IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83356

GREGORY GARMONG,

Appellant

--against--

WESPAC; GREG CHRISTIAN,

Respondents

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

APPELLANT'S APPENDIX VOLUME 7

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Attorney for Appellant
Gregory Garmong

INDEX TO APPELLANT'S APPENDIX

Strike, p. 2. On February 21, 2017, this Court entered its *Order Appointing Arbitrator*, appointing Judge Phillip M. Pro ("Judge Pro").

On March 27, 2017, Mr. Garmong filed *Plaintiff's Objection Pursuant to NRS 38.231(3) and 38.241(e) That There is No Agreement to Arbitrate; Notification of Objection to the Court*. Despite prior determinative orders from this Court, Mr. Garmong again objected to arbitration on the basis there was no agreement to arbitrate.

On May 23, 2017, this Court entered its *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)*, finding "Mr. Garmong and Defendants were ordered numerous times to participate in arbitration as early as December 13, 2012. The Court held no evidence was presented establishing the parties had proceeded to arbitration as ordered. *Order,* p. 4. Accordingly, the Court ordered the parties to show cause why the action should not be dismissed for want of prosecution. *Order,* p. 4.

The parties had their first arbitration conference in April 2017. On June 22, 2018, without asking for leave of Court, Mr. Garmong filed his *Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator* ("*Motion to Disqualify*").

Defendants thereafter filed the *Defendants' Motion for Limited Relief From Stay to File Motion for Attorney's Fees and Sanctions* ("*Motion for Sanctions*") requesting limited relief from this Court's order staying the proceeding pending the outcome of arbitration. However, on October 22, 2018, Defendants filed their *Notice of Completion of Arbitration Hearing*. The Court held that, with completion of the arbitration, Defendants' *Motion for Sanctions* was moot. Additionally, the Court took notice of Defendants' *Notice of*

Completion of Arbitration and determined there are no additional decisions to be rendered regarding the *Notice*.

II. PENDING MOTIONS.

A. Motion to Confirm Final Award

In its *Motion to Confirm Final Award*, Defendants petition the Court for an order confirming the arbitration award pursuant to Rule 38.239 of the Nevada Revised Statutes. *Motion to Confirm Final Award*, p. 5. Defendants assert the arbitration Final Award in JAMS Arbitration Case No. 1260003474 was entered April 11, 2019, in favor of Defendants and against Mr. Garmong in the total sum of $111,649.96, including reasonable attorney's fees and costs. Defendants further request interest accrued on the total sum at the legal rate of 7.5% per annum, from the date this Court enters judgment until the date judgment is satisfied in full. *Motion to Confirm Final Award*, p. 5.

Mr. Garmong opposed the *Motion to Confirm Final Award* on the grounds he did not enter into a "binding contract including an agreement providing for arbitration" as required by NRS 38.221(1). *Opposition to Motion to Confirm Final Award*, p. 1. Mr. Garmong argues if Defendants "cannot identify one, and only one, true, complete, correct, certain, unambiguous, definite, verified and binding Contract in the record as it now exists, the arbitrator's Final Award cannot be confirmed because there was no agreement to arbitrate." *Opposition to Motion to Confirm Final Award*, p. 2. Mr. Garmong further argues Defendants' *Motion to Confirm Final Award* must be denied because Defendants perpetrated fraud upon the Court, arbitrator, and Plaintiff by falsely representing the first version of the Investment Management Agreement was correct.

In their *Reply*, Defendants assert the parties entered into a valid and enforceable

Investment Management Agreement (the "Agreement"), the final version of which was executed on August 31, 2005. *Reply to Motion to Confirm Final Award*, p. 5. Defendants maintain the Arbitration Clause is included in the Agreement at paragraph 16, pages 17 and 18. *Reply to Motion to Confirm Final Award*, p. 5. Moreover, the fully executed Agreement was submitted in support of Defendants' *Motion to Dismiss and to Compel Arbitration*, and is therefore part of the record. *Reply to Motion to Confirm Final Award*, p. 9.

B. Plaintiff's Motion to Vacate Arbitrator's Final Award

In his *Motion to Vacate Final Award*, Mr. Garmong first maintains the Final Award must be vacated pursuant to NRS 38.241(1) because there is no agreement to arbitrate. *Motion to Vacate Final Award*, p. 5. Second, Mr. Garmong contends the arbitration provision contained in the Agreement is void pursuant to NRS 597.995 because it has no "specific authorization." *Motion to Vacate Final Award*, p. 8. Mr. Garmong argues the arbitration provision is also void because it is not conspicuous and does not warn the consumer he is foregoing important rights under Nevada law. *Motion to Vacate Final Award*, p. 9.

Mr. Garmong further contends the award was procured by corruption, fraud or other undue means. *Motion to Vacate Final Award*, p. 10. Additionally, Mr. Garmong maintains the arbitrator refused to consider evidence material to the controversy and that the arbitrator showed partiality. *Motion to Vacate Final Award*, p. 15. Lastly, Mr. Garmong contends the Final Award may be vacated on nonstatutory grounds, such as disregard of facts or manifest disregard of legal authority. *Motion to Vacate Final Award*, p. 43.

C. Motion to Vacate MSJ Decision

In his *Motion to Vacate MSJ Decision*, Mr. Garmong requests an order from this

Court vacating Judge Pro's decision denying his *Motion for Partial Summary Judgment*, filed in the course of arbitration, and to further consider the *Motion for Partial Summary Judgment* and grant it *de novo*. *Motion to Vacate MSJ Decision*, p.1. In support, Mr. Garmong contends Judge Pro disregarded the applicable substantive legal principles. *Motion to Vacate MSJ Decision*, generally.

Defendants oppose the *Motion to Vacate MSJ Decision* on the following grounds: First, Defendants argue it is well established that an order denying summary judgment is not appealable after a hearing on the merits because it is not a final judgment. *Opposition to Motion to Vacate MSJ*, p. 2. Second, Defendants assert Judge Pro properly denied Mr. Garmong's *Motion for Partial Summary Judgment*. *Motion to Vacate MSJ Decision*, p. 5. Lastly, Defendants assert Judge Pro did not evaluate witness credibility when he ruled on the *MSJ*. *Opposition to Motion to Vacate MSJ*, p. 6.

D. Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees

In his *Motion to Vacate Award of Fees*, Mr. Garmong argues Rule 68 of the Nevada Revised Statutes does not apply to this case because the parties did not agree it would apply. *Motion to Vacate Award of Fees*, p. 5. In support, Mr. Garmong argues JAMS Rule 24 provides the award of the arbitrator may include attorney's fees if agreed to by the parties. *Motion to Vacate Award of Fees*, p. 6. Moreover, Mr. Garmong argues the award was procured by corruption, fraud, or other undue means.

In their *Opposition to Motion to Vacate Fees*, Defendants maintains Judge Pro's award of attorney's fees and costs was proper pursuant to NRCP Rule 68 and JAMS Rule 24(g). Defendants assert, Judge Pro set forth:

> There is no dispute that the issues in this case are governed by Nevada law, and procedurally by JAMS Rules and the provisions of the Nevada Rules of

> Civil Procedure enumerated in the Stipulation for arbitration entered by the Parties on February 8, 2017. However, the agreement of the Parties to specific NRCP rules relating to discovery does not automatically exclude the applicability of others, particularly where the Arbitrator determines that necessary.

Opposition to Motion to Vacate Award of Fees, p. 3; citing *Arbitrator's Final Award.*

In addition to arguing the award is proper under NRCP Rule 68 and JAMS Rule 24(g), Defendants argue the evidence supports Judge Pro's determination that the fees are reasonable. *Opposition to Motion to Vacate Award of Fees*, p. 14.

E. Motion to File Exhibit as Confidential

Defendants filed their *Motion to File Exhibit as Confidential* asking this Court for an Order to File Exhibit "4" to Defendants' *Reply to Motion to Confirm Final Award*, filed May 6, 2019, as confidential. Defendants assert after filing their *Reply to Motion to Confirm Final Award*, Mr. Garmong informed Defendants' counsel Exhibit 4 contained his social security number. *Motion to File Exhibit as Confidential*, p. 2. Defendants maintain they immediately apologized for the inadvertent error and hand delivered a Stipulation to file the Exhibit as confidential to Mr. Garmong's counsel. *Motion to File Exhibit as Confidential*, p. 2. Defendants additionally called the Second Judicial District Court Clerk's office and requested the Exhibit be marked and filed as confidential. However, Defendants assert Mr. Garmong refused to sign the Stipulation. *Motion to File Exhibit as Confidential*, p. 2.

Mr. Garmong opposed the *Motion to File Exhibit as Confidential* on the grounds that he "seeks protection from the exposure by the Defendants and their attorney to potential identity or financial theft, but opposes the requested relief as insufficient and having no basis in law." *Opposition to Motion to File Exhibit as Confidential*, p. 3. Mr. Garmong further

maintains he "needs the Court's help in protecting his sensitive personal and financial information . . . ." *Opposition to Motion to File Exhibit as Confidential*, p. 3.

III. APPLICABLE LAW AND ANALYSIS.

A. Motion to Confirm Final Award

Section 38.239 of the Nevada Revised Statutes provides,

> After a party to an arbitral proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to NRS 38.237 or 38.242 or is vacated pursuant to NRS 38.241.

NRS 38.239. "[T]he scope of judicial review of an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P.3d 172, 177 (2004). "A 'reviewing court should not concern itself with the "correctness" of an arbitration award' and thus does not review the merits of the dispute." Bohlmann v. Byron John Printz, 120 Nev. at 547, 96 P.3d 1158 (2004) (quoting Thompson v. Tega–Rand Intern., 740 F.2d 762, 763 (9th Cir.1984)); *see also* Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8 (2006). Thus, "'[a] party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration.'" Clark Cty. Edu. Ass'n, 122 Nev. at 342, 131 P.3d at 8 (quoting Bohlmann, 120 Nev. at 547, 96 P.3d at 1158). Rather, "[t]he party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." Rainbow Med., 120 Nev. at 695, 100 P.3d at 176.

Here, Mr. Garmong argues the arbitration award must be set aside pursuant to NRS 38.221 because Defendants "cannot identify one, and only one, true, complete, correct,

certain, unambiguous, definite, verified and binding Contract in the record as it now exists;" and, therefore, "the arbitrator's Final Award cannot be confirmed because there was no agreement to arbitrate." *Opposition to Motion to Confirm Final Award*, p. 2.

This Court has repeatedly ruled, unequivocally, that an enforceable agreement to arbitrate exists in the record and that the parties were properly ordered to arbitrate pursuant to NRS 38.221. See *Order*, December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the Agreement is not unconscionable and is enforceable); Order, April 2, 2014 (denying motion for reconsideration, and again holding arbitration agreement to be enforceable, based on identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E))* (holding Mr. Garmong was ordered numerous times to participate in arbitration.

In accordance with this Court's prior Orders, the record in this case, and the pending *Motion*, the Court, again, holds a valid and enforceable agreement exists. As such, this Court grants Defendants *Motion to Confirm Final Award* pursuant to NRS 38.239.

B. Motion to Vacate Final Award; Motion to Vacate MSJ Decision

Rule 13 of the District Court Rules for the State of Nevada provides, "No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties." DCR 13(7).

Well-established authority in this State governs reconsideration of previously-decided issues. In Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., the Nevada Supreme Court held:

> A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous. *See Little Earth of United Tribes v. Department of Housing*, 807 F.2d 1433, 1441 (8th Cir.1986); *see also Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which *new issues of fact or law* are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted.") (Emphasis added).

113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (alterations and citations in original). In Masonry & Tile Contractors Ass'n, the Nevada Supreme Court upheld a district court's reconsideration of a previously decided issue in light of new clarifying case law. Id. Because of new case law, the decision by the prior district judge was properly determined to be "clearly erroneous." Id. When a motion for reconsideration raises "no new issues of law and [makes] reference to no new or additional facts," reconsideration is "superfluous" and constitutes an "abuse of discretion" by the district court to entertain such a motion. Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Such motions are granted in "rare instances." Id. Further, it is well settled the decision of whether to grant reconsideration is within "the sound discretion of the court." Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003); see also Riger v. Hometown Mortg., LLC, 104 F. Supp. 3d 1092, 1095 (D. Nev. 2015) (district court's decision to grant reconsideration after entry of an order is within its discretion).

Mr. Garmong filed two *Motions*, the subject of which have been previously decided by this Court and for which he does not raise new issues of law or fact. First, Mr. Garmong filed his *Motion to Vacate Final Award,* in which he argues the Final Award must be vacated pursuant to NRS 38.241(1) because there is no agreement to arbitrate. *Motion to Vacate Final Award*, p. 5. However, as stated, this Court has previously held a valid and enforceable arbitration agreement exists in the record pursuant to NRS 38.241. Moreover,

Mr. Garmong does not raise new issues of law or fact. See *Order*, December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the Agreement is not unconscionable and is enforceable); Order, April 2, 2014 (denying motion for reconsideration and again holding arbitration agreement to be enforceable based on identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)* (holding Mr. Garmong was ordered numerous time to participate in arbitration).

Second, Mr. Garmong filed his *Motion to Vacate MSJ Decision*, arguing the arbitrator disregarded the applicable substantive legal principles. Again, this Court previously considered and decided this issue. See *Order Denying Plaintiff's Motion to Disqualify Arbitrator Pro; Order Denying Motion to Vacate Order Denying Motion for Summary Judgment; Order Denying Motion to Appoint New Arbitrator*, entered September 29, 2018.

Accordingly, Mr. Garmong did not properly move to renew the *Motions* pursuant to DCR 13(7). Moreover, Mr. Garmong does not present the Court with any new issues of law or fact; and as such, his *Motion to Vacate Final Award* based on a lack of enforceable agreement, and his *Motion to Vacate MSJ Decision* are meritless and should be denied.

C. Motion to Vacate Attorney's Fees

Rule 24(g) of JAMS Comprehensive Arbitration Rules & Procedures (JAMS Rule) provides an arbitrator may award attorney's fees, expenses, and interest if provided by the Parties' Agreement **or allowed by applicable law**. JAMS Rule 24(g). Defendants made an Offer of Judgment in the amount of $10,000 on February 12, 2017. *Final Award*, p. 10.

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Rule 68 of the Nevada Rules of Civil Procedure provides, in pertinent part:

> (a) The Offer. At any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions.
>
> * * * *
>
> (e) Failure to Accept Offer...Any offeree who fails to accept the offer may be subject to the penalties of this rule.
>
> (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,
>
> (1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and
>
> (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer.

NRCP 68. An award of fees pursuant to NRCP 68 is discretionary with the Court and will not be disturbed absent clear abuse. Bidart v. American Title Ins. Co., 103 Nev. 175, 734 P.2d 732 (1987).

Mr. Garmong argues Judge Pro's award of attorney's fees should be vacated because the Scheduling Order entered in Arbitration between the parties on August 11, 2017 enumerated specific provisions of the Nevada Rules of Civil Procedure as applicable to discovery in Arbitration, but omitted any reference to NRCP 68.

However, as Judge Pro properly found, there is no dispute that the issues in this case are governed by Nevada law, and procedurally by JAMS Rules. The agreement of the Parties to specific NRCP rules relating to discovery does not automatically exclude the applicability of others to the matter, particularly where the Arbitrator determines it necessary.

Moreover, although Mr. Garmong argued the award was procured by corruption, fraud, or other undue means, no evidence exists to support this assertion. Accordingly, the

Court finds Judge Pro awarded attorney's fees, interest, and expenses in accordance with NRCP 68 and JAMS Rule 24(g).

D. Motion to File Exhibit as Confidential

Section 205.4605(1) of the Nevada Revised Statutes provides, a person shall not **willfully and intentionally** post or display in any public manner the social security number of another person unless the person is authorized or required to do so by law. NRS 205.4605(1). Here, it is clear that Defendants filed Mr. Garmong's social security number in their moving papers and took immediate steps to remedy the disclosure.

Mr. Garmong opposes the *Motion to File Exhibit as Confidential* on the grounds the request is insufficient to protect his identity and has no basis in law. However, Mr. Garmong refused to sign the Stipulation which would provide for protection of his personal information. The Court further notes Mr. Garmong has offered no remedy for a clearly inadvertent disclosure of his social security number. It is clear from the parties' communications that Defendants were not aware of the disclosure and took all necessary steps to remedy the disclosure at the time they gained knowledge of such. See *Motion to File Exhibit as Confidential*, Exhibit 1-3. The Court finds this was not a willful and intentional disclosure. Moreover, the Court finds the inadvertent disclosure is remedied by ordering the Exhibit filed as confidential.

IV. CONCLUSION AND ORDER

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. *Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reduce Award to Judgment, Including, Attorneys' Fees and Costs* is GRANTED;

2. Defendants are directed to submit a proposed judgment within ten (14) days from the entry of this Order;

3. *Plaintiff's Motion to Vacate Arbitrator's Final Award* is DENIED;

4. *Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees* is DENIED;

5. *Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment* is DENIED;

6. *Defendants' Motion for an Order to File Exhibit as Confidential* is GRANTED.

DATED this 8th day of August, 2019.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 8th day of August, 2019, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

CARL HEBERT, ESQ.

THOMAS BRADLEY, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Judi Bre

CV12-01271

CODE: 2010
THOMAS C. BRADLEY, ESQ.
NV Bar. No. 1621
435 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 323-5178
Tom@TomBradleyLaw.com
Attorney for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

CASE NO. CV12-01271

DEPT. NO. 6

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

/

DEFENDANTS' MOTION FOR ATTORNEY'S FEES

Defendants WESPAC and Greg Christian, by and through their counsel, Thomas C. Bradley, Esq., hereby move for an award of attorney's fees. This Motion is based upon the accompanying Memorandum of Points and Authorities, Declaration of Thomas C. Bradley, and upon all of the pleadings, papers and documents on file herein.

Affirmation: *The undersigned verifies that this document does not contain the personal information of any person.*

DATED this 8th day of August, 2019.

/s/ Thomas C. Bradley
THOMAS C. BRADLEY, ESQ.
Attorney for Defendants

THOMAS C. BRADLEY, ESQ.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 15, 2019, Defendants petitioned this Court to confirm Judge Pro's Arbitration Award. Plaintiff Greg Garmong filed three (3) Motions to Vacate and filed an Opposition to Defendants' Petition to Confirm. Defendants incurred substantial fees seeking confirmation of the Arbitration Award.

On August 8, 2019, this Court confirmed the Arbitration Award including the Arbitrator's award of fees and costs. Defendants now seek an award of the attorney's fees incurred to confirm the award before this Court.

II. REQUEST FOR ATTORNEY FEES IF THIS PETITION IS CONTESTED

Pursuant to NRS 38.239, 38.241, and 38.242 as well as 38.243(3), Defendants hereby request the award of attorney fees incurred to confirm the Arbitration Award. Defendants also request that these additional fees be included in the final Judgment amount.

"In Nevada, "the method upon which a reasonable fee is determined is subject to the discretion of the court,' which 'is tempered only by reason and fairness.'" Shuette v. Beazer Homes Holding Corp., 121 Nev. 837, 865, 124 P.3d 530, 548-49 (2005) (quoting University of Nevada v. Tarkanian, 110 Nev. 581, 591, 879 P. 2d 1180 (1994)). However, there are certain factors, which the Court should analyze in determining the reasonableness of a fee award:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

Counsel for Wespac charged WESPAC $395.00 per hour, which is a fair and reasonable hourly rate based upon the fact that counsel graduated from Arizona State University School of Law in 1984; he then clerked for the Honorable Bruce R. Thompson for two years; he is a member of both the Nevada and California Bar Association; he worked as an Associate for Lawrence J. Semenza for five years; he worked as an a deputy federal public defender for five years and tried

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many jury trials; he then worked in private practice for over twenty years and successfully represented parties in over 200 securities arbitration cases, many of which have tried to an arbitration panel; his current hourly rate for security arbitration cases is $395.00 per hour: he served as the President of the local Chapter of Inns of Court; and it is his understanding that a substantial percentage of attorneys in Reno, Nevada charge $395.00 or more per hour.

