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IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY O. GARMONG,

Appellant, Case No. 80376

v.

WESPAC; GREG CHRISTIAN,

Respondents.
_____/

Appeal from the Second Judicial District Court

RESPONDENTS' ANSWERING BRIEF AND REQUEST FOR REMAND FOR THE AWARD OF ATTORNEY'S FEES AND COSTS INCURRED BY RESPONDENTS ON APPEAL

NRAP 26.1 DISCLOSURE

The undersigned counsel of record hereby certifies that there are no persons or entities as described in NRAP 26.1(a), however, the undersigned counsel of record certifies that the following qualify as an entity and person whose identities must be disclosed pursuant to the provisions of NRAP 26.1. These representations are made in order that the judges of this Court may evaluate the possible need for disqualification or recusal.

1. WESPAC Advisors, LLC, *Respondent*;
2. Greg Christian, *Respondent*; and
3. Thomas C. Bradley (Nevada State Bar No. 1621), *Counsel for Respondents*.

Dated this 23rd of June, 2020.

By /s/ *Thomas C. Bradley*
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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. 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.[1] 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. 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, colon and the document number found in the lower right corner of each page.

ROUTING STATEMENT

This is an appeal from the confirmation of an Arbitration Award in favor of the defendants/respondents and from a confirmation of an Arbitration Award of 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).

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I. INTRODUCTION

Appellant Gregory Garmong, a vexatious litigant, brought a frivolous case against Respondents Wespac and Greg Christian essentially alleging Respondents failed to make reasonable investment recommendations. The evidence completely contradicted Appellant's claims and showed that Respondents acted responsibly and prudently at all times.

Retired Judge Philip Pro was mutually selected by the parties to arbitrate the case and determined that Appellant's claims lacked merit and awarded Respondents the entirety of their legal fees and costs. District Court Judge Lynn Simons confirmed Judge Pro's arbitration award, including the award of attorney's fees, and found Appellant's arguments to be without merit. In this appeal, Appellant fails to meet his burden of proving by clear and convincing evidence that Judge Pro's Arbitration Award should be vacated. Notably, Appellant elected to include only very limited portions of the Arbitration hearing transcript. This appears to be a transparent attempt to prevent this Court from reviewing all of the evidence adduced at the Arbitration hearing.

II. STATEMENT OF THE ISSUES PRESENTED

1. Whether Appellant failed to meet his burden of proving, by clear and convincing evidence that the Arbitrator's denial of Appellant's Motion for Partial Summary Judgment is a legally adequate ground to vacate the Arbitration Award?

2. Whether Appellant failed to meet his burden of proving, by clear and convincing evidence, that the Arbitrator intentionally disregarded material facts or intentionally refused to follow the law?

3. Whether Appellant failed to meet his burden of proving, by clear and convincing evidence, that he did not execute an enforceable Arbitration Agreement?

4. Whether Appellant failed to meet his burden of proving, by clear and convincing evidence, that the Award of Attorney's Fees violated Nevada Law?

5. Whether this Court should remand this case to the district court for the award of attorney fees and costs incurred on appeal?

III. STATEMENT OF THE CASE

This case has a long and sordid history. In July 2005, Appellant Gregory Garmong, who was then a licensed California attorney, met with Defendant Greg Christian, an investment advisor at Respondent WESPAC Advisors, LLC, to discuss the possibility of Appellant becoming a client of Respondents.

On or about August 31, 2005 Appellant and Respondents Greg Christian and WESPAC entered into an "Investment Management Agreement" ("Agreement") whereby Appellant retained Respondents as his investment advisor. RA 2:0315-0323.[2] The Agreement contained an arbitration provision which provided, in

[2] References to Respondent's Appendix ("RA") include the volume number, colon and the document number found in the lower right corner of each page.

pertinent part, that any disputes between the parties would be resolved by arbitration in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS"). *Id.*

On or about March 9, 2009, Appellant terminated the services of Respondents.

Over 3 years after terminating his relationship with Respondents, on May 9, 2012, Appellant filed a *Complaint* with the District Court alleging Respondents had breached the Investment Management Agreement. RA 1:0017. In his *Complaint*, Appellant also alleged claims of breach of Nevada Deceptive Trade Practices Act, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, malpractice, and negligence. JA 1:1-9. In his prayer, Appellant sought general and special damages, punitive damages, and attorney's fees and costs. *Id.*

In response, Respondents filed a *Motion to Dismiss and to Compel Arbitration*, in which they requested dismissal of the *Complaint* pursuant to NRCP 12(b)(1) and an order compelling arbitration pursuant to NRS 38.221. RA 1:0017.

On October 29, 2012, Appellant filed an *Opposition to Defendants' Motion to Dismiss and to Compel Arbitration*. RA 1:0017. In his *Opposition*, Appellant claimed that because the arbitration clause of the Agreement was unconscionable, he would not arbitrate his disputes with Respondents. On December 3, 2012, Respondents filed a reply to Appellant's *Opposition*. *Id.*

On December 13, 2012, the District Court filed an Order in which it found that "the arbitration agreement contained in paragraph 16 of the Investment Management Agreement entered into by the parties is not unconscionable and is therefore enforceable." RA 1:0017. As a result of this finding, the District Court ordered the parties to engage in binding arbitration and stayed further judicial proceedings pending the arbitration. *Id.*

On December 31, 2012, Appellant filed a document entitled *Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13, 2012 Compelling Arbitration.* RA 1:0016. Respondents opposed the *Combined Motions* on January 9, 2012, arguing that because Appellant's *Motion for Rehearing* offered no new legal or factual matters for the District Court to consider, Nevada law required the Court to deny the *Combined Motions*. Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted."). RA 1:0016. In addition, Respondents requested an award of reasonable attorney's fees they had expended in opposing the *Combined Motions*. *Id.*

On January 13, 2014, the District Court filed an *Order for Response or Dismissal* in which it ordered the Appellant to file a status report within thirty days. The District Court further informed the Appellant that if there was no response to its

order, the case would be dismissed with prejudice. RA 1:0016.

On February 3, 2014, over a year after Respondents had filed their *Opposition* to Appellant's *Motion for Rehearing*, Appellant filed a *Reply*. RA 1:0016.

A week later, Appellant filed a *Response to Order of January 13, 2014*. RA0016. In his *Response*, Appellant explained that "If the motion for rehearing is denied the Appellant *will immediately move forward with arbitration under the terms of the Investment Management Agreement* and concurrently with a petition for writ of prohibition or mandate to vacate the order directing arbitration." (emphasis added). RA 1:0016.

On April 2, 2014, the District Court denied *Appellant's Motion for Rehearing*, stating that "the Appellant's motion is substantively the same as his original opposition [and] the Appellant has not raised any new issues of fact or law in his present motion." RA 1:0016. The District Court did not address Respondents' request for attorney's fees in its Order. *Id.*

About two months later, on June 20, 2014, Appellant filed a *Petition for Writ of Mandamus or Prohibition* with the Supreme Court of Nevada, in which Appellant urged the Court to reverse the District Court's order mandating arbitration. Respondents were thereafter directed by the Court to answer the *Petition*, and on August 15, 2014, Respondents filed an *Answer*. Appellant filed a *Reply* on September 3, 2014 and on December 12, 2014 the Court filed an *Order Denying*

Petition for Writ of Mandamus or Prohibition.

Two weeks later, Appellant filed a *Petition for Rehearing* with the Nevada Supreme Court. The *Petition for Rehearing* was denied on February 27, 2015.

On March 16, 2015 Appellant filed a *Petition for En Banc Reconsideration*. Appellant's *Petition* was denied on April 22, 2015.

On February 21, 2017, the District Court appointed the Honorable Phillip M. Pro as arbitrator. RA 1:0013.

Appellant then filed an objection to the court ordered arbitration pursuant to NRS 38.231(1)(e) and NRS 38.231(3) in which he claimed that there was no agreement to arbitrate. RA 1:0013.

On June 30, 2017, the District Court declined to dismiss this case pursuant to NRCP 41(e) and instead again ordered the parties to proceed with arbitration. RA 1:0012.

