8th day of August, 2019, I electronically filed the foregoing with the Clerk of  
the Court system which will send a notice of electronic filing to the following:

CARL HEBERT, ESQ.

THOMAS BRADLEY, ESQ.

And, I deposited in the County mailing system for postage and mailing with the  
United States Postal Service in Reno, Nevada, a true and correct copy of the attached  
document addressed as follows:

Hudi Bore

CV12-01271



1 CODE: 2010  
2 THOMAS C. BRADLEY, ESQ.  
3 NV Bar. No. 1621  
4 435 Marsh Avenue  
5 Reno, Nevada 89509  
6 Telephone: (775) 323-5178  
7 Tom@TomBradleyLaw.com  
8 Attorney for Defendants

9  
10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

11 **IN AND FOR THE COUNTY OF WASHOE**

12 GREGORY GARMONG,

CASE NO. CV12-01271

13 Plaintiff,

DEPT. NO. 6

14 v.

15 WESPAC, GREG CHRISTIAN, and  
16 Does 1-10,

17 Defendants.  
18 \_\_\_\_\_ /

19 **DEFENDANTS' MOTION FOR ATTORNEY'S FEES**

20 Defendants WESPAC and Greg Christian, by and through their counsel, Thomas C. Bradley,  
21 Esq., hereby move for an award of attorney's fees. This Motion is based upon the accompanying  
22 Memorandum of Points and Authorities, Declaration of Thomas C. Bradley, and upon all of the  
23 pleadings, papers and documents on file herein.

24 ***Affirmation:** The undersigned verifies that this document does not contain the personal  
25 information of any person.*

26 DATED this 8th day of August, 2019.

27 /s/ Thomas C. Bradley  
28 THOMAS C. BRADLEY, ESQ.  
Attorney for Defendants



## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

On April 15, 2019, Defendants petitioned this Court to confirm Judge Pro's Arbitration Award. Plaintiff Greg Garmong filed three (3) Motions to Vacate and filed an Opposition to Defendants' Petition to Confirm. Defendants incurred substantial fees seeking confirmation of the Arbitration Award.

On August 8, 2019, this Court confirmed the Arbitration Award including the Arbitrator's award of fees and costs. Defendants now seek an award of the attorney's fees incurred to confirm the award before this Court.

### **II. REQUEST FOR ATTORNEY FEES IF THIS PETITION IS CONTESTED**

Pursuant to NRS 38.239, 38.241, and 38.242 as well as 38.243(3), Defendants hereby request the award of attorney fees incurred to confirm the Arbitration Award. Defendants also request that these additional fees be included in the final Judgment amount.

"In Nevada, 'the method upon which a reasonable fee is determined is subject to the discretion of the court,' which 'is tempered only by reason and fairness.'" Shuette v. Beazer Homes Holding Corp., 121 Nev. 837, 865, 124 P.3d 530, 548-49 (2005) (quoting University of Nevada v. Tarkanian, 110 Nev. 581, 591, 879 P. 2d 1180 (1994)). However, there are certain factors, which the Court should analyze in determining the reasonableness of a fee award:

(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

Counsel for Wespac charged WESPAC \$395.00 per hour, which is a fair and reasonable hourly rate based upon the fact that counsel graduated from Arizona State University School of Law in 1984; he then clerked for the Honorable Bruce R. Thompson for two years; he is a member of both the Nevada and California Bar Association; he worked as an Associate for Lawrence J. Semenza for five years; he worked as an a deputy federal public defender for five years and tried

1 many jury trials; he then worked in private practice for over twenty years and successfully  
2 represented parties in over 200 securities arbitration cases, many of which have tried to an  
3 arbitration panel; his current hourly rate for security arbitration cases is \$395.00 per hour; he served  
4 as the President of the local Chapter of Inns of Court; and it is his understanding that a substantial  
5 percentage of attorneys in Reno, Nevada charge \$395.00 or more per hour.

6 The area of securities arbitration is complicated and requires specialized knowledge and  
7 experience. Moreover, Mr. Garmong filed three voluminous extremely detailed Motions to Vacate,  
8 Opposition to Motion to Confirm, and Replies. He also attached hundreds of pages of exhibits. In  
9 fact, Mr. Garmong filed so many exhibits, his lawyer had to file supplemental attachments to  
10 comply with the Court's limits of 100 megabytes per submittal. Counsel was required to perform  
11 many hours of legal research. Counsel believes that he provided zealous and superior representation  
12 on behalf of his clients. This court affirmed Judge Pro's Arbitration  
13 award and, thus, the result obtained by counsel was superior. The quality of such representation,  
14 however, required counsel to spend many hours working on the case. The consequence was that my  
15 attorney fees incurred to confirm the arbitration award totaled \$24,529.50. See Exhibit "1",  
16 Declaration of Thomas C. Bradley and Exhibit "2," Copy of Invoice paid by Wespac. Additionally,  
17 counsel paid Michael Hume \$3,175.00. Thus, total fees were \$27,704.50.

### 18 **III. CONCLUSION**

19 This Court should enter an order confirming the Arbitrator's Final Award dated April 11,  
20 2019, and reduce the Final Award to Judgment, including the award of \$111,649.96 in attorney fees  
21 and costs incurred in the arbitration plus \$27,704.50 of attorney fees incurred in the confirmation of  
22 the Arbitration Award for a total of \$139,354.46.

23 DATED this 8th day of August, 2019.

24 /s/ Thomas C. Bradley  
25 THOMAS C. BRADLEY, ESQ.  
26 Attorney for Defendants  
27  
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thomas C. Bradley, Esq., and the  
3 date set forth below, I served a true copy of the foregoing document on the party(ies) identified  
4 herein, via the following means:

- 5 ☐ Personal Delivery  
6 ☐ Professional Courier  
7 ☐ Federal Express or Other Overnight Delivery Service  
8 ☐ US Mail with Sufficient Postage Affixed  
9 ☐ Facsimile to the Facsimile Number specified  
10 ☐ Electronic Mail to the e-mail address(es) specified  
11 ☒ Second Judicial District Court eFlex system

12 Carl Hebert, Esq.  
13 [carl@cmhebertlaw.com](mailto:carl@cmhebertlaw.com)  
14 202 California Avenue  
15 Reno, Nevada 89509  
Attorney for Plaintiff

16 DATED this 8th day of August, 2019.

17 By: /s/ Mehi Aonga  
18 Employee of Thomas C. Bradley, Esq.

## INDEX OF EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>	<u>No. of Pages</u>
1	Declaration of Thomas C. Bradley	2
2	Wespac Invoice	2

# EXHIBIT 1

# EXHIBIT 1

**DECLARATION OF THOMAS C. BRADLEY**

I, Thomas C. Bradley, declare under penalty of perjury to the following:

1. I have been counsel of record in Garmong v. WESPAC since 2012.
2. I charged WESPAC \$395.00 per hour, which I believe is a fair and reasonable hourly rate based upon the following:
  - a. I graduated from Arizona State University School of Law in 1984;
  - b. I clerked for the Honorable Bruce R. Thompson for two years;
  - c. I am a member of both the Nevada and California Bar Association;
  - d. I worked as an Associate for Lawrence J. Semenza for five years;
  - e. I have worked in private practice for over twenty years;
  - f. I was President of the Local Chapter of the Inns of Court;
  - g. I have successfully represented parties in over 200 securities arbitration cases, many of which I have tried to an arbitration panel;
  - h. My current hourly rate for security arbitration cases is \$395.00 per hour;
  - i. It is my understanding that a majority of attorneys in Reno, Nevada charge \$300.00 or more per hour; and
  - j. WESPAC has paid all of my outstanding fees.
3. The area of securities arbitration is complicated and requires specialized knowledge and experience. Moreover, Mr. Garmong's three Motions to Vacate, Opposition to Motion to Confirm and three Replies were very detailed and voluminous, and contained numerous exhibits.
4. I believe that I provided zealous and superior representation before this Court on behalf of my clients. The quality of such representation, however, required me to spend many hours working on the case. I hereby certify that I worked a total of 62.1 hours and billed a total of TWENTY-FOUR THOUSAND FIVE HUNDRED TWENTY-NINE DOLLARS AND FIFTY CENTS (\$24,529.50), and that the invoice was accurate, and all hours worked were reasonable and necessary. Attached to this Declaration is a true and correct copy of my invoice in this matter.
5. I retained Michael Hume to assist me in the defense of Mr. Garmong's claims. I paid Mr. Hume \$100.00 per hour to assist me before this Court. Mr. Hume is a very experienced

securities arbitration consultant. He has assisted lawyers throughout the United States in excess of one thousand security arbitration cases over the past 25 years. Mr. Hume assisted me in reviewing and analyzing voluminous pleadings and exhibits filed by Mr. Garmong. Mr. Hume further assisted me with locating referenced and citations to the arbitration hearing. I have carefully reviewed, approved, and verified all of Mr. Hume's work and the accuracy and reasonableness of his invoices. Mr. Hume worked a total of 31.75 hours for a total \$3,175.00.

6. I did not charge my clients for any time expended on any pleadings to make a certain exhibit confidential or for any telephone calls, e-mails, or legal research regarding that subject.

I swear under penalty of perjury that the foregoing statements in this Declaration are true and correct.

DATED this 8th day of August, 2019.

By /s/ Thomas C. Bradley  
THOMAS C. BRADLEY, ESQ.

# EXHIBIT 2

# EXHIBIT 2



**THOMAS C. BRADLEY, ESQ.**

800-379-1130 T 775-323-5178  
[TOM@TOMBRADLEYLAW.COM](mailto:TOM@TOMBRADLEYLAW.COM)  
435 MARSH AVENUE RENO, NEVADA 89509  
[TOMBRADLEYLAW.COM](http://TOMBRADLEYLAW.COM)

June 1, 2019

WESPAC  
689 Sierra Rose Drive  
Suite A-2  
Reno, NV 89511

**INVOICE for April & May 2019  
FEES**

DATE	DESCRIPTION	HOURS	AMOUNT
4/25/2019	Review and Analysis of Garmong's 48-page Motion to Vacate Award, plus exhibits; Legal Research cases cited therein; Telephone conference with client	4.1	\$ 1,619.50
4/26/2019	Continued Review and analysis of Motion to Vacate Award; Legal Research and draft Opposition	4.7	\$ 1,856.50
4/27/2019	Review and Analysis of Garmong's 31-page Motion to Vacate Denial of Motion for Partial Summary Judgment, plus exhibits; Legal Research cases cited therein	4.6	\$ 1,817.00
4/28/2019	Continued Review and Analysis of Garmong's Motion to Vacate Denial of Motion for Partial Summary Judgment and draft Opposition	3.8	\$ 1,501.00
5/1/2019	Review and Analysis of Garmong's 24-page Motion to Vacate Award of Attorney Fees, plus exhibits; Legal Research cases	4.9	\$ 1,935.50
5/2/2019	Continued Review and Analysis of Garmong's Motion to Vacate Award of Attorney Fees; Legal Research and draft Opposition	5.7	\$ 2,251.50
5/3/2019	Draft Oppositions; Telephone Conference with Client; Legal Research	5.6	\$ 2,212.00
5/4/2019	Review and Analysis of Garmong's Opposition to Motion to Confirm Award; Legal Research; Draft Reply	5.1	\$ 2,014.50
5/6/2019	Draft Oppositions and Legal Research; Finalize Reply	4.9	\$ 1,935.50
5/7/2019	Legal Research; Draft Oppositions	5.5	\$ 2,172.50
5/8/2019	Legal Research; Draft Oppositions	4.9	\$ 1,935.50

DATE	DESCRIPTION	HOURS	AMOUNT
5/9/2019	Finalize Oppositions; Telephone conference with client	4.9	\$ 1,935.50
5/22/2019	Review and Analyze 22-page Reply to Motion to Vacate Final Award; Review 14-page Reply to Motion to Vacate Denial of Motion for Partial Summary Judgment; Review 12-page Reply to Motion to Vacate Award of Attorney Fees; Finalized Requests for Submission of all 3 of Garmong's Motions	3.4	\$ 1,343.00

---

TOTAL TIME @ \$395.00 AN HOUR	62.1	\$ 24,529.50
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<i>Hume Invoice (31.75 Hours @ \$100.00/hour)</i>	<i>\$3,175.00</i>
---	-------------------

<b>INVOICE TOTAL</b>	<b><u>\$ 27,704.50</u></b>
----------------------	----------------------------

1 CODE: 2010  
2 THOMAS C. BRADLEY, ESQ.  
3 NV Bar. No. 1621  
4 435 Marsh Avenue  
5 Reno, Nevada 89509  
6 Telephone: (775) 323-5178  
7 Tom@TomBradleyLaw.com  
8 Attorney for Defendants

9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

10 **IN AND FOR THE COUNTY OF WASHOE**

11 GREGORY GARMONG,

CASE NO. CV12-01271

12 Plaintiff,

DEPT. NO. 6

13 v.

14 WESPAC, GREG CHRISTIAN, and  
15 Does 1-10,

16 Defendants.  
17 \_\_\_\_\_/

18 **STIPULATION**

19 Plaintiff Gregory Garmong intends to timely file a Motion pursuant NRCP 59 seeking to amend  
20 the Judgment. Defendants WESPAC and Greg Christian (collectively, "WESPAC"), intend to file  
21 an Amended Motion seeking the award of the additional attorney's fees incurred in opposing the  
22 Motion to Amend the Judgment.

23 Accordingly, Plaintiff Gregory Garmong, by and through his counsel, Carl M. Hebert, Esq., and  
24 Defendants WESPAC and Greg Christian (collectively, "WESPAC"), by and through their counsel,  
25 Thomas C. Bradley, Esq., hereby stipulate that:

- 26 1. WESPAC shall have until ten (10) days after the Court issues a ruling favorable to WESPAC  
27 on Plaintiff's Motion to Amend the Judgment to file an Amended Motion for the Award of  
28 Attorney's Fees;

1 2. Plaintiff shall have the standard response time in which to file and serve his opposition to the  
2 Defendant's Amended Motion for the Award of Attorney's Fees; and

3 3. WESPAC shall not be required to file a Proposed Final Judgment until ten (10) days  
4 following this Court's ruling on WESPAC's Amended Motion for the Award of Attorney's  
5 Fees.

6 Attached as Exhibit "1" is a Proposed Order.

7 *Affirmation: The undersigned verifies that this document does not contain the personal*  
8 *information of any person.*

9  
10 Stipulated to this 16th day of August, 2019.

Stipulated to this 13 day of August, 2019.

11  
12  
13 By: Carl M. Hebert

14 CARL HEBERT, ESQ.  
15 Attorney for Gregory Garmong

By: T.C. Bradley

THOMAS C. BRADLEY, ESQ.  
Attorney for Greg Christian and  
Wespac

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INDEX OF EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>	<u>No. of Pages</u>
1	Proposed Order	1

# **EXHIBIT 1**

# **EXHIBIT 1**

1 CODE: 3370  
2 THOMAS C. BRADLEY, ESQ.  
3 NV Bar. No. 1621  
4 435 Marsh Avenue  
5 Reno, Nevada 89509  
6 Telephone: (775) 323-5178  
7 [Tom@TomBradleyLaw.com](mailto:Tom@TomBradleyLaw.com)  
8 Attorney for Defendants

9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
10 **IN AND FOR THE COUNTY OF WASHOE**

11 GREGORY GARMONG,

CASE NO. CV12-01271

12 Plaintiff,

DEPT. NO. 6

13 v.

14 WESPAC, GREG CHRISTIAN, and  
15 Does 1-10,

Defendants.

16 **ORDER**

17 GOOD CAUSE APPEARING, the Court orders that:

- 18 1. WESPAC shall have until ten (10) days after the Court issues a ruling favorable to WESPAC  
19 on Plaintiff's Motion to Amend the Judgment to file an Amended Motion for the Award of  
20 Attorney's Fees;
- 21 2. Plaintiff shall have the standard response time in which to file and serve his opposition to the  
22 Defendant's Amended Motion for the Award of Attorney's Fees; and
- 23 3. WESPAC shall not be required to file a Proposed Final Judgment until ten (10) days  
24 following this Court's ruling on WESPAC's Amended Motion for the Award of Attorney's  
25 Fees.

26 DATED this \_\_\_\_ day of \_\_\_\_\_, 2019.

1 CODE: 3370  
2 THOMAS C. BRADLEY, ESQ.  
3 NV Bar. No. 1621  
4 435 Marsh Avenue  
5 Reno, Nevada 89509  
6 Telephone: (775) 323-5178  
7 Tom@TomBradleyLaw.com  
8 Attorney for Defendants

9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

10 **IN AND FOR THE COUNTY OF WASHOE**

11 GREGORY GARMONG, CASE NO. CV12-01271  
12 Plaintiff, DEPT. NO. 6  
13

14 v.

15 WESPAC, GREG CHRISTIAN, and  
16 Does 1-10,

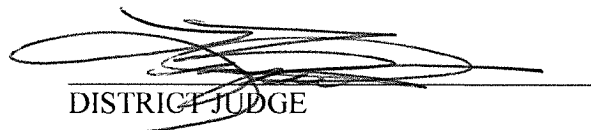
17 Defendants.  
18

19 **ORDER**

20 GOOD CAUSE APPEARING, the Court orders that:

- 21 1. WESPAC shall have until ten (10) days after the Court issues a ruling favorable to WESPAC  
22 on Plaintiff's Motion to Amend the Judgment to file an Amended Motion for the Award of  
23 Attorney's Fees;  
24 2. Plaintiff shall have the standard response time in which to file and serve his opposition to the  
25 Defendant's Amended Motion for the Award of Attorney's Fees; and  
26 3. WESPAC shall not be required to file a Proposed Final Judgment until ten (10) days  
27 following this Court's ruling on WESPAC's Amended Motion for the Award of Attorney's  
28 Fees.

DATED this 27<sup>th</sup> day of August, 2019.

  
DISTRICT JUDGE



CARL M. HEBERT, ESQ.  
Nevada Bar #250  
202 California Avenue  
Reno, NV 89509  
(775) 323-5556

Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,  
Plaintiff,

vs.

**CASE NO. : CV12-01271**

WESPAC; GREG CHRISTIAN;  
DOES 1-10, inclusive,  
Defendants.

**DEPT. NO. : 6**

---

**PLAINTIFF'S MOTION TO ALTER OR AMEND  
"ORDER RE MOTIONS" ENTERED AUGUST 8, 2019**

---

Petitioner moves the Court pursuant to NRCP 59(e) to substantively alter or amend the judgment found in the "Order Re Motions" entered August 8, 2019." ("Order").

The requested substantive alterations or amendments to the judgment are to

- Deny Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reduce Award to Judgment, including Attorneys' Fees and Costs.
- Grant Plaintiff's Motion to Vacate Arbitrator's Final Award.
- Grant Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees.
- Grant Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion

1 for Partial Summary Judgment (“PMPSJ”) and for the Court to Decide and Grant Plaintiff’s  
2 Motion for Partial Summary Judgment.

3 This Motion is based upon the Order, the following Points and Authorities, the  
4 papers filed with the Court, the papers filed in the arbitration, and the other papers in the  
5 case.  
6

7 **POINTS AND AUTHORITIES**

8 **I. REQUESTED RELIEF, THE DISTRICT COURT’S MANDATORY DUTY TO**  
9 **REVIEW AND PRELIMINARY MATTERS**

10 **A. The requested relief**

11 The Order Granted Defendants’ Petition for an Order Confirming Arbitrator’s Final  
12 Award and Reduce Award to Judgment, including Attorneys’ Fees and Costs; Denied  
13 Plaintiff’s Motion to Vacate Arbitrator’s Final Award; Denied Plaintiff’s Motion to Vacate  
14 Arbitrator’s Award of Attorney’s Fees and denied Plaintiff’s Motions to Vacate Arbitrator’s  
15 Award of Denial of Plaintiff’s Motion for Partial Summary Judgment and for the Court to  
16 Decide and Grant Plaintiff’s Motion for Partial Summary Judgment (“PMPSJ”).  
17

18 Each of these decisions was erroneous for reasons set forth below. Plaintiff Mr.  
19 Garmong asks that they be vacated and reversed.  
20

21 **B. The District Court has a duty to review the actions and rulings**  
22 **of the arbitrator to determine whether he disregarded the facts or manifestly**  
23 **disregarded the law.**

24 See NRS § 38.241(1) and case authority discussed at Plaintiff’s Motion to Vacate  
25 Arbitrator’s Final Award at 3:3-4:21, including, among others, Graber v. Comstock Bank,  
26 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995) (“[T]he district court had the  
27 authority and obligation to review the arbitrator’s award to determine whether the arbitrator  
28

1 manifestly disregarded the law. To the extent the arbitration transcript and exhibits  
2 contained substantial evidence of a manifest disregard for the law, the district court acted  
3 improperly by failing to review the arbitration transcript and exhibits before confirming the  
4 arbitration award.”); WPH Architecture, Inc. v. Vegas VP, LP, 131 Nev. Adv. Op. 88, 360  
5 P.3d 1145, 1147 (2015); Clark County Educ. Ass’n v. Clark County School Dist., 122 Nev.  
6 337, 341-42, 131 P.3d 5, 8 (2006). The District Court has a mandatory legal obligation  
7 to perform that review of the arbitrator’s award including, in this case, the arbitrator’s denial  
8 of Plaintiff’s Motion for Partial Summary Judgment and the arbitrator’s Final Award.  
9

10 **C. The matter of purported delays and alleged reluctance to**  
11 **participate in arbitration is not relevant to the Court’s duty to review.**  
12

13 The Order discusses at some length purported delays in the proceeding. Neither  
14 party raised an objection on this basis. Any such purported delays are not relevant to the  
15 issues presented by the various motions decided by the Order. However, the plaintiff  
16 wishes to note that he appealed (petitioned for a writ of mandamus or prohibition) the order  
17 of the District Court committing the case to arbitration. This appellate process consumed  
18 11 months. Further, the parties had could not agree on selection of the arbitrator and  
19 sought the assistance of this Court. This took additional time.  
20

21 Considerations of reluctance to arbitrate, which the Court raised on its on own  
22 motion, cannot justify a refusal to follow mandatory requirements of the law.

