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' *COMBINED* REPLY BRIEF ON APPEAL/ANSWERING BRIEF ON CROSS-APPEAL

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.
KENNEDY & COUVILLIER, PLLC
(Former counsel for Appellants below)

(7) MICHAEL V. CRISTALLI, ESQ.
GENTILE CRISTALLI MILLER ARMENI SAVARESE
(Former counsel for Appellants below)

(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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(Counsel for Respondents below and on appeal)

(16) KEITH D. ROUTSONG, ESQ.
GOODSELL & OLSEN, LLP and later BLACKROCK LEGAL, LLC
(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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UPDATED JURISDICTIONAL STATEMENT

In general, Appellants BETTY CHAN ("Chan") and ASIAN AMERICAN REALTY & PROPERTY MANAGEMENT ("Asian American") (each an "Appellant" and collectively the "Chan Appellants") rely upon and re-urge the jurisdictional statement presented in their Opening Brief. (OB xiv-xvi).[1] Chan Appellants would also add that, in their Answering Brief, Respondents WAYNE WU ("Wu"), JUDITH SULLIVAN ("Sullivan"), NEVADA REAL ESTATE CORP. ("NREC"), and JERRIN CHIU ("Chiu") (each a "Respondent" and collectively the "Wu Respondents") refer to a "November 28, 2020 … final order." (AB 1).[2] Nevertheless, the final order was filed five days earlier, on November 23, 2020. (7 Appx 1456).[3] On that same date, the notice of entry was filed and served. (7 Appx 1465, 1476).

In their Answering Brief, Wu Respondents also do not mention the dates that the notices of appeal and cross-appeal were filed. (AB 1). On December 8, 2020—within 30 days of the notice of entry of final order being served—Chan Appellants filed their notice of appeal. (7 Appx 1478). Later that same day, Chan

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[1] *See Appellants' Opening Brief* at xiv-xvi (filed May 27, 2021) [hereinafter "Opening Brief" or "OB"].

[2] *See Appellees' [sic] Answering Brief and Opening Brief on Cross-Appeal (Amended)* at 1 (filed Feb. 3, 2022) [hereinafter "Answering Brief" or "AB"].

[3] Herein, the abbreviation "Appx" refers to volumes 1-7 of *Appellants' Appendix* (filed May 26, 2022).

Appellants filed an amended notice of appeal. (7 Appx 1481). Both of Chan Appellants' notices were timely. *See* NRAP 4(a)(1). Exactly 14 days later—on December 22, 2020—Wu Respondents filed their notice of cross-appeal. (7 Appx 1503). That notice would appear to be timely too. *See* NRAP 4(a)(2).

IMPORTANT UPDATE: In their Answering Brief, Wu Respondents made reference to their *Motion to Dismiss Second Appeal* (filed Jul. 6, 2021), in which they argued that jurisdiction did not lie for Chan Appellants' appeal. (AB 19). In their Answering Brief, they then proceeded to rehash arguments raised in their jurisdictional motion. (AB 19-20) Chan Appellants filed an opposition to the motion. (*Appellants' Response in Opposition to Respondents' Motion to Dismiss Second Appeal* (filed Aug. 3, 2021)). Wu Respondents then filed a reply to the opposition. (*Reply in Support of Motion to Dismiss Second Appeal* (filed Aug. 30, 2021)). ***Ultimately, this Court denied Wu Respondents' motion to dismiss for lack of jurisdiction and ordered that this appeal proceed in its entirety.*** (*Order Denying Motion to Dismiss* (filed Jan. 19, 2022)).

ROUTING STATEMENT

In their cross-appeal, Wu Respondents have made it clear that, at a minimum, this case involves a *contract dispute where the amount in controversy comes to no less than $152,195.32 ($13,795.32 in commissions and $138,400.00 in attorney fees and costs as special damages)*. Therefore, this case is *not* "presumptively assigned to the Court of Appeals" because it is far in excess of $75,000.00. NRAP 17(b)(6). The arbitration award, confirmed by the District Court, involved *$13,795.32 in commissions*. (2 Appx 390, 394; 4 Appx 816). The District Court also awarded Wu Respondents $57,985.83 in attorney fees and costs as special damages under the arbitration contract. (4 Appx 822; 7 Appx 1459). Now, Wu Respondents are seeking a *reversal* and *increase* of that award; specifically, on appeal, Wu Respondents are now seeking "all fees and costs" not awarded to them below. (AB 47). Below, they sought *$138,400.00 in such special damages*. (3 Appx 660; 4 Appx 764; 6 Appx 1359).

In addition, 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

Issues on Appeal

I. Whether, given the legal doctrine of "procuring cause," its protective policy, as well as its tenets of first priority and singular exclusivity, the District Court erred in confirming an arbitration award that split a sales commission between two realtors, the last of which had nothing to do with the buyer's committing to the subject sale.

II. Whether the District Court erred in awarding Wu Respondents attorney fees when, under the contract upon which it relied, express requirements were not satisfied—namely, Chan Appellants did not fail to abide or comply with the arbitration award, and it was not necessary for Wu Respondents to obtain judicial confirmation and enforcement of the award.[4]

Issue on Cross-Appeal

III. Whether the District Court properly rendered summary judgment against Wu Respondents on their claim for abuse of process when there was no showing of either an actionable ulterior motive or an improper or willful act in furtherance thereof.

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[4] Although not included in the issues presented or argument sections of their cross-appeal briefing, in their Answering Brief, Wu Respondents do present argument with respect to this issue actually seek *reversal* of the district court's attorney-fee order and an *increase* in the amount of these special damages. (AB 1, 20-30, 47).

CLARIFICATION OF FACTS

Undisputed Timeline

The parties' admitted or unrebutted recitation of events include the following:

Aug. 2013	"Chan and … Chiu began an ongoing professional relationship, with Chan as realtor and … Chiu as buyer." (OB 6; *accord* AB 4).
Jan. 24, 2014	"Chiu signed a Duties Owed by a Nevada Real Estate Licensee,' on which he acknowledged that Chan was his formal real estate agent." (OB 6; *see also* 1 Appx 12, 40; 2 Appx 251, 309, 389).
Mar. 18, 2014	"Chiu purchased a condominium, which Chan showed him. After that, Chan maintained contact with … Chiu about his condo and maintenance issues." (OB 6, 8; *see also* 1 Appx 193, 205).
Nov. 2, 2014	"Chiu … emailed Chan and informed her that he wanted to look for a second home." (OB 6 *see also* 1 Appx 40).
Mar. 2015	"Dr. Kwang Chiu [Respondent Chiu's father] contacted … Chan … to make an appointment for him and his son … to see homes …." (OB 7; *see also* 1 Appx 40)
Mar. 30, 2015	"Chan updated … Chiu's loan pre-approval letter before they started looking for the second home." (OB 7; *see also* 1 Appx 41, 193).
Apr. 2-14, 2015	"Chiu and Chan exchanged emails about the house search." (OB 7; *see also* 1 Appx 215).
Apr. 10, 2015	"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 [in his search for a second home] …. Afterwards, … Chiu and Chan texted each other and looked at properties together." (OB 7; *see also* 2 Appx 252, 254, 309, 388).

Apr. 18, 2015 — "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. Later, because of the accident, … Chiu decided to use his money to purchase a new automobile; so, he put the home search on pause." (OB 7-8; *see also* 1 Appx 193; 2 Appx 264).

Jul. 18, 2015 — "Chan emailed and texted … 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." (OB 8; *see also* 1 Appx 193; 2 Appx 266).

Oct. 2, 2015 — "Dr. Kwang Chiu called Chan, told her he would be in town on *December 30, 2015*, and specifically requested that she show him and … Chiu houses then. They scheduled to meet on December 30 at 10:00 a.m. Chan asked … Chiu to provide updated financials to update his loan pre-approval." (OB 8; *see also* 1 Appx 41, 193).

Nov. 2-3, 2015 — "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. … 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.'" (OB 9; *see also* OB 11; 1 Appx 193, 210; 2 Appx 229-30, 294, 312, 314, 316; 4 Appx 728-36, 748; *accord* AB 3).

Nov. 18-29, 2015	"On November 18-29, 2015, … Chiu and Chan exchanged emails about the home search." (OB 9; *see also* 1 Appx 42, 194; 2 Appx 231-33, 294).
Dec. 29, 2015	"Chan researched properties available …, compared them to [Chiu's] criteria and budget …. Chan … found <u>*Tevare*</u>, a new development in Summerlin by KB Home." (OB 9; *see also* 1 Appx 194; 2 Appx 241-49). Chan did these even though, originally, Chiu only wanted to purchase a resale. (1 Appx 41-42, 194; 2 Appx 231-33, 241-49, 294-95, 316).
Dec. 30, 2015	*Per Wu Respondents:* "Chan met with … Chiu and his parents to view some potential properties …. Chan took … Chiu and his parents to <u>*Tevare*</u> at Summerlin, a housing development by KB Homes Sales-Nevada, Inc." (AB 4; *see also* 1 Appx 41-42, 194-95, 202; 2 Appx 249, 268-29, 295, 316; 4 Appx 731; *accord* OB 9-10).
Dec. 31, 2015	*Per Wu Respondents:* "Chiu and his parents … returned to the KB Home Development…. <u>*[W]ithout the assistance of any broker*</u>[,] …. Chiu … decided to make a[n] … earnest deposit of $10,000.00 …." (AB 6; *see also* 2 Appx 296-97, 317; 3 Appx 469; *accord* OB 11). This was all done "[u]nbeknownst to Chan." (OB 11; *see also* 2 Appx 296).
Jan. 5, 2016	"Chan emailed … Chiu to ask if he had decided anything yet. Chan got no response." (OB 13; *see also* 1 Appx 197, 201; 2 Appx 235).
Jan. 7, 2016	*Per Wu Respondents:* "On January 7, 2016, … Chiu met Wu at the KB Home Development." (AB 8). <u>*This was the first time Wu went to Tevare*</u>. (AB 13; *see also* 1 Appx 197, 201; 2 Appx 235).
Jan. 8, 2016	*Per Wu Respondents:* "Chiu purchased Lot 43 with the Model 2 floorplan" at Tevare. (AB 9; *see also* 1 Appx 128-31, 197, 199; 2 Appx 298, 322).

