IN THE SUPREME COURT OF THE STATE OF NEVADA

NO. 82208

BETTY CHAN; and ASIAN AMERICAN REALTY & PROPERTY MANAGEMENT,

Appellants,

vs.

WAYNE WU; JUDITH SULLIVAN; NEVADA REAL ESTATE CORP.; and JERRIN CHIU,

Respondents.

APPELLANTS' OPENING BRIEF

Appeal from

the Eighth Judicial District Court sitting in Clark County, Nevada

District Court Case No.: A-16-744109-C

District Court Judge: Hon. Eric Johnson

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BETTY CHAN, *et al.* Appellants, vs. WAYNE WU, *et al.* Respondents.	**Case No.: 82208** District Court Case No.: A-16-744109-C

NRAP 26.1 DISCLOSURE

The undersigned counsel of record for Appellants certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

(1) BETTY CHAN
Appellant

(2) ASIAN AMERICAN REALTY & PROPERTY MANAGEMENT
Appellant
(Owned solely by Betty Chan)

(3) R. DUANE FRIZELL, ESQ.
FRIZELL LAW FIRM, PLLC
(Counsel for Appellants below and on appeal)

(4) AVECE M. HIGBEE, ESQ.
MARQUIS AURBACH COFFING
(Former counsel for Appellants below)

(5) TODD E. KENNEDY, ESQ.
BLACK & LOBELLO and later KENNEDY & COUVILLIER, PLLC
(Former counsel for Appellants below)

(6) MAXIMILIANO D. COUVILLIER, ESQ.
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(7) MICHAEL V. CRISTALLI, ESQ.
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(8) JANIECE S. MARSHALL, ESQ.
GENTILE CRISTALLI MILLER ARMENI SAVARESE
(Former counsel for Appellants below)

(9) JEFFREY R. HALL, ESQ.
HUTCHISON & STEFFEN
(Former counsel for Appellants below)

(10) WAYNE WU
Respondent

(11) JUDITH SULLIVAN
Respondent

(12) NEVADA REAL ESTATE CORP.
Respondent
(Ownership unknown to Appellants)

(13) JERRIN CHIU
Respondent

(14) MICHAEL A. OLSEN, ESQ.
GOODSELL & OLSEN, LLP and later BLACKROCK LEGAL, LLC
(Counsel for Respondents below and on appeal)

(15) THOMAS R. GROVER, ESQ.
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(16) KEITH D. ROUTSONG, ESQ.
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(Counsel for Respondents below and on appeal)

(17) ROMAN C. HARPER, ESQ.
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(Counsel for Respondents below)

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

This is an appeal of a final judgment—a summary judgment on the parties dueling motions, to be precise—in a case brought to the District Court under the Nevada Uniform Arbitration Act of 2000. As shown below, this judgment is final and appealable.

A. Basis for Supreme Court's or Court of Appeals' Jurisdiction.

In an arbitration case, "[a]n appeal may be taken from ... [a] *final judgment* entered pursuant to [the Nevada Uniform Arbitration Act of 2000]." NRS 38.247(1)(f) (emphasis added). Such an appeal "must be taken as from an order or a *judgment* in a civil action." NRS 38.247(2) (emphasis added). In a civil case, "[a]n appeal may be taken from ... A *final judgment* entered in an action or proceeding commenced in the court in which the judgment is rendered." NRAP 3A(b)(1) (emphasis added).

Here, on November 23, 2020, the District Court entered an order on the parties' dueling motions for summary judgment. (7 Appx 1456).[1] Under NRCP 54(b), the District "f[ound] no just reason for delay" and entered summary judgment "as a final order as to any and all claims and counterclaims between and among" the parties. (7 Appx 1461). Therefore, the District Court's summary

[1] Herein, the abbreviation "Appx" refers to volumes 1-7 of the *Appellants' Appendix*, which was filed more or less contemporaneously with this, *Appellants' Opening Brief*.

judgment is "final" and appealable for the purposes of NRS 38.247(1)(f) and NRAP 3A(b)(1). That is true, even though the District Court has yet to adjudicate Appellants' claims against an entity not a party to this appeal—KB Home Sales-Nevada Inc. *See* NRCP 54(b) ("[W]hen multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, ... parties only if the court expressly determines that there is no just reason for delay.").

B. Filing Dates Establishing the Timeliness of the Appeal

"In a civil case in which an appeal is permitted by law from a district court, … a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." In the case at bar, on November 23, 2020, the District Court entered summary judgment and certified it as final under NRCP 54(b). (7 Appx 1456). On that same date, the notice of entry was filed and served. (7 Appx 1465, 1476). Within 30 days—on December 8, 2020—Appellants filed their notice of appeal. (7 Appx 1478). Later that same day, Appellants filed an amended notice. (7 Appx 1481). Appellants' notice and amended notice were both timely.

C. Assertion of Appealable Order

Appellants hereby assert that, under NRS 38.247(1)(f), NRAP 3A(b)(1), and NRCP 54(b), this is an "appeal … from a final order or judgment." NRAP 28(a)(4)(C).

ROUTING STATEMENT

It is possible that this case *might* be "presumptively assigned to the Court of Appeals" because it *might* be construed as one "involving a contract dispute where the amount in controversy is less than $75,000.00." NRAP 17(b)(6). Nevertheless, given that the doctrine of "procuring cause" is at the center of this case—and that issues relating to the doctrine routinely arise between and among real estate agents, brokers, and their clients—this case may "rais[e] as a principle issue a question of statewide public importance." NRAP 17(a)(12). Accordingly, this appeal may possibly be more properly routed to the Supreme Court. *See id*.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether, given the legal doctrine of "procuring cause" and its tenet of singular exclusivity, the District Court erred in confirming an arbitration award that split a sales commission between two realtors.

II. Whether the District Court erred in awarding Respondents attorney fees when, under the contract upon which it relied, express requirements were not satisfied.

STATEMENT OF THE CASE

A. Nature of the Case.

In 2016, Plaintiffs-Appellants Betty Chan ("Chan") and Asian American Realty & Property Management ("Asian American") commenced this action. Appellants brought claims arising out of the purchase of a home at Tevare at Summerlin ("Tevare"), a development of KB Home Las Vegas, Inc. ("KB Home"),[1] by Defendant-Respondent Jerrin Chiu ("Respondent Chiu"). At its core, this case is a dispute to a $13,795.32 real estate commission between Respondent Chiu's competing buyer's agents: Chan and Defendant-Respondent Wayne Wu ("Wu"). Defendants-Respondents Judith Sullivan ("Sullivan") and Nevada Real Estate Corp. ("NREC") were the broker and brokerage under which Wu operated.

Appellants initially attempted to take this case to arbitration before the Greater Las Vegas Associate of Realtors ("GLVAR"). GLVAR having initially considered the matter premature to arbitrate, Appellants filed this action in District Court. Eventually, GLVAR accepted the arbitration, and upon Appellants' motion in the District Court, arbitration was compelled, and the case stayed.

The GLVAR arbitration panel found in favor of both Appellants and Respondents. Specifically, the panel *split* the commission between them, with

[1] KB Home was a party below but is not a party to this appeal. The District Court certified its last order as final as between Appellants and Respondents, which do not include KB Home. (7 Appx 1461).

Chan taking the lesser share of $3,448.83 (about 25%) and Wu taking the greater share of $10,346.49 (approximately 75%).

After arbitration, the stay was lifted, and the case proceeded in District Court. Appellants moved to vacate the arbitration award. Respondents opposed and filed a countermotion to affirm the award and grant them attorney fees and court costs. The District Court denied Appellants' motion and granted Respondents' countermotion. It awarded Respondents $21,435.00 in attorney fees and $920.83 in court costs.

Appellants then took their first appeal of this matter, which was dismissed for lack of a final judgment and therefore appellate jurisdiction. After the prior appeal was dismissed, the District Court considered dueling motions for summary judgment on Respondents' counterclaim for abuse of process. The District Court ruled in favor of Appellants but awarded Respondents' additional attorney fees in the amount of $35,630.00. The present appeal then followed.

B. Course of the Proceedings.

On July 11, 2016—within 180 days of the close of the sale—Appellants attempted to take the matter to GLVAR "to comply with the rules … to go to arbitration first."[2] (6 Appx 1232). Unfortunately, GLVAR considered the matter

[2] Before GLVAR, Respondents admitted that "Chan had until July 20, 2016 to file a request for arbitration." (1 Appx 66; 2 Appx 304-05).

premature because no sales commission had been distributed. As the situation could have remained that way indefinitely, Appellants had no choice but to file suit. (6 Appx 1201).

On September 27, 2016, Appellants filed their complaint in the District Court below. (1 Appx 1). After the sale closed, Appellants were allowed to submit the matter to arbitration with GLVAR. Therefore, on November 9, 2016, Appellants filed with GLVAR their request and agreement to arbitrate." (1 Appx 184-88).

Subsequently, Appellants filed their amended complaint in the lawsuit. (1 Appx 11). Respondents filed an answer and counterclaim. (1 Appx 39; 2 Appx 301). Appellants filed a reply to counterclaim. (1 Appx 56). Appellants later filed an amended counterclaim reply. (1 Appx 132).

In the meantime, on January 13, 2017, because the GLVAR case had finally been opened and Respondents had finally made an appearance in the lawsuit, Appellants filed a motion to stay proceedings pending GLVAR arbitration. (1 Appx 61; 2 Appx 302). Respondents opposed that motion. Their opposition included a countermotion to dismiss or render summary judgment in their favor. (1 Appx 66; 2 Appx 302).