23 **D. Scope of this Motion**  
24

25 This Motion addresses errors found in the Order, and explains why the rulings in  
26 the Order should be reversed. Those errors relate primarily to the Order attempting to  
27 justify avoiding addressing the substantive issues. There is no attempt here to address in  
28 detail the substantive issues raised in the briefs that led to the Order, which discussion is

1 found in those briefs.

## 2 II. LEGAL STANDARDS FOR AMENDING JUDGMENTS

3 The "Order Re Motions" entered on August 8, 2019 decided all of the claims  
4 between the parties and left nothing for future disposition by the Court; therefore, it is a  
5 final judgment, Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 445, 874 P.2d 729, 733  
6 (1994), for which a NRCP 59(e) motion to alter or amend judgment may be brought.

8 More recently, in Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 445, 874  
9 P.2d 729, 733 (1994), we reiterated that '[t]his court determines the finality  
10 of an order or judgment by looking to what the order or judgment actually  
11 does, not what it is called.' We thus found labels to be inconclusive when  
12 determining finality; instead, we recognized that this court has consistently  
13 determined the finality of an order or judgment by what it substantively  
14 accomplished. *Id.* at 444–45, 874 P.2d at 733 (citing *State, Taxicab Authority*  
15 *v. Greenspun*, 109 Nev. 1022, 1025, 862 P.2d 423, 425 (1993); *Hallicrafters*  
16 *Co. v. Moore*, 102 Nev. 526, 528–29, 728 P.2d 441, 443 (1986)); see also  
17 *Bally's Grand Hotel v. Reeves*, 112 Nev. 1487, 1488, 929 P.2d 936, 937  
18 (1996) (" 'This court has consistently looked past labels in interpreting NRAP  
19 3A(b)(1), and has instead taken a functional view of finality, which seeks to  
20 further the rule's main objective: promoting judicial economy by avoiding the  
21 specter of piecemeal appellate review.' ") (quoting *Ginsburg*, 110 Nev. at  
22 444, 874 P.2d at 733).

23 Thus, whether the district court's decision is entitled a 'judgment' or an 'order'  
24 is not dispositive in determining whether it may be appealed; what is  
25 dispositive is whether the decision is final.

26 Lee v. GNLV Corp., 116 Nev. 424, 427, 996 P.2d 416, 418 (2000)(emphasis added).

27 NRCP 59(e) does not state the permissible grounds for the motion, but AA Primo  
28 Builders, 126 Nev. 578, 582, 245 P.3d 1190, 1192-93 (2010), identifies the grounds. After  
observing that "NRCP 59(e) and NRAP 4(a)(4)(C) echo Fed.R.Civ.P. 59(e) and Fed.  
R.App. P. 4(a)(4)(A)(iv), and we may consult federal law in interpreting them," AA Primo  
Builders holds:

Because its terms are so general, Federal Rule 59(e) 'has been interpreted  
as permitting a motion to vacate a judgment rather than merely amend it,' 11  
C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2810.1, at

1 119 (2d ed.1995), and as ‘cover[ing] a broad range of motions, [with] the only  
2 real limitation on the type of motion permitted [being] that it must request a  
3 substantive alteration of the judgment, not merely correction of a clerical  
4 error, or relief of a type wholly collateral to the judgment.’ Id. at 121, 976 P.2d  
5 518 (citing Osterneck v. Ernst & Whinney, 489 U.S. 169, 109 S.Ct. 987, 103  
6 L.Ed.2d 146 (1989); Buchanan v. Stanships, Inc., 485 U.S. 265, 108 S.Ct.  
7 1130, 99 L.Ed.2d 289 (1988)). Among the ‘basic grounds’ for a Rule 59(e)  
8 motion are ‘correct[ing] manifest errors of law or fact,’ ‘newly discovered or  
9 previously unavailable evidence,’ the need ‘to prevent manifest injustice,’ or  
10 a ‘change in controlling law.’ Id. at 124–27, 976 P.2d 518.

11 (Emphasis added).

12 In the present case, there was ‘newly discovered or previously unavailable  
13 evidence,” the Order makes “manifest errors of law or fact,” and the Order promulgates  
14 “manifest injustice,” for reasons that will be discussed in the Argument.

15 To the extent that this motion to alter or amend requires the Court to revisit earlier  
16 rulings in light of subsequent events, the standard for reconsideration by a district court  
17 was stated in Masonry and Tile Contractors Association of Southern Nevada v. Jolley, Urga  
18 & Wirth, Ltd, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997), and is similar to the standards  
19 for consideration of a Rule 59 motion: “A district court may reconsider a previously decided  
20 issue if substantially different evidence is subsequently introduced or the decision is clearly  
21 erroneous.” (Emphasis added). Again, in this case, substantially different evidence was  
22 subsequently introduced, and the decision is clearly erroneous.

### 23 **III. ARGUMENT**

24 The Order at 10-15 includes Sections A-C, dealing respectively with (A) Defendants’  
25 Motion to Confirm Final Award, (B) Plaintiff’s Motion to Vacate Final Award, and Motions  
26 to Vacate Arbitrator’s Award of Denial of Plaintiff’s Motion for Partial Summary Judgment  
27 and for the Court to Decide and Grant Plaintiff’s Motion for Partial Summary Judgment, and  
28 (C) Plaintiff’s Motion to Vacate Arbitrator’s Award of Attorney’s Fees. The Argument is

1 organized in the same manner.

2 **A. Defendants' Motion to Confirm Final Award**

3 **1. Basis as set forth in AA Primo Builders**

4  
5 The need to "correct manifest errors of law or fact," consider "newly discovered or  
6 previously unavailable evidence" (e.g., the introduction by the defendants of additional  
7 versions of the alleged "arbitration agreement"), manifest errors of law and fact, and the  
8 need "to prevent manifest injustice" all form the bases for a motion to alter or amend.

9 The Order fails to address the fact that defendants earlier misrepresented to Judge  
10 Adams that Version 1 of the purported Agreement was "true, complete and correct," when  
11 Version 1 was plainly not "true, complete and correct" because it lacked exhibits expressly  
12 required by Version 1. Defendants had in their possession at that time, and concealed  
13 from Judge Adams, a Version 2 that they later introduced into the record and claimed it  
14 was "true, complete and correct." Two different versions of a purported contract cannot  
15 both be "true, complete and correct."

16  
17 Version 2 of the purported contract is "previously unavailable evidence" that requires  
18 the Court to grant the Rule 59(e) motion as to Defendants' Motion to Confirm Final Award.

19  
20 These fraudulent misrepresentations were successful in persuading Judge Adams  
21 to refer the matter to arbitration. After Defendants' misrepresentations and fraud as to  
22 Version 1 and the concealment of Version 2 from Judge Adams were successful and he  
23 was induced to refer the matter, Defendants renounced Version 1 and switched to Version  
24 2—and got away with it before the arbitrator.

1                   2.       Errors of law or fact in the Order, and the revelation of  
2       “previously unavailable evidence” that Defendants had concealed from Judge  
3       Adams.

4                   (a)     A party asserting an agreement to arbitrate must identify the  
5       requirements imposed upon the party asserting an agreement to arbitrate.  
6

7               As discussed at, *inter alia*, 1:20-23 of “Plaintiff’s Opposition to Defendants’ Motion  
8       to Confirm Arbitrator’s Award,” NRS § 38.221(1) and case authority such as Obstetrics and  
9       Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) require that the  
10      party asserting an agreement to arbitrate, here defendants, must make of record a binding  
11      contract that includes an arbitration provision. This is a statutory requirement that the  
12      Court may not disregard. This Court and plaintiff are entitled to have defendants identify  
13      the documents from the record that the defendants contend constitute the single,  
14      complete, binding purported contract that they claim includes an arbitration provision. If  
15      defendants cannot identify one, and only one, true, complete, correct, certain,  
16      unambiguous, definite, verified and binding contract in the record as it now exists, the  
17      arbitrator’s Final Award cannot be confirmed because there was no agreement to arbitrate  
18      as required by NRS §38.221(1) and case authority such as Obstetrics and Gynecologists..  
19

20               An incomplete, uncertain, indefinite collection of paper purporting to be a “contract”  
21      or an “agreement” cannot be enforced or be binding upon the victimized party. See Dodge  
22      Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-4 (1930), holding that “There  
23      is no better established principle of equity jurisprudence than that specific performance will  
24      not be decreed when the contract is incomplete, uncertain, or indefinite.”  
25

26               Defendants have never identified a single document that they can show is not  
27      “incomplete, uncertain, or indefinite,” and the Order does not address this requirement.  
28

1 Instead, Defendants have identified two documents as purported “agreements,” neither of  
2 which is “true, complete and correct.”

3 Even if either of Version 1 and Version 2 had been “true, complete and correct,” the  
4 content of the Agreement remains uncertain and indefinite. When a party introduces two  
5 different versions of a “contract,” and swears that each is “true, complete and correct,” to  
6 which the other party is to be bound, a court and the other party cannot determine which  
7 of the two versions is the actual “true, complete, and correct” contract.

8  
9 **(b) The Order does not address the differences in Version 1 and**  
10 **Version 2 of the purported Agreement, and Defendants’ fraudulent**  
11 **misrepresentations to Judge Adams.**

12  
13 “Plaintiff’s Opposition to Defendants’ Motion to Confirm Arbitrator’s Award,” at 5:2  
14 discusses in detail Version 1 of the purported Agreement, and at 6:26-8:10 discusses in  
15 detail Version 2.

16 The Order relies on Judge Adams’ Orders of December 13, 2012 and April 2, 2014,  
17 both of which hold that the Version 1 of the purported agreement is valid. However, the  
18 Order makes no mention of the impact of “previously unavailable evidence” on Judge  
19 Adams’ Orders, where the Defendants substantially admitted that they had misled Judge  
20 Adams with Version 1, while they had Version 2 in their possession the entire time.

21  
22 Judge Adams’ Orders are not controlling for two reasons under the applicable legal  
23 standards. First, in 2012-2014 Defendants concealed from Judge Adams Version 2 of the  
24 Agreement, the version they ultimately advanced in the arbitration. Version 2, which is new  
25 and substantially different “previously unavailable evidence,” was not disclosed by  
26 Defendants until 2017.

27  
28 Second, Judge Adams’ Orders cannot be construed as “law of the case.” “Law of



1 the case” arises only from an express ruling on a matter by an appellate court. Hsu v.  
2 County of Clark, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007), holds: “Under the law  
3 of the case doctrine, ‘[w]hen an appellate court states a principle or rule of law necessary  
4 to a decision, the principle or rule becomes the law of the case and must be followed  
5 throughout its subsequent progress, both in the lower court and upon subsequent appeal.’”  
6 (Emphasis added). In the present case the Supreme Court did not speak to the question  
7 of validity of Version 1 of the purported Agreement.

9 Defendants misrepresented Version 1 of their purported Agreement to Judge  
10 Adams in 2012-2014, in order to persuade him to refer the matter to arbitration. Then  
11 when the matter reached arbitration in 2017, Defendants realized that they could not  
12 possibly rely on Version 1 in the arbitration, and presented the second, inconsistent  
13 Version 2 of the purported Agreement to the arbitrator. Inasmuch as no further purported  
14 Agreement papers were prepared after 2012, Defendants clearly had Version 2 in their  
15 possession when they misrepresented Version 1 to Judge Adams in 2012-2014, and  
16 concealed that Version 2 from Judge Adams, from the Supreme Court, and from Mr.  
17 Garmong. Neither Version 1 nor Version 2 were in fact “true, complete and correct.”

19 The Order focuses on Judge Adams’ Orders of December 13, 2012 and April 2,  
20 2014 dealing with Version 1, but fails to address Version 2 that was available to  
21 Defendants when they misrepresented Version 1 to Judge Adams as “true, complete and  
22 correct,” but was concealed by Defendants at that time and later introduced into the  
23 arbitration. The points that the Order overlooks are, first, that the introduction of Version  
24 2 constitutes evidence that was “previously unavailable” because Defendants concealed  
25 it, and, second, that by failing to address Version 2 in the Order, the Court effectively  
26 ratifies Defendants’ strategy of misrepresenting Version 1 in 2012-2014 as “true, complete  
27 and correct.”

1 and correct” in order to obtain referral to arbitration, while concealing from the Court  
2 Version 2, which was later also represented to be “true, complete and correct.

3 Even in 2012-2014, it was apparent that the purported Version 1 could not serve as  
4 the basis for the arbitration. For this reason Mr. Garmong argued that Version 1 was not  
5 a valid contract including a valid agreement for arbitration. Subsequent events proved that  
6 he was correct. His arguments in 2012 were limited by the fact that Version 2 was then  
7 being concealed by the Defendants. That is no longer the case, and the significance of  
8 Version 2 must be considered as new, previously unavailable evidence.

10 **(c) Factual and legal errors in the Order**

11 The Order disregards the two different versions of the purported Agreement. It also  
12 disregards the fact that both versions are incomplete. Neither version has the required  
13 number of Exhibits A and B. Version 1 calls for two different Exhibits A and two different  
14 Exhibits B, while Version 2 calls for three different Exhibits A and three different Exhibits  
15 B. Both Versions call for a “Confidential Client Profile.” Version 1 had a blank-form  
16 “Confidential Client Profile,” while Version 2 had an incomplete “Confidential Client Profile.”  
17 Defendants represented, under oath, both Version 1 and Version 2 to be “true, complete  
18 and correct. Obviously, Version 1 and Version 2 cannot both be “true, complete and  
19 correct.”

21 This Court and plaintiff are entitled to have identified for them the document from  
22 the record that the defendants contend constitutes the single, complete, binding, “true,  
23 complete and correct” purported contract, and which they claim includes an arbitration  
24 provision. NRS § 38.221(1) and case authority such as Obstetrics and Gynecologists  
25 require that the party asserting an agreement to arbitrate, here defendants, must make of  
26 record a binding contract that includes an arbitration provision.

1 The Order fails to address the requirements of NRS § 38.221(1) and case authority  
2 such as Obstetrics and Gynecologists, and also fails to address the omission of Exhibits  
3 A and B from the record, and the different versions of the Confidential Client profile that  
4 were advanced by defendants.

5  
6 Defendants refused to address this issue during the arbitration, and in their Motion  
7 to Confirm Final Award, and Reply. The reason that they refused to address the issue is  
8 that if they chose Version 2, the version introduced during the arbitration proceeding, they  
9 would have to admit perjury when Defendant Christian swore under oath that Version 1  
10 was "true, complete and correct." If, on the other hand, they chose Version 1, they would  
11 have to admit that Version 2 was falsely represented to the arbitrator and to the Court,  
12 They would also be forced to admit that the Final Order, which was based upon Version  
13 2, was invalid.

14  
15 **3. In response to this Rule 59 motion, the Court should require**  
16 **defendants to elect either Version 1 or Version 2.**

17 NRS § 38.221(1) and case authority such as Obstetrics and Gynecologists require  
18 that the party asserting the existence of the contract including the agreement to arbitrate  
19 must identify that agreement. The Court may not properly disregard this statutory  
20 requirement. The Court should require Defendants to elect either Version 1 or Version 2.  
21 Of courser, once Defendants make this election, the fraud in asserting the non-elected  
22 version becomes even more apparent. Once the election is made, the Defendants must  
23 identify in the record the required exhibits.  
24  
25  
26  
27  
28

1                   **4. Absent a demonstration by the Defendants that there was an**  
2 **enforceable agreement to arbitrate, the Court must vacate the Final Award pursuant**  
3 **to NRS § 38.241(e).**

4                   If Defendants do not demonstrate the existence of a single, valid, “true, complete  
5 and correct” contract including an agreement to arbitrate, NRS § 38.221(1) and case  
6 authority such as Obstetrics and Gynecologists, the court “shall” vacate the final award.  
7 NRS § 38.241(e). Two inconsistent versions, Version 1 and Version 2, do not meet this  
8 requirement.  
9

10                   **5. Order to Show Cause Why Action Should not be Dismissed for**  
11 **Want of Prosecution Pursuant to NRCP 41(e).**

12                   On a related issue, Order at 11:12-14 references the Court’s Order to Show Cause,  
13 characterized as “holding Mr. Garmong was ordered numerous times to participate in  
14 arbitration.” This Order to Show Cause was prompted solely by the Court’s failure to  
15 consider properly NRS §38.221(7) and Judge Adams’ Order of December 13, 2012,  
16 holding at 21-22, “In addition, in accordance with NRS 38.221(7), this judicial proceeding  
17 shall be stayed pending the arbitration.”  
18

19                   This Order to Show Cause was also discussed at Order 5:8-15 and 13:6-9,  
20 attempting likewise to cast some sort of blame on Mr. Garmong because the arbitration did  
21 not move faster. However, nowhere is there recognition of the fact that there is no  
22 evidence that Mr. Garmong had declined to participate in arbitration or otherwise acted  
23 improperly. After Judge Adams’ Order of December 13, 2012, Mr. Garmong appealed that  
24 Order, as he was permitted to do. After the Supreme Court affirmed, he fully participated  
25 in the arbitration, despite his continuing objection that arbitration was never proper in the  
26 first instance.  
27  
28

1 Nor is there any mention of the fact that the Order to Show Cause was satisfied  
2 when Mr. Garmong drew the Court's attention to NRS §38.221(7) and the above-quoted  
3 sentence from Judge Adams' Order of December 13, 2012. The repeated reference to the  
4 Order to Show Cause is an improper attempt to blame Mr. Garmong for a demonstrable  
5 error by the Court.  
6

7 In the end, regardless of the speed at which the arbitration moved, Defendants are  
8 still required to identify the single "true, complete and correct" document in the record that  
9 contains the purported agreement to arbitrate, NRS § 38.221(1) and Obstetrics and  
10 Gynecologists v. Pepper, and the Court is still required to follow the statutory law and case  
11 authority. If Mr. Garmong's position is not correct, pointing out such a single "true,  
12 complete and correct" document in the record should pose no burden for either Defendants  
13 or the Court.  
14

15 **B. Motion to Vacate Final Award; Motions to Vacate Arbitrator's Award of**  
16 **Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to**  
17 **Decide and Grant Plaintiff's Motion for Partial Summary Judgment ("PMPSJ").**  
18

19 **1. Basis as set forth in AA Primo Builders**

20 The need to "correct manifest errors of law or fact," consider "newly discovered or  
21 previously unavailable evidence," and the need "to prevent manifest injustice" serve as the  
22 grounds for this portion of the motion to alter or amend.

23 The Order at 11:20-13:20 asserts that these motions were previously decided by the  
24 Court, and that Mr. Garmong may not reassert them. This position disregards the content  
25 of the prior motions and the content of this Court's Order of November 29, 2018.  
26  
27  
28



1                   **2.       Errors of law or fact in the Order**

2                   **(a).     The Order of November 29, 2018 did not address or decide**  
3 **either of these motions as presented by Mr. Garmong.**

4                   The Order at 11:19-13:19 consolidates these two issues under a single heading,  
5 but Mr. Garmong will discuss them separately in this subsection (i) and the following  
6 subsection (ii). The thrust of the Order at 11:20-24 is that Mr. Garmong had previously  
7 raised these two matters and that the Court had already decided these two matters in its  
8 Order of November 29, 2018.

9                   The present Order overlooks the Court's Order of November 29, 2018 at 8:23-25,  
10 holding, "Here, Mr. Garmong does not seek review of a final arbitration award. Instead, Mr.  
11 Garmong is asking the Court to challenge the continued service of Judge Pro and vacate  
12 Judge Pro's order regarding summary judgment." (Emphasis added). Plainly, this sentence  
13 recognizes that Mr. Garmong's motion leading to the Court's Order of November 29, 2018  
14 does not relate in any way to the arbitration Final Award, and therefore DCR 13(7) could  
15 not apply. The sentence also recognizes that the challenge to the summary judgement  
16 was based solely upon the disqualification of the arbitrator, and not the substance of the  
17 arbitrator's decision on PMPSJ.

18                   The Order also overlooks the statutory and case authority of a party to bring motions  
19 to vacate a Final Award.

20                   **(i)     Motion to Vacate Final Award**

21                   The date of the arbitration Final Award was March 11, 2019, some four months after  
22 the date of the Order of November 29, 2018. Consequently, Mr. Garmong's motion of July  
23 5, 2018 leading to the Court's Order of November 29, 2018, and the Court's Order of  
24 November 29, 2018, could not possibly have dealt with the subject matter of the Final  
25

1 Award. The Order at 11:20-24 asserts that Mr. Garmong did not follow the procedure of  
2 DCR 13(7) in seeking vacating of the arbitrator's Final Award, but failed to recognize that  
3 the Final Award was announced months after the Order of November 29, 2018. Surely the  
4 Court does not contend that Mr. Garmong's motion of July 5, 2018 contested, or that the  
5 Court's own Order of November 29, 2018 could have addressed, the arbitrator's Final  
6 Award that was made months later, on March 11, 2019.