The area of securities arbitration is complicated and requires specialized knowledge and experience. Moreover, Mr. Garmong filed three voluminous extremely detailed Motions to Vacate, Opposition to Motion to Confirm, and Replies. He also attached hundreds of pages of exhibits. In fact, Mr. Garmong filed so many exhibits, his lawyer had to file supplemental attachments to comply with the Court's limits of 100 megabytes per submittal. Counsel was required to perform many hours of legal research. Counsel believes that he provided zealous and superior representation on behalf of his clients. This court affirmed Judge Pro's Arbitration award and, thus, the result obtained by counsel was superior. The quality of such representation, however, required counsel to spend many hours working on the case. The consequence was that my attorney fees incurred to confirm the arbitration award totaled $24,529.50. *See* Exhibit "1", Declaration of Thomas C. Bradley and Exhibit "2," Copy of Invoice paid by Wespac. Additionally, counsel paid Michael Hume $3,175.00. Thus, total fees were $27.704.50.

III. CONCLUSION

This Court should enter an order confirming the Arbitrator's Final Award dated April 11, 2019, and reduce the Final Award to Judgment, including the award of $111,649.96 in attorney fees and costs incurred in the arbitration plus $27,704.50 of attorney fees incurred in the confirmation of the Arbitration Award for a total of $139,354.46.

DATED this 8th day of August, 2019.

/s/ Thomas C. Bradley
THOMAS C. BRADLEY, ESQ.
Attorney for Defendants

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
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Tom@TomBradleyLaw.com

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thomas C. Bradley, Esq., and the date set forth below, I served a true copy of the foregoing document on the party(ies) identified herein, via the following means:

____ Personal Delivery

____ Professional Courier

____ Federal Express or Other Overnight Delivery Service

____ US Mail with Sufficient Postage Affixed

____ Facsimile to the Facsimile Number specified

____ Electronic Mail to the e-mail address(es) specified

_X_ Second Judicial District Court eFlex system

Carl Hebert, Esq.
carl@cmhebertlaw.com
202 California Avenue
Reno, Nevada 89509
Attorney for Plaintiff

DATED this 8th day of August, 2019.

By: */s/ Mehi Aonga*
Employee of Thomas C. Bradley, Esq.

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INDEX OF EXHIBITS

Exhibit No.	Description	No. of Pages
1	Declaration of Thomas C. Bradley	2
2	Wespac Invoice	2

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EXHIBIT 1

EXHIBIT 1

DECLARATION OF THOMAS C. BRADLEY

I, Thomas C. Bradley, declare under penalty of perjury to the following:

1. I have been counsel of record in Garmong v. WESPAC since 2012.
2. I charged WESPAC $395.00 per hour, which I believe is a fair and reasonable hourly rate based upon the following:
   a. I graduated from Arizona State University School of Law in 1984;
   b. I clerked for the Honorable Bruce R. Thompson for two years;
   c. I am a member of both the Nevada and California Bar Association;
   d. I worked as an Associate for Lawrence J. Semenza for five years;
   e. I have worked in private practice for over twenty years;
   f. I was President of the Local Chapter of the Inns of Court;
   g. I have successfully represented parties in over 200 securities arbitration cases, many of which I have tried to an arbitration panel;
   h. My current hourly rate for security arbitration cases is $395.00 per hour;
   i. It is my understanding that a majority of attorneys in Reno, Nevada charge $300.00 or more per hour; and
   j. WESPAC has paid all of my outstanding fees.

3. The area of securities arbitration is complicated and requires specialized knowledge and experience. Moreover, Mr. Garmong's three Motions to Vacate, Opposition to Motion to Confirm and three Replies were very detailed and voluminous, and contained numerous exhibits.

4. I believe that I provided zealous and superior representation before this Court on behalf of my clients. The quality of such representation, however, required me to spend many hours working on the case. I hereby certify that I worked a total of 62.1 hours and billed a total of TWENTY-FOUR THOUSAND FIVE HUNDRED TWENTY-NINE DOLLARS AND FIFTY CENTS ($24,529.50), and that the invoice was accurate, and all hours worked were reasonable and necessary. Attached to this Declaration is a true and correct copy of my invoice in this matter.

5. I retained Michael Hume to assist me in the defense of Mr. Garmong's claims. I paid Mr. Hume $100.00 per hour to assist me before this Court. Mr. Hume is a very experienced

securities arbitration consultant. He has assisted lawyers throughout the United States in excess of one thousand security arbitration cases over the past 25 years. Mr. Hume assisted me in reviewing and analyzing voluminous pleadings and exhibits filed by Mr. Garmong. Mr. Hume further assisted me with locating referenced and citations to the arbitration hearing. I have carefully reviewed, approved, and verified all of Mr. Hume's work and the accuracy and reasonableness of his invoices. Mr. Hume worked a total of 31.75 hours for a total $3,175.00.

6. I did not charge my clients for any time expended on any pleadings to make a certain exhibit confidential or for any telephone calls, e-mails, or legal research regarding that subject.

I swear under penalty of perjury that the foregoing statements in this Declaration are true and correct.

DATED this 8th day of August, 2019.

By */s/ Thomas C. Bradley*
THOMAS C. BRADLEY, ESQ.

EXHIBIT 2

EXHIBIT 2

THOMAS C. BRADLEY, ESQ.

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June 1, 2019

WESPAC
689 Sierra Rose Drive
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INVOICE for April & May 2019
FEES

DATE	DESCRIPTION	HOURS	AMOUNT
4/25/2019	Review and Analysis of Garmong's 48-page Motion to Vacate Award, plus exhibits; Legal Research cases cited therein; Telephone conference with client	4.1	$ 1,619.50
4/26/2019	Continued Review and analysis of Motion to Vacate Award; Legal Research and draft Opposition	4.7	$ 1,856.50
4/27/2019	Review and Analysis of Garmong's 31-page Motion to Vacate Denial of Motion for Partial Summary Judgment, plus exhibits; Legal Research cases cited therein	4.6	$ 1,817.00
4/28/2019	Continued Review and Analysis of Garmong's Motion to Vacate Denial of Motion for Partial Summary Judgment and draft Opposition	3.8	$ 1,501.00
5/1/2019	Review and Analysis of Garmong's 24-page Motion to Vacate Award of Attorney Fees, plus exhibits; Legal Research cases	4.9	$ 1,935.50
5/2/2019	Continued Review and Analysis of Garmong's Motion to Vacate Award of Attorney Fees; Legal Research and draft Opposition	5.7	$ 2,251.50
5/3/2019	Draft Oppositions; Telephone Conference with Client; Legal Research	5.6	$ 2,212.00
5/4/2019	Review and Analysis of Garmong's Opposition to Motion to Confirm Award; Legal Research; Draft Reply	5.1	$ 2,014.50
5/6/2019	Draft Oppositions and Legal Research; Finalize Reply	4.9	$ 1,935.50
5/7/2019	Legal Research; Draft Oppositions	5.5	$ 2,172.50
5/8/2019	Legal Research; Draft Oppositions	4.9	$ 1,935.50

DATE	DESCRIPTION	HOURS	AMOUNT
5/9/2019	Finalize Oppositions; Telephone conference with client	4.9	$ 1,935.50
5/22/2019	Review and Analyze 22-page Reply to Motion to Vacate Final Award; Review 14-page Reply to Motion to Vacate Denial of Motion for Partial Summary Judgment; Review 12-page Reply to Motion to Vacate Award of Attorney Fees; Finalized Requests for Submission of all 3 of Garmong's Motions	3.4	$ 1,343.00
	TOTAL TIME @ $395.00 AN HOUR	**62.1**	**$ 24,529.50**
	Hume Invoice (31.75 Hours @ $100.00/hour)		*$3,175.00*
	INVOICE TOTAL		***$ 27,704.50***

CODE: 2010
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Attorney for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

CASE NO. CV12-01271

DEPT. NO. 6

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

/

STIPULATION

Plaintiff Gregory Garmong intends to timely file a Motion pursuant NRCP 59 seeking to amend the Judgment. Defendants WESPAC and Greg Christian (collectively, "WESPAC"), intend to file an Amended Motion seeking the award of the additional attorney's fees incurred in opposing the Motion to Amend the Judgment.

Accordingly, Plaintiff Gregory Garmong, by and through his counsel, Carl M. Hebert, Esq., and Defendants WESPAC and Greg Christian (collectively, "WESPAC"), by and through their counsel, Thomas C. Bradley, Esq., hereby stipulate that:

1. WESPAC shall have until ten (10) days after the Court issues a ruling favorable to WESPAC on Plaintiff's Motion to Amend the Judgment to file an Amended Motion for the Award of Attorney's Fees;

THOMAS C. BRADLEY, ESQ.
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2. Plaintiff shall have the standard response time in which to file and serve his opposition to the Defendant's Amended Motion for the Award of Attorney's Fees; and

3. WESPAC shall not be required to file a Proposed Final Judgment until ten (10) days following this Court's ruling on WESPAC's Amended Motion for the Award of Attorney's Fees.

Attached as Exhibit "1" is a Proposed Order.

Affirmation: *The undersigned verifies that this document does not contain the personal information of any person.*

Stipulated to this 16th day of August, 2019.

By: Carl M. Hebert
CARL HEBERT, ESQ.
Attorney for Gregory Garmong

Stipulated to this 13 day of August, 2019.

By: T C Bradley
THOMAS C. BRADLEY, ESQ.
Attorney for Greg Christian and Wespac

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INDEX OF EXHIBITS

Exhibit No.	Description	No. of Pages
1	Proposed Order	1

THOMAS C. BRADLEY, ESQ.
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EXHIBIT 1

EXHIBIT 1

CODE: 3370
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

_____/

CASE NO. CV12-01271

DEPT. NO. 6

ORDER

GOOD CAUSE APPEARING, the Court orders that:

1. WESPAC shall have until ten (10) days after the Court issues a ruling favorable to WESPAC on Plaintiff's Motion to Amend the Judgment to file an Amended Motion for the Award of Attorney's Fees;
2. Plaintiff shall have the standard response time in which to file and serve his opposition to the Defendant's Amended Motion for the Award of Attorney's Fees; and
3. WESPAC shall not be required to file a Proposed Final Judgment until ten (10) days following this Court's ruling on WESPAC's Amended Motion for the Award of Attorney's Fees.

DATED this _____ day of _____, 2019.

_____
DISTRICT JUDGE

THOMAS C. BRADLEY, ESQ.
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Attorney for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

CASE NO. CV12-01271

DEPT. NO. 6

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

_____/

ORDER

GOOD CAUSE APPEARING, the Court orders that:

1. WESPAC shall have until ten (10) days after the Court issues a ruling favorable to WESPAC on Plaintiff's Motion to Amend the Judgment to file an Amended Motion for the Award of Attorney's Fees;
2. Plaintiff shall have the standard response time in which to file and serve his opposition to the Defendant's Amended Motion for the Award of Attorney's Fees; and
3. WESPAC shall not be required to file a Proposed Final Judgment until ten (10) days following this Court's ruling on WESPAC's Amended Motion for the Award of Attorney's Fees.

DATED this 27th day of August, 2019.

DISTRICT JUDGE

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CARL M. HEBERT, ESQ.
Nevada Bar #250
202 California Avenue
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(775) 323-5556

Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive,

DEPT. NO. : 6

Defendants.
_____/

PLAINTIFF'S MOTION TO ALTER OR AMEND "ORDER RE MOTIONS" ENTERED AUGUST 8, 2019

Petitioner moves the Court pursuant to NRCP 59(e) to substantively alter or amend the judgment found in the "Order Re Motions" entered August 8, 2019." ("Order").

The requested substantive alterations or amendments to the judgment are to

• Deny Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reduce Award to Judgment, including Attorneys' Fees and Costs.

• Grant Plaintiff's Motion to Vacate Arbitrator's Final Award.

• Grant Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees.

• Grant Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion

for Partial Summary Judgment ("PMPSJ") and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment.

This Motion is based upon the Order, the following Points and Authorities, the papers filed with the Court, the papers filed in the arbitration, and the other papers in the case.

POINTS AND AUTHORITIES

I. REQUESTED RELIEF, THE DISTRICT COURT'S MANDATORY DUTY TO REVIEW AND PRELIMINARY MATTERS

A. The requested relief

The Order Granted Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reduce Award to Judgment, including Attorneys' Fees and Costs; Denied Plaintiff's Motion to Vacate Arbitrator's Final Award; Denied Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees and denied Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment ("PMPSJ").

Each of these decisions was erroneous for reasons set forth below. Plaintiff Mr. Garmong asks that they be vacated and reversed.

B. The District Court has a duty to review the actions and rulings of the arbitrator to determine whether he disregarded the facts or manifestly disregarded the law.

See NRS § 38.241(1) and case authority discussed at Plaintiff's Motion to Vacate Arbitrator's Final Award at 3:3-4:21, including, among others, Graber v. Comstock Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995) ("[T]he district court had the authority and obligation to review the arbitrator's award to determine whether the arbitrator

manifestly disregarded the law. To the extent the arbitration transcript and exhibits contained substantial evidence of a manifest disregard for the law, the district court acted improperly by failing to review the arbitration transcript and exhibits before confirming the arbitration award."); WPH Architecture, Inc. v. Vegas VP, LP, 131 Nev. Adv. Op. 88, 360 P.3d 1145, 1147 (2015); Clark County Educ. Ass'n v. Clark County School Dist., 122 Nev. 337, 341-42, 131 P.3d 5, 8 (2006). The District Court has a mandatory legal obligation to perform that review of the arbitrator's award including, in this case, the arbitrator's denial of Plaintiff's Motion for Partial Summary Judgment and the arbitrator's Final Award.

C. The matter of purported delays and alleged reluctance to participate in arbitration is not relevant to the Court's duty to review.

The Order discusses at some length purported delays in the proceeding. Neither party raised an objection on this basis. Any such purported delays are not relevant to the issues presented by the various motions decided by the Order. However, the plaintiff wishes to note that he appealed (petitioned for a writ of mandamus or prohibition) the order of the District Court committing the case to arbitration. This appellate process consumed 11 months. Further, the parties had could not agree on selection of the arbitrator and sought the assistance of this Court. This took additional time.

Considerations of reluctance to arbitrate, which the Court raised on its on own motion, cannot justify a refusal to follow mandatory requirements of the law.

D. Scope of this Motion

This Motion addresses errors found in the Order, and explains why the rulings in the Order should be reversed. Those errors relate primarily to the Order attempting to justify avoiding addressing the substantive issues. There is no attempt here to address in detail the substantive issues raised in the briefs that led to the Order, which discussion is

found in those briefs.

II. LEGAL STANDARDS FOR AMENDING JUDGMENTS

The "Order Re Motions" entered on August 8, 2019 decided all of the claims between the parties and left nothing for future disposition by the Court; therefore, it is a final judgment, Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994), for which a NRCP 59(e) motion to alter or amend judgment may be brought.

> More recently, in Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994), we reiterated that '[t]his court determines the finality of an order or judgment by looking to what the order or judgment actually does, not what it is called.' We thus found labels to be inconclusive when determining finality; instead, we recognized that this court has consistently determined the finality of an order or judgment by what it substantively accomplished. Id. at 444–45, 874 P.2d at 733 (citing State, Taxicab Authority v. Greenspun, 109 Nev. 1022, 1025, 862 P.2d 423, 425 (1993); Hallicrafters Co. v. Moore, 102 Nev. 526, 528–29, 728 P.2d 441, 443 (1986)); see also Bally's Grand Hotel v. Reeves, 112 Nev. 1487, 1488, 929 P.2d 936, 937 (1996) (" 'This court has consistently looked past labels in interpreting NRAP 3A(b)(1), and has instead taken a functional view of finality, which seeks to further the rule's main objective: promoting judicial economy by avoiding the specter of piecemeal appellate review.' ") (quoting Ginsburg, 110 Nev. at 444, 874 P.2d at 733).
>
> Thus, whether the district court's decision is entitled a 'judgment' or an 'order' is not dispositive in determining whether it may be appealed; what is dispositive is whether the decision is final.

Lee v. GNLV Corp, 116 Nev. 424, 427, 996 P.2d 416, 418 (2000)(emphasis added).

NRCP 59(e) does not state the permissible grounds for the motion, but AA Primo Builders, 126 Nev. 578, 582, 245 P.3d 1190,1192-93 (2010), identifies the grounds. After observing that "NRCP 59(e) and NRAP 4(a)(4)(C) echo Fed.R.Civ.P. 59(e) and Fed. R.App. P. 4(a)(4)(A)(iv), and we may consult federal law in interpreting them," AA Primo Builders holds:

> Because its terms are so general, Federal Rule 59(e) 'has been interpreted as permitting a motion to vacate a judgment rather than merely amend it,' 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2810.1, at

> 119 (2d ed.1995), and as 'cover[ing] a broad range of motions, [with] the only real limitation on the type of motion permitted [being] that it must request a substantive alteration of the judgment, not merely correction of a clerical error, or relief of a type wholly collateral to the judgment.' Id. at 121, 976 P.2d 518 (citing Osterneck v. Ernst & Whinney, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989); Buchanan v. Stanships, Inc., 485 U.S. 265, 108 S.Ct. 1130, 99 L.Ed.2d 289 (1988)). Among the 'basic grounds' for a Rule 59(e) motion are 'correct[ing] manifest errors of law or fact,' 'newly discovered or previously unavailable evidence,' the need 'to prevent manifest injustice,' or a 'change in controlling law.' Id. at 124–27, 976 P.2d 518.

(Emphasis added).

In the present case, there was 'newly discovered or previously unavailable evidence," the Order makes "manifest errors of law or fact," and the Order promulgates "manifest injustice," for reasons that will be discussed in the Argument.

To the extent that this motion to alter or amend requires the Court to revisit earlier rulings in light of subsequent events, the standard for reconsideration by a district court was stated in Masonry and Tile Contractors Association of Southern Nevada v. Jolley, Urga & Wirth, Ltd, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997), and is similar to the standards for consideration of a Rule 59 motion: "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." (Emphasis added). Again, in this case, substantially different evidence was subsequently introduced, and the decision is clearly erroneous.

III. ARGUMENT

The Order at 10-15 includes Sections A-C, dealing respectively with (A) Defendants' Motion to Confirm Final Award, (B) Plaintiff's Motion to Vacate Final Award, and Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment, and (C) Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees. The Argument is

organized in the same manner.

A. Defendants' Motion to Confirm Final Award

1. Basis as set forth in AA Primo Builders

The need to "correct manifest errors of law or fact," consider "newly discovered or previously unavailable evidence" (*e.g.*, the introduction by the defendants of additional versions of the alleged "arbitration agreement"), manifest errors of law and fact, and the need "to prevent manifest injustice" all form the bases for a motion to alter or amend.

The Order fails to address the fact that defendants earlier misrepresented to Judge Adams that Version 1 of the purported Agreement was "true, complete and correct," when Version 1 was plainly not "true, complete and correct" because it lacked exhibits expressly required by Version 1. Defendants had in their possession at that time, and concealed from Judge Adams, a Version 2 that they later introduced into the record and claimed it was "true, complete and correct." Two different versions of a purported contract cannot both be "true, complete and correct."

Version 2 of the purported contract is "previously unavailable evidence" that requires the Court to grant the Rule 59(e) motion as to Defendants' Motion to Confirm Final Award.

These fraudulent misrepresentations were successful in persuading Judge Adams to refer the matter to arbitration. After Defendants' misrepresentations and fraud as to Version 1 and the concealment of Version 2 from Judge Adams were successful and he was induced to refer the matter, Defendants renounced Version 1 and switched to Version 2–and got away with it before the arbitrator.

2. Errors of law or fact in the Order, and the revelation of "previously unavailable evidence" that Defendants had concealed from Judge Adams.

(a) A party asserting an agreement to arbitrate must identify the requirements imposed upon the party asserting an agreement to arbitrate.