On August 11, 2017, Arbitrator Hon. Philip M. Pro issued a *Discovery Plan and Scheduling Order*. JA 1:14. In addition to setting forth discovery rules and deadlines for the arbitration proceeding, the *Scheduling Order* stated that "[w]ithin 20 days after the entry of this Discovery Plan and Scheduling Order, the plaintiff may file an amended complaint." *Id.* In accordance with the Arbitrator's *Order*, both parties thereafter filed opening briefs in the arbitration proceeding on September 18, 2017. JA 1:31. However, Appellant simultaneously filed an *Amended Complaint*

with the District Court. JA 1:20. In his *Amended Complaint*, Appellant repeated claims previously made in his initial *Complaint* and added additional claims. *Id.* Nowhere in his *Amended Complaint* did Appellant refer to the pending arbitration or to the prior orders of the District Court regarding arbitration. *Id.* In response to this new pleading, Respondents' attorney requested that the parties stipulate that the *Amended Complaint* be withdrawn, but Appellant refused to do so.

On October 11, 2017, Respondents filed their *Motion to Strike Plaintiff's Amended Complaint.* RA 1:0012. Appellant filed his *Opposition* on October 30, 2017. Respondents filed their *Reply* on November 6, 2017. *Id.* The District Court granted *Defendants' Motion to Strike* through its Order dated November 13, 2017. RA 1:0011.

On December 4, 2017, Appellant again ignored the clear directive of the District Court and filed his *Motion for Leave to Reconsider and Motion for Reconsideration of Order of November 13, 2017, Granting Defendants' Motion to Strike.* RA 1:0011. On May 31, 2018, the District Court denied Appellant's *Motion for Reconsideration*. *Id.*

Six years after the State Court first ordered the parties to engage in binding arbitration, the arbitration hearing was finally held on October 16, 17, and 18, 2018. On January 12, 2019, Judge Pro issued an "Interim Award" wherein he ruled that Mr. Garmong failed to prove any of his claims and permitted WESPAC and Mr.

Christian to file a motion for attorneys' fees and costs. JA 4:655-665. After this issue was fully briefed, Judge Pro issued a "Final Award" and awarded $111,649.96 as reasonable attorneys' fees and costs. JA 5:727-738.

On April 15, 2019, Respondents petitioned the District Court to confirm Judge Pro's Arbitration Award. JA 5:784-819, RA 1:0009. Appellant Greg Garmong filed three (3) Motions to Vacate and filed an Opposition to Respondents' Petition to Confirm. JA 5:820-875, RA 1:0006-0009. Respondents incurred substantial fees seeking confirmation of the Arbitration Award. JA 7:1131-1141.

On August 8, 2019, the District Court confirmed the Arbitration Award including the Arbitrator's award of fees and costs. JA 6:1095-1111. Thereafter, Respondents filed another Motion for the award of Attorney's Fees incurred in confirming the Arbitration Award. RA 1:0002. The District Court elected to decide that motion following the appeal. RA 1:0001.

IV. STATEMENT OF THE FACTS

A. Appellant's attacks against Judge Pro for intentionally refusing to follow the law are wholly without merit.

Appellant Gregory Garmong attacks both Judge Pro's judicial skills and character throughout his Opening Brief. Dr. Garmong's attacks on Judge Pro are baseless and without merit. Appellant offers no explanation why a distinguished jurist would intentionally refuse to follow the law and intentionally disregard facts.

The District Court reviewed Judge Pro's Curriculum Vitae ("CV") prior to

selecting Judge Pro to serve as the arbitrator in this case. The CV demonstrated that Judge Pro had a distinguished federal judicial career spanning nearly 35 years, during which he earned a reputation for active case management, fairness, preparation, decisiveness, and a deep understanding of the law. As a United States District Judge for more than 27 years, Judge Pro presided over a full range of cases involving intellectual property, commercial disputes, antitrust, securities, employment, class actions, multi-district litigation, and many others.

B. Mr. Garmong is a vexatious litigant who is also wealthy, financially sophisticated, and well educated.

Mr. Garmong has filed frivolous lawsuits against (1) Nevada Supreme Court Justices Hardesty, Pickering, Gibbons, Cherry, Douglas, Saitta and Parraguirre in 2016; (2) all members of the Tahoe Regional Planning Agency (TRPA) in 2017, (3) Lyon County Board of Commissioners, Smith Valley Fire Protection District, and Verizon Wireless in 2017; (4) Nevada Energy in 2016; (5) the Silverman Law firm who previously represented him in 2011; (6) the Maupin, Cox, Legoy Law firm who previously represented him in 2017; (7) his building contractor in 2008; and (8) his former wife in different cases in 2010, 2011, 2012, and 2017. RA 2:00163-0305. Sadly, this list is not exhaustive. This Court should take judicial notice that Appellant never won any of these cases and that his claims attacking Judge Pro are similar to Appellant's attacks against the Nevada Supreme Court Justices.

Appellant is not just a vexatious litigant, he is also a wealthy, financially

sophisticated, and well-educated individual. When he began to invest with the Respondents, Mr. Garmong had a net worth of approximately ten million dollars ($10,000,000). RA 1:0034. He self-managed his three million ($3,000,000) dollar municipal bond portfolio utilizing "bond ladders" as his investment strategy. RA 1:0028, RA 1:0020-0021, RA 1:0075. The Respondents were never asked to manage his three-million-dollar bond fund. RA 1:0132. At the arbitration hearing Mr. Garmong also testified that, "I have a Ph.D. also in metallurgy and material science. I have a juris doctor law degree from UCLA and an MBA, master of business administration, from UCLA." RA 1:0026-0027.

C. Mr. Garmong's suit was frivolous.

Mr. Garmong's suit was frivolous, unreasonable, and without a factual foundation. Moreover, the claims for breach of implied warranty and unjust enrichment were without legal foundation. Instead, Mr. Garmong's testimony reflected that his claims were transparently vindictive and were made in bad faith in order to harass Mr. Christian and Wespac. A practice that he continues to this day.

In their Motion for Attorney's Fees, the Respondents attached a Declaration from a national securities arbitration expert, Bruce Cramer, who stated:

> "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**

<u>that Mr. Garmong's case against Wespac and Mr. Christian to be one of the most frivolous cases that I have encountered.</u>"

JA 4:685 (emphasis added).

D. Wespac invested Mr. Garmong's accounts in a very conservative manner.

Mr. Cramer, a nationally recognized securities expert, was asked the following questions and gave the following answers.

> **Question**: So in August of 2007, if Mr. Garmong had 1 million in equities, 1 million in cash and then 3 million in muni bonds, would you consider that to be a conservative or a moderate or an aggressive risk portfolio?
>
> **Answer**: Given the totality of the portfolio? That would be a conservative portfolio.
>
> **Question**: Is it also appropriate to take into account the fact that he had real estate investments of approximately 5 million outside of his stocks and bonds and cash?
>
> **Answer**: In evaluating the wherewithal of the investor, absolutely you would.
>
> **Question**: And would that make his 1 -- if he's worth 10 million dollars and he only has 1 million invested in equities, would you describe that as a conservative investment?
>
> **Answer**: Yes. That would be the -- that would be the conservative end of the spectrum, yes.

RA 1:0075.

/ / /

E. Wespac created and maintained a safe and suitable portfolio.

Mr. Cramer analyzed the accounts and determined that Wespac created a well-diversified portfolio. RA 1:0095. In fact, Mr. Cramer determined that the portfolio had less risk than a portfolio with a 60% S&P500 and a 40% Barclays Bond mix. RA0089. Mr. Cramer also testified that once Wespac moved the accounts into a 50% cash position then the accounts were even more conservative because half the account was not subjected to any risk. RA 1:0091.

F. Mr. Garmong closely monitored and participated in the investment strategy decision making.

Mr. Garmong accurately described his relationship with Wespac regarding the management of his accounts when he testified that, "So this expresses the way we worked together. I raise a problem, he contacts me, we talk it over, and then he takes action based on what we decide." RA 1:0046.

