IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 80376

GREGORY GARMONG,

Appellant

--against--

WESPAC; GREG CHRISTIAN,

Respondents

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

APPELLANT'S OPENING BRIEF

Carl M. Hebert, Esq.
Nevada Bar No. 250
202 California Ave.
Reno, NV 89509
(775) 323-5556

Attorney for Appellant
Gregory Garmong

NRAP 26.1 DISCLOSURE

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

Appellant Gregory Garmong is an individual. The undersigned has appeared as counsel for him at all times in the District Court and this Court.

There have been no other counsel for the appellant in the District Court or this Court.

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

Attorney for appellant

TABLE OF CONTENTS

SECTION **PAGE**

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

NRAP 17(b)(5)-xv

NRAP 26.1(a)-i

NRCP 6-54

NRCP 16.1(a)(1)(A-D)-54

NRCP 30-54

NRCP 33-54

NRCP 34-54

NRCP 37-54

NRCP 56-8, 9, 10, 23

NRCP 56(c)-9, 12

NRCP 56(d)-13

NRCP 56(e)-12, 14

NRCP 68-3, 5, 50, 51, 52, 53, 54, 55, 56

JURISDICTIONAL STATEMENT

The basis for the jurisdiction of this Court is NRAP Rule 3A(b)(1): "A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." This is appeal from an order confirming an arbitration award. NRS 38.243(1). On March 11, 2019, the arbitrator issued his Final Award (JA 5/0727).[1] Garmong requested that the Final Award be vacated by the District Court, and on August 8, 2019 the District Court entered an order confirming the arbitrator's Final Award (JA 6/1095). Garmong moved to alter or amend this Order. Notice of entry of the District Court's Order Denying Motion to Alter or Amend was served and filed on December 9, 2019 (JA 7/1221). The District Court's Order Denying Motion to Alter or Amend was a final order which terminated the underlying case.

Appellant Garmong his filed Notice of Appeal on January 7, 2020 (JA 7/1238).

[1] References to the Joint Appendix ("JA") include the volume number, a slash and the document number found in the lower right corner of each page followed, when appropriate, by a colon and the line number on the page.

ROUTING STATEMENT

This is an appeal from an arbitration order in favor of the defendants/respondents and from a post-confirmation order awarding them attorney's fees. It is presumptively assigned to the Court of Appeals. NRAP 17(b)(5) (Appeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case) and (7) (Appeals from postjudgment orders in civil cases).

I. STATEMENT OF THE ISSUES

1. Whether an arbitrator may disregard the facts and substantive law of Nevada to decide in favor of those whose reckless incompetence deprived an elderly Nevada resident of his retirement savings.

2. Whether by submitting to arbitration, a party gives up the right to have his case decided by the established facts and the governing law.

3. Whether the denial of Plaintiff's Motion for Partial Summary Judgment ("PMPSJ") by the arbitrator was arbitrary, capricious or unsupported by the arbitration agreement, in manifest disregard of the law or violated the statutory mandates.

4. Whether the arbitrator's failure to consider Wespac's obligations of disclosure to the elderly in deciding the PMPSJ was arbitrary, capricious or unsupported by the arbitration agreement, in manifest disregard of the law or violated the statutory mandates.

5. Whether the arbitrator's award of attorney's fees and costs to Wespac was arbitrary, capricious, or unsupported by the agreement, in manifest disregard of the law or violated the statutory mandates.

6. Whether this Court will uphold an arbitration award which supports and encourages the preying upon the elderly by "investment advisors" such as

Respondents.

7. Whether out-of-state "investment advisors" may come to Nevada, willfully violate numerous Nevada regulatory statutes and federal regulations, deceive the elderly and destroy their life savings.

II. STATEMENT OF THE CASE

This is an appeal from a District Court Order confirming Orders by an arbitrator.

Defendants are financial advisors and planners who, by law, NRS 628A.020, have a fiduciary duty to their clients, including a duty of full disclosure. The Plaintiff, over the age of 60 at the time, entrusted a portion of his life savings to Defendants/Respondents Wespac and Christian (collectively sometimes "Wespac") to manage and provide for his retirement. Wespac is an Oakland, California company that, at the time of events, had recently opened an office in Reno. In their initial dealings and later, Wespac concealed that Defendant Christian had previously been disciplined and suspended by the governing body of financial advisors and planners, the United States Securities Exchange Commission ("SEC"), for defrauding clients. Wespac also concealed that they had violated, and were continuing to violate, numerous regulatory laws of the State of Nevada governing financial advisors and planners, and foreign LLCs, as well as numerous SEC regulations.

These factual misrepresentations and the concealment of information were all highly material because Dr. Garmong testified that he "never, never, never would have remotely considered doing business with" Defendants if he had known the truth of the information that Defendants falsified and/or concealed.

This initial deception by Wespac, not discovered by Garmong until after this lawsuit had commenced, set the tone for Wespac's dishonesty in their dealings. This dishonesty resulted in Wespac negligently wasting hundreds of thousands of dollars of Garmong's retirement savings at a time after he had retired and could not replace the losses by subsequent earnings.

Plaintiff filed his Complaint in the Second Judicial District Court. At an early stage Christian falsified three Declarations to persuade the District Court to refer the matter to arbitration. During the arbitration, at the arbitrator's invitation, Garmong filed Plaintiff's PMPSJ, which was fully briefed. In ruling on the PMPSJ the arbitrator admitted that "Many of the facts relied upon by Claimant [Garmong] are indeed 'undisputed,'" yet disregarded Plaintiff's Undisputed Material Facts and the legal approach mandated by Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The arbitrator excused his disregard for the law by calling for a "merits hearing" as part of the summary judgment procedure to test credibility of the witnesses, which is directly contrary to law and which he never held in any event. The arbitrator denied the PMPSJ, and the District Judge later affirmed the denial.

The case then proceeded to arbitration discovery and a three-day hearing, which resulted in the arbitrator's Final Award in favor of Wespac. In reaching this decision, the arbitrator disregarded both the facts and the law presented to him.

Early in the arbitration, the parties had agreed upon, and the arbitrator had ordered, the rules governing the case, as permitted by the arbitration agency JAMS. This governing law did not include NRCP Rule 68, providing for offers of judgment. About a month after this agreement and order, Wespac nevertheless made an offer of judgement, to which Garmong did not respond. About 20 months later, after the arbitrator had ruled in favor of Wespac on the substance of the case, the arbitrator awarded Wespac attorney's fees based upon the offer of judgment. The parties never changed their agreement, and the arbitrator never changed his Order, establishing that NRCP Rule 68 was not included in the law governing the arbitration.

Garmong then brought motions to vacate the arbitrator's decisions. These were denied by the District Court. This appeal followed.

III. SCOPE OF THIS APPEAL

The inquiry in this appeal is <u>not</u> whether the arbitrator considered the facts and law in deciding PMPSJ and made an error in attempting to apply the law to the facts, or made a mistake in his interpretation of the law. Instead, it is whether the arbitrator manifestly disregarded facts and law and whether the arbitrator's Orders fell within the statutory grounds to vacate awards set forth in NRS 38.241.

The Nevada Supreme Court has rejected some appeals of arbitrators' decisions because the appellant sought to argue the merits of the case or to treat the

appeal of an arbitrator's decision like the appeal of a district court decision. Here, the appeal of the arbitrator's denial of PMPSJ centers on the arbitrator's disregard of the undisputed material facts and law and the violation of statute. The appeal cannot be based on the arbitrator's misunderstanding of the facts or the law, because the arbitrator did not discuss or reveal his understanding of either the facts or the law.

IV. SUMMARY OF THE ARGUMENT

This appeal deals primarily with the arbitrator's failure to decide PMPSJ properly. A review of the arbitrator's two Orders (JA 3/0366-0369 and 3/0391-0394) regarding summary judgment reveals the basic argument. The Orders do not discuss the applicable undisputed material facts or the procedural, evidentiary, or substantive law of summary judgment. These Orders are utterly unlike any other orders purporting to decide summary judgment motions, as they disregard and ignore both the facts and the law. There could be no more concrete evidence of the arbitrator's intent to disregard the facts and law than by ignoring them.

The arbitrator ignored and manifestly disregarded the facts and law establishing that Plaintiff should prevail on the tort claims of the First Amended Complaint ("FAC," JA 1/020-030). The deception and fraud of the Defendants clearly required an award for Plaintiff on those Claims.

The arbitrator ignored the statutory grounds, NRS 38.241, mandating granting

of Plaintiff's summary judgment motion.

The arbitrator manifestly disregarded the agreement of the parties and the arbitrator's order that excluded NRCP Rule 68 from the law governing the arbitration; it was therefore improper to grant attorney's fees based upon an offer of judgment. An award of attorney's fees was improper for other reasons as well.

This is a case where the arbitrator completely ignored the facts and law presented to him in PMPSJ, and the District Court confirmed the negative award.