As discussed at, *inter alia,* 1:20-23 of "Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award," NRS § 38.221(1) and case authority such as Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) require that the party asserting an agreement to arbitrate, here defendants, must make of record a binding contract that includes an arbitration provision. This is a statutory requirement that the Court may not disregard. This Court and plaintiff are entitled to have defendants identify the documents from the record that the defendants contend constitute the single, complete, binding purported contract that they claim includes an arbitration provision. If defendants cannot identify one, and only one, true, complete, correct, certain, unambiguous, definite, verified and binding contract in the record as it now exists, the arbitrator's Final Award cannot be confirmed because there was no agreement to arbitrate as required by NRS §38.221(1) and case authority such as Obstetrics and Gynecologists..

An incomplete, uncertain, indefinite collection of paper purporting to be a "contract" or an "agreement" cannot be enforced or be binding upon the victimized party. See Dodge Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-4 (1930), holding that "There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite."

Defendants have never identified a single document that they can show is not "incomplete, uncertain, or indefinite," and the Order does not address this requirement.

Instead, Defendants have identified two documents as purported "agreements," neither of which is "true, complete and correct."

Even if either of Version 1 and Version 2 had been "true, complete and correct," the content of the Agreement remains uncertain and indefinite. When a party introduces two different versions of a "contract," and swears that each is "true, complete and correct," to which the other party is to be bound, a court and the other party cannot determine which of the two versions is the actual "true, complete, and correct" contract.

(b) The Order does not address the differences in Version 1 and Version 2 of the purported Agreement, and Defendants' fraudulent misrepresentations to Judge Adams.

"Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award," at 5:2 discusses in detail Version 1 of the purported Agreement, and at 6:26-8:10 discusses in detail Version 2.

The Order relies on Judge Adams' Orders of December 13, 2012 and April 2, 2014, both of which hold that the Version 1 of the purported agreement is valid. However, the Order makes no mention of the impact of "previously unavailable evidence" on Judge Adams' Orders, where the Defendants substantially admitted that they had misled Judge Adams with Version 1, while they had Version 2 in their possession the entire time.

Judge Adams' Orders are not controlling for two reasons under the applicable legal standards. First, in 2012-2014 Defendants concealed from Judge Adams Version 2 of the Agreement, the version they ultimately advanced in the arbitration. Version 2, which is new and substantially different "previously unavailable evidence," was not disclosed by Defendants until 2017.

Second, Judge Adams' Orders cannot be construed as "law of the case." "Law of

the case" arises only from an express ruling on a matter by an appellate court. Hsu v. County of Clark, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007), holds: "Under the law of the case doctrine, '[w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal.'" (Emphasis added). In the present case the Supreme Court did not speak to the question of validity of Version 1 of the purported Agreement.

Defendants misrepresented Version 1 of their purported Agreement to Judge Adams in 2012-2014, in order to persuade him to refer the matter to arbitration. Then when the matter reached arbitration in 2017, Defendants realized that they could not possibly rely on Version 1 in the arbitration, and presented the second, inconsistent Version 2 of the purported Agreement to the arbitrator. Inasmuch as no further purported Agreement papers were prepared after 2012, Defendants clearly had Version 2 in their possession when they misrepresented Version 1 to Judge Adams in 2012-2014, and concealed that Version 2 from Judge Adams, from the Supreme Court, and from Mr. Garmong. Neither Version 1 nor Version 2 were in fact "true, complete and correct."

The Order focuses on Judge Adams' Orders of December 13, 2012 and April 2, 2014 dealing with Version 1, but fails to address Version 2 that was available to Defendants when they misrepresented Version 1 to Judge Adams as "true, complete and correct," but was concealed by Defendants at that time and later introduced into the arbitration. The points that the Order overlooks are, first, that the introduction of Version 2 constitutes evidence that was "previously unavailable" because Defendants concealed it, and, second, that by failing to address Version 2 in the Order, the Court effectively ratifies Defendants' strategy of misrepresenting Version 1 in 2012-2014 as "true, complete

and correct" in order to obtain referral to arbitration, while concealing from the Court Version 2, which was later also represented to be "true, complete and correct.

Even in 2012-2014, it was apparent that the purported Version 1 could not serve as the basis for the arbitration. For this reason Mr. Garmong argued that Version 1 was not a valid contract including a valid agreement for arbitration. Subsequent events proved that he was correct. His arguments in 2012 were limited by the fact that Version 2 was then being concealed by the Defendants. That is no longer the case, and the significance of Version 2 must be considered as new, previously unavailable evidence.

(c) Factual and legal errors in the Order

The Order disregards the two different versions of the purported Agreement. It also disregards the fact that both versions are incomplete. Neither version has the required number of Exhibits A and B. Version 1 calls for two different Exhibits A and two different Exhibits B, while Version 2 calls for three different Exhibits A and three different Exhibits B. Both Versions call for a "Confidential Client Profile." Version 1 had a blank-form "Confidential Client Profile," while Version 2 had an incomplete "Confidential Client Profile." Defendants represented, under oath, both Version 1 and Version 2 to be "true, complete and correct. Obviously, Version 1 and Version 2 cannot both be "true, complete and correct."

This Court and plaintiff are entitled to have identified for them the document from the record that the defendants contend constitutes the single, complete, binding, "true, complete and correct" purported contract, and which they claim includes an arbitration provision. NRS § 38.221(1) and case authority such as Obstetrics and Gynecologists require that the party asserting an agreement to arbitrate, here defendants, must make of record a binding contract that includes an arbitration provision.

The Order fails to address the requirements of NRS § 38.221(1) and case authority such as Obstetrics and Gynecologists, and also fails to address the omission of Exhibits A and B from the record, and the different versions of the Confidential Client profile that were advanced by defendants.

Defendants refused to address this issue during the arbitration, and in their Motion to Confirm Final Award, and Reply. The reason that they refused to address the issue is that if they chose Version 2, the version introduced during the arbitration proceeding, they would have to admit perjury when Defendant Christian swore under oath that Version 1 was "true, complete and correct." If, on the other hand, they chose Version 1, they would have to admit that Version 2 was falsely represented to the arbitrator and to the Court, They would also be forced to admit that the Final Order, which was based upon Version 2, was invalid.

3. In response to this Rule 59 motion, the Court should require defendants to elect either Version 1 or Version 2.

NRS § 38.221(1) and case authority such as Obstetrics and Gynecologists require that the party asserting the existence of the contract including the agreement to arbitrate must identify that agreement. The Court may not properly disregard this statutory requirement. The Court should require Defendants to elect either Version 1 or Version 2. Of courser, once Defendants make this election, the fraud in asserting the non-elected version becomes even more apparent. Once the election is made, the Defendants must identify in the record the required exhibits.

4. Absent a demonstration by the Defendants that there was an enforceable agreement to arbitrate, the Court must vacate the Final Award pursuant to NRS § 38.241(e).

If Defendants do not demonstrate the existence of a single, valid, "true, complete and correct" contract including an agreement to arbitrate, NRS § 38.221(1) and case authority such as Obstetrics and Gynecologists, the court "shall" vacate the final award. NRS § 38.241(e). Two inconsistent versions, Version 1 and Version 2, do not meet this requirement.

5. Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(e).

On a related issue, Order at 11:12-14 references the Court's Order to Show Cause, characterized as "holding Mr. Garmong was ordered numerous times to participate in arbitration." This Order to Show Cause was prompted solely by the Court's failure to consider properly NRS §38.221(7) and Judge Adams' Order of December 13, 2012, holding at 21-22, "In addition, in accordance with NRS 38.221(7), this judicial proceeding shall be stayed pending the arbitration."

This Order to Show Cause was also discussed at Order 5:8-15 and 13:6-9, attempting likewise to cast some sort of blame on Mr. Garmong because the arbitration did not move faster. However, nowhere is there recognition of the fact that there is no evidence that Mr. Garmong had declined to participate in arbitration or otherwise acted improperly. After Judge Adams' Order of December 13, 2012, Mr. Garmong appealed that Order, as he was permitted to do. After the Supreme Court affirmed, he fully participated in the arbitration, despite his continuing objection that arbitration was never proper in the first instance.

Nor is there any mention of the fact that the Order to Show Cause was satisfied when Mr. Garmong drew the Court's attention to NRS §38.221(7) and the above-quoted sentence from Judge Adams' Order of December 13, 2012. The repeated reference to the Order to Show Cause is an improper attempt to blame Mr. Garmong for a demonstrable error by the Court.

In the end, regardless of the speed at which the arbitration moved, Defendants are still required to identify the single "true, complete and correct" document in the record that contains the purported agreement to arbitrate, NRS § 38.221(1) and Obstetrics and Gynecologists v. Pepper, and the Court is still required to follow the statutory law and case authority. If Mr. Garmong's position is not correct, pointing out such a single "true, complete and correct" document in the record should pose no burden for either Defendants or the Court.

B. Motion to Vacate Final Award; Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment ("PMPSJ").

1. Basis as set forth in AA Primo Builders

The need to "correct manifest errors of law or fact," consider "newly discovered or previously unavailable evidence," and the need "to prevent manifest injustice" serve as the grounds for this portion of the motion to alter or amend.

The Order at 11:20-13:20 asserts that these motions were previously decided by the Court, and that Mr. Garmong may not reassert them. This position disregards the content of the prior motions and the content of this Court's Order of November 29, 2018.

2. Errors of law or fact in the Order

(a). The Order of November 29, 2018 did not address or decide either of these motions as presented by Mr. Garmong.

The Order at 11:19-13:19 consolidates these two issues under a single heading, but Mr. Garmong will discuss them separately in this subsection (i) and the following subsection (ii). The thrust of the Order at 11:20-24 is that Mr. Garmong had previously raised these two matters and that the Court had already decided these two matters in its Order of November 29, 2018.

The present Order overlooks the Court's Order of November 29, 2018 at 8:23-25, holding, "Here, Mr. Garmong does not seek review of a final arbitration award. Instead, Mr. Garmong is asking the Court to challenge the continued service of Judge Pro and vacate Judge Pro's order regarding summary judgment." (Emphasis added). Plainly, this sentence recognizes that Mr. Garmong's motion leading to the Court's Order of November 29, 2018 does not relate in any way to the arbitration Final Award, and therefore DCR 13(7) could not apply. The sentence also recognizes that the challenge to the summary judgement was based solely upon the disqualification of the arbitrator, and not the substance of the arbitrator's decision on PMPSJ.

The Order also overlooks the statutory and case authority of a party to bring motions to vacate a Final Award.

(i) Motion to Vacate Final Award

The date of the arbitration Final Award was March 11, 2019, some four months after the date of the Order of November 29, 2018. Consequently, Mr. Garmong's motion of July 5, 2018 leading to the Court's Order of November 29, 2018, and the Court's Order of November 29, 2018, could not possibly have dealt with the subject matter of the Final

Award. The Order at 11:20-24 asserts that Mr. Garmong did not follow the procedure of DCR 13(7) in seeking vacating of the arbitrator's Final Award, but failed to recognize that the Final Award was announced months after the Order of November 29, 2018. Surely the Court does not contend that Mr. Garmong's motion of July 5, 2018 contested, or that the Court's own Order of November 29, 2018 could have addressed, the arbitrator's Final Award that was made months later, on March 11, 2019.

(ii) Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment.

Although it had a similar title, the earlier motion to vacate the arbitrator's denial of the PMPSJ differed for two important reasons from the one addressed in the Order; therefore, it was not the same motion, and did not require permission under DCR 13(7). First, as the above-quoted sentence from the Order recognizes, the earlier motion to vacate was based upon requested disqualification of the arbitrator, not on the substance of the PMPSJ; second, the earlier motion to vacate did not request the Court to decide the PMPSJ on the merits, only to vacate the decision of the arbitrator and appoint a new arbitrator who would then hopefully decide the PMPSJ according to Nevada law. The Court's Order of November 29, 2018 at 8:11-9:8 did not remotely suggest that it had decided the PMPSJ on the substantive merits. In fact, the Order of November 29, 2018 states at 9:2-5, "This Court . . . declines to consider an appeal of a motion for summary disposition of claims."

The result of that Order of November 29, 2018 and the present Order, taken together, is that the arbitration Final Award has never previously been addressed by this Court, and that the PMPSJ has never been decided by this Court according to the

substantive law of Nevada dealing with summary judgment.

(b). The Order of November 29, 2018 expressly invited and authorized Mr. Garmong to assert the motions after a Final Order was entered, stating, "Mr. Garmong will have the opportunity to appeal the final arbitration award to this Court in accordance with JAMS rules, should he wish to do so."

After the arbitrator refused to decide the PMPSJ according to the law, Mr. Garmong moved the Court for the arbitrator's disqualification. The purpose of seeking the disqualification of an arbitrator who clearly disregarded Nevada law was for the Court to appoint a new arbitrator who would obey the law of Nevada. Hoping that the arbitrator would do the right thing and recuse himself because of his obvious refusal to follow the law of Nevada, Mr. Garmong sent the arbitrator a pre-filing courtesy copy of a draft of the motion; see Exhibit 9 to the Motion to Disqualify. The motion was not directed to JAMS, but was directed to this Court. JAMS improperly issued an advisory opinion on a motion directed to this Court. Not surprisingly, JAMS ignored the facts and law, and supported the arbitrator's refusal to follow the law of Nevada and his improper decision on the PMPSJ.

Mr. Garmong then sent the actual motion to this Court, which denied it in the Order of November 29, 2018. The Order misinterpreted the actions of JAMS as a proper decision on the motion directed to this Court, stating at 8:23-9:7:

> Here, Mr. Garmong does not seek judicial review of a final arbitration award. Instead, Mr. Garmong is asking this Court to challenge the continued service of Judge Pro and vacate Judge Pro's order regarding summary judgment. Mr. Garmong makes this motion after making an identical request to the JAMS Arbitration Appeals Committee, which was denied. As set forth '[JAMS] will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.' JAMS Comprehensive Rules & Procedures Rule 15(i). Accordingly, this Court will not interfere to supersede the Committee's final determination regarding the

> continued service of an arbitrator and declines to consider an appeal of a motion for summary disposition of claims. Mr. Garmong will have the opportunity to appeal the final arbitration award to this Court in accordance with JAMS rules, should he wish to do so.

(Emphasis added).

The Court's decision on the present Order re Motions is erroneous in light of the decision of the Order of November 29, 2018 for several reasons. First, there was never any motion directed to JAMS, and it had no authority to decide a courtesy copy of a motion directed to this Court. Second, the rules of JAMS do not supersede the authority of this Court, which appointed the arbitrator and had the power to disqualify the arbitrator. Third, the argument that the Court already decided the motion to vacate the PMPSJ is incorrect–the Court plainly stated that it "declines to consider an appeal of a motion for summary disposition of claims." Fourth, the Disqualification Motion of July 5, 2018 never asked this court to decide the PMPSJ; it only asked this Court to vacate the arbitrator's decision. Fifth, the Order of November 29, 2018 expressly authorized Mr. Garmong to appeal the final arbitration award, which final arbitration award includes the Final Award and the arbitrator's decision on the PMPSJ. Sixth, the arbitrator's denial of the PMPSJ was solely for the reason that he maintained that assessment of the credibility of witnesses was necessary to decide the PMPSJ, and determinations of credibility on summary judgment are expressly forbidden by Nevada case law. The Court's Order of November 29, 2018 and the present Order do not address this point at all. There has never been a decision on the PMPSJ utilizing the proper legal approach, either by the arbitrator or by the Court.

The special significance of the arbitrator refusing to follow the law of Nevada in deciding the PMPSJ is that the resolution of a summary judgment motion must follow a highly specific and tightly defined procedure pursuant to Nevada authority, see Wood v.

Safeway, 121 Nev. 724, 121 P.3d 1026 (2005). In this case, the arbitrator refused to follow Nevada law, and instead decided the PMPSJ on a basis–determining credibility of the declarants–that is expressly forbidden by Nevada law. The arbitrator's refusal to follow the law of Nevada in deciding PMPSJ did not bode well for the remainder of the arbitration, and that concern was borne out.

The Disqualification Motion of July 5, 2018 discussed at 3:18-4:26 this Court's statutory and equitable powers to disqualify an arbitrator that the Court had appointed. NRS §28.241 provides "Upon motion to the court by a party to an arbitral proceeding, the court shall vacate an award . . . [upon specified conditions]." There is no limitation that the Court shall vacate only a final award or final decision on an otherwise-dispositive motion such as the PMPSJ. In the case of the disqualification motion, Mr. Garmong sought vacating of the decision on the PMPSJ, and the Court refused. Mr. Garmong also sought disqualification of the arbitrator based on the Court's equitable powers as utilized by other courts.

After the final decision of the arbitrator, which necessarily included his denial of the PMPSJ, Mr. Garmong took the Court at its word as giving him permission and for the first time moved to vacate the final determination of the arbitrator and for the Court to decide PMPSJ.

As is plain from the above quotation, Mr. Garmong had not previously moved to vacate the Final Award (which could not have been done prior to the date of the Final Award). Plaintiff's Motion to Vacate Arbitrator's Final Award, filed April 22, 2019 sets forth at 3:2-4:16 the legal standards for deciding a motion to vacate a final award, and at 4:18-21: "The District Court has a duty to review the actions and rulings of the arbitrator to determine whether the arbitrator manifestly disregarded the law or the facts." Graber v.

Comstock Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995).

Further, the Motion after Final Order was brought under NRS §38.241(1), expressly authorizing and permitting a party to challenge the final decisions of an arbitrator.

The attempted reliance on DCR 13(7) at 11:20-12:21 in the Court's Order of August 8, 2019 is misplaced. The authority cited above supports the Court's granting of Mr. Garmong's motion to alter or amend. New facts are presented in the motion to vacate, specifically the facts brought forth in the arbitration proceeding, and the errors of law and fact underlying the Court's Order are detailed.

C. Motion to Vacate Attorney's Fees

1. Basis as set forth in AA Primo Builders

The need to "correct manifest errors of law or fact," consider "newly discovered or previously unavailable evidence," and the need "to prevent manifest injustice" is the basis for this portion of the motion to alter or amend.

2. Errors of law or fact in the Order

(a). The Court's decision is a clear abuse of discretion because it failed to follow the controlling legal authority.

The Order at 13:20-15:2 denies the motion to vacate attorney's fees, employing several arguments which are based upon erroneous assumptions and without citation to any relevant supporting legal principles.

The Order evidences an abuse of discretion on the part of the District Court, based upon the very case whose holding it paraphrased. The Order at 14:14-16 addressed and misstated the holding of the one case authority cited in this section, Bidart v. American Title Ins. Co., 103 Nev. 175, 734 P.2d 732 (1987). Bidart, 103 Nev. at 179, 734 P.2d at 735, held,

> The trial court properly considered the factors laid out by this court in Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983). Where the court properly weighs the Beattie factors, an award of attorneys fees based on NRCP 68 is discretionary with the court. Its discretion will not be disturbed absent a clear abuse.

There is no indication in the Order that it considered the Beattie factors. Accordingly, its decision was a clear abuse of discretion because the Court failed to follow the principles of Bidart. "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." State v. Eighth Judicial Dist. Court (Zogheib), 130 Nev.158, 161, 321 P.3d 882, 884 (2014) (internal quotations omitted).

(b). The arbitrator's Discovery Plan and Scheduling Order set forth the rules and procedures to govern the entire arbitration. It was not limited to discovery matters.

In an attempt to justify the arbitrator's retroactive application of NRCP Rule 68, Order at 14:17-26 incorrectly suggests that the arbitrator's Discovery Plan and Scheduling Order ("Plan") of August 11, 2017 dealt solely with, and was limited to, "specific NRCP rules relating to discovery." The arbitrator made the same argument in the Final Order, page 10, fourth paragraph, stating, "However, the agreement of the parties to specific NRCP rules relating to discovery does not automatically exclude the applicability of others, particularly where the arbitrator deems that necessary. See JAMS Rule 24." JAMS Rule 24 has no such provision. The word "necessary" appears in JAMS Rule 24 twice, once in JAMS Rule 24(e) relating to "interim measures," and again in JAMS Rule 24(j) relating to "correct any computational, typographical or other similar error in an Award." JAMS Rule 24 has no provision for changing the scope of the previously identified rules that govern

an arbitration proceeding, to take retroactive effect to the detriment of a party.