Jan. 15-16, 2016	"Chan texted … Chiu, following up as to whether he had made any decision on any of the homes she had shown him…. [In response], 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 decided to go with Wu; Chiu said he felt "terrible" and that he should have told Chan sooner. (OB 14; *see also* 1 Appx 14, 44, 197-98, 201; 2 Appx 269-71, 299; *cf.* AB 9; 4 Appx 728-36).
Jan. 22, 2016	"Chan went to Tevare and learned that … Chiu had, in fact, signed a contract." (OB 14; *see also* 1 Appx 198).
Jan. 25-27, 2016	"Chan reached out to … Chiu again about the Tevare home." (OB 14; *see also* 1 Appx 199; 2 Appx 236-39, 353).
May 27, 2016	" Chiu closed on the purchase of the Tevare home…. [T[he commission from the sale came to a total of *$13,795.32*. The funds are currently held by GLVAR."[1] (1 Appx 14, 16, 45, 47, 190; 2 Appx 351; 7 Appx 001460).

[1] GLVAR is now known as Las Vegas Realtors® ("LVR"). <https://www.lasvegasrealtor.com>.

SUMMARY OF THE ARGUMENT

I. (Appeal)

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.

This is true for two primary reasons, first irrespective of the arbitration award among and between Chan Appellants and Respondents Wu, Sullivan, and NREC, and regardless of this Court's ultimate decision on the District Court's confirmation of that award, Chiu and KB Homes are still liable to Chan Appellants. Moreover, by the express terms and conditions of the agreement, Wu may not recover a commission because he was not the first agent to accompany Chiu to the Tevare community. Under the agreement, the issue is black and white; there are no shades of grey.

Harping on the lack of a written contract between Chiu and Chan Appellants, Wu Respondents miss the point that, as matter of fact and law, Chan Appellants are entitled to the Tevare commission under the doctrine of quantum

meruit. This is so because Chan's efforts were substantial, and Wu's efforts were "merely trifling," under that law, he is not entitled to any award.

Wu Respondents raise the issues of abandonment, the KB Homes lost registration card, and a missing transcript. These are all red hearings. The record clearly shows that Chan did not abandon their commission in less than a week after Chan accompanied Chu and his parents to the Tevare development. With respect to the registration card, Chan Appellants were not required to have it to recover their commission. However, because Wu signed the KB Homes broker agreement, he was, and he had to have Chiu sign it at Chiu's first visit to the Tevare property. Wu Failed to do either. As for the arbitration transcript, Chan Appellants requested it, but per its own rules, GLVAR denied the request. Wu Respondents never raised the issue below either.

II. (Appeal)

ATTORNEY FEES

The District Court erred in awarding respondents attorney fees because under the contract upon which it relied; express requirements were not satisfied. The first requirement is not satisfied because "abiding by" and "complying with" the express terms of the arbitration award, Chan appellants timely mounted a permissible legal challenge. the second requirement is not fulfilled because this is not a "judicial

confirmation and enforcement" case. The third requirement is not satisfied because it was not "necessary" for Wu Respondents to seek affirmative relief.

III. (Cross-Appeal)

ABUSE OF PROCESS

In bringing the instant action, Chan Appellants did *not* attempt to gain unwarranted strategic leverage in a completely unrelated matter or in a manner that went beyond the recovery or relief they could have obtained, if successful. Under de novo review, it is clear that Chan Appellants easily carried their burden below of establishing that they were entitled to summary judgment on Wu Respondents' counterclaim for abuse of process. in ruling upon dueling motions for summary judgment on that counterclaim, the District Court did not err in rendering judgment in favor of Chan Appellants and against Wu Respondents.

The summary judgment evidence shows that Chan Appellants have had no actionable, ulterior purpose and have not engaged in any improper, willful act in their use of the legal process. At worst, Wu Respondents' evidence may show a "bad intent," but as a matter of law, that is insufficient for their counterclaim. In fact, Chan Appellants have only fought to enforce their rights, and as a consequence, they have worked for the public good of real estate agents. In accordance with law, Chan Appellants have simply appealed the arbitration award

through proper channels; Wu Respondents have produced no evidence of any improper, willful act on Chan Appellants' part in their use of the legal process.

ARGUMENT

I. (APPEAL) 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.

This case is simple: Conspiring with Chiu, Wu hijacked the sale away from Chan. It is a textbook case. "[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 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).

The GLVAR panel and the District Court should not have corrupted the doctrine of procuring cause by applying it in a manner that effectuates the exact situation against which it was designed to prevent. This Court should reverse;

otherwise, the doctrine would lose all purpose and meaning. This is so because Chan "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 [full] commission." *Flamingo Realty v. Midwest Dev*., 110 Nev. 984, 990, 879 P.2d 69, 73 (1994).

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

Relative to the District Court's denial of Chan Appellants' motion to vacate the arbitration award and its resulting confirmation thereof, the Nevada Supreme Court reviews such matters *de novo*. *See Washoe Cty. Sch. Dist. v. White*, 396 P.3d 834, 838, 133 Nev. 301, 303 (2017). Similarly, "in 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).

As applicable to the case at bar, there are three common-law and statutory grounds for reviewing the GLVAR arbitration award: "(1) whether the award [wa]s arbitrary, capricious, or unsupported by the agreement; … (2) whether the arbitrator manifestly disregarded the law," *Clark County Educ. Ass'n v. Clark County Sch. Dist*., 122 Nev. 337, 341, 131 P.3d 5, 8 (2006); and (3) where "[a]n arbitrator exceeded his or her powers." NRS 38.241(1)(d). (OB 24). Wu Respondents do not dispute those standards. (AB 31-32). Utilizing the arbitrary-

and-capricious, manifest-disregard-of-the-law, and excess-of-authority standards, this Court should reverse the District Court's confirmation of the arbitration award and remand all of Chan Appellants' claims against Wu Respondents to the District Court. These are all reviewed *de novo*. *See Washoe*, 396 P.3d at 838, 133 Nev. at 303.

B. ***Claims Against Chiu and KB Homes*—Irrespective of the Arbitration Award Among and Between Chan Appellants and Respondents Wu, Sullivan, and NREC, and Regardless of this Court's Ultimate Decision on the District Court's Confirmation of that Award, Chiu and KB Homes Are Still Liable to Chan Appellants.**

Wu Respondents contend that Chan Appellants "filed a frivolous action against [NREC] (the real estate [brokerage] where Wu works), Judith Sullivan (… [broker] of Nevada Real Estate Corp.), … Chiu [the purchaser], and KB Homes (the property developer/seller)." (AB at 12). Nevertheless, for the reasons stated throughout Chan Appellants' Opening Brief and in this, their Reply Brief, nothing could be further from the truth. (*See also* OB 20-21 & n.6; OB 47 & n.9).

With respect to Chiu's liability in particular, Wu Respondents argue that "Chiu and Chan never entered a written agreement." (AB 12; see also AB 4). They also contend that "[t]here is no mention of Chan in any of the closing documents." (AB 9). Contrary to Wu Respondents' arguments here, for the reasons discussed below, Chiu faces exposure to Chan Appellants for the full value

of their services under the theories of implied contract and quantum meruit, among other claims. (*See also* OB 20-21 & n.6; OB 47 & n.9).

This liability survives the arbitration and even this appeal, for that matter. In the Code of Ethics (Article 17) of the *Code of Ethics and Arbitration Manual* (2018) (hereafter the "NAR Manual" or the "Manual") utilized by GLVAR, the words "client," "customer," or terms of similar meaning do not even appear with respect to any *mandatory arbitration*. (1 Appx 180-81; 2 Appx 411, 429). The NAR Manual also notes that disputes between clients and their agents/brokers "are often decided in court").

Because Chiu was Chan'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. Even Wu Respondents note that the ethical obligation only extends to limited "disputes between realtors." (AB 27). In accordance with this principle, the District Court properly stayed the lawsuit pending the arbitration between and among Chan Appellants and all of the Wu Respondents, with the notable exception of Respondent Chiu. (1 Appx 153). *See Maide, LLC v. Dileo*, 138 Nev. Adv. Rep. 9, __ P.3d __, __ 2022 Nev. LEXIS 6, *2-3 ("[T]he statutory heirs were not bound by the arbitration provision and [the district court] stayed their claims pending arbitration.").

At that juncture *Chiu could have voluntarily agreed* to participate in and be bound by the arbitration. Section 2(c) of the NAR Manual allows for a "*client's voluntary agreement* to arbitrate and to be bound by the decision." (2 Appx 411 (emphasis added)). Despite this provision, Chiu flat-out refused to participate. He did not list his name in the *Response and Agreement to Arbitrate*. (2 Appx 290-91). He did not sign his name to the agreement either. (*Id*.). He did not participate in the arbitration. Not surprisingly, the arbitration award does not mention his name or make any ruling relating to him either; therefore, the arbitration award is not binding as to Chan Appellants' claims against him. (2 Appx 393).