When asked about whether Mr. Christian ever recommended that Mr. Garmong go to 100% cash, he testified that, "I did not, because we were conversing all the time about these accounts, and he knew exactly where he stood, exactly how he was invested. He was looking at performance reports, he was calculating his own performance. ***He was in the driver's seat with me, he knew what was going on.***" RA 1:0159 (emphasis added.).

Wespac also communicated regularly with Mr. Garmong through quarterly meetings, correspondence, ... and phone calls. RA 1:0048, RA 1:0143, RA 1:0156.

In other words, Mr. Garmong understood and accepted the risks of his investments.

G. Mr. Garmong's damage calculations were completely without merit.

Appellant Gregory Garmong requested that the arbitrator award him "damages" based on the decline in the value of his Wespac accounts for a very limited period during the life of his relationship with Respondents Wespac and Greg Christian. More specifically, Mr. Garmong sought damages for the decline in value of his portfolio during the worst stock market upheaval in the country's history since the Great Depression – from November 2007 (the exact top in the stock market) through February 2009 (the exact bottom in the stock market). RA 1:0090.

Mr. Garmong asked for these damages even though (1) his accounts were profitable during the entirety of the Wespac relationship, (2) he did not sell the securities at Wespac about which he complains, and, instead, (3) he held onto those securities in an account at Fidelity Investments - and still holds those securities today. The Wespac securities doubled in value since Mr. Garmong terminated his relationship at Wespac through April 2014, the last day of permitted discovery for the Fidelity accounts - and, since the stock market, as measured by the Dow Jones Industrial Average, has appreciated by more than 300% since April 2014, Mr. Garmong has undoubtably experienced significant further gains in his Wespac portfolio.

Respondent's expert, Mr. Cramer, was asked, "Would it be appropriate to

ignore the stock dividends and bond interest that was paid into an account in calculating net out-of-pocket damages?" and he responded, "No. That's part of the investment return…There's two sources of gain: Income and capital." RA 1:0091. Mr. Garmong's damages only report what Mr. Cramer called the "trading P&L." Mr. Cramer testified that, "So we would add the dividends and interest. And "fees and other," you would subtract that, because it was what was paid out for the maintenance of the account." RA 1:0087.

Mr. Garmong's response to Mr. Cramer's explanation shows that his damage claims are frivolous. He testified that:

> "… if we look at this month of December 2007, there's not a single thing that happened in this account that's attributable to Wespac. They didn't buy, they didn't sell. All of this is -- all of this money and income is attributed to my capital. And when I was thinking about this, Judge, **what went through my mind is this sounds like a quasi-Marxian argument. It's something that Karl Marx would've said about who gets the benefits of capital; is it the capitalist or is it the workers?** Not that I'm in that camp, but that's what went through my mind. To me, it seems that what Wespac is suggesting and the net out-of-pocket analysis is suggesting is that the benefit of my -- the benefits realized by my capital should be attributed to the investment advisor.

RA 1:0112.

H. Mr. Garmong did not lose money.

Mr. Cramer testified that Mr. Garmong's Wespac accounts were profitable – "And so, as you can see, there's those four different accounts; the 0713, the No. 1 account, lost $147,865.06. The other three were profitable to the tune that you see

there. Then you add all those numbers together, you end up, for the whole relationship during this time frame, a net profit of $5,403.88." RA 1:0087.

Since Mr. Garmong did not sell the securities in his Wespac accounts and, instead, transferred them to Fidelity, Mr. Cramer testified about the performance of those securities at Fidelity through April 2014. "So the stocks that Mr. Garmong held in his taxable account at Wespac are the ones that got transferred to Fidelity and it's those stocks that you analyzed?" RA 1:0095.

"Correct. It was that portfolio that was analyzed that we had statements from July of '09 to April of 2014. And those stocks that were held at Wespac, did they appreciate while they were held at Fidelity? Yes. They did. And again, going through the analysis data, you can see the net out of pocket in that case was a $290,400 profit. Okay. And that profit was accounted for, again going to this trading and dividends and so forth, $203,000 of that profit was the trading profit or appreciation value of the securities, and $86,271 was the income produced." RA 1:0095.

In sum, the evidence showed Wespac assiduously performed their fiduciary duty to prudently manage Mr. Garmong's accounts and, remarkably, even generated a small profit during the life of the accounts at Wespac – September 2005 through March 2009. The profit is remarkable as had Mr. Garmong invested in the S&P 500 during this same period he would have lost close to $1,000,000. Had Mr. Garmong invested in a conservative, balanced portfolio of 60% stocks and 40% bonds he

would have lost more than $400,000. RA 2:0324-327.

The profit was generated by Wespac's reallocation of the nearly 100% equity portfolio that Mr. Garmong transferred to be managed by Wespac into a better performing, better dividend paying portfolio and, most importantly, by consistently reducing the risk and equity exposure of the portfolio by selling securities to raise cash. Mr. Cramer testified that the high level of cash in the account was not only conservative, "but in the gradient of conservative, it's very, very, very conservative." RA 1:0091.

The decline in the Wespac portfolio from 2007 through 2009 was caused solely by the devastating financial crisis and world stock market decline at that time and not by any wrongdoing by Respondents. RA 1:0158. Therefore, Mr. Garmong's case was brought in bad faith to harass Greg Christian.

I. Judge Pro's Arbitration Award

The Arbitrator's Final Award ("Judge Pro's Award" or the "Award") stated in the preliminary paragraphs that, among other things, "Although this decision is narrative in form and does not employ a format which states specific 'factual findings' and 'conclusions of law' in numbered or headed paragraphs, it necessarily reflects my factual findings and legal conclusions flowing therefrom ***by a preponderance of the testimonial and documentary evidence*** adduced at the arbitral hearing." JA 5:728 (emphasis added).

The Award concluded that, "The evidence adduced at the arbitral hearing fails to show that Christian breached ***any duty*** to consider Garmong's financial condition or investment objectives, or otherwise failed to fulfill his responsibilities as an investment advisor and manager during Garmong's relationship with Wespac." JA 5:734 (emphasis added).

The basis for the Award could have stopped there as JAMS arbitrators are only required to provide "a concise written statement of the reasons for the Award." *See* JAMS Rule 24(h). However, in this case, Judge Pro provided an eleven-page explanation of his factual findings, including factual findings supporting his conclusions of law, some of which are quoted from the Award as follows:

- Dr. Garmong holds a Ph.D. in metallurgy and material science from MIT, a JD from UCLA Law School, and, most relevant to this case, a MBA from UCLA.

- Mr. Christian has been a financial advisor since 1987.

- Wespac Advisors and Mr. Christian have been members of the Charles Schwab Advisors Network for many years.

- After nearly five years of litigation in the Second Judicial District Court, on February 8, 2017, the Parties entered into a stipulation to proceed to arbitration pursuant to paragraph 16 of the Investment Management Agreement.

- [Dr. Garmong's] express investment objective [was] to "moderately increase his investment value while minimizing potential for loss of principal."

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

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

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

- Garmong's acumen in understanding securities investments is further reflected in his personal editing of Wespac's Client Profile; his use of the "laddering" technique he employed in connection with his investments in the bond market; and his ability to understand the financial reports he received regularly from Wespac and Charles Schwab relating to his investment portfolio.

- Christian testified that he maintained regular written and oral communication with Garmong throughout most of their professional relationship, and they personally met quarterly to review the status of Garmong's investments through Wespac. Christian characterized Garmong's ability to understand what was happening as "Better than most." The evidence adduced clearly supports that view.

- The testimony of expert witness Bruce Cramer shows that Christian and Wespac employed a conservative "growth and income" investment strategy throughout the relationship with Garmong, which [Mr. Christian] made more conservative over time to accommodate Garmong's circumstances and the marketplace.

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

- 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."

- Defendants Wespac and Christian offered several exhibits reflecting meaningful communications regarding the status of Garmong's investments after October 2007.

- The foregoing exchange of communications between Garmong and Christian from late 2007 throughout 2008 compel the conclusion that although Garmong was understandably upset about losses he experienced during the decline in the stock market during that period, Christian and Wespac did not fail to abide Garmong's investment objectives and instructions, that Christian could not have avoided all loss of capital without converting Garmong's accounts to 100% cash, as he offered in September 2008, and that Garmong did not instruct Christian to move all of his accounts to 100% cash.