This argument of the Court and the arbitrator is apparently intended to excuse the omission of NRCP Rule 68 from the Plan, and justify its later introduction by the arbitrator to take retroactive effect to Mr. Garmong's detriment. That argument is incorrect. The Plan dealt with the entire range of rules and matters governing the arbitration, not just discovery. It expressly included NRCP 6 (Plan 1:17), dealing with time periods; NRCP 56 (Plan 2:12-13), dealing with motions for summary judgment; Washoe District Court Rule 12 (Plan 1:19-20), dealing with deadlines, and the filing of status reports (Plan 2:16-17). It also addressed opening arbitration briefs (Plan 2:6-7), pre-hearing briefs (Plan 2:14-15), and amended complaints and answers (Plan 2:18-20). It was not limited to discovery matters. Certainly a limitation of the Plan to discovery matters was not intended by either the parties or the arbitrator, as these rules were stated (Plan 1:20) to "generally govern this case." Accordingly, the agreement and order of the Plan was properly relied upon by Mr. Garmong as a statement of the broad range of rules governing the arbitration.

The parties entered into an agreement (Plan 1:17) concerning the rules governing the arbitration, and the arbitrator ordered those agreed-upon provisions (Plan 1:16). Thus, Defendants' argument, repeated at Order 14:25-26, that the agreement and order "does not automatically exclude the applicability of others to the matter, particularly where the arbitrator determines it necessary," is not found in the Plan itself and is not valid. The parties and the arbitrator agreed, after a conference (Plan 1:20) that the entirety of the arbitration, not just discovery, would be governed by a limited set of rules and procedures set forth in the Plan. Neither the arbitrator nor the Court has the authority unilaterally to alter that agreement.

(c). The arbitrator never ruled that NRCP Rule 68 would be included in the rules governing the arbitration.

Regarding the inclusion of the phrase "unless the arbitrator rules otherwise" in the Plan at 1:20, the arbitrator never ruled that Rule 68, governing offers of judgement, would be included in the set of rules governing the arbitration. Garmong pointed this out in his Motion to Vacate Award of Attorney's Fees at 3:21-27, 20:18-23, and 20:26-27. Neither the arbitrator, the defendants, nor this Court identified any oral or written ruling of the arbitrator where he extended the rules governing the arbitration to include NRCP Rule 68.

Nor was there any finding by the arbitrator that adding NRCP Rule 68 to the list of governing rules of the arbitration, long after the offer of judgment was made and after the time that Mr. Garmong was permitted to respond, was "necessary" as argued by Defendants and echoed by the Order at 8:24-9:3. A determination of "necessary" in this context requires specific findings of fact and conclusions of law. In this case such a finding of fact and conclusion of law would have had to demonstrate that retroactive addition of Rule 68 to the governing rules, prior to the time that the purported offer of judgment was made, and without notice to Mr. Garmong or an opportunity to be heard, is somehow justified by statute or case authority, and did not prejudice Mr. Garmong.

(d). Even if the arbitrator had ruled that NRCP Rule 68 would be included in the rules governing the arbitration, no such ruling was made prior to the offer of judgment of September 12, 2017, and the required date of action by Mr. Garmong.

Although Defendants allege that they sent, and Mr. Garmong received, an offer of judgment on September 12, 2017, the governing law of the case at that time and during the 10-day period thereafter when Mr. Garmong could accept the offer of judgment, was

that Rule 68 was not included in the rules governing the arbitration set forth in the Plan of a month earlier. The Defendants did not at that time return to the arbitrator and ask him to modify the Plan to add Rule 68 to that group of rules, and consequently Rule 68 was not a governing rule of the arbitration.

Had Mr. Garmong responded to the purported offer of judgment of September 12, 2017, he would have opened the door to an argument by defendants, the arbitrator, and the Court that by this action he acquiesced in the addition of Rule 68 to the set of rules set out in the Plan to govern the arbitration. He did not acquiesce. To the contrary, if Defendants wished to add Rule 68 to the set of rules governing the arbitration, it was their obligation to return to the arbitrator and move for the addition.

(e). The taking of Garmong's property without due process is a violation of both the United States and Nevada Constitutions.

The action of the arbitrator, and rationalization in the Order, is an attempt to justify a denial of Due Process under the Fourteenth Amendment to the United States Constitution ("nor shall any State deprive any person of life, liberty, or property, without due process of law") and Art. 1, § 8(5) of the Nevada Constitution ("No person shall be deprived of life, liberty, or property, without due process of law.").

Both of these constitutional provisions forbid government from the kinds of actions perpetrated by the arbitrator and approved by the Order, the taking of Garmong's property without proper notice. A fundamental requirement of due process is that the party whose property is to be affected must be given fair notice and an opportunity to speak to the grounds under which his property is to be taken, before the event–here the purported offer of judgement–underlying the taking had occurred. At the time of the purported offer of judgment of September 12, 2017, Mr. Garmong had been given no notice that the

arbitrator might later make a ruling consistent with Rule 68 becoming a part of the rules governing the arbitration, and in fact the listing of governing rules in the Plan of August 11, 2017 gave him clear notice to the contrary. Arguing and appealing an already-ordered taking of property is not the same as fair notice and an opportunity to speak prior to the events--here the purported offer of judgment--leading to the taking. On this fundamental point the United States Supreme Court stated, Armstrong v. Manzo, 380 U.S. 545, 552 (1965):

> A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted . . . . For the reasons stated, the judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

The Order at 13:24-14:16 references and apparently relies upon the language "or allowed by applicable law." NRCP Rule 68 was not "applicable law" according to the arbitrator's own Plan at the time the offer of judgment was made on September 12, 2017, and during the 10-day period thereafter. The arbitrator never at any time made any ruling that NRCP Rule 68 would be one of the rules governing the arbitration, nor have the arbitrator, the defendants, or the Court identified any such ruling.

Prior to September 12, 2017, had the defendants moved that the arbitrator amend the Plan to include NRCP Rule 68 and the arbitrator made this change after giving Mr. Garmong the opportunity to oppose the change, the Due Process argument of this subsection and the fundamental fairness argument of the next subsection would lose much of their force. But defendants did not do so, and the arbitrator never amended the Plan to

include NRCP Rule 68.

The attempt to take Mr. Garmong's property in violation of Due Process is founded solely upon the purported offer of judgment, which was not applicable to the arbitration proceeding by the arbitrator's own Plan at the time the purported offer of judgment was made, or at a later time.

(f). The award under NRCP 68 also violates principles of fundamental fairness.

Constitutional Due Process expresses the principles of fundamental fairness in relation to the taking of property. The taking of Mr. Garmong's property based solely upon an offer of judgment under NRCP Rule 68, when that rule was not one of the arbitrator's enumerated rules governing the arbitration, is the height of unfairness.

Had the parties agreed, and the arbitrator ordered in the Plan, that NRCP Rule 68 would be part of the arbitration proceedings, Mr. Garmong's view of the case and strategy would have been entirely different. For example, he might have made his own offer of judgment before the PMPSJ was filed, under the assumption (wrongly, as it turned out) that it would be fairly decided according to the applicable legal principles. This was the guiding principle in Davidsohn v. Steffens, 112 Nev. 136, 140, 911 P.2d 855, 857 (1996). In that case the prevailing party at trial moved for attorney's fees well after the time ran for the filing of a notice of appeal. The losing party had not filed a notice of appeal. The Nevada Supreme Court reversed a grant of fees, stating that:

> We conclude that Doyle's [the prevailing party] delay of more than three months after the judgment before filing her request for attorney's fees was unreasonable. She has not offered any reason to justify this delay, and Davidsohn [the losing party] was prejudiced by the delay since he received no notice that Doyle would seek fees until after the deadline for filing an appeal had passed. Although the parties dispute whether or not Doyle agreed not to seek attorney's fees in return for Davidsohn's forgoing his right

> to appeal, it is undisputed that on October 20, 1993, Davidsohn's attorney at the very least informed Doyle's attorney that Doyle's decision regarding attorney's fees was important to Davidsohn's decision whether to appeal. Doyle then did not request attorney's fees during the running of the period for filing an appeal. We conclude that it was therefore reasonable for Davidsohn to believe that Doyle had decided not to seek fees and in reliance on that belief not to act on his right to appeal and, conversely, that it was unreasonable for Doyle to delay in this fashion before seeking fees.

(Emphasis added). The point is that, as in Davidsohn, if the plaintiff here had advance notice of the rules by which he was playing, he could have conducted himself differently. Here, if the plaintiff was informed that NRCP 68 was a part of the rules governing the arbitration, he might have accepted the offer of judgment. Instead, the decision to employ NRCP 68 and award fees was made well after the plaintiff could have done anything under the rule. In short, he was effectively misled to his disadvantage.

The Order takes the position that Mr. Garmong should not suggest that the arbitrator was biased against him. But the evidence is so strong that it may not be ignored. The arbitrator refused to decide fairly the PMPSJ, which if decided according to the applicable principles of law would have required the arbitrator to decide the entire arbitration in Mr. Garmong's favor, and avoided the subsequent lengthy and expensive arbitrator process. The arbitrator's Final Award was based upon Version 2 of the alleged Agreement, which was demonstrated to have been the beneficiary of Defendants' misrepresentation to this Court. The arbitrator's Final Award refused to decide those issues presented in the First Amended Complaint which would have mandated a decision in Mr. Garmong's favor, and the arbitrator refused to give reasons for most of his decisions on the claims that he did decide. The arbitrator awarded attorneys fees based upon an offer of judgment under NRCP Rule 68, that was not included in the Discovery Plan and Scheduling Order of August 11, 2017. An objective consideration of these facts mandates a decision that the

arbitrator was biased against Mr. Garmong.

IV. SUMMARY AND CONCLUSION

The Order seeks improperly to avoid the District Court's obligation to review the arbitrator's award to determine whether the arbitrator manifestly disregarded the law or facts. Graber v. Comstock Bank, *supra*. The Court may not use diversions such as irrelevant claims of delays or reluctance to arbitrate, assertions of decisions on issues which were in fact not presented or decided previously and claims that Judge Adams' 2012-2014 orders constitute law of the case, when new facts later arose. Instead, the Court should recognize that manifest errors of law have infected this entire proceeding, for example, the steadfast refusal of the arbitrator to rule on a partial motion for summary judgment upon which the plaintiff would have prevailed and the use of a rule of civil procedure (NRCP 68) which unfairly surprised the plaintiff at a time when he could take no action.

Consistent with the arguments and points and authorities stated above, the plaintiff urges this Court to alter or amend the Order Re Motions to grant the following:

• Deny Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reduce Award to Judgment, including Attorneys' Fees and Costs.

• Grant Plaintiff's Motion to Vacate Arbitrator's Final Award.

• Grant Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees.

• Grant Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment ("PMPSJ") and for the Court to Decide and Grant Plaintiff's

Motion for Partial Summary Judgment.

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

DATED this 5th day of September, 2019.

/S/ Carl M. Hebert
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

_____/

CASE NO. CV12-01271

DEPT. NO. 6

OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND "ORDER RE MOTIONS" ENTERED AUGUST 8, 2019

Defendants Wespac and Greg Christian, by and through their counsel, Thomas C. Bradley, Esq., hereby oppose Plaintiff Gregory Garmong's *Motion to Alter or Amend "Order Re Motions" Entered August 8, 2019* ("Motion to Amend"). Defendants' *Opposition* is based on the following Points and Authorities, and all other pleadings, briefs, and exhibits identified below.

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POINTS & AUTHORITIES

I.
INTRODUCTION

Mr. Garmong just cannot take "no" for an answer. Instead, he filed this latest Motion based on technical criticisms and perceived deficiencies of this Court's well-reasoned decision. As this Court aptly pointed out previously, while the Court is required to "consider" every argument, it is not required to "address" each and every argument made by a party. *See* District Judge Simons Order (5-31-18).

Mr. Garmong has been litigating this case for over seven (7) years and rehashes the same meritless arguments and then complains when the rulings do not change. This meritless Motion to Amend continues this same pattern and his previously raised and rejected arguments are barred from reconsideration by laws governing Rule 59(e) motions.

II.
LAW

A. Federal Law May be Relied Upon in Interpretation of NRCP 59(e)

The wording of NRCP 59(e) is based on its federal counterpart FRCP 59(e), and Nevada Courts may consult Federal law in interpreting them. *See* Coury v. Robison, 115 Nev. 84, 91 n.4, 976 P.2d 518, 522 n.4 (1999).

1. Rule 59(e) Standards

Rule 59(e) provides that a party may file a "motion to alter or amend a judgment." Fed. R. Civ. P. 59(e). The Ninth Circuit has explained the standard for a motion under Rule 59(e) as follows: "Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion." McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam) (internal quotation marks omitted). But amending a judgment after its entry remains "an extraordinary remedy which should be used sparingly." *Id.* (underscoring added). *See* Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1112 (9th Cir. 2011).

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In general, there are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law. *Id.*

In determining whether a decision could result in manifest injustice, Courts examine whether it would "upset settled expectations—expectations on which a party may reasonably place reliance." Qwest Servs. Corp. v. FCC, 509 F.3d 531, 540 (D.C. Cir. 2007). "[M]anifest injustice" requires "at least (1) a clear and certain prejudice to the moving party that (2) is fundamentally unfair in light of governing law." *See* Mohammadi v. Islamic Republic of Iran, 947 F.Supp.2d 48, 78 (D.D.C. 2013), aff'd, 782 F.3d 9 (D.C. Cir. 2015).

2. No Miscarriage of Justice

While Rule 59(e) allows a district court to reconsider and amend its previous orders for clear error or a fundamental miscarriage of justice, the interests of finality and conservation of judicial resources behoove the courts to use the rule sparingly and only as an extraordinary remedy. Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir.2003). Mr. Garmong utterly failed to identify a clear error or a fundamental miscarriage of justice.

Judge Pro concluded that, "The evidence adduced at the arbitral hearing fails to show that Christian breached any duty to consider Garmong's financial condition or investment objectives, or otherwise failed to fulfill his responsibilities as an investment advisor and manager during Garmong's relationship with Wespac." *See* Plaintiff's Exhibit 4 at page 8, last paragraph (emphasis added).

Judge Pro in this case provided an 11-page explanation of his factual findings, including factual findings supporting his conclusions of law, some of which are quoted from the Final Award as follows:

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

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- The Confidential Client Profile signed by Dr. Garmong on August 18, 2005 expressly stated [in his own handwriting] his investment goal as "moderate growth, moderate-low risk."
- Dr. Garmong is a highly intelligent and educated individual…before he engaged the professional services of Wespac and Christian, Dr. Garmong had considerable experience in managing a comfortably large individual portfolio of assets.
- In 2005, Garmong had amassed five to seven million dollars in bond and stock market [investments] and money funds before engaging Wespac and Christian.
- Garmong's acumen in understanding securities investments is further reflected in his personal editing of Wespac's Client Profile; his use of the "laddering" technique he employed in connection with his investments in the bond market; and his ability to understand the financial reports he received regularly from Wespac and Charles Schwab relating to his investment portfolio.
- Christian testified that he maintained regular written and oral communication with Garmong throughout most of their professional relationship, and they personally met quarterly to review the status of Garmong's investments through Wespac. Christian characterized Garmong's ability to understand what was happening as "Better than most." The evidence adduced clearly supports that view.
- The testimony of expert witness Bruce Cramer shows that Christian and Wespac employed a conservative "growth and income" investment strategy throughout the relationship with Garmong, which [Mr. Christian] made more conservative over time to accommodate Garmong's circumstances and the marketplace.
- This strategy was consistent with Garmong's investment objectives set forth in the Client Profile, and as otherwise expressed when the parties regularly reviewed his accounts with Wespac.
- Clearly, Wespac and Mr. Christian did not subvert those objectives by their actions.
- Christian acknowledged that Garmong's "life situation changed" when he retired but explained that he knew of Garmong's intended retirement from the beginning of their professional relationship and had factored that into the investment strategy employed for Garmong's accounts with Wespac.
- Christian testified that at the time of his meeting with Garmong in October 2007, Garmong understood his overall investment portfolio and that he was partially invested in stocks and that stocks could go down.
- I [the Arbitrator] asked Dr. Garmong why, in October 2007, he did not convert his stocks to all cash if his goal was solely to protect capital after his retirement and in the face of a worsening economy. Garmong responded, "Because you don't need to do that to get gains and preserve capital…What I was trying to do was to stay even with inflation and not lose purchasing power to inflation."
- A final factor which weighs against Garmong's claim that Wespac and Christian caused a loss in the value of his portfolio by failing to adhere to his investment objectives is that Garmong was free to terminate his relationship with Wespac and Christian at any time.

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- Cramer further explained that the securities in Garmong's accounts with Wespac were not sold but were transferred to Fidelity and his analysis of available statements from the Fidelity account showed that Garmong generated a profit.
- On the record adduced in this case I find that Dr. Garmong has failed to prove the liability of Wespac or Christian on any of his claims by a preponderance of the evidence.

In addition, Mr. Cramer stated under oath:

"Over the past fifteen years, I have carefully reviewed and analyzed hundreds of cases against SEC Registered Advisors, FINRA representatives, and other financial advisors alleging breach of fiduciary duty and other similarly related claims. Based upon the opinions and conclusions contained in my arbitration hearing testimony, I believe that Mr. Garmong's case against Wespac and Mr. Christian to be one of the most frivolous cases that I have encountered." (underscoring added).

The only miscarriage of justice in this case is that Mr. Garmong has been torturing Mr. Christian with his meritless and relentless litigation attacks for the past seven years.

3. Rule 59 May Not be Used to Relitigate Old Matters

The United States Supreme Court made it absolutely clear that Rule 59 "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been made prior to the entry of judgment." Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008). *See also* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1, pp. 127–128 (2d ed.1995) (footnotes omitted)

Mr. Garmong's arguments in his Motion to Amend are not based on manifest errors of fact or law, and instead rest primarily on his dissatisfaction with this Court's decision not to specifically address all his meritless arguments. *See* Motion at page 3, lines 25-27. As such, they are efforts to "relitigate old matters" that provide no basis for relief under Rule 59. *See* Exxon Shipping, 554 U.S. at 485 n.5.

For example, Mr. Garmong complains there is no indication in the Order that the Court considered the Beattie v. Thomas factors. Again, there is only a requirement to "consider not address" each and every meritless argument. Judge Pro determined the attorney's fees and costs

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sought by Defendants were reasonable and appropriate for the work done in this case. In making this determination Judge Pro found that the quality of Respondents' counsel; the quality and difficulty of the work performed; the amounts charged for the service performed; and the overall benefits derived warrant the finding that the fees and costs are reasonable and cited Bunzell v. Golden Gate National Bank, 455 P.2d 31, 33 (1969). Accordingly, Judge Pro found that Respondents Wespac and Mr. Christian were entitled to an Award of reasonable attorney's fees and costs of this action.

The Ninth Circuit stated in San Martine Compania De Navegacion v. Saguenay Terminals Ltd., 293 F.2d 796, 800 (9th Cir. 1961): [A]n award such as this, which is one within the terms of the submission, will not be set aside by a court for error in law or fact.... "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts.... If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court ... will not set it aside for error, either in law or fact." (*quoting* Burchell v. Marsh, 58 U.S. (17 How.) 344, 349, 15 L. Ed. 96 (1854)). Thus, there was no need for this Court to specifically address the Brunzell factors for the award of attorney's fees.

4. Alleged New Evidence Regarding Arbitration Agreement Attachments

Mr. Garmong incorrectly alleges that the attachments to the arbitration agreement constitute "new evidence." The test for Rule 59(e) is whether the evidence was available "prior to the entry of judgment." Exxon Shipping, 554 U.S. at 486 n. 5, 128 S. Ct. 2605. *See also* Odhiambo v. Republic of Kenya, 947 F. Supp. 2d 30, 36 (D.D.C. 2013).