On March 30, 2017, the District Court entered its order granting the motion to stay and denying the motion to dismiss and for summary judgment. Therein, the

District Court ordered arbitration among Appellants and Respondents Wu, Sullivan, and NREC. The lawsuit was otherwise stayed. (1 Appx 154). Nearly four months later, on July 25, 2017, Wu, Sullivan, and NREC finally got around to filing their response and agreement to arbitrate with GLVAR. (2 Appx 290).

This matter came for hearing before a GLVAR arbitration panel on April 17, 2018. The panel heard evidence and argument of the parties and found that of the $13,795.32 in commission, Wu was to be paid $10,346.49 and Chan paid $3,448.83. *The panel made no findings of fact*. (2 Appx 390, 394; 4 Appx 816).

On May 17, 2018, in a timely fashion, Appellants notified GLVAR of their "legal challenge"—specifically, their intent to vacate the arbitration award. (3 Appx 460, 482; 6 Appx 1230). The case then proceeded in District Court, where the stay was lifted.

C. Disposition in the Court Below.

After arbitration, on September 18, 2018, the District Court entered its order denying Appellants' motion to vacate or modify arbitration award. (3 Appx 691). In its order, the District Court confirmed the arbitration award. (3 Appx 693). The notice of entry of this order was filed on September 18, 2018 and subsequently served on September 21, 2018. (4 Appx 695, 702).

On March 22, 2019, the District Court entered its order granting Respondent's countermotion for summary judgment on all of Appellants' claims

and for attorney fees and costs. (4 Appx 816). The District Court also awarded Respondents $21,435.00 in attorney fees and $920.83 in court costs. (4 Appx 822). The notice of entry of this order was filed on March 22, 2019 and served later on March 25, 2019. (4 Appx 823, 832).

On April 22, 2019, without the benefit of counsel, Appellants filed their first notice of appeal in this matter. (4 Appx 860). On May 14, 2020, the Supreme Court dismissed that appeal (Case No. 78666) for lack of a final judgment and therefore appellate jurisdiction. On June 8, 2020, the Supreme Court issued its remittitur, which the District Court received on June 9, 2020. (5 Appx 1090).

On November 23, 2020, the District Court entered its order granting in part Respondents' motion for summary judgment, or in the alternative, for contractual award of attorney's fees, for writ of execution on Appellants' commissions awarded by GLVAR arbitration panel, and release of bond deposited on appeal and order granting Appellants' countermotion for summary judgment. (7 Appx 1456). In that order, the District Court ruled that "Defendants' request for summary judgment that Ms. Chan committed an abuse of process is DENIED" and that "Plaintiffs' request for summary judgment that Ms. Chan did not commit an abuse of process is GRANTED." (7 Appx 1460). Despite the fact that Respondents lost on that counterclaim, the District Court awarded them an additional $35,630.00 in attorney fees. (7 Appx 1459). Pursuant to NRCP 54(b), the District Court further

certified its order as final as between Appellants and Respondents. (7 Appx 1461). The notice of entry of that order was both filed and served on November 23, 2020. (7 Appx 1465, 1476).

STATEMENT OF FACTS

Appellant Betty Chan ("Chan") has been a licensed Real Estate Broker in Nevada since 1993 (License No. 25444). She has never been disciplined by the Nevada Real Estate Division. (4 Appx 729).

In about August 2013, Chan and Respondent Chiu began an ongoing professional relationship, with Chan as realtor and Respondent Chiu as buyer. (1 Appx 40; 1 Appx 12, 40). On January 24, 2014, Respondent Chiu signed a "Duties Owed by a Nevada Real Estate Licensee," on which he acknowledged that Chan was his formal real estate agent. (2 Appx 251, 309, 389). In his answer, "Respondent Chiu admits that … Chan showed him some homes" in 2014. (1 Appx 12, 40). In fact, on March 18, 2014, Respondent Chiu purchased a condominium, which Chan showed him. (1 Appx 205). After that, Chan maintained contact with Respondent Chiu about his condo and maintenance issues. (1 Appx 205).

On November 2, 2014, eight months after Respondent Chiu closed on his condo, he emailed Chan and informed her that he wanted to look for a second home. A few weeks later, on November 19, 2014, Chan underwent a kidney

transplant. Respondent Chiu's father, Dr. Kwang Chiu ("Dr. Kwang Chiu" or "Dr. Chiu"),[3] regularly called Chan and advised her as to how to take care of her health. (1 Appx 192).

In his answer, "Respondent Chiu admits that," a few months later, "Dr. Kwang Chiu contacted … Chan on or about March 2015 to make an appointment for him and his son, Defendant … to see homes in 2015…." (1 Appx 40). On March 30, 2015, Chan updated Respondent Chiu's loan pre-approval letter before they started looking for the second home. (1 Appx 41, 193). Chan worked with Respondent Chiu and Dr. Chiu to find houses. (1 Appx 193).

On April 2-14, 2015, Respondent Chiu and Chan exchanged emails about the house search. (1 Appx 215-18). On April 10, 2015, Respondent Chiu signed another "Duties Owed by a Nevada Real Estate Licensee," on which he acknowledged that he had formally retained Chan to be his real estate agent once again. (2 Appx 252, 309, 388). Afterwards, Respondent Chiu and Chan texted each other and looked at properties together. (2 Appx 256-64).

On about April 18, 2015, Respondent Chiu got into a traffic accident, was injured, and emailed Chan about it; however, he continued to inquire as to news on the home search, and he and Chan continued to text each other. (1 Appx 193, 220-22, 264-66). Later, because of the accident, Respondent Chiu decided to use his

[3] Dr. Chiu is not a party to this action.

money to purchase a new automobile; so, he put the home search on pause. (1 Appx 193).

On May 11, 2015, Respondent Chiu emailed Chan that his condo had a leak and might have a mold problem. Chan advised him as to how to proceed. (1 Appx 193).

On July 18, 2015, Chan emailed and texted Respondent Chiu to check up on him and to see how he was recovering from his injury. He said he needed surgery and that if he decided to remain in Las Vegas, he would need her help to continue his home search. (1 Appx 193; 2 Appx 266-68).

On October 2, 2015, Dr. Kwang Chiu call Chan, told her he would be in town on December 30, 2015, and specifically requested that she show him and Respondent Chiu houses then. They scheduled to meet on December 30 at 10:00 a.m. Chan asked Respondent Chiu to provide updated financials to update his loan pre-approval. (1 Appx 41, 193).

On November 2-3, 2015, Respondent Chiu and Chan exchanged emails. He reminded her of their upcoming appointment on December 30 and listed out his criteria and budget for a home. Respondent Chiu informed Chan that they wanted to view homes on three days: *December 30, December 31, and January 1*. Despite the holidays, Chan confirmed, stating "Thank you for using my service again." (1 Appx 193, 210-14, 229-30; 2 Appx 294, 312, 314, 316).

On November 18-29, 2015, Respondent Chiu and Chan exchanged emails about the home search. (1 Appx 42, 194; 2 Appx 231-33, 294). On Tuesday, December 29, 2015, in preparation for her showing homes to Respondent Chiu, Chan researched properties available at that exact time, compared them to his criteria and budget, and identified potential older homes in the Summerlin area. Chan also found Tevare, a new development in Summerlin by KB Home. (1 Appx 194; 2 Appx 241-49).

On Wednesday, December 30, 2015, Chan and Respondent Chiu began texting at 7:34 a.m. (2 Appx 268-69). Later that morning, Chan picked up Respondent Chiu, his girlfriend, and his parents at his condo. Since Respondent Chiu was interested in the Summerlin area, she showed them some older homes there. (1 Appx 41, 194; 2 Appx 294-95, 316).

Later that same day, December 30, even though it was outside of Chiu's parameters and specified area of interest, *Chan encouraged and convinced Chiu to tour the new construction homes at the Tevare*. (2 Appx 249). Chan then took everyone there, where they looked at three modular homes and their respective floorplans. Respondent Chiu and his girlfriend were so excited to see Model 2 that they did not want to leave. (1 Appx 42-43, 195; 2 Appx 295; 4 Appx 731). As with any new development, at Tevare, KB Home would not negotiate price and would not give out any special incentives to buyers. (1 Appx 202).

Based on the availability shown on a computer screen at the Tevare office, KB Home only had two lots left that were approved for Model 2: Lot 37 and Lot 43. As is common with new developments, at Tevare, KB Home had already predetermined which lots would go with which models. Having opted for Model 2, Respondent Chiu could not select any location other than Lot 37 or Lot 43. Later, it was discovered that as of December 31, 2015, Lot 37 had already sold and only Lot 43 was available for Model 2. (1 Appx 202; 2 Appx 249; 3 Appx 610; 4 Appx 722-23, 731). Respondent Chiu agreed to Lot 43. That was the lot he purchased—*the only lot he could purchase*. (2 Appx 295, 298, 322-23).

At the time, Respondent Chiu had had no experience purchasing a new home. Therefore, Chan spent extra time explaining to him pricing differentials based on house elevation, the location of the lot, upgrades, and so forth. Respondent Chiu and Chan completed a registration card for KB Home and left it in KB's office.[4]

As it was late in the day, Chan offered to take Respondent Chiu and his parents to get a quick bite to eat and then to go back and check out the lots that were still available. They declined because Dr. Chiu was in a hurry for some other

[4] KB Home subsequently lost the card. (1 Appx 198-200; 2 Appx 273-80, 284-88). Subsequently, Chan had multiple communications with KB Home and its attorney about the matter. (1 Appx 200; 2 Appx 273-83, 284-288, 300, 355-356).

matter. Chan then drove them all back to Respondent Chiu's condo. (1 Appx 195-96).