- 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.

JA 5:727-738.

V. LEGAL ARGUMENT

A. Standard of Review

The Nevada Court of Appeals recently summarized the correct standard of review in the confirmation of arbitration awards:

> This court reviews a district court decision to confirm an arbitration award de novo. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). But the scope of the district court's review of an arbitration award (and, consequently, our own de novo review of the district court's decision) is extremely limited and is "nothing like the scope of an appellate court's review of a trial court's decision." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004). "A reviewing court should not concern itself with the 'correctness' of an arbitration award and thus does not review the merits of the dispute." *Bohlmann v. Printz*, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004) (*quoting Thompson v. Tega–Rand Int'l.*, 740 F.2d 762, 763 (9th Cir. 1984)), overruled on other grounds by *Bass–Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006).
>
> Rather, when a contractual agreement mandates that disputes be resolved through binding arbitration, courts give considerable deference to the arbitrator's decision. Judicial review is limited to inquiring only whether a petitioner has proven, clearly and convincingly, that one of the following is true: the arbitrator's actions were arbitrary, capricious, or unsupported by the agreement; the arbitrator manifestly disregarded the law; or one of the specific statutory grounds set forth in NRS 38.241(1) was met. *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006); *Health Plan of Nev.*, 120 Nev. at 695, 100 P.3d at 176.

Knickmeyer v. State ex. rel. Eighth Judicial Dist. Court, 408 P.3d 161, 164 (Nev.

App. 2017).

"The 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 (Nev. 2004)(emphasis added).

B. Appellant failed to meet his burden of proving, by clear and convincing evidence, that the Arbitrator's denial of Appellant's Motion for Partial Summary Judgment is a legally adequate ground to vacate the Arbitration Award.

1. The Arbitrator's denial of Appellant's Motion for Partial Summary Judgment is not reviewable following an Arbitration Hearing on the merits.

Appellant Gregory Garmong seeks review of Judge Pro's interlocutory decision that the case should proceed to hearing and not be decided by Appellant's Motion for Partial Summary Judgment. As discussed below in detail, it is well established that an order denying summary judgment is not appealable after a hearing on the merits.

A Rule 56(d) order granting partial summary judgment from which no immediate appeal lies is merged into the final judgment and reviewable on appeal from that final judgment. Aaro, Inc. v. Daewoo International (America) Corp., 755 F.2d 1398, 1400 (11th Cir.1985), and cases cited therein; *see also* Eudy v. Motor-Guide, Herschede Hall Clock Co., 604 F.2d 17, 18, 203 USPQ 721 (5th Cir.1979). An order granting a judgment on certain issues is a judgment on those issues. It

forecloses further dispute on those issues at the trial stage.

An order denying a motion for partial summary judgment, on the other hand, is merely a judge's determination that genuine issues of material fact exist. It is not a judgment and does not foreclose trial on the issues on which summary judgment was sought. *See* Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986). It "does not settle or even tentatively decide anything about the merits of the claim." Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966), 87 S.Ct. 193, 195, 17 L.Ed.2d 23 (1966).

Denial of summary judgment "is strictly a pretrial order that decides only one thing—that the case should go to trial," i.e., that the claim remains pending for trial. Switzerland Cheese Ass'n, Inc., 385 U.S. at 25. "An order denying a motion for summary judgment is interlocutory, non-final, and non-appealable." Parker Brothers v. Tuxedo Monopoly, Inc., 757 F.2d 254, 255, (Fed.Cir.1985)(citations omitted). Accordingly, a denial of summary judgment is not properly reviewable on an appeal from the final judgment entered after trial. *See* Glaros v. H.H. Robertson Co., 797 F.2d at 1573.

The Eighth Circuit held that a "ruling by a district court denying summary judgment is interlocutory in nature and not appealable after a full trial on the merits." Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19 F.3d 431 (8th Cir.1994). The Johnson Court explained that: The final judgment from which an appeal lies in the

judgment on the verdict. The judgment on the verdict, in turn, is based not on the pretrial filings [to support summary judgment] under Federal Rule of Civil Procedure 56(c), but on the evidence adduced at trial. *Id.* at 434.

The Johnson Court explained that the primary question on summary judgment is whether there exists a genuine issue of material fact as to the elements of the party's claim. *Id.* Once the summary judgment motion is denied and the case proceeds to trial, however, the question of whether a party has met its burden must be answered with reference to the evidence and the record as a whole rather than by looking to the pretrial submissions alone. *Id.* The district court's judgment on the verdict after a full trial on the merits thus supersedes the earlier summary judgment proceedings. *Id.*

In Metro. Life Ins. Co. v. Golden Triangle, the Eighth Circuit further held that appellant's proposed dichotomy between a summary judgment denied on factual grounds and one denied on legal grounds, was both problematic and without merit because district courts are not required to delineate why it denied summary judgment, therefore, the acceptance of appellant's proposed distinction would require the reviewing court to "to engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are 'legal' or 'factual.'" 121 F.3d 351, 355 (8th. 1997)(citations omitted)(underscoring added).

Thus, the Metro Life Court reasoned that such an approach that would require

it to "craft a new jurisprudence based on a series of dubious distinctions between law and fact, inviting potentially confusing and inconsistent case law to benefit only those summary judgment movants who have failed to abide by the Federal Rules of Civil Procedure"; the court found such an approach to be "unjustified and decline[d] to adopt it." 121 F.3d at 355. In rejecting the appellant's proposed approach, the Court stated "…we note that our decision is in harmony with the majority of the other circuits that have considered whether an appellate court may review a pretrial denial of a motion for summary judgment after a full trial and judgment on the merits." *Id.* at 355-356 (citations omitted).

The Metro Life Court further concluded that it should not ignore the persuasive policy and prudential considerations advanced by the aforementioned courts and allowing such appeals would unduly circumscribe the discretion of the district court to "deny summary judgment in a case where there is a reason to believe that the better course would be to proceed to a full trial." 121 F.3d at 356, *citing* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986) (citation omitted); *accord* Black v. J.I. Case Company, Inc., 22 F.3d 568, 572 (5th Cir. 1994). "Because the denial [of the summary judgment motion] decided nothing but a need for trial and trial has occurred," we now adopt "the general and better view against review of summary judgment denials on appeal from a final judgment entered after trial." Glaros, 797 F.2d at 1573 n. 14, *see* Metro.

Life Ins. Co. v. Golden Triangle, 121 F.3d 351, 356 (8th Cir. 1997).

Similarly, the Ninth Circuit held that it would be unjust to deprive a party of a trial verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial. *See* Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1359 (9th Cir. 1987)(holding that "the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits").

The Eleventh Circuit court aptly explained that "Summary judgment is designed to weed out those cases so clearly meritorious or so clearly lacking in merit that the full trial process need not be activated to resolve them. Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal; instead, it was intended as a device to diminish the effort, time, and costs associated with unnecessary trials." Holley v. Northrop Worldwide Aircraft Servs., Inc., 835 F.2d 1375, 1377 (11th Cir. 1988).

For the reasons expressed above, the overwhelming majority of reviewing Courts have held that they need not consider the propriety of an order denying summary judgment once there has been a full hearing on the merits. *See* Watson v Amedco Steel, Inc., 29 F3d 274, 277 (7th Cir. 1994).

Although the foregoing cases involve a trial court's denial of summary

judgment, the reasoning is equally applicable to arbitrations. Moreover, NRS 38.241 only references a motion to vacate an "award" with no reference to interlocutory rulings such as a denial of partial summary judgment.

2. Judge Pro's denial of Appellant's Motion for Partial Summary Judgment was proper.

Even if such an Order was appealable, Judge Pro correctly ruled that there were issues of material fact precluding the granting of Mr. Garmong's Motion for Partial Summary Judgment. JA 3:366-368.

During the Arbitration, Wespac and Mr. Christian demonstrated in their Opposition pleadings that there were material issues of disputed facts on each and every claim brought by Mr. Garmong.