8 **(ii) Motions to Vacate Arbitrator's Award of Denial of Plaintiff's**  
9 **Motion for Partial Summary Judgment and for the Court to Decide and Grant**  
10 **Plaintiff's Motion for Partial Summary Judgment.**

11 Although it had a similar title, the earlier motion to vacate the arbitrator's denial of  
12 the PMPSJ differed for two important reasons from the one addressed in the Order;  
13 therefore, it was not the same motion, and did not require permission under DCR 13(7).  
14 First, as the above-quoted sentence from the Order recognizes, the earlier motion to  
15 vacate was based upon requested disqualification of the arbitrator, not on the substance  
16 of the PMPSJ; second, the earlier motion to vacate did not request the Court to decide the  
17 PMPSJ on the merits, only to vacate the decision of the arbitrator and appoint a new  
18 arbitrator who would then hopefully decide the PMPSJ according to Nevada law. The  
19 Court's Order of November 29, 2018 at 8:11-9:8 did not remotely suggest that it had  
20 decided the PMPSJ on the substantive merits. In fact, the Order of November 29, 2018  
21 states at 9:2-5, "This Court . . . declines to consider an appeal of a motion for summary  
22 disposition of claims."

23  
24  
25 The result of that Order of November 29, 2018 and the present Order, taken  
26 together, is that the arbitration Final Award has never previously been addressed by this  
27 Court, and that the PMPSJ has never been decided by this Court according to the  
28

1 substantive law of Nevada dealing with summary judgment.

2           **(b). The Order of November 29, 2018 expressly invited and**  
3 **authorized Mr. Garmong to assert the motions after a Final Order was entered,**  
4 **stating, “Mr. Garmong will have the opportunity to appeal the final arbitration award**  
5 **to this Court in accordance with JAMS rules, should he wish to do so.”**  
6

7           After the arbitrator refused to decide the PMPSJ according to the law, Mr. Garmong  
8 moved the Court for the arbitrator’s disqualification. The purpose of seeking the  
9 disqualification of an arbitrator who clearly disregarded Nevada law was for the Court to  
10 appoint a new arbitrator who would obey the law of Nevada. Hoping that the arbitrator  
11 would do the right thing and recuse himself because of his obvious refusal to follow the law  
12 of Nevada, Mr. Garmong sent the arbitrator a pre-filing courtesy copy of a draft of the  
13 motion; see Exhibit 9 to the Motion to Disqualify. The motion was not directed to JAMS,  
14 but was directed to this Court. JAMS improperly issued an advisory opinion on a motion  
15 directed to this Court. Not surprisingly, JAMS ignored the facts and law, and supported  
16 the arbitrator’s refusal to follow the law of Nevada and his improper decision on the  
17 PMPSJ.  
18

19           Mr. Garmong then sent the actual motion to this Court, which denied it in the Order  
20 of November 29, 2018. The Order misinterpreted the actions of JAMS as a proper  
21 decision on the motion directed to this Court, stating at 8:23-9:7:  
22

23           Here, Mr. Garmong does not seek judicial review of a final arbitration award.  
24 Instead, Mr. Garmong is asking this Court to challenge the continued service  
25 of Judge Pro and vacate Judge Pro’s order regarding summary judgment. Mr. Garmong makes this motion after making an identical request to the  
26 JAMS Arbitration Appeals Committee, which was denied. As set forth  
27 ‘[JAMS] will make the final determination as to whether an Arbitrator is  
28 unable to fulfill his or her duties, and that decision shall be final.’ JAMS  
Comprehensive Rules & Procedures Rule 15(i). Accordingly, this Court will  
not interfere to supersede the Committee’s final determination regarding the

1 continued service of an arbitrator and declines to consider an appeal of a  
2 motion for summary disposition of claims. Mr. Garmong will have the  
3 opportunity to appeal the final arbitration award to this Court in accordance  
4 with JAMS rules, should he wish to do so.

4 (Emphasis added).

5 The Court's decision on the present Order re Motions is erroneous in light of the  
6 decision of the Order of November 29, 2018 for several reasons. First, there was never  
7 any motion directed to JAMS, and it had no authority to decide a courtesy copy of a motion  
8 directed to this Court. Second, the rules of JAMS do not supersede the authority of this  
9 Court, which appointed the arbitrator and had the power to disqualify the arbitrator. Third,  
10 the argument that the Court already decided the motion to vacate the PMPSJ is  
11 incorrect—the Court plainly stated that it “declines to consider an appeal of a motion for  
12 summary disposition of claims.” Fourth, the Disqualification Motion of July 5, 2018 never  
13 asked this court to decide the PMPSJ; it only asked this Court to vacate the arbitrator's  
14 decision. Fifth, the Order of November 29, 2018 expressly authorized Mr. Garmong to  
15 appeal the final arbitration award, which final arbitration award includes the Final Award  
16 and the arbitrator's decision on the PMPSJ. Sixth, the arbitrator's denial of the PMPSJ was  
17 solely for the reason that he maintained that assessment of the credibility of witnesses was  
18 necessary to decide the PMPSJ, and determinations of credibility on summary judgment  
19 are expressly forbidden by Nevada case law. The Court's Order of November 29, 2018  
20 and the present Order do not address this point at all. There has never been a decision  
21 on the PMPSJ utilizing the proper legal approach, either by the arbitrator or by the Court.  
22  
23  
24

25 The special significance of the arbitrator refusing to follow the law of Nevada in  
26 deciding the PMPSJ is that the resolution of a summary judgment motion must follow a  
27 highly specific and tightly defined procedure pursuant to Nevada authority, see Wood v.  
28

1 Safeway, 121 Nev. 724, 121 P.3d 1026 (2005). In this case, the arbitrator refused to follow  
2 Nevada law, and instead decided the PMPSJ on a basis—determining credibility of the  
3 declarants—that is expressly forbidden by Nevada law. The arbitrator’s refusal to follow the  
4 law of Nevada in deciding PMPSJ did not bode well for the remainder of the arbitration,  
5 and that concern was borne out.  
6

7 The Disqualification Motion of July 5, 2018 discussed at 3:18-4:26 this Court’s  
8 statutory and equitable powers to disqualify an arbitrator that the Court had appointed.  
9 NRS §28.241 provides “Upon motion to the court by a party to an arbitral proceeding, the  
10 court shall vacate an award . . . [upon specified conditions].” There is no limitation that the  
11 Court shall vacate only a final award or final decision on an otherwise-dispositive motion  
12 such as the PMPSJ. In the case of the disqualification motion, Mr. Garmong sought  
13 vacating of the decision on the PMPSJ, and the Court refused. Mr. Garmong also sought  
14 disqualification of the arbitrator based on the Court’s equitable powers as utilized by other  
15 courts.  
16

17 After the final decision of the arbitrator, which necessarily included his denial of the  
18 PMPSJ, Mr. Garmong took the Court at its word as giving him permission and for the first  
19 time moved to vacate the final determination of the arbitrator and for the Court to decide  
20 PMPSJ.  
21

22 As is plain from the above quotation, Mr. Garmong had not previously moved to  
23 vacate the Final Award (which could not have been done prior to the date of the Final  
24 Award). Plaintiff’s Motion to Vacate Arbitrator’s Final Award, filed April 22, 2019 sets forth  
25 at 3:2-4:16 the legal standards for deciding a motion to vacate a final award, and at 4:18-  
26 21: “The District Court has a duty to review the actions and rulings of the arbitrator to  
27 determine whether the arbitrator manifestly disregarded the law or the facts.” Graber v.  
28

1 Comstock Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995).

2 Further, the Motion after Final Order was brought under NRS §38.241(1), expressly  
3 authorizing and permitting a party to challenge the final decisions of an arbitrator.

4 The attempted reliance on DCR 13(7) at 11:20-12:21 in the Court's Order of August  
5 8, 2019 is misplaced. The authority cited above supports the Court's granting of Mr.  
6 Garmong's motion to alter or amend. New facts are presented in the motion to vacate,  
7 specifically the facts brought forth in the arbitration proceeding, and the errors of law and  
8 fact underlying the Court's Order are detailed.

9  
10 **C. Motion to Vacate Attorney's Fees**

11 **1. Basis as set forth in AA Primo Builders**

12 The need to "correct manifest errors of law or fact," consider "newly discovered or  
13 previously unavailable evidence," and the need "to prevent manifest injustice" is the basis  
14 for this portion of the motion to alter or amend.

15  
16 **2. Errors of law or fact in the Order**

17 **(a). The Court's decision is a clear abuse of discretion because it**  
18 **failed to follow the controlling legal authority.**

19 The Order at 13:20-15:2 denies the motion to vacate attorney's fees, employing  
20 several arguments which are based upon erroneous assumptions and without citation to  
21 any relevant supporting legal principles.

22 The Order evidences an abuse of discretion on the part of the District Court, based  
23 upon the very case whose holding it paraphrased. The Order at 14:14-16 addressed and  
24 misstated the holding of the one case authority cited in this section, Bidart v. American Title  
25 Ins. Co., 103 Nev. 175, 734 P.2d 732 (1987). Bidart, 103 Nev. at 179, 734 P.2d at 735,  
26 held,  
27  
28



1 The trial court properly considered the factors laid out by this court in Beattie  
2 v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983). Where the court properly  
3 weighs the Beattie factors, an award of attorneys fees based on NRCP 68  
4 is discretionary with the court. Its discretion will not be disturbed absent a  
clear abuse.

5 There is no indication in the Order that it considered the Beattie factors.  
6 Accordingly, its decision was a clear abuse of discretion because the Court failed to follow  
7 the principles of Bidart. “An arbitrary or capricious exercise of discretion is one founded  
8 on prejudice or preference rather than on reason, or contrary to the evidence or  
9 established rules of law.” State v. Eighth Judicial Dist. Court (Zogheib), 130 Nev.158, 161,  
10 321 P.3d 882, 884 (2014) (internal quotations omitted).

12 **(b). The arbitrator’s Discovery Plan and Scheduling Order set forth**  
13 **the rules and procedures to govern the entire arbitration. It was not limited to**  
14 **discovery matters.**

15 In an attempt to justify the arbitrator’s retroactive application of NRCP Rule 68,  
16 Order at 14:17-26 incorrectly suggests that the arbitrator’s Discovery Plan and Scheduling  
17 Order (“Plan”) of August 11, 2017 dealt solely with, and was limited to, “specific NRCP  
18 rules relating to discovery.” The arbitrator made the same argument in the Final Order,  
19 page 10, fourth paragraph, stating, “However, the agreement of the parties to specific  
20 NRCP rules relating to discovery does not automatically exclude the applicability of others,  
21 particularly where the arbitrator deems that necessary. See JAMS Rule 24.” JAMS Rule  
22 24 has no such provision. The word “necessary” appears in JAMS Rule 24 twice, once in  
23 JAMS Rule 24(e) relating to “interim measures,” and again in JAMS Rule 24(j) relating to  
24 “correct any computational, typographical or other similar error in an Award.” JAMS Rule  
25 24 has no provision for changing the scope of the previously identified rules that govern  
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1 an arbitration proceeding, to take retroactive effect to the detriment of a party.

2       This argument of the Court and the arbitrator is apparently intended to excuse the  
3 omission of NRCP Rule 68 from the Plan, and justify its later introduction by the arbitrator  
4 to take retroactive effect to Mr. Garmong's detriment. That argument is incorrect. The  
5 Plan dealt with the entire range of rules and matters governing the arbitration, not just  
6 discovery. It expressly included NRCP 6 (Plan 1:17), dealing with time periods; NRCP 56  
7 (Plan 2:12-13), dealing with motions for summary judgment; Washoe District Court Rule  
8 12 (Plan 1:19-20), dealing with deadlines, and the filing of status reports (Plan 2:16-17).  
9 It also addressed opening arbitration briefs (Plan 2:6-7), pre-hearing briefs (Plan 2:14-15),  
10 and amended complaints and answers (Plan 2:18-20). It was not limited to discovery  
11 matters. Certainly a limitation of the Plan to discovery matters was not intended by either  
12 the parties or the arbitrator, as these rules were stated (Plan 1:20) to "generally govern this  
13 case." Accordingly, the agreement and order of the Plan was properly relied upon by Mr.  
14 Garmong as a statement of the broad range of rules governing the arbitration.  
15

16       The parties entered into an agreement (Plan 1:17) concerning the rules governing  
17 the arbitration, and the arbitrator ordered those agreed-upon provisions (Plan 1:16). Thus,  
18 Defendants' argument, repeated at Order 14:25-26, that the agreement and order "does  
19 not automatically exclude the applicability of others to the matter, particularly where the  
20 arbitrator determines it necessary," is not found in the Plan itself and is not valid. The  
21 parties and the arbitrator agreed, after a conference (Plan 1:20) that the entirety of the  
22 arbitration, not just discovery, would be governed by a limited set of rules and procedures  
23 set forth in the Plan. Neither the arbitrator nor the Court has the authority unilaterally to  
24 alter that agreement.  
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1                   **(c). The arbitrator never ruled that NRCP Rule 68 would be included**  
2 **in the rules governing the arbitration.**

3           Regarding the inclusion of the phrase “unless the arbitrator rules otherwise” in the  
4 Plan at 1:20, the arbitrator never ruled that Rule 68, governing offers of judgment, would  
5 be included in the set of rules governing the arbitration. Garmong pointed this out in his  
6 Motion to Vacate Award of Attorney’s Fees at 3:21-27, 20:18-23, and 20:26-27. Neither  
7 the arbitrator, the defendants, nor this Court identified any oral or written ruling of the  
8 arbitrator where he extended the rules governing the arbitration to include NRCP Rule 68.  
9

10           Nor was there any finding by the arbitrator that adding NRCP Rule 68 to the list of  
11 governing rules of the arbitration, long after the offer of judgment was made and after the  
12 time that Mr. Garmong was permitted to respond, was “necessary” as argued by  
13 Defendants and echoed by the Order at 8:24-9:3. A determination of “necessary” in this  
14 context requires specific findings of fact and conclusions of law. In this case such a finding  
15 of fact and conclusion of law would have had to demonstrate that retroactive addition of  
16 Rule 68 to the governing rules, prior to the time that the purported offer of judgment was  
17 made, and without notice to Mr. Garmong or an opportunity to be heard, is somehow  
18 justified by statute or case authority, and did not prejudice Mr. Garmong.  
19  
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21                   **(d). Even if the arbitrator had ruled that NRCP Rule 68 would be**  
22 **included in the rules governing the arbitration, no such ruling was made prior to the**  
23 **offer of judgment of September 12, 2017, and the required date of action by Mr.**  
24 **Garmong.**

25           Although Defendants allege that they sent, and Mr. Garmong received, an offer of  
26 judgment on September 12, 2017, the governing law of the case at that time and during  
27 the 10-day period thereafter when Mr. Garmong could accept the offer of judgment, was  
28

1 that Rule 68 was not included in the rules governing the arbitration set forth in the Plan of  
2 a month earlier. The Defendants did not at that time return to the arbitrator and ask him  
3 to modify the Plan to add Rule 68 to that group of rules, and consequently Rule 68 was not  
4 a governing rule of the arbitration.  
5

6 Had Mr. Garmong responded to the purported offer of judgment of September 12,  
7 2017, he would have opened the door to an argument by defendants, the arbitrator, and  
8 the Court that by this action he acquiesced in the addition of Rule 68 to the set of rules set  
9 out in the Plan to govern the arbitration. He did not acquiesce. To the contrary, if  
10 Defendants wished to add Rule 68 to the set of rules governing the arbitration, it was their  
11 obligation to return to the arbitrator and move for the addition.  
12

13 **(e). The taking of Garmong's property without due process is a**  
14 **violation of both the United States and Nevada Constitutions.**

15 The action of the arbitrator, and rationalization in the Order, is an attempt to justify  
16 a denial of Due Process under the Fourteenth Amendment to the United States  
17 Constitution ("nor shall any State deprive any person of life, liberty, or property, without due  
18 process of law") and Art. 1, § 8(5) of the Nevada Constitution ("No person shall be deprived  
19 of life, liberty, or property, without due process of law.").

20  
21 Both of these constitutional provisions forbid government from the kinds of actions  
22 perpetrated by the arbitrator and approved by the Order, the taking of Garmong's property  
23 without proper notice. A fundamental requirement of due process is that the party whose  
24 property is to be affected must be given fair notice and an opportunity to speak to the  
25 grounds under which his property is to be taken, before the event—here the purported offer  
26 of judgement—underlying the taking had occurred. At the time of the purported offer of  
27 judgment of September 12, 2017, Mr. Garmong had been given no notice that the  
28

1 arbitrator might later make a ruling consistent with Rule 68 becoming a part of the rules  
2 governing the arbitration, and in fact the listing of governing rules in the Plan of August 11,  
3 2017 gave him clear notice to the contrary. Arguing and appealing an already-ordered  
4 taking of property is not the same as fair notice and an opportunity to speak prior to the  
5 events--here the purported offer of judgment--leading to the taking. On this fundamental  
6 point the United States Supreme Court stated, Armstrong v. Manzo, 380 U.S. 545, 552  
7 (1965):

9 A fundamental requirement of due process is 'the opportunity to be heard.'  
10 Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783. It is an  
11 opportunity which must be granted at a meaningful time and in a meaningful  
12 manner. The trial court could have fully accorded this right to the petitioner  
13 only by granting his motion to set aside the decree and consider the case  
14 anew. Only that would have wiped the slate clean. Only that would have  
15 restored the petitioner to the position he would have occupied had due  
16 process of law been accorded to him in the first place. His motion should  
17 have been granted . . . . For the reasons stated, the judgment is reversed  
18 and the case is remanded for further proceedings not inconsistent with this  
19 opinion.

20 The Order at 13:24-14:16 references and apparently relies upon the language "or  
21 allowed by applicable law." NRCP Rule 68 was not "applicable law" according to the  
22 arbitrator's own Plan at the time the offer of judgment was made on September 12, 2017,  
23 and during the 10-day period thereafter. The arbitrator never at any time made any ruling  
24 that NRCP Rule 68 would be one of the rules governing the arbitration, nor have the  
25 arbitrator, the defendants, or the Court identified any such ruling.

26 Prior to September 12, 2017, had the defendants moved that the arbitrator amend  
27 the Plan to include NRCP Rule 68 and the arbitrator made this change after giving Mr.  
28 Garmong the opportunity to oppose the change, the Due Process argument of this  
subsection and the fundamental fairness argument of the next subsection would lose much  
of their force. But defendants did not do so, and the arbitrator never amended the Plan to

1 include NRCP Rule 68.

2       The attempt to take Mr. Garmong's property in violation of Due Process is founded  
3 solely upon the purported offer of judgment, which was not applicable to the arbitration  
4 proceeding by the arbitrator's own Plan at the time the purported offer of judgment was  
5 made, or at a later time.  
6

7               **(f).     The award under NRCP 68 also violates principles of fundamental**  
8 **fairness.**

9       Constitutional Due Process expresses the principles of fundamental fairness in  
10 relation to the taking of property. The taking of Mr. Garmong's property based solely upon  
11 an offer of judgment under NRCP Rule 68, when that rule was not one of the arbitrator's  
12 enumerated rules governing the arbitration, is the height of unfairness.  
13

14       Had the parties agreed, and the arbitrator ordered in the Plan, that NRCP Rule 68  
15 would be part of the arbitration proceedings, Mr. Garmong's view of the case and strategy  
16 would have been entirely different. For example, he might have made his own offer of  
17 judgment before the PMPSJ was filed, under the assumption (wrongly, as it turned out) that  
18 it would be fairly decided according to the applicable legal principles. This was the guiding  
19 principle in Davidsohn v. Steffens, 112 Nev. 136, 140, 911 P.2d 855, 857 (1996). In that  
20 case the prevailing party at trial moved for attorney's fees well after the time ran for the  
21 filing of a notice of appeal. The losing party had not filed a notice of appeal. The Nevada  
22 Supreme Court reversed a grant of fees, stating that:  
23

24       We conclude that Doyle's [the prevailing party] delay of more than three  
25 months after the judgment before filing her request for attorney's fees was  
26 unreasonable. She has not offered any reason to justify this delay, and  
27 Davidsohn [the losing party] was prejudiced by the delay since he received  
28 no notice that Doyle would seek fees until after the deadline for filing an  
appeal had passed. Although the parties dispute whether or not Doyle  
agreed not to seek attorney's fees in return for Davidsohn's forgoing his right



1 to appeal, it is undisputed that on October 20, 1993, Davidsohn's attorney at  
2 the very least informed Doyle's attorney that Doyle's decision regarding  
3 attorney's fees was important to Davidsohn's decision whether to appeal.  
4 Doyle then did not request attorney's fees during the running of the period  
5 for filing an appeal. We conclude that it was therefore reasonable for  
Davidsohn to believe that Doyle had decided not to seek fees and in reliance  
on that belief not to act on his right to appeal and, conversely, that it was  
unreasonable for Doyle to delay in this fashion before seeking fees.

6 (Emphasis added). The point is that, as in Davidsohn, if the plaintiff here had advance  
7 notice of the rules by which he was playing, he could have conducted himself differently.  
8 Here, if the plaintiff was informed that NRCP 68 was a part of the rules governing the  
9 arbitration, he might have accepted the offer of judgment. Instead, the decision to employ  
10 NRCP 68 and award fees was made well after the plaintiff could have done anything under  
11 the rule. In short, he was effectively misled to his disadvantage.

13 The Order takes the position that Mr. Garmong should not suggest that the arbitrator  
14 was biased against him. But the evidence is so strong that it may not be ignored. The  
15 arbitrator refused to decide fairly the PMPSJ, which if decided according to the applicable  
16 principles of law would have required the arbitrator to decide the entire arbitration in Mr.  
17 Garmong's favor, and avoided the subsequent lengthy and expensive arbitrator process.  
18 The arbitrator's Final Award was based upon Version 2 of the alleged Agreement, which  
19 was demonstrated to have been the beneficiary of Defendants' misrepresentation to this  
20 Court. The arbitrator's Final Award refused to decide those issues presented in the First  
21 Amended Complaint which would have mandated a decision in Mr. Garmong's favor, and  
22 the arbitrator refused to give reasons for most of his decisions on the claims that he did  
23 decide. The arbitrator awarded attorneys fees based upon an offer of judgment under  
24 NRCP Rule 68, that was not included in the Discovery Plan and Scheduling Order of  
25 August 11, 2017. An objective consideration of these facts mandates a decision that the  
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1 arbitrator was biased against Mr. Garmong.