ARGUMENT

V. STANDARD OF REVIEW OF ARBITRATOR'S AWARD

1. De novo review of the confirmation of an arbitrator's award.

Confirmation of an arbitrator's award is reviewed *de novo*. Thomas v. City of North Las Vegas, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). Thus, "[t]he party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P .3d 172, 176 (2004).

2. Standard for vacating an arbitrator's award.

An arbitrator's decision may be vacated on either statutory grounds under NRS 38.241 or common-law grounds. WPH Architecture, Inc. v. Vegas VP, LP, 131

Nev. 884, 887, 360 P.3d 1145, 1147 (2015) held:

> An arbitration award may be vacated based on statutory grounds and certain limited common-law grounds. [Citation omitted]. At common law, an arbitration award may be vacated if it is arbitrary, capricious, or unsupported by the agreement or when an arbitrator has manifestly disregard [ed] the law.

(Internal quotation marks omitted).

Clark County Educ. Ass'n v. Clark County School Dist., 122 Nev. 337, 341-42, 131 P.3d 5, 8 (2006) elaborated and set forth the relevant standards for common-law grounds:

> This court has previously recognized both statutory and common-law grounds to be applied by a court reviewing an award resulting from private binding arbitration. The statutory grounds are contained in the Uniform Arbitration Act, specifically NRS 38.241(1), and are not implicated as a basis for relief in this appeal. There are two common law grounds recognized in Nevada under which a court may review private binding arbitration awards: (1) whether the award is arbitrary, capricious, or unsupported by the agreement; and (2) whether the arbitrator manifestly disregarded the law. Initially, we take this opportunity to clarify that while the latter standard ensures that the arbitrator recognizes applicable law, the former standard ensures that the arbitrator does not disregard the facts or the terms of the arbitration agreement.
>
> 'In determining a question under an arbitration agreement, an arbitrator enjoys a broad discretion, but that discretion is not without limits.' 'He is confined to interpreting and applying the agreement, and his award need not be enforced if it is arbitrary, capricious, or unsupported by the agreement But,"[j]udicial inquiry under the manifest-disregard-of-the-law standard is extremely limited.' 'A party seeking to vacate an arbitration award based on manifest disregard of

> the law may not merely object to the results of the arbitration.' In such instance, 'the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law.'

Graber v. Comstock Bank, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995), provides further guidance:

> [W]hen searching for a manifest disregard for the law, a court should attempt to locate arbitrators who appreciate the significance of clearly governing legal principles but decide to ignore or pay no attention to those principles. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir.1986). The governing law alleged to have been ignored must be well-defined, explicit, and clearly applicable. Id. at 934.

The present appeal firmly establishes both the statutory grounds and the common law grounds for vacating the arbitrator's Final Award.

3. *De novo* review of decision on motion for summary judgment.

If the Supreme Court is called upon to review a decision on a motion for summary judgment because the arbitrator's decision is vacated, that review is *de novo*. Wood v. Safeway, Inc., 121 Nev. at 729, 121 P.3d at 1029.

VI. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT-- THE ARBITRATOR DISREGARDED THE UNDISPUTED MATERIAL FACTS YET HELD "MANY OF THE FACTS RELIED UPON BY CLAIMANT ARE INDEED 'UNDISPUTED,' " BUT THEN DISREGARDED THE ANALYSIS MANDATED BY LAW

A. History of summary judgment proceeding.

1. Before the arbitrator.

On August 11, 2017, after a telephone conference between the attorneys for the parties and the arbitrator, the arbitrator issued a "Discovery Plan and Scheduling Order" ("Scheduling Order", JA 1/0014-0016). Scheduling Order ¶ 6 provided that "The Parties may bring motions for summary judgment, pursuant to NRCP 56."

On November 22, 2017, the arbitrator issued Second Scheduling Order, (JA 1/0056-0058), which provided that "the arbitrator hereby sets November 30, 2017, as the deadline for dispositive motions by either party."

Garmong timely served PMPSJ (JA 1/0059-0245). Wespac served an Opposition, (JA 3/0246-0282), and Garmong served a Reply (JA 3/0283-0365). The arbitrator issued an Order denying PMPSJ, (JA 3/0366-0369).

Garmong moved for reconsideration, (JA 3/0370-0379), and Wespac opposed, (JA 3/0380-0390). The arbitrator issued Order denying the motion for

reconsideration, (JA 3/0391-0394).

2. Before the District Court.

Pursuant to NRS 38.241, Garmong filed a motion (JA 5/0820-0849) to vacate the arbitrator's denial of PMPSJ. Wespac filed an Opposition (JA 6/1016-1025), and Garmong filed a Reply (JA 6/1081-1094). The District Court denied the Motion to Vacate (JA 6/1095-1111).

Garmong filed a Motion to Alter or Amend the Order of the District Court confirming the arbitrator's award (JA 7/1148-1175), Wespac opposed (JA 7/1176-1185), and Garmong replied (JA 7/1186-1205). The District Court denied the Motion to Reconsider (JA 7/1206-1220).

The arbitrator also awarded attorney's fees to Wespac (JA5/0735-0736) in his Final Award. In the District Court, Garmong moved to vacate the award of fees (JA 5/0851-0874), and the District Court affirmed (JA 6/1095-1111).

B. The procedural law of adjudicating motions for summary judgment.

In the prior version of NRCP 56 under which PMPSJ was filed and decided, NRCP 56(c)[2] provides in relevant part:

---

[2] This Court recently decided in Nalder v. Lewis, 136 Nev. Adv. Op. 24 at *10 n. 6 (2020), that the prior version of a revised rule, in effect at the time the case was

> (c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Applying Rule 56, Wood v. Safeway, Inc., 121 Nev.724, 729, 121 P.3d 1026, 1029 (2005) held:

> Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'

That is, deciding a motion for summary judgment involves two steps. The arbitrator first must identify the undisputed material facts, if any, and, second, must determine whether those undisputed material facts entitle the moving party to judgment as a matter of law. With these requirements in mind, PMPSJ included and supported with reference to the evidentiary record a set of twenty Undisputed Material Facts ("UMFs"), (JA 01/0061:21-0066:10).

The initial burden is on the moving party to "demonstrate that no genuine issue of material fact remains." If the moving party meets this initial burden, as PMPSJ did, Wood v. Safeway, 121 Nev. at 732, 121 P.3d at 1031, requires:

> The nonmoving party 'must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have

---

before the District Court, is to be applied.

> summary judgment entered against him.' The nonmoving party " 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.' "

The next step under Wood v. Safeway is to determine whether "the moving party is entitled to a judgment as a matter of law." Following this determination process is mandatory, not discretionary, if there are undisputed material facts.

The arbitrator's Orders did not follow these procedural steps.

C. The arbitrator's Orders disregarded both the facts and the applicable procedural, evidentiary and substantive law of summary judgment.

The arbitrator's Orders denying PMPSJ (JA 3/0366-0369 and 3/0391-0394), were arbitrary and capricious in that they disregarded the undisputed material facts–not a single one of them was mentioned, although the arbitrator candidly admitted that many (in fact, all) were "undisputed." Order at JA 3/0367 indicated awareness of the procedural requirements of Wood v. Safeway, but then disregarded Wood v. Safeway by not applying its holdings a single time as to either facts or law. The Orders disregarded the procedural, evidentiary, and substantive law applying to each of the claims of the FAC.

1. The Orders disregarded the UMFs established by PMPSJ, which were not disputed by Wespac.

PMPSJ stated and properly supported with reference to evidence twenty

UMFs, (JA 1/0061:21-0066:10).

Wespac did not dispute any of these UMFs with evidence–valid affidavits or otherwise. Wespac submitted a purported Christian Declaration (JA 3/0265-0270), that did not meet the evidentiary requirements of NRCP 56(e), see Reply (JA 3/0290:8-16 and 03/0292:1-23), because it was not made on the "personal knowledge" of the declarant (JA 3/265:9-12), as required by NRCP 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge[.]"), as well as for other reasons discussed at JA 03/0290:8-0308:12.

The arbitrator's disregard of UMF 12 (JA 1/0064:26-28), "At all times relevant to this matter Plaintiff was over the age of 60 and Defendants knew he was over the age of 60" is of special significance. As discussed below in § IX.A.2-3, the State of Nevada has provided special protection for those over age 60 against deceitful investment advisors like Defendants.

In its Opposition (JA 3/0246-0282), Wespac did not properly dispute any of the UMFs by presenting any admissible evidence, or dispute the governing law. As provided in NRCP 56(c), quoted above, where there are no undisputed material facts, "The judgment sought shall be rendered forthwith[.]" The arbitrator disregarded this mandatory procedure, as well as the applicable evidentiary rules and the applicable substantive rules.