Unbeknownst to Chan, less than 24 hours later, in the morning of Thursday, December 31, 2015, Respondent Chiu and his parents returned to the Tevare site. (2 Appx 296). While there, Respondent Chiu made an earnest money deposit of $10,000.00 on Lot 43. (2 Appx 296-97, 316). Respondent Chiu was told that he could cancel the sale and receive a refund for up to 14 days. (2 Appx 297, 316-17). Respondent Chiu did not inform Chan that he was returning to Tevare site; nor did he meet any other real estate agent there, including Wu. (2 Appx 351). Respondent Chiu admits that he went there "without the assistance of any broker." (3 Appx 469).

At around 2:00 p.m. that same day, Dr. Chiu called Chan and asked if she would give Respondent Chiu a kickback of 1.00% of the commission from the sale of the Tevare home, like another agent had offered them.[5] As a matter of practice, Chan did not give kickbacks, but as a return favor for his genuine care of her health and the ongoing business relationship that they had had over the years, she offered a 0.25% reduction if she could also handle Respondent Chiu's loan. (1 Appx 196, 201; 6 Appx 1199).

[5] At the GLVAR hearing, Wu testified that he had never offered to reduce his commission in this manner. Nevertheless, Dr. Chiu never told Chan that Wu was the agent to whom he was referring. (3 Appx 474).

In the GLVAR proceeding, Respondents did not rebut that Dr. Chiu and Chan had this conversation. In fact, during that proceeding, Chan produced an AT&T bill proving Dr. Chiu's call at the time as well as a sworn affidavit from Chan's daughter, an attorney, who could hear Chan's responses in that conversation. In their answer in the District Court, Respondents stated that they "were without sufficient knowledge as to the truth of the[se] matters alleged." (1 Appx 14, 44). Respondents did admit, however, that Dr. Chiu called Chan that day. (2 Appx 317).

On New Year's Day, Friday, January 1, 2016, Dr. Chiu posted on City-Data.com: "Had a previous post about living in Tevare/Paseo village but didn't have my replies. I guess my follow up question is *the home I am looking for is made by KB Home* which have gotten many bad reviews in previous years. Can anyone give any insight whether they are okay to buy now?" (2 Appx 320).

As noted, Respondent Chiu previously emailed Chan that he and his parents wanted her to be available for them on *December 30, December 31, and January 1*. (1 Appx 193, 210-214; 2 Appx 229-30, 294, 312, 314, 316). In fact, Dr. Chiu told Chan that he would be leaving Las Vegas on January 2, 2016. (1 Appx 297).

Respondents admit that on Sunday, January 3, 2016, at about 1:40 p.m., Dr. Chiu called Wu. (2 Appx 298). Less than an hour later, on about 2:30 p.m. that day, Dr. Chiu called and left Chan a voicemail message. (1 Appx 197; 2 Appx

317). At the GLVAR hearing, Chan was not allowed to play the voicemail to the Panel but did tell the panel what was said: "Hello Betty, yeah, it's Dr. Chiu. Today is Sunday, January 3rd, right now it's about 12 noon. Uh … *I know you are probably on vacation, when you get this message, please give me a call*. Okay, thanks." Dr. Chiu spoke with a very calm voice, and he in no way indicated that he needed urgent attention or was otherwise facing any pressing situation. (3 Appx 607, 609).

On Monday, January 4, 2016, someone broke into one of the rental units that Chan managed. It took her all day to handle and mitigate that matter. Understandably, she was unable to return Dr. Chiu's call then. (1 Appx 197).

The very next day, on Tuesday, January 5, 2016—two business days after Chan showed Respondent Chiu and his parents the Tevare home, and one business day after Respondent Chiu made is $10,000 deposit—Chan emailed Respondent Chiu to ask if he had decided anything yet. Chan got no response. (1 Appx 197, 201; 2 Appx 235, 297).

Respondent Chiu did not even meet Wu until two days later, on January 7, 2016. (2 Appx 298, 317). The next day, on Friday, January 8, 2016, Respondent Chiu signed the KB contract with Wu. (1 Appx 197, 199; 2 Appx 298, 322-48). Chan was not included in the paperwork. (2 Appx 298).

The purchasing documents included a broker agreement between Wu and KB Home. That document provided, as an "absolute condition," that in order for Wu to earn a commission, he must have been the agent that accompanied Respondent Chiu during his "first visit" to the Tevare community. In the broker agreement, Wu misrepresents himself as being the agent with Respondent Chiu at his first visit. (2 Appx 343).

On January 15-16, 2016, Chan texted Respondent Chiu, following up as to whether he had made any decision on any of the homes she had shown him. Hiding the fact that he had already made a $10,000 towards the Tevare home, he simply lied, "Ah nah, been kinda busy lately." He also said that he was not going to buy anything. Upon further inquiry, he admitted that his father had found another agent, Wu. Respondent Chiu said he felt "terrible" and that he should have told Chan sooner. Chan informed him that if he decided to purchase the KB home, he needed to do so through her. Respondent Chiu abruptly stopped communicating. (1 Appx 14, 44, 197, 201; 2 Appx 269-71, 299).

On January 22, 2016, Chan went to Tevare and learned that Respondent Chiu had, in fact, signed a contract. On January 25-27, 2016, Chan reached out to Respondent Chiu again about the Tevare home. He pushed back and tried to justify himself, saying that he was unhappy with Chan and alleged that he could not find her when he needed her. (1 Appx 199; 2 Appx 236-39, 353).

On or about May 27, 2016, Respondent Chiu closed on the purchase of the Tevare home. (1 Appx 14, 16, 45, 47). Per the sales summary, the commission from the sale came to a total of *$13,795.32*. (1 Appx 190; 2 Appx 351). The funds are currently held by GLVAR.

SUMMARY OF THE ARGUMENT

I.

ARBITRATION AWARD—THE GLVAR PANEL COULD ONLY AWARD THE SALES COMMISSION TO THE ONE AGENT WHO WAS THE PROCURING CAUSE, AND CHAN WAS IT.

Given the facts and the law, there could only be one procuring cause, and Chan was it. By splitting the commission between Chan and Wu, the GLVAR panel manifestly disregarded the law, rendered an arbitrary and capricious award, and exceed its authority under the agreement to arbitrate. The District Court erred in confirming the arbitration award.

The GLVAR panel manifestly disregarded Nevada's law of "procuring cause." Under GLVAR's own standards, the primary determining factor for the panel was "procuring cause"—in "strict conformity" with "state law." In Nevada, the "procuring cause" is the agent who brings the buyer and the seller together. The doctrine of "procuring cause" is grounded in a protective policy that guards against a first successful broker being sniped by a second. Inherent in that policy are the salient tenets of first priority and singular exclusivity. Regarding first

priority, the doctrine gives considerable weight to the question whether a broker was the first to bring the property to the attention of the buyer. If the broker was not the first to do so, the burden switches to the second broker to show that the first subsequently abandoned efforts or that the efforts of the first were ineffectual. As to singular exclusivity, multiple procuring causes cannot exist.

By splitting the commission, the GLVAR panel manifestly disregarded the law. Because of Chan's substantial efforts, she was undeniably the procuring cause of the sale. Before Wu was even on the scene, Chan found the Tevare property for Respondent Chiu, she showed the property to him, and one day later, he committed to purchase it with an earnest money deposit. Wu's efforts, if anything, were "merely trifling."

The arbitration award was arbitrary and capricious because the GLVAR panel made no findings, and even if implicit findings could be properly determined, such findings would not be supported by substantial evidence. An implicit finding of dual procuring causes is belied by Chan's efforts being substantial, Wu's being "merely trifling," and Wu's broker agreement forbidding him from taking any commission.

The GLVAR panel exceeded its authority by splitting the commission. The arbitration agreement only authorized it to determine procuring cause and to award

the commission to *either* Chan *or* Wu. It had no authority to make a partial award to each.

The Court may conclude that the award is ambiguous. If so, it should remand for clarification.

II.

ATTORNEY FEES—RESPONDENTS WERE ENTITLED TO NONE.

The District court erred in awarding Respondents Attorney fees because under the contract upon which it relied, express requirements were not satisfied. Under the arbitration agreement, there were two requirements Respondents had to satisfy to recover their fees: Chan had to fail to "comply" with the arbitration award, and it had to be "necessary" for Respondents to obtain "judicial confirmation and enforcement of the award." These requirements must be strictly construed. Neither is satisfied here. The first requirement is not satisfied because Chan did not fail to "comply" with the arbitration award. Rather, by contractual, statutory, and constitutional right, she appealed and challenged it.

The second requirement is not fulfilled either because this is not an "enforcement" case, Respondents did not seek "confirmation" of the arbitration award below, and Respondents took no "necessary" action for judicial confirmation. Relative to "enforcement," Chan did not refuse to allow Wu to recover his share of the commission awarded to him by the GLVAR panel. Rather,

she simply appealed and challenged the award, which was her right. Respondents did not take any "enforcement" action either.

Respondents also did not seek "confirmation" of the award below. Instead, they specifically stated a counterclaim, made a motion, and requested relief for Wu to receive the *full commission*. Respondents took no "necessary" action for judicial confirmation of the arbitration award because such confirmation came as a matter of statutory course upon the District Court's denial of Chan's motion to vacate the award, and Respondents only stated all sorts of unrelated counterclaims and made all sorts of motions that had nothing to do with confirmation.

In addition, the Supreme Court denied Respondents' motion for attorney fees on the prior appeal. That was the law of the case. The District Court erred in revisiting the matter and essentially reversing the Supreme Court's ruling.