Moreover, Mr. Garmong's fifty-page *Motion for Summary Judgment* was convoluted, hard to comprehend, and its reasoning was highly questionable. JA 1:59-110. In their *Opposition*, Respondents, however, dedicated substantial time and effort to explain why the *Motion for Summary Judgment* was meritless, in part because there are so many disputed material issues of facts that the *Motion* should be summarily denied. JA 3:246-263. The Appellant's *Motion for Summary Judgment* was so voluminous, Respondents may have failed to specifically identify each and every material fact in dispute. Mr. Christian's Affidavit, however, adequately refuted the Appellant's baseless claims. JA 3:265-270.

3. Judge Pro did not evaluate witness credibility when he ruled upon Mr. Garmong's Motion for Partial Summary Judgment.

Mr. Garmong attempts to mislead this Court by contending that Judge Pro evaluated the credibility of witnesses when he denied Mr. Garmong's Motion for Partial Summary Judgment. JA 5:863. Mr. Garmong either fails to understand the rules governing summary judgment or he hopes that he can mislead this court as to the basis of Judge Pro's decision. In his initial ruling, Judge Pro explained that he was applying the law in accord with the Nevada Supreme Court's decision in Wood v. Safeway, 121P.3d 1026,1029-1031(2005). He concluded that based upon the Wood standard, Mr. Garmong's claims were not "amenable to resolution on summary judgment." JA 3:366-368.

After Mr. Garmong raised his same arguments for partial summary judgment in a subsequent Motion for Reconsideration, Judge Pro reiterated that:

> Claimant's basis for reconsideration is grounded in the well settled law of Nevada that summary judgment shall be granted, "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." NRCP 56(c). That is precisely the standard applied by the Arbitrator in concluding that summary judgment was not warranted.
>
> The exhaustive analysis provided in Claimant's original motion, and the voluminous declarations and exhibits attached thereto articulate Claimants view of the evidence supporting his claims. Many of the facts relied upon by claimant are indeed "undisputed." Viewed in context, however, the conclusion of the Arbitrator then, and now is that they do not entitle Claimant to judgment as a matter of law without first

> affording Defendants the opportunity to defend the claims at a merits hearing.
>
> Moreover, Nevada law does not require that an arbitrator or judge parse and render a dispositive ruling on every fact asserted by each party as undisputed. The standard to be applied is to "if practicable, ascertain what material facts exist without substantial controversy" which are material to the resolution of a claim such that a trial on the merits of that claim is unnecessary. *Id.*
>
> 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 witnesses, Gregory Garmong and Greg Christian, and on the Arbitrator's opportunity to assess and weigh the credibility of each witness, and all the evidence in that context.

JA 3:391-394.

Judge Pro clearly determined that because there were disputed issues of material fact as to each claim for relief, a 'trial on the merits" also known as a "merits hearing" was required by Rule 56. At no time did Judge Pro assess witness credibility as part of his Rule 56 decision. Mr. Garmong's argument to the contrary is merely another attempt to mislead this Court. Mr. Garmong's argument that Judge Pro failed to understand the requirements of ruling upon a motion for summary judgment is difficult to accept given Judge Pro's decades of experience on the Federal bench.

In conclusion, Judge Pro's Order denying summary judgment is not reviewable after a hearing on the merits. Even if such an Order was subject to review, Judge Pro correctly ruled that there were issues of material fact precluding the granting of Appellant's Motion for Partial Summary Judgment.

C. Appellant failed to meet his burden of proving, by clear and convincing evidence, that the Arbitrator intentionally disregarded material facts or intentionally refused to follow the law.

There is no requirement that Judge Pro identify each law he relied upon and to rule upon every non-material issue raised by Mr. Garmong. In the Investment Management Agreement, the parties specifically agreed that there was no requirement that the arbitration award ever include factual findings or conclusions of law. RA 2:0320.

Moreover, JAMS Rule 19 (g) provides that: "[t]he Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award. Thus, Judge Pro more than complied with the requirements of the Investment Management Agreement and the JAMS Rules governing the Arbitration."

Additionally, it is well established that arbitration awards, which would include interlocutory arbitration decisions, are not required to discuss each and every factual allegation or legal claim. In Waddell, v. Holiday Isle, LLC, the Alabama Federal District Court held that although an arbitrator's failure to explicitly address all arguments results in some aesthetic "imperfection," the award is valid and enforceable as long as it resolves all issues submitted to arbitration. 2009 WL 2413668 (S.D. Ala. Aug. 4, 2009).

In Evans v. E*TRADE Sec. LLC, a federal district judge held that the Arbitrators' failure to include specific findings as to each of the Appellant's claims does not demonstrate that the Award is indefinite. *See* 2017 WL 6355500 (N.D. Ind. Dec. 13, 2017) The Evans Court stated "Arbitrators are not required to make separate findings as to each issue before them. *See, e.g.*, Robots of Mars, Inc. v. Imax Corp., No. CV 11-3226, 2011 WL 13220323, at *2 (C.D. Cal. July 13, 2011)("there is nothing indefinite about a single award encompassing the entire dispute between the parties."); Colletti v. Mesh, 23 A.D.2d 245, 247 (N.Y. Sup. Ct. 1965)(finding that because "[o]n its face, the award specifically states that it was 'in full settlement of all claims and counterclaims submitted to arbitration,' " "[i]t was unnecessary for the arbitrators in their award specifically to mention the particular issues they had decided"); Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., Local 133 U.S.W., A.F.L.C.I.O. v. Fafnir Bearing Co., 201 A.2d 656, 657–58 (Conn. 1964)(upholding arbitration award where arbitrator answered only one of two issues explicitly and generally denied the remainder of the grievance)."

The Evans Court explained that "[t]he arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case." 2017 WL 6355500, *See* D.H. Blair & Co., v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006)(internal quotations omitted); *see also* Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310, 312 (7th Cir.

1981)("The arbitrators gave no reasons for their award, but they are not required to do so")(*citing* United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960)); Sullivan v. Lemoncello, 36 F.3d 676, 683 (7th Cir. 1994)("arbitrators have no obligation ... to give their reasons for an award")(*quoting* United Steelworkers, 363 U.S. at 598).

Appellant made these same arguments that the Nevada Supreme Court failed to address each of his arguments in the Court's published decision. *See* Garmong v. Rogney and Sons Construct.,130 Nev. 1180 (2014)(Petition for Rehearing filed April 18, 2014). The Nevada Supreme Court rejected Mr. Garmong's arguments by summarily denying his Petition. *See* Garmong Order Denying Rehearing (May 30, 2014).

Therefore, Judge Pro went above and beyond the requirements imposed on him by JAMS and the Investment Management Agreement.

D. Appellant failed to meet his burden of proving, by clear and convincing evidence, that he did not execute a valid and enforceable Arbitration Agreement.

Appellant attempts to obfuscate the facts in this case by focusing his attention on page numbering and exhibit attachments to the various drafts of the Investment Management Agreement (Agreement) that Wespac prepared to accommodate Mr. Garmong's edits and revisions to the standard Agreement used with Wespac's clients. The final draft of the Agreement is the operative enforceable Agreement that

controlled the relationship between the parties. That Agreement is one that was fully executed by the parties on August 31, 2005. RA0306-0323. The arbitration clause is included in the Agreement at paragraph 16 is on pages 17 and 18. RA0320-0321.

While previous drafts of the Investment Management Agreement were provided to Appellant, in which he requested edits, annotations and deletions, none of those drafts were ever executed by the parties.

It is important to note that the Investment Management Agreement is included in a three- part new client package that Wespac provides to prospective clients who are interested in establishing an Investment Management relationship with Wespac. The first part of the package is a Confidential Client Profile ("Profile"). RA 2:0306-0307. The second part is the Investment Policy Questionnaire ("Questionnaire"). RA 2:0308-0314. The third part is the Investment Management Agreement. RA 2:0315-0323.

The Profile contains basic information about the client, including, among other things, name, address, telephone number, Social Security number, occupation, income, tax bracket, and net worth. The Confidential Client Profile has nothing to do with the Investment Management Agreement. Indeed, it is not an "agreement" at all. It is a fact gathering tool. RA 2:0306-0307.