Had the arbitrator followed the mandatory procedure of Wood v. Safeway, this case would have properly been decided by summary judgment at that stage of the arbitration and not proceeded further.

2. The arbitrator's Orders admitted that the material facts of PMPSJ were undisputed, and then disregarded the UMFs.

Arbitrator's Order JA 3/0392:3 admitted that **"Many of the facts relied upon by Claimant are indeed 'undisputed.' "** (Emphasis added). The Order did not identify which UMFs were undisputed, as the analysis of Wood v. Safeway requires. That is, the Order admitted the first step of Wood v. Safeway, that facts were undisputed, but then disregarded completion of the first step to identify undisputed UMFs, and totally disregarded the second step of the analysis.

The arbitrator also disregarded the fact that all of Plaintiff's UMFs were established for trial. See the prior version of NRCP 56(d).

3. The arbitrator's Orders disregarded the evidentiary law governing summary judgment.

Plaintiff's Reply (JA 03/0283-0308:12) and Motion for Reconsideration (JA 3/0375:11-18) discussed the mandatory law of evidence and admissibility of evidence in summary judgment proceedings, and the reasons that this law required exclusion of the material submitted by Defendants. The two Orders (JA 3/0366 and

0391) disregarded this mandatory law completely.

NRCP 56(e) provides:

> Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Adherence to NRCP 56(e)'s standard of admissible evidence to dispute material facts is mandatory and the arbitrator's consideration of the Christian Affidavit, which does not comply with the rule, constitutes reversible error. Havas v. Hughes Estate, 98 Nev. 172, 173, 643 P.2d 1220, 1221 (1982). The "personal knowledge" requirement is mandatory, Coblentz v. Hotel Employees & Restaurant Employees Union, 112 Nev. 1161, 1172, 925 P.2d 496, 502 (1996). ("Affidavits supporting or opposing a motion for summary judgment shall be made on personal knowledge[.]") The requirement for attachment of sworn or certified copies of exhibits is likewise mandatory. Havas, 98 Nev. at 173, 643 P.2d at 1221. The Christian Declaration (JA 3/0264-270, especially 03/0265:9-13) was not made on

"personal knowledge."

The two Orders (JA 3/0366 and 0391) disregarded this mandatory law completely. There is not one word in either Order addressing the matters of evidence and admissibility, even though the authority cited in the prior paragraph makes consideration of such matters mandatory. See also State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011), dealing with evidence.

The arbitrator's two orders (JA 3/0366-0369 and 3/0391-0394) make no mention of the evidentiary law.

4. The arbitrator's Orders disregarded the substantive law of the Claims.

a. The content of the arbitrator's Orders

Addressing the second step of Wood v. Safeway, PMPSJ (JA 1/0066:12-1/104:7) demonstrated how each Claim of the FAC was supported by various of UMFs 1-20. For each claim, the nature of the claim and the specific elements of the respective claim were stated with reference to the governing law, followed by a section "Application to the Present Facts" in which the governing law was applied on an element-by-element basis to the appropriate UMFs.

Most of the arbitrator's 2-1/2 page Order (JA 3/0366-0368) dealt with history

and the contentions of the parties. The Order at JA 3/0367, fourth paragraph, indicated that it was aware of some relevant law, but thereafter disregarded and ignored that law.

The paragraph bridging pages JA 3/0367-0368 and the first paragraph on page JA 03/0368, a total of 10 lines, was the entirety of the substance of the Order dealing with resolution of PMPSJ. After noting that the parties had expended much energy and time on the Motion, Opposition and Reply, "nearly 100 pages accompanied by voluminous declarations and exhibits," the Order stated: "Under the circumstances, the Arbitrator finds the claims in dispute are not amenable to resolution on summary judgment." The basis of this statement was apparently that "Moreover, it appears that issues of fact and credibility pervade in assessing the merit of the claims in dispute." There was no discussion of any basis for the contention that there were issues of fact and credibility. Moreover, this statement contradicts the admission that "Many of the facts relied upon by Claimant are indeed 'undisputed.'" No specification was made of the facts that were not in dispute.

There was no mention or discussion at all in either Order (JA 3/0366 and 03/0391) of the UMFs set forth at PMPSJ JA 1/0061:22-0066:10. "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." Wood v. Safeway, 121 Nev. at 731,

121 P.3d at 1031.

Having made this admission that there were undisputed material facts, the arbitrator was required by Wood v. Safeway to evaluate the Claims. The Order disregarded this mandate. The Order did not address a single one of the twelve Claims of the FAC and whether those undisputed facts were sufficient to require decision in favor of Garmong on any of the Claims, thereby disregarding the governing law.

b. The Orders did not even mention the Claims.

Garmong does not contend that the arbitrator made an error in attempting to apply the law and in his interpretation of the law. To the contrary, it is apparent from the arbitrator's two Orders (JA 3/0366 and 3/0391) that he completely disregarded the governing procedural, evidentiary and substantive law. There was no arbitrator's interpretation to dispute. The arbitrator did not mention the law at all, thereby manifestly disregarding it. Such manifest disregard of the law is a basis for vacating the arbitrator's decision on PMPSJ.

All of the law disregarded by the arbitrator was either known to the arbitrator or disclosed to the arbitrator by Garmong in his briefs. The Orders evidence the disregard and refusal of the arbitrator to consider the law. The following discussion identifies and discusses other specific instances of the arbitrator's manifest disregard

of the well-defined, explicit and clearly applicable law. All of the law disregarded by the arbitrator here meets that standard.

A review of the two Orders (JA 3/0366 and 0391) shows that the arbitrator did not address at all, and utterly and manifestly disregarded, the substantive law of the Claims. Not one word! The arbitrator instead candidly admitted that "Many of the facts relied upon by Claimant are indeed 'undisputed,'" but disregarded the UMFs, and disregarded the controlling substantive law, based upon a legally incorrect concept of including a "merits hearing" as part of a summary judgment proceeding.

This following discussion addresses the substantive legal authority governing each of the Claims, and references the location in the PMPSJ where it was discussed. All of this law was well-defined, explicit, clearly applicable and correct, and the arbitrator and the Defendants did not dispute it. The arbitrator willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore this legal authority in preparing the two Orders. The two Orders provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

PMPSJ at JA 1/0066:15-0068:13 demonstrated the elements of the First Claim for Relief, Breach of Contract. As stated there, the facts sufficient to demonstrate the elements were found in UMFs 1, 3, 4-11, and 13-19. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the

two Orders.

PMPSJ at JA 1/0068:14-0069:25 demonstrated the elements of the Second Claim for Relief, Breach of Implied Warranty in Contract. As stated there, the facts sufficient to demonstrate the elements were found in UMFs 1 and 6-11. These UMFs, their evidentiary bases, and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0069:26-0073:9 demonstrated the elements of the Third Claim for Relief, Contractual Breach of Implied Covenant of Good Faith and Fair Dealing. The facts sufficient to demonstrate the elements were found in UMFs 1, 3-7, and 9-11. These UMFs, their evidentiary bases, and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0073:10-0084:8 demonstrated the elements of the Fourth Claim for Relief, Tortious Breach of Implied Covenant of Good Faith and Fair Dealing. The facts sufficient to demonstrate the elements were found in UMFs 1, and 3-21. These UMFs, their evidentiary bases, and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0084:9-0089:1 demonstrated the elements of the Fifth Claim for Relief, Breach of Nevada Deceptive Trade Practices Act, NRS Ch. 598. The facts sufficient to demonstrate the elements are found in UMFs 3, 6, 7-9, 11-20. These

UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0089:2-0092:15 demonstrated the elements of the Sixth Claim for Relief, Breach of Fiduciary Duty. The facts sufficient to demonstrate the elements were found in UMFs 19-20. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0092:16-0095:24 demonstrated the elements of the Seventh Claim for Relief, Breach of Fiduciary Duty of Full Disclosure. The facts sufficient to demonstrate the elements are found in UMFs 13-18. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0095:25-0098:1 demonstrated the elements of the Eighth Claim for Relief, Breach of Agency. The facts sufficient to demonstrate the elements are found in UMFs 1 and 4-9. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

(The Ninth and Eleventh Claims for Relief were not included in PMPSJ.)

PMPSJ at JA 1/98:2-0101:2 demonstrated the elements of the Tenth Claim for Relief, Breach of NRS 628A.030. The facts sufficient to demonstrate the elements were found in UMFs 1, 8-9, 13-19. These UMFs, their evidentiary bases

and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0101:3-0102:5 demonstrated the elements of the Twelfth Claim for Relief, Unjust Enrichment. The facts sufficient to demonstrate the elements were found in UMFs 4 and 6-9. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/102:6-104:7 demonstrated the elements of Statutory Doubling of Damages Pursuant to NRS 41.1395. The facts sufficient to demonstrate the elements were found in UMFs 9 and 12 and UMFs cited in respect to individual claims. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

Additionally, PMPSJ at JA 1/0104:8-0107:7 demonstrated the basis for the dollar amounts of damages to be awarded.