ARGUMENT

A NOTE ON RESPONDENTS' ATTEMPTS TO ASSASSINATE CHAN'S CHARACTER

In the District Court, Respondents did a preternatural job of attempting to assassinate Chan's character. Nevertheless, upon a review of the record, it is clear that Respondents' assassination attempts were completely unfair, unwarranted, and unjustified.

In attempting to assassinate Chan's character, Respondents have made three primary arguments. All lack merit. The first raised the eyebrows of the judge, who stated: "[Respondents] have a good argument that [Chan] ran this lawsuit far beyond what it should have been run, and the Court thinks … Chan represents the worst of litigations …." (7 Appx 1457). Respondents' argument lacks merit because, as the judge ultimately found, Chan "ha[d] a right to file a complaint, and her filing of the civil complaint d[id] not rise to the level of abuse of judicial process." (7 Appx 1457). Moreover, as explained in detail below, Chan simply appealed and challenged the arbitration award, which she had a contractual, statutory, and constitutional right to do.

In classic pot-kettle fashion, Respondents also ignore the fact that in the proceedings below, they stated and made various unsuccessful and unrelated counterclaims and motions, including a counterclaim and motion for the full sales commission. Respondents opposed Chan's motion to stay the case pending

arbitration and, in connection with their opposition, filed a countermotion for summary judgment, which was denied. On at least two occasions, Respondents filed additional summary judgment motions on their counterclaim for abuse of process; however, as discussed below, the District Court denied those motions as well.

For their second argument, Respondents have contended that "Chan … committed an ethical violation of the GLVAR rules by filing a '*Complaint*' in the Eighth Judicial Court, prior to submitting the matter to GLVAR." (2 Appx 301). Respondents' argument caught the attention of the judge, who stated: "Chan apparently had an ethical obligation with the realtor board to attend either arbitration or mediation, which Ms. Chan may have violated (but the Court is not making a ruling on this matter because it is not before the Court); however, the Court finds she had a right to file the civil Complaint." (7 Appx 1457).

As with their first argument, Respondents' second argument is much ado about nothing. As the record shows, Chan <u>*did*</u> try to take the matter to GLVAR arbitration before filing suit, but GLVAR refused. Furthermore, because Respondent Chiu was a realtor's client and not a member of GLVAR, Chan could not compel him—as a party to the lawsuit—to take the matter to arbitration.[6] At

[6] In the Standards of Practice (17-1 to 17-5) of the Manual, which set forth the matters for mandatory arbitration, the word "client" does not even appear. (1 Appx 180-81). Section 2(c) of the Manual provides: "A Realtor® … may … invoke

the end of the day, the District Court stayed the lawsuit pending the arbitration among Appellants and all of the Respondents, with the notable exception of Respondent Chiu. (1 Appx 153).

Turning to their third argument, Respondents call undue attention to the fact that Chan has had a number of attorneys below, strongly implying that Chan has engaged in some sort of nefarious or unbecoming conduct. There is no record of that. Furthermore, nothing could be further from the truth. Chan's response is *apropos*: "The number of attorneys … or law firms I have retained … is wholly irrelevant to the legal question at issue: Whether, for purposes of a real estate sale, there can be more than one procuring [cause]." (6 Appx 1203).

I. ARBITRATION AWARD—GIVEN THE FACTS AND THE LAW, THERE COULD ONLY BE ONE PROCURING CAUSE, AND CHAN WAS IT. BY SPLITTING THE COMMISSION BETWEEN CHAN AND WU, THE GLVAR PANEL MANIFESTLY DISREGARDED THE LAW, RENDERED AN ARBITRARY AND CAPRICIOUS AWARD, AND EXCEED ITS AUTHORITY UNDER THE AGREEMENT TO ARBITRATE. THE DISTRICT COURT ERRED IN CONFIRMING THE ARBITRATION AWARD.

"To be entitled to a commission from the sale of real estate, a broker must show that; (1) an employment contract existed, and (2) the broker was the procuring cause of the sale." *Atwell v. Southwest Securities*, 107 Nev. 820, 823, 820 P.2d 766, 768 (1991). "The requirement that an employment contract be

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arbitration against [their] client but no arbitration may be held without the client's voluntary agreement to arbitrate and to be bound by the decision." (2 Appx 411). Other sections of the Manual have similar provisions. (2 Appx 411, 429).

found to exist is easily met…. [T]his court [has] held that '[a] promise to pay the reasonable value of services may be implied, and a real estate agent may recover under the theory of quantum meruit….' Implied employment contracts between sellers and brokers have been found to exist with only moderate factual support." *Id*.

Here, the first element—an employment contract—is not in dispute. The facts support this. Chan had been Respondent Chiu's realtor for over two years. In 2014 and 2015, Respondent Chiu signed two separate "Duties Owed," expressly acknowledging Chan as his agent. He previously bought a condominium that Chan found for him, and Chan received a commission for that. In the case at bar, Respondent Chiu specifically requested Chan to find a new home for him. She put a lot of work into that endeavor and was successful in finding him one. He put a deposit on it less than 24 hours after she showed it to him. There is no question that, at a bare minimum, there was an implied contract. *See Florey v. Sinkey*, 77 Nev. 275, 278-81, 362 P.2d 271, 273-74 (1961) (holding that the respondent was the "procuring cause" of a sale of mining property and that appellants were obligated under an "implied agreement" to pay him for "his services").

In the present action, the crux of the issue on appeal is the second element: "procuring cause." This matter is highly contested. In its September 18, 2018 order, the District Court concluded "that Nevada law does not prohibit splitting a

commission between two individuals both claiming to be the procuring cause." (3 Appx 693). That conclusion constitutes an error of law, upon which this appeal is based. For the reasons discussed below, it is clear that in Nevada, *there can only be one procuring cause* and that in this case, *Chan was the procuring cause*.

A. Standard of Review—A District Court's Confirmation of an Arbitration Award Is Reviewed *De Novo*.

The Nevada Supreme Court "reviews a district court's decision to vacate or confirm an arbitration award de novo." *Washoe Cty. Sch. Dist. v. White*, 396 P.3d 834, 838, 133 Nev. 301, 303 (2017). "The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the … ground relied upon for challenging the award." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004).

"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." *Clark County Educ. Ass'n v. Clark County Sch. Dist*., 122 Nev. 337, 341, 131 P.3d 5, 8 (2006).

> 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.

Id. "The statutory grounds are contained in the Uniform Arbitration Act, specifically NRS 38.241(1)." *Id*. Those grounds include the situation where "[a]n arbitrator exceeded his or her powers. NRS 38.241(1)(d).

B. The GLVAR Panel Manifestly Disregarded Nevada's Law of "Procuring Cause."

"A manifest disregard of the law encompasses an error that is '"obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."'" *Bohlmann v. Printz*, 120 Nev. 543, 547, 96 P.3d 1155, 1157-1158 (2004), *overruled on other grounds by Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006). "'Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it."'" *Id*. "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.'" *WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. 884, 890, 360 P.3d 1145, 1149 (2015). "[T]he manifest-disregard-of-the-law standard limits the reviewing court's concern to whether the arbitrator consciously ignored or missed the law." *Clark County Educ.*, 122 Nev. at 342, 131 P.3d at 9.

1. There was no finding that Wu was ***the*** procuring cause.

The arbitration panel made no finding as to whether Chan, Wu, or even both were the procuring cause. Instead, it simply split the commission between the two.

(2 Appx 390, 394). At the August 22, 2018 hearing on Chan's motion to vacate the arbitration award, the District Court opined: "I don't find anything that says there can only be one procuring cause." (3 Appx 636). Subsequently, in its September 18, 2018 written order on the motion, the District Court expressly found "that Nevada law does not prohibit splitting a commission between two individuals both claiming to be the procuring cause." Consequently, it made no finding as to who—between Chan and Wu—the procuring cause was. It simply "CONFIRMED" the arbitration award. (3 Appx 693).

Strangely, in a subsequent order entered March 22, 2019, the District Court stated: "During … [the] August 22, 2018 hearing the Court … found that Wayne Wu was the procuring cause …. The Court hereby affirms its Order dated on or about September 18, 2018 … finding Wu to be the procuring cause." (4 Appx 818). Nevertheless, neither the September 18, 2018 order, the transcript of the August 22, 2018 hearing, nor the minutes of the hearing even remotely suggest—much less find—that Wu was "*the*" procuring cause. (3 Appx 616, 618, 636, 691). Even if they did, such a "finding" would be improper, for a court may only "confirm, vacate, modify or correct an arbitration award [or] … remand the matter to the arbitrator for certain limited action." *Health Plan*, 120 Nev. at 695, 100 P.3d at 177; *see also* NRS 38.234, 38.239, 38.241-38.242.

2. Nevada law controlled: The primary determining factor for the GLVAR arbitration panel was "procuring cause," in "strict conformity" with "state law."

By its own rules, the GLVAR panel was required to follow the National Association of Realtors' *Code of Ethics and Arbitration Manual* (2018) (hereafter the "NAR Manual" or the "Manual"). (2 Appx 398). Standard of Practice 17-4 of the NAR Manual sets forth "[s]pecific non-contractual disputes that are subject to arbitration." Such disputes include those relating to competing brokers making a claim to the same sales commission. Standard 17-4 makes it clear that, in each instance, there must be a "decision of the hearing panel as to procuring cause." (1 Appx 180-81). The Manual specifies: The "panel is called on to determine *which* of the contesting parties is entitled to the funds in dispute." (2 Appx 442).