The second part of the new client package contains the Questionnaire, which is comprised of 15 questions and a comment section. RA 2:0308-0314. It is designed

to allow Wespac to get an understanding of the new client's investment objectives and risk factors. It is executed by the parties to confirm its accuracy and Wespac's recommendations are based upon the information the client supplies. It is merely an agreement to confirm that the investor and Wespac agree on the investment plan. However, it is a wholly separate document in the new client package and is not part of the Investment Management Agreement.

Appellant completed the first part, the Confidential Client Profile and the second part, the Investment Policy Questionnaire, prior to executing the final draft of the Investment Management Agreement. Importantly, Appellant did not edit or change the first two parts at any time. Even more importantly, Appellant carved out the Investment Management Agreement from the three-part new client package and worked on it separately with Wespac until a final version was acceptable to him, which the parties then signed and dated on August 31, 2005. RA 2:0315-0323.

E. Appellant failed to meet his burden of proving, by clear and convincing evidence, that the Award of Attorney's Fees violated Nevada Law.

1. Background

On September 12, 2017, Respondents made an Offer of Judgment to Mr. Garmong in the amount of TEN THOUSAND DOLLARS ($10,000), which he rejected. JA 1:17-19. On January 12, 2019, Judge Pro entered an Interim Award that Mr. Garmong failed to prove any of his claims and that Wespac and Christian were

entitled to an Award of Judgment against Mr. Garmong on all claims. JA 4:655-667. Therefore, the judgment (award) is much less favorable to Mr. Garmong than Respondent's Offer of Judgment.

The Interim Order also permitted Respondents to file a Motion for Attorney's Fees and Costs. JA 4:655-667. Respondents filed a Motion requesting an award of attorney's fees and costs totaling $111,649.96 pursuant to Nevada Rules of Civil Procedure 68, and JAMS fees and costs in the amount of $16,353.41 pursuant to JAMS Rule 24(f). JA 4:666-694. Mr. Garmong filed an Opposition and Motion to Retax, and Respondents filed a Reply thereto. JA 5:695-726.

Judge Pro determined the attorney's fees and costs sought by Respondents' Motion were reasonable and appropriate for the work done in this case. Schuette v. Beazer Homes Holding Corp.,124 P.3d 530, 548 (2005). JA 5:736-737. In making this determination Judge Pro found that the quality of Respondents' counsel; the quality and difficulty of the work performed; the amounts charged for the service performed; and the overall benefits derived warrant the finding that the fees and costs are reasonable and cited Bunzell v. Golden Gate Nat's Bank, 455 P.2d 31, 33 (1969). JA 5:736-737.

Accordingly, Judge Pro found that Respondents Wespac and Mr. Christian were entitled to an Award of reasonable attorney's fees and costs of this action from

Claimant Garmong in the total sum of $111,649.96.[3] JA 5:736-737.

2. Judge Pro's decision to award attorney fees complied with Nevada law.

In his Final Award at pp.10-11, Judge Pro stated:

> Defendants seek an award of attorney's fees and costs totaling $111,649.96 pursuant to Nevada Rule of Civil Procedure 68, and JAMS fees and costs in the amount of $16,353.41 pursuant to JAMS Rule 24(f).
>
> In his Opposition filed March 6, 2019, Claimant Garmong argues Defendants are not entitled to attorney's fees under Rule 68 because the Scheduling Order entered in this case on August 11, 2017 enumerated specific provisions of the Nevada Rules of Civil Procedure as applicable to this Arbitration, but omitted any reference to Rule 68 thereby rendering it inapplicable to these proceedings. This is a novel argument which the Arbitrator rejects.
>
> 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 Civil Procedure enumerated in the Stipulation for Arbitration entered by the Parties on February 8, 2017. However, the agreement of the Parties to specific NRCP Rules relating to discovery does not automatically exclude the applicability of others, particularly where the Arbitrator determines that necessary. *See* JAMS Rule 24.
>
> In its Reply memorandum of March 14, 2019, Defendants cite the important purpose of NRCP 68 to encourage resolution of cases and conserve resources of the Parties and the court. *Dillard Department Stores v. Beckwith*, 989 P. 2d 882, 888 (1999). When Wespac made its Offer of Judgment of $10,000 on February 12, 2017 *[Judge Pro referenced an incorrect date but corrected it below]* to Garmong, no objection was made and there is no basis in the record to support the argument that by entering the Stipulation for Arbitration Defendants had clearly demonstrated the intent to waive their right to seek

[3] Judge Pro declined to exercise discretion under JAMS Rile 24(f) to require that Garmong pay 100% of the JAMS Arbitration Fees. Respondents did not challenge this portion of Judge Pro's decision.

attorney's fees and costs. In accord with NRS 38.238 an arbitrator has discretion to consider an award of fees and costs and finds it appropriate to do so in this case. *WPH Architecture, Inc. v. Vegas VP, LP*, 360 P.3d 1145, 1149 (2015).

In resolving the question of Defendants entitlement to recover attorney's fees and costs, the Arbitrator finds it unnecessary to address Respondent's argument that Garmong has maintained this action in bad faith. Here it is sufficient to find that Respondent's Offer of Judgment of September 12, 2017 was reasonable. Moreover, it was made more than eight years after Garmong's relationship with Wespac had ended and well after the securities upon which he based his claims had increased in value. Garmong was in a position to reasonably evaluate the viability of the Offer of Judgment with an understanding of the potential consequences and he made his decision to proceed for whatever reasons he deemed prudent.

The Arbitrator finds the attorney's fees and costs sought by Defendants' Motion are reasonable and appropriate for the work done in the case. *Schuette -v. Beazer Homes Holding Corp.*, 124 P.3d 530, S48 (200S). In making this determination the Arbitrator finds that the quality of Defendants counsel; the quality and difficulty of the work performed; the amounts charged for the services performed; and the overall benefits derived warrant the finding that the fees and costs requested are reasonable. *Bunzell v. Golden Gate Nat's Bank*, 455 P.2d 31, 33 (1969). *See also*, JAMS Rule 24(g).

The Arbitrator further finds that the corrected declaration and exhibits attached to Respondent's Motion and Reply memorandum support the fees and costs reflected as reasonable. Additionally, the Arbitrator finds no good cause to strike the original Declaration of Mr. Bradley dated February 15, 2019 which was appended to Respondent's Motion for Attorney's Fees and Costs. The error therein was properly corrected by

Mr. Bradley on March 14, 2019, and before the filings of the Parties in connection with the Motion were considered by the Arbitrator.

JA 5:727-738.

3. The evidence overwhelmingly supports Judge Pro's determination that Wespac's Offer of Judgment was reasonable.

Respondents' offer was reasonable and in good faith in both its timing and amount in that Respondents offered to have judgment entered against it in the amount of TEN THOUSAND DOLLARS ($10,000.00). JA 1:17-19. Respondents made the offer on September 12, 2017, which was eight and a half years after the Wespac relationship was terminated and several years after the securities that Mr. Garmong complained were unsuitable had increased in value by THREE HUNDRED THOUSAND DOLLARS ($300,000). *Id.* Mr. Garmong also knew by 2017, he had no overall loss in the combined performance in his accounts at Wespac but had a net profit of FIVE THOUSAND FOUR HUNDRED THREE DOLLARS ($5,403). Additionally, he knew by 2017 that any temporary reduction in the value of his accounts was solely due to the severe stock market decline of 2007-2009, and not any misconduct on behalf of Respondents. He also knew that these same securities had significantly appreciated in value and generated substantial income while he continued to hold them at Fidelity.

Respondents made the offer despite Respondents' belief that Respondents did nothing wrong and all of Mr. Garmong's claims were without merit. Judge Pro agreed with Respondents that, "Dr. Garmong has failed to prove the liability of Wespac or Christian on any of his claims by a preponderance of the evidence. As a

result, Garmong is not entitled to recover any loss he alleges he sustained during his professional relationship with Wespac and Christian from 2005-2009." JA 4:655-665.

Under the facts of this case, Respondents' offer was imminently reasonable both in its timing and amount.