The arbitrator was aware and conscious of all of these UMFs and the procedural, evidentiary and substantive law, as they were discussed in PMPSJ and the Reply and chose to disregard and ignore the facts and law, as they were not cited or applied in either of the arbitrator's Orders.

D. The arbitrator's second Order, following Garmong's request for reconsideration, presented as the sole excuse for failing to follow the law of Wood v. Safeway and the substantive law by calling for credibility determination as part of a summary judgment proceeding, thereby disregarding the authority that such credibility determinations are contrary to law.

Garmong pressed for reconsideration and a better explanation of the initial Order.

The arbitrator issued the Order Denying Reconsideration (JA 03/0391-0394) presenting as his sole excuse for denying PMPSJ, a contention that a "merits hearing" must be held as part of the resolution of PMPSJ. See Order Denying Reconsideration (JA 3/0392, third paragraph), stating: "A merits hearing is particularly appropriate where, as here, the resolution of the claims is so heavily dependent on the opportunity of the parties to test the credibility of the two principle [sic] witnesses[.]"

The arbitrator was fully aware that the credibility of affiants/declarants may not be determined by the arbitrator on summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), referenced generally by the arbitrator in Order JA 3/0367, fourth paragraph, states: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury

functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." See also Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002) ("Neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion [for summary judgment] or the opposition.").

The arbitrator was aware of the law forbidding credibility determinations on motions for summary judgment, and chose to manifestly disregard and deliberately ignore it in the present case as an excuse to reject the approach mandated by NRCP Rule 56 and Wood v. Safeway.

E. The arbitrator's decision on PMPSJ must be vacated and reversed.

As provided in Clark County Educ. Ass'n, *supra*, the arbitrator's denial of PMPSJ must be reversed.

VII. THE ARBITRATOR DISREGARDED THE OVERT INTENTIONAL FRAUD AND DECEPTION BY WESPAC

The parties and the arbitrator agreed that Wespac and Christian had a fiduciary duty, a duty of confidentiality and contractual duties to Garmong. The evidence in PMPSJ clearly established that Wespac and Christian had intentionally deceived Garmong prior to and during the time that he employed them to manage his retirement savings, in violation of their duties to him. The arbitrator disregarded

these deceptions in his Orders, refusing even to discuss them, and the District Court affirmed.

A. The arbitrator disregarded the legal duty of full disclosure of a fiduciary, those in a confidential relation, and under contract principles.

Wespac and Christian entered into a relation with Garmong whereby they agreed to act as his financial planners and investment advisors, in return for pay. NRS 628A.010(3) and NRS 628A.020 provide that a financial planner has a fiduciary duty to his client. The common law expressed in case authority states that an investment advisor or financial planner has a confidential relation, and thus a fiduciary duty, to his client, including duties of full and fair disclosure, loyalty, and good faith and fair dealing. Randono v. Turk, 86 Nev. 123, 129, 466 P.2d 218, 222 (1970); Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335, 338 (1995) (confidential relationship).

Perry held: "When a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party." Further, Perry stated, 111 Nev. at 948, 900 P.2d at 338: "Perry held a duty to act with the utmost good faith, based on her confidential relationship with Jordan. This duty requires affirmative disclosure and avoidance of self dealing." The

duty of full disclosure by Wespac and Christian arose no later than the time Garmong first gave them confidential information on August 18, 2005 (JA 2/0215-0223), even before they entered a formal relation on August 31, 2005 (JA 1/0224-2/0231), and continued during the entire time of their relation and thereafter. See PMPSJ 1/0089:7-0090:5.

The duty of full disclosure also arises under Nevada common law of contracts. "[A]n implied covenant of good faith and fair dealing exists in *all* contracts." (Italics in original). A.C. Shaw Construction v. Washoe County, 105 Nev. 913, 914, 784 P.2d 9, 11 (1989). "Every contract imposes upon each party an implied duty of good faith and fair dealing in its performance and its enforcement." J.A. Jones Constr. v. Lehrer McGovern Bovis, 120 Nev. 277, 286, 89 P.3d 1009, 1015 (2004). The implied covenant prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other. The parties must make a full and fair disclosure of material facts.

B. The arbitrator disregarded the facts and law establishing violations of NRS 628A.030 by Wespac and Christian.

Defendants Wespac and Christian deceived the elderly in order to deprive them of their life savings, and Garmong was one of their victims. This practice was condoned by the arbitrator.

Wespac and Christian have a long history of failing to obey federal and Nevada law governing financial planners and securities advisors, and concealing material information from their clients such as Garmong. Wespac concealed material information from Garmong, as set forth in the following seven subsections.

All of these violations and deceptions were established in the UMFs of PMPSJ and/or the Reply, and at the arbitration hearing, where Wespac and Christian had every opportunity to counter them with their own testimony and exhibits, yet the arbitrator disregarded them.

1. The arbitrator disregarded the facts establishing the prior discipline and suspension by the SEC of Defendant Christian for defrauding securities clients and concealment from Garmong

Wespac and Christian were "financial planners" under the definition of that term set forth in NRS 628A.010(3). "Financial planners" have a fiduciary duty to their clients, under both statutory (NRS 628A.010(3) and NRS 628A.020) and common law. Randono v. Turk, 86 Nev. at 129, 466 P.2d at 222. (JA 1/0089:4-19).

Wespac and Christian first revealed in their Opening Arbitration Brief filed September 18, 2017, at JA 1/0034:26-0035:4, what they had long known but concealed from Garmong–that Christian had been disciplined and suspended from practice by the SEC for fraudulent securities practices, well before Defendants were

misrepresented to Garmong as honest, trustworthy financial planners and investment advisors. Wespac and Christian actively concealed from Garmong the discipline and suspension of Christian by the SEC during the period that they were conducting their fraud upon him. This deception was established in UMF 19, which was disregarded by the arbitrator. Garmong first learned of this deception during this lawsuit. UMF 19 (JA 1/0065:26-0066:4) and Declaration ¶ 34 (JA 3/244:28-245:14).

Wespac and Christian did not dispute that they had concealed this information from Garmong in violation of NRS 628A.030(2)(a). Christian admitted that he and Wespac had a duty to make this disclosure and that it intentionally failed to do so (JA 4/621:21-622:11). Christian proudly testified:

> Q· · And you've heard the discussion about fiduciary duties?
>
> A· · Correct.
>
> Q· · And you said in your deposition that you probably gave us the best definition of fiduciary duty, and that is to always act in the client's best interest; are you staying with that?
>
> A· · Correct.
>
> Q· · Now, it's important as a fiduciary, wouldn't you agree, to be open and honest and clear about what you're doing to the client; isn't it?
>
> A· · Yes.
>
> Q· · So when you first met with Mr. Garmong, did you tell him about your SEC discipline and suspension from 1992?

A· · I did not.

Concealment of this highly material information is a violation of NRS 628.030(c).

This is the most unconscionable of the concealments. It is hard to imagine a financial planner/advisor, having a statutory fiduciary duty to a client, concealing this information, and even harder to imagine an arbitrator and a Court disregarding the concealment from an elderly person to establish a relation of trust.

2. The arbitrator disregarded the facts and law establishing the failure of Wespac to obey Nevada law requiring that it become licensed as an investment advisor, NRS 90.330, and concealment from Garmong.

Wespac and Christian were also "investment advisors." (JA 1/0035:14; JA 1/0034:25; JA 1/0147).

NRS 90.330(1) provides: "It is unlawful for any person to transact business in this State as an investment adviser or as a representative of an investment adviser unless licensed or exempt from licensing under this chapter." (JA 1/0087:13-17; 1/0095:4-21).

PMPSJ UMF 15 (PMPSJ JA 1/0065:10-16; JA 2/0155) established that Wespac did not register as an investment advisor until September 24, 2008, long after Wespac started delivering investment advice to Garmong on August 31, 2005

(PMPSJ JA 1/0230).

Garmong testified at the hearing that Wespac had never informed him that it was not properly licensed as an investment advisor. JA 1/0503:25-0504:3. Wespac's "compliance officer" Williams admitted that Wespac had been doing business in Nevada long before it registered as an investment advisor. (JA 4/603:4-11).

Wespac failed to register as an investment advisor as required by NRS 90.330(1) before it began doing business in Nevada. Concealment of this failure by Wespac and Christian was a violation of NRS 628A.030(2)(a) and (c).

3. The arbitrator disregarded the facts and law establishing Wespac's failure to have the required insurance or bond, NRS 628A.040, and concealment from Garmong.

NRS 628A.040 provides: "A financial planner shall maintain insurance covering liability for errors or omissions, or a surety bond to compensate clients for losses actionable pursuant to this chapter, in an amount of $1,000,000 or more."