The Manual also states expressly that "[p]rocuring cause shall be the primary determining factor." (2 Appx 443). An arbitration panel must make a determination of procuring cause in "strict conformity with the law," specifically "state law." (2 Appx 444). "All arbitration hearings must be conducted in a manner consistent with state law." (2 Appx 455). "In such matters, the advice of Board legal counsel should be followed." (2 Appx 442). The Manual specifically provides: ***Awards may not be split between the parties "where prohibited by state law."*** (2 Appx 442). As shown below, in Nevada, there may only be one procuring cause.

3. In Nevada, the "procuring cause" is ***the*** agent who brings the buyer and the seller together.

"The evidence consistently shows [Chan] brought buyer and seller together"; therefore, she was "the 'procuring cause.'" *Shell Oil Co. v. Ed Hoppe Realty*, 91 Nev. 576, 581, 540 P.2d 107, 110 (1975). The doctrine of "procuring cause" is grounded in a protective policy that guards against a first successful broker being sniped by a second. Inherent in that policy are the salient tenets of first priority and singular exclusivity. Regarding first priority, the doctrine gives considerable weight to the question whether a broker was the first to bring the property to the attention of the buyer. If the broker was not the first to do so, the burden switches to the second broker to show that the first subsequently abandoned efforts or that the efforts of the first were ineffectual. As to singular exclusivity, multiple procuring causes cannot exist. As a matter of law, there can only be one.

a. ***Protective policy*— As between competing buyer's agents, the policy behind the procuring-cause doctrine is to protect a broker who first succeeds in procuring the sale from having their sale hijacked by another.**

"[T]he doctrine of 'procuring cause' developed primarily to protect the broker where he or she arranges a sale …." *Carrigan v. Ryan*, 109 Nev. 797, 799, 858 P.2d 29, 30 (1993). "[T]he broker must be given an opportunity to consummate a sale with the ultimate purchaser where he or she initially introduced that purchaser and has not abandoned negotiations." *Morrow v. Barger*, 103 Nev.

247, 253, 737 P.2d 1153, 1157 (1987). "Good faith and fair methods of trade require such a course of conduct." *Id*. at 254, 737 P.2d at 1157.

"Thus the law will not permit one broker who has been … working with a customer whom he had found, to be deprived of his commission by another agent stepping in …." *Fink v. Williamson*, 158 P.2d 159, 162 (Ariz. 1945).

> For otherwise, one might employ an agent to interview persons, and secure from them promises of contracts and then, by having another one 'close' the contracts, deny the agent the fruit of his labor. The law does not sanction such action….

Crosby v. Pacific S.S. Lines, Ltd., 133 F.2d 470, 474 (9th Cir. 1943).

In a case nearly 30 years old now, the Nevada Supreme Court could have been describing Chan's predicament today: "She was the procuring cause of a very substantial and highly profitable sale, and the victim of an attempt to utilize the benefit of her efforts without paying her a commission." *Flamingo Realty v. Midwest Dev*., 110 Nev. 984, 990, 879 P.2d 69, 73 (1994). The whole policy behind the procuring-cause doctrine protects against that.

b. *First priority*— The procuring-cause doctrine gives considerable weight to the question whether the broker first approaches the buyer, brings to the attention of the buyer that the property is for sale, or brings the buyer into the picture.

"To be the procuring cause of a sale, a broker must 'set in motion a chain of events which, without break in their continuity, cause the buyer and seller to come to terms as the proximate result of his or her peculiar activities.'" *Carrigan*, 109

Nev. at 801-802, 858 P.2d at 32. GLVAR arbitration panels are particularly familiar with this legal doctrine.

Citing *Mohamed v. Robbins*, 531 P.2d 928, 930 (Ariz. App. 1975), the NRA Manual provides:

> *A broker will be regarded as the "procuring cause" of a sale, so as to be entitled to commission, if his efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating a series of events which, without break in their continuity, result in accomplishment of prime objective of the employment of the broker who is producing a purchaser ready, willing, and able to buy real estate on the owner's terms. Mohamed v. Robbins ….*

(Italics in original). (2 Appx 442).

Cited in the NAR Manual above, the *Mohamed* case is instructive: "It is well settled real estate law that generally a broker who is the 'procuring cause' of a sale … is entitled to a commission." *Mohamed*, 531 P.2d at 930. "[T]he term 'procuring cause' [is] defined as follows: …. '[A] cause *originating* a series of events which, without break in their continuity, result in accomplishment of the prime objective of employment of the broker—producing a purchaser ready, willing and able to buy real estate on the owner's terms.'" *Id*. (emphasis in original).

> The word 'procure' does not necessarily imply the formal consummation of an agreement…. In its broadest sense, the word means to prevail upon, induce or persuade a person to do something…. *The originating cause, which ultimately led to the conclusion of the transaction, is held to be the procuring cause*.

Chamberlain v. Abeles, 198 P.2d 927, 930 (Cal. App. 1948).

"[T]he fact that plaintiff [agent] took no part in the concluding negotiations is immaterial as long as the procuring cause of the ultimate sale is gleaned in his favor from the evidence." *Mohamed*, 531 P.2d at 931. "[I]f the activities of the agent … are the procuring cause, he is entitled to his commission even though the principal himself or others may have intervened and completed the final act of negotiation after the employment ceases." *J.&B. Motors v. Margolis,* 257 P.2d 588, 592 (Ariz. 1953).

> "*Where several brokers are employed to negotiate or effect the same transaction, the broker who first succeeds and is the procuring cause of the transaction is entitled to the full commission, to the exclusion of the other brokers*. A broker may be the procuring cause of a transaction, so as to be entitled to compensation, even though the transaction is closed or consummated by … another broker ...."

Fink, 158 P.2d at 161.

In Nevada, "[w]hether the broker first approaches, or brings to the attention of the buyer that the property is for sale, or brings the buyer into the picture, has considerable weight in determining … the procuring cause of the sale." *Morrow v. Barger*, 103 Nev. at 254, 737 P.2d at 1157.

> Although the concept of "procuring cause" is not conducive to precise legal measurement, this court has recognized some general principles applicable to it. For example, a broker's efforts in bringing about the sale must be more than "merely trifling." Additionally, "'whether the broker first approaches, or brings to the attention of the buyer that the property is for sale, or brings the buyer into the picture, has considerable weight in determining whether the [broker] is the

> procuring cause of the sale.'" …. To be a procuring cause, the broker need not make the actual sale or terms thereof, nor must the broker be present at the sale.

Carrigan, 109 Nev. at 802, 858 P.2d at 32-33. As a matter of law, "[w]here the broker does introduce the eventual purchaser, the burden switches … to show that the broker subsequently abandoned efforts or that the broker's efforts were ineffectual." *Atwell*, 107 Nev. at 825, 820 P.2d at 770. Here, it is undisputed that Chan was the first to show Defendant Chiu the modular homes and the lots available at Tevare, and as discussed in detail below, substantial evidence would not support a finding that Chan "abandoned" her efforts or that they were "ineffectual."

c. ***Singular exclusivity*—As a matter of law, multiple procuring causes cannot exist; there can only be one.

Nevada cases refer to "the procuring cause" (singular), rather than "procuring causes" (plural). *See, e.g.*, *Flamingo*, 110 Nev. at 990, 879 at 73; *Carrigan*, 109 Nev. at 802, 858 P.2d at 32-33; *Atwell*, 107 Nev. at 823, 820 P.2d at 768; *Morrow*, 103 Nev. at 253, 737 P.2d at 1157; *Shell Oil*, 91 Nev. at 581, 540 at 110; *Barstas Realty v. Leverton*, 82 Nev. 6, 9, 409 P.2d 627, 629 (1966). In a Lexis search, only one case was found using the plural term "procuring causes," a term employed by a lower court. *See Caldwell v. Consolidated Realty & Management Co*., 99 Nev. 635, 637-638, 668 P.2d 284, 286 (1983) (noting that "[t]he district court ultimately concluded that [two brokers were] … the 'procuring

causes' of a ready, willing, and able buyer"). However, that case was reversed on appeal. *See id*. at 641, 668 P.2d at 288.

The dearth of the plural "procuring causes" in Nevada precedent is not surprising. In Nevada, "courts have relied on the doctrine of 'procuring cause' where *more than one broker* claims entitlement to *the commission*." *Carrigan*, 109 Nev. at 799, 858 P.2d at 30. Indeed, the doctrine has become a "pervasive tool" for resolving such disputes. *Id*. at 199, 858 P.2d at 31. "Faced with *competing brokers*, a court must decide which was the 'procuring' or 'inducing' cause of the sale." *Bartsas*, 82 Nev. at 9, 409 P.2d at 629. "*That broker* is entitled to [the] commission, irrespective of who makes the actual sale or terms thereof." *Id*. "If a real estate broker has been a 'procuring' or 'inducing' cause of a sale, *he or she is entitled to the agreed commission* irrespective of who makes the actual sale or terms thereof." *Morrow*, 103 Nev. at 253, 737 P.2d at 1157.

Applying Nevada law, the United States District Court for the District of Nevada has rejected the notion that there can be more than one procuring cause. *See Twitchell v. Paris*, 2008 U.S. Dist. LEXIS 136552 (D. Nev.) ("[T]o earn a commission, a broker must be *the proximate cause* of the sale, *not just an actual cause*." (unpublished disposition) (citing *Carrigan*, 109 Nev. at 803, 858 P.2d at 33; *Morrow*, 103 Nev. at 254, 737 P.2d at 1157)). Relying upon Nevada precedent, other courts have also held that multiple procuring causes cannot exist.