Refusing to participate in the arbitration, he cannot now hide behind the arbitration award and claim that he owes Chan Appellants nothing. To the contrary, under various theories, including those for implied contract and quantum meruit, he remains very much liable to them. (OB 20-21 & n.6; OB 47 & n.9). At a minimum, the Chan Appellants' claims against Chiu need to be remanded to the District Court for a final determination. *See Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 634, 189 P.3d 656, 660, 2008 ("Generally, arbitration is a matter of contract and '"a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."'").

As for KB Homes, it is not even a party to this Appeal; Chan Appellants' claims against it remain unadjudicated, still pending in the District Court.[2] (OB xv; OB 1 & n.1). Like Chiu, KB Homes has exposure for liability here:

> An owner who has knowledge that a certain broker first interested a customer with whom negotiations are still pending proceeds at his peril in closing a deal with such customer through another broker and paying a commission to the latter broker; and he cannot thereby avoid liability to the first broker.

12 C.J.S., *Brokers* § 92, *cited with approval in Bartsas*, 82 Nev. at 9, 409 P.2d at 629. The undisputed evidence shows KB Homes had knowledge that Chan was the broker who first interested Chiu here. (OB 10 & n.4; AB 9-11). The resolution of the issues on this appeal will, however, be instructive, if not determinative, in the controversy between Chan Appellants and KB Homes. As a matter of judicial efficiency, it is best for this controversy to be resolved on this appeal before Chan Appellants proceed with their claims against KB Homes below.

Given that Chiu was not a party to the arbitration agreement, the arbitration panel could not have rendered an award in his favor in the first instance. *See Health Plan of Nev., Inc. v. Rainbow Med., LLC*., 120 Nev. 689, 697-698, 100 P.3d 172, 178 (2004) ("Arbitrators exceed their powers when they address issues or make awards outside the scope of the governing contract."). It is undisputed that

[2] As between and among the parties on this appeal, the District Court certified its summary judgment as final under NRCP 54(b). (7 Appx 1456). KB Homes is not a party to this appeal.

the arbitration panel did consider Chan Appellants' claims against Chiu. By stretching its "confirmation" of the panel's award to include those claims, the District Court necessarily erred. Therefore, with a *de novo* application of the excess-of-authority standard, this Court should reverse the District Court's rulings as to the claims against Chiu and remand them for further proceedings. (1 Appx 15-17). *See* NRCP 54(b). It should also allow the claims against KB Homes to proceed below.

C. ***Wu's Broker Agreement with KB Homes*. By the Express Terms and Conditions of the Agreement, Wu May Not Recover a Commission Because He Was Not the First Agent to Accompany Chiu to the Tevare Community. Under the Agreement, the Issue Is Black and White; There Are No Shades of Grey.**

Wu Respondents contend that "Wu is the broker that procured the sale and the ONLY listed Broker on the *purchase agreement and the addendum*." (AB 9 (emphasis added)). "If there was any error by the arbitration panel," they argue, "it is that they should have awarded the entirety of the commission to Wu and nothing to Chan." (OB 33). In light of terms of the agreement, specifically as they apply to the conditions for Wu earning a commission, this argument altogether lacks substance.

As explained in Chan Appellants' Opening Brief, "given the express terms of Wu's broker agreement with KB Home [which was part of the purchase agreement], he was not entitled to take any commission at all." (OB 42 (citing 2

Appx 343). It is undisputed that Wu is bound by that agreement. (OB 14). It is also undisputed that the agreement expressly excludes a broker (or agent) from earning a commission if they were not the first to accompany the prospective buyer to the Tevare development. (1 Appx 102; 2 Appx 343). Specifically, the agreement provides, in pertinent part:

> It is an absolute condition for the payment of any Commission that Broker accompanies and registers Buyer at the Community at the time of Buyer's first visit as a prospective purchaser to the Community. Broker shall *not* be entitled to any Commission if Buyer or any relative of Buyer or any other person designated by Buyer has visited the Community without Broker prior to the date of this Agreement.
>
> …. Any attempt by Broker to effectuate a broker relationship with Seller without Broker's actual presence at Buyer's ***first*** visit shall be null and void.

(1 Appx 102 (emphasis in original); 2 Appx 343 (emphasis in original)).

Thus, unlike the common law of procuring cause, under the broker agreement, "'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,'" does *not* just have "'considerable weight in determining whether the [broker] is the procuring cause of the sale.'" *Carrigan v. Ryan*, 109 Nev. 797, 802, 858 P.2d 29, 32-33 (1993). *Rather, by the express terms of the agreement, the first accompanying broker is the sole determinative factor.* In this manner, unlike the common law, the broker agreement does set forth a "*precise legal measurement*."

Carrigan, 109 Nev. at 802, 858 P.2d at 32-33 (emphasis added). Unlike Chan, because Wu has a contract with KB Homes, he may not recover a commission under the theories of implied contract and quantum meruit. *See LasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997) ("An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement.").

Wu Respondents admit that Chan accompanied Chiu to the Tevare community for his **first visit** on December 30, 2015. (AB 4). They also concede that Wu did not even accompany Chiu for his **second visit**, when he paid the earnest-money deposit on December 31, 2015. (AB 6). *In fact, by Wu Respondents' own reckoning, Wu did not accompany Chiu to the Tevare community until his* **third visit** *a week later, on January 7, 2016*. (AB 8). ***Per the plan language of the KB Homes commission contract, this precludes Wu from earning any commission whatsoever.***

Once again trying to muddy the waters, Wu Respondents contend: "[T]he floor plan and lot combination ultimately purchased by Chiu was never presented to him by Chan but rather by the later retained agent, Wu." (AB 5). They also "[Chan was] pushing [Chiu] … to purchase a KB Homes Model 3 floorplan, a plan … Chiu was not impressed with …." (AB 8). They continue: "[Wu]

suggested Lot 43 and the Model 2 floorplan, a combination that had never even been suggested by Chan." (AB 8)

Even if these assertions are true—and as discussed below they are not—they are wholly irrelevant and immaterial. The commission contract does not link "model," "lot," "floorplan," "upgrades," or anything along those lines with the condition for commission. Rather, it expressly provides that the litmus test for commission is the "Buyer's first visit as a prospective purchaser to the *Community*." (1 Appx 102 (emphasis added); 2 Appx 343 (emphasis supplied)). As stated, Wu Respondents concede that Chan accompanied Chiu to the Tevare community on his first visit. (AB 4). Thus, under the KB Homes commission contract, which Wu signed and to which he is bound, he is not entitled to anything.

Given that Tevare was an undeveloped community, the commission contract's focus on the first visit to the community makes. After all, changes to the models and lots can be made as long as construction is not too far along. Thus, the focus is rightly on the visit to the community, rather than to a specific modular home on whatever lot that just happened to have been built out and available for touring at the time.

To the extent a specific model or lot has any bearing on the matter, Chan actually showed Chiu, his girlfriend, and his parents all of the different models and available lots. (OB 10-11; *see also* 1 Appx 42-43, 195; 2 Appx 295; 4 Appx 731).

Even Chiu admits in his answer that Chan showed them all to him. In their amended complaint, Chan Appellants state: "25. Chan then showed the [KB] model homes to the Chiu family and … Chiu liked the first and second model homes." (1 Appx 13). In his answer, "[a]nswering paragraph 25 of the complaint, … Chiu admits to touring the model homes and expressing interest in a couple of the layouts." (1 Appx 43).

At the time, KB Homes 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 Homes had already predetermined which lots would go with which models. Having opted for Model 2, Chiu could not select any location other than Lot 37 or Lot 43. As of December 31, 2015—when Chiu made his earnest-money deposit—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). It is no wonder, then, why Chiu went with Lot 43. *That was the only lot he could purchase*. (2 Appx 295, 298, 322-23).

The NAR Manual specifically required the GLVAR arbitration panel to consider whether "the broker's [Wu's] actions [were] in accordance with the terms and conditions of the offer of cooperation and compensation [in the broker agreement]." (2 Appx 444). If so, it mandated that the GLVAR panel had to determine whether "all the conditions of the [broker] agreement [were] met." (*Id*.).

It is undisputed that the broker agreement was presented to the GLVAR panel at the arbitration. Nevertheless, it somehow went against the facts and all controlling law and awarded Wu the bulk of the commission.

From the foregoing, it is clear that, by its express terms, the broker agreement sets the procuring-cause principle of singular exclusivity in stone, establishes its principle of first priority as a precise legal measurement, and specifically precludes Wu from earning a commission. (OB 28-34). This is the only result the arbitration panel could have reached because he was not the first agent to accompany Chiu to the Tevare community. Under the agreement, the issue is black and white; there are no shades of grey.

Given that agreement, the NAR Manual, and the undisputed facts here, it is clear that the GLVAR panel "kn[ew] the law and recogniz[ed] that the law required a particular result"; however, it "simply disregarded the law." *Clark County Educ. Ass'n*, 122 Nev. at 341-342, 131 P.3d at 8. Thus, Chan Appellants have satisfied the manifest-disregard-of-the-law standard here. For the same reasons, the arbitrary-and-capricious standard has been satisfied because the arbitration panel's decision had no way of being "supported by substantial evidence in the record." *Id*. at 343-344, 131 P.3d at 9-10. Likewise, Chan Appellants have satisfied the excess-of-authority standard because the arbitration panel was not "arguably construing or applying the contract," and there is no

"colorable justification for the outcome." *Health Plan*, 120 Nev. at 697-698, 100 P.3d at 178. Applying these standards *de novo*, this Court should reverse the confirmation of the arbitration award, render judgment in favor of Chan, and vacate the arbitration award. Alternatively, the Court should remand this case back to District Court.