Wespac and Christian did not have insurance or a surety bond in the required amount until nearly the end of their relation with Garmong, if at all, a violation of NRS 628A.040, and concealed that failure from Garmong, a violation of NRS 628A.030(2)(a) and (c).

At the hearing Garmong testified that he had requested in discovery proof of Wespac's

insurance but had not received any proof. (JA 4/0504:5-14). At the hearing Wespac's compliance officer Williams testified (JA 4/0595:3-0599:24) concerning insurance and produced an Insurance Policy (JA 4/0627-0629) with an effective date of January 26, 2009, but could not produce evidence of earlier insurance. Wespac and Christian operated without insurance for years after they started providing financial planning advice to Garmong on August 31, 2005 (PMPSJ JA 1/0230), contrary to NRS 628A.040, and concealed this statutory violation from Garmong.

Concealment of this failure by Wespac and Christian is a violation of NRS 628A.030(2)(a) and (c).

4. The arbitrator disregarded the facts and law establishing Wespac's failure to register as a foreign LLC, NRS 86.544, and concealment from Garmong.

NRS 86.544(1) provides: "Before transacting business in this State, a foreign limited-liability company must register with the Secretary of State." PMPSJ JA 1/94:15-95:3.

Wespac was a foreign limited liability company. PMPSJ (JA 1/0212-0214) establishes that Wespac did not register with Nevada as a foreign LLC until October 15, 2008, more than 3 years after commencing business with Garmong on August 31, 2005 (PMPSJ JA 1/0230). That is, Wespac did not register with Secretary of State before transacting business in Nevada with Garmong for several years, a violation of NRS 86.544(1), and concealed this information from Garmong, violations of NRS 628A.030(2)(a) and (c).

PMPSJ UMF 18 (JA 1/0065:22-25) asserted and supported this fact, and Wespac did not dispute it. At the hearing, Garmong testified that Wespac had never disclosed to him that it was not properly registered as a foreign LLC. JA 4/0503:21-24. Wespac's compliance officer Williams confirmed that Wespac did not register in Nevada as a foreign LLC until October 15, 2008 (JA 4/0609:15-0610:3), over three years after it started doing business with Garmong (PMPSJ JA 1/0230).

5. The arbitrator disregarded the facts and law establishing Wespac's violation of federal SEC law requiring a Code of Ethics, and concealing that deficiency from Garmong.

The SEC required all investment advisors to prepare a Code of Ethics and, upon request, provide that Code of Ethics to clients by the compliance date of January 7, 2005 or for new clients, whenever they became clients. PMPSJ JA 1/0156; 1/0162-163. Not surprisingly, Wespac and Christian prepared no Code of Ethics by the compliance date (4:0611:6-0615:17), as ethics were apparently foreign to their mode of business. They concealed from Garmong their failure to prepare a Code of Ethics. (JA 4/503:5-9).

Wespac and Christian violated the SEC requirement of having a Code of Ethics by January 7, 2005, and concealed that violation from Garmong, a violation of NRS 628A.030(2)(a).

6. The arbitrator disregarded the facts establishing Christian's false statements to the SEC that he had no other business interests outside Wespac, and concealing those misrepresentations from Garmong.

Wespac and Christian made false representations to the SEC concerning the fact that Christian had business interests outside Wespac that took his time and attention away from his fiduciary duty in advising Garmong (JA 4/557, ¶ 13). Christian concealed those misrepresentations and the business interests from Garmong, a violation of NRS 628A.030(2)(a).

At the hearing, Garmong testified that he had learned during the lawsuit that Christian was operating, with Wespac's approval, a conflicting investment business called "Fusion" during most of the period he acted as investment advisor to Garmong, and that Christian concealed this conflict from Garmong until the present lawsuit. (JA 4/0509:8-18). Garmong testified that he had learned in Christian's deposition of the conflict and that he was not devoting sufficient time to his representation of Garmong. When Wespac was acquired by another company, Christian was required to cease the conflicting business. (JA 4/0592:1-22).

7. The arbitrator disregarded the three fraudulent Christian affidavits filed in this lawsuit.

To induce the District Court to refer the matter to arbitration, Christian filed three

false and fraudulent affidavits in this lawsuit.. (JA 3/331-333; 3/347-348; 3/350). These fraudulent affidavits addressed the purported Investment Management Agreement presented by Wespac at the time and its constantly changing versions. (JA 3/338-344).

The fraudulent affidavits are discussed in detail in Plaintiff's Reply to Opposition to PMPSJ at JA 3/297:20-301:11.

The arbitrator's Orders denying PMPSJ (JA 3/0366 and 3/0391) disregarded the fraudulent affidavits.

C. The arbitrator disregarded the significance of these violations. If Wespac and Christian had been truthful, Garmong would never have done business with them, they would not have depleted his retirement savings and they would not have gotten the payments he made to them.

The reason that the above-listed misrepresentations and concealments are material and important is that Garmong never wavered in his insistence that he would never have dealt with Wespac and Christian if he had known of the concealed information.

In PMPSJ Declaration ¶ 35 (JA 3/244:28-245:14), Garmong testified:

> If Defendants had disclosed to me in July-August 2005 during my initial discussions with Defendants when they were persuading me to become their client, and in August 2005-2008 after I became their client, any or all of the facts that Defendants refused to comply with the lawful requirements of the SEC and the State of Nevada, and had no Code of Ethics as required by the SEC, and that Defendant Christian had been previously disciplined and suspended by the SEC, I never would have even considered doing business

with them because I would have been on notice that Defendants were fundamentally dishonest. Defendants' refusal to obey the federal and state laws, and Defendant Christian's discipline by the SEC, strongly indicate a willingness to engage in other wrongful, illegal, injurious misconduct, such as breaching a private contract and its associated provisions, violating conditions imposed by law such as fiduciary duty, and violating other federal and state laws. The concealment from me by Defendants of this information caused me to do business with them, when otherwise I would have refused if I had known the information, and led to great harm to me.

Later, Garmong orally testified at the hearing to the same point. (JA 4/0505:3-507:14).

Q· ·If you had that knowledge -- and I've taken you through what they didn't tell you -- if you had that knowledge, would you have done business with them in August of 2005?

A· ·The answer is no, nor would I have done business with them at a later time.

Q· ·And why is that?

A· ·A couple of reasons.· First of all, one of the big arguments made by Mr. Christian was that Wespac and Mr. Christian were worthy of trust. They were, after all, taking over the management of my life savings, what I expected to have in retirement.

I had to trust them to do what they were supposed to do and honor the Investment Management Agreement. So if they didn't disclose important information like this to me, I think it would be reasonable for me to be suspicious about whether they were honest and would properly deal with me.

Just the notion that all of this important information is concealed by someone who is asking for your trust is just alien to the granting of that trust, when -- let me put it this way:· When I learned about these failures of disclosure and violations of law much later in 2016 -- '16 or '17 I was dumbfounded.· I've been dumbfounded several times in this case and that was one of them.

The other thing is -- the other part of my concern is, if someone will not obey the law of the SEC, the federal law governing their industry and will not

> obey the law of the State of Nevada governing their specific industry, why should I expect that they would agree to honor the terms of a private contract with an individual?
>
> Those two things together, the violation of trust and the willingness to scofflaws, if everyone knows that term, to me is just beyond the pale. **I never, never, never would have remotely considered doing business with them if they had made any of those disclosures to me, particularly because, as I said, the matters at issue here were not whether they violated some traffic code or something like that. These issues went precisely to the nature of their dealings with the government and the failure to disclose went to their dealings with me.**

(Emphasis added).

In short, if Wespac and Christian had been forthcoming in their fiduciary duties of full disclosure, Garmong would never have fallen into their hands.

The arbitrator disregarded these fraudulent acts perpetrated by Wespac and Christian, as well as the governing law, and disregarded Garmong's reasons that such dishonesty was important to him.

D. The arbitrator disregarded the liability of Wespac and Christian under NRS Ch. 628A.

Wespac and Christian owed a duty of full disclosure under the fiduciary-like confidential relation of Perry before their contractual relation was established, and under Randono and NRS 628A.020 after their relation was established. But in fact what happened was that Wespac and Christian concealed their violations shown above.

Randono, 86 Nev. 129, 466 P.2d 222, held:

> Additionally, in G. Bogert, The Law of Trusts and Trustees, s 482 (2d ed. 1960), it is written, '**Investment advisors** have been held to occupy a confidential relation toward those advised.' In that same work, at s 483, it is provided, 'Where a trustee or other fiduciary holds property to be used for the benefit of his cestui, it is, of course, a breach of his trust to employ the property for his own private advantage, as where he spends or consumes it for his own benefit, or uses it directly to acquire other property in his own name. This civil wrong, the breach of trust, is as reprehensible as the criminal act of embezzlement, from the point of view of equity. It is readily admitted to be a sufficient basis for charging the fiduciary with a constructive trust as to any avails of the breach of his express trust.'