See, e.g., *Lundburg v. Stinson*, 695 P.2d 328, 335 (Haw. 1985) ("Where there are many brokers involved in a transaction, *there can be only one 'procuring cause.'*" (*citing Barstas*, 82 Nev. at 9, 409 P.2d at 629)). The great weight of authority supports this rule.[7]

In *Flinders*, the court approved of the following jury instruction: "'The court … instructs you that, when [there are] … a number of real estate agents, *the one* who succeeds in bringing the seller and purchaser together and induces them to enter into a contract is *the one* who has earned the commission ….'" *Flinders*, 378 P.2d at 388. The Nevada Supreme Court relied upon *Flinders* and cited it with full approval. *See Bartsas*, 82 Nev. at 9, 409 P.2d at 629.

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[7] *See also Spencer v. Backus*, 1992 U.S. App. LEXIS 30770, *9 (9th Cir. 1992) (unpublished disposition) (holding that there *could only be one procuring cause* where it was "undisputed that two agents were involved in bringing about the sale"); *Van C. Argiris & Co. v. FMC Corp.*, 494 N.E.2d 723, 727 (Ill. App. 1986) ("*[O]nly one commission* will become due when a ready, willing and able purchaser has been found, and the commission will be *due only to the broker* who can show that he was the procuring cause."); *McCartney v. Malm*, 627 P.2d 1014, 1022 (Wyo. 1981) ("Where several brokers are involved, the commission is to be paid to the one who can show that his efforts were the efficient, predominating and procuring cause of the sale. *There cannot be multiple procuring causes*."); *Flinders v. Gilbert*, 378 P.2d 385, 388 (Mont. 1963) ("'Where several brokers are employed to negotiate or effect the same transaction, *the broker who first succeeds* and is the procuring cause of the transaction is entitled to the full commission, to the *exclusion of the other brokers*.'"); *Briden v. Osborne*, 184 S.W.2d 860, 863 (Tex. App. 1944) ("Whether there be but one broker involved, or more than one independent broker, *the one who is the procuring cause* of the sale is the one entitled to a commission."); *Salamon v. Broklyn Sav. Bank*, 44 N.Y.S.2d 420, 421 (N.Y. Sup. Ct. 1943) (holding that, as between competing claimants, "*only one could have been the procuring cause*.").

There can only be one procuring cause. There cannot be multiple causes. There is no sliding scale. Before the GLVAR panel and in the District Court, Wu failed to cite any authority holding that there can be joint procuring causes and split commissions in Nevada. (3 Appx 596; 4 Appx 718). In the case *sub judice*, Chan is the procuring cause. Therefore, she is entitled to 100% of the commission.

4. By splitting the commission, the GLVAR panel manifestly disregarded the doctrine of procuring cause.

In the NAR Manual, the plural "procuring causes" does not appear anywhere. (2 Appx 398). The Manual does, however, expressly provide that *commissions may* not *be split between the parties "where prohibited by state law."* (2 Appx 442). "In such matters, the *advice of Board legal counsel* should be followed." (2 Appx 442).

In 1993—nearly three decades ago—the Nevada Supreme Court observed that "the doctrine of 'procuring cause' [was] so well established in the law of broker's transactions that courts readily interpret[ed] the requirement into listing agreements for the protection of the vendor as well as of the broker." *Carrigan*, 109 Nev. at 797, 799, 858 P.2d at 30. This "well-established" law is crystal clear: In Nevada, as in most, if not all, jurisdictions, there can only be one procuring cause.

The procuring-cause doctrine's singular exclusivity is so obvious and pervasively known that instructional institutions for realtors teach it as a matter of

curriculum. One such institution drives the point home in a fact pattern similar to the one at bar:

> Consider the following example:
>
> A buyer's agent (Selling Agent 1) is working with buyers and shows them multiple properties. Ultimately, the buyers select one and ask the agent to prepare a purchase offer; which is accepted. The buyers learn a family friend (Selling Agent 2) will handle their purchase and rebate back 1% of the cooperative commission. The buyers switch to Selling Agent 2, who has the buyers sign an exclusive buyer agency agreement. At closing, who is entitled to the commission?
>
> Selling Agent 1 will argue they were the procuring cause of the sale, even though they did not represent the buyers through closing. Selling Agent 2 will argue they were the exclusive agent of the buyers and thus due the commission. *The procuring cause dispute will likely be resolved in favor of Selling Agent 1. This is because it was Selling Agent 1 that introduced the buyers to the property and initiated the series of events that led to the successful closing*. In this scenario, even though Selling Agent 2 was in an agency relationship with the buyers, Selling Agent 2 is not entitled to the commission.

<https://www.hondros.com/resources/blog/protecting-your-commission-from-procuring-cause-claims/>. The NAR Manual has similar fact patterns. (2 Appx 446-48). The result: There is only one procuring cause.

At the GLVAR arbitration, both sides' briefs show that the issue submitted to the panel was the determination of which—between Wu and Chan—was the procuring cause. (1 Appx 200-03; 2 Appx 305-08). Chan claimed the entire commission of $13,795.32 as the sum "due, unpaid, and owing" to her. (1 Appx 184). Likewise, Respondents prayed "[t]hat Chan's request for … [the]

[c]ommission be denied because Wu was [Respondent] Chiu's real estate agent and the procuring cause of the purchase." (2 Appx 310). There was no plea for a "split" commission.

In her arbitration brief, Chan made it clear that there could only be one "procuring cause." For example, she quoted *Black's Law Dictionary* for the definition of the term. That very definition appears in the NAR Manual as well. Chan also cited *Mohamed v. Robbins*, which also appears in the NAR Manual. She additionally cited other cases showing that there is only one procuring cause. (1 Appx 200-01; 2 Appx 442). *Before the GLVAR panel, Respondents did not argue to the contrary. Indeed, they did not so much as even suggest that there could be more than one procuring cause.*

Given the provisions of the NAR Manual, Nevada's well-established law of real estate transactions, the procuring-cause doctrine's obvious and pervasively known singular exclusivity, and the parties' submissions at arbitration, it is patently clear the GLVAR panel knew what they were to decide and that there could only be one procuring cause. (3 Appx 597). Moreover, in this case, the GLVAR panel was made up of long-time and experienced brokers. In fact, Chan expressly requested arbitrators with "10 years or more experience." (1 Appx 188).

In addition, the NAR Manual provides that one of the factors the panel should consider in determining procuring cause is the terms of any agreement

between brokers. (2 Appx 444). Here, the broker agreement between Wu and KB Home gives full force and effect to the singular exclusivity tenet of the procuring cause doctrine. Specifically, the agreement provides that only one agent may receive a commission, and that agent is the first who brings a prospective buyer to the KB Home development. (2 Appx 343).

For all of these reasons, it is clear that the GLVAR panel knew that there could only be one procuring cause. By splitting the commission between Chan and Wu, it manifestly disregarded the law. The District Court erred in confirming its award.

5. Because of Chan's substantial efforts, she was undeniably the procuring cause of the sale. Before Wu was even on the scene, Chan found the Tevare property for Respondent Chiu, she showed the property to him, and one day later, he committed to purchase it with an earnest money deposit. Wu's efforts, if anything, were "merely trifling."

Respondent Chiu had a history of relying on Chan and buying properties that she showed him. They had an ongoing business relationship, a course of dealing, a course of performance. When Respondent Chiu purchased the Tevar property, Chan had been his agent for over two years. Before this purchase, he signed a "Duties owed" acknowledging Chan as his agent. Respondent Chiu then requested Chan to find another home for him. Chan researched numerous properties, updated his loan pre-approval letter, and showed him and his parents several properties. With respect to the Tevare property in particular, Respondent Chiu

committed to purchase it—with a $10,000 deposit—less than 24 hours after Chan showed it to him.

Chan put forth a great deal of effort to find the Tevare property for him. As Chan explained to the GLVAR panel:

> … [M]y efforts and a series of my acts … [included]: get[ting] a loan pre approval to make sure Buyer Jerrin Chiu is a buyer who is willing and able to qualify for the necessary financing for the purchase, researching, screening 200 +/- homes down to 5, setting up appointments, strategically planning the route, touring resales homes, new models and [giving a] detailed explanation of the process of buying a new home built from scratch. All my work [was] the foundation and direct cause leading or inducing the Buyer to successfully achieve his intended purpose of buying a second house based on his defined price range, location, size and the style as per his criteria. When he offered [for] me to be his agent in writing, I accepted and completed that job.

(2 Appx 307). During this time, Chan had numerous telephone calls, emails, and text messages with Respondent Chiu and his family. But for Chan's substantial efforts, Respondent Chiu would not have purchased the Tevare home. Such efforts were anything but "trifling." *Carrigan*, 109 Nev. at 802, 858 P.2d at 32-33.

It also is undisputed that Chan was the first agent to bring the Tevare property to the "attention" of Respondent Chiu and the first to bring him as a "buyer into the picture." *Id*. This has "considerable weight" in determining whether Chan was the procuring cause of the sale. *Id*. Even though Wu misrepresented on the broker agreement that he was the first agent, the undisputed fact is that he was not. (2 Appx 343). Wu has admitted as much.

Because Chan was the first, the burden shifted to Wu to show that Chan "abandoned efforts" or that her efforts were "ineffectual." *Atwell*, 107 Nev. at 825, 820 P.2d at 770. Wu cannot, with a straight face, argue that he carried this burden. After all, before Wu came on the scene, Chan had found the Tevare property for Respondent Chiu, she had shown the property to him, and he had committed to purchase it. By awarding part of the commission to Chan, the GLVAR panel necessarily rejected any argument that there was any interruption, abandonment, or trifling effort on her part.

Unlike Chan's efforts, Wu's were, indeed, "trifling." Chan did the research and identified the Tevare development as a potential fit for Respondent Chiu in the first place. Wu did not do that. Chan was the first to recommend the KB Home development to Respondent Chiu. Wu did not do that either. Chan was the first to show the development, the lots, and the property to Respondent Chiu. Wu had no part of that.