#### 2 **IV. SUMMARY AND CONCLUSION**

3 The Order seeks improperly to avoid the District Court's obligation to review the  
4 arbitrator's award to determine whether the arbitrator manifestly disregarded the law or  
5 facts. Graber v. Comstock Bank, *supra*. The Court may not use diversions such as  
6 irrelevant claims of delays or reluctance to arbitrate, assertions of decisions on issues  
7 which were in fact not presented or decided previously and claims that Judge Adams'  
8 2012-2014 orders constitute law of the case, when new facts later arose. Instead, the  
9 Court should recognize that manifest errors of law have infected this entire proceeding, for  
10 example, the steadfast refusal of the arbitrator to rule on a partial motion for summary  
11 judgment upon which the plaintiff would have prevailed and the use of a rule of civil  
12 procedure (NRCp 68) which unfairly surprised the plaintiff at a time when he could take no  
13 action.  
14

15  
16 Consistent with the arguments and points and authorities stated above, the plaintiff  
17 urges this Court to alter or amend the Order Re Motions to grant the following:

18 • Deny Defendants' Petition for an Order Confirming Arbitrator's Final Award and  
19 Reduce Award to Judgment, including Attorneys' Fees and Costs.

20 • Grant Plaintiff's Motion to Vacate Arbitrator's Final Award.

21 • Grant Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees.

22 • Grant Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion  
23 for Partial Summary Judgment ("PMPSJ") and for the Court to Decide and Grant Plaintiff's  
24

1 Motion for Partial Summary Judgment.

2 **THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT DOES NOT**  
3 **CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.**

4 DATED this 5<sup>th</sup> day of September, 2019.

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

7 Counsel for plaintiff  
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9  
10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

11 **IN AND FOR THE COUNTY OF WASHOE**

12 GREGORY GARMONG,

CASE NO. CV12-01271

13 Plaintiff,

DEPT. NO. 6

14 v.

15 WESPAC, GREG CHRISTIAN, and  
16 Does 1-10,

17 Defendants.  
18 \_\_\_\_\_/

19 **OPPOSITION TO PLAINTIFF'S MOTION TO ALTER**  
20 **OR AMEND "ORDER RE MOTIONS" ENTERED AUGUST 8, 2019**

21 Defendants Wespac and Greg Christian, by and through their counsel, Thomas C. Bradley,  
22 Esq., hereby oppose Plaintiff Gregory Garmong's *Motion to Alter or Amend "Order Re Motions"*  
23 *Entered August 8, 2019* ("Motion to Amend"). Defendants' *Opposition* is based on the following  
24 Points and Authorities, and all other pleadings, briefs, and exhibits identified below.  
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## **POINTS & AUTHORITIES**

### **I. INTRODUCTION**

Mr. Garmong just cannot take “no” for an answer. Instead, he filed this latest Motion based on technical criticisms and perceived deficiencies of this Court’s well-reasoned decision. As this Court aptly pointed out previously, while the Court is required to “consider” every argument, it is not required to “address” each and every argument made by a party. *See* District Judge Simons Order (5-31-18).

Mr. Garmong has been litigating this case for over seven (7) years and rehashes the same meritless arguments and then complains when the rulings do not change. This meritless Motion to Amend continues this same pattern and his previously raised and rejected arguments are barred from reconsideration by laws governing Rule 59(e) motions.

### **II. LAW**

#### **A. Federal Law May be Relied Upon in Interpretation of NRCP 59(e)**

The wording of NRCP 59(e) is based on its federal counterpart FRCP 59(e), and Nevada Courts may consult Federal law in interpreting them. *See Coury v. Robison*, 115 Nev. 84, 91 n.4, 976 P.2d 518, 522 n.4 (1999).

#### **1. Rule 59(e) Standards**

Rule 59(e) provides that a party may file a “motion to alter or amend a judgment.” Fed. R. Civ. P. 59(e). The Ninth Circuit has explained the standard for a motion under Rule 59(e) as follows: “Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion.” *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam) (internal quotation marks omitted). But amending a judgment after its entry remains “an extraordinary remedy which should be used sparingly.” *Id.* (underscoring added). *See Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1112 (9th Cir. 2011).

///

1 In general, there are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if  
2 such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2)  
3 if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if  
4 such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an  
5 intervening change in controlling law. *Id.*

6 In determining whether a decision could result in manifest injustice, Courts examine whether it  
7 would “upset settled expectations—expectations on which a party may reasonably place reliance.”  
8 Qwest Servs. Corp. v. FCC, 509 F.3d 531, 540 (D.C. Cir. 2007). “[M]anifest injustice” requires “at  
9 least (1) a clear and certain prejudice to the moving party that (2) is fundamentally unfair in light of  
10 governing law.” *See Mohammadi v. Islamic Republic of Iran*, 947 F.Supp.2d 48, 78 (D.D.C. 2013),  
11 *aff’d*, 782 F.3d 9 (D.C. Cir. 2015).

## 12 **2. No Miscarriage of Justice**

13 While Rule 59(e) allows a district court to reconsider and amend its previous orders for clear  
14 error or a fundamental miscarriage of justice, the interests of finality and conservation of judicial  
15 resources behoove the courts to use the rule sparingly and only as an extraordinary remedy. Carroll  
16 v. Nakatani, 342 F.3d 934, 945 (9th Cir.2003). Mr. Garmong utterly failed to identify a clear error  
17 or a fundamental miscarriage of justice.

18 Judge Pro concluded that, “The evidence adduced at the arbitral hearing fails to show that  
19 Christian breached any duty to consider Garmong’s financial condition or investment objectives, or  
20 otherwise failed to fulfill his responsibilities as an investment advisor and manager during  
21 Garmong’s relationship with Wespac.” *See* Plaintiff’s Exhibit 4 at page 8, last paragraph (emphasis  
22 added).

23 Judge Pro in this case provided an 11-page explanation of his factual findings, including factual  
24 findings supporting his conclusions of law, some of which are quoted from the Final Award as  
25 follows:

- 26 • [Dr. Garmong’s] express investment objective [was] to “moderately increase  
27 his investment value while minimizing potential for loss of principal.”  
28



1       • The Confidential Client Profile signed by Dr. Garmong on August 18, 2005  
2 expressly stated [in his own handwriting] his investment goal as “moderate growth,  
3 moderate-low risk.”

4       • Dr. Garmong is a highly intelligent and educated individual...before he  
5 engaged the professional services of Wespac and Christian, Dr. Garmong had  
6 considerable experience in managing a comfortably large individual portfolio of  
7 assets.

8       • In 2005, Garmong had amassed five to seven million dollars in bond and  
9 stock market [investments] and money funds before engaging Wespac and Christian.

10       • Garmong’s acumen in understanding securities investments is further  
11 reflected in his personal editing of Wespac’s Client Profile; his use of the “laddering”  
12 technique he employed in connection with his investments in the bond market; and  
13 his ability to understand the financial reports he received regularly from Wespac and  
14 Charles Schwab relating to his investment portfolio.

15       • Christian testified that he maintained regular written and oral communication  
16 with Garmong throughout most of their professional relationship, and they personally  
17 met quarterly to review the status of Garmong’s investments through Wespac.  
18 Christian characterized Garmong’s ability to understand what was happening as  
19 “Better than most.” The evidence adduced clearly supports that view.

20       • The testimony of expert witness Bruce Cramer shows that Christian and  
21 Wespac employed a conservative “growth and income” investment strategy  
22 throughout the relationship with Garmong, which [Mr. Christian] made more  
23 conservative over time to accommodate Garmong’s circumstances and the  
24 marketplace.

25       • This strategy was consistent with Garmong’s investment objectives set forth  
26 in the Client Profile, and as otherwise expressed when the parties regularly reviewed  
27 his accounts with Wespac.

28       • Clearly, Wespac and Mr. Christian did not subvert those objectives by their  
actions.

      • Christian acknowledged that Garmong’s “life situation changed” when he  
retired but explained that he knew of Garmong’s intended retirement from the  
beginning of their professional relationship and had factored that into the investment  
strategy employed for Garmong’s accounts with Wespac.

      • Christian testified that at the time of his meeting with Garmong in October  
2007, Garmong understood his overall investment portfolio and that he was partially  
invested in stocks and that stocks could go down.

      • I [the Arbitrator] asked Dr. Garmong why, in October 2007, he did not  
convert his stocks to all cash if his goal was solely to protect capital after his  
retirement and in the face of a worsening economy. Garmong responded, “Because  
you don’t need to do that to get gains and preserve capital...What I was trying to do  
was to stay even with inflation and not lose purchasing power to inflation.”

      • A final factor which weighs against Garmong’s claim that Wespac and  
Christian caused a loss in the value of his portfolio by failing to adhere to his  
investment objectives is that Garmong was free to terminate his relationship with  
Wespac and Christian at any time.

- Cramer further explained that the securities in Garmong's accounts with Wespac were not sold but were transferred to Fidelity and his analysis of available statements from the Fidelity account showed that Garmong generated a profit.
- On the record adduced in this case I find that Dr. Garmong has failed to prove the liability of Wespac or Christian on any of his claims by a preponderance of the evidence.

In addition, Mr. Cramer stated under oath:

"Over the past fifteen years, I have carefully reviewed and analyzed hundreds of cases against SEC Registered Advisors, FINRA representatives, and other financial advisors alleging breach of fiduciary duty and other similarly related claims. Based upon the opinions and conclusions contained in my arbitration hearing testimony, I believe that Mr. Garmong's case against Wespac and Mr. Christian to be one of the most frivolous cases that I have encountered." (underscoring added).

The only miscarriage of justice in this case is that Mr. Garmong has been torturing Mr. Christian with his meritless and relentless litigation attacks for the past seven years.

### **3. Rule 59 May Not be Used to Relitigate Old Matters**

The United States Supreme Court made it absolutely clear that Rule 59 "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been made prior to the entry of judgment." Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008). *See also* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1, pp. 127–128 (2d ed.1995) (footnotes omitted)

Mr. Garmong's arguments in his Motion to Amend are not based on manifest errors of fact or law, and instead rest primarily on his dissatisfaction with this Court's decision not to specifically address all his meritless arguments. *See* Motion at page 3, lines 25-27. As such, they are efforts to "relitigate old matters" that provide no basis for relief under Rule 59. *See Exxon Shipping*, 554 U.S. at 485 n.5.

For example, Mr. Garmong complains there is no indication in the Order that the Court considered the Beattie v. Thomas factors. Again, there is only a requirement to "consider not address" each and every meritless argument. Judge Pro determined the attorney's fees and costs

1 sought by Defendants were reasonable and appropriate for the work done in this case. In making  
2 this determination Judge Pro found that the quality of Respondents' counsel; the quality and  
3 difficulty of the work performed; the amounts charged for the service performed; and the overall  
4 benefits derived warrant the finding that the fees and costs are reasonable and cited Bunzell v.  
5 Golden Gate National Bank, 455 P.2d 31, 33 (1969). Accordingly, Judge Pro found that  
6 Respondents Wespac and Mr. Christian were entitled to an Award of reasonable attorney's fees and  
7 costs of this action.

8 The Ninth Circuit stated in San Martine Compania De Navegacion v. Saguenay Terminals Ltd.,  
9 293 F.2d 796, 800 (9th Cir. 1961): [A]n award such as this, which is one within the terms of the  
10 submission, will not be set aside by a court for error in law or fact.... "Arbitrators are judges chosen  
11 by the parties to decide the matters submitted to them, finally and without appeal. As a mode of  
12 settling disputes, it should receive every encouragement from courts.... If the award is within the  
13 submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the  
14 parties, a court ... will not set it aside for error, either in law or fact." (*quoting* Burchell v. Marsh, 58  
15 U.S. (17 How.) 344, 349, 15 L. Ed. 96 (1854)). Thus, there was no need for this Court to  
16 specifically address the Brunzell factors for the award of attorney's fees.

17 **4. Alleged New Evidence Regarding Arbitration Agreement Attachments**

18 Mr. Garmong incorrectly alleges that the attachments to the arbitration agreement constitute  
19 "new evidence." The test for Rule 59(e) is whether the evidence was available "prior to the entry of  
20 judgment." Exxon Shipping, 554 U.S. at 486 n. 5, 128 S. Ct. 2605. *See also* Odhiambo v. Republic  
21 of Kenya, 947 F. Supp. 2d 30, 36 (D.D.C. 2013).

22 Mr. Garmong raised, at length, these same arguments to Judge Pro before the final decision on  
23 the arbitration award was issued. Mr. Garmong subsequently raised these same arguments to this  
24 Court in Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award at page 4, line  
25 16 to page 15, line 16 and in his Motion to Vacate Arbitrator's Final Award at page 3, line 3 to page  
26 4, line 21.

1 Accordingly, his argument that there exists “new” evidence is without merit. Moreover, Counsel  
2 will not waste this Court’s valuable time re-stating their arguments why this claim is a red herring  
3 and instead incorporates by reference his arguments in Defendants’ Opposition to Plaintiff’s Motion  
4 to Vacate Arbitrator’s Final Award at page 6, line 10 to page 20, line 4.

5 **5. Denial of Mr. Garmong’s Motion for Partial Summary Judgment**

6 Mr. Garmong raised these same arguments to this Court in Plaintiff’s Opposition to Defendants’  
7 Motion to Confirm Arbitrator’s Award at page 4, line 16 to page 15, line 16, his Motion to Vacate  
8 Arbitrator’s Final Award at page 3, line 3 to page 4, line 21 and Plaintiff’s Motions to Vacate  
9 Arbitrator’s Award of Denial of Plaintiff’s Motion for Partial Summary Judgment and for the Court  
10 to Decide and Grant Plaintiff’s Motion for Partial Summary Judgment at page 10, line 12 to page  
11 31, line 6.

12 A “mere disagreement” with a court’s initial decision will not support a Rule 59(e) motion.  
13 Slate v. Am. Broad. Cos., Inc., 12 F. Supp. 2d 30, (D.D.C. 2013).

14 **6. Mr. Garmong Failed to Timely Raise His Argument That His Due Process**  
15 **Rights Were Violated**

16 A motion to amend a judgment based on arguments that could have been raised, but were not  
17 raised, before judgment was entered may not properly be granted. 11 Wright, Miller & Kane,  
18 Federal Practice and Procedure: Civil 2nd § 2810.1 at 127-28; Demasse v. ITT Corporation, 915 F.  
19 Supp. 1040, 1048 (Ariz. 1995) (a Rule 59(e) motion may not be used to raise arguments or present  
20 evidence that could have been raised or presented prior to judgment). *See Parks v. Baron*, 2009 WL  
21 10695434, at \*1 (D. Ariz. July 29, 2009).

22 A position advanced “for the first time in a Rule 59(e) motion, [is] barred where there [is] no  
23 reason why the defendant could not have presented its argument prior to its motion to alter or  
24 amend the judgment.” *Id.* Rule 59(e) consequently does not provide litigants the “opportunity to re-  
25 argue a case.” Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir.  
26 1998) (*citing* FDIC, 978 F.2d at 16).

27 Plaintiff’s arguments regarding due process violations could have been raised in any of the  
28 Motions or Oppositions filed in either Arbitration or before this Court entered its Judgment

1 confirming the Arbitration award. Plaintiff may disagree with the award issued by the arbitrator,  
2 but attaching a new interpretation to the award hardly constitutes new evidence within the meaning  
3 of a Rule 59(e) motion.

4 Moreover, even if Mr. Garmong had timely raised the due process argument, it is without merit.  
5 Defendants had repeatedly placed Mr. Garmong on notice that they were seeking the award of  
6 attorney's fees. Mr. Garmong was certainly aware that Defendants intended to rely upon NRCP 68  
7 when they served him with an Offer of Judgment. At no time, did Mr. Garmong request that Judge  
8 Pro address the issue whether a NRCP 68 Offer of Judgment was valid.

9 Instead, Mr. Garmong requested that Judge Pro misinterpret his discovery order in Opposition  
10 to Defendant's Motion for the Award of Attorney's Fees. Judge Pro soundly rejected this argument.  
11 Mr. Garmong again raised this issue before this Court. As explained in detail in Defendants'  
12 Opposition to Mr. Garmong's Motion to Vacate the Award of Attorney's Fees, Judge Pro was  
13 entitled to interpret his Order and found there was no waiver of Defendants' right to make a Rule 68  
14 Offer of Judgment. Finally, Mr. Garmong's due process rights were not violated because he was  
15 given multiple opportunities to be heard on the issue.

16 The scope of the district court's review of an arbitration award (and, consequently, our own de  
17 novo review of the district court's decision) is extremely limited and is "nothing like the scope of an  
18 appellate court's review of a trial court's decision." Health Plan of Nev., Inc. v. Rainbow Med.,  
19 LLC, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004). "A reviewing court should not concern itself  
20 with the 'correctness' of an arbitration award and thus does not review the merits of the dispute."  
21 Bohlmann v. Printz, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004). Review of arbitration awards is  
22 extremely narrow, and review of judicial rulings on such awards narrower still. *See* Waddell v.  
23 Holiday Isle, LLC, No. CIV.A. 09-0040-WS-M, 2009 WL 4898356, at \*8 (S.D. Ala. Dec. 10,  
24 2009).

25 In short, the issue whether the award of attorney's fees was proper has been repeatedly raised  
26 and rejected. Mr. Garmong's attempt to re-cast the same argument as a constitutional violation is  
27 meritless. To the extent it could be considered a new argument, Mr. Garmong failed to raise it in a  
28 timely manner as required by NRCP 59(e).

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thomas C. Bradley, Esq., and on  
3 the date set forth below, I served a true copy of the foregoing document on the party(ies) identified  
4 herein, via the following means:

- 5 ☐ Personal Delivery  
6 ☐ Professional Courier  
7 ☐ Federal Express or Other Overnight Delivery Service  
8 ☐ US Mail with Sufficient Postage Affixed  
9 ☐ Facsimile to the Facsimile Number specified  
10 ☐ Electronic Mail to the e-mail address(es) specified  
11 ☒ Second Judicial District Court eFlex system

12 Carl Hebert, Esq.  
13 [carl@cmhebertlaw.com](mailto:carl@cmhebertlaw.com)  
14 202 California Avenue  
15 Reno, Nevada 89509  
Attorney for Plaintiff

16 Dated this 12th day of September, 2019.

17  
18 By: /s/ Mehi Aonga  
Employee of Thomas C. Bradley, Esq.  
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CARL M. HEBERT, ESQ.  
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202 California Avenue  
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Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,  
Plaintiff,

vs.

CASE NO. : CV12-01271

WESPAC; GREG CHRISTIAN;  
DOES 1-10, inclusive,  
Defendants.

DEPT. NO. : 6

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**PLAINTIFF'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO  
ALTER OR AMEND "ORDER RE MOTIONS" ENTERED ON AUGUST 8, 2019**

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On September 5, 2019, Plaintiff filed "Plaintiff's Motion to Alter or Amend 'Order re Motions' Entered August 8, 2019." ("Motion to Alter or Amend"). On September 12, 2019, Defendant filed its "Opposition to Plaintiff's Motion to Alter or Amend 'Order re Motions' Entered August 8, 2019" ("Opposition").

The Plaintiff now replies to the Opposition.

1 POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 A. The Order of August 8, 2019 did not address the governing law and the  
4 established facts of the case.

5  
6 The Order of August 8, 2019 ("Order") did not address the law, facts or substance  
7 of the motions to vacate.

8 Regarding Defendants' Motion to Confirm Final Award, the Order at 11:5-15 relied  
9 upon two earlier orders of Judge Adams, dated December 13, 2012 and April 2, 2014. As  
10 discussed in the Motion to Alter or Amend at 6:4-24, these two orders dealt with Version  
11 1 of the alleged Contract. The orders were overtaken by events in the case and were  
12 effectively superseded when Defendants introduced an inconsistent Version 2 into the  
13 arbitration proceeding. Defendants had Version 2 in their possession on the dates of  
14 Judge Adams' two orders, yet they concealed Version 2 to mislead Judge Adams and to  
15 induce him to issue his two orders. Notably, Defendants' Petition to Confirm, filed April  
16 15, 2019, did not mention Version 1 and Version 2, nor did it include the different versions  
17 as exhibits.  
18

19  
20 Defendants' Opposition declined to address this issue, implicitly conceding it.  
21 Defendants continue to misrepresent this point, and seek to bury the issue. To find the two  
22 different and inconsistent versions, the Court must look to Exhibits 2 and 5 (Version 1) and  
23 Exhibits 6 and 7 (Version 2) of Plaintiff's Opposition to Defendants' Motion to Confirm, filed  
24 April 25, 2019.

25  
26 The Court's Order chastised Plaintiff for insisting that no single "true, complete and  
27 correct" purported Contract is in the record of this case. The events have proven Plaintiff  
28 correct. At the outset of this case, Defendants had both Version 1 and Version 2 in their

1 possession, represented Version 1 to Judge Adams as “true, complete and correct,” while  
2 concealing Version 2, thereby fraudulently misrepresenting to this Court that it did not  
3 exist.<sup>1</sup> Judge Adams based his earlier two orders that were referenced by the Court in the  
4 Order upon Defendants’ misrepresentations.

5  
6 The Plaintiff has demonstrated multiple times<sup>2</sup> Defendants’ misrepresentation of  
7 the facts of the agreement. The Defendants have never denied or even responded to that  
8 accusation and demonstration of their fraud. The Plaintiff is at a loss as to how this fact  
9 and the arguments based upon it continue to be overlooked.