D. ***Employment Contract and Procuring Cause*—Chan Appellants Have Satisfied Both of These Requirements for Their Recovery of the Tevare Commission.**

"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 undisputed evidence leads to the inescapable conclusion, Chan Appellants have satisfied both of these requirements and are therefore entitled to the Tevare commission.

(1) Implied contract. Harping on the lack of a written contract between Chiu and Chan Appellants, Wu Respondents miss the point that, as matter of fact and law, Chan Appellants are entitled to the Tevare commission under the doctrine of quantum meruit.

As mentioned, Wu Respondents attempt to make an argument with their contention that there was no written agreement between Chan Appellants and Wu. (AB 4, 9, 12). Nevertheless—importantly—they do not dispute the point Chan Appellants are entitled to their commission under the law of implied contract and

quantum meruit. (OB 21-22; *see also* AB 20-47). The Nevada Supreme Court precedent explains why Chan Appellants have such an entitlement here:

> The requirement that an employment contract be found to exist is easily met. In [*Morrow v. Barger*, 103 Nev. 247, 252, 737 P.2d 1153, 1156 (1987)], this court 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. For example, in [*Shell Oil Co. v. Ed Hoppe Realty*, 91 Nev. 576, 580-81, 540 P.2d 107, 109-10 (1975)], this court held that an employment contract could be found to exist where the only evidence of a contract consisted of letters sent by the broker to the seller and price information received in return. The court noted that the seller was aware of common real estate practice and knew that the broker expected to be paid …. *Id*. at 579, 540 P.2d at 108-09.

Atwell v. Southwest Sec., 107 Nev. 820, 823-824, 820 P.2d 766, 768-769 (1991).

Here, the facts are so much more compelling than even those in *Shell Oil*. For starters, it is not as though there were no writing in which Chiu acknowledged that Chan was his agent. On January 24, 2014 and then again on April 10, 2015, Chiu signed two separate "Duties Owed by a Nevada Real Estate Licensee," each of which unequivocally states that Chan is authorized to represent Chiu as his real estate agent. On November 2, 2015, Chiu asked Chan if she could "show [him] some houses around new years time." (2 Appx 229). Chan responded in an email later that day, "Sure. Thank you for using my service again." (2 Appx 230). Wu Respondents' contention that there is no writing is clearly unsupported by the record. Moreover, even if there were no writings, the Nevada Real Estate Division

has provided legal guidance to brokers/agents that "it is legal to have oral brokerage agreements." NEVADA REAL ESTATE DIVISION, THE NEVADA LAW AND REFERENCE GUIDE at 44 (5th ed. 2020) ("NRED Law Guide").

Chan and Chiu actually began their professional relationship back in August 2013. *See* "Clarification of Facts/Undisputed Timeline," *supra*. On March 18, 2014, Chiu closed on the purchase of a condominium; Chan was his buyer's agent and earned a commission. *See id*. Thus, Chiu was certainly aware of common real estate practice in general, as well as Chan Appellants' practice in particular, and he knew that they expected to be paid.

With respect to the search for and purchase of the Tevare property, Chiu and Chan had numerous phone calls and exchanged numerous emails and text messages beginning as early as November 2, 2014 and continuing to as recently as January 27, 2016—*a period of nearly fifteen (15) months*. *See id*. During this time—before Wu was even on the scene—Chan spent countless hours to find Chiu a second home. *See id*. Among other things, went through hundreds of listings to find the Tevare property for him, drove him to the Tevare community, and accompanied him on his first visit to various models and lots. (OB 34-40). Other details of her work are set forth in Chan Appellants' Opening Brief. (*See id*.). Chiu was so impressed with the Tevare community that he made an earnest-money deposit on the Tevare home the very next day, less than 24 hours later. (*Id*.). *See*

also "Clarification of Facts/Undisputed Timeline," *supra*. Given these facts, and the holdings in *Atwell*, *Morrow*, and *Shell Oil*, it is just silly for Wu Respondents to argue that there was no employment contract between Chan Appellants and Chiu.

It is also important to reiterate the point that because Chiu was not a party to the arbitration below. (2 Appx 290-91, 393). Therefore, regardless of how the GLVAR panel decided how commission KB Home should be distributed, Chiu is still liable for full value of Chan Appellants' services. *See Atwell*, 107 Nev. at 823-24, 820 P.2d at 768-69; *Morrow*, 103 Nev. at 252, 737 P.2d at 1156; *Shell Oil*, 91 Nev. at 580-81, 540 P.2d at 109-10.

(2) <u>Procuring cause</u>. The principle of singular exclusivity is the law of Nevada regardless whether the legal term is "procuring cause," "predominating cause," "inducing cause," or any other cause. Because Wu's efforts were "merely trifling," under that law, he is not entitled to any award.

As discussed in Chan Appellants' Opening Brief, Nevada's law of procuring has three basic tenets: (1) protective policy; (2) first priority; and (3) singular exclusivity. (OB 27-34). With respect to the 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. (OB 27-28). In terms of 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. (OB 28-31). As for singular exclusivity, as a matter of law, multiple procuring causes cannot exist; there can only be one. (OB 31-34).

Wu Respondents do not dispute the protective policy or the principle of first priority underlying the procuring-cause doctrine. They even tacitly agree that the doctrine is singularly exclusive. For example, they maintain that "[t]he underlying commission at issue in this litigation should rightfully be paid to Wayne Wu." (AB 2). That argument leaves no room for more than one procuring cause.

Arguing from the other side of their mouths, Wu Respondents contend that Chan Appellants have failed to cite any authority holding that there can only be one procuring cause. (OB 38). This contention is just wrong; Chan Appellants' Opening Brief is replete with such citations. (OB 31-34). In Nevada, singular exclusivity has been "well settled" for over 100 years. *Ramezzano v. Avansino*, 44 Nev. 72, 84, 189 P. 681, 685 (1920). Since then, the principle has been repeated time and again. For example, in *Bartsas Realty v. Leverton*, 82 Nev. 6, 409 P.2d 627 (1966), the Nevada Supreme Court followed and relied upon a Montana case, *Flinders v. Gilbert*, holding that there could only be one procuring cause: "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 (emphasis added) (citing *Flinders v. Gilbert*, 378 P.2d 385, 388 (Mont. 1963)). The United

States District Court for the District of Nevada has likewise relied upon *Flinders*. *See Twitchell v. Paris*, 2008 U.S. Dist. LEXIS 136552 (D. Nev.).

The *Flinders* court held unequivocally that there can only be one procuring cause: "'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, <u>to the exclusion of the other brokers</u>.'" *Flinders v. Gilbert*, 378 P.2d 385, 388 (Mont. 1963) (emphasis added). Coming back full circle to the Nevada Supreme Court's holding in *Bartsas*, the Supreme Court of Hawaii followed that case and held: "Where there are many brokers involved in a transaction, <u>*there can be only one 'procuring cause.'*</u>" *Lundburg v. Stinson*, 695 P.2d 328, 335 (Haw. 1985) (emphasis added) (*citing Bartsas*, 82 Nev. at 9, 409 P.2d at 629). (*See also* OB 31-34).

Suggesting that other jurisdictions have allowed for multiple brokers to share in a commission, Wu Respondents then attempt to sew further confusion by arguing: "Several jurisdictions have held that the broker's efforts must be the <u>*predominating cause*</u>." (AB 33 & n.70). This is a complete red herring. None of the cases cited by Wu Respondents held that there can be more than just "predominating cause" in the context of a sale. Rather, none of the cases cited by Wu Respondents involved multiple brokers, and every single one held either that the one broker in the case was entitled to the commission or not (most of the cases

were actually between one broker and their customer). *See AN Assocs. v. Quotron Sys*., 605 N.Y.S.2d 178 (Civ. Ct. 1993); *Carmichael v. Agur Realty Co*., 574 So. 2d 603 (Miss. 1990); *Ham v. Morris*, 711 S.W.2d 187 (1986); *Vincent v. Weber*, 232 N.E.2d 671 (Ohio Mun. Ct. 1965).

Furthermore, term "predominating cause" and even other terms are not absent from the Nevada Supreme Court's lexicon. *See, e.g., Morrow v. Barger*, 103 Nev. 247, 253, 737 P.2d 1153, 1156-1157 (1987) ("To constitute the *predominating cause* of the sale … , [t]he 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." (emphasis supplied)). As the U.S. District Court in Nevada has observed: "The Nevada Supreme Court has also used the terms '*predominating cause*' and '*inducing cause*' interchangeably with '*procuring cause*' and '*proximate cause*.'" *Twitchell v. Paris*, 2008 U.S. Dist. LEXIS 136552 (emphases added) (citing *Morrow*, 103 Nev. at 253, 737 P.2d at 1156; *Bartsas*, 82 Nev. at 9, 409 P.2d at 629).

The different terms all employ the singular "cause" (as opposed to the plural "causes"), and all mean the same thing: singular exclusivity. *See id*. Even the Nevada Real Estate Division has observed that only one broker may be the cause: "If a real estate broker has been the 'procuring' or 'inducing' cause of a sale, *he or she* is entitled to the … commission regardless of who eventually closes the

transaction." NEVADA REAL ESTATE DIVISION, THE NEVADA LAW AND REFERENCE GUIDE at 54 (5th ed. 2020).