Mr. Garmong raised, at length, these same arguments to Judge Pro before the final decision on the arbitration award was issued. Mr. Garmong subsequently raised these same arguments to this Court in Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award at page 4, line 16 to page 15, line 16 and in his Motion to Vacate Arbitrator's Final Award at page 3, line 3 to page 4, line 21.

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Accordingly, his argument that there exists "new" evidence is without merit. Moreover, Counsel will not waste this Court's valuable time re-stating their arguments why this claim is a red herring and instead incorporates by reference his arguments in Defendants' Opposition to Plaintiff's Motion to Vacate Arbitrator's Final Award at page 6, line 10 to page 20, line 4.

5. Denial of Mr. Garmong's Motion for Partial Summary Judgment

Mr. Garmong raised these same arguments to this Court in Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award at page 4, line 16 to page 15, line 16, his Motion to Vacate Arbitrator's Final Award at page 3, line 3 to page 4, line 21 and Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment at page 10, line 12 to page 31, line 6.

A "mere disagreement" with a court's initial decision will not support a Rule 59(e) motion. Slate v. Am. Broad. Cos., Inc., 12 F. Supp. 2d 30, (D.D.C. 2013).

6. Mr. Garmong Failed to Timely Raise His Argument That His Due Process Rights Were Violated

A motion to amend a judgment based on arguments that could have been raised, but were not raised, before judgment was entered may not properly be granted. 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2nd § 2810.1 at 127-28; Demasse v. ITT Corporation, 915 F. Supp. 1040, 1048 (Ariz. 1995) (a Rule 59(e) motion may not be used to raise arguments or present evidence that could have been raised or presented prior to judgment). *See* Parks v. Baron, 2009 WL 10695434, at *1 (D. Ariz. July 29, 2009).

A position advanced "for the first time in a Rule 59(e) motion, [is] barred where there [is] no reason why the defendant could not have presented its argument prior to its motion to alter or amend the judgment." *Id.* Rule 59(e) consequently does not provide litigants the "opportunity to re-argue a case." Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998) (*citing* FDIC, 978 F.2d at 16).

Plaintiff's arguments regarding due process violations could have been raised in any of the Motions or Oppositions filed in either Arbitration or before this Court entered its Judgment

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confirming the Arbitration award. Plaintiff may disagree with the award issued by the arbitrator, but attaching a new interpretation to the award hardly constitutes new evidence within the meaning of a Rule 59(e) motion.

Moreover, even if Mr. Garmong had timely raised the due process argument, it is without merit. Defendants had repeatedly placed Mr. Garmong on notice that they were seeking the award of attorney's fees. Mr. Garmong was certainly aware that Defendants intended to rely upon NRCP 68 when they served him with an Offer of Judgment. At no time, did Mr. Garmong request that Judge Pro address the issue whether a NRCP 68 Offer of Judgment was valid.

Instead, Mr. Garmong requested that Judge Pro misinterpret his discovery order in Opposition to Defendant's Motion for the Award of Attorney's Fees. Judge Pro soundly rejected this argument. Mr. Garmong again raised this issue before this Court. As explained in detail in Defendants' Opposition to Mr. Garmong's Motion to Vacate the Award of Attorney's Fees, Judge Pro was entitled to interpret his Order and found there was no waiver of Defendants' right to make a Rule 68 Offer of Judgment. Finally, Mr. Garmong's due process rights were not violated because he was given multiple opportunities to be heard on the issue.

The scope of the district court's review of an arbitration award (and, consequently, our own de novo review of the district court's decision) is extremely limited and is "nothing like the scope of an appellate court's review of a trial court's decision." Health Plan of Nev., Inc. v. Rainbow Med., LLC, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004). "A reviewing court should not concern itself with the 'correctness' of an arbitration award and thus does not review the merits of the dispute." Bohlmann v. Printz, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004). Review of arbitration awards is extremely narrow, and review of judicial rulings on such awards narrower still. *See* Waddell v. Holiday Isle, LLC, No. CIV.A. 09-0040-WS-M, 2009 WL 4898356, at *8 (S.D. Ala. Dec. 10, 2009).

In short, the issue whether the award of attorney's fees was proper has been repeatedly raised and rejected. Mr. Garmong's attempt to re-cast the same argument as a constitutional violation is meritless. To the extent it could be considered a new argument, Mr. Garmong failed to raise it in a timely manner as required by NRCP 59(e).

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7. No Evidence That Judge Pro Was Biased

Mr. Garmong contends that Judge Pro's decisions prove he was biased. This argument has been raised and rejected many times. Accordingly, it is barred under the laws governing Rule 59(e) motions. Moreover, the Nevada Supreme Court has held rulings of a judge during official proceedings do not establish bias to disqualify a judge. In Re Petition to Recall Dunleavy, 104 Nev. 784 (1988).

III.
CONCLUSION

This Court should find that Mr. Garmong has not raised any new arguments, cited any intervening change in controlling law, provided any new evidence, or established that reconsideration is necessary to correct a clear error of law or prevent manifest injustice. Unfortunately for Mr. Garmong, his train has not merely left the station—it has already reached its destination and discharged its cargo. He simply does not accept the fact that the case is over and he lost on every claim.

Although it is time to move on, we all know that an appeal is imminent. Accordingly, Defendants respectfully request that this Court clarify that it has considered all of Mr. Garmong's arguments and determined them to be without merit.

Affirmation: *The undersigned verifies that this document does not contain the personal information of any person.*

Dated this 12th day of September, 2019.

/s/ *Thomas C. Bradley*
Thomas C. Bradley, Esq.
Attorney for Defendants

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thomas C. Bradley, Esq., and on the date set forth below, I served a true copy of the foregoing document on the party(ies) identified herein, via the following means:

____ Personal Delivery

____ Professional Courier

____ Federal Express or Other Overnight Delivery Service

____ US Mail with Sufficient Postage Affixed

____ Facsimile to the Facsimile Number specified

____ Electronic Mail to the e-mail address(es) specified

__X__ Second Judicial District Court eFlex system

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Dated this 12th day of September, 2019.

By: */s/ Mehi Aonga*
Employee of Thomas C. Bradley, Esq.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive,

DEPT. NO. : 6

Defendants.
_____/

PLAINTIFF'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ALTER OR AMEND "ORDER RE MOTIONS" ENTERED ON AUGUST 8, 2019

On September 5, 2019, Plaintiff filed "Plaintiff's Motion to Alter or Amend 'Order re Motions' Entered August 8, 2019." ("Motion to Alter or Amend"). On September 12, 2019, Defendant filed its "Opposition to Plaintiff's Motion to Alter or Amend 'Order re Motions' Entered August 8, 2019" ("Opposition").

The Plaintiff now replies to the Opposition.

POINTS AND AUTHORITIES

I. INTRODUCTION

A. The Order of August 8, 2019 did not address the governing law and the established facts of the case.

The Order of August 8, 2019 ("Order") did not address the law, facts or substance of the motions to vacate.

Regarding Defendants' Motion to Confirm Final Award, the Order at 11:5-15 relied upon two earlier orders of Judge Adams, dated December 13, 2012 and April 2, 2014. As discussed in the Motion to Alter or Amend at 6:4-24, these two orders dealt with Version 1 of the alleged Contract. The orders were overtaken by events in the case and were effectively superseded when Defendants introduced an inconsistent Version 2 into the arbitration proceeding. Defendants had Version 2 in their possession on the dates of Judge Adams' two orders, yet they concealed Version 2 to mislead Judge Adams and to induce him to issue his two orders. Notably, Defendants' Petition to Confirm, filed April 15, 2019, did not mention Version 1 and Version 2, nor did it include the different versions as exhibits.

Defendants' Opposition declined to address this issue, implicitly conceding it. Defendants continue to misrepresent this point, and seek to bury the issue. To find the two different and inconsistent versions, the Court must look to Exhibits 2 and 5 (Version 1) and Exhibits 6 and 7 (Version 2) of Plaintiff's Opposition to Defendants' Motion to Confirm, filed April 25, 2019.

The Court's Order chastised Plaintiff for insisting that no single "true, complete and correct" purported Contract is in the record of this case. The events have proven Plaintiff correct. At the outset of this case, Defendants had both Version 1 and Version 2 in their

possession, represented Version 1 to Judge Adams as "true, complete and correct," while concealing Version 2, thereby fraudulently misrepresenting to this Court that it did not exist.[1] Judge Adams based his earlier two orders that were referenced by the Court in the Order upon Defendants' misrepresentations.

The Plaintiff has demonstrated multiple times[2] Defendants' misrepresentation of the facts of the agreement. The Defendants have never denied or even responded to that accusation and demonstration of their fraud. The Plaintiff is at a loss as to how this fact and the arguments based upon it continue to be overlooked.

Regarding Plaintiff's Motion to Vacate Final Award, Order at 11:20-12:21 held that it had already addressed and decided the final award in its order of November 29, 2018. But that Order, at 8:23-25, held: "Here, Mr. Garmong does not seek review of a final arbitration award." Additionally, the date of the arbitration Final Award was March 11, 2019, almost four months after the date of the order of November 29, 2018. The Court could not possibly have decided the "final award" on November 29, 2018. Defendants' Opposition declined to address this issue, again implicitly conceding that Plaintiff's position is correct.

Regarding Plaintiff's Motion to Vacate MSJ, Order at 13:9-20 asserts that the Court previously considered this issue, and denied the Motion to Vacate MSJ on the grounds

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[1] Concealment of material information constitutes fraud, see Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007), cited and quoted at Plaintiff's Motion to Vacate Arbitrator's Final Award filed April 22, 2019 at 10:9-13.

[2] See, for example, Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award, filed April 25, 2019, at 12:8-14:6 (addressing both the governing law of fraud and the specific facts of this fraud by Defendants in this case); and Plaintiff's Motion to Vacate Arbitrator's Final Award, filed April 22, 2019 at 10:1-22 (addressing the governing law of fraud) and at 10:24-13:7(addressing additional specific acts of fraud in this case by Defendants).

that Plaintiff did not file a request under DCR 13(7). However, the Order of November 29, 2019 expressly stated that "This Court . . . declines to consider an appeal of a motion for summary disposition of claims." Further, the Order of November 29, 2018 (8:23-9:7) expressly invited and authorized Mr. Garmong to assert the motions after a Final Order was entered, stating, "Mr. Garmong will have the opportunity to appeal the final arbitration award to this Court in accordance with JAMS rules, should he wish to do so." (Emphasis added).

Regarding the Motion to Vacate Attorney's Fees, Order at 14:17-26 asserted that the arbitrator's retroactive application of NRCP Rule 68 could be justified by the argument that the arbitrator's Discovery Plan and Scheduling Order ("Plan") of August 11, 2017 dealt solely with, and was limited to, "specific NRCP rules relating to discovery." (Emphasis in original). As discussed at Motion to Alter or Amend 20:12-21:27, that position is clearly wrong. The Plan dealt with the full range of rules governing the management of the arbitration, not just discovery. The omission of NRCP Rule 68 from the Plan meant that it was not to be included in the case for any purpose, both by agreement of the parties and by the arbitrator's order. Plaintiff relied upon that agreement and the order, and the Court has no authority to ignore or revise that agreement. Further, the Order at 14:27-28 asserts that no evidence exists to support the assertion that the award was obtained by corruption, fraud, or other undue means. How exactly would the Court characterize the actions of the Defendants, described above, in first representing the incomplete Version 1 of the alleged contract to Judge Adams to obtain referral to arbitration, and then changing to the incomplete, and inconsistent Version 2 to persuade the arbitrator to decide in Defendants' favor, if not fraud? Defendants swore Version 1 to be "true, complete and correct" to persuade Judge Adams to refer the case to arbitration, and obtained that result; later

Defendants swore Version 2 to be "true, complete and correct" to support their claim in the arbitration, and obtained that result. A more straightforward case of fraud on the Court is difficult to envision. Yet the arbitrator, and later this Court, ignored this fraud, with the Court erroneously stating that there was no evidence of fraud. Here, Defendants' fraud is derived from their own statements and submissions in the Court's record.

B. Summary

The Motion to Alter or Amend focused upon the duty of the District Court to review the arbitrator's award (Motion to Alter or Amend 2:21-3:9), the governing law (Motion to Alter or Amend 4:2-5:20), the fact that it had not considered the relevant issues previously, and errors of law and fact in the Order (Motion to Alter or Amend 6:1-27:1).

As will be discussed in the following sections, the Opposition did not contest the points raised in the Motion to Alter or Amend. Instead, the Opposition takes the position that Plaintiff is asking for something to which he is not entitled. The Opposition attempts to shift the discourse from whether the Order properly addressees the issues, to attacks on Plaintiff.

The case authority is clear. Once a party has initiated District Court review of an arbitrator's award on either statutory grounds (NRS 38.241(1)) or nonstatutory grounds, the District Court has an obligation to conduct that review properly. In this case, the Order did not follow that mandatory obligation.

II. THE OPPOSITION CONCEDES THAT THE DISTRICT COURT HAS AN OBLIGATION TO REVIEW THE ARBITRATOR'S AWARD, BUT THAT THE COURT DID NOT FULFILL THIS OBLIGATION

NRS 38.241 provides for District Court review and mandatory vacating of an arbitrator's decision in some instances. The case authority speaks of an "obligation" of the

district court. Graber v. Comstock Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995), cited together with related authority at Motion to Alter or Amend 2:21-3:9, holds:

> The Wichinsky decision solidified this court's position that a reviewing court in Nevada may apply common law grounds to review an arbitration award. As stated in Wichinsky, a district court's power of review is limited to statutory grounds, but "when an arbitrator manifestly disregards the law, a reviewing court may vacate an arbitration award." Wichinsky, 109 Nev. at 89–90, 847 P.2d at 731. Accordingly, in this case the district court had the authority and obligation to review the arbitrator's award to determine whether the arbitrator manifestly disregarded the law. To the extent the arbitration transcript and exhibits contained substantial evidence of a manifest disregard for the law, the district court acted improperly by failing to review the arbitration transcript and exhibits before confirming the arbitration award.

(Emphasis added).

This "obligation" is a mandatory duty which must be obeyed and acted upon by the District Court; it is not discretionary.

The Supreme Court repeated this requirement in Clark County Educ. Ass'n v. Clark County School Dist., 122 Nev. 337, 341-42, 131 P.3d 5, 8 (2006), holding: "This court has previously recognized both statutory and common-law grounds to be applied by a court reviewing an award resulting from private binding arbitration." WPH Architecture, Inc. v. Vegas VP, LP, 131 Nev. Adv. Op. 88, 360 P.3d 1145, 1147 (2015) further clarified the District Court's obligation as to common-law grounds, holding: "An arbitration award 'may be vacated based on statutory grounds and certain limited common-law grounds.' At common law, 'an arbitration award may be vacated if it is "arbitrary, capricious, or unsupported by the agreement"' or when an arbitrator has 'manifestly disregard [ed] the law.'" (Citations omitted).

The Opposition does not address this "obligation" at all. Instead, it attempts to lead the District Court into error by suggesting that Plaintiff is seeking to persuade the District Court to take some action that it is not required to take. That is not at all the case. Once

a party has sought review of the arbitrator's award, as Plaintiff did, the District Court has no discretion to decline to conduct that mandatory review of the arbitrator's actions. Plaintiff's filed motion papers demonstrated the errors of the arbitrator's actions.

III. THE DISTRICT COURT IS OBLIGATED TO REVIEW THE ARBITRATOR'S AWARD BECAUSE THE DISTRICT COURT HAS A SWORN DUTY TO UPHOLD THE LAW, AND THE ARBITRATOR DOES NOT.

As discussed in the preceding §II, NRS 38.241 provides for the review of an arbitrator's decision by the District Court and Graber held that "the district court had the authority and obligation to review the arbitrator's award." One may ask why the legislature and the Supreme Court provide for district court review of the arbitrator's actions at all, and why the resolution of a dispute is not turned over to the arbitrator in its entirety.

The answer is that an arbitrator has no duty to the litigants and to the public, while a judge does. A district judge takes an oath of a specific form:

> Members of the Legislature and all officers, executive, judicial and ministerial, shall, before they enter upon the duties of their respective offices, take and subscribe to the following oath:
>
> > I, ..., do solemnly swear (or affirm) that I will support, protect and defend the Constitution and Government of the United States, and the Constitution and government of the State of Nevada, against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance and loyalty to the same, any ordinance, resolution or law of any state notwithstanding, and that I will well and faithfully perform all the duties of the office of ....., on which I am about to enter; (if an oath) so help me God; (if an affirmation) under the pains and penalties of perjury.

NRS 281.020.

Litigants are entitled under NRS 38.239 and 38.241 to have their case reviewed by

a person–a District Judge--who has taken that oath.

IV. THE OPPOSITION CONCEDES THAT THE ORDER DID NOT FULFILL THE DISTRICT COURT'S OBLIGATION

A. Defendants' Motion to Confirm Final Award (Motion to Alter or Amend 6:2-13:14).

As discussed at Motion to Alter or Amend 7:5-8:7, the party asserting an agreement to arbitrate, here defendants, must make of record a binding contract that includes an arbitration provision. NRS 38.221(2)[3] and 38.219(4), and case authority such as Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) ("Since [defendants in the present case] set up the existence of the agreement to preclude the lawsuit from proceeding, it had the burden of showing that a binding agreement existed.").

The Motion to Alter or Amend, 6:4-24, points out that the District Court's Order of August 8, 2019 addressed Version 1 of the purported Contract, as presented to and discussed by Judge Adams, and which was relied upon by Judge Adams to refer the case to arbitration. But later, when arbitration started, the Defendants quietly abandoned Version 1 and introduced an inconsistent Version 2. The arbitrator relied upon Version 2. The Defendants swore that Version 1 was "true, complete and correct, and also swore that the different, inconsistent Version 2 was "true, complete and correct." Moreover, neither Version 1 nor Version 2 had the required complete "Confidential Client Profile" and the required Exhibits A and Exhibits B. Two different versions of a purported contract cannot both be "true, complete and correct," particularly when neither version is "complete." An

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[3] The Motion to Alter or Amend mistakenly refers to NRS 38.221(1).

incomplete, uncertain, indefinite collection of paper purporting to be a "contract" or an "agreement" cannot be enforced or be binding upon the victimized party. See Dodge Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-4 (1930), holding that "There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite." (Motion to Alter or Amend at 7:21-26).

The Motion to Alter or Amend at 11:15-12:10 challenges Defendants to identify whether Version 1 or Version 2 (or something else) is the actual "true, complete and correct" alleged Contract. The Opposition refused, and does not mention the two inconsistent versions of the alleged Contract. The Court should take that as an admission by Defendants that they have not met the statutory requirements of NRS 38.221(2) and 38.219(4), and case authority such as Obstetrics and Gynecologists. The Court must reverse on this one ground alone.

Version 2 of the purported contract is "previously unavailable evidence" that requires the Court to grant the Rule 59(e) motion as to Defendants' Motion to Confirm Final Award.

The Opposition's Response. The Opposition refuses to address this subject, and refuses to identify whether Version 1 or Version 2 is the actual "true, complete and correct" version of the alleged Contract, thereby conceding Plaintiff's position. This refusal is directly contrary to the mandates of NRS 38.221(2) and 38.219(4), and Obstetrics and Gynecologists. Defendants got away with this refusal to adhere to the statutory authority and the case law in dealing with the arbitrator and in relation to the Order, but surely this Court will not ignore the mandates of NRS 38.221(1), NRS 38.219(4), and Obstetrics and Gynecologists, when called to its attention, and in light of the mandate of Graber of the

District Court's "obligation to review the arbitrator's award."