(Emphasis added).

These were violations of NRS 628A.020(2)(a) and (c). Of these violations, the concealment of Christian's prior discipline and suspension by the SEC is by far the most reprehensible, as Christian had represented himself to Garmong as an honest financial planner and investment advisor in order to gain Garmong's trust.

The various failures of Wespac and Christian to conform to Nevada law, and the law itself, were called to the attention of the arbitrator in PMPSJ. (JA 1/0065:1-0066:4; 0090:2-101:2) The arbitrator disregarded all the facts and all the law.

NRS 628A.030 provides:

> Liability of financial planner.
>
> 1. If loss results from following a financial planner's advice under any of the circumstances listed in subsection 2, the client may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney's fees.
> 2. The circumstances giving rise to liability of a financial planner are that the financial planner:

(a) Violated any element of his or her fiduciary duty;
(b) Was grossly negligent in selecting the course of action advised, in the light of all the client's circumstances known to the financial planner; or
(c) Violated any law of this State in recommending the investment or service.

As set forth above, Wespac and Christian violated NRS 628A.030(2)(a) by failing to disclose Christian's prior discipline and suspension by the SEC, and in the other ways described above, and concealed those violations from Garmong.

NRS 628A.030(1) provides that Garmong "may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney's fees."

E. The arbitrator disregarded the liability of Wespac and Christian under NRS Ch. 598.

The liability and damages of Wespac and Christian are discussed at PMPSJ JA1/0084:9-0089:1. The arbitrator's Orders (JA 3/0366 and 3/0391) disregarded the facts and governing law of the Fifth Claim.

F. The arbitrator disregarded the liability of Wespac and Christian under Breach of Fiduciary Duty.

The liability and damages of Wespac and Christian are discussed at PMPSJ, JA 1/0089:2-0095:24. The arbitrator's Orders (JA 3/0366 and 3/0391) disregarded the facts and governing law of the Sixth and Seventh Claims.

G. The arbitrator disregarded the amounts of dollar damages.

The contract damages and fraud by Wespac and Christian led directly to damages of over $500,000.00, by the most conservative calculations, and over $9 million by the most liberal calculation (JA 1/0104:8-0107:7; 0137-0138), plus the costs of litigation.

VIII. STATUTORY GROUNDS FOR VACATING THE ARBITRATOR'S SUMMARY JUDGMENT DECISION

A. Statutory authority for vacating the arbitrator's final award.

NRS 38.241(1) sets forth the mandatory ("shall vacate") statutory grounds for vacating an arbitrator's final award. Relevant provisions include:

> 1. Upon motion to the court by a party to an arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if:
> (a) The award was procured by corruption, fraud or other undue means;
> . . . .
> (d) An arbitrator exceeded his or her powers;
> (e) There was no agreement to arbitrate, unless the movant participated in the arbitral proceeding without raising the objection under subsection 3 of NRS 38.231 not later than the beginning of the arbitral hearing.

B. First statutory ground: Wespac procured the award by fraud. (NRS 34.241(1)(a))

The elements of fraud are found in NRS 42.005:

> Definitions; exceptions. As used in this chapter, unless the context otherwise requires and except as otherwise provided in subsection 5 of NRS 42.005:
> 2. "Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person

of his or her rights or property or to otherwise injure another person.

Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007), held

> Intentional misrepresentation is established by three factors: (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance. With respect to the false representation element, the suppression or omission " 'of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist.' "

Wespac and Christian clearly defrauded Garmong by their concealment of the undisputed facts discussed in § VII.B. above. These concealments constitute fraud under the definition of NRS 42.005. Wespac concealed material facts, with the intent to induce Garmong to trust Wespac and Christian, and to pay them money as investment managers, and as a result they purloined management fees from Garmong.

As a separate basis of fraud, Defendants submitted three false Affidavits of Defendant Greg Christian, see § VII.B.7 above and Reply (JA 3/0297:20-0301:11), to induce the Court to refer the matter to arbitration. The Orders (JA 3/0366 and 3/0391) ignored the fraud upon Garmong and upon the Court perpetrated by the three false Affidavits. The First Christian Affidavit (JA 3/0332) falsely swore under oath that Agreement Version 1 (JA 3/0338-0344) was "true, correct, and complete." After prodding by Plaintiff, the Second Christian Affidavit (JA 3/0347-0348) falsely swore under oath that the apparent inconsistencies were simply a word processing error. After yet further pointed inquiry by

Plaintiff, the Third Christian Affidavit (JA 3/0350) falsely swore under oath that the blank-form Confidential Client Profile ("Profile") (JA 3/0353-0365) was "true, correct, and complete" and was part of Agreement Version 1, failed to produce the actual completed Profile referenced in Agreement Version 1, and did not produce the three Exhibits A and three Exhibits B referenced in the Agreement.

Defendants were successful in their strategy of withholding the completed partial Profile (JA 2/0215-0223) from the District Court and this Court earlier in this litigation. They only finally produced it during the arbitration as JA 2/0215-0223 when production suited their purposes, but still concealed the Exhibits A and B, and the complete Profile including completed critical pages 10-11.[3]

As discussed in Garmong Declaration ¶¶ 7-8 (JA 3/0238:24-0239:10), Defendants did not during the course of their business relation with Plaintiff, and have never to this day in the lawsuit, produced an entire, "true, correct, and complete" copy of the Investment Management Agreement ("purported Agreement") including the still-missing pages, the three

---

[3] When Defendants and their counsel first presented the Profile at the outset of the lawsuit as a blank-form document (JA 3/0353-0365), which the Third Christian Affidavit (JA 3/0350) swore was "true, correct, and complete" even though it was blank, it was an 11-page document including pages 10-11 (JA 3/0364-0365–note the original page numbers in the lower right of each page). When Defendants later presented a completed form of the Profile (JA 02/0215-0223), it had only 9 pages. Missing pages 10-11 would have provided critical facts to support Plaintiff's case, but Defendants simply made those pages disappear. This was emblematic of Garmong's dealing with Wespac.

Exhibits A and three Exhibits B referenced in the document, and the completed critical pages 10-11 of the Profile.

C. Second statutory ground: No complete, unambiguous Contract including an arbitration clause was ever made of record; there was no Agreement to arbitrate. (NRS 34.241(1)(e)).

On March 27, 2017, Plaintiff filed with the District Court "Plaintiff's Objection Pursuant to NRS § 38.231(3) and § 38.241(1)(e) that there is no Agreement to Arbitrate; Notification of Objection to the Court." (JA 01/0012-0013). Such a filing is a prerequisite to contesting the agreement to arbitrate under NRS § 34.241(1)(e).

As established at PMPSJ Reply (JA 3/0285:18-25 and 3/0298:5-0301:11), Defendants never submitted a complete copy of the purported Agreement. They never attempted to provide a copy to Plaintiff of any purported Agreement during the course of the relationship, but only after the lawsuit was filed. (JA 4/479:13-16). Defendants argued a purported Contract that they alleged contained a provision to arbitrate. The Contract was to have included an Agreement, a Confidential Client Profile including completed pages 10-11, three different documents confusingly named "Exhibit A" and three different documents confusingly named "Exhibit B. To support this argument, Defendants made of record two different version of the Agreement, two different versions of the Profile, an unauthenticated and unsigned one out of three Exhibits A called for in the purported Contract, and none out

of three Exhibits B called for in the purported Contract. Defendant Christian stated under oath that he was "guessing" that one of the papers Defendants called an Exhibit B was "obviously" an Exhibit A. He blamed the typist for what he characterized as a "typo" error, and the arbitrator accepted this story. (JA 4/624:20-0625:7). Additionally, when all of the different versions were sorted out, they were missing crucial completed pages 10-11 of the Profile, which would have strongly supported Plaintiff's case.

Defendants never made of record a complete Contract, because ¶ 14 (JA 3/0229) of the purported Agreement provides that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties." (Emphasis added). The arbitrator therefore did not have a complete Contract to adjudicate and consequently exceeded his authority.

NRS 38.221(1) requires that the party asserting an agreement to arbitrate, here Defendants, demonstrate a valid agreement that includes an arbitration provision. Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) held:

> NRS 38.045 provides that if a party requests a court to compel arbitration pursuant to a written agreement to arbitrate, and the opposing party denies the existence of such an agreement, the court shall summarily determine the issue. See Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 729, 558 P.2d 517, 521–522 (1976). Since appellant [in the present case Respondent Wespac] set up the existence of the agreement to preclude the lawsuit from proceeding, it had the burden of showing that a binding agreement existed. After reviewing the facts,

> we cannot say that the district court erred in finding that appellant did not sustain that burden.

In the present case, Defendants have never met this burden of "showing that a binding agreement existed." They have never even attempted to meet this burden, other than the three demonstrably false Christian Affidavits.