Wu Respondents quote from the NAR Manual, which indicates that "in exceptional cases, awards may be split between the parties." (AB 34). Wu Respondents' argument is disingenuous on many levels. Most obvious, they conveniently leave out the express requirement in the Manual 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). Irrespective of the general language in the NAR Manual, Wu Respondents ignore the specific language in the GLVAR arbitration award itself: "Many arbitration hearings are convened to determine questions of *procuring cause [singular]*. For purposes of arbitration, ... *procuring cause [singular]* is considered to be the initiation of the unbroken chain of events that results in a successful transaction, defined as a sale that closes …." (2 Appx 393). They also ignore the point that in their arbitration briefs, both sides set forth Nevada law, showing that there could only be one procuring cause; no party even suggested that there could be more than one. (OB 35-37).

"Although the concept of 'procuring cause' is not conducive to precise legal measurement, …. a broker's efforts in bringing about the sale must be more than 'merely trifling.'" *Carrigan*, 109 Nev. at 802, 858 P.2d at 32-33. As discussed in

Chan Appellants' Opening Brief, Because of Chan's substantial efforts, she was undeniably the procuring cause of the sale. (OB 34-40). Before Wu was even on the scene, Chan spent nearly fifteen (15) months looking for second home for Chiu, went through hundreds of listings to find the Tevare property for him, drove him to the Tevare community, and accompanied him on his first visit to various models and lots. (*Id*.). Chiu was so impressed; he made an earnest-money deposit on the Tevare home the very next day. (*Id*.).

Chiu did not even know who Wu was at the time. Wu did not go with Chiu to the property until at least seven (7) days later. (AB 8). Even then, if anything, all Wu did was help Chiu select upgrades (such as tile and carpet), consider *feng shui* factors, fill out boilerplate paperwork, and address other minor details. (OB 40). Even if true, these very minor efforts were "merely trifling." They pale in comparison to the efforts of Chan. Even if the express terms of the KB Homes commission contract do not control Wu's right to the commission, under *Carrigan*, his "merely trifling" contributions disqualify him from being the procuring cause.

Given the facts here, including the express requirement in the NAR Manual to follow state law, briefing of the parties in the GLVAR proceeding as to the singular exclusivity of procuring cause in Nevada law, and the respective efforts of the parties, it is clear the arbitration panel "kn[ew] the law and recogniz[ed] that the law required a particular result"; however, it "simply disregarded the law."

Clark County Educ. Ass'n, 122 Nev. at 341-342, 131 P.3d at 8. Its award is not "supported by substantial evidence in the record." *Id*. at 343-344, 131 P.3d at 9-10. Nor was there "colorable justification for the outcome." *Health Plan*, 120 Nev. at 697-698, 100 P.3d at 178. Applying these standards *de novo*, this Court should reverse the confirmation of the arbitration award, render judgment in favor of Chan, and vacate the arbitration award. Alternatively, the Court should remand this case back to District Court.

E. *Abandonment*—Given the Facts and Timeline Here, Wu Respondents' Argument Is Ridiculous; the Record Clearly Shows that Chan Did Not Abandon Their Commission In Less than a Week After Chan Accompanied Chiu and His Parents to the Tevare Development.

"[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). In the present case, Wu Respondents argue: "[T]he Arbitration Panel rightly believed that Chan had abandoned [Chiu]." (AB 40; *see also* AB 2-3, 6, 10, 33). This argument is ludicrous. If, indeed, the panel believed that Chan had abandoned Chiu, they would not have awarded her anything.

The key to legal "abandonment" is the subjective intent to relinquish a right. The Supreme Court of Nevada has opined:

> "'Abandonment' is a word which has acquired a technical meaning …. It is defined to be '*the relinquishment of a right, the*

> *giving up of something to which we are entitled*.' In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry; for there can be no strict abandonment of property without the intention to do so…. [L]apse of time may often be a strong circumstance, when connected with others, to prove the intention to abandon, though *the bare lapse of time*, short of the statute of limitations and unconnected with any other circumstance, *would be no evidence of abandonment*…."

Goldfield Consol. Milling & Transp. Co. v. Old Sandstrom Annex Gold Mining Co., 38 Nev. 426, 440-41, 150 P. 313, 317 (1915).

Here, the evidence shows that Wu Respondents only wanted to pay a commission of 1% and that they actually forsook Chan for that reason. (OB 35). With respect to Chan Appellants, they have no evidence of abandonment. It is undisputed that Chan Appellants never stated or even suggested that they were abandoning their rights to the commission. The facts actually show the opposite to be true. On January 5, 2016—six days after she showed Chiu the Tevare home—"Chan emailed … Chiu to ask if he had decided anything yet. Chan got no response." (OB 13; see also 1 Appx 197, 201; 2 Appx 235). Not long after, on January 15-16, 2016, "Chan texted … Chiu, following up as to whether he had made any decision on any of the homes she had shown him…. [In response], he simply lied, 'Ah nah, been kinda busy lately.'" (OB 14; *see also* 1 Appx 14, 44, 197-98, 201; 2 Appx 269-71, 299; *cf.* AB 9; 4 Appx 728-36). He also said that he was not going to buy anything. (*Id*.). Upon further inquiry, he admitted that his

father had decided to go with Wu; Chiu said he felt "terrible" and that he should have told Chan sooner. (*Id*.).

About a week later, on January 22, 2016, "Chan went to Tevare and learned that … Chiu had, in fact, signed a contract." (OB 14; see also 1 Appx 198). Soon thereafter, "Chan reached out to … Chiu again about the Tevare home." (OB 14; see also 1 Appx 199; 2 Appx 236-39, 353). She gave Chiu fair warning that she wanted her commission. (*Id*.). There was no express abandonment.

Trying to dodge these facts, Wu Respondents focus on the time. For example, they claim: "Chan admits that she had no contact with … Chiu from December 30, 2015, to January 5, 2016, the very days Dr. Chiu had indicated they needed help locating a home." (AB 7; *see also* 1 Appx 194-95; 4 Appx 728-36). Wu Respondents continue: "According to Chan, her nonresponsive attitude during the … time … Chiu needed to make his decision was due to her pursuit of personal affairs, including going to see 'fireworks'" on New Year's eve. (AB 6; *see also* 1 Appx 194).

This argument is extremely calloused—Heaven forbid that Chan would actually take some time off to enjoy the holidays with her family. More importantly, it misstates the undisputed facts. By Wu Respondents' own admission, Chan showed the Tevare property to Chiu on December 30, 2015. *See* "Clarification of Facts/Undisputed Timeline," *supra*. (AB 4; *see also* 1 Appx 41-

42, 194-95, 202; 2 Appx 249, 268-29, 295, 316; 4 Appx 731; *accord* OB 9-10). Therefore, Wu Respondents cannot, with a straight face, press their argument Chan had no contact with Chiu on that day. (AB 7).

Granted, prior to December 30, 2015, Chiu initially indicated that he might continue looking for houses on December 31, 2015 and January 1, 2015, while his parents were still in town. Nevertheless, he abruptly stopped his search less than 24 hours after Chan showed him the Tevare property, when—by Wu Respondents' admission—he unilaterally made an earnest-money deposit towards that home on December 31, 2015. *See* "Clarification of Facts/Undisputed Timeline," *supra*. (AB 3, 6, 11; *see also* 1 Appx 193, 210; 2 Appx 229-30, 294, 296-97, 312, 314, 316-17; 3 Appx 469; 4 Appx 728-36, 748; *accord* OB 9, 11; 2 Appx 296).

Wu Respondents aver that "[o]n December 31, 2015, …. [Chiu and his parents] called Chan at approximately 10:50 a.m., to express their desire to look at more options before … Chiu's parents left town." (AB 6). However, Chiu had already made his earnest-money deposit by then, and Chan did return their call later that day at about 2:00 p.m. (AB 6; OB 11-12). Conveniently, they did not tell Chan about the deposit. Given these facts, it is not surprising that Chan subsequently received no contact from Chiu or his parents.

Wu Respondents allege that Chiu and his parents did try to call Chan on January 2-3, 2015. (AB 7). However, Dr. Kwang Chiu told Chan that he would be

leaving Las Vegas on January 2, 2016. (OB 12; *see also* 1 Appx 297). In addition, this was *after* the December 30, 2015 to January 1, 2015 period which, as Wu Respondents concede, was the timeframe Chiu had requested that Chan be available. (AB 3). Chan therefore had no reason to expect any contact from them right after the new year.

Besides, that is a time that people spend with family; Chiu and his parents reasonably should have expected Chan to be doing just that. Interestingly, Chiu admits that from January 2-3, 2016, as he and his parents were allegedly searching for new representation, they "call[ed] a few different agents, but none answered." (AB 7). Obviously, many other agents were celebrating the holiday as well.

According to Wu Respondents, Dr. Kwang Chiu "located Wu's number in a local newspaper and called Wu at approximately 1:40 p.m. on January 3, 2016." (AB 8). This account contradicts the sworn statement of Chiu below, which gave no such date or time and explained that his father had actually "recommended Wayne Wu as a replacement real estate agent and called Wayne on [his] behalf." (1 Appx 130). Regardless of which version of Wu Respondents' recitations of the facts is correct, the earliest Chiu met Wu was January 3, 2016—*three (3) days after Chiu had made his earnest-money deposit and four (4) days after Chan showed him the Tevare home*.

