**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 8

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



**Case No. 80376**

**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 OPENING BRIEF

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant Gregory Garmong is an individual. The undersigned has appeared as counsel for him at all times in the District Court and this Court.

There have been no other counsel for the appellant in the District Court or this Court.

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

Attorney for appellant

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## JURISDICTIONAL STATEMENT

The basis for the jurisdiction of this Court is NRAP Rule 3A(b)(1): "A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." This is appeal from an order confirming an arbitration award. NRS 38.243(1). On March 11, 2019, the arbitrator issued his Final Award (JA 5/0727).[1] Garmong requested that the Final Award be vacated by the District Court, and on August 8, 2019 the District Court entered an order confirming the arbitrator's Final Award (JA 6/1095). Garmong moved to alter or amend this Order. Notice of entry of the District Court's Order Denying Motion to Alter or Amend was served and filed on December 9, 2019 (JA 7/1221). The District Court's Order Denying Motion to Alter or Amend was a final order which terminated the underlying case.

Appellant Garmong his filed Notice of Appeal on January 7, 2020 (JA 7/1238).

[1] References to the Joint Appendix ("JA") include the volume number, a slash and the document number found in the lower right corner of each page followed, when appropriate, by a colon and the line number on the page.

## ROUTING STATEMENT

This is an appeal from an arbitration order in favor of the defendants/respondents and from a post-confirmation order awarding them attorney's fees. It is presumptively assigned to the Court of Appeals. NRAP 17(b)(5) (Appeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case) and (7) (Appeals from postjudgment orders in civil cases).

## I. STATEMENT OF THE ISSUES

1. Whether an arbitrator may disregard the facts and substantive law of Nevada to decide in favor of those whose reckless incompetence deprived an elderly Nevada resident of his retirement savings.

2. Whether by submitting to arbitration, a party gives up the right to have his case decided by the established facts and the governing law.

3. Whether the denial of Plaintiff's Motion for Partial Summary Judgment ("PMPSJ") by the arbitrator was arbitrary, capricious or unsupported by the arbitration agreement, in manifest disregard of the law or violated the statutory mandates.

4. Whether the arbitrator's failure to consider Wespac's obligations of disclosure to the elderly in deciding the PMPSJ was arbitrary, capricious or unsupported by the arbitration agreement, in manifest disregard of the law or violated the statutory mandates.

5. Whether the arbitrator's award of attorney's fees and costs to Wespac was arbitrary, capricious, or unsupported by the agreement, in manifest disregard of the law or violated the statutory mandates.

6. Whether this Court will uphold an arbitration award which supports and encourages the preying upon the elderly by "investment advisors" such as

Respondents.

7. Whether out-of-state "investment advisors" may come to Nevada, willfully violate numerous Nevada regulatory statutes and federal regulations, deceive the elderly and destroy their life savings.

## II. STATEMENT OF THE CASE

This is an appeal from a District Court Order confirming Orders by an arbitrator.

Defendants are financial advisors and planners who, by law, NRS 628A.020, have a fiduciary duty to their clients, including a duty of full disclosure. The Plaintiff, over the age of 60 at the time, entrusted a portion of his life savings to Defendants/Respondents Wespac and Christian (collectively sometimes "Wespac") to manage and provide for his retirement. Wespac is an Oakland, California company that, at the time of events, had recently opened an office in Reno. In their initial dealings and later, Wespac concealed that Defendant Christian had previously been disciplined and suspended by the governing body of financial advisors and planners, the United States Securities Exchange Commission ("SEC"), for defrauding clients. Wespac also concealed that they had violated, and were continuing to violate, numerous regulatory laws of the State of Nevada governing financial advisors and planners, and foreign LLCs, as well as numerous SEC regulations.

These factual misrepresentations and the concealment of information were all highly material because Dr. Garmong testified that he "never, never, never would have remotely considered doing business with" Defendants if he had known the truth of the information that Defendants falsified and/or concealed.

This initial deception by Wespac, not discovered by Garmong until after this lawsuit had commenced, set the tone for Wespac's dishonesty in their dealings. This dishonesty resulted in Wespac negligently wasting hundreds of thousands of dollars of Garmong's retirement savings at a time after he had retired and could not replace the losses by subsequent earnings.

Plaintiff filed his Complaint in the Second Judicial District Court. At an early stage Christian falsified three Declarations to persuade the District Court to refer the matter to arbitration. During the arbitration, at the arbitrator's invitation, Garmong filed Plaintiff's PMPSJ, which was fully briefed. In ruling on the PMPSJ the arbitrator admitted that "Many of the facts relied upon by Claimant [Garmong] are indeed 'undisputed,'" yet disregarded Plaintiff's Undisputed Material Facts and the legal approach mandated by Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The arbitrator excused his disregard for the law by calling for a "merits hearing" as part of the summary judgment procedure to test credibility of the witnesses, which is directly contrary to law and which he never held in any event. The arbitrator denied the PMPSJ, and the District Judge later affirmed the denial.

The case then proceeded to arbitration discovery and a three-day hearing, which resulted in the arbitrator's Final Award in favor of Wespac. In reaching this decision, the arbitrator disregarded both the facts and the law presented to him.