Wu did not show Respondent Chiu the model homes and lots. Wu could not have helped Respondent Chiu pick out a lot because there was only one left. Wu was not on the scene when Respondent Chiu made his earnest money deposit. Wu did not even meet Respondent Chiu until seven days after that, when the deal was all but done.

Even by his own rendition of the facts, if Wu did anything, he only helped Chiu select upgrades (such as tile and carpet), consider *feng shui* factors, fill out boilerplate paperwork, and address other minor details. Even if true, all of this is "merely trifling." It pales in comparison to the efforts of Chan, who toiled to find, show, and recommend the property to Respondent Chiu.

Given these facts, it *does not matter* what Wu did, if anything. *See Morrow*, 103 Nev. 247 at 253, 737 P.2d at 1157 ("If a real estate broker has been a "procuring" or "inducing" cause of a sale, he or she is entitled to the agreed commission irrespective of who makes the actual sale or terms thereof."). In addition, under the express terms of his broker agreement with KB Home, Wu could not have received any commission because he was not the first to show Respondent Chiu the Tevare community.

The conclusion is inescapable: Chan was the procuring cause; Wu was not. The GLVAR panel erred in concluding that they both were, and the District Court erred in confirming the panel's award.

C. The Arbitration Award Was Arbitrary and Capricious Because the GLVAR Panel Made No Findings, and Even If Implicit Findings Could Be Properly Determined, Such Findings Would Not Be Supported by Substantial Evidence. An Implicit Finding of Dual Procuring Causes Is Belied by Chan's Efforts Being Substantial, Wu's Being "Merely Trifling," and Wu's Broker Agreement Forbidding Him from Taking Any Commission.

"The arbitrary-and-capricious standard does not permit a reviewing court to vacate an arbitrator's award based on a misinterpretation of the law. Rather, our review is limited to whether the arbitrator's findings are supported by substantial evidence in the record." *Clark County Educ.*, 122 Nev. at 343-344, 131 P.3d at 9-10. A "lack of evidence to support the arbitrator's findings compels us to conclude that the arbitrator abused her discretion." *Wichinsky v. Mosa*, 109 Nev. 84, 90, 847 P.2d 727, 731 (1993).

Here, the GLVAR panel made no findings. Under the terms of the NAR Manual, it could not have made any even if it wanted to do so. (2 Appx 446). Thus, there is really nothing for a court to review. Given the arbitrary-and-capricious standard, this requires the award to be vacated in and of itself.

It would be error to determine that there were any specific findings because a court may only "confirm, vacate, modify or correct an arbitration award [or] … remand the matter to the arbitrator for certain limited action." *Health Plan*, 120 Nev. at 695, 100 P.3d at 177; *see also* NRS 38.241, 38.242, 38.234, 38.239; *cf. Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 611

(1993) (explaining that under the Multiemployer Pension Plan Amendments Act of 1980, a reviewing court may only "enforce, vacate, or modify" an arbitration award).

Even if this Court were to conclude that it may properly make a determination as to any implicit findings, it must necessarily conclude that they were arbitrary and capricious. One could argue that, by splitting the commission, the GLVAR panel implicitly found that there were two procuring causes. However, such a finding would not be supported by substantial evidence. As discussed, Chan's efforts were substantial; Wu's, if any, were "merely trifling." Mover, given the express terms of Wu's broker agreement with KB Home, he was not entitled to take any commission at all. (2 Appx 343).

D. The GLVAR Panel Exceeded Its Authority by Splitting the Commission; the Arbitration Agreement Only Authorized It to Determine Procuring Cause and to Award the Commission to *Either* Chan *or* Wu. It Had No Authority to Make a Partial Award to Each.

An arbitrator exceeds their authority if they lack "'the authority under the [arbitration] agreement to decide an issue." *Washoe Cty.*, 133 Nev. at 304, 396 P.3d at 838. As discussed, under the GLVAR arbitration agreement and its controlling NAR Manual, the arbitration's panel's *sole* authority thus was to determine procuring cause and award the commission to *either* Chan *or* Wu. It had no authority to make a partial award to each.

E. If the Court Were to Conclude That the Award Is Ambiguous, It Should Remand for Clarification.

A court may "remand the matter to the arbitrator for certain limited action." *Health Plan*, 120 Nev. at 695, 100 P.3d at 172. Here, the award simply proclaims without explanation that Chan is to receive one fractional portion of the commission and Wu is to receive the remainder. While the financial division is clear enough, the issue submitted to the panel was to determine procuring cause. The award does not even mention "procuring cause." much less make any such determination. For the reasons discussed above, both Chan and Wu cannot legally or logically be the procuring cause. Accordingly, if this Court were to conclude that the award is ambiguous, perhaps because it fails to advise what was determined and how that relates to the controlling principal of procuring cause, it should remand the award for clarification on this point.

II. ATTORNEY FEES—THE DISTRICT COURT ERRED IN AWARDING RESPONDENTS ATTORNEY FEES BECAUSE UNDER THE CONTRACT UPON WHICH IT RELIED, EXPRESS REQUIREMENTS WERE NOT SATISFIED.

"Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). In the District Court, Respondents bore the burden of showing that they were entitled to the attorney fees they sought. *See O'Connell v. Wynn Las Vegas, LLC*, 34 Nev. Adv. Rep. 67, 429 P.3d 664, 673 (Ct. App. 2018) ("Counsel must show how their work helped accomplish the result achieved.").

Below, relying solely on a contract theory, the District Court made two separate awards of attorney fees in favor of Respondents. First, over six months after the District Court denied Appellants' motion to vacate the arbitration decision, it awarded Respondents $21,435.00 in attorney fees and $920.83 in court costs.[8] (4 Appx 822). Second, after the first appeal was dismissed for lack of jurisdiction, the District Court denied Respondents' motion for summary judgment and granted Appellants' summary judgment motion, but it somehow awarded

[8] "The Court decline[d] to award fees requested on the invoices dated December 31, 2016, January 31, 2017, and February 28, 2017, as the redactions made to Plaintiffs' [sic] counsel's billing records prevent the Court from determining if those fees were reasonable and necessary." (4 Appx 820).

Respondents additional fees and costs in the amount of $35,630.00. (7 Appx 1460).

For the reasons set forth above, the District Court should have granted Appellants' motion to vacate the arbitration award. If the appellate court were to agree, Respondents would have no grounds for an award of attorney fees. Thus, if the appellate court were to vacate or modify the arbitration award, the attorney-fee award should be reversed as a matter of course. Nevertheless, even if the appellate court affirms the District Court's confirmation of the arbitration award, it should still reverse the award of attorney fees.

A. Standard of Review—Appellate Courts Review *De Novo* Attorney-Fee Matters that Implicate Questions of Law, Such as the Interpretation of Contracts.

In an arbitration case, the Nevada Supreme Court held: "'The decision whether to award attorney's fees is within the sound discretion of the district court.' Generally, we review decisions awarding or denying attorney fees for 'a manifest abuse of discretion.' But when the attorney fees matter implicates questions of law, the proper review is de novo." *Thomas*, 122 Nev. at 90, 127 P.3d at 1063. "[I]n the absence of ambiguity or other factual complexities, contract interpretation presents a question of law for the district court to decide, with de novo review to follow in this court." *Fed. Ins. Co. v. Coast Converters, Inc*., 130

Nev. 960, 965, 339 P.3d 1281, 1284 (2014). In awarding attorney fees here, the District Court concluded that the terms of the arbitration agreement controlled.

B. Under the Arbitration Agreement, There Were Two Requirements Respondents Had to Satisfy to Recover Their Attorney Fees: Chan Had to Fail to "Comply" with the Arbitration Award, and It Had to Be "Necessary" for Respondents to Obtain "Judicial Confirmation and Enforcement" of the Award. These Requirements Must Be Strictly Construed. Neither Is Satisfied Here.

The GLVAR arbitration agreement sets forth two requirements for an award of attorney fees: "In the event [1] I *do not comply* with the [arbitration] award and [2] it is *necessary* for any party to obtain *judicial confirmation and enforcement* of the award against me, I agree to pay that party costs and reasonable attorney's fees incurred in obtaining such confirmation and enforcement." (1 Appx 184; 2 Appx 290). These two requirements must be strictly construed. *See Thornley v. Sanchez*, 857 P.2d 601, 608, (Haw. App. 1993) ("Because an award of attorney's fees is in derogation of common law, a statute allowing an award of attorney's fees is strictly construed."); *cf. Bobby Berosini, Ltd. v. People for the Ethical Treatment*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) ("[S]tatutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law.")

Relying upon the arbitration agreement and finding that Respondents' attorney fees "were actually incurred in *the confirmation and enforcement of the*

award of the Arbitration Panel," the District Court granted Respondents two separate attorney-fee awards. (4 Appx 822; 7 Appx 1460). That was error.

The District Court's reliance upon the arbitration agreement was misplaced because neither of its two requirements were satisfied.[9] With respect to the first requirement, Chan did not fail to "comply" with the arbitration award; she only appealed. In terms of the second requirement, this is not an "enforcement" case, Respondents did not seek "confirmation" of the arbitration award below, and Respondents took no "necessary" action for judicial confirmation.

1. The first requirement is not satisfied because Chan did not fail to "comply" with the arbitration award. Rather, by contractual, statutory, and constitutional right, she appealed and challenged it.