The Opposition at 6:18-7:4 does argue that the Version 2 of the contract is not "new evidence." Of course it is. It was available to Defendants (but to no one else), but concealed by them, when they fraudulently induced Judge Adams to issue his two orders referenced in the Order. Version 2 was first revealed by Defendants during the arbitration. The Court did not address the two versions in its Order, and the Motion to Alter or Amend seeks to persuade the Court to do so. The Order was clearly erroneous as well because it did not consider the issue of Version 1 versus Version 2, see Motion to Alter or Amend at 5:12-21.

B. Motion to Vacate Final Award; Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment ("PMPSJ").

The Order at 11:19-13:19 consolidates these two issues under a single heading, but the Motion to Alter or Amend discussed them separately. The Order of August 8, 2019 asserted that these two issues had already been decided, and that Plaintiff had not brought a motion pursuant to DCR 13(7). In fact, neither was previously decided.

1. Motion to Vacate Final Award. (Motion to Alter or Amend 14:23-15:7).

The Motion to Vacate Final Award could not have been earlier decided by the Court for two reasons. First, the date of the arbitration Final Award was March 11, 2019, some four months after the date of the Order of November 29, 2018. Consequently, Mr. Garmong's motion of July 5, 2018 leading to the Court's Order of November 29, 2018, and the Court's Order of November 29, 2018, could not possibly have dealt with the subject matter of the Final Award.

Second, the Court's Order of November 29, 2018 at 8:23-25, held, "Here, Mr.

Garmong does not seek review of a final arbitration award. Instead, Mr. Garmong is asking the Court to challenge the continued service of Judge Pro and vacate Judge Pro's order regarding summary judgment." (Emphasis added).

The Opposition's Response. There was none. The Defendants thereby yield to the Plaintiff's position.

2. Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment. (Motion to Alter or Amend 15:8-19:9).

This section of the Motion to Alter or Amend discussed a number of reasons that the Order of August 8, 2019 was incorrect. The Opposition does not address any of these reasons.

Although it had a similar title, the earlier motion to vacate the arbitrator's denial of the PMPSJ differed for two important reasons from the one addressed in the Order; therefore, it was not the same motion, and did not require permission under DCR 13(7). The earlier motion to vacate was based upon requested disqualification of the arbitrator, not on the substance of the PMPSJ. Further, the earlier motion to vacate did not request the Court to decide the PMPSJ on the merits, only to vacate the decision of the arbitrator and appoint a new arbitrator who would then hopefully decide the PMPSJ according to Nevada law. Plaintiff's Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment, and Appoint New Arbitrator, filed July 22, 2018, stated at 29:6-11,

> The question is what should this Court do. It can leave arbitrator Pro in place and let him continue with his disregard of the facts and the law, the effect of which benefits the defendants. This will lengthen the case and increase the cost to plaintiff, a key objective of the defendants. It will also lead to the Court having to consider the summary judgment issue, as well as other issues involving disregard of law and facts that will likely have arisen by that time, when it is faced with a motion to confirm the award pursuant to

> NRS 38.239. Then, depending upon the Court's ruling, there may be either further arbitration, action in this court, or an appeal.
>
> A great deal of time and expenditure for both the parties and the Court would be avoided by simply disqualifying arbitrator Pro, vacating his determination on Plaintiff's MSJ, and bringing in a new arbitrator who is guided by the facts and law to properly decide the MSJ and who does not have a time conflict with other duties and is not, in practical effect, partial toward the defendants.

(Emphasis added).

The Court's Order of November 29, 2018 at 8:11-9:8 recognized this as the objective of the motion, and did not remotely suggest that it had decided the PMPSJ on the substantive merits. In fact, the Order of November 29, 2018 states at 9:2-5, "This Court . . . declines to consider an appeal of a motion for summary disposition of claims." (Emphasis added). The result of that Order of November 29, 2018 and the present Order, taken together, is that the arbitration Final Award has never previously been addressed by this Court, and that the PMPSJ has never been addressed or decided by this Court according to the substantive law of Nevada dealing with summary judgment.

Further, the Order of November 29, 2018 (8:23-9:7) expressly invited and authorized Mr. Garmong to assert the motions after a Final Order was entered, stating, "Mr. Garmong will have the opportunity to appeal the final arbitration award to this Court in accordance with JAMS rules, should he wish to do so." (Emphasis added).

The Court's decision on the present Order is erroneous in light of the decision of the Order of November 29, 2018 for several reasons. First, there was never any motion directed to JAMS, and it had no authority to decide a courtesy copy of a motion directed to this Court. Second, the rules of JAMS do not supersede the authority of this Court, which appointed the arbitrator and had the power to disqualify the arbitrator. Third, as seen in the quote above, the Disqualification Motion of July 5, 2018 never asked this Court

to decide the PMPSJ; it only asked this Court to vacate the arbitrator's decision. That is a significant distinction. Plaintiff expected that the Court would vacate the arbitrator's decision, appoint a new arbitrator, and permit the new arbitrator to decide PMPSJ. Fourth, the argument that the Court already decided the motion to vacate the PMPSJ is incorrect–the Order of November 29, 2018 plainly stated that it "declines to consider an appeal of a motion for summary disposition of claims." Fifth, the Order of November 29, 2018 expressly authorized Mr. Garmong to appeal the final arbitration award, which final arbitration award includes the Final Award and the arbitrator's decision on the PMPSJ. Sixth, the arbitrator's denial of the PMPSJ was solely for the reason that he maintained that assessment of the credibility of witnesses was necessary to decide the PMPSJ, but determinations of credibility on summary judgment are expressly forbidden by Nevada case law. The Court's Order of November 29, 2018 and the present Order do not address this point at all. There has never been a decision on the PMPSJ utilizing the proper legal approach of Nevada law, either by the arbitrator or by the Court.

The special significance of the arbitrator refusing to follow the law of Nevada in deciding the PMPSJ is that the resolution of a summary judgment motion must follow a highly specific and tightly defined procedure pursuant to Nevada authority See Wood v. Safeway, 121 Nev. 724, 121 P.3d 1026 (2005). In this case, the arbitrator refused to follow Nevada law, and instead decided the PMPSJ on a basis–determining credibility of the declarants–that is expressly forbidden by Nevada law. As Plaintiff pointed out at the time, the arbitrator's refusal to follow the law of Nevada in deciding PMPSJ did not bode well for the remainder of the arbitration, and that concern was borne out by subsequent developments.

The Opposition's Response. There was none. The Defendants thereby concede

Plaintiff's position.

C. Motion to Vacate Attorney's Fees (Motion to Alter or Amend 19:6-27:1).

The legalities are discussed at Motion to Alter or Amend 19:6-27:1 and were not disputed by the Opposition.

1. No valid offer of judgment was made under NRCP Rule 68.

Plaintiff first addresses the sequence of events. As discussed in the Motion to Alter or Amend, on August 11, 2017 the arbitrator entered the Discovery Plan and Scheduling Order ("Plan"), which listed the rules which would govern the entirety of the arbitration, not just "discovery" as erroneously stated in the Order. NRCP Rule 68, dealing with offers of judgment, was not included. Defendants never moved to revise the Plan to add NRCP Rule 68 to the rules governing the arbitration. The arbitrator never *sua sponte* revised the Plan to add NRCP Rule 68 to the rules governing the arbitration. There is no provision under the statutes, the NRCPs or the JAMS rules to retroactively amend a scheduling order such as the Plan.

A month later, on September 12, 2017, Defendants ostensibly made an offer of judgment under NRCP Rule 68. Of course, Defendants' offer of judgment was not valid, because NRCP Rule 68 was not in effect as a governing rule of the arbitration at that time. It is as though NRCP Rule 68 never existed for the arbitration portion of this case. If a valid offer of judgment had been made, Plaintiff would have had until September 22, 2017 to accept the offer of judgment.

At the time the offer of judgment was ostensibly made over the period September 12-22, 2017, NRCP Rule 68 was not a governing rule of the arbitration. Consequently, the Defendants could not have made a valid offer of judgment, and Plaintiff could not have accepted an offer of judgment. There was no rule governing the arbitration that would

permit either an offer of judgment or its acceptance.

2. The action by the arbitrator in granting attorney's fees on an invalid offer of judgment confirms that the arbitration was conducted in a flawed manner.

The arbitrator manifestly disregarded the law of Nevada in deciding PMPSJ. Further, the arbitrator manifestly disregarded the fraud perpetrated upon this Court by the Defendants in first presenting Version 1 of the purported contract as "true, complete and correct," while concealing Version 2, and then presenting Version 2 of the purported contract as "true, complete and correct."

The awarding of attorney's fees based upon an offer of judgment, after letting the Plaintiff believe that NRCP 68 was not part of the arbitration proceeding, and then 19 months later reversing his position confirms that the arbitrator was operating outside of the law governing the arbitration proceedings.

3. Opposition at 5:25-6:7 attempts to respond that the Order did address the Beattie or Brunzell factors, when admittedly it did not.

Motion to Alter or Amend 19:17-20:11 points out that the Order did not address the factors mandated by Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983). The Opposition does not disagree, but instead argues that the arbitrator discussed Brunzell v. Golden Gate National Bank, 455 P.2d 31, 33 (1969). This argument is invalid, for three reasons. First, this is a Motion to Alter or Amend directed to the Court, not to the arbitrator. The point is that the Court abused its discretion by not performing the proper analysis in deciding Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees. Second, Brunzell does not deal with offers of judgment, but on award of attorneys fees on other grounds. Third, as discussed in Beattie and in many other cases such as Parodi v. Budetti, 115 Nev. 236, 240, 984 P.2d 172, 175 (1998), before awarding attorney' fees under NRCP

Rule 68, the Court must find that there was a valid offer of judgment at the time the alleged offer was made. There cannot be a valid offer of judgment when NRCP Rule 68 is not in effect in the arbitration. *See* Stockton Kenworth, Inc. v. Mentzer Detroit Diesel, Inc., 101 Nev. 400, 403, 705 P.2d 145, 148 (1985)(an award of fees must be made on a valid offer of judgment). The arbitrator never ruled there was a valid offer of judgment made on September 12, 2017, a time when NRCP Rule 68 was not one of the rules governing the arbitration. Nor did the Order.

4. The award of attorney's fees violated Plaintiff's due process rights and was fundamentally unfair under traditional rules of law and equity.

Opposition at 7:14-8:3 argues that Plaintiff had not raised Due Process and fundamental fairness prior to the Motion to Alter or Amend. These points were made in, among others, Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees at 8:15-16, stating: "The Final Award disregards the Constitutional Due Process principle that government may not take a person's property without proper notice." See also Plaintiff's Motion to Vacate Arbitrator's Award of Attorney Fees at 23:16-20.

Opposition at 8:9-28 further argues that violation of Due Process and fundamental fairness is fully acceptable in an arbitration proceeding. That is not correct, as these are Constitutional rights guaranteed to all persons in all proceedings. The Opposition further argues that the arbitrator could interpret the order of his Plan. However, he could not interpret that order so as to violate Plaintiff's Due Process rights. That the arbitrator ruled that he could violate Plaintiff's Due Process rights does not permit this Court to do so. This Court is bound by its oath, discussed above, to obey the law, and in particular the Due Process guarantees of the United States and Nevada Constitutions. The arbitrator was

not so bound.

Nor could the arbitrator make a holding contrary to the agreement between the parties and expressed in the Plan. As stated in the Plan (Exhibit 1 to Plaintiff's Motion to Vacate Arbitrator's Award of Attorney Fees) at page 1, lines 17-20: "The parties have agreed that Rules [list of rules, not including NRCP Rule 68] will generally govern this case unless the arbitrator rules otherwise." The arbitrator never "ruled otherwise," and certainly did not "rule otherwise" prior to the purported offer of judgment of September 12, 2017 from which the Plaintiff could reasonably conclude that the offer of judgment was invalid as outside the approved Rules applicable to the arbitration.

5. The Motion to Alter or Amend explained in detail how Defendants failed to give notice.

The Opposition at 8:4-28 argues that Defendants gave proper notice of the seeking of attorney's fees. As discussed at Motion to Alter or Amend 23:13-27:1, Defendants never gave notice prior to September 12, 2017 that they intended to breach the contract expressed in the Plan dated August 11, 2017, and that they intended to contravene the arbitrator's order set forth in the Plan.

6. The award of attorney's fees must be reversed when the substantive decisions in favor of Defendants are reversed, as they must be.

When the substantive decisions in favor of Defendants are reversed, the award of attorney's fees must be as well.

V. REPLY TO OTHER ARGUMENTS OF DEFENDANTS' OPPOSITION

The Opposition raises some further arguments that extend beyond the narrow confines of a single one of the motions to vacate, and are addressed here.

A. The federal cases cited by the Opposition are inapplicable, because there is no indication they are decided under Nevada's Uniform Arbitration Act, and because there is no evidence that Version 1 and Version 2 are governed by the Federal Arbitration Act.

The present Motion to Alter or Amend deals with altering or amending a decision concerning Version 1 and Version 2 of the purported Contract, and specifically purported Contracts with arbitration clauses, as well as other aspects of the arbitration. Both Version 1 and Version 2 state that they are governed by Nevada law. Consequently, interpretation of these two versions is governed by Nevada's Uniform Arbitration Act ("UAA"). See Paragraph 14 of each of Exhibit 2 (Version 1) and Exhibit 6 (Version 2) to Plaintiff's Opposition to Defendants' Motion to Confirm, filed April 25, 2019.

The Opposition discusses a number of case authorities from Federal Courts. The Opposition at 2:14-18 argues "The wording of NRCP 59(e) is based on its federal counterpart FRCP 59(e), and Nevada Courts may consult Federal law in interpreting them. See Coury v. Robison, 115 Nev. 84, 91 n.4, 976 P.2d 518, 522 n.4 (1999)." Coury v. Robison dealt with FRCP Rule 11 and FRCP Rule 11, not FRCP Rule 59 and NRCP Rule 59, nor did Coury v. Robison deal with arbitration.

Defendants' Opposition has not demonstrated that the FAA and the arbitration law of other jurisdictions, relied upon in some instances by the federal decisions cited by the Opposition, are applicable here. Under the cited authority, absent such a demonstration by Defendants, this Court must reject the principles based upon Defendants' cited federal authority and the above-cited holdings of the Nevada Supreme Court.

The actual law governing a motion to alter or amend a Nevada judgment is found at Motion to Alter or Amend 4:2-5:20.

B. Besides being inapplicable, "authority" cited by the Opposition has been reversed on the very points relied upon by the Opposition.

In the short time permitted by the rules for a reply, Plaintiff has not been able to track down the history of all of the "authority" relied upon by the Opposition. One in particular caught Plaintiff's attention. Besides the fact that federal law is not applicable to deciding a Motion to Alter or Amend a Nevada state matter decided under the Nevada UAA, Demasse v. ITT Corp., 915 F.Supp. 1040 (D.Ariz 1995), the primary case relied upon concerning Constitutional rights at Opposition 7:16-20, was reversed on the point relied upon by Defendants in Demasse v. ITT Corp., 185 F.3d 866 (9th Cir. 1999). The reversed case was the basis for the Opposition's secondary reference, Parks v. Baron, 2009 WL 10695434 (D.Ariz 2009). None of the authority cited by the Opposition in this section, like all of the other "authority" cited in the Opposition, related to a Rule 59 based upon the Nevada Uniform Arbitration Act.

C. The Motion to Alter or Amend was not based upon a mere disagreement with the Order. (Opposition 7:12-13)

The Opposition argues that a "mere disagreement" will not support a Rule 59 Motion. The matters raised in the Motion to Alter or Amend were legal and factual errors of the Order, as pointed out in numerous places of the Motion to Alter or Amend.

D. Under Graber, the Court's obligation to review the arbitrator's award is not satisfied by a conclusory statement, but only by a demonstration of the review with findings of fact and conclusions of law.

The Opposition at 9:15-17 argues that " Accordingly, Defendants respectfully request that this Court clarify that it has considered all of Mr. Garmong's arguments and determined them to be without merit." That is, Defendants seek to misdirect this Court

that it may satisfy its Graber obligation by a mere conclusory statement.

This Court may not discharge its "obligation to review the arbitrator's award to determine whether the arbitrator manifestly disregarded the law" under Graber simply by saying that it considered all of the arguments. It must demonstrate that it has considered the arguments presented by the parties, and state its findings of fact and conclusions of law.

VI. SUMMARY AND CONCLUSION

Defendants are desirous that the Court not perform the proper analyses mandated by Graber. The Court must do so to satisfy its "obligation." Performing the required analysis necessarily will result in reversal of the arbitrator's decisions.

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

DATED this 24th day of September 2019.

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

Counsel for plaintiff

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CODE NO. 3060

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive,

Defendants.
_____/

Case No. CV12-01271

Dept. No. 6

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

Before this Court is *Plaintiff's Motion to Alter or Amend "Order Re Motions" Entered August 8, 2019* ("*Motion*") filed by Plaintiff GREGORY GARMONG ("Mr. Garmong") through his attorney of record, Carl M. Herbert, Esq. Defendants WESPAC and GREG CHRISTIAN (collectively "Defendants" unless individually referenced), through their attorney of record, Thomas C. Bradley, Esq., filed their *Opposition to Plaintiff's Motion to Alter or Amend "Order Re Motions" Entered August 8, 2019* ("*Opposition*"). Thereafter, *Plaintiff's Reply Points and Authorities in Support of Motion to Alter or Amend "Order Re Motions" Entered on August 8, 2019* ("*Reply*") was filed and the matter was submitted for decision.

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I. FACTS AND PROCEDURAL HISTORY.

This is an action for breach of contract. Mr. Garmong filed his *Complaint* on May 9, 2012. On September 19, 2012, Defendants filed their *Motion to Dismiss and Compel Arbitration*. On December 13, 2012, this Court[1] entered its *Order* granting Defendants' request to compel arbitration but denying the motion to dismiss. Mr. Garmong then filed his *Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13, 2012 Compelling Arbitration* ("*Reconsider Motion*"). The motion was opposed by Defendants. Mr. Garmong did not file a reply and this case was stagnant for nearly a year until January 13, 2014, when this Court entered its *Order to Proceed*. Mr. Garmong filed his reply on February 3, 2014. The *Reconsider Motion* was denied on April 2, 2014.

Mr. Garmong then sought writ relief from the Nevada Supreme Court. On December 18, 2014, the Nevada Supreme Court entered its *Order Denying Petition for Writ of Mandamus or Prohibition*. The Supreme Court next entered its *Order Denying Rehearing* on March 18, 2015, and, subsequently, entered its *Order Denying En Banc Reconsideration* on May 1, 2015.

After the Nevada Supreme Court's orders were entered, this Court again entered an *Order for Response*, instructing the parties to proceed with this case. *Order*, November 17, 2015. In response, the parties indicated they had initiated an arbitration proceeding with JAMS in Las Vegas. *Notice of Status Report*, December 1, 2015.

On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*, arguing the JAMS arbitrators were prejudiced against Mr. Garmong. This matter was fully

[1] Judge Brent T. Adams originally presided over this proceeding in Department 6 before his retirement. Judge Lynne K. Simons was sworn in on January 5, 2015, and now presides in Department 6.

briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration* requiring three arbitrators. The parties then stipulated to select one arbitrator, to reduce costs. *Stipulation to Select One Arbitrator*, October 17, 2016. In accordance, this Court entered its *Order Appointing Arbitrator* on October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator. After it was determined Mr. Ornstil was unavailable, Mr. Garmong stipulated to the appointment of either retired Judge Phillip M. Pro,[2] or Lawrence R. Mills. Esq.

On November 13, 2017, this Court entered its *Order Granting Motion to Strike,* which stayed the proceeding pending the outcome of the arbitration, and directed the parties to file an amended complaint and other responsive papers at the direction of Judge Phillip M. Pro. *Order Granting Motion to Strike*, p. 2. On February 21, 2017, this Court entered its *Order Appointing Arbitrator*, appointing Judge Phillip M. Pro ("Judge Pro").

On March 27, 2017, Mr. Garmong filed *Plaintiff's Objection Pursuant to NRS 38.231(3) and 38.241(e) That There is No Agreement to Arbitrate; Notification of Objection to the Court*. Despite prior determinative orders from this Court, Mr. Garmong again objected to arbitration on the basis there was no agreement to arbitrate.