10 Regarding Plaintiff’s Motion to Vacate Final Award, Order at 11:20-12:21 held that  
11 it had already addressed and decided the final award in its order of November 29, 2018.  
12 But that Order, at 8:23-25, held: “Here, Mr. Garmon does not seek review of a final  
13 arbitration award.” Additionally, the date of the arbitration Final Award was March 11,  
14 2019, almost four months after the date of the order of November 29, 2018. The Court  
15 could not possibly have decided the “final award” on November 29, 2018. Defendants’  
16 Opposition declined to address this issue, again implicitly conceding that Plaintiff’s position  
17 is correct.  
18

19  
20 Regarding Plaintiff’s Motion to Vacate MSJ, Order at 13:9-20 asserts that the Court  
21 previously considered this issue, and denied the Motion to Vacate MSJ on the grounds  
22

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23 <sup>1</sup> Concealment of material information constitutes fraud, see Nelson v. Heer, 123  
24 Nev. 217, 225, 163 P.3d 420, 426 (2007), cited and quoted at Plaintiff’s Motion to Vacate  
Arbitrator’s Final Award filed April 22, 2019 at 10:9-13.

25 <sup>2</sup> See, for example, Plaintiff’s Opposition to Defendants’ Motion to Confirm  
26 Arbitrator’s Award, filed April 25, 2019, at 12:8-14:6 (addressing both the governing law of  
27 fraud and the specific facts of this fraud by Defendants in this case); and Plaintiff’s Motion  
28 to Vacate Arbitrator’s Final Award, filed April 22, 2019 at 10:1-22 (addressing the governing  
law of fraud) and at 10:24-13:7 (addressing additional specific acts of fraud in this case by  
Defendants).

1 that Plaintiff did not file a request under DCR 13(7). However, the Order of November 29,  
2 2019 expressly stated that “This Court . . . declines to consider an appeal of a motion for  
3 summary disposition of claims.” Further, the Order of November 29, 2018 (8:23-9:7)  
4 expressly invited and authorized Mr. Garmong to assert the motions after a Final Order  
5 was entered, stating, “Mr. Garmong will have the opportunity to appeal the final arbitration  
6 award to this Court in accordance with JAMS rules, should he wish to do so.” (Emphasis  
7 added).

9       Regarding the Motion to Vacate Attorney’s Fees, Order at 14:17-26 asserted that  
10 the arbitrator’s retroactive application of NRCP Rule 68 could be justified by the argument  
11 that the arbitrator’s Discovery Plan and Scheduling Order (“Plan”) of August 11, 2017 dealt  
12 solely with, and was limited to, “specific NRCP rules relating to discovery.” (Emphasis in  
13 original). As discussed at Motion to Alter or Amend 20:12-21:27, that position is clearly  
14 wrong. The Plan dealt with the full range of rules governing the management of the  
15 arbitration, not just discovery. The omission of NRCP Rule 68 from the Plan meant that  
16 it was not to be included in the case for any purpose, both by agreement of the parties and  
17 by the arbitrator’s order. Plaintiff relied upon that agreement and the order, and the Court  
18 has no authority to ignore or revise that agreement. Further, the Order at 14:27-28 asserts  
19 that no evidence exists to support the assertion that the award was obtained by corruption,  
20 fraud, or other undue means. How exactly would the Court characterize the actions of the  
21 Defendants, described above, in first representing the incomplete Version 1 of the alleged  
22 contract to Judge Adams to obtain referral to arbitration, and then changing to the  
23 incomplete, and inconsistent Version 2 to persuade the arbitrator to decide in Defendants’  
24 favor, if not fraud? Defendants swore Version 1 to be “true, complete and correct” to  
25 persuade Judge Adams to refer the case to arbitration, and obtained that result; later  
26  
27  
28

1 Defendants swore Version 2 to be “true, complete and correct” to support their claim in the  
2 arbitration, and obtained that result. A more straightforward case of fraud on the Court is  
3 difficult to envision. Yet the arbitrator, and later this Court, ignored this fraud, with the  
4 Court erroneously stating that there was no evidence of fraud. Here, Defendants’ fraud is  
5 derived from their own statements and submissions in the Court’s record.  
6

### 7 **B. Summary**

8 The Motion to Alter or Amend focused upon the duty of the District Court to review  
9 the arbitrator’s award (Motion to Alter or Amend 2:21-3:9), the governing law (Motion to  
10 Alter or Amend 4:2-5:20), the fact that it had not considered the relevant issues previously,  
11 and errors of law and fact in the Order (Motion to Alter or Amend 6:1-27:1).  
12

13 As will be discussed in the following sections, the Opposition did not contest the  
14 points raised in the Motion to Alter or Amend. Instead, the Opposition takes the position  
15 that Plaintiff is asking for something to which he is not entitled. The Opposition attempts  
16 to shift the discourse from whether the Order properly addressees the issues, to attacks  
17 on Plaintiff.  
18

19 The case authority is clear. Once a party has initiated District Court review of an  
20 arbitrator’s award on either statutory grounds (NRS 38.241(1)) or nonstatutory grounds,  
21 the District Court has an obligation to conduct that review properly. In this case, the Order  
22 did not follow that mandatory obligation.

## 23 **II. THE OPPOSITION CONCEDES THAT THE DISTRICT COURT** 24 **HAS AN OBLIGATION TO REVIEW THE ARBITRATOR’S AWARD,** 25 **BUT THAT THE COURT DID NOT FULFILL THIS OBLIGATION** 26

27 NRS 38.241 provides for District Court review and mandatory vacating of an  
28 arbitrator’s decision in some instances. The case authority speaks of an “obligation” of the

1 district court. Graber v. Comstock Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16  
2 (1995), cited together with related authority at Motion to Alter or Amend 2:21-3:9, holds:

3       The Wichinsky decision solidified this court's position that a reviewing court  
4       in Nevada may apply common law grounds to review an arbitration award.  
5       As stated in Wichinsky, a district court's power of review is limited to statutory  
6       grounds, but "when an arbitrator manifestly disregards the law, a reviewing  
7       court may vacate an arbitration award." Wichinsky, 109 Nev. at 89-90, 847  
8       P.2d at 731. Accordingly, in this case the district court had the authority and  
9       obligation to review the arbitrator's award to determine whether the arbitrator  
10      manifestly disregarded the law. To the extent the arbitration transcript and  
11      exhibits contained substantial evidence of a manifest disregard for the law,  
12      the district court acted improperly by failing to review the arbitration transcript  
13      and exhibits before confirming the arbitration award.

14 (Emphasis added).

15       This "obligation" is a mandatory duty which must be obeyed and acted upon by the  
16      District Court; it is not discretionary.

17       The Supreme Court repeated this requirement in Clark County Educ. Ass'n v. Clark  
18      County School Dist., 122 Nev. 337, 341-42, 131 P.3d 5, 8 (2006), holding: "This court has  
19      previously recognized both statutory and common-law grounds to be applied by a court  
20      reviewing an award resulting from private binding arbitration." WPH Architecture, Inc. v.  
21      Vegas VP, LP, 131 Nev. Adv. Op. 88, 360 P.3d 1145, 1147 (2015) further clarified the  
22      District Court's obligation as to common-law grounds, holding: "An arbitration award 'may  
23      be vacated based on statutory grounds and certain limited common-law grounds.' At  
24      common law, 'an arbitration award may be vacated if it is "arbitrary, capricious, or  
25      unsupported by the agreement'" or when an arbitrator has 'manifestly disregard [ed] the  
26      law.'" (Citations omitted).

27       The Opposition does not address this "obligation" at all. Instead, it attempts to lead  
28      the District Court into error by suggesting that Plaintiff is seeking to persuade the District  
29      Court to take some action that it is not required to take. That is not at all the case. Once



1 a party has sought review of the arbitrator's award, as Plaintiff did, the District Court has  
2 no discretion to decline to conduct that mandatory review of the arbitrator's actions.  
3 Plaintiff's filed motion papers demonstrated the errors of the arbitrator's actions.

4  
5 **III. THE DISTRICT COURT IS OBLIGATED TO REVIEW**  
6 **THE ARBITRATOR'S AWARD BECAUSE THE DISTRICT COURT**  
7 **HAS A SWORN DUTY TO UPHOLD THE LAW,**  
8 **AND THE ARBITRATOR DOES NOT.**

9 As discussed in the preceding §II, NRS 38.241 provides for the review of an  
10 arbitrator's decision by the District Court and Graber held that "the district court had the  
11 authority and obligation to review the arbitrator's award." One may ask why the legislature  
12 and the Supreme Court provide for district court review of the arbitrator's actions at all, and  
13 why the resolution of a dispute is not turned over to the arbitrator in its entirety.  
14

15 The answer is that an arbitrator has no duty to the litigants and to the public, while  
16 a judge does. A district judge takes an oath of a specific form:

17 Members of the Legislature and all officers, executive, judicial and  
18 ministerial, shall, before they enter upon the duties of their respective offices,  
19 take and subscribe to the following oath:

20 I, ....., do solemnly swear (or affirm) that I will  
21 support, protect and defend the Constitution and Government  
22 of the United States, and the Constitution and government of  
23 the State of Nevada, against all enemies, whether domestic or  
24 foreign, and that I will bear true faith, allegiance and loyalty to  
25 the same, any ordinance, resolution or law of any state  
notwithstanding, and that I will well and faithfully perform all the  
duties of the office of ....., on which I am about to enter;  
(if an oath) so help me God; (if an affirmation) under the pains  
and penalties of perjury.

26 NRS 281.020.

27 Litigants are entitled under NRS 38.239 and 38.241 to have their case reviewed by  
28

1 a person—a District Judge—who has taken that oath.

2 **IV. THE OPPOSITION CONCEDES THAT THE ORDER**  
3 **DID NOT FULFILL THE DISTRICT COURT'S OBLIGATION**

4 **A. Defendants' Motion to Confirm Final Award (Motion to Alter or Amend**  
5 **6:2-13:14).**  
6

7 As discussed at Motion to Alter or Amend 7:5-8:7, the party asserting an agreement  
8 to arbitrate, here defendants, must make of record a binding contract that includes an  
9 arbitration provision. NRS 38.221(2)<sup>3</sup> and 38.219(4), and case authority such as  
10 Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985)  
11 ("Since [defendants in the present case] set up the existence of the agreement to preclude  
12 the lawsuit from proceeding, it had the burden of showing that a binding agreement  
13 existed.").

14  
15 The Motion to Alter or Amend, 6:4-24, points out that the District Court's Order of  
16 August 8, 2019 addressed Version 1 of the purported Contract, as presented to and  
17 discussed by Judge Adams, and which was relied upon by Judge Adams to refer the case  
18 to arbitration. But later, when arbitration started, the Defendants quietly abandoned  
19 Version 1 and introduced an inconsistent Version 2. The arbitrator relied upon Version 2.  
20 The Defendants swore that Version 1 was "true, complete and correct, and also swore that  
21 the different, inconsistent Version 2 was "true, complete and correct." Moreover, neither  
22 Version 1 nor Version 2 had the required complete "Confidential Client Profile" and the  
23 required Exhibits A and Exhibits B. Two different versions of a purported contract cannot  
24 both be "true, complete and correct," particularly when neither version is "complete." An  
25  
26

27  
28 <sup>3</sup> The Motion to Alter or Amend mistakenly refers to NRS 38.221(1).

1 incomplete, uncertain, indefinite collection of paper purporting to be a “contract” or an  
2 “agreement” cannot be enforced or be binding upon the victimized party. See Dodge Bros.,  
3 Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-4 (1930), holding that “There is no  
4 better established principle of equity jurisprudence than that specific performance will not  
5 be decreed when the contract is incomplete, uncertain, or indefinite.” (Motion to Alter or  
6 Amend at 7:21-26).

8 The Motion to Alter or Amend at 11:15-12:10 challenges Defendants to identify  
9 whether Version 1 or Version 2 (or something else) is the actual “true, complete and  
10 correct” alleged Contract. The Opposition refused, and does not mention the two  
11 inconsistent versions of the alleged Contract. The Court should take that as an admission  
12 by Defendants that they have not met the statutory requirements of NRS 38.221(2) and  
13 38.219(4), and case authority such as Obstetrics and Gynecologists. The Court must  
14 reverse on this one ground alone.

16 Version 2 of the purported contract is “previously unavailable evidence” that  
17 requires the Court to grant the Rule 59(e) motion as to Defendants’ Motion to Confirm Final  
18 Award.

19 The Opposition’s Response. The Opposition refuses to address this subject, and  
20 refuses to identify whether Version 1 or Version 2 is the actual “true, complete and correct”  
21 version of the alleged Contract, thereby conceding Plaintiff’s position. This refusal is  
22 directly contrary to the mandates of NRS 38.221(2) and 38.219(4), and Obstetrics and  
23 Gynecologists. Defendants got away with this refusal to adhere to the statutory authority  
24 and the case law in dealing with the arbitrator and in relation to the Order, but surely this  
25 Court will not ignore the mandates of NRS 38.221(1), NRS 38.219(4), and Obstetrics and  
26 Gynecologists, when called to its attention, and in light of the mandate of Graber of the  
27  
28

1 District Court's "obligation to review the arbitrator's award."

2 The Opposition at 6:18-7:4 does argue that the Version 2 of the contract is not "new  
3 evidence." Of course it is. It was available to Defendants (but to no one else), but  
4 concealed by them, when they fraudulently induced Judge Adams to issue his two orders  
5 referenced in the Order. Version 2 was first revealed by Defendants during the arbitration.  
6 The Court did not address the two versions in its Order, and the Motion to Alter or Amend  
7 seeks to persuade the Court to do so. The Order was clearly erroneous as well because  
8 it did not consider the issue of Version 1 versus Version 2, see Motion to Alter or Amend  
9 at 5:12-21.  
10

11 **B. Motion to Vacate Final Award; Motions to Vacate Arbitrator's Award of**  
12 **Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to**  
13 **Decide and Grant Plaintiff's Motion for Partial Summary Judgment ("PMPSJ").**  
14

15 The Order at 11:19-13:19 consolidates these two issues under a single heading,  
16 but the Motion to Alter or Amend discussed them separately. The Order of August 8, 2019  
17 asserted that these two issues had already been decided, and that Plaintiff had not brought  
18 a motion pursuant to DCR 13(7). In fact, neither was previously decided.  
19

20 **1. Motion to Vacate Final Award. (Motion to Alter or Amend 14:23-15:7).**

21 The Motion to Vacate Final Award could not have been earlier decided by the Court  
22 for two reasons. First, the date of the arbitration Final Award was March 11, 2019, some  
23 four months after the date of the Order of November 29, 2018. Consequently, Mr.  
24 Garmong's motion of July 5, 2018 leading to the Court's Order of November 29, 2018, and  
25 the Court's Order of November 29, 2018, could not possibly have dealt with the subject  
26 matter of the Final Award.  
27

28 Second, the Court's Order of November 29, 2018 at 8:23-25, held, "Here, Mr.

1 Garmoning does not seek review of a final arbitration award. Instead, Mr. Garmoning is asking  
2 the Court to challenge the continued service of Judge Pro and vacate Judge Pro's order  
3 regarding summary judgment." (Emphasis added).

4 The Opposition's Response. There was none. The Defendants thereby yield to the  
5 Plaintiff's position.  
6

7 **2. Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for**  
8 **Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion**  
9 **for Partial Summary Judgment. (Motion to Alter or Amend 15:8-19:9).**

10 This section of the Motion to Alter or Amend discussed a number of reasons that  
11 the Order of August 8, 2019 was incorrect. The Opposition does not address any of these  
12 reasons.  
13

14 Although it had a similar title, the earlier motion to vacate the arbitrator's denial of  
15 the PMPSJ differed for two important reasons from the one addressed in the Order;  
16 therefore, it was not the same motion, and did not require permission under DCR 13(7).  
17 The earlier motion to vacate was based upon requested disqualification of the arbitrator,  
18 not on the substance of the PMPSJ. Further, the earlier motion to vacate did not request  
19 the Court to decide the PMPSJ on the merits, only to vacate the decision of the arbitrator  
20 and appoint a new arbitrator who would then hopefully decide the PMPSJ according to  
21 Nevada law. Plaintiff's Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion  
22 for Summary Judgment, and Appoint New Arbitrator, filed July 22, 2018, stated at 29:6-11,  
23

24 The question is what should this Court do. It can leave arbitrator Pro  
25 in place and let him continue with his disregard of the facts and the law, the  
26 effect of which benefits the defendants. This will lengthen the case and  
27 increase the cost to plaintiff, a key objective of the defendants. It will also  
28 lead to the Court having to consider the summary judgment issue, as well as  
other issues involving disregard of law and facts that will likely have arisen  
by that time, when it is faced with a motion to confirm the award pursuant to

1 NRS 38.239. Then, depending upon the Court's ruling, there may be either  
2 further arbitration, action in this court, or an appeal.

3 A great deal of time and expenditure for both the parties and the Court  
4 would be avoided by simply disqualifying arbitrator Pro, vacating his  
5 determination on Plaintiff's MSJ, and bringing in a new arbitrator who is  
6 guided by the facts and law to properly decide the MSJ and who does not  
7 have a time conflict with other duties and is not, in practical effect, partial  
8 toward the defendants.

9 (Emphasis added).

10 The Court's Order of November 29, 2018 at 8:11-9:8 recognized this as the  
11 objective of the motion, and did not remotely suggest that it had decided the PMPSJ on the  
12 substantive merits. In fact, the Order of November 29, 2018 states at 9:2-5, "This Court  
13 ... declines to consider an appeal of a motion for summary disposition of claims."

14 (Emphasis added). The result of that Order of November 29, 2018 and the present Order,  
15 taken together, is that the arbitration Final Award has never previously been addressed by  
16 this Court, and that the PMPSJ has never been addressed or decided by this Court  
17 according to the substantive law of Nevada dealing with summary judgment.

18 Further, the Order of November 29, 2018 (8:23-9:7) expressly invited and authorized  
19 Mr. Garmong to assert the motions after a Final Order was entered, stating, "Mr. Garmong  
20 will have the opportunity to appeal the final arbitration award to this Court in accordance  
21 with JAMS rules, should he wish to do so." (Emphasis added).

22 The Court's decision on the present Order is erroneous in light of the decision of the  
23 Order of November 29, 2018 for several reasons. First, there was never any motion  
24 directed to JAMS, and it had no authority to decide a courtesy copy of a motion directed  
25 to this Court. Second, the rules of JAMS do not supersede the authority of this Court,  
26 which appointed the arbitrator and had the power to disqualify the arbitrator. Third, as  
27 seen in the quote above, the Disqualification Motion of July 5, 2018 never asked this Court  
28

1 to decide the PMPSJ; it only asked this Court to vacate the arbitrator's decision. That is  
2 a significant distinction. Plaintiff expected that the Court would vacate the arbitrator's  
3 decision, appoint a new arbitrator, and permit the new arbitrator to decide PMPSJ. Fourth,  
4 the argument that the Court already decided the motion to vacate the PMPSJ is  
5 incorrect—the Order of November 29, 2018 plainly stated that it “declines to consider an  
6 appeal of a motion for summary disposition of claims.” Fifth, the Order of November 29,  
7 2018 expressly authorized Mr. Garmong to appeal the final arbitration award, which final  
8 arbitration award includes the Final Award and the arbitrator's decision on the PMPSJ.  
9 Sixth, the arbitrator's denial of the PMPSJ was solely for the reason that he maintained that  
10 assessment of the credibility of witnesses was necessary to decide the PMPSJ, but  
11 determinations of credibility on summary judgment are expressly forbidden by Nevada  
12 case law. The Court's Order of November 29, 2018 and the present Order do not address  
13 this point at all. There has never been a decision on the PMPSJ utilizing the proper legal  
14 approach of Nevada law, either by the arbitrator or by the Court.

17 The special significance of the arbitrator refusing to follow the law of Nevada in  
18 deciding the PMPSJ is that the resolution of a summary judgment motion must follow a  
19 highly specific and tightly defined procedure pursuant to Nevada authority See Wood v.  
20 Safeway, 121 Nev. 724, 121 P.3d 1026 (2005). In this case, the arbitrator refused to follow  
21 Nevada law, and instead decided the PMPSJ on a basis—determining credibility of the  
22 declarants—that is expressly forbidden by Nevada law. As Plaintiff pointed out at the time,  
23 the arbitrator's refusal to follow the law of Nevada in deciding PMPSJ did not bode well for  
24 the remainder of the arbitration, and that concern was borne out by subsequent  
25 developments.

26  
27  
28 The Opposition's Response. There was none. The Defendants thereby concede



1 Plaintiff's position.

2 **C. Motion to Vacate Attorney's Fees (Motion to Alter or Amend 19:6-27:1).**

3 The legalities are discussed at Motion to Alter or Amend 19:6-27:1 and were not  
4 disputed by the Opposition.  
5

6 **1. No valid offer of judgment was made under NRCP Rule 68.**

7 Plaintiff first addresses the sequence of events. As discussed in the Motion to Alter  
8 or Amend, on August 11, 2017 the arbitrator entered the Discovery Plan and Scheduling  
9 Order ("Plan"), which listed the rules which would govern the entirety of the arbitration, not  
10 just "discovery" as erroneously stated in the Order. NRCP Rule 68, dealing with offers of  
11 judgment, was not included. Defendants never moved to revise the Plan to add NRCP  
12 Rule 68 to the rules governing the arbitration. The arbitrator never *sua sponte* revised the  
13 Plan to add NRCP Rule 68 to the rules governing the arbitration. There is no provision  
14 under the statutes, the NRCPs or the JAMS rules to retroactively amend a scheduling  
15 order such as the Plan.  
16

17 A month later, on September 12, 2017, Defendants ostensibly made an offer of  
18 judgment under NRCP Rule 68. Of course, Defendants' offer of judgment was not valid,  
19 because NRCP Rule 68 was not in effect as a governing rule of the arbitration at that time.  
20 It is as though NRCP Rule 68 never existed for the arbitration portion of this case. If a valid  
21 offer of judgment had been made, Plaintiff would have had until September 22, 2017 to  
22 accept the offer of judgment.  
23

24 At the time the offer of judgment was ostensibly made over the period September  
25 12-22, 2017, NRCP Rule 68 was not a governing rule of the arbitration. Consequently, the  
26 Defendants could not have made a valid offer of judgment, and Plaintiff could not have  
27 accepted an offer of judgment. There was no rule governing the arbitration that would  
28

1 permit either an offer of judgment or its acceptance.