As discussed at JA 5/0880:8-21, any "agreement to arbitrate" must be a complete contract for any portion of it to be valid and enforceable. NRS 38.221(3). An incomplete collection of paper purporting to be an "Agreement" or contract cannot be enforced. See Dodge Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-4 (1930) ("There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite."); All Star Bonding v. State of Nevada, 119 Nev. 47, 49, 62 P.3d 1124 (2003) ("[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain."); May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite.").

Defendants prepared the incomplete collection of paper they assert is a Contract and forced it on the Plaintiff. Any incompleteness or ambiguity must therefore be interpreted against Defendants' interests. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 (1995).

NRS 38.219(2) requires that the District Court "shall decide whether an agreement to arbitrate exists." NRS 38.219(1) mandates that the District Court may not approve an agreement to arbitrate if there is a ground at law or in equity for revocation of a contract. Incompleteness is such a ground for revocation.

The "Contract" must also be interpreted against Defendants because they refused to provide all of the parts of the Contract, in an unambiguous form. There is no question that Defendants had possession, custody, and control of all of the parts of the alleged Contract, if such ever existed. They prepared the papers, and never gave a copy of them to Plaintiff until the present lawsuit was filed. (JA 4/0478:25-0480:10). The unavailability of material evidence, through destruction or spoilation, results in either an adverse inference or a rebuttable presumption under NRS 47.250(3), against the controlling party. Bass-Davis v. Davis, 122 Nev. 442, 445, 451-453, 134 P.3d 103, 105, 109-10 (2006). In the present case, it is not necessary to determine whether Defendants lost or destroyed the three relevant Exhibits A, the three relevant Exhibits B, and the missing pages 10-11. Defendants did not produce two of the three Exhibits A, any of the three Exhibits B, or the crucial missing pages 10-11 of the Profile, and they are not part of the record. The Court may not infer some content from the missing Exhibits A and Exhibits B in order to sustain the Contract. All Star Bonding, *supra* JA 5/0881:22-0882:7

To enforce an arbitration provision, Defendants had an obligation to place into the

record a complete Contract that unambiguously included all of the pieces–one unambiguous Agreement, one unambiguous Profile, the missing pages 10-11 of the Profile, three separate Exhibits A, and three separate Exhibits B. They did not do so.

IX. NONSTATUTORY GROUNDS FOR VACATING ARBITRATOR'S AWARD

A. The arbitrator's Final Award was arbitrary, capricious, or was unsupported by the agreement, and disregarded the facts or the terms of the arbitration agreement.

Wichinsky v. Mosa, 109 Nev. 84, 89, 847 P.2d 727, 731 (1993) held in respect to an arbitrator's award, " If an award is determined to be arbitrary, capricious, or unsupported by the agreement, it may not be enforced." "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." State v. Eighth Judicial Dist. Court (Zogheib), 130 Nev. 158, 161, 321 P.3d 882, 884 (2014) (internal quotations omitted).

The arbitrator's Final Award was not supported by the facts. The following subsections address specific instances where the arbitrator disregarded the facts.

1. The previously established discussed nonstatutory grounds.

Multiple nonstatutory grounds for vacating the arbitrator's award are discussed in § VI.C. These grounds include, among others, complete disregard of the procedural,

evidentiary, and substantive law of summary judgment, and complete disregard of the law of false statements and concealed facts by a fiduciary.

2. The arbitrator manifestly disregarded the fact that Plaintiff was an elderly person over the age of 60 years, and disregarded the provisions of NRS 598.0933 and 598.0977 that grant special protection to the elderly.

In deciding PMPSJ, the arbitrator disregarded the fact that Plaintiff was over the age of 60; see PMPSJ UMF 12, JA 1/0064:26-28.

A private cause of action is not available under NRS Ch. 598 to everyone. It is available only for persons over age 60 and those with a disability. The disregard of this fact is of special importance because there is a private cause of action under NRS Ch. 598 only for persons over age 60 and persons with a disability. NRS 598.0977.

The arbitrator also disregarded the law that NRS 598.0933 and 598.0977 grant special protection to such persons. PMPSJ, JA 1/0085:17-0086:4.

The arbitrator further disregarded the policy favoring protection of the elderly from Defendants and their ilk. PMPSJ, JA 1/0080:18-0081:1. It is difficult to understand the treatment of the elderly by the arbitrator in the face of statute and case authority to the contrary.

3. The arbitrator disregarded the reprehensible preying of Defendants upon the elderly.

The arbitrator disregarded the special protection against those who prey upon the elderly granted by the Nevada legislature in NRS 598.0933 and 598.0977, and the case authority. (PMPSJ 1/0080:18-0081:9). Plaintiff was 61 years old when Defendants first started manipulating him. At that time he was very specific about disclosing his age, and that he needed financial guidance to conserve and protect his savings for retirement. Profile, JA 1/0216 and 0223. The arbitrator disregarded these special circumstances. Plaintiff was a perfect target; he was elderly, he had worked hard all his life and saved for his retirement, and he had enough saved to make the Defendants' efforts worthwhile.

Courts have taken a special interest in protecting the elderly from physical and financial abuse. See, for example, Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043 (2000) and Estate of Wildhaber ex rel. Halbrook v. Life Care Centers, 2012 WL 5287980 (D. Nev. 2012). As the U.S. Supreme Court has stated in Washington v. Glucksberg, 521 U.S. 702, 731 (1997), "[T]he State has an interest in protecting vulnerable groups-including the poor, the elderly, and disabled persons-from abuse, neglect, and mistakes."

In Parsons v. First Investors Corp., 122 F.3d 525, 530 (8th Cir. 1997), the Eighth Circuit quoted with approval the district court in upholding punitive damages against those

who, like Defendants, prey especially on the elderly: "Fraudulent representations which put the life savings of the elderly at risk are reprehensible and deserve punishment." Parsons might have been speaking to the facts of the present case, where Defendants established trust by a series of fraudulent representations, thereafter to recklessly dissipate the life savings of an elderly person. All of this authority was known to, and disregarded by, the arbitrator, see PMPSJ JA1/0080:18-0081:1.

To induce him to entrust a portion of his life savings, to be used for his retirement, Defendants concealed their misdeeds from Plaintiff, see UMF 13-20 at PMPSJ JA 1/0065:1-0066:10. Never once did Defendants notify Plaintiff that they would not, or could not, manage his accounts as he had instructed them. (UMFs 6,7 at JA 1/0063:8-0064:8). In a letter of September 30, 2008 (PMPSJ JA 1/0232), when under Defendants' fiduciary management Plaintiff's retirement accounts had lost over $500,000.00 in capital value in a year, Defendant Christian blithely informed Plaintiff that he knew all along how to have avoided the wasting of Plaintiff's life savings: "Go to 100% cash" for the duration of the decline in the stock markets. But he did not do that, contrary to his contractual, fiduciary, and agency duties. Mr. Christian was too busy running his conflicting business, Fusion, to pay attention to Garmong's precipitous losses.

The arbitrator disregarded these facts, and the violations resulting from the concealing of these facts by Defendants.

B. The arbitrator manifestly disregarded the governing statutory and case-authority law.

The arbitrator manifestly disregarded and ignored the well-established evidentiary and substantive law in multiple areas. Plaintiff does not contend that the arbitrator made an error of law, because it is apparent that he did not apply the governing law at all. In the present case, the arbitrator ignored the law known or communicated to him. Plaintiff again emphasizes that he is not disputing the arbitrator's interpretation of the law. There is no interpretation to dispute, only disregard. The arbitrator ignored the law and did not mention it at all. Such manifest disregard of the law is a basis for vacating the arbitrator's Final Award on PMPSJ.

As discussed in §VI.C. above, the arbitrator manifestly disregarded the law, which he already knew or had communicated to him in PMPSJ. The "concrete evidence" of intent to disregard is found in the two Orders (JA 3/0366 and 3/0391), where the procedural law is mentioned but not followed, and the evidentiary and substantive law are not mentioned at all.

X. ATTORNEYS FEES

U.S. Design & Const. Corp. v. International Broth. of Elec. Workers, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002) held: "A district court is not permitted to award attorney fees or costs unless authorized to do so by a statute, rule or contract." See also Henry Prods., Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998). The first step of the inquiry into

the award of attorneys' fees and/or costs is whether there is a statute, rule, or contract applicable to this arbitration that authorizes an award attorneys' fees and costs.

Wespac sought an award of attorney's fees based on NRCP Rule 68. Pursuant to JAMS Rule 24, the Order of August 11, 2017, and the Agreement of the parties expressed in the Order of August 11, 2017 (JA 1/0014:17-20), NRCP Rule 68 was excluded from the set of rules governing the arbitration.

There was no statute, rule or contract term authorizing an award of attorney's fees under Rule 68 in the arbitration.