On May 23, 2017, this Court entered its *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)*, finding "Mr. Garmong and Defendants were ordered numerous times to participate in arbitration as early as December 13, 2012." The Court held the file did not contain any evidence the parties had proceeded to arbitration as ordered. *Order,* p. 4. Accordingly, the Court ordered the parties to show cause why the action should not be dismissed for want of prosecution. *Order,* p. 4.

[2] Mr. Garmong stipulated to Judge Pro although he previously moved to preclude a judge from serving as an arbitrator.

The parties had their first arbitration conference in April, 2017. On June 22, 2018, without asking for leave of Court because the matter was stayed, Mr. Garmong filed his *Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator* ("*Motion to Disqualify*").

Defendants thereafter filed *Defendants' Motion for Limited Relief From Stay to File Motion for Attorney's Fees and Sanctions* ("*Motion for Sanctions*") requesting limited relief from this Court's order staying the proceeding pending the outcome of arbitration. While the *Motion for Sanctions* was under consideration, Defendants filed their *Notice of Completion of Arbitration Hearing* on October 22, 2018. The Court therefore held, with completion of the arbitration, Defendants' *Motion for Sanctions* was moot. Additionally, the Court took notice of Defendants' *Notice of Completion of Arbitration* and determined there were additional decisions to be rendered regarding the *Notice.*

Judge Pro found Mr. Garmong's claims for (1) Breach of Contract; (2) Breach of Implied Warranty; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Nevada's Deceptive Trade Practices Act; (5) Breach of Fiduciary Duty of Full Disclosure; (6) Intentional Infliction of Emotional Distress; and, (7) Unjust Enrichment all failed as a matter of law because Mr. Garmong did not establish his claims by a preponderance of the evidence. *Final Award*, p. 8-9. Furthermore, after weighing the necessary factors required by Brunzell v. Golden Gate National Bank, 455 P.2d 31, 33 (1969), Judge Pro found Defendants were entitled to an award of reasonable attorneys' fees in the total sum of $111,649.96. *Final Award*, p. 11.

The litigation proceeded with several filings. On August 8, 2019, this Court entered its *Order Re Motions* (*"ORM"*): (1) granting *Defendants' Petition for an Order Confirming*

Arbitrator's Final Award and Reducing Award to Judgment, Including, Attorneys' Fees and Costs; (2) denying *Plaintiff's Motion to Vacate Arbitrator's Final Award*; (3) denying *Plaintiff's Motion to Vacate Arbitrator's Award of Attorneys' Fees*; (4) denying *Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment* ("*Motion to Vacate MSJ Decision*"); and, (5) granting *Defendants' Motion for an Order to File Exhibit as Confidential*. *ORM*, p. 15-16.

On August 27, 2019, this Court entered its *Order* directing: (1) WESPAC to file an *Amended Motion for the Award of Attorneys' Fees*; (2) allowing Mr. Garmong the standard response time to file and serve his opposition to Defendants' *Amended Motion for the Award of Attorneys' Fees*; and, (3) providing WESPAC would not be required to file a *Proposed Final Judgment* until ten (10) days following this Court's ruling on WESPAC's *Amended Motion for the Award of Attorneys' Fees*. *Order*, p. 1.

In his present *Motion*, Mr. Garmong contends this Court has a duty to review Judge Pro's actions and rulings to determine whether he disregarded facts, or manifestly disregarded the law. *Motion*, p. 2-3. Further, Mr. Garmong claims Judge Adams allegedly relied on Version 1 of the Contract, instead of Version 2 of the Contract, which was fraudulently used to compel arbitration between the parties. *Motion*, p. 6-13. As a result, Version 2 of the Contract constitutes "previously unavailable evidence" which should, *inter alia*, be used to identify the validity of the arbitration agreement and the final award. *Motion*, p. 7-12. Additionally, Mr. Garmong argues DCR 13(7) does not apply to his precluded claims because the *Motion to Vacate MSJ Decision* was not decided on substantive merits. *Motion*, p. 14-15. Mr. Garmong also claims there was no valid offer of judgment for

attorneys' fees because, in short, NRCP 68 was not a governing rule of arbitration under Judge Pro's Discovery Plan. *Motion*, p. 20-26. Finally, Mr. Garmong claims his due process rights were violated after failing to receive proper notice regarding the offer of judgment and attorneys' fees award. *Motion*, p. 25-26.

In their *Opposition*, Defendants contend Mr. Garmong fails to identify a clear error, or a fundamental miscarriage of justice, because Judge Pro provided an eleven (11) page explanation of his factual findings supported by law. *Opposition*, p. 3-4. Defendants also argue Mr. Garmong's *Motion* seeks to relitigate old matters which provide no basis for relief under NRCP 59. *Opposition*, p. 5. Defendants emphasize this Court is only obligated to "consider [and] not address" every argument posited by Mr. Garmong. *Opposition*, p. 2, 5. Moreover, Defendants maintain Judge Pro properly found they were entitled to attorneys' fees after weighing the necessary factors required by Brunzell, 455 P.2d at 33. *Opposition*, p. 6. More importantly, Defendants purport Mr. Garmong's allegations regarding the differing versions of the Contract does not constitute "new evidence" because Mr. Garmong raised the same arguments to Judge Pro before the final decision on the arbitration award, and to the Court through his previous papers. *Opposition*, p. 6 *citing Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award*, p. 4:16–15:16; *Motion to Vacate Arbitrator's Final Award*, p. 3:3–4:21. Defendants contend Mr. Garmong continues to raise the same arguments in his *Motion to Vacate MSJ Decision*. *Opposition*, p. 7. Additionally, Defendants argue Mr. Garmong failed to timely raise his due process arguments because he could have raised them in any of the motions or oppositions filed during arbitration, or before this Court previously. *Opposition*, p. 7-8. Finally, Defendants state there is no

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evidence Judge Pro was biased and agree the argument has been raised and rejected many times before. *Opposition*, p. 9.

In his *Reply*, Mr. Garmong re-asserts this Court failed to fulfill its obligation of reviewing the arbitrator's award because the Court did not consider the differing versions of the Contract. *Reply*, p. 5-10. In addition, Mr. Garmong re-emphasizes DCR 13(7) is inapplicable to the claims set forth in his *Motion to Vacate MSJ Decision* because the claims were not substantively addressed on the merits. *Reply*, p. 10-13. Finally, Mr. Garmong stresses there was no valid offer of judgment for attorneys' fees because, in short, NRCP 68 was not a governing rule of arbitration under Judge Pro's Discovery Plan, and Judge Pro failed to address the factors mandated by Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983) and Brunzell, 455 P.2d at 33 to award attorneys' fees. *Reply,* p. 13-17.

II. APPLICABLE LAW AND ANALYSIS.

Pursuant to NRCP 59(e), a motion to alter or amend a judgment must be filed no later than twenty-eight (28) days after service of written notice of entry of judgment. A motion to alter or amend judgment may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment. Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013). The basic grounds for granting a NRCP 59(e) motion include "correct[ing] manifest errors of law or fact," "newly discovered or previously unavailable evidence," the need "to prevent manifest injustice," or a "change in controlling law." AA Primo Builders, LLC v. Washington, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010). Nevada courts may consult federal law in interpreting NRCP 59(e) due to its similarity to the federal standard. Id.

The Nevada Supreme Court will not disturb a judgment sustained by substantial evidence when the moving party cannot specify, and when the court cannot find anything in the record from which the Court could conclude that it is clear that a wrong conclusion had been reached in judgment. Brechan v. Scott, 1976, 555 P.2d 1230, 92 Nev. 633 (interpreting NRCP 52(b) and 59(e)). A motion to alter or amend judgment under Rule 59(e) is "an extraordinary remedy which should be used sparingly." Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013). Motions made under Rule 59(e) "should not be granted absent highly unusual circumstances." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

A. Defendants' *Motion to Confirm Final Award.*

As discussed *supra*, Mr. Garmong claims Judge Adams relied on Version 1 of the Contract, which was fraudulently utilized to compel arbitration between the parties, instead of relying on Version 2 of the Contract. *Motion*, p. 6-13.

"[T]he scope of judicial review of an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P.3d 172, 177 (2004). "A 'reviewing court should not concern itself with the "correctness" of an arbitration award' and thus does not review the merits of the dispute." Bohlmann v. Byron John Printz, 120 Nev. at 547, 96 P.3d 1158 (2004) (quoting Thompson v. Tega–Rand Intern., 740 F.2d 762, 763 (9th Cir.1984)); *see also* Clark Ctv. Educ. Ass'n v. Clark Cty. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8 (2006). Rather, "[t]he party seeking to attack the validity of an arbitration award has the burden of proving, **by clear and convincing evidence**, the statutory or common-law

ground relied upon for challenging the award." Rainbow Med., 120 Nev. at 695, 100 P.3d at 176 (emphasis added).

After considering this matter pursuant to the present papers filed, the Court finds Mr. Garmong has failed to provide clear and convincing evidence to challenge the award. Moreover, Mr. Garmong has failed to provide clear and convincing evidence Defendants fraudulently induced Judge Adams and the Nevada Supreme Court to compel arbitration.

Notably, Mr. Garmong does not cite to anything in the record with specificity to substantiate his claims in the *Reconsider Motion*. Instead, Mr. Garmong rehashes his same argument, the Contract is not "true, complete and correct." Compare *Motion*, p. 6, 7, 13, with *Opposition to Motion to Confirm Final Award*, p. 2. Despite this, the Court finds no grounds to change its prior ruling that an enforceable agreement to arbitrate exists in the record, and the parties were properly ordered to arbitrate. See *ORM*, p. 11; see also *Order*, December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the Agreement is not unconscionable and is enforceable); *Order*, April 2, 2014 (denying motion for reconsideration, and again holding arbitration agreement to be enforceable, based on identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E))* (holding Mr. Garmong was ordered numerous times to participate in arbitration).

Therefore, this Court rejects Mr. Garmong's arguments and denies his request to amend the Court's findings regarding the confirmation of the award.

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B. Plaintiff's *Motion to Vacate Arbitrator's Final Award* and Plaintiff's *Motion to Vacate MSJ Decision.*

Rule 13 of the District Court Rules for the State of Nevada provides, "No motion once heard and disposed of shall be renewed in the same cause, **nor shall the same matters therein embraced be reheard**, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties." DCR 13(7) (emphasis supplied).

Well-established authority in this state governs reconsideration of previously-decided issues. In Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., the Nevada Supreme Court held:

> A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous. *See Little Earth of United Tribes v. Department of Housing,* 807 F.2d 1433, 1441 (8th Cir.1986); *see also Moore v. City of Las Vegas,* 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which *new issues of fact or law* are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted.") (Emphasis added).

113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (alterations and citations in original). In Masonry & Tile Contractors Ass'n, the Nevada Supreme Court upheld a district court's reconsideration of a previously decided issue in light of new clarifying case law. Id. Because of new case law, the decision by the prior district judge was properly determined to be "clearly erroneous." Id. When a motion for reconsideration raises "no new issues of law and [makes] reference to no new or additional facts," reconsideration is "superfluous" and constitutes an "abuse of discretion" by the district court to entertain such a motion. Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Such motions are granted in "rare instances." Id. Further, it is well-settled the decision of whether to grant reconsideration is within "the sound discretion of the court." Navajo Nation v. Confederated

Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003); see also Riger v. Hometown Mortg., LLC, 104 F. Supp. 3d 1092, 1095 (D. Nev. 2015) (district court's decision to grant reconsideration after entry of an order is within its discretion).

Mr. Garmong's *Motion to Vacate Final Award* argues the Final Award must be vacated pursuant to NRS 38.241(1) because there was no agreement to arbitrate, and even *arguendo* if there was an agreement to arbitrate, it is invalid based on statutory and non-statutory grounds. *Motion to Vacate Final Award*, p. 5-9. However, as stated, this Court has previously held a valid and enforceable arbitration agreement exists in the record pursuant to NRS 38.241 on numerous occasions. See *ORM*, p. 12; see also *Order*, December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the Agreement is not unconscionable and is enforceable); *Order*, April 2, 2014 (denying motion for reconsideration and again holding arbitration agreement to be enforceable based on identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)* (holding Mr. Garmong was ordered numerous time to participate in arbitration).

As such, Mr. Garmong's argument constitutes "similar matters" or matters "embraced" under DCR 13(7) requiring leave of court. Therefore, this Court declines to re-entertain Mr. Garmong's arguments in this *Motion*, and therefore, declines to amend its findings and confirmation of the award.

Second, Mr. Garmong contends the Court's *Nov. Order* did not decide the *Motion to Vacate MSJ* on the substantive merits, thereby obviating application of DCR 13(7). *Motion*, p. 15. However, the Court again finds Mr. Garmong previously raised the same argument regarding Judge Pro disregarding applicable substantive legal principles. See *ORM*, p. 13;

Compare *Motion*, p. 16-19, with *Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award*, p. 4:16–15:16; *Motion to Vacate Arbitrator's Final Award*, p. 3:3–4:21; *Plaintiff's Motions to Vacate MSJ Decision*, p. 10:12–31:6. Thus, this Court has previously considered and decided this issue in accordance with JAMS Comprehensive Rules & Procedures Rule (JAMS Rules). See *Nov. Order*, p. 8-9.

Accordingly, Mr. Garmong did not properly move to reconsider *Plaintiff's Motion to Vacate MSJ Decision* as required by DCR 13(7). Therefore, this Court declines to amend its findings regarding Judge Pro's summary disposition of claims.

C. Plaintiff's *Motion to Vacate Arbitrator's Award of Attorney's Fees.*

Mr. Garmong asserts there was no valid offer of judgment for attorneys' fees because NRCP 68 was not a governing rule of arbitration under Judge Pro's Discovery Plan. *Motion*, p. 20-26.

JAMS Rule 24(g) provides an arbitrator may award attorney's fees, expenses, and interest if provided by the Parties' Agreement **or allowed by applicable law**. JAMS Rule 24(g) (emphasis added). Defendants propounded an Offer of Judgment in the amount of $10,000 on February 12, 2017 pursuant to applicable Nevada law. *Final Award*, p. 10. Rule 68 of the Nevada Rules of Civil Procedure provides, in pertinent part:

> (a) The Offer. At any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions.
>
> * * * *
>
> (e) Failure to Accept Offer…Any offeree who fails to accept the offer may be subject to the penalties of this rule.
>
> (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,

(1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and

(2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer.

NRCP 68. An award of fees pursuant to NRCP 68 is discretionary with the Court and will not be disturbed absent clear abuse. Bidart v. American Title Ins. Co., 103 Nev. 175, 734 P.2d 732 (1987).

The Court does not change its conclusion Judge Pro properly found the issues in this case are governed by applicable Nevada law and JAMS Rules. *ORM*, p. 14. The application of NRCP rules relating to discovery does not automatically exclude or preclude the applicability of other NRCP rules to the matter, particularly where the Arbitrator determines it necessary to apply them. *ORM*, p. 14.

Accordingly, the Court finds Judge Pro awarded attorneys' fees, interest, and expenses in accordance with NRCP 68 and JAMS Rule 24(g). Therefore, this Court declines to amend its findings regarding Judge Pro's award of attorneys' fees.

D. Due Process Claim.

Mr. Garmong claims his due process rights were violated because he did not receive proper notice regarding the offer of judgment and award of attorneys' fees. *Motion*, p. 25-26. A motion to alter or amend judgment may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment. Stevo Design, Inc., 919 F. Supp. 2d at 1117. Mr. Garmong's new claim regarding due process violations is not appropriate for NRCP 59(e) as it could have been raised prior to the entry of judgment. Therefore, this Court declines to consider Mr.

Garmong's due process claim as it could have been raised before this Court or the arbitrator prior to the entry of judgment.

D. Potential Sanctions.

This Court notes Mr. Garmong's continued indifference to the previous orders issued by this Court. The Court will consider imposing sanctions in the future should Mr. Garmong continue to disregard this Court's orderst.

III. CONCLUSION AND ORDER.

For the foregoing reasons, and good cause appearing therefor,

IT IS HEREBY ORDERED Mr. Garmong's *Motion to Alter or Amend "Order Re Motions" Entered August 8, 2019* ("*Motion*") is **DENIED**.

Dated this 6th day of December, 2019.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 11th day of December, 2019, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

CARL HEBERT, ESQ.

THOMAS BRADLEY, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Heidi Brx

CV12-01271

CODE: 2540
THOMAS C. BRADLEY, ESQ.
NV Bar. No. 1621
435 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 323-5178
Tom@TomBradleyLaw.com
Attorney for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

_____/

CASE NO. CV12-01271

DEPT. NO. 6

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an ORDER was entered in the above-referenced case on December 6, 2019, a copy of which is attached.

Affirmation: *The undersigned verifies that this document does not contain the personal information of any person.*

DATED this 9th day of December, 2019.

/s/ *Thomas C. Bradley*
THOMAS C. BRADLEY, ESQ.
Attorney for Defendants

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
Reno, Nevada 89509
(775) 323-5178
Tom@TomBradleyLaw.com

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thomas C. Bradley, Esq., and the date set forth below, I served a true copy of the foregoing document on the party(ies) identified herein, via the following means:

____ Personal Delivery

____ Professional Courier

____ Federal Express or Other Overnight Delivery Service

____ US Mail with Sufficient Postage Affixed

____ Facsimile to the Facsimile Number specified

____ Electronic Mail to the e-mail address(es) specified

_X_ Second Judicial District Court eFlex system

Carl Hebert, Esq.
carl@cmhebertlaw.com
202 California Avenue
Reno, Nevada 89509
Attorney for Plaintiff

Dated this 9th day of December, 2019.

By: */s/ Mehi Aonga*
Employee of Thomas C. Bradley, Esq.

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
Reno, Nevada 89509
(775) 323-5178
Tom@TomBradleyLaw.com

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Jacqueline Bryant
Clerk of the Court
Transaction # 7625279

CODE NO. 3060

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive,

Defendants.
_____/

Case No. CV12-01271

Dept. No. 6

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

Before this Court is *Plaintiff's Motion to Alter or Amend "Order Re Motions" Entered August 8, 2019* ("*Motion*") filed by Plaintiff GREGORY GARMONG ("Mr. Garmong") through his attorney of record, Carl M. Herbert, Esq. Defendants WESPAC and GREG CHRISTIAN (collectively "Defendants" unless individually referenced), through their attorney of record, Thomas C. Bradley, Esq., filed their *Opposition to Plaintiff's Motion to Alter or Amend "Order Re Motions" Entered August 8, 2019* ("*Opposition*"). Thereafter, *Plaintiff's Reply Points and Authorities in Support of Motion to Alter or Amend "Order Re Motions" Entered on August 8, 2019* ("*Reply*") was filed and the matter was submitted for decision.

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I. FACTS AND PROCEDURAL HISTORY.

This is an action for breach of contract. Mr. Garmong filed his *Complaint* on May 9, 2012. On September 19, 2012, Defendants filed their *Motion to Dismiss and Compel Arbitration*. On December 13, 2012, this Court[1] entered its *Order* granting Defendants' request to compel arbitration but denying the motion to dismiss. Mr. Garmong then filed his *Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13, 2012 Compelling Arbitration* ("*Reconsider Motion*"). The motion was opposed by Defendants. Mr. Garmong did not file a reply and this case was stagnant for nearly a year until January 13, 2014, when this Court entered its *Order to Proceed*. Mr. Garmong filed his reply on February 3, 2014. The *Reconsider Motion* was denied on April 2, 2014.

Mr. Garmong then sought writ relief from the Nevada Supreme Court. On December 18, 2014, the Nevada Supreme Court entered its *Order Denying Petition for Writ of Mandamus or Prohibition*. The Supreme Court next entered its *Order Denying Rehearing* on March 18, 2015, and, subsequently, entered its *Order Denying En Banc Reconsideration* on May 1, 2015.