2           **2.       The action by the arbitrator in granting attorney's fees on an invalid**  
3 **offer of judgment confirms that the arbitration was conducted in a flawed manner.**

4           The arbitrator manifestly disregarded the law of Nevada in deciding PMPSJ.  
5 Further, the arbitrator manifestly disregarded the fraud perpetrated upon this Court by the  
6 Defendants in first presenting Version 1 of the purported contract as "true, complete and  
7 correct," while concealing Version 2, and then presenting Version 2 of the purported  
8 contract as "true, complete and correct."  
9

10           The awarding of attorney's fees based upon an offer of judgment, after letting the  
11 Plaintiff believe that NRCP 68 was not part of the arbitration proceeding, and then 19  
12 months later reversing his position confirms that the arbitrator was operating outside of the  
13 law governing the arbitration proceedings.  
14

15           **3.       Opposition at 5:25-6:7 attempts to respond that the Order did address**  
16 **the Beattie or Brunzell factors, when admittedly it did not.**

17           Motion to Alter or Amend 19:17-20:11 points out that the Order did not address the  
18 factors mandated by Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983). The  
19 Opposition does not disagree, but instead argues that the arbitrator discussed Brunzell v.  
20 Golden Gate National Bank, 455 P.2d 31, 33 (1969). This argument is invalid, for three  
21 reasons. First, this is a Motion to Alter or Amend directed to the Court, not to the arbitrator.  
22 The point is that the Court abused its discretion by not performing the proper analysis in  
23 deciding Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees. Second,  
24 Brunzell does not deal with offers of judgment, but on award of attorneys fees on other  
25 grounds. Third, as discussed in Beattie and in many other cases such as Parodi v. Budetti,  
26 115 Nev. 236, 240, 984 P.2d 172, 175 (1998), before awarding attorney' fees under NRCP  
27  
28

1 Rule 68, the Court must find that there was a valid offer of judgment at the time the alleged  
2 offer was made. There cannot be a valid offer of judgment when NRCP Rule 68 is not in  
3 effect in the arbitration. See Stockton Kenworth, Inc. v. Mentzer Detroit Diesel, Inc., 101  
4 Nev. 400, 403, 705 P.2d 145, 148 (1985)(an award of fees must be made on a valid offer  
5 of judgment). The arbitrator never ruled there was a valid offer of judgment made on  
6 September 12, 2017, a time when NRCP Rule 68 was not one of the rules governing the  
7 arbitration. Nor did the Order.

9 **4. The award of attorney's fees violated Plaintiff's due process rights and**  
10 **was fundamentally unfair under traditional rules of law and equity.**

11 Opposition at 7:14-8:3 argues that Plaintiff had not raised Due Process and  
12 fundamental fairness prior to the Motion to Alter or Amend. These points were made in,  
13 among others, Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion to Vacate  
14 Arbitrator's Award of Attorney's Fees at 8:15-16, stating: "The Final Award disregards the  
15 Constitutional Due Process principle that government may not take a person's property  
16 without proper notice." See also Plaintiff's Motion to Vacate Arbitrator's Award of Attorney  
17 Fees at 23:16-20.  
18

19 Opposition at 8:9-28 further argues that violation of Due Process and fundamental  
20 fairness is fully acceptable in an arbitration proceeding. That is not correct, as these are  
21 Constitutional rights guaranteed to all persons in all proceedings. The Opposition further  
22 argues that the arbitrator could interpret the order of his Plan. However, he could not  
23 interpret that order so as to violate Plaintiff's Due Process rights. That the arbitrator ruled  
24 that he could violate Plaintiff's Due Process rights does not permit this Court to do so. This  
25 Court is bound by its oath, discussed above, to obey the law, and in particular the Due  
26 Process guarantees of the United States and Nevada Constitutions. The arbitrator was  
27  
28

1 not so bound.

2 Nor could the arbitrator make a holding contrary to the agreement between the  
3 parties and expressed in the Plan. As stated in the Plan (Exhibit 1 to Plaintiff's Motion to  
4 Vacate Arbitrator's Award of Attorney Fees) at page 1, lines 17-20: "The parties have  
5 agreed that Rules [list of rules, not including NRCP Rule 68] will generally govern this case  
6 unless the arbitrator rules otherwise." The arbitrator never "ruled otherwise," and certainly  
7 did not "rule otherwise" prior to the purported offer of judgment of September 12, 2017  
8 from which the Plaintiff could reasonably conclude that the offer of judgment was invalid  
9 as outside the approved Rules applicable to the arbitration.  
10

11 **5. The Motion to Alter or Amend explained in detail how Defendants failed**  
12 **to give notice.**  
13

14 The Opposition at 8:4-28 argues that Defendants gave proper notice of the seeking  
15 of attorney's fees. As discussed at Motion to Alter or Amend 23:13-27:1, Defendants never  
16 gave notice prior to September 12, 2017 that they intended to breach the contract  
17 expressed in the Plan dated August 11, 2017, and that they intended to contravene the  
18 arbitrator's order set forth in the Plan.  
19

20 **6. The award of attorney's fees must be reversed when the substantive**  
21 **decisions in favor of Defendants are reversed, as they must be.**

22 When the substantive decisions in favor of Defendants are reversed, the award of  
23 attorney's fees must be as well.

24 **V. REPLY TO OTHER ARGUMENTS OF DEFENDANTS' OPPOSITION**

25 The Opposition raises some further arguments that extend beyond the narrow  
26 confines of a single one of the motions to vacate, and are addressed here.  
27  
28

1           **A.     The federal cases cited by the Opposition are inapplicable, because**  
2 **there is no indication they are decided under Nevada’s Uniform Arbitration Act, and**  
3 **because there is no evidence that Version 1 and Version 2 are governed by the**  
4 **Federal Arbitration Act.**

5  
6           The present Motion to Alter or Amend deals with altering or amending a decision  
7 concerning Version 1 and Version 2 of the purported Contract, and specifically purported  
8 Contracts with arbitration clauses, as well as other aspects of the arbitration. Both Version  
9 1 and Version 2 state that they are governed by Nevada law. Consequently, interpretation  
10 of these two versions is governed by Nevada’s Uniform Arbitration Act (“UAA”). See  
11 Paragraph 14 of each of Exhibit 2 (Version 1) and Exhibit 6 (Version 2) to Plaintiff’s  
12 Opposition to Defendants’ Motion to Confirm, filed April 25, 2019.

13  
14           The Opposition discusses a number of case authorities from Federal Courts. The  
15 Opposition at 2:14-18 argues “The wording of NRCP 59(e) is based on its federal  
16 counterpart FRCP 59(e), and Nevada Courts may consult Federal law in interpreting them.  
17 See Coury v. Robison, 115 Nev. 84, 91 n.4, 976 P.2d 518, 522 n.4 (1999).” Coury v.  
18 Robison dealt with FRCP Rule 11 and FRCP Rule 11, not FRCP Rule 59 and NRCP Rule  
19 59, nor did Coury v. Robison deal with arbitration.

20  
21           Defendants’ Opposition has not demonstrated that the FAA and the arbitration law  
22 of other jurisdictions, relied upon in some instances by the federal decisions cited by the  
23 Opposition, are applicable here. Under the cited authority, absent such a demonstration  
24 by Defendants, this Court must reject the principles based upon Defendants’ cited federal  
25 authority and the above-cited holdings of the Nevada Supreme Court.

26  
27           The actual law governing a motion to alter or amend a Nevada judgment is found  
28 at Motion to Alter or Amend 4:2-5:20.

1           **B.     Besides being inapplicable, “authority” cited by the Opposition has**  
2 **been reversed on the very points relied upon by the Opposition.**

3           In the short time permitted by the rules for a reply, Plaintiff has not been able to  
4 track down the history of all of the “authority” relied upon by the Opposition. One in  
5 particular caught Plaintiff’s attention. Besides the fact that federal law is not applicable to  
6 deciding a Motion to Alter or Amend a Nevada state matter decided under the Nevada  
7 UAA, Demasse v. ITT Corp., 915 F.Supp. 1040 (D.Ariz 1995), the primary case relied upon  
8 concerning Constitutional rights at Opposition 7:16-20, was reversed on the point relied  
9 upon by Defendants in Demasse v. ITT Corp., 185 F.3d 866 (9<sup>th</sup> Cir. 1999). The reversed  
10 case was the basis for the Opposition’s secondary reference, Parks v. Baron, 2009 WL  
11 10695434 (D.Ariz 2009). None of the authority cited by the Opposition in this section, like  
12 all of the other “authority” cited in the Opposition, related to a Rule 59 based upon the  
13 Nevada Uniform Arbitration Act.  
14

15           **C.     The Motion to Alter or Amend was not based upon a mere disagreement**  
16 **with the Order. (Opposition 7:12-13)**

17           The Opposition argues that a “mere disagreement” will not support a Rule 59  
18 Motion. The matters raised in the Motion to Alter or Amend were legal and factual errors  
19 of the Order, as pointed out in numerous places of the Motion to Alter or Amend.  
20

21           **D.     Under Graber, the Court’s obligation to review the arbitrator’s award is**  
22 **not satisfied by a conclusory statement, but only by a demonstration of the review**  
23 **with findings of fact and conclusions of law.**  
24

25           The Opposition at 9:15-17 argues that “ Accordingly, Defendants respectfully  
26 request that this Court clarify that it has considered all of Mr. Garmong’s arguments and  
27 determined them to be without merit.” That is, Defendants seek to misdirect this Court  
28

1 that it may satisfy its Graber obligation by a mere conclusory statement.

2 This Court may not discharge its "obligation to review the arbitrator's award to  
3 determine whether the arbitrator manifestly disregarded the law" under Graber simply by  
4 saying that it considered all of the arguments. It must demonstrate that it has considered  
5 the arguments presented by the parties, and state its findings of fact and conclusions of  
6 law.  
7

## 8 VI. SUMMARY AND CONCLUSION

9 Defendants are desirous that the Court not perform the proper analyses mandated  
10 by Graber. The Court must do so to satisfy its "obligation." Performing the required  
11 analysis necessarily will result in reversal of the arbitrator's decisions.  
12

13 **THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT DOES NOT**  
14 **CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.**

15 DATED this 24<sup>th</sup> day of September 2019.

16  
17 /S/ Carl M. Hebert  
18 CARL M. HEBERT, ESQ.

19 Counsel for plaintiff  
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28



1 CODE NO. 3060  
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE  
8

9 GREGORY O. GARMONG,

Case No. CV12-01271

10 Plaintiff,

Dept. No. 6

11 vs.

12 WESPAC; GREG CHRISTIAN; DOES 1-10,  
13 inclusive,

14 Defendants.  
15 \_\_\_\_\_ /

16 **ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT**  
17

18 Before this Court is *Plaintiff's Motion to Alter or Amend "Order Re Motions" Entered*  
19 *August 8, 2019 ("Motion")* filed by Plaintiff GREGORY GARMONG ("Mr. Garmong") through  
20 his attorney of record, Carl M. Herbert, Esq. Defendants WESPAC and GREG CHRISTIAN  
21 (collectively "Defendants" unless individually referenced), through their attorney of record,  
22 Thomas C. Bradley, Esq., filed their *Opposition to Plaintiff's Motion to Alter or Amend "Order*  
23 *Re Motions" Entered August 8, 2019 ("Opposition")*. Thereafter, *Plaintiff's Reply Points and*  
24 *Authorities in Support of Motion to Alter or Amend "Order Re Motions" Entered on August 8,*  
25 *2019 ("Reply")* was filed and the matter was submitted for decision.  
26

27 //

28 //

1     **I.     FACTS AND PROCEDURAL HISTORY.**

2             This is an action for breach of contract. Mr. Garmong filed his *Complaint* on May 9,  
3 2012. On September 19, 2012, Defendants filed their *Motion to Dismiss and Compel*  
4 *Arbitration*. On December 13, 2012, this Court<sup>1</sup> entered its *Order* granting Defendants'  
5 request to compel arbitration but denying the motion to dismiss. Mr. Garmong then filed his  
6 *Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13,*  
7 *2012 Compelling Arbitration ("Reconsider Motion")*. The motion was opposed by  
8 Defendants. Mr. Garmong did not file a reply and this case was stagnant for nearly a year  
9 until January 13, 2014, when this Court entered its *Order to Proceed*. Mr. Garmong filed his  
10 reply on February 3, 2014. The *Reconsider Motion* was denied on April 2, 2014.

11             Mr. Garmong then sought writ relief from the Nevada Supreme Court. On December  
12 18, 2014, the Nevada Supreme Court entered its *Order Denying Petition for Writ of*  
13 *Mandamus or Prohibition*. The Supreme Court next entered its *Order Denying Rehearing*  
14 on March 18, 2015, and, subsequently, entered its *Order Denying En Banc Reconsideration*  
15 on May 1, 2015.

16             After the Nevada Supreme Court's orders were entered, this Court again entered an  
17 *Order for Response*, instructing the parties to proceed with this case. *Order*, November 17,  
18 2015. In response, the parties indicated they had initiated an arbitration proceeding with  
19 JAMS in Las Vegas. *Notice of Status Report*, December 1, 2015.

20             On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*,  
21 arguing the JAMS arbitrators were prejudiced against Mr. Garmong. This matter was fully  
22

23  
24  
25  
26  
27             

---

<sup>1</sup> Judge Brent T. Adams originally presided over this proceeding in Department 6 before his  
28 retirement. Judge Lynne K. Simons was sworn in on January 5, 2015, and now presides in  
Department 6.

1 briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration* requiring three  
2 arbitrators. The parties then stipulated to select one arbitrator, to reduce costs. *Stipulation*  
3 *to Select One Arbitrator*, October 17, 2016. In accordance, this Court entered its *Order*  
4 *Appointing Arbitrator* on October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator.  
5 After it was determined Mr. Ornstil was unavailable, Mr. Garmong stipulated to the  
6 appointment of either retired Judge Phillip M. Pro,<sup>2</sup> or Lawrence R. Mills. Esq.  
7

8 On November 13, 2017, this Court entered its *Order Granting Motion to Strike*, which  
9 stayed the proceeding pending the outcome of the arbitration, and directed the parties to file  
10 an amended complaint and other responsive papers at the direction of Judge Phillip M. Pro.  
11 *Order Granting Motion to Strike*, p. 2. On February 21, 2017, this Court entered its *Order*  
12 *Appointing Arbitrator*, appointing Judge Phillip M. Pro ("Judge Pro").  
13

14 On March 27, 2017, Mr. Garmong filed *Plaintiff's Objection Pursuant to NRS*  
15 *38.231(3) and 38.241(e) That There is No Agreement to Arbitrate; Notification of Objection*  
16 *to the Court*. Despite prior determinative orders from this Court, Mr. Garmong again  
17 objected to arbitration on the basis there was no agreement to arbitrate.  
18

19 On May 23, 2017, this Court entered its *Order to Show Cause Why Action Should not*  
20 *be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)*, finding "Mr. Garmong and  
21 Defendants were ordered numerous times to participate in arbitration as early as December  
22 13, 2012." The Court held the file did not contain any evidence the parties had proceeded  
23 to arbitration as ordered. *Order*, p. 4. Accordingly, the Court ordered the parties to show  
24 cause why the action should not be dismissed for want of prosecution. *Order*, p. 4.  
25  
26  
27

28 <sup>2</sup> Mr. Garmong stipulated to Judge Pro although he previously moved to preclude a judge from  
serving as an arbitrator.

1 The parties had their first arbitration conference in April, 2017. On June 22, 2018,  
2 without asking for leave of Court because the matter was stayed, Mr. Garmong filed his  
3 *Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment*  
4 *and Appoint New Arbitrator ("Motion to Disqualify")*.  
5

6 Defendants thereafter filed *Defendants' Motion for Limited Relief From Stay to File*  
7 *Motion for Attorney's Fees and Sanctions ("Motion for Sanctions")* requesting limited relief  
8 from this Court's order staying the proceeding pending the outcome of arbitration. While the  
9 *Motion for Sanctions* was under consideration, Defendants filed their *Notice of Completion*  
10 *of Arbitration Hearing* on October 22, 2018. The Court therefore held, with completion of  
11 the arbitration, Defendants' *Motion for Sanctions* was moot. Additionally, the Court took  
12 notice of Defendants' *Notice of Completion of Arbitration* and determined there were  
13 additional decisions to be rendered regarding the *Notice*.  
14

15 Judge Pro found Mr. Garmong's claims for (1) Breach of Contract; (2) Breach of  
16 Implied Warranty; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4)  
17 Nevada's Deceptive Trade Practices Act; (5) Breach of Fiduciary Duty of Full Disclosure; (6)  
18 Intentional Infliction of Emotional Distress; and, (7) Unjust Enrichment all failed as a matter  
19 of law because Mr. Garmong did not establish his claims by a preponderance of the  
20 evidence. *Final Award*, p. 8-9. Furthermore, after weighing the necessary factors required  
21 by Brunzell v. Golden Gate National Bank, 455 P.2d 31, 33 (1969), Judge Pro found  
22 Defendants were entitled to an award of reasonable attorneys' fees in the total sum of  
23 \$111,649.96. *Final Award*, p. 11.  
24

25 The litigation proceeded with several filings. On August 8, 2019, this Court entered  
26 its *Order Re Motions ("ORM")*: (1) granting *Defendants' Petition for an Order Confirming*  
27  
28

1 *Arbitrator's Final Award and Reducing Award to Judgment, Including, Attorneys' Fees and*  
2 *Costs; (2) denying Plaintiff's Motion to Vacate Arbitrator's Final Award; (3) denying Plaintiff's*  
3 *Motion to Vacate Arbitrator's Award of Attorneys' Fees; (4) denying Plaintiff's Motions to*  
4 *Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and*  
5 *for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment ("Motion*  
6 *to Vacate MSJ Decision"); and, (5) granting Defendants' Motion for an Order to File Exhibit*  
7 *as Confidential. ORM, p. 15-16.*

9  
10 On August 27, 2019, this Court entered its *Order* directing: (1) WESPAC to file an  
11 *Amended Motion for the Award of Attorneys' Fees; (2) allowing Mr. Garmong the standard*  
12 *response time to file and serve his opposition to Defendants' Amended Motion for the*  
13 *Award of Attorneys' Fees; and, (3) providing WESPAC would not be required to file a*  
14 *Proposed Final Judgment until ten (10) days following this Court's ruling on WESPAC's*  
15 *Amended Motion for the Award of Attorneys' Fees. Order, p. 1.*

17 In his present *Motion*, Mr. Garmong contends this Court has a duty to review Judge  
18 Pro's actions and rulings to determine whether he disregarded facts, or manifestly  
19 disregarded the law. *Motion*, p. 2-3. Further, Mr. Garmong claims Judge Adams allegedly  
20 relied on Version 1 of the Contract, instead of Version 2 of the Contract, which was  
21 fraudulently used to compel arbitration between the parties. *Motion*, p. 6-13. As a result,  
22 Version 2 of the Contract constitutes "previously unavailable evidence" which should, *inter*  
23 *alia*, be used to identify the validity of the arbitration agreement and the final award. *Motion*,  
24 p. 7-12. Additionally, Mr. Garmong argues DCR 13(7) does not apply to his precluded  
25 claims because the *Motion to Vacate MSJ Decision* was not decided on substantive merits.  
26  
27 *Motion*, p. 14-15. Mr. Garmong also claims there was no valid offer of judgment for  
28

1 attorneys' fees because, in short, NRCP 68 was not a governing rule of arbitration under  
2 Judge Pro's Discovery Plan. *Motion*, p. 20-26. Finally, Mr. Garmong claims his due process  
3 rights were violated after failing to receive proper notice regarding the offer of judgment and  
4 attorneys' fees award. *Motion*, p. 25-26.

6 In their *Opposition*, Defendants contend Mr. Garmong fails to identify a clear error, or  
7 a fundamental miscarriage of justice, because Judge Pro provided an eleven (11) page  
8 explanation of his factual findings supported by law. *Opposition*, p. 3-4. Defendants also  
9 argue Mr. Garmong's *Motion* seeks to relitigate old matters which provide no basis for relief  
10 under NRCP 59. *Opposition*, p. 5. Defendants emphasize this Court is only obligated to  
11 "consider [and] not address" every argument posited by Mr. Garmong. *Opposition*, p. 2, 5.  
12 Moreover, Defendants maintain Judge Pro properly found they were entitled to attorneys'  
13 fees after weighing the necessary factors required by Brunzell, 455 P.2d at 33. *Opposition*,  
14 p. 6. More importantly, Defendants purport Mr. Garmong's allegations regarding the  
15 differing versions of the Contract does not constitute "new evidence" because Mr. Garmong  
16 raised the same arguments to Judge Pro before the final decision on the arbitration award,  
17 and to the Court through his previous papers. *Opposition*, p. 6 citing *Plaintiff's Opposition to*  
18 *Defendants' Motion to Confirm Arbitrator's Award*, p. 4:16-15:16; *Motion to Vacate*  
19 *Arbitrator's Final Award*, p. 3:3-4:21. Defendants contend Mr. Garmong continues to raise  
20 the same arguments in his *Motion to Vacate MSJ Decision*. *Opposition*, p. 7. Additionally,  
21 Defendants argue Mr. Garmong failed to timely raise his due process arguments because  
22 he could have raised them in any of the motions or oppositions filed during arbitration, or  
23 before this Court previously. *Opposition*, p. 7-8. Finally, Defendants state there is no

24 //  
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1 evidence Judge Pro was biased and agree the argument has been raised and rejected  
2 many times before. *Opposition*, p. 9.