A. The arbitrator disregarded the JAMS rule providing that the parties and the arbitrator may agree on the rules governing the arbitration, and that the arbitrator "shall" be guided by those rules agreed upon by the Parties.

The arbitration was governed in part by the rules of JAMS. JAMS Rule 24 provides in relevant part:

> (c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.
>
> (g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable

law.

(Emphasis added).

There was an agreement between the parties (JA 1/0014:17-20) listing a number of civil rules to be included in the governing law of the arbitration, but excluding Nevada Rule of Civil Procedure 68 from the rules governing the arbitration. Thus, the arbitrator "shall be guided" by those rules agreed upon by the Parties. Adherence by the arbitrator to the agreement of the parties is mandatory. The arbitrator had no choice but to follow the "rules of law agreed upon by the Parties." Instead, he elected to disregard the rules of JAMS and the agreement of the parties.

Notably, the original Agreement (JA 1/0224-02/230) had no provision for fee shifting.

B. The arbitrator disregarded the fact that at the outset of arbitration, the parties agreed, and the arbitrator ordered, that NRCP 68 would not be included in the governing rules of the arbitration.

During the course of the arbitration process, and as permitted by the rules, the parties and the arbitrator agreed that only certain of the Nevada Rules of Civil Procedure would be applied to govern the arbitration, and the arbitrator also entered an order to the same effect. On August 11, 2017, after a telephone conference between the attorneys for the parties and the arbitrator, in which the parties were heard, the arbitrator entered a "Discovery Plan and Scheduling Order" ("Scheduling Order", JA 1/0014:17-20). One purpose of this Scheduling

Order was to record and give notice to the parties and to the arbitrator exactly what rules would govern the arbitration. The Scheduling Order, stated,

> "The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure and the deadlines for filing Oppositions and Replies found in Washoe District Court Rule 12 will generally govern this case unless the arbitrator rules otherwise."

The parties did not agree that fee shifting pursuant to NRCP 68 would be part of the arbitration and there was no other applicable law.

Scheduling Order at 2:23 also entered an order to the same effect, stating, "IT IS SO ORDERED." followed by the arbitrator's signature.

In their agreement, and as ordered by the arbitrator, there was no provision that NRCP Rule 68 would be applicable law in the arbitration. NRCP Rule 68 is therefore not "applicable law."

This aspect of the Scheduling Order, expressly stating the rules that would govern the arbitration, was not altered or amended by any subsequent orders issued by the arbitrator. Indeed, this aspect of the Scheduling Order was not ever altered or amended by the arbitrator, nor did the parties ever change their contractual agreement as stated in the Scheduling Order.

Plaintiff adhered to the agreement and Scheduling Order throughout the period of the arbitration. Wespac decided that it would break the agreement with Garmong and violate

the arbitrator's Order. Wespac served an Offer of Judgment pursuant to NRCP Rule 68 (JA 1/0017-0018) in the arbitration on September 12, 2017, almost exactly one month after they agreed that Offers of Judgment pursuant to NRCP 68 would not be included within the scope of rules governing the arbitration, and the arbitrator had so ordered. This dishonest approach was consistent with Wespac's prior dealings. Wespac did not, then or later, seek to modify their agreement with Garmong, or move the arbitrator for relief from the terms of the Scheduling Order so as to include NRCP 68 in the rules governing the arbitration. Plaintiff did not accept Wespac's Offer of Judgment under NRCP 68, because the parties had agreed, and the arbitrator had ordered, that NRCP 68 would not be applicable to this arbitration.

On February 15, 2019, after an Interim Award in their favor, Wespac filed a Motion for Attorney Fees pursuant to Rule 68 and Costs (JA 4/0666-0694). This Motion was based solely on their purported Offer of Judgment of September 12, 2017. Garmong filed an Opposition (JA 04/0695-0726) based upon several grounds, primarily that the rules of the arbitration did not permit offers of judgment.

The Scheduling Order provided that only certain enumerated rules of the NRCP would "govern this case unless the arbitrator rules otherwise." Neither the Final Award nor any other order of the arbitrator attempted to rule that the Scheduling Order should be modified to add Rule 68 to the enumerated rules governing the arbitration, and that Rule 68 should be retroactively made part of the rules governing the arbitration. Had the Final

Award attempted to make such a finding, the retroactive nature of the arbitrator's attempt to add Rule 68 would have been clear. And, in any event, the arbitrator could not alter the terms of the contractual agreement between the parties.

The arbitrator's award is truly outrageous. After the parties agreed, and the arbitrator ordered, that "The parties have agreed that only Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, 37 (and 56) of the Nevada Rules of Civil Procedure" would govern the case, as set out in the Scheduling Order, the arbitrator sought unilaterally, without notice, and retroactively to alter that agreement of the parties, and his own Order to add Rule 68, twenty months after the parties had made their agreement and the Scheduling Order was entered.

C. The arbitrator disregarded JAMS Rule 24's limitation of the award of attorney's fees to grounds agreed to by the parties, and that the parties had not agreed that NRCP 68 would be a governing rule of the arbitration.

The arbitrator had no discretion to grant attorneys fees contrary to the agreement of the parties. JAMS Rule 24(c) states, "The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement." JAMS Rule 24(g) states, "The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law."

Here, the parties agreed to the governing rules of the arbitration, and those rules did

not include NRCP Rule 68.

Conversely stated, nowhere did the parties agree that Rule 68 would have effect in the arbitration.

In the arbitrator's Final Award of April 11, 2019, the arbitrator granted Wespac's Motion, and awarded Wespac attorney's fees based upon NRCP 68 that was not part of the governing law of the arbitration. JA 5/0736-0737.

D. The arbitrator disregarded the fact that the Order set forth separate (1) agreement between the parties and (2) an order of the arbitrator that NRCP 68 would not be part of the governing law of the arbitration. Neither subsequently changed.

The paragraph quoted *supra* from the Scheduling Order included both an agreement between the parties and an order of the arbitrator, each setting forth the governing rules of the arbitration as permitted by JAMS Rule 24. The agreement between the parties could be modified only by a subsequent new agreement between the parties, and there was no such new agreement. The arbitrator has no authority to change the agreement between the parties contrary to the JAMS rules. The arbitrator does have the authority to change his own order, but he never did so, nor did he give Garmong notice that he intended to do so. The record contains no evidence of the arbitrator ever ruling that NRCP 68 would be included in the rules governing the arbitration.

E. The arbitrator disregarded the legal principle that parties must be able to trust the representations made by the arbitrator.

As noted, the arbitrator ordered, and the parties agreed, as to the provisions of NRCP that would govern the arbitration. NRCP 68 was not included in that list.

Courts have held that litigants must be able to trust and rely upon the pronouncements of judges, which presumably includes arbitrators. Nagib v. Conner, 192 F.3d 127 at *4 (5th Cir. 1999) held:

> Litigants need to be able to trust the oral pronouncements of district court judges," United States v. Buchanan, 59 F.3d 914, 918 (9th Cir.1995), and requiring district courts to refrain from providing mis-information, unlike affirmatively requiring them to provide information, does not impose a significant burden.

Similarly, Buchanan, 59 F.3d at 918 held, "Litigants need to be able to trust the oral pronouncements of district court judges." This presumably includes written orders as well, and applies to arbitrators as well as judges.

Naively, Garmong trusted the written and oral pronouncements of the arbitrator, as well as the contractual agreement with the Defendants.

F. The arbitrator disregarded the fact that Plaintiff should have prevailed in PMPSJ and the hearing under the facts and law, and that there could be no award of attorney's fees to Wespac.

The arbitrator disregarded the fact Plaintiff should have prevailed at both the PMPSJ

and the hearing, and that therefore Defendants should not have any basis for an award of attorney's fees on any theory.

XI. SUMMARY AND CONCLUSION

The arbitrator disregarded every applicable principle of procedural, evidentiary and substantive law. He also violated the mandatory statutory requirements of NRS 38.241(1). Under Clark County, the arbitrator's orders on summary judgment and award of fees must be reversed.

The Defendants used falsification and concealment to gain a fiduciary position with Plaintiff, and then violated that trust to waste a large amount of his retirement savings. In ruling on PMPSJ, the arbitrator disregarded all of the UMFs and the governing law, and denied PMPSJ on the argument that he needed to conduct a "merits evidentiary" hearing as part of a summary judgment proceeding to assess credibility. The arbitrator disregarded the legal authority that such a "merits hearing" is strictly forbidden by law, by both the US Supreme Court and this Court.

Appellant Garmong respectfully requests that this Court reverse the judgment and award of attorney's fees entered by the District Court, vacate the arbitration award and attorney's fees entered after the award and remand the case to the District Court for trial on

the merits.

DATED this 27th day of May, 2020.

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

Counsel for appellant Garmong

ATTORNEY'S CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **13,342** words.

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

of Appellate Procedure.

DATED this 27th day of May, 2020.

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

Counsel for Appellant