Per GLVAR's own rules, Chan had a right to petition the District Court to challenge and appeal the arbitration award. (2 Appx 390, 394, 458). Chan had a similar statutory right to petition the District Court to "vacate" the award, NRS 38.241(1), or "modify or correct" it, NRS 38.242(1). Chan's statutory right gave rise to constitutional protections. *See Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (holding that the "constitutionally protected right[] … to petition for

[9] As to Respondent Chiu in particular, the arbitration agreement provided no grounds for an attorney-fee award at all because he was not even a party to the agreement. (2 Appx 291; 4 Appx 716). Thus, it is without question that the District Court erred in awarding any fees to him.

redress of … grievances" is "protected by the Fourteenth Amendment from invasion by the States" (also citing U.S. CONST. amend. 1)).

In the case as bar, Chan properly challenged the award as allowed and expressly authorized by the GLVAR procedures, the Nevada statutes, and the U.S. Constitution. Chan has not, however, failed to comply with the award. For this reason, the first contractual requirement for Respondents' recovering attorney fees was not satisfied, and the District Court erred in allowing for an attorney-fee recovery.

2. The second requirement is not fulfilled because this is not an "enforcement" case, Respondents did not seek "confirmation" of the arbitration award below, and Respondents took no "necessary" action for judicial confirmation.

The arbitration sets forth express "necessary," "enforcement," and "confirmation" conditions. None of these conditions were satisfied here.

(a) This is not an "enforcement" case. Chan did not refuse to allow Wu to recover his share of the commission awarded to him by the GLVAR panel. Rather, she simply appealed and challenged the award, which was her right. Respondents did not take any "enforcement" action either.

This is not a case where Chan refused to have Wu's share of the commission released to him, and he had to obtain judicial confirmation and a writ of execution in order to recover that which the arbitration panel had already awarded him. If that were the case *sub judice*, and if the arbitration award were confirmed, Wu

would likely have had a right to attorney fees under the arbitration agreement. This is, however, no such case. To the contrary, in the case at bar, Chan simply appealed and challenged the award, which was her contractual, statutory, and constitutional right.

Respondents never sought any "enforcement" of the arbitration award either. As late as November 23, 2020, Respondents still had not requested any writ of execution to enforce the award. Rather, they only requested a writ relating to the enforcement of the award of attorney fees.[10] (7 Appx 1458, 1461). To this day, Respondents still have not requested a writ of execution to enforce the arbitration award.

Because Respondents did not take any "enforcement" action, the arbitration agreement provided no grounds for their attorney-fee recovery. The District Court erred in coming to the opposite conclusion.

(b) Respondents did not seek "confirmation" of the award below. Instead, they specifically stated a counterclaim, made a motion, and requested relief for Wu to receive the "full commission."

[10] Respondents did previously seek to enforce the *attorney-fee award* by levying upon Chan's share of the commission; however, in that instance, they were not enforcing the arbitration award itself. Rather, they were attempting to levy on Chan's share of the commission (as a means) to collect upon the attorney-fee award (as an end). In that regard, Chan's share of the commission was like any other personal property (such as a bank account) that could be levied. There was no enforcement of the GLVAR award itself.

In the District Court, Respondents contended that "in their Opposition to Motion to Vacate or Modify Arbitration Award and Countermotion to Recognize Wu as the Procuring Case, for Summary Judgment and for Attorney Fees, [they] d[id] argue several times that the arbitration award should be confirmed." (4 Appx 759-760). This mischaracterizes the record.

Under NRS 38.239, Respondents could have "ma[d]e a motion to the court for an order confirming the award." Nevertheless, Respondents did not bother to do that. Rather, upon their very first appearance in the District Court proceeding, Respondents stated a counterclaim, "request[ing] an Order … declaring that Counterclaimants Wu, Sullivan and NREC are entitled to the *full commission* on the sale of the subject property." (1 Appx 52). Later, in Respondent's opposition to Chan's motion to vacate, "Wu assert[ed] a counter-motion that any revision of the Award on grounds related to procuring cause must order the *full $13,795.32* be distributed to him." (3 Appx 484). In their countermotion, Respondents included a specific prayer for the *entire award*. (3 Appx 491-92).

By going far afield from seeking "confirmation" of the arbitration award, Respondents altogether lacked any basis under the arbitration agreement for the recovery of any attorney fees. It was error for the District Court to conclude otherwise.

(c) Respondents took no "necessary" action for judicial confirmation of the arbitration award because such confirmation came as a matter of statutory course upon the District Court's denial of Chan's motion to vacate, and Respondents only stated all sorts of counterclaims and made all sorts of motions that had nothing to do with confirmation.

NRS 38.241(4) provides that "[i]f the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending." Similarly, under NRS 38.242(2), "[i]f a motion [to modify or correct the award] … is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award."

Given these statutory provisions, the District Court had no option but confirm the arbitration award upon denying Chan's motion to vacate. The District Court did just that. In its order denying the motion to vacate, the District Court ordered "[t]hat pursuant to NRS 38.241(4) and NRS 38.242(2) the Arbitration Award of the GLVAR panel is CONFIRMED." (3 Appx 693). It was therefore not necessary for Respondents to seek confirmation. That happened as a matter of statutory course.

Instead of seeking confirmation, Respondents stated and made various unrelated counterclaims and motions, including a counterclaim and motion for the full sales commission. They even opposed Chan's motion to stay the case pending

arbitration and, in connection with their opposition, filed a countermotion for summary judgment, which was denied. (1 Appx 66, 153). On at least two occasions, they filed additional summary judgment motions on their counterclaim for abuse of process; however, the District Court denied those motions as well. (5 Appx 953, 1018, 1034; 7 Appx 1456).

By doing everything but seeking to have the District Court confirm the arbitration award, Respondents took no "necessary" action. Therefore, under the arbitration agreement, they were not entitled to attorney fees, and the District Court erred in awarding them.

B. The Supreme Court Denied Respondent's Motion for Attorney Fees on the Prior Appeal. That Was the Law of the Case, and the District Court Erred in Revisiting the Matter and Essentially Reversing the Supreme Court's Ruling.

The District Court found that Appellants "had a right to file [their] complaint and did not file [their] complaint with an ulterior motive." (7 Appx 1459). It did not find in impropriety on the part of Appellants in taking their previous appeal either. Nevertheless, Respondents argued before the District Court that they were entitled to recover $35,034.58 in fees related to their "trying to combat Ms. Chan's appeal." (5 Appx 1044). Unfortunately for them, the Nevada Supreme Court rejected this argument and denied Respondents' related request.

In the prior appeal, Respondents filed an identical motion praying for an identical sum of fees. (6 Appx 1224-25, 1228). In its order dismissing the prior

appeal, the Supreme Court made short shrift of that motion, holding that Defendants' "*request for attorney fees incurred on appeal is denied*." (6 Appx 1212). That decision was dispositive, the law of the case. *See Tien Fu Hsu v. County of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007) ("The doctrine of the law of the case provides that the law or *ruling of a first appeal must be followed* in all subsequent proceedings, both in the lower court and on any later appeal."). Respondents could not resurrect the issue in the District Court.

The District Court disagreed, concluding that "[t]he Nevada Supreme Court's decision to dismiss the [prior] appeal did not preclude collection of additional fees as the Nevada Supreme Court never took jurisdiction of the matter or examined the scope of the arbitration agreement." (7 Appx 1459). That conclusion was erroneous.

Even though the Supreme Court determined that it ultimately lack jurisdiction over the prior appeal, it still had jurisdiction to rule upon a motion for attorney fees. The Supreme Court has held as much:

> The United States Supreme Court has held that a lower court may impose sanctions … after a plaintiff files a voluntary notice of dismissal. The Court noted several other collateral issues over which federal courts exercise ongoing jurisdiction, including "costs after an action is dismissed for want of jurisdiction," attorney fees, and criminal contempt charges.

Emerson v. Eighth Judicial Dist. Court, 127 Nev. 672, 677, 263 P.3d 224, 228 (2011). Under *Emerson*, the Nevada Supreme Court did have jurisdiction to

decide whether to award Respondents their attorney fees for the prior appeal. It chose to deny Respondents those fees. That is the end of the matter.

Moreover, it was simply incorrect for the District Court to state that the Supreme Court did not examine the scope of the arbitration agreement. In fact, the attorney-fee provision of the arbitration agreement was expressly quoted and argued before the Supreme Court. (6 Appx 1215, 1225). Accordingly, the District Court erred in awarding Respondents attorney fees for the prior appeal.

REQUEST FOR RELIEF

WHEREFORE, Appellants BETTY CHAN and ASIAN AMERICAN REALTY & PROPERTY MANAGEMENT hereby requests the Court as follows:

1. to reverse, in all respects, the District Court's confirmation of the GLVAR arbitration award;
2. to reverse, in all respects, the District Court's award of attorney fees and court costs to Respondents;
3. to vacate or modify the arbitration award, or alternatively, to remand the matter back to the GLVAR panel for clarification; and

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4. to grant Appellants all such other and further relief to which they may be entitled at law or in equity.

DATED: *May 27, 2021*.

Respectfully submitted,

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28(a)(12), 28.2(a) and NRAP 32(a)(9), I hereby certify as follows:

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:

> [***X***] This brief has been prepared in a proportionally spaced typeface using *the most recent version of Word, which is routinely updated*, in *Times New Roman 14-point font*; or
>
> [ ] This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

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 either:

> [***X***] Proportionately spaced, has a typeface of 14 points or more, and contains *13,859* words; or
>
> [ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or
>
> [ ] Does not exceed _____ pages.

///

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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 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: *May 27, 2021*.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on *May 27, 2021*, I served a true and correct copy of the forgoing ***APPELLANTS' OPENING BRIEF***, together with any and all exhibits and attachments, via the Supreme Court's Electronic Filing System to the following:

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