3 In his *Reply*, Mr. Garmong re-asserts this Court failed to fulfill its obligation of  
4 reviewing the arbitrator's award because the Court did not consider the differing versions of  
5 the Contract. *Reply*, p. 5-10. In addition, Mr. Garmong re-emphasizes DCR 13(7) is  
6 inapplicable to the claims set forth in his *Motion to Vacate MSJ Decision* because the claims  
7 were not substantively addressed on the merits. *Reply*, p. 10-13. Finally, Mr. Garmong  
8 stresses there was no valid offer of judgment for attorneys' fees because, in short, NRCP 68  
9 was not a governing rule of arbitration under Judge Pro's Discovery Plan, and Judge Pro  
10 failed to address the factors mandated by Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268  
11 (1983) and Brunzell, 455 P.2d at 33 to award attorneys' fees. *Reply*, p. 13-17.

## 14 **II. APPLICABLE LAW AND ANALYSIS.**

15 Pursuant to NRCP 59(e), a motion to alter or amend a judgment must be filed no  
16 later than twenty-eight (28) days after service of written notice of entry of judgment. A  
17 motion to alter or amend judgment may not be used to relitigate old matters, or to raise  
18 arguments or present evidence that could have been raised prior to the entry of judgment.  
19 Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013). The  
20 basic grounds for granting a NRCP 59(e) motion include "correct[ing] manifest errors of law  
21 or fact," "newly discovered or previously unavailable evidence," the need "to prevent  
22 manifest injustice," or a "change in controlling law." AA Primo Builders, LLC v. Washington,  
23 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010). Nevada courts may consult federal law in  
24 interpreting NRCP 59(e) due to its similarity to the federal standard. Id.



1 The Nevada Supreme Court will not disturb a judgment sustained by substantial  
2 evidence when the moving party cannot specify, and when the court cannot find anything in  
3 the record from which the Court could conclude that it is clear that a wrong conclusion had  
4 been reached in judgment. Brechan v. Scott, 1976, 555 P.2d 1230, 92 Nev. 633  
5 (interpreting NRCP 52(b) and 59(e)). A motion to alter or amend judgment under Rule 59(e)  
6 is "an extraordinary remedy which should be used sparingly." Stevo Design, Inc. v. SBR  
7 Mktg. Ltd., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013). Motions made under Rule 59(e)  
8 "should not be granted absent highly unusual circumstances." 389 Orange St. Partners v.  
9 Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

12 **A. Defendants' Motion to Confirm Final Award.**

13 As discussed *supra*, Mr. Garmong claims Judge Adams relied on Version 1 of the  
14 Contract, which was fraudulently utilized to compel arbitration between the parties, instead  
15 of relying on Version 2 of the Contract. *Motion*, p. 6-13.

17 "[T]he scope of judicial review of an arbitration award is limited and is nothing like the  
18 scope of an appellate court's review of a trial court's decision." Health Plan of Nevada v.  
19 Rainbow Med., 120 Nev. 689, 695, 100 P.3d 172, 177 (2004). "A 'reviewing court should not  
20 concern itself with the 'correctness' of an arbitration award' and thus does not review the  
21 merits of the dispute." Bohlmann v. Byron John Printz, 120 Nev. at 547, 96 P.3d 1158  
22 (2004) (quoting Thompson v. Tega-Rand Intern., 740 F.2d 762, 763 (9th Cir.1984)); see  
23 also Clark Ctv. Educ. Ass'n v. Clark Cty. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8  
24 (2006). Rather, "[t]he party seeking to attack the validity of an arbitration award has the  
25 burden of proving, **by clear and convincing evidence**, the statutory or common-law  
26  
27  
28

1 ground relied upon for challenging the award.” Rainbow Med., 120 Nev. at 695, 100 P.3d at  
2 176 (emphasis added).

3       After considering this matter pursuant to the present papers filed, the Court finds Mr.  
4 Garmong has failed to provide clear and convincing evidence to challenge the award.  
5 Moreover, Mr. Garmong has failed to provide clear and convincing evidence Defendants  
6 fraudulently induced Judge Adams and the Nevada Supreme Court to compel arbitration.  
7

8       Notably, Mr. Garmong does not cite to anything in the record with specificity to  
9 substantiate his claims in the *Reconsider Motion*. Instead, Mr. Garmong rehashes his same  
10 argument, the Contract is not “true, complete and correct.” Compare Motion, p. 6, 7, 13,  
11 with Opposition to Motion to Confirm Final Award, p. 2. Despite this, the Court finds no  
12 grounds to change its prior ruling that an enforceable agreement to arbitrate exists in the  
13 record, and the parties were properly ordered to arbitrate. See ORM, p. 11; see also Order,  
14 December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the  
15 Agreement is not unconscionable and is enforceable); *Order*, April 2, 2014 (denying motion  
16 for reconsideration, and again holding arbitration agreement to be enforceable, based on  
17 identical arguments as raised in in Mr. Garmong’s *Motion to Vacate Final Award*); *Order to*  
18 *Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to*  
19 *NRCP 41(E)* (holding Mr. Garmong was ordered numerous times to participate in  
20 arbitration).  
21  
22  
23

24       Therefore, this Court rejects Mr. Garmong’s arguments and denies his request to  
25 amend the Court’s findings regarding the confirmation of the award.  
26

27 //

28 //

1           **B.     Plaintiff's Motion to Vacate Arbitrator's Final Award and**  
2           **Plaintiff's Motion to Vacate MSJ Decision.**

3           Rule 13 of the District Court Rules for the State of Nevada provides, "No motion once  
4 heard and disposed of shall be renewed in the same cause, **nor shall the same matters**  
5 **therein embraced be reheard**, unless by leave of the court granted upon motion therefor,  
6 after notice of such motion to the adverse parties." DCR 13(7) (emphasis supplied).  
7

8           Well-established authority in this state governs reconsideration of previously-decided  
9 issues. In Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., the  
10 Nevada Supreme Court held:

11           A district court may reconsider a previously decided issue if substantially  
12 different evidence is subsequently introduced or the decision is clearly  
13 erroneous. See *Little Earth of United Tribes v. Department of Housing*, 807  
14 F.2d 1433, 1441 (8th Cir.1986); see also *Moore v. City of Las Vegas*, 92 Nev.  
15 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which *new*  
16 *issues of fact or law* are raised supporting a ruling contrary to the ruling  
already reached should a motion for rehearing be granted.") (Emphasis  
added).

17 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (alterations and citations in original). In  
18 Masonry & Tile Contractors Ass'n, the Nevada Supreme Court upheld a district court's  
19 reconsideration of a previously decided issue in light of new clarifying case law. Id.  
20 Because of new case law, the decision by the prior district judge was properly determined to  
21 be "clearly erroneous." Id. When a motion for reconsideration raises "no new issues of law  
22 and [makes] reference to no new or additional facts," reconsideration is "superfluous" and  
23 constitutes an "abuse of discretion" by the district court to entertain such a motion. Moore v.  
24 City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Such motions are granted  
25 in "rare instances." Id. Further, it is well-settled the decision of whether to grant  
26 reconsideration is within "the sound discretion of the court." Navajo Nation v. Confederated  
27  
28

1 Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003); see also  
2 Riger v. Hometown Mortg., LLC, 104 F. Supp. 3d 1092, 1095 (D. Nev. 2015) (district court's  
3 decision to grant reconsideration after entry of an order is within its discretion).

4  
5 Mr. Garmong's *Motion to Vacate Final Award* argues the Final Award must be  
6 vacated pursuant to NRS 38.241(1) because there was no agreement to arbitrate, and even  
7 *arguendo* if there was an agreement to arbitrate, it is invalid based on statutory and non-  
8 statutory grounds. *Motion to Vacate Final Award*, p. 5-9. However, as stated, this Court  
9 has previously held a valid and enforceable arbitration agreement exists in the record  
10 pursuant to NRS 38.241 on numerous occasions. See *ORM*, p. 12; see also *Order*,  
11 December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the  
12 Agreement is not unconscionable and is enforceable); *Order*, April 2, 2014 (denying motion  
13 for reconsideration and again holding arbitration agreement to be enforceable based on  
14 identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); *Order to*  
15 *Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to*  
16 *NRCP 41(E)* (holding Mr. Garmong was ordered numerous time to participate in arbitration).

17  
18 As such, Mr. Garmong's argument constitutes "similar matters" or matters  
19 "embraced" under DCR 13(7) requiring leave of court. Therefore, this Court declines to re-  
20 entertain Mr. Garmong's arguments in this *Motion*, and therefore, declines to amend its  
21 findings and confirmation of the award.

22  
23 Second, Mr. Garmong contends the Court's *Nov. Order* did not decide the *Motion to*  
24 *Vacate MSJ* on the substantive merits, thereby obviating application of DCR 13(7). *Motion*,  
25 p. 15. However, the Court again finds Mr. Garmong previously raised the same argument  
26 regarding Judge Pro disregarding applicable substantive legal principles. See *ORM*, p. 13;  
27  
28

1 Compare Motion, p. 16-19, with Plaintiff's Opposition to Defendants' Motion to Confirm  
2 Arbitrator's Award, p. 4:16-15:16; Motion to Vacate Arbitrator's Final Award, p. 3:3-4:21;  
3 Plaintiff's Motions to Vacate MSJ Decision, p. 10:12-31:6. Thus, this Court has previously  
4 considered and decided this issue in accordance with JAMS Comprehensive Rules &  
5 Procedures Rule (JAMS Rules). See Nov. Order, p. 8-9.

7 Accordingly, Mr. Garmong did not properly move to reconsider *Plaintiff's Motion to*  
8 *Vacate MSJ Decision* as required by DCR 13(7). Therefore, this Court declines to amend  
9 its findings regarding Judge Pro's summary disposition of claims.

11 **C. Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees.**

12 Mr. Garmong asserts there was no valid offer of judgment for attorneys' fees  
13 because NRCP 68 was not a governing rule of arbitration under Judge Pro's Discovery  
14 Plan. *Motion*, p. 20-26.

15 JAMS Rule 24(g) provides an arbitrator may award attorney's fees, expenses, and  
16 interest if provided by the Parties' Agreement or allowed by applicable law. JAMS Rule  
17 24(g) (emphasis added). Defendants propounded an Offer of Judgment in the amount of  
18 \$10,000 on February 12, 2017 pursuant to applicable Nevada law. *Final Award*, p. 10.  
19 Rule 68 of the Nevada Rules of Civil Procedure provides, in pertinent part:  
20

21  
22 (a) The Offer. At any time more than 10 days before trial, any party may  
23 serve an offer in writing to allow judgment to be taken in accordance with its  
24 terms and conditions.

24 \* \* \* \*

25 (e) Failure to Accept Offer...Any offeree who fails to accept the offer may be  
26 subject to the penalties of this rule.

27 (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to  
28 obtain a more favorable judgment,

1 (1) the offeree cannot recover any costs or attorney's fees and shall  
2 not recover interest for the period after the service of the offer and before the  
3 judgment; and

4 (2) the offeree shall pay the offeror's post-offer costs, applicable  
5 interest on the judgment from the time of the offer to the time of entry of the  
6 judgment and reasonable attorney's fees, if any be allowed, actually incurred  
7 by the offeror from the time of the offer.

8 NRCP 68. An award of fees pursuant to NRCP 68 is discretionary with the Court and will  
9 not be disturbed absent clear abuse. Bidart v. American Title Ins. Co., 103 Nev. 175, 734  
10 P.2d 732 (1987).

11 The Court does not change its conclusion Judge Pro properly found the issues in  
12 this case are governed by applicable Nevada law and JAMS Rules. *ORM*, p. 14. The  
13 application of NRCP rules relating to discovery does not automatically exclude or preclude  
14 the applicability of other NRCP rules to the matter, particularly where the Arbitrator  
15 determines it necessary to apply them. *ORM*, p. 14.

16 Accordingly, the Court finds Judge Pro awarded attorneys' fees, interest, and  
17 expenses in accordance with NRCP 68 and JAMS Rule 24(g). Therefore, this Court  
18 declines to amend its findings regarding Judge Pro's award of attorneys' fees.

19  
20 **D. Due Process Claim.**

21 Mr. Garmong claims his due process rights were violated because he did not receive  
22 proper notice regarding the offer of judgment and award of attorneys' fees. *Motion*, p. 25-  
23 26. A motion to alter or amend judgment may not be used to relitigate old matters, or to  
24 raise arguments or present evidence that could have been raised prior to the entry of  
25 judgment. Stevo Design, Inc., 919 F. Supp. 2d at 1117. Mr. Garmong's new claim  
26 regarding due process violations is not appropriate for NRCP 59(e) as it could have been  
27 raised prior to the entry of judgment. Therefore, this Court declines to consider Mr.  
28

1 Garmong's due process claim as it could have been raised before this Court or the arbitrator  
2 prior to the entry of judgment.

3 **D. Potential Sanctions.**

4 This Court notes Mr. Garmong's continued indifference to the previous orders issued  
5 by this Court. The Court will consider imposing sanctions in the future should Mr. Garmong  
6 continue to disregard this Court's orderst.

7  
8 **III. CONCLUSION AND ORDER.**

9 For the foregoing reasons, and good cause appearing therefor,

10 **IT IS HEREBY ORDERED** Mr. Garmong's *Motion to Alter or Amend "Order Re*  
11 *Motions" Entered August 8, 2019 ("Motion")* is **DENIED**.

12 Dated this 6<sup>th</sup> day of December, 2019.

13  
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16 DISTRICT JUDGE  
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1 CERTIFICATE OF SERVICE

2 I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;  
3 that on the 6<sup>th</sup> day of December, 2019, I electronically filed the foregoing with the  
4 Clerk of the Court system which will send a notice of electronic filing to the following:  
5

6 CARL HEBERT, ESQ.

7 THOMAS BRADLEY, ESQ.  
8  
9  
10  
11  
12

13 And, I deposited in the County mailing system for postage and mailing with the  
14 United States Postal Service in Reno, Nevada, a true and correct copy of the attached  
15 document addressed as follows:  
16  
17  
18  
19

20 Heidi Bore  
21  
22  
23  
24  
25  
26  
27  
28

CV12-01271



1 CODE: 2540  
2 THOMAS C. BRADLEY, ESQ.  
3 NV Bar. No. 1621  
4 435 Marsh Avenue  
5 Reno, Nevada 89509  
6 Telephone: (775) 323-5178  
7 [Tom@TomBradleyLaw.com](mailto:Tom@TomBradleyLaw.com)  
8 Attorney for Defendants

9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

10 **IN AND FOR THE COUNTY OF WASHOE**

11 GREGORY GARMONG,

CASE NO. CV12-01271

12 Plaintiff,

DEPT. NO. 6

13 v.

14 WESPAC, GREG CHRISTIAN, and  
15 Does 1-10,

16 Defendants.

17 **NOTICE OF ENTRY OF ORDER**

18 PLEASE TAKE NOTICE that an ORDER was entered in the above-referenced case on  
19 December 6, 2019, a copy of which is attached.

20 *Affirmation: The undersigned verifies that this document does not contain the personal*  
21 *information of any person.*

22 DATED this 9th day of December, 2019.

23 /s/ Thomas C. Bradley

24 THOMAS C. BRADLEY, ESQ.

25 Attorney for Defendants  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thomas C. Bradley, Esq., and the  
3 date set forth below, I served a true copy of the foregoing document on the party(ies) identified  
4 herein, via the following means:

- 5 ☐ Personal Delivery  
6 ☐ Professional Courier  
7 ☐ Federal Express or Other Overnight Delivery Service  
8 ☐ US Mail with Sufficient Postage Affixed  
9 ☐ Facsimile to the Facsimile Number specified  
10 ☐ Electronic Mail to the e-mail address(es) specified  
11 ☒ Second Judicial District Court eFlex system

12 Carl Hebert, Esq.  
13 [carl@cmhebertlaw.com](mailto:carl@cmhebertlaw.com)  
14 202 California Avenue  
15 Reno, Nevada 89509  
16 Attorney for Plaintiff

17 Dated this 9th day of December, 2019.

18 By: /s/ Mehi Aonga  
19 Employee of Thomas C. Bradley, Esq.  
20  
21  
22  
23  
24  
25  
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28

1 CODE NO. 3060  
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4  
5

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE  
8

9 GREGORY O. GARMONG,

Case No. CV12-01271

10 Plaintiff,

Dept. No. 6

11 vs.

12 WESPAC; GREG CHRISTIAN; DOES 1-10,  
13 inclusive,

14 Defendants.  
15 \_\_\_\_\_ /

16 **ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT**  
17

18 Before this Court is *Plaintiff's Motion to Alter or Amend "Order Re Motions" Entered*  
19 *August 8, 2019 ("Motion")* filed by Plaintiff GREGORY GARMONG ("Mr. Garmong") through  
20 his attorney of record, Carl M. Herbert, Esq. Defendants WESPAC and GREG CHRISTIAN  
21 (collectively "Defendants" unless individually referenced), through their attorney of record,  
22 Thomas C. Bradley, Esq., filed their *Opposition to Plaintiff's Motion to Alter or Amend "Order*  
23 *Re Motions" Entered August 8, 2019 ("Opposition")*. Thereafter, *Plaintiff's Reply Points and*  
24 *Authorities in Support of Motion to Alter or Amend "Order Re Motions" Entered on August 8,*  
25 *2019 ("Reply")* was filed and the matter was submitted for decision.  
26

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28 //

1     **I.     FACTS AND PROCEDURAL HISTORY.**

2             This is an action for breach of contract. Mr. Garmong filed his *Complaint* on May 9,  
3 2012. On September 19, 2012, Defendants filed their *Motion to Dismiss and Compel*  
4 *Arbitration*. On December 13, 2012, this Court<sup>1</sup> entered its *Order* granting Defendants'  
5 request to compel arbitration but denying the motion to dismiss. Mr. Garmong then filed his  
6 *Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13,*  
7 *2012 Compelling Arbitration ("Reconsider Motion")*. The motion was opposed by  
8 Defendants. Mr. Garmong did not file a reply and this case was stagnant for nearly a year  
9 until January 13, 2014, when this Court entered its *Order to Proceed*. Mr. Garmong filed his  
10 reply on February 3, 2014. The *Reconsider Motion* was denied on April 2, 2014.

11             Mr. Garmong then sought writ relief from the Nevada Supreme Court. On December  
12 18, 2014, the Nevada Supreme Court entered its *Order Denying Petition for Writ of*  
13 *Mandamus or Prohibition*. The Supreme Court next entered its *Order Denying Rehearing*  
14 on March 18, 2015, and, subsequently, entered its *Order Denying En Banc Reconsideration*  
15 on May 1, 2015.

16             After the Nevada Supreme Court's orders were entered, this Court again entered an  
17 *Order for Response*, instructing the parties to proceed with this case. *Order*, November 17,  
18 2015. In response, the parties indicated they had initiated an arbitration proceeding with  
19 JAMS in Las Vegas. *Notice of Status Report*, December 1, 2015.

20             On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*,  
21 arguing the JAMS arbitrators were prejudiced against Mr. Garmong. This matter was fully  
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<sup>1</sup> Judge Brent T. Adams originally presided over this proceeding in Department 6 before his  
28 retirement. Judge Lynne K. Simons was sworn in on January 5, 2015, and now presides in  
Department 6.

1 briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration* requiring three  
2 arbitrators. The parties then stipulated to select one arbitrator, to reduce costs. *Stipulation*  
3 *to Select One Arbitrator*, October 17, 2016. In accordance, this Court entered its *Order*  
4 *Appointing Arbitrator* on October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator.  
5 After it was determined Mr. Ornstil was unavailable, Mr. Garmong stipulated to the  
6 appointment of either retired Judge Phillip M. Pro,<sup>2</sup> or Lawrence R. Mills. Esq.  
7

8 On November 13, 2017, this Court entered its *Order Granting Motion to Strike*, which  
9 stayed the proceeding pending the outcome of the arbitration, and directed the parties to file  
10 an amended complaint and other responsive papers at the direction of Judge Phillip M. Pro.  
11 *Order Granting Motion to Strike*, p. 2. On February 21, 2017, this Court entered its *Order*  
12 *Appointing Arbitrator*, appointing Judge Phillip M. Pro ("Judge Pro").  
13

14 On March 27, 2017, Mr. Garmong filed *Plaintiff's Objection Pursuant to NRS*  
15 *38.231(3) and 38.241(e) That There is No Agreement to Arbitrate; Notification of Objection*  
16 *to the Court*. Despite prior determinative orders from this Court, Mr. Garmong again  
17 objected to arbitration on the basis there was no agreement to arbitrate.  
18

19 On May 23, 2017, this Court entered its *Order to Show Cause Why Action Should not*  
20 *be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)*, finding "Mr. Garmong and  
21 Defendants were ordered numerous times to participate in arbitration as early as December  
22 13, 2012." The Court held the file did not contain any evidence the parties had proceeded  
23 to arbitration as ordered. *Order*, p. 4. Accordingly, the Court ordered the parties to show  
24 cause why the action should not be dismissed for want of prosecution. *Order*, p. 4.  
25  
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28 <sup>2</sup> Mr. Garmong stipulated to Judge Pro although he previously moved to preclude a judge from  
serving as an arbitrator.