4. The evidence overwhelmingly supports a determination that Mr. Garmong's refusal was unreasonable.

Mr. Garmong's refusal of Wespac's offer was unreasonable and in bad faith. In search of a claim for damages, Mr. Garmong chose October 2007, the exact top of the stock market, as the date to start his damage calculation. By doing so, Mr. Garmong omitted to include the more than FIVE HUNDRED THOUSAND DOLLARS ($500,000) in gains in his accounts that Wespac had produced from September 2005 through October 2007. Mr. Garmong also chose to omit all dividends and interest generated in his accounts in his damage calculations. In another bold attempt to fabricate a claim, Mr. Garmong falsely testified that he lost close to SIX HUNDRED FIFTY THOUSAND DOLLARS ($650,000) in his accounts at Wespac.

Mr. Garmong knew that Respondents did not mismanage his investment accounts and there was no basis in fact or law to support filing a claim against Respondents. Therefore, it was unreasonable for him to refuse Respondents' good

faith offer to resolve Mr. Garmong's claims for TEN THOUSAND DOLLARS ($10,000) when it was likely he would not win an arbitration award.

Mr. Garmong fully understood from personal experience, the risks and costs of filing a case in bad faith. *See* Garmong v. Rogney and Sons Construction, Nev. Sup. Ct. No. 68255 (2016)(the Rogney Court ordered Garmong to pay Respondents' attorney fees and costs after finding that his purposes in litigation were to harass respondents, cause unnecessary delay, and needlessly increase litigation costs); *see also* Garmong v. Silverman, Nev. Sup. Ct. No. 63404 (2014)(the Nevada Supreme Court affirmed an award of substantial attorney fees and costs pursuant to an Offer of Judgment).

5. The evidence overwhelmingly supports Judge Pro's determination that Respondents' attorney's fees were reasonable.

The fees which Respondents paid are entirely reasonable, necessary, and usual for a case such as this. Accordingly, Mr. Garmong should pay all of Respondents' reasonable attorney's fees after September 12, 2017.

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:

> 33. (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 Respondents charged them $300.00 per hour, which is a fair and reasonable hourly rate based upon the fact that following graduation from Arizona State University School of Law in 1984, counsel clerked for the Honorable Bruce R. Thompson for two years; became a member of both the Nevada and California Bar Associations; then worked as an Associate for four years from 1986 to 1990; then worked as a deputy federal public defender for five years and tried many jury trials; then worked in private practice for the past twenty-four years and successfully represented parties in over 200 securities arbitration cases, many of which were tried before an arbitration panel. Counsel's current hourly rate for security arbitration cases is $395.00 per hour; and it is his understanding that a majority of attorneys in Reno, Nevada currently charge $300.00 or more per hour.

Although Mr. Garmong's case lacked legal and factual foundation, the area of securities arbitration is complicated and requires specialized knowledge and

experience. Moreover, thousands of pages of discovery and complicated damage calculations had to be reviewed, evaluated, analyzed, and presented at the arbitration hearing. Counsel believes that he provided zealous and superior representation on behalf of his clients. The quality of such representation, however, required counsel to spend many hours working on the case. Additionally, Mr. Garmong filed frivolous motions such as the one to disqualify Judge Pro. Mr. Garmong also filed unduly lengthy briefs such as the Pre-Hearing Brief which was 58 pages long.

Counsel certified that he worked a total of 275.5 hours and billed a total of EIGHTY-TWO THOUSAND SIX HUNDRED and FIFTY DOLLARS ($82,650) and that all such bills were accurate, and all hours worked were reasonable.

Counsel retained Michael Hume to assist him in the defense of Mr. Garmong's claims and paid him $100.00 per hour. Mr. Hume is a very experienced securities arbitration consultant. He has assisted lawyers throughout the United States on more than a thousand security arbitration cases over the past 25 years. Counsel has 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 240.2 hours. The total amount of his invoices following service of the Offer of Judgment total TWENTY-FOUR THOUSAND TWENTY DOLLARS ($24,020).

The costs, without including JAMS fees, totaled FOUR THOUSAND NINE HUNDRED SEVENTY-NINE AND 96/100 DOLLARS ($4,979.96). Those costs did not include the expert witness costs, which were substantial.

The consequence was that the total expense, not including JAMS fees, to defend the case totaled ONE HUNDRED ELEVEN THOUSAND SIX HUNDRED FORTY-NINE AND 96/100 DOLLARS ($111,649.96). Finally, the result obtained by Respondents was that Mr. Garmong lost each and every one of his claims and was not awarded any monies.

6. Respondents did not waive their right to file an Offer of Judgment.

Mr. Garmong's primary argument to vacate Motion for Attorney Fees and Costs is that Respondents waived their right to make an Offer of Judgment pursuant to NRCP 68, when Respondents agreed which discovery and time-computation rules of civil procedure would govern as stated in the Arbitrator's "Discovery and Scheduling Order" (hereinafter referred to as "Discovery Order"). JA 1:14-16. This argument is without merit.

In relevant part, the Discovery Order signed by Judge Pro 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 to motions found in Washoe District Court Rule 12 will generally govern this case unless the Arbitrator rules otherwise." (underscoring added). JA 1:14.

First, it is clear from the under-scored wording of the Discovery Order that Judge Pro had the authority to decide when and if certain rules of civil procedure will apply. Pursuant to JAMS Rule 24:

> (c) In determining the merits of the dispute, 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.
> (d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and awards.

Accordingly, Judge Pro had the authority to decide if Respondents had the right to make an Offer of Judgment in this matter.

The purpose of an Offer of Judgment is to encourage pretrial settlements and, consequently, to conserve judicial resources. There is a strong public policy favoring the pretrial resolution of disputes which is substantially furthered by encouraging litigants to accept reasonable offers of judgment. Offers of Judgment encourage fair and reasonable compromise between litigants by penalizing a party that fails to accept a reasonable offer of settlement. Accordingly, Judge Pro determined that Respondents were permitted to make an NRCP 68 Offer of Judgment.

Second, even without reliance on the under-scored language or the JAMS rules, Mr. Garmong has utterly failed to meet his burden of proving that Respondents waived their rights to make an Offer of Judgment under NRCP 68.

Under Nevada law:

> a waiver is the "intentional relinquishment of a known right." *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 103 P.3d 8, 18 (Nev.2004) *(quotation omitted); see also McKeeman v. Gen. Am. Life Ins. Co.*, 111 Nev. 1042, 899 P.2d 1124, 1128 (Nev.1995)*(*"Waiver requires an existing right, a knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished.")(quotation omitted)). A waiver is not effective unless done with "full knowledge of all material facts." *Sutton*, 103 P.3d at 18 *(quotation omitted)…* The party asserting waiver as a defense bears the burden of establishing waiver. *McKellar v. McKellar*, 110 Nev. 200, 871 P.2d 296, 297 (Nev.1994). *See Baroi v. Platinum Condo. Dev., LLC*, No. 2:09-CV-00671-PMP, 2012 WL 2847912 (D. Nev. July 11, 2012) (citations omitted).

To establish waiver, the party claiming the existence of waiver must prove a clear intent that the party intended to relinquish its right. *See* Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. Of Clark, 123 Nev. 44, 50, 152 P.3d 737, 740 (2007). To constitute waiver, there must be an actual intention to relinquish the known right or conduct from which one should infer the intention to relinquish that right. *See* Am. Home Assur. Co. v. Harvey's Wagon Wheel, Inc., 398 F. Supp. 379, 383–84 (D. Nev. 1975), *aff'd sub nom.*; Am. Home Assurance Co. v. Harvey's Wagon Wheel, Inc., 554 F.2d 1067 (9th Cir. 1977).

Essentially, Mr. Garmong argues that by agreeing which discovery and time-computation rules of civil procedure would apply, Respondents intentionally relinquished their right to make an Offer of Judgment. There is no language contained in the Discovery Order that expressly references (1) a waiver of the right

to make Offers of Judgment; (2) a waiver of rights under NRS 38.238(1); or (3) a waiver of any unspecified rights.

