

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

2 BETTY CHAN; and ASIAN AMERICAN
3 REALTY & PROPERTY
4 MANAGEMENT,

5 Appellants, Cross-Respondents,

6 v.

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

10 Respondents/ Cross-Appellants

Case No. 82208

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Elizabeth A. Brown
Clerk of Supreme Court

11 **BLACKROCK LEGAL, LLC**

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16 *Attorneys for Appellees*

17 **APPELLEES' RESPONSE TO APPELLANTS' MOTION FOR COURT TO**
18 **CONSIDER ITEMS OUTSIDE OF THE RECORD**

19 COMES NOW, RESPONDENTS/CROSS-APPELLANTS by and through
20 their attorneys at Blackrock Legal, LLC., hereby submits this Response to
21 Appellants' Motion for Court to Consider Items Outside of the Record (hereafter
22 "Response") on the grounds set forth in the Points and Authorities herein, Exhibits
23 attached hereto and any paper or pleadings on file with this court.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **ISSUES PRESENTED**

3 The issue presented in the Appellants' Motion for Court to Consider Items
4 Outside of the Record is to permit Appellants to file additional facts that were not
5 considered in District Court when the Respondents' arguments were made on
6 July 6, 2018, in an Opposition and Countermotion. Appellants' request to
7 consider items outside the record demonstrates a failure to properly review District
8 records, and is contrary to precedent and the fundamental rules of the appeals
9 process.
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13 **BACKGROUND**

14 Respondents filed an "Appellees' Answering Brief and Opening Brief on
15 Cross-Appeal (Amended) on February 03, 2022 (hereafter "Answering Brief").
16 Respondent's Answering Brief argued:
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18 Finally, Chan has not presented a copy of the transcript from the
19 actual arbitration panel. How can this court review the decision of the
20 panel without a copy of the transcript? Chan argues that since there
21 are no findings in the actual award, the award should be reversed.
22 However, the panel clearly entertained argument and reached
23 conclusion at the arbitration hearing. A review of the transcript of the
24 actual hearing is essential to determine whether GLVAR was
25 attempting to flaunt or openly disregard the law. No information is
26 presented to support this; therefore, the award must be affirmed.
27 Answering Brief, Pg 40:15-25.
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26 On April 12, 2022, Appellants/Cross-Respondents filed their
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1 “Appellants’ Combined Reply Brief on Appeal/Answering Brief on Cross-
2 Appeal.” Here, they stated “Perhaps even more importantly, in the
3 proceedings below, Respondents never raised the issue of the transcript in
4 the District Court. Therefore, they cannot now raise it on appeal.” And
5 “Chan Appellants will submit Volume 8 [to supplement Appellants’
6 Appendix (filed May 26, 2021)] under cover of a motion for the Court to
7 consider items outside of the record.” Appellants’ Combined Reply Brief on
8 Appeal/Answering Brief on Cross-Appeal Pg 36.
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11 On August 27, 2022, one hundred and thirty-seven days after their
12 filing, Appellants filed an “Appellants’ Motion for Court to Consider Items
13 Outside of the Record,” to which this is in response. Not only is this
14 Supplement late, but it is also inaccurate in its position that Respondents
15 never raised the issue of a lack of record previously.
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18 On July 6, 2018, Respondents filed an “Opposition to Motion to
19 Vacate or Modify Arbitration Award and Countermotion to Recognize Wu
20 as the Procuring Cause, for Summary Judgement, and for Attorney Fees”
21 (hereafter (“Opposition”), which stated:
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23 A party seeking to fulfill their burden of proof in challenging an
24 arbitration award must cite to a record. Merely referring to
25 previous briefing is not sufficient to allow review of a matter.
26 GLVAR arbitration proceedings establish a method for parties
27 to preserve a record. ‘The Board shall have a court reporter
28 present at the hearing or shall record the hearing. Parties may,
at the Board’s discretion, record the hearing or utilize a court

reporter at their own expense.’

Use of the record is important in part due to the inability of a party to defeat an arbitration award by raising arguments not previously raised. ‘Failure to raise the claim before the arbitrator, however, waives the claim for any future judicial review.’... Indeed, Chan fails to even cite to the record of the hearing or offer any explanation that can disturb the presumption that the Award was based on substantial evidence and must be affirmed. Nor does Chan provide any citation to any record to demonstrate any fraudulent conduct in the arbitration proceedings, which are also presumed to have proceeded in the normal course. Chan cannot point to a procedural challenge wherein she alleged any irregularity because she intentionally refused to pursue any such challenge. Opposition at Pg. 21-22.

LEGAL ARGUMENT

Respondents’ request that this Court Deny “Appellants’ Motion for Court to Consider Items Outside of the Record, as the request is based on a misrepresentation of the actual record from the District Court. Furthermore, the argument made by Respondents is procedural and a question of pure law and not a new argument of fact. As such, it falls under an exception to the general rule to prohibit new arguments on appeal.

I. The Court should permit the argument made by Respondents, and deny Appellants’ Motion for Court to Consider Items Outside of the Record as the argument was brought before the District Court

Appellants were correct in asserting that “the general rule that this Court will not ordinarily consider on appeal matters or arguments not properly presented to

1 the District Court.” Where the Appellants have failed, is in considering all the
2 Motions that were filed at the District Court level.

3 As shown in the Background section, on July 6, 2018, Respondents filed an
4 Opposition which addressed the very concern of the lack of a transcript of the
5 arbitration. Respondents clearly argued that the Appellants failed to request the
6 transcript within the required time frame with GVLAR. Without the transcript, or
7 citation to any other form of record, Respondents argued that the Appellants were
8 unable to “demonstrate any fraudulent conduct in the arbitration proceedings.”
9 This is the exact same argument that Respondents brought in their Answering
10 Brief, stating “A review of the transcript of the actual hearing is essential to
11 determine whether GLVAR was attempting to flaunt or openly disregard the law.
12 No information is presented to support this; therefore, the award must be
13 affirmed.” Answering Brief at Pg. 40.