By Wu Respondents' reckoning, Chan Appellants somehow impliedly "abandoned" the commission during a four-day period (over the holidays) when Chiu was not even looking for homes anymore. Wu Respondents' argument also ignores the that just a few days after she showed the Tevare home to Chiu, she followed up with him about it and thereafter continued to demand her commission. Wu Respondents' argument simply lacks factual and evidentiary support and should be dismissed out of hand.

F. ***The Lost KB Homes Registration Card*—In Order to Recover Their Commission, Chan Appellants Were Not Required to Have the KB Home Registration Card. However, Because Wu Signed the KB Homes Broker Agreement, He Was, and He Had to Have Chiu Sign It at Chiu's First Visit to the Tevare Property. Wu Failed to Do Either.**

Wu Respondents argue that Chan has fraudulently represented that Chiu signed a registration card naming her as an agent because she has been unable to produce one. (AB 9-12). Nevertheless, Chan did not keep the card; KB Homes did. Moreover, in their Answering Brief, Wu Respondents do not dispute the fact that Chiu did, in fact, sign a registration card naming Chan as his agent. In his sworn statements in the record, Chiu never denies that fact either. The evidence actually shows that KB Homes received the card and subsequently lost it. (OB 10 & n.4). That evidence is unrebutted.

As discussed above, under the KB Homes broker agreement—to which Wu is a party and Chan is not—Wu was required to accompany the Chiu at his visit to

the Tevare community. It is undisputed that he did not. Under the agreement it is also "an *absolute condition* for the payment of any Commission that Broker … *registers* Buyer at the Community at the time of the Buyer's *first visit*." (1 Appx 102 (emphasis added); 2 Appx 343 (emphases added)). Per the terms of the agreement, the buyer must complete the registration card at the first visit. (*Id*.). It is undisputed that Wu has no such card.

Chan Appellants were not required to have the KB Home registration card. As discussed above, Chan Appellants do not need a registration to recover their commission because they are not bound by the terms of the KB Homes broker agreement. Instead, they may recover under the theories of implied contract and quantum meruit.

G. *Arbitration Transcript*—Wu Respondents' Raising the Lack of a Transcript from the GLVAR Panel is a Red Herring; Chan Appellants Requested It, But Per Its Own Rules, GLVAR Denied the Request. Wu Respondents Never Raised the Issue Below Either.

Wu Respondents argue: "Chan has not presented a copy of the transcript [or tape] from the actual arbitration panel. How can this court review the decision of the panel without a copy of the transcript?" (AB 40). This argument is disingenuous and ignores the facts and proceedings below.

The fact of the matter is that Chan first requested the transcript from GLVAR on May 17, 2018—which was within the time for appeal. (5 Appx 969; 6

Appx 1231). She made subsequent requests on June 13, 15, 16, and 18, 2018, and then again on September 5, 2018 and October 2, 2018. (8 Appx 1552-60).[3] GLVAR gave her noncommittal responses on June 15, 18, and 19, 2018. (*Id*.). Ultimately, GLVAR denied her request on October 4, 2018, citing its own rules, and averring that Chan failed to request the transcript within the time to take an appeal. (8 Appx 1561). Chan responded that same day, reminding GLVAR that she had, in fact, requested the transcript in a timely fashion. (8 Appx 1562; *see also* 6 Appx 1231). GLVAR altogether ignored her response and provided no further comment.

Perhaps even more importantly, proceedings below, Wu Respondents never raised the issue of the transcript in the District Court. Therefore, they cannot now raise it on appeal.

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

In their Answering Brief, Wu Respondents make much of the arbitration agreement (AB 14, 45). The arbitration agreement includes the following clause for attorney fees and court costs:

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[3] The items in Volume 8 of *Appellants' Appendix* were not part of the record below because, as discussed here, Wu Respondents never made an issue of the transcript (recording) below. Chan Appellants will submit Volume 8 under cover of a motion for the Court to consider items outside of the record.

> …. I agree to abide by the arbitration award and, if I am the non-prevailing party, to … either (1) pay the award to the party(ies) named in the award or (2) deposit the funds with the [GLVAR] Professional Standards Administrator to be held in an escrow or trust account maintained for this purpose….
>
> In the event I do not comply with the award and 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 obtaining such confirmation and enforcement.

(1 Appx 184).

These terms impose three separate requirements for Wu Respondents to obtain an award of attorney fees and costs: (1) Chan Appellants had to fail to "abide by" and "comply with" the arbitration award; (2) Wu Respondents had to seek "judicial confirmation and enforcement" of the award; and (3) it had to be "necessary" for Wu Respondents to take such action. These 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.") None of these requirements have been satisfied here.

In their Answering Brief, Wu Respondents do not address—much less rebut or contest—Chan Appellants' point of error that because the Supreme Court denied

Wu Respondents' motion for attorney fees on the prior appeal, that ruling became the law of the case, and by awarding Wu Respondents such fees, the District Court improperly revisited the matter and essentially reversed the Supreme Court's decision. (AB 41-46; *see also* OB 52-54). Accordingly, the award of those specific fees should be reversed.

What is more perplexing, without raising a point of error, Wu Respondents request relief in the form of a "remand with instructions to enter an award of all fees and costs," beyond those already awarded by the District Court. (AB 47). This request is not a part of their cross-appeal, and it is improperly raised in response to Chan Appellants' appeal. Therefore, this request for relief should be denied out of hand.

A. The First Requirement Is Not Satisfied Because "Abiding by" and "Complying with" the Express Terms of the Arbitration Award, Chan Appellants Timely Mounted a Permissible Legal Challenge.

As with the arbitration agreement, the arbitration award required the non-prevailing party either to pay the award to the prevailing parties or deposit the funds in the GLVAR escrow or trust account. (2 Appx 393). It also allowed the non-prevailing party to mount "a legal challenge to the validity of the award," provided that notice of the challenge is given to GLVAR no later than "twenty (20) days following transmittal of the award." (*Id*.). The arbitration award further provided that, during the pendency of the legal challenge, the funds shall remain in

the escrow/trust account. (*Id*.). *Importantly, nowhere does the arbitration award state or even suggest that if the non-prevailing party's legal challenge is unsuccessful, they must pay the other side's attorney fees.* (*See id*.).

From the foregoing, a few points come clear. First, to abide by and comply with the arbitration award, the non-prevailing party must either have the funds paid out to the prevailing parties or have them deposited into the GLVAR escrow/trust account. Second, if the non-prevailing party fails to have the funds dispersed in this manner, then they have not abided by or complied with the arbitration award. Third, the non-prevailing party may mount a legal challenge to the award so long as GLVAR is given notice thereof no later than 20 days of the transmittal. Fourth, for the duration of the challenge, the funds shall remain in the escrow/trust account. Finally, because the arbitration award does not allow for an award of attorney fees or costs in connection with a legal challenge, a non-prevailing party does not fail to abide by or comply with the award by mounting such a challenge.

Here, with respect to the first, second, and fourth points noted above, it is undisputed that the commission funds were deposited into the GLVAR escrow account. The District Court noted that the funds remain there. (7 Appx 1460). It is undisputed that they remain there to the present day. Relative to the third point, the arbitration award was transmitted under cover of a GLVAR letter dated April 27, 2018. (5 Appx 969). Per the terms of that transmittal letter, a "notice of legal

challenge [had to] be received" by GLVAR no later than "5:00 p.m. on May 17, 2018." (*Id*.). GLVAR received such notice from Chan on 3:17 p.m. on May 17, 2018; therefore, it was timely. (6 Appx 1231). That too is undisputed. Likewise, in terms of the fifth and final point, it is undisputed that, in abidance and compliance with terms of the arbitration award, Chan Appellants mounted the present legal challenge. (*See also* AB 47-48).

Given these circumstances, as a matter of fact and law, Chan Appellants have not failed to abide by or comply with the arbitration award. Accordingly, Wu Respondents are not entitled to any award of attorney fees or costs whatsoever.

B. The Second Requirement Is Not Fulfilled Because This Is Not a "Judicial Confirmation and Enforcement" Case.

This is not a "judicial confirmation and enforcement" case. Rather, as discussed above, the present action is a simple legal challenge to the arbitration award, which is expressly permissible. (*See also* OB 47-48). Moreover, as discussed in detail in Chan Appellants' Opening Brief, Wu Respondents *did* not *seek* mere *"confirmation"* of the arbitration award; instead, they specifically pursued a counterclaim and separately requested relief for the "full commission," which was contrary to and far beyond what the arbitration panel awarded them. (OB 49-51). Wu Respondents stated these extra-award requests repeatedly in their answer, counterclaim, and various motions and countermotions. Even on appeal, they continue to seek more than what the arbitration panel awarded them: "The

underlying commission at issue in this litigation should rightfully be paid to Wayne Wu ….” (AB 2).

C. The Third Requirement Is Not Satisfied Because It Was Not “Necessary” for Wu Respondents to Seek Affirmative Relief.

As explained in Chan Appellants’ Opening Brief, it was not “necessary” for Wu Respondents to seek 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 it. (OB 49-51). *See* NRS 38.241(4), NRS 38.242(2). In its ruling, that is expressly and exactly what the District Court did. (3 Appx 693). The District Court did not enter its ruling based upon a specific request for confirmation or enforcement. (*See id*.). Moreover, as discussed above, Wu Respondents continually made extra-confirmation and extra-enforcement requests in their answer, counterclaim, and various motions and countermotions. (*See also* OB 51-52).