Mr. Garmong also fails to reference any conduct by Respondents that proves a clear, unequivocal, and decisive intention to waive important NRCP 68 rights. Moreover, the fact that Respondents served an Offer of Judgement only a month after the Discovery Order was executed demonstrates that Respondents never intended to waive its rights under NRCP 68. Finally, if Mr. Garmong truly believed there had been a waiver then Mr. Garmong should have notified Judge Pro of the issue so it could have been resolved at the time. Thus, Judge Pro correctly determined that:

> 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 Civil Procedure enumerated in the Stipulation for arbitration entered by the Parties on February 8, 2017. However, the agreement of the Parties to specific NRCP Rules relating to discovery does not automatically exclude the applicability of others, particularly where the Arbitrator determines that necessary. See JAMS Rule 24.
>
> When Wespac made its Offer of Judgment of $10,000 … to Garmong, no objection was made and there is no basis in the record to support the argument that by entering the Stipulation for Arbitration Defendants had clearly demonstrated the intent to waive their right to seek attorney's fees and costs. In accord with NRS 38.238 an arbitrator has discretion to consider an award of fees and costs and finds it appropriate to do so in this case. *WPH Architecture, Inc. v. Vegas VP, LP,* 360 P.3d 1145, 1149 (2015).

The doctrine of laches is not applicable. Mr. Garmong was on notice that Respondents made an Offer of Judgment on September 12, 2017. Clearly,

Respondents by making the Offer demonstrated that they believed that no amendment to a Discovery Order was needed. He could have brought up the issue to Judge Pro at the time. He was not prejudiced by Respondents' alleged failure to amend a discovery order because Judge Pro determined it was unnecessary. JA 5:736.

7. Judge Pro's interpretation of the Discovery and Scheduling Order is entitled to great weight.

A district court is granted considerable leeway to interpret the meaning and application of its own injunctive order and that the interpretation is entitled to great weight. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 795, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994)(SCALIA, J., concurring in judgment in part and dissenting in part).

The Federal Courts of Appeals have consistently held that district courts have considerable discretion in interpreting and applying their own orders and decrees. *See, e.g.*, JTH Tax, Inc. v. H & R Block E. Tax Servs., Inc., 359 F.3d 699, 705 (4th Cir. 2004); Truskoski v. ESPN, Inc., 60 F.3d 74, 77 (2d Cir. 1995)(it is peculiarly within the province of the district court to determine the meaning of its own order and an appellate court would not disturb the issuing judge's interpretation absent a clear abuse of discretion); *See also* Cty. of Suffolk v. Stone & Webster Eng'g Corp., 106 F.3d 1112, 1117 (2d Cir. 1997)(province of trial court to determine meaning of its order); Matter of Chicago, Milwaukee, St. Paul & Pac. R. Co., 961 F.2d 1260,

1264 (7th Cir. 1992)(full deference should be accorded to the lower court's decision); Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 131 (4th Cir. 1992)(1992)(the court's interpretation of its order will not be disturbed "absent a clear abuse of discretion); Hastert v. Illinois State Bd. of Election Comm'rs, 28 F.3d 1430, 1438 (7th Cir. 1993), as amended on reh'g (June 1, 1994); *see* S. E. C. v. Sloan, 535 F.2d 679, 681 (2d Cir. 1976)(finding no basis to substitute our judgment for that of district judge in interpreting his order); In re Cintra Realty Corp., 373 F.2d 321, 322 (2d Cir. 1967)(expressing satisfaction with district judge's interpretation of his own order even if the order was ambiguous); United States v. Sepulveda, 15 F.3d 1161, 1177 (1st Cir. 1993)(district court's interpretation of its own order accorded great weight).

A number of state and federal district courts are in accord. *See* State v. Pacheco, 128 Haw. 477, 290 P.3d 547 (Ct. App. 2012)(the trial judge is in the best position to interpret its own ruling); Ludwigson v. Ludwigson, 642 N.W.2d 441, 449 (Minn. Ct. App. 2002)(stating that when a judgment is open to diverse constructions, it should be clarified by the judge who ordered it); Bondhus v. Bondhus, No. C4-89-1311, 1989 WL 153822 (Minn. Ct. App. Dec. 26, 1989)(on appeal the trial court's construction of its order has great weight); United States v. Ballard, No. CRS-06-283 JAM, 2010 WL 960361, (E.D. Cal. Mar. 16, 2010)(the district court has the authority to interpret ambiguities in its own orders and judgments); Johnson v. Johnson, 627 N.W.2d 359, 363 (Minn. Ct. App. 2001)(the trial judge is in the best

position to clarify his original judgment and the reviewing court should defer to its interpretation); Anderson v. Anderson, 522 N.W.2d 476, 478 (N.D. 1994)(the clarification has been done by the same trial court which ordered entry of the original judgment, logic suggests we should afford such a clarification considerable deference).

Although the foregoing cases involve trial courts, the same reasoning applies to situations where the arbitrator is called upon to interpret an arbitration order, especially when the arbitrator is an experienced trial judge.

Even in the unlikely event that this Court disagrees with Judge Pro's interpretation, the standard of review does not permit this court to vacate the award. *See* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987)("to be sure, we cannot reverse an arbitrator's mistaken interpretation of an agreement if the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority").

8. Counsel attached a corrected declaration before Judge Pro ruled.

Mr. Garmong argues that Judge Pro was not permitted to consider a corrected Declaration before he ruled upon Respondents' Motion for Attorney's fees. Mr. Garmong, however, fails to cite any binding precedent. Moreover, this Court is not permitted to second guess or substitute its own judgment for the arbitrator. Counsel for Respondents immediately acknowledged that his initial Declaration failed to

include the requisite provision that "I declare under penalty of perjury that the foregoing is true and correct." Counsel apologized to Judge Pro and Mr. Garmong and his counsel for the oversight. Counsel then attached a corrected Declaration with the requisite language.

"To err is human, and the ablest lawyers, like the courts, (and including appellate courts) are not infallible. The practicing lawyer who has never made a mistake, who has never omitted to do something which diligence required that he should have done, would be difficult to find. It is a risk inherent in a difficult and often controversial profession." *See* Windus v. Great Plains Gas, 255 Iowa 587, 602, 122 N.W.2d 901, 909–10 (1963).

In Pruco Life Ins. Co. v. Martin, the Court allowed an attorney the opportunity to file an appropriate affidavit after the attorney failed to submit proper affidavit required by rule to authenticate the information contained in the attorneys' fee motion which confirmed that the bill has been reviewed and edited and that the fees and costs charged are reasonable. 2011 WL 3627282 (D. Nev. Aug. 16, 2011).

Clearly, Judge Pro had authority under Nevada law to accept Counsel's corrected declaration. *See* NRS 38.231 (the authority of the arbitrator includes the power to determine the admissibility, relevance, materiality, and weight of any evidence).

/ / /

VI. REQUEST FOR REMAND FOR THE AWARD OF ATTORNEY FEES AND COSTS INCURRED ON APPEAL

NRCP 68 provides in pertinent part that "the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer." Nev. R. Civ. P. 68(f)(2) (underscoring added). Thus, while the rule allows "applicable interest on the judgment [up to] the time of entry of the judgment," costs and attorney's fees are not so limited—there is no end date.

Indeed, the Supreme Court of Nevada has confirmed "that the fee-shifting provisions in NRCP 68 ... extend to fees incurred on and after appeal." In re Estate of Miller, 216 P.3d 239, 243 (2009); *see also* Garmong v. Rogney & Sons Const., Nev. S. Ct. Case No. 60517, 2014 WL 1319071, at *4 (Nev. Mar. 31, 2014)("Our holding in In re Estate of Miller makes clear that a district court has authority to award a prevailing party appellate attorney fees").

VII. CONCLUSION

Appellant's appeal is wholly without merit and should be summarily denied because Appellant utterly failed to meet his burden of proving by clear and convincing evidence that Judge Pro's Arbitration Award should be vacated. Respondents may have failed to address each and every argument raised by

Appellant but contends that all arguments not specifically addressed are so meritless or so similar to his other arguments that they do not justify discussion.

Dated this 23rd of June, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the following 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 Microsoft Word in 14 point font and 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 brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more and contains 12,472 words.

3. Finally, I hereby certify that I have read this appellate 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

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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 23rd of June, 2020.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF THOMAS C. BRADLEY, and that on the 23rd day of June, 2020, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **RESPONDENTS' ANSWERING BRIEF** on the following:

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