After the Nevada Supreme Court's orders were entered, this Court again entered an *Order for Response*, instructing the parties to proceed with this case. *Order*, November 17, 2015. In response, the parties indicated they had initiated an arbitration proceeding with JAMS in Las Vegas. *Notice of Status Report*, December 1, 2015.

On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*, arguing the JAMS arbitrators were prejudiced against Mr. Garmong. This matter was fully

[1] Judge Brent T. Adams originally presided over this proceeding in Department 6 before his retirement. Judge Lynne K. Simons was sworn in on January 5, 2015, and now presides in Department 6.

briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration* requiring three arbitrators. The parties then stipulated to select one arbitrator, to reduce costs. *Stipulation to Select One Arbitrator*, October 17, 2016. In accordance, this Court entered its *Order Appointing Arbitrator* on October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator. After it was determined Mr. Ornstil was unavailable, Mr. Garmong stipulated to the appointment of either retired Judge Phillip M. Pro,[2] or Lawrence R. Mills. Esq.

On November 13, 2017, this Court entered its *Order Granting Motion to Strike,* which stayed the proceeding pending the outcome of the arbitration, and directed the parties to file an amended complaint and other responsive papers at the direction of Judge Phillip M. Pro. *Order Granting Motion to Strike*, p. 2. On February 21, 2017, this Court entered its *Order Appointing Arbitrator*, appointing Judge Phillip M. Pro ("Judge Pro").

On March 27, 2017, Mr. Garmong filed *Plaintiff's Objection Pursuant to NRS 38.231(3) and 38.241(e) That There is No Agreement to Arbitrate; Notification of Objection to the Court*. Despite prior determinative orders from this Court, Mr. Garmong again objected to arbitration on the basis there was no agreement to arbitrate.

On May 23, 2017, this Court entered its *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)*, finding "Mr. Garmong and Defendants were ordered numerous times to participate in arbitration as early as December 13, 2012." The Court held the file did not contain any evidence the parties had proceeded to arbitration as ordered. *Order,* p. 4. Accordingly, the Court ordered the parties to show cause why the action should not be dismissed for want of prosecution. *Order,* p. 4.

[2] Mr. Garmong stipulated to Judge Pro although he previously moved to preclude a judge from serving as an arbitrator.

The parties had their first arbitration conference in April, 2017. On June 22, 2018, without asking for leave of Court because the matter was stayed, Mr. Garmong filed his *Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator* ("*Motion to Disqualify*").

Defendants thereafter filed *Defendants' Motion for Limited Relief From Stay to File Motion for Attorney's Fees and Sanctions* ("*Motion for Sanctions*") requesting limited relief from this Court's order staying the proceeding pending the outcome of arbitration. While the *Motion for Sanctions* was under consideration, Defendants filed their *Notice of Completion of Arbitration Hearing* on October 22, 2018. The Court therefore held, with completion of the arbitration, Defendants' *Motion for Sanctions* was moot. Additionally, the Court took notice of Defendants' *Notice of Completion of Arbitration* and determined there were additional decisions to be rendered regarding the *Notice.*

Judge Pro found Mr. Garmong's claims for (1) Breach of Contract; (2) Breach of Implied Warranty; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Nevada's Deceptive Trade Practices Act; (5) Breach of Fiduciary Duty of Full Disclosure; (6) Intentional Infliction of Emotional Distress; and, (7) Unjust Enrichment all failed as a matter of law because Mr. Garmong did not establish his claims by a preponderance of the evidence. *Final Award*, p. 8-9. Furthermore, after weighing the necessary factors required by Brunzell v. Golden Gate National Bank, 455 P.2d 31, 33 (1969), Judge Pro found Defendants were entitled to an award of reasonable attorneys' fees in the total sum of $111,649.96. *Final Award*, p. 11.

The litigation proceeded with several filings. On August 8, 2019, this Court entered its *Order Re Motions* (*"ORM"*): (1) granting *Defendants' Petition for an Order Confirming*

Arbitrator's Final Award and Reducing Award to Judgment, Including, Attorneys' Fees and Costs; (2) denying *Plaintiff's Motion to Vacate Arbitrator's Final Award*; (3) denying *Plaintiff's Motion to Vacate Arbitrator's Award of Attorneys' Fees*; (4) denying *Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment* ("*Motion to Vacate MSJ Decision*"); and, (5) granting *Defendants' Motion for an Order to File Exhibit as Confidential*. *ORM*, p. 15-16.

On August 27, 2019, this Court entered its *Order* directing: (1) WESPAC to file an *Amended Motion for the Award of Attorneys' Fees*; (2) allowing Mr. Garmong the standard response time to file and serve his opposition to Defendants' *Amended Motion for the Award of Attorneys' Fees*; and, (3) providing WESPAC would not be required to file a *Proposed Final Judgment* until ten (10) days following this Court's ruling on WESPAC's *Amended Motion for the Award of Attorneys' Fees*. *Order*, p. 1.

In his present *Motion*, Mr. Garmong contends this Court has a duty to review Judge Pro's actions and rulings to determine whether he disregarded facts, or manifestly disregarded the law. *Motion*, p. 2-3. Further, Mr. Garmong claims Judge Adams allegedly relied on Version 1 of the Contract, instead of Version 2 of the Contract, which was fraudulently used to compel arbitration between the parties. *Motion*, p. 6-13. As a result, Version 2 of the Contract constitutes "previously unavailable evidence" which should, *inter alia*, be used to identify the validity of the arbitration agreement and the final award. *Motion*, p. 7-12. Additionally, Mr. Garmong argues DCR 13(7) does not apply to his precluded claims because the *Motion to Vacate MSJ Decision* was not decided on substantive merits. *Motion*, p. 14-15. Mr. Garmong also claims there was no valid offer of judgment for

attorneys' fees because, in short, NRCP 68 was not a governing rule of arbitration under Judge Pro's Discovery Plan. *Motion*, p. 20-26. Finally, Mr. Garmong claims his due process rights were violated after failing to receive proper notice regarding the offer of judgment and attorneys' fees award. *Motion*, p. 25-26.

In their *Opposition*, Defendants contend Mr. Garmong fails to identify a clear error, or a fundamental miscarriage of justice, because Judge Pro provided an eleven (11) page explanation of his factual findings supported by law. *Opposition*, p. 3-4. Defendants also argue Mr. Garmong's *Motion* seeks to relitigate old matters which provide no basis for relief under NRCP 59. *Opposition*, p. 5. Defendants emphasize this Court is only obligated to "consider [and] not address" every argument posited by Mr. Garmong. *Opposition*, p. 2, 5. Moreover, Defendants maintain Judge Pro properly found they were entitled to attorneys' fees after weighing the necessary factors required by Brunzell, 455 P.2d at 33. *Opposition*, p. 6. More importantly, Defendants purport Mr. Garmong's allegations regarding the differing versions of the Contract does not constitute "new evidence" because Mr. Garmong raised the same arguments to Judge Pro before the final decision on the arbitration award, and to the Court through his previous papers. *Opposition*, p. 6 *citing Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award*, p. 4:16–15:16; *Motion to Vacate Arbitrator's Final Award*, p. 3:3–4:21. Defendants contend Mr. Garmong continues to raise the same arguments in his *Motion to Vacate MSJ Decision*. *Opposition*, p. 7. Additionally, Defendants argue Mr. Garmong failed to timely raise his due process arguments because he could have raised them in any of the motions or oppositions filed during arbitration, or before this Court previously. *Opposition*, p. 7-8. Finally, Defendants state there is no

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evidence Judge Pro was biased and agree the argument has been raised and rejected many times before. *Opposition*, p. 9.

In his *Reply*, Mr. Garmong re-asserts this Court failed to fulfill its obligation of reviewing the arbitrator's award because the Court did not consider the differing versions of the Contract. *Reply*, p. 5-10. In addition, Mr. Garmong re-emphasizes DCR 13(7) is inapplicable to the claims set forth in his *Motion to Vacate MSJ Decision* because the claims were not substantively addressed on the merits. *Reply*, p. 10-13. Finally, Mr. Garmong stresses there was no valid offer of judgment for attorneys' fees because, in short, NRCP 68 was not a governing rule of arbitration under Judge Pro's Discovery Plan, and Judge Pro failed to address the factors mandated by Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983) and Brunzell, 455 P.2d at 33 to award attorneys' fees. *Reply,* p. 13-17.

II. APPLICABLE LAW AND ANALYSIS.

Pursuant to NRCP 59(e), a motion to alter or amend a judgment must be filed no later than twenty-eight (28) days after service of written notice of entry of judgment. A motion to alter or amend judgment may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment. Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013). The basic grounds for granting a NRCP 59(e) motion include "correct[ing] manifest errors of law or fact," "newly discovered or previously unavailable evidence," the need "to prevent manifest injustice," or a "change in controlling law." AA Primo Builders, LLC v. Washington, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010). Nevada courts may consult federal law in interpreting NRCP 59(e) due to its similarity to the federal standard. Id.

The Nevada Supreme Court will not disturb a judgment sustained by substantial evidence when the moving party cannot specify, and when the court cannot find anything in the record from which the Court could conclude that it is clear that a wrong conclusion had been reached in judgment. Brechan v. Scott, 1976, 555 P.2d 1230, 92 Nev. 633 (interpreting NRCP 52(b) and 59(e)). A motion to alter or amend judgment under Rule 59(e) is "an extraordinary remedy which should be used sparingly." Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013). Motions made under Rule 59(e) "should not be granted absent highly unusual circumstances." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

A. Defendants' *Motion to Confirm Final Award.*

As discussed *supra*, Mr. Garmong claims Judge Adams relied on Version 1 of the Contract, which was fraudulently utilized to compel arbitration between the parties, instead of relying on Version 2 of the Contract. *Motion*, p. 6-13.

"[T]he scope of judicial review of an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P.3d 172, 177 (2004). "A 'reviewing court should not concern itself with the "correctness" of an arbitration award' and thus does not review the merits of the dispute." Bohlmann v. Byron John Printz, 120 Nev. at 547, 96 P.3d 1158 (2004) (quoting Thompson v. Tega–Rand Intern., 740 F.2d 762, 763 (9th Cir.1984)); *see also* Clark Ctv. Educ. Ass'n v. Clark Cty. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8 (2006). Rather, "[t]he party seeking to attack the validity of an arbitration award has the burden of proving, **by clear and convincing evidence**, the statutory or common-law

ground relied upon for challenging the award." Rainbow Med., 120 Nev. at 695, 100 P.3d at 176 (emphasis added).

After considering this matter pursuant to the present papers filed, the Court finds Mr. Garmong has failed to provide clear and convincing evidence to challenge the award. Moreover, Mr. Garmong has failed to provide clear and convincing evidence Defendants fraudulently induced Judge Adams and the Nevada Supreme Court to compel arbitration.

Notably, Mr. Garmong does not cite to anything in the record with specificity to substantiate his claims in the *Reconsider Motion*. Instead, Mr. Garmong rehashes his same argument, the Contract is not "true, complete and correct." Compare *Motion*, p. 6, 7, 13, with *Opposition to Motion to Confirm Final Award*, p. 2. Despite this, the Court finds no grounds to change its prior ruling that an enforceable agreement to arbitrate exists in the record, and the parties were properly ordered to arbitrate. See *ORM*, p. 11; see also *Order*, December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the Agreement is not unconscionable and is enforceable); *Order*, April 2, 2014 (denying motion for reconsideration, and again holding arbitration agreement to be enforceable, based on identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E))* (holding Mr. Garmong was ordered numerous times to participate in arbitration).

Therefore, this Court rejects Mr. Garmong's arguments and denies his request to amend the Court's findings regarding the confirmation of the award.

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B. Plaintiff's *Motion to Vacate Arbitrator's Final Award* and Plaintiff's *Motion to Vacate MSJ Decision.*

Rule 13 of the District Court Rules for the State of Nevada provides, "No motion once heard and disposed of shall be renewed in the same cause, **nor shall the same matters therein embraced be reheard**, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties." DCR 13(7) (emphasis supplied).

Well-established authority in this state governs reconsideration of previously-decided issues. In Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., the Nevada Supreme Court held:

> A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous. *See Little Earth of United Tribes v. Department of Housing,* 807 F.2d 1433, 1441 (8th Cir.1986); *see also Moore v. City of Las Vegas,* 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which *new issues of fact or law* are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted.") (Emphasis added).

113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (alterations and citations in original). In Masonry & Tile Contractors Ass'n, the Nevada Supreme Court upheld a district court's reconsideration of a previously decided issue in light of new clarifying case law. Id. Because of new case law, the decision by the prior district judge was properly determined to be "clearly erroneous." Id. When a motion for reconsideration raises "no new issues of law and [makes] reference to no new or additional facts," reconsideration is "superfluous" and constitutes an "abuse of discretion" by the district court to entertain such a motion. Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Such motions are granted in "rare instances." Id. Further, it is well-settled the decision of whether to grant reconsideration is within "the sound discretion of the court." Navajo Nation v. Confederated

Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003); see also Riger v. Hometown Mortg., LLC, 104 F. Supp. 3d 1092, 1095 (D. Nev. 2015) (district court's decision to grant reconsideration after entry of an order is within its discretion).

Mr. Garmong's *Motion to Vacate Final Award* argues the Final Award must be vacated pursuant to NRS 38.241(1) because there was no agreement to arbitrate, and even *arguendo* if there was an agreement to arbitrate, it is invalid based on statutory and non-statutory grounds. *Motion to Vacate Final Award*, p. 5-9. However, as stated, this Court has previously held a valid and enforceable arbitration agreement exists in the record pursuant to NRS 38.241 on numerous occasions. See *ORM*, p. 12; see also *Order*, December 13, 2012 (holding the arbitration agreement contained in paragraph 16 of the Agreement is not unconscionable and is enforceable); *Order*, April 2, 2014 (denying motion for reconsideration and again holding arbitration agreement to be enforceable based on identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)* (holding Mr. Garmong was ordered numerous time to participate in arbitration).

As such, Mr. Garmong's argument constitutes "similar matters" or matters "embraced" under DCR 13(7) requiring leave of court. Therefore, this Court declines to re-entertain Mr. Garmong's arguments in this *Motion*, and therefore, declines to amend its findings and confirmation of the award.

Second, Mr. Garmong contends the Court's *Nov. Order* did not decide the *Motion to Vacate MSJ* on the substantive merits, thereby obviating application of DCR 13(7). *Motion*, p. 15. However, the Court again finds Mr. Garmong previously raised the same argument regarding Judge Pro disregarding applicable substantive legal principles. See *ORM*, p. 13;

Compare *Motion*, p. 16-19, with *Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award*, p. 4:16–15:16; *Motion to Vacate Arbitrator's Final Award*, p. 3:3–4:21; *Plaintiff's Motions to Vacate MSJ Decision*, p. 10:12–31:6. Thus, this Court has previously considered and decided this issue in accordance with JAMS Comprehensive Rules & Procedures Rule (JAMS Rules). See *Nov. Order*, p. 8-9.

Accordingly, Mr. Garmong did not properly move to reconsider *Plaintiff's Motion to Vacate MSJ Decision* as required by DCR 13(7). Therefore, this Court declines to amend its findings regarding Judge Pro's summary disposition of claims.

C. Plaintiff's *Motion to Vacate Arbitrator's Award of Attorney's Fees.*

Mr. Garmong asserts there was no valid offer of judgment for attorneys' fees because NRCP 68 was not a governing rule of arbitration under Judge Pro's Discovery Plan. *Motion*, p. 20-26.

JAMS Rule 24(g) provides an arbitrator may award attorney's fees, expenses, and interest if provided by the Parties' Agreement **or allowed by applicable law**. JAMS Rule 24(g) (emphasis added). Defendants propounded an Offer of Judgment in the amount of $10,000 on February 12, 2017 pursuant to applicable Nevada law. *Final Award*, p. 10. Rule 68 of the Nevada Rules of Civil Procedure provides, in pertinent part:

> (a) The Offer. At any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions.
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> (e) Failure to Accept Offer…Any offeree who fails to accept the offer may be subject to the penalties of this rule.
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> (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,

(1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and

(2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer.

NRCP 68. An award of fees pursuant to NRCP 68 is discretionary with the Court and will not be disturbed absent clear abuse. Bidart v. American Title Ins. Co., 103 Nev. 175, 734 P.2d 732 (1987).

The Court does not change its conclusion Judge Pro properly found the issues in this case are governed by applicable Nevada law and JAMS Rules. *ORM*, p. 14. The application of NRCP rules relating to discovery does not automatically exclude or preclude the applicability of other NRCP rules to the matter, particularly where the Arbitrator determines it necessary to apply them. *ORM*, p. 14.

Accordingly, the Court finds Judge Pro awarded attorneys' fees, interest, and expenses in accordance with NRCP 68 and JAMS Rule 24(g). Therefore, this Court declines to amend its findings regarding Judge Pro's award of attorneys' fees.

D. Due Process Claim.

Mr. Garmong claims his due process rights were violated because he did not receive proper notice regarding the offer of judgment and award of attorneys' fees. *Motion*, p. 25-26. A motion to alter or amend judgment may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment. Stevo Design, Inc., 919 F. Supp. 2d at 1117. Mr. Garmong's new claim regarding due process violations is not appropriate for NRCP 59(e) as it could have been raised prior to the entry of judgment. Therefore, this Court declines to consider Mr.

Garmong's due process claim as it could have been raised before this Court or the arbitrator prior to the entry of judgment.

D. Potential Sanctions.

This Court notes Mr. Garmong's continued indifference to the previous orders issued by this Court. The Court will consider imposing sanctions in the future should Mr. Garmong continue to disregard this Court's orderst.

III. CONCLUSION AND ORDER.

For the foregoing reasons, and good cause appearing therefor,

IT IS HEREBY ORDERED Mr. Garmong's *Motion to Alter or Amend "Order Re Motions" Entered August 8, 2019* ("*Motion*") is **DENIED**.

Dated this 6th day of December, 2019.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 11th day of December, 2019, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

CARL HEBERT, ESQ.

THOMAS BRADLEY, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Heidi Brx

CV12-01271

CARL M. HEBERT, ESQ.
Nevada Bar #250
202 California Avenue
Reno, NV 89509
(775) 323-5556

Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive,

DEPT. NO. : 6

Defendants.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that plaintiff Gregory O. Garmong appeals to the Supreme Court of Nevada from the following orders entered in the District Court in the above-captioned case:

1. Order denying plaintiff's motion to disqualify arbitrator Pro and to vacate the arbitrator's denial of the plaintiff's motion for summary judgment and to appoint a new arbitrator, entered on November 29, 2018;

2. Order re Motions, entered on August 8, 2019 which:

a. Granted the defendants' petition for an order confirming arbitrator's final award and reduce award to judgment, including attorney's fees and costs;

b. Denied the plaintiff's motion to vacate arbitrator's final award;

c. Denied the plaintiff's motion to vacate arbitrator's award of attorney's fees;

d. Denied the plaintiff's motions to vacate arbitrator's award of denial of plaintiff's motion for partial summary judgment and for the court to decide and grant

plaintiff's motion for partial summary judgment.

3. Order denying plaintiff's motion to alter or amend judgment, entered on December 6, 2019.

DATED this 7th day of January, 2019.

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

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

Counsel for plaintiff/appellant
Gregory O. Garmong

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of CARL M. HEBERT, ESQ., and that on January 10, 2022, I

_____hand-delivered

_____mailed, postage pre-paid U.S. Postal Service in Reno, Nevada

_____e-mailed

_____telefaxed, followed by mailing on the next business day,

__X___served through use of the court's electronic filing system pursuant Nevada EFCR 9(c),

a copy of the attached

APPELLANT'S APPENDIX VOLUME 7

addressed to:

THOMAS C. BRADLEY, ESQ.
Bar No. 1621
435 Marsh Ave.
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775-323-5178
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Counsel for defendants/respondents
WESPAC; Greg Christian

/S/ Carl M. Hebert
An employee of Carl M. Hebert, Esq.