III. (CROSS-APPEAL) NO ABUSE OF PROCESS—IN BRINGING THE INSTANT ACTION, CHAN APPELLANTS DID *NOT* ATTEMPT TO GAIN UNWARRANTED STRATEGIC LEVERAGE IN A COMPLETELY UNRELATED MATTER OR IN A MANNER THAT WENT BEYOND THE RECOVERY OR RELIEF THEY COULD HAVE OBTAINED, IF SUCCESSFUL.

Wu Respondents have no evidence of either an actionable “ulterior motive” or an abuse of the legal system by Chan Appellants. To the contrary, Chan Appellants only exercised their constitutional rights to petition the courts; there is

nothing wrong with that. Accordingly, Wu Respondents' counterclaim for abuse of process fails, and this Court should affirm the summary judgment on that counterclaim rendered in favor of Chan Appellants and against Wu Respondents.

A. ***Standard of Review*—Under De Novo Review, It Is Clear That Chan Appellants Easily Carried Their Burden Below Of Establishing That They Were Entitled To Summary Judgment On Wu Respondents' Counterclaim For Abuse Of Process. In Ruling Upon Dueling Motions For Summary Judgment On That Counterclaim, The District Court Did Not Err In Rendering Judgment In Favor Of Chan Appellants And Against Wu Respondents.**

Summary judgment standards are well established. The Nevada Supreme Court has succinctly presented them as follows:

> We review a district court's order granting summary judgment *de novo*. *Wood v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence in the record demonstrate that no genuine issue of material fact exists "and that the moving party is entitled to a judgment as a matter of law." *Id*…. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."

Kuptz-Blinkinsop v. Blinkinsop, 466 P.3d 1271, 1273 (2020) (emphasis added).

In the District Court, the parties presenting dueling motions for summary judgment on Wu Respondents' counterclaim for abuse of process: Chan Appellants argued that there were no genuine issues of fact and that they were entitled to judgment on that counterclaim as a matter of law; Wu Respondents argued the exact opposition. Ultimately, the District Court agreed with Chan Appellants and rendered

summary judgment in their favor. For the reasons discussed in the sections that follow, under de novo review, it is clear that Chan Appellants easily carried their burden of establishing that they were entitled to summary judgment. The District Court did not err in rendering it in their favor and against Wu Respondents.

B. *No Abuse of Process*—The Summary Judgment Evidence Shows that Chan Appellants Have Had No Actionable, Ulterior Purpose and Have Not Engaged in Any Improper, Willful Act in Their Use of the Legal Process.

"[T]he elements of an abuse of process claim are: '(1) an ulterior purpose by the Wu Respondents other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002). The summary judgment evidence shows that Wu Respondents could not have satisfied these elements here.

1. No Ulterior Purpose—*At worst, Wu Respondents' evidence may show a "bad intent," but as a matter of law, that is insufficient for their counterclaim. In fact, Chan Appellants have only fought to enforce their rights, and as a consequence, they have worked for the public good of real estate agents.*

"[T]here is '*no liability* where the defendant has done nothing more than carry out the process to its authorized conclusion, *even though with bad intentions*.'" *Raphaelson v. Ashtonwood Stud Assocs., L.P.*, 2009 U.S. Dist. LEXIS 66517, *8 (D. Nev. 2009) (emphases added) (quoting PROSSER ON TORTS, ABUSE OF PROCESS § 115, p. 877 (3rd ed.1964)). That is all Wu Respondents allege here: bad intentions.

Grasping at straws, Wu Respondents argue: "In her own words, [Chan] has admitted that she filed the lawsuit, not because of a valid legal dispute, but because she wanted to avenge her pride and teach [Wu Respondents] a lesson." (AB 21-22; *see also* 2 Appx 280). On appeal, Wu Respondents continue to grasp at this straw. (AB 18). They grasp at other straws on appeal as well. (AB 10, 18, 21). For example, they argue that "Chan openly admitted that it wasn't about the commission but that she wanted to financially punish Wu with this litigation." (AB 18). They also argue that Chan called the lawsuit "a game" and that she authored an email showing her desire to punish Wu for "daring" to challenge her. (AB 10, 18; *see also* 3 Appx 537).

This is all utter nonsense. At worst, it may evidence a "bad intention," but as a matter of law, such an intention is not actionable. Moreover, Wu Respondents take Chan's words out of context, mispresent the email as a communication and threat to Wu Respondents, and twist and contort Chan's words beyond reason. Chan explains:

> This language [quoted by Wu Respondents] is taken out of context and is falsely presented here as an email from me to Defendants [Wu Respondents]. It is not. In fact, it is not even an email; neither is it a communication between Defendants and me. To the contrary, it was part of a series of text messages between me and Jana, an agent at KB Homes.[4] Taking it all out of context and falsely presenting it here, Defendants are trying to twist this language into a threat coming from me to them. However, it was nothing more than my venting to a fellow agent. Interestingly, Jana responded in a text: "Yes …thank you Betty. I know it's frustrating. I've lost more than a few commissions that were due to me. So I understand." Jana knew what I was saying and was completely sympathetic.

[4] *See Exhibit 16*. (6 Appx 1207).

> Moreover, it is just wrong to say that my desire was to punish Defendants. If they eventually lose, they will suffer financial and other repercussions, but that goes with every lawsuit. I am and have been well within my rights to seek the commission to which I believe I am rightly entitled. Even the language quoted by Defendants above only shows that, in tandem with seeking to enforce my rights, I am hoping to put an end to people's taking advantage of other agents, as they did to me in this case (and Jana in others). It is a fact that I was cheated, and I am genuinely seeking redress for a wrong against me. In that connection, the law of Nevada can and should be clarified that there cannot be more than one procuring agent for any real estate sale. My fighting for my rights only works for the public good.

(6 Appx 1203-04).

In Nevada, actionable "ulterior purposes" include lawsuits used for unwarranted strategic leverage in completely unrelated matters or in manners that go beyond the recovery or relief the plaintiffs could obtain, if successful. For example, "[c]ourts have found ulterior motives where a party brought a *malpractice claim* without any basis, in order to coerce the settlement of a *nuisance claim*, and when a party *attached a property in great excess of the debt* in order to coerce payment." *Georgiou Studio, Inc. v. Blvd. Invest, LLC*, 663 F. Supp. 2d 973, 982 (D. Nev. 2009) (citing *Bull v. McCuskey*, 96 Nev. 706, 709, 615 P.2d 957, 960 (1980), *overruled in part on other grounds by Ace Truck v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987); *Nevada Credit Rating Bur. v. Williams*, 88 Nev. 601, 606, 503 P.2d 9, 12 (1972)).

This is no such case. Chan has a basis for filing this suit: her claim to the real estate commission and an appeal of the GLVAR arbitration award. Chan has not brought this action in attempt to coerce a settlement of an unrelated claim. Chan has not attached any property; even though the commission is still held by GLVAR, that commission should go to the agent who was the procuring cause of the sale of the Tevare home—a core issue in this action. Indeed, the GLVAR arbitration panel actually granted Chan a portion of that commission. Everything Chan Appellants have sought in this action relate to proper relief within the scope of their claims *sub judice*. Thus, there is no actionable "ulterior purpose" here.

Taking issue with this reality, Wu Respondents contort Chan Appellants' arguments below. Among other things, they assert: "Chan claims she is fighting a battle for justice, even going to the lengths of comparing herself to Thurgood Marshall in *Brown v. Board of Education*." (AB 17). They continue: "Chan asserts that she is fighting against injustice, like the great civil rights activists of the 1960s. The District Court outright stated that comparing Chan to Thurgood Marshall was offensive and that … Chan represented the worst of litigants." (AB 18-19) (7 Appx 1456-64). [7 Appx 1457].

This argument is a gross distortion of what Chan Appellants argued below. The following is the exact verbiage of their argument:

> When Thurgood Marshall pressed forward with *Brown v. Board of Education*, the underlying disputes had actually resolved and the

> case could have been construed as moot. Nevertheless, Marshall pressed on because he wanted social justice. Was that an ulterior purpose giving rise to a claim for abuse of process? *Under Defendants' logic, it would be. The absurdity of this conclusion is obvious*. No reasonable person would conclude that an actionable "ulterior purpose" results when one attempts to achieve social justice by enforcing their legal rights.

(5 Appx 1112) (emphasis added).

With their argument, Chan Appellants simply show—by analogy—the "absurdity" of Wu Respondents' contention: Just because Chan Appellants may have had more than one motive in bringing the instant action, it does not necessarily follow that they harbored an actionable "ulterior purpose" for abuse-of-process purposes. By twisting Chan Appellants' argument and claiming that Chan was comparing herself to Thurgood Marshall, Wu Respondents—and even the District Court for that matter—fall in the traps of logical fallacies. For starters, they raised a "straw man" argument, stretching Chan Appellants' point beyond the breaking point. "A straw man fallacy occurs when someone takes another person's argument or point, distorts it or exaggerates it in some kind of extreme way, and then attacks the extreme distortion, as if that is really the claim the first person is making."[5]

With their reasoning, Wu Respondents also fabricate a "faulty analogy" of their own making. "This fallacy consists in assuming that because two things are

[5] <https://owl.excelsior.edu/argument-and-critical-thinking/logical-fallacies/logical-fallacies-straw-man/>.

alike in one or more respects [here, working for a public good], they are necessarily alike in some other respect [that Chan is on the same plane as the legendary Thurgood Marshall]."[6] In addition, Wu Respondents' reasoning smacks of the "Nirvana fallacy," as follows:

> [It] [c]ompar[es] a realistic solution [here, Chan seeking to protect procuring-cause agents in Nevada] with an idealized one [the celebrated Thurgood Marshall fighting for social justice across America], and discounting or even dismissing the realistic solution as a result of comparing to a "perfect world" or impossible standard, ignoring the fact that improvements are often good enough reason.[7]

Obviously, protecting fair real estate commissions is nowhere near as socially seismic or important as eradicating *de jure* and *de facto* racial injustice; however, they do constitute "good enough reason." In the world of real estate, commissions do matter—and they impact upon agents' very livelihood. That is no small consequence. In this regard, by seeking to enforce her rights, Chan is also working for a "public good." (6 Appx 1204). That is not actionable abuse of process by any stretch of the imagination.