1 The parties had their first arbitration conference in April, 2017. On June 22, 2018,  
2 without asking for leave of Court because the matter was stayed, Mr. Garmong filed his  
3 *Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment*  
4 *and Appoint New Arbitrator ("Motion to Disqualify")*.  
5

6 Defendants thereafter filed *Defendants' Motion for Limited Relief From Stay to File*  
7 *Motion for Attorney's Fees and Sanctions ("Motion for Sanctions")* requesting limited relief  
8 from this Court's order staying the proceeding pending the outcome of arbitration. While the  
9 *Motion for Sanctions* was under consideration, Defendants filed their *Notice of Completion*  
10 *of Arbitration Hearing* on October 22, 2018. The Court therefore held, with completion of  
11 the arbitration, Defendants' *Motion for Sanctions* was moot. Additionally, the Court took  
12 notice of Defendants' *Notice of Completion of Arbitration* and determined there were  
13 additional decisions to be rendered regarding the *Notice*.  
14

15 Judge Pro found Mr. Garmong's claims for (1) Breach of Contract; (2) Breach of  
16 Implied Warranty; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4)  
17 Nevada's Deceptive Trade Practices Act; (5) Breach of Fiduciary Duty of Full Disclosure; (6)  
18 Intentional Infliction of Emotional Distress; and, (7) Unjust Enrichment all failed as a matter  
19 of law because Mr. Garmong did not establish his claims by a preponderance of the  
20 evidence. *Final Award*, p. 8-9. Furthermore, after weighing the necessary factors required  
21 by Brunzell v. Golden Gate National Bank, 455 P.2d 31, 33 (1969), Judge Pro found  
22 Defendants were entitled to an award of reasonable attorneys' fees in the total sum of  
23 \$111,649.96. *Final Award*, p. 11.  
24

25 The litigation proceeded with several filings. On August 8, 2019, this Court entered  
26 its *Order Re Motions ("ORM")*: (1) granting *Defendants' Petition for an Order Confirming*  
27  
28

1 *Arbitrator's Final Award and Reducing Award to Judgment, Including, Attorneys' Fees and*  
2 *Costs; (2) denying Plaintiff's Motion to Vacate Arbitrator's Final Award; (3) denying Plaintiff's*  
3 *Motion to Vacate Arbitrator's Award of Attorneys' Fees; (4) denying Plaintiff's Motions to*  
4 *Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and*  
5 *for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment ("Motion*  
6 *to Vacate MSJ Decision"); and, (5) granting Defendants' Motion for an Order to File Exhibit*  
7 *as Confidential. ORM, p. 15-16.*

9  
10 On August 27, 2019, this Court entered its *Order* directing: (1) WESPAC to file an  
11 *Amended Motion for the Award of Attorneys' Fees*; (2) allowing Mr. Garmong the standard  
12 response time to file and serve his opposition to Defendants' *Amended Motion for the*  
13 *Award of Attorneys' Fees*; and, (3) providing WESPAC would not be required to file a  
14 *Proposed Final Judgment* until ten (10) days following this Court's ruling on WESPAC's  
15 *Amended Motion for the Award of Attorneys' Fees. Order, p. 1.*

17 In his present *Motion*, Mr. Garmong contends this Court has a duty to review Judge  
18 Pro's actions and rulings to determine whether he disregarded facts, or manifestly  
19 disregarded the law. *Motion*, p. 2-3. Further, Mr. Garmong claims Judge Adams allegedly  
20 relied on Version 1 of the Contract, instead of Version 2 of the Contract, which was  
21 fraudulently used to compel arbitration between the parties. *Motion*, p. 6-13. As a result,  
22 Version 2 of the Contract constitutes "previously unavailable evidence" which should, *inter*  
23 *alia*, be used to identify the validity of the arbitration agreement and the final award. *Motion*,  
24 p. 7-12. Additionally, Mr. Garmong argues DCR 13(7) does not apply to his precluded  
25 claims because the *Motion to Vacate MSJ Decision* was not decided on substantive merits.  
26  
27  
28 *Motion*, p. 14-15. Mr. Garmong also claims there was no valid offer of judgment for



1 attorneys' fees because, in short, NRCP 68 was not a governing rule of arbitration under  
2 Judge Pro's Discovery Plan. *Motion*, p. 20-26. Finally, Mr. Garmong claims his due process  
3 rights were violated after failing to receive proper notice regarding the offer of judgment and  
4 attorneys' fees award. *Motion*, p. 25-26.

6 In their *Opposition*, Defendants contend Mr. Garmong fails to identify a clear error, or  
7 a fundamental miscarriage of justice, because Judge Pro provided an eleven (11) page  
8 explanation of his factual findings supported by law. *Opposition*, p. 3-4. Defendants also  
9 argue Mr. Garmong's *Motion* seeks to relitigate old matters which provide no basis for relief  
10 under NRCP 59. *Opposition*, p. 5. Defendants emphasize this Court is only obligated to  
11 "consider [and] not address" every argument posited by Mr. Garmong. *Opposition*, p. 2, 5.  
12 Moreover, Defendants maintain Judge Pro properly found they were entitled to attorneys'  
13 fees after weighing the necessary factors required by Brunzell, 455 P.2d at 33. *Opposition*,  
14 p. 6. More importantly, Defendants purport Mr. Garmong's allegations regarding the  
15 differing versions of the Contract does not constitute "new evidence" because Mr. Garmong  
16 raised the same arguments to Judge Pro before the final decision on the arbitration award,  
17 and to the Court through his previous papers. *Opposition*, p. 6 citing *Plaintiff's Opposition to*  
18 *Defendants' Motion to Confirm Arbitrator's Award*, p. 4:16-15:16; *Motion to Vacate*  
19 *Arbitrator's Final Award*, p. 3:3-4:21. Defendants contend Mr. Garmong continues to raise  
20 the same arguments in his *Motion to Vacate MSJ Decision*. *Opposition*, p. 7. Additionally,  
21 Defendants argue Mr. Garmong failed to timely raise his due process arguments because  
22 he could have raised them in any of the motions or oppositions filed during arbitration, or  
23 before this Court previously. *Opposition*, p. 7-8. Finally, Defendants state there is no

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1 evidence Judge Pro was biased and agree the argument has been raised and rejected  
2 many times before. *Opposition*, p. 9.

3 In his *Reply*, Mr. Garmong re-asserts this Court failed to fulfill its obligation of  
4 reviewing the arbitrator's award because the Court did not consider the differing versions of  
5 the Contract. *Reply*, p. 5-10. In addition, Mr. Garmong re-emphasizes DCR 13(7) is  
6 inapplicable to the claims set forth in his *Motion to Vacate MSJ Decision* because the claims  
7 were not substantively addressed on the merits. *Reply*, p. 10-13. Finally, Mr. Garmong  
8 stresses there was no valid offer of judgment for attorneys' fees because, in short, NRCP 68  
9 was not a governing rule of arbitration under Judge Pro's Discovery Plan, and Judge Pro  
10 failed to address the factors mandated by Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268  
11 (1983) and Brunzell, 455 P.2d at 33 to award attorneys' fees. *Reply*, p. 13-17.

## 14 **II. APPLICABLE LAW AND ANALYSIS.**

15 Pursuant to NRCP 59(e), a motion to alter or amend a judgment must be filed no  
16 later than twenty-eight (28) days after service of written notice of entry of judgment. A  
17 motion to alter or amend judgment may not be used to relitigate old matters, or to raise  
18 arguments or present evidence that could have been raised prior to the entry of judgment.  
19 Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013). The  
20 basic grounds for granting a NRCP 59(e) motion include "correct[ing] manifest errors of law  
21 or fact," "newly discovered or previously unavailable evidence," the need "to prevent  
22 manifest injustice," or a "change in controlling law." AA Primo Builders, LLC v. Washington,  
23 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010). Nevada courts may consult federal law in  
24 interpreting NRCP 59(e) due to its similarity to the federal standard. Id.

1 The Nevada Supreme Court will not disturb a judgment sustained by substantial  
2 evidence when the moving party cannot specify, and when the court cannot find anything in  
3 the record from which the Court could conclude that it is clear that a wrong conclusion had  
4 been reached in judgment. Brechan v. Scott, 1976, 555 P.2d 1230, 92 Nev. 633  
5 (interpreting NRCP 52(b) and 59(e)). A motion to alter or amend judgment under Rule 59(e)  
6 is "an extraordinary remedy which should be used sparingly." Stevo Design, Inc. v. SBR  
7 Mktg. Ltd., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013). Motions made under Rule 59(e)  
8 "should not be granted absent highly unusual circumstances." 389 Orange St. Partners v.  
9 Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

12 **A. Defendants' Motion to Confirm Final Award.**

13 As discussed *supra*, Mr. Garmong claims Judge Adams relied on Version 1 of the  
14 Contract, which was fraudulently utilized to compel arbitration between the parties, instead  
15 of relying on Version 2 of the Contract. *Motion*, p. 6-13.

17 "[T]he scope of judicial review of an arbitration award is limited and is nothing like the  
18 scope of an appellate court's review of a trial court's decision." Health Plan of Nevada v.  
19 Rainbow Med., 120 Nev. 689, 695, 100 P.3d 172, 177 (2004). "A 'reviewing court should not  
20 concern itself with the 'correctness' of an arbitration award' and thus does not review the  
21 merits of the dispute." Bohlmann v. Byron John Printz, 120 Nev. at 547, 96 P.3d 1158  
22 (2004) (quoting Thompson v. Tega-Rand Intern., 740 F.2d 762, 763 (9th Cir.1984)); see  
23 also Clark Ctv. Educ. Ass'n v. Clark Cty. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8  
24 (2006). Rather, "[t]he party seeking to attack the validity of an arbitration award has the  
25 burden of proving, **by clear and convincing evidence**, the statutory or common-law  
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1 ground relied upon for challenging the award.” Rainbow Med., 120 Nev. at 695, 100 P.3d at  
2 176 (emphasis added).

3       After considering this matter pursuant to the present papers filed, the Court finds Mr.  
4 Garmong has failed to provide clear and convincing evidence to challenge the award.  
5 Moreover, Mr. Garmong has failed to provide clear and convincing evidence Defendants  
6 fraudulently induced Judge Adams and the Nevada Supreme Court to compel arbitration.  
7

8       Notably, Mr. Garmong does not cite to anything in the record with specificity to  
9 substantiate his claims in the *Reconsider Motion*. Instead, Mr. Garmong rehashes his same  
10 argument, the Contract is not “true, complete and correct.” Compare Motion, p. 6, 7, 13,  
11 with Opposition to Motion to Confirm Final Award, p. 2. Despite this, the Court finds no  
12 grounds to change its prior ruling that an enforceable agreement to arbitrate exists in the  
13 record, and the parties were properly ordered to arbitrate. See ORM, p. 11; see also Order,  
14 December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the  
15 Agreement is not unconscionable and is enforceable); *Order*, April 2, 2014 (denying motion  
16 for reconsideration, and again holding arbitration agreement to be enforceable, based on  
17 identical arguments as raised in in Mr. Garmong’s *Motion to Vacate Final Award*); *Order to*  
18 *Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to*  
19 *NRCP 41(E)* (holding Mr. Garmong was ordered numerous times to participate in  
20 arbitration).  
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24       Therefore, this Court rejects Mr. Garmong’s arguments and denies his request to  
25 amend the Court’s findings regarding the confirmation of the award.  
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27 //

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1           **B.     Plaintiff's Motion to Vacate Arbitrator's Final Award and**  
2           **Plaintiff's Motion to Vacate MSJ Decision.**

3           Rule 13 of the District Court Rules for the State of Nevada provides, "No motion once  
4 heard and disposed of shall be renewed in the same cause, **nor shall the same matters**  
5 **therein embraced be reheard**, unless by leave of the court granted upon motion therefor,  
6 after notice of such motion to the adverse parties." DCR 13(7) (emphasis supplied).  
7

8           Well-established authority in this state governs reconsideration of previously-decided  
9 issues. In Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., the  
10 Nevada Supreme Court held:

11           A district court may reconsider a previously decided issue if substantially  
12 different evidence is subsequently introduced or the decision is clearly  
13 erroneous. See *Little Earth of United Tribes v. Department of Housing*, 807  
14 F.2d 1433, 1441 (8th Cir.1986); see also *Moore v. City of Las Vegas*, 92 Nev.  
15 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which *new*  
16 *issues of fact or law* are raised supporting a ruling contrary to the ruling  
already reached should a motion for rehearing be granted.") (Emphasis  
added).

17 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (alterations and citations in original). In  
18 Masonry & Tile Contractors Ass'n, the Nevada Supreme Court upheld a district court's  
19 reconsideration of a previously decided issue in light of new clarifying case law. Id.  
20 Because of new case law, the decision by the prior district judge was properly determined to  
21 be "clearly erroneous." Id. When a motion for reconsideration raises "no new issues of law  
22 and [makes] reference to no new or additional facts," reconsideration is "superfluous" and  
23 constitutes an "abuse of discretion" by the district court to entertain such a motion. Moore v.  
24 City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Such motions are granted  
25 in "rare instances." Id. Further, it is well-settled the decision of whether to grant  
26 reconsideration is within "the sound discretion of the court." Navajo Nation v. Confederated  
27  
28

1 Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003); see also  
2 Riger v. Hometown Mortg., LLC, 104 F. Supp. 3d 1092, 1095 (D. Nev. 2015) (district court's  
3 decision to grant reconsideration after entry of an order is within its discretion).

4  
5 Mr. Garmong's *Motion to Vacate Final Award* argues the Final Award must be  
6 vacated pursuant to NRS 38.241(1) because there was no agreement to arbitrate, and even  
7 *arguendo* if there was an agreement to arbitrate, it is invalid based on statutory and non-  
8 statutory grounds. *Motion to Vacate Final Award*, p. 5-9. However, as stated, this Court  
9 has previously held a valid and enforceable arbitration agreement exists in the record  
10 pursuant to NRS 38.241 on numerous occasions. See *ORM*, p. 12; see also *Order*,  
11 December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the  
12 Agreement is not unconscionable and is enforceable); *Order*, April 2, 2014 (denying motion  
13 for reconsideration and again holding arbitration agreement to be enforceable based on  
14 identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); *Order to*  
15 *Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to*  
16 *NRCP 41(E)* (holding Mr. Garmong was ordered numerous time to participate in arbitration).

17  
18 As such, Mr. Garmong's argument constitutes "similar matters" or matters  
19 "embraced" under DCR 13(7) requiring leave of court. Therefore, this Court declines to re-  
20 entertain Mr. Garmong's arguments in this *Motion*, and therefore, declines to amend its  
21 findings and confirmation of the award.

22  
23 Second, Mr. Garmong contends the Court's *Nov. Order* did not decide the *Motion to*  
24 *Vacate MSJ* on the substantive merits, thereby obviating application of DCR 13(7). *Motion*,  
25 p. 15. However, the Court again finds Mr. Garmong previously raised the same argument  
26 regarding Judge Pro disregarding applicable substantive legal principles. See *ORM*, p. 13;  
27  
28

1 Compare Motion, p. 16-19, with Plaintiff's Opposition to Defendants' Motion to Confirm  
2 Arbitrator's Award, p. 4:16–15:16; Motion to Vacate Arbitrator's Final Award, p. 3:3–4:21;  
3 Plaintiff's Motions to Vacate MSJ Decision, p. 10:12–31:6. Thus, this Court has previously  
4 considered and decided this issue in accordance with JAMS Comprehensive Rules &  
5 Procedures Rule (JAMS Rules). See Nov. Order, p. 8-9.

7 Accordingly, Mr. Garmong did not properly move to reconsider *Plaintiff's Motion to*  
8 *Vacate MSJ Decision* as required by DCR 13(7). Therefore, this Court declines to amend  
9 its findings regarding Judge Pro's summary disposition of claims.

11 **C. Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees.**

12 Mr. Garmong asserts there was no valid offer of judgment for attorneys' fees  
13 because NRCP 68 was not a governing rule of arbitration under Judge Pro's Discovery  
14 Plan. *Motion*, p. 20-26.

15 JAMS Rule 24(g) provides an arbitrator may award attorney's fees, expenses, and  
16 interest if provided by the Parties' Agreement or allowed by applicable law. JAMS Rule  
17 24(g) (emphasis added). Defendants propounded an Offer of Judgment in the amount of  
18 \$10,000 on February 12, 2017 pursuant to applicable Nevada law. *Final Award*, p. 10.  
19 Rule 68 of the Nevada Rules of Civil Procedure provides, in pertinent part:  
20

21 (a) The Offer. At any time more than 10 days before trial, any party may  
22 serve an offer in writing to allow judgment to be taken in accordance with its  
23 terms and conditions.

24 \* \* \* \*

25 (e) Failure to Accept Offer...Any offeree who fails to accept the offer may be  
subject to the penalties of this rule.

26 (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to  
27 obtain a more favorable judgment,  
28

1 (1) the offeree cannot recover any costs or attorney's fees and shall  
2 not recover interest for the period after the service of the offer and before the  
3 judgment; and

4 (2) the offeree shall pay the offeror's post-offer costs, applicable  
5 interest on the judgment from the time of the offer to the time of entry of the  
6 judgment and reasonable attorney's fees, if any be allowed, actually incurred  
7 by the offeror from the time of the offer.

8 NRCP 68. An award of fees pursuant to NRCP 68 is discretionary with the Court and will  
9 not be disturbed absent clear abuse. Bidart v. American Title Ins. Co., 103 Nev. 175, 734  
10 P.2d 732 (1987).

11 The Court does not change its conclusion Judge Pro properly found the issues in  
12 this case are governed by applicable Nevada law and JAMS Rules. *ORM*, p. 14. The  
13 application of NRCP rules relating to discovery does not automatically exclude or preclude  
14 the applicability of other NRCP rules to the matter, particularly where the Arbitrator  
15 determines it necessary to apply them. *ORM*, p. 14.

16 Accordingly, the Court finds Judge Pro awarded attorneys' fees, interest, and  
17 expenses in accordance with NRCP 68 and JAMS Rule 24(g). Therefore, this Court  
18 declines to amend its findings regarding Judge Pro's award of attorneys' fees.

19  
20 **D. Due Process Claim.**

21 Mr. Garmong claims his due process rights were violated because he did not receive  
22 proper notice regarding the offer of judgment and award of attorneys' fees. *Motion*, p. 25-  
23 26. A motion to alter or amend judgment may not be used to relitigate old matters, or to  
24 raise arguments or present evidence that could have been raised prior to the entry of  
25 judgment. Stevo Design, Inc., 919 F. Supp. 2d at 1117. Mr. Garmong's new claim  
26 regarding due process violations is not appropriate for NRCP 59(e) as it could have been  
27 raised prior to the entry of judgment. Therefore, this Court declines to consider Mr.  
28

1 Garmong's due process claim as it could have been raised before this Court or the arbitrator  
2 prior to the entry of judgment.

3 **D. Potential Sanctions.**

4 This Court notes Mr. Garmong's continued indifference to the previous orders issued  
5 by this Court. The Court will consider imposing sanctions in the future should Mr. Garmong  
6 continue to disregard this Court's orderst.

7  
8 **III. CONCLUSION AND ORDER.**

9 For the foregoing reasons, and good cause appearing therefor,

10 **IT IS HEREBY ORDERED** Mr. Garmong's *Motion to Alter or Amend "Order Re*  
11 *Motions" Entered August 8, 2019 ("Motion")* is **DENIED**.

12 Dated this 6<sup>th</sup> day of December, 2019.

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16 DISTRICT JUDGE  
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CARL HEBERT, ESQ.  
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Hadi Bore

CV12-01271

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Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,  
Plaintiff,

vs.

**CASE NO. : CV12-01271**

WESPAC; GREG CHRISTIAN;  
DOES 1-10, inclusive,

**DEPT. NO. : 6**

Defendants.

---

**NOTICE OF APPEAL**

---

NOTICE IS GIVEN that plaintiff Gregory O. Garmong appeals to the Supreme Court of Nevada from the following orders entered in the District Court in the above-captioned case:

1. Order denying plaintiff's motion to disqualify arbitrator Pro and to vacate the arbitrator's denial of the plaintiff's motion for summary judgment and to appoint a new arbitrator, entered on November 29, 2018;

2. Order re Motions, entered on August 8, 2019 which:

a. Granted the defendants' petition for an order confirming arbitrator's final award and reduce award to judgment, including attorney's fees and costs;

b. Denied the plaintiff's motion to vacate arbitrator's final award;

c. Denied the plaintiff's motion to vacate arbitrator's award of attorney's fees;

d. Denied the plaintiff's motions to vacate arbitrator's award of denial of plaintiff's motion for partial summary judgment and for the court to decide and grant

1 plaintiff's motion for partial summary judgment.

2 3. Order denying plaintiff's motion to alter or amend judgment, entered on  
3 December 6, 2019.

4 DATED this 7<sup>th</sup> day of January, 2019.

5 **THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT DOES NOT**  
6 **CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.**

7  
8 /S/ Carl M. Hebert  
9 CARL M. HEBERT, ESQ.

10 Counsel for plaintiff/appellant  
11 Gregory O. Garmong  
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2 **CERTIFICATE OF SERVICE**

3 Pursuant to NRAP 25(c), I certify that I am an employee of CARL M. HEBERT,  
4 ESQ., and that on May 27, 2020, I

5   X   hand-delivered

6        mailed, postage pre-paid U.S. Postal Service in Reno, Nevada

7   X   e-mailed

8        telefaxed, followed by mailing on the next business day,

9        served through use of the court's electronic filing system pursuant Nevada EFCR  
10 9(c),

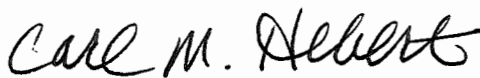
11 a copy of the attached

12 **JOINT APPENDIX VOL. 7**

13 addressed to:

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An employee of Carl M. Hebert, Esq.