14 Appellants’ Motion for the Court to Consider Items Outside the Record is an
15 attempt to make up for their shortcomings in the District Court litigation.
16 Appellants could have brought these “new” facts forward back in July of 2018
17 when Respondents originally made the claim regarding the lack of a transcript.
18 Appellants failed to do so and now are attempting to blame this shortcoming on the
19 Respondents. Appellants apparently failed to closely review the District Court
20 record and are continuing to wrack up insane legal fees for a case that should have
21 been resolved many years ago.

1 **II. This Court should find that the Issue regarding the need of the**
2 **arbitration transcript to overcome the outcome is a question of law**
3 **and procedure under NRAP 9(d), which may be brought on Appeal.**

4 Even if the Court did find that the Respondent's argument in its Opposition
5 was different from the argument brought in the Answering Brief, the issue is a
6 procedural question of law, which is often accepted on appeal.

7 In *41 Clinton Ave. Realty Corp. v. Silver*, the Supreme Court of New York
8 considered whether an argument could be raised for the first time on appeal. The
9 Court stated, "Although this argument is raised for the first time on appeal, we
10 nonetheless reach the issue as a question of law apparent on the face of the record,
11 which could not have been avoided if raised at the proper juncture." *41 Clinton*
12 *Ave. Realty Corp. v. Silver*, 2017 NY Slip Op 04085, 150 A.D.3d 1053, 52
13 N.Y.S.3d 650 (App. Div.) see also *Rivera v. Smith*, 63 N.Y.2d 501, 516, n.5
14 (1984).
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18 Here, the Respondents clearly argued that the Appellants did not have a
19 record that supported their claim that the arbitration was improper, stating that "A
20 party seeking to fulfill their burden of proof in challenging an arbitration award
21 must cite to a record." The need for a record or transcript to determine if the
22 arbitration was improper is a question of law, not fact. Respondents are not
23 challenging the facts of the case, but the legal question of whether the Court must
24 consider the record to determine if the arbitration was improper.
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1 In *Gittings v. Hartz*, the Nevada Supreme Court considered whether a record
2 of the arbitration was required to challenge it. The court determined that an
3 arbitration transcript constituted “a statement of proceedings similar to the types of
4 statements required under NRAP 9(d).” *Gittings v. Hartz*, 116 Nev. 386, 996 P.2d
5 898 (2000). As such, the consideration of a transcript would be considered a
6 procedural issue.
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9 Here, the Appellants did not provide any NRAP 9(d) statement regarding the
10 arbitration proceeding. Appellants have not relied on “detailed factual findings” as
11 the party did in *Gittings* but have instead made baseless claims without any factual
12 support. Appellants have failed to accurately represent the arguments made by
13 Respondents at the District Court Level, and are seeking to blatantly go against
14 precedent to remand this case and require the court to consider irrelevant factual
15 matters that the Appellants failed to bring before the District Court. As such,
16 Respondents request that this Court deny Appellant’s request for this Court to
17 consider items outside of the record.
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21 **III. Should this Court find that the argument raised in the Answer Brief**
22 **was “Never Raised in the District Court,” The argument should not**
23 **be considered, and the Appellant’s Motion should still be denied.**

24 Appellants accurately stated the law when they argued, “the general rule that
25 this Court will not ordinarily consider on appeal matters or arguments not properly
26 presented to the District Court.” Appellants’ distinguishment between Respondents
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1 and Appellants on the other hand misconstrues the law and fails to have any
2 historical merit.

3 As the Appellants have shown, there is ample case law supporting the lack
4 of consideration for new arguments made at trial. While there are some exceptions
5 to this rule as mentioned in the previous section, none of those exceptions regard
6 the roles of Appellant and Respondent. Neither side is allowed to bring new
7 arguments or evidence on appeal. As such, the cases that the Appellants cited,
8 *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P. 3d 542,
9 544 (2010); *Old Aztec Mine v. Brown*, 97 Nev. 49, 52-53, 623 P.2d 981, 983-
10 984 (1981); *Carson Ready Mix v. First Nat'l Bank*, 97 Nev. 474, 476-477, 635 P.2d
11 276, 277-278 (1981) should apply. In contrast, there is zero case law indicating
12 that an Appellant should be permitted to bring additional evidence into an appeal.
13 Their attempt to admit evidence that they failed to provide at the District Court is a
14 direct violation of the procedural rule and attending case law.

15 Putting it succinctly, should this Court find that Respondent's argument
16 regarding the need for a transcript is a new argument the Court should simply
17 disregard the argument and deny Appellant's Motion and attempt to introduce
18 entirely new evidence on appeal. Of course, as proven, Respondents did raise the
19 argument and Appellants simply failed to timely request the transcript from
20 GLVAR.

21 WHEREFORE, Respondents hereby request the Court as follows:
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- 1 1. To deny Appellants' Motion for Court to Consider Items Outside of the
2 Record;
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4 2. To deny the Appellants' request to file the proposed Volume 8 to
5 Appellants' Appendix in this appeal;
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7 3. To grant Respondents all such other and further relief that they justly
8 deserve or to which they are entitled at law or in equity.

9 DATED this 6th day of September 2022.

10 By: /s/Michael A. Olsen, Esq.
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12 NEVADA BAR NO. 6067
13 THOMAS R. GROVER, ESQ.
14 NEVADA BAR NO. 12387
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