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[6] <https://www.txstate.edu/philosophy/resources/fallacy-definitions/Faulty-Analogy.html>.

[7] <https://www.logicallyfallacious.com/logicalfallacies/Nirvana-Fallacy>.

Ultimately, the District Court agreed with Chan Appellants. Although it "th[ought] … Chan represent[ed] the worst of *litigations*,[8] … *she had 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 (emphases supplied)). Moreover, with her complaint, Chan did not attempt to gain unwarranted strategic leverage in a completely unrelated matter or in a manner that went beyond the recovery or relief she could have obtained, if successful. Accordingly, as a matter of law, she has not sought to further any actionable "ulterior purpose."

Undaunted, Wu Respondents argue: "Chan did not simply sue Wu. She also filed a frivolous action against [NREC] …, Judith Sullivan …, Chiu, and KB Homes." (AB 11-12). They argue further that Chan "indicated … she would name KB in order to 'justify' filing in district court" and that she "never pursued her claims against KB Homes." (AB 12, 18).

This argument completely misses the mark. Is undisputed that Wu is an agent that works for NREC, the brokerage for which Sullivan serves as the broker. In the sales documents for the Tevare property, NREC and Sullivan are named as recipients of the commission and identified as responsible parties, payees, or both. (1 Appx 97, 102). Inasmuch as NREC and Sullivan also have claims to the

[8] Contrary to Wu Respondents' assertions, the District Court did *not* say that "Chan represented the worst of *litigants*." (AB 18-19 (emphasis added); *contra* 7 Appx 1457). The "litigations"-"litigants" distinction is subtle but important.

commission, it was quite natural that Chan Appellants would have named them in the lawsuit. Naming those defendants was not an abuse of process.

As for KB Homes, while it may be true that Chan Appellants' claims against it remain unadjudicated, they are still pending in the District Court.[9] The resolution of the issues on this appeal will also be instructive, if not determinative, in the controversy between Wu Respondents and KB Homes. Moreover, KB Homes does have exposure for liability here: "An owner who has knowledge that a certain broker first interested a customer with whom negotiations are still pending proceeds at his peril in closing a deal with such customer through another broker and paying a commission to the latter broker; and he cannot thereby avoid liability to the first broker." 12 C.J.S., *Brokers* § 92, *cited with approval in Bartsas*, 82 Nev. at 9, 409 P.2d at 629. The undisputed evidence shows KB Homes had knowledge that Chan was the broker who first interested Chiu here. (OB 10 & n.4; AB 9-11). For this reason, naming KB Homes was not an abuse of process either.

2. **No Improper, Willful Act**—***In accordance with law, Chan Appellants have simply appealed the arbitration award through proper channels; Wu Respondents have produced no evidence of any improper, willful act on Chan Appellants' part in their use of the legal process.***

[9] As between and among the parties on this appeal, the District Court certified its summary judgment as final under NRCP 54(b). (7 Appx 1456).

"[F]iling a complaint does not constitute abuse of process." *Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. 686, 698, 356 P.3d 511, 520 (2015). That is all Chan has done here. Wu Respondents may not like that, but it is safe to assume that no defendant in any lawsuit likes the fact that they have been sued. Wu Respondents have presented no evidence of any "willful act in the use of the legal process not proper in the regular conduct of the proceeding"—*None*. Yes, Chan Appellants have challenged the arbitration award, but that has not been improper. As Chan explains, "the Agreement, the Arbitrator's Award, and the law all allowed [Chan Appellants] to challenge the award." (6 Appx 122). Even Wu Respondents agree with that. (AB 36-37). Wu Respondents have not cited any authority or produced any evidence to the contrary. Moreover, Chan has "not violated or refused to abide by the arbitrators' decision or the Court's rulings." (6 Appx 1203). "Rather, in accordance with law, [she] ha[s] appealed the matters through proper channels. [She] ha[s] been well within [her] rights to do this…. [T]his is the way the American legal system works." (*Id*.).

In addition, for an abuse-of-process claim to stand, "[t]he utilized process must be judicial, as the tort protects the integrity of the court." *Land Baron*, 131 Nev. at 698, 356 P.3d at 519. Thus, to the extent Wu Respondents are raising anything that happened in the GLVAR proceeding—or seek any damages related thereto (such as attorney fees)—their counterclaim must fail.

Wu Respondents try to muddy the waters, arguing that an ethical rule for real estate agents required a GLVAR arbitration/mediation prior to the legal challenge here. (AB 27-29). Specifically, Wu Respondents argue: "On September 27, 2016, Chan … committed an ethical violation of the GLVAR Rules by filing a *Complaint* in the Eighth Judicial District Court, prior to submitting the matter to GLVAR for mediation and possible arbitration as required by rule." (AB 11 & n.18; *see also* 2 Appx 434).

With this argument, Wu Respondents fall into another logical-fallacy trap: "The fallacy of begging the question occurs when an argument's premises assume the truth of the conclusion, instead of supporting it."[10] Because Chiu was a realtor's client and *not* a member of GLVAR, per its rules of ethics, Chan could *not* compel him—as a party to the lawsuit—to take the matter to arbitration.[11] At the end of the day, the District Court stayed the lawsuit pending the arbitration

[10] https://www.txstate.edu/philosophy/resources/fallacy-definitions/Begging-the-Question.html#:~:text=The%20fallacy%20of%20begging%20the,called%20arguing%20in%20a%20circle.

[11] 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 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).

between and among Chan Appellants and all of the Wu Respondents, with the notable exception of Respondent Chiu. (1 Appx 153).

Ultimately, the District Court made short shrift of Wu Respondents' argument, holding as follows: "[T]he Court is not making a ruling on this [ethics] matter because it is not before the Court …; however, the Court finds *[Chan Appellants] had a right to file the civil Complaint*." (7 Appx 1457 (emphasis supplied)). Even if the ethics issue were before the Court, Wu Respondents' argument altogether lacks merit. Chan explains:

> …. Before filing suit on or about September 27, 2016, I tried to take the matter to GLVAR, but they would not open up an arbitration case because no commission had been distributed. [12] As the situation could have remained that way indefinitely, I had no choice but to file suit.
>
> ….
>
> … [S]ince GLVAR would not accept arbitration at the time, I had no choice but to file suit….

(6 Appx 1201). Chan continues:

> …. On or about November 11, 2016, immediately after GLVAR indicated that they would be willing to accept the arbitration case, I submitted a claim for arbitration with GLVAR. Not long thereafter (after the holidays on or about January 13, 2017), I sought to put the Lawsuit on hold and to that end, I filed a Motion for Stay Pending Arbitration. As a matter of fact, Defendants [Wu Respondents] actually opposed my Motion to Stay. *Thus, it was they—not me—who sought to impede arbitration*.

[12] On June 11, 2016, months before she filed this action, Chan tried to proceed with arbitration before GLVAR. (6 Appx 1233).

(*Id.* (emphasis added)). Wu Respondents admit that Chan Appellants were the ones who sought arbitration. (AB 13).

After the arbitration award was transmitted under cover of a GLVAR letter dated April 27, 2018. (5 Appx 969). Per the terms of that transmittal letter, Chan Appellants had until 5:00 p.m. on May 17, 2018 to notify GLVAR of her intention to lodge a legal challenge to the arbitration award. (5 Appx 969). Chan gave her notice on 3:17 p.m. on May 17, 2018; therefore, it was timely. (6 Appx 1231). Wu Respondents admit that Chan Appellants had the right to lodge a legal challenge in this manner, and they do not challenge that it was timely. (AB 36-37). There was no abuse of process.

In short, Chan Appellants have never had any ulterior purpose; their motives have been pure. Wu Respondents arguments to the contrary are false manipulations of communications taken out of context or stroppy distortions based on logical fallacies. Moreover, Chan Appellants have not committed any willful act not proper in the regular course of any proceeding. Wu Respondents have produced no evidence to the contrary. It thus follows that Wu Respondents' abuse-of-process counterclaim must fail, and that the District Court properly summary judgment in Chan Appellants' favor on that counterclaim.

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 render judgment in Appellants' favor and vacate or modify the arbitration award, or alternatively, to remand the matter back to District Court or the GLVAR panel for clarification;
4. to affirm the District Court's summary judgment rendered in favor of Appellants and against Respondents on Respondents' counterclaim for abuse of process; and

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

DATED: *April 11, 2022*.

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 *13,891 words*; or
>
> [ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or
>
> [ ] Does not exceed _____ pages.

///

/// [*THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK*]

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: *April 11, 2022*.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on *April 11, 2022*, I served a true and correct copy of the forgoing ***APPELLANTS' COMBINED REPLY BRIEF ON APPEAL/ANSWERING BRIEF ON CROSS-APPEAL***, together with any and all exhibits and attachments, via the Supreme Court's Electronic Filing System to the following:

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