Early in the arbitration, the parties had agreed upon, and the arbitrator had ordered, the rules governing the case, as permitted by the arbitration agency JAMS. This governing law did not include NRCP Rule 68, providing for offers of judgment. About a month after this agreement and order, Wespac nevertheless made an offer of judgement, to which Garmong did not respond. About 20 months later, after the arbitrator had ruled in favor of Wespac on the substance of the case, the arbitrator awarded Wespac attorney's fees based upon the offer of judgment. The parties never changed their agreement, and the arbitrator never changed his Order, establishing that NRCP Rule 68 was not included in the law governing the arbitration.

Garmong then brought motions to vacate the arbitrator's decisions. These were denied by the District Court. This appeal followed.

## III. SCOPE OF THIS APPEAL

The inquiry in this appeal is <u>not</u> whether the arbitrator considered the facts and law in deciding PMPSJ and made an error in attempting to apply the law to the facts, or made a mistake in his interpretation of the law. Instead, it is whether the arbitrator manifestly disregarded facts and law and whether the arbitrator's Orders fell within the statutory grounds to vacate awards set forth in NRS 38.241.

The Nevada Supreme Court has rejected some appeals of arbitrators' decisions because the appellant sought to argue the merits of the case or to treat the

appeal of an arbitrator's decision like the appeal of a district court decision. Here, the appeal of the arbitrator's denial of PMPSJ centers on the arbitrator's disregard of the undisputed material facts and law and the violation of statute. The appeal cannot be based on the arbitrator's misunderstanding of the facts or the law, because the arbitrator did not discuss or reveal his understanding of either the facts or the law.

## IV. SUMMARY OF THE ARGUMENT

This appeal deals primarily with the arbitrator's failure to decide PMPSJ properly. A review of the arbitrator's two Orders (JA 3/0366-0369 and 3/0391-0394) regarding summary judgment reveals the basic argument. The Orders do not discuss the applicable undisputed material facts or the procedural, evidentiary, or substantive law of summary judgment. These Orders are utterly unlike any other orders purporting to decide summary judgment motions, as they disregard and ignore both the facts and the law. There could be no more concrete evidence of the arbitrator's intent to disregard the facts and law than by ignoring them.

The arbitrator ignored and manifestly disregarded the facts and law establishing that Plaintiff should prevail on the tort claims of the First Amended Complaint ("FAC," JA 1/020-030). The deception and fraud of the Defendants clearly required an award for Plaintiff on those Claims.

The arbitrator ignored the statutory grounds, NRS 38.241, mandating granting

of Plaintiff's summary judgment motion.

The arbitrator manifestly disregarded the agreement of the parties and the arbitrator's order that excluded NRCP Rule 68 from the law governing the arbitration; it was therefore improper to grant attorney's fees based upon an offer of judgment. An award of attorney's fees was improper for other reasons as well.

This is a case where the arbitrator completely ignored the facts and law presented to him in PMPSJ, and the District Court confirmed the negative award.

## ARGUMENT

## V. STANDARD OF REVIEW OF ARBITRATOR'S AWARD

### 1. De novo review of the confirmation of an arbitrator's award.

Confirmation of an arbitrator's award is reviewed *de novo*. Thomas v. City of North Las Vegas, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). Thus, "[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." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P .3d 172, 176 (2004).

### 2. Standard for vacating an arbitrator's award.

An arbitrator's decision may be vacated on either statutory grounds under NRS 38.241 or common-law grounds. WPH Architecture, Inc. v. Vegas VP, LP, 131

Nev. 884, 887, 360 P.3d 1145, 1147 (2015) held:

> An arbitration award may be vacated based on statutory grounds and certain limited common-law grounds. [Citation omitted]. 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.

(Internal quotation marks omitted).

Clark County Educ. Ass'n v. Clark County School Dist., 122 Nev. 337, 341-42, 131 P.3d 5, 8 (2006) elaborated and set forth the relevant standards for common-law grounds:

> 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. The statutory grounds are contained in the Uniform Arbitration Act, specifically NRS 38.241(1), and are not implicated as a basis for relief in this appeal. There are two common law grounds recognized in Nevada under which a court may review private binding arbitration awards: (1) whether the award is arbitrary, capricious, or unsupported by the agreement; and (2) whether the arbitrator manifestly disregarded the law. Initially, we take this opportunity to clarify that while the latter standard ensures that the arbitrator recognizes applicable law, the former standard ensures that the arbitrator does not disregard the facts or the terms of the arbitration agreement.
>
> 'In determining a question under an arbitration agreement, an arbitrator enjoys a broad discretion, but that discretion is not without limits.' 'He is confined to interpreting and applying the agreement, and his award need not be enforced if it is arbitrary, capricious, or unsupported by the agreement But,"[j]udicial inquiry under the manifest-disregard-of-the-law standard is extremely limited.' '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.' In such instance, 'the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law.'

Graber v. Comstock Bank, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995), provides further guidance:

> [W]hen searching for a manifest disregard for the law, a court should attempt to locate arbitrators who appreciate the significance of clearly governing legal principles but decide to ignore or pay no attention to those principles. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir.1986). The governing law alleged to have been ignored must be well-defined, explicit, and clearly applicable. Id. at 934.

The present appeal firmly establishes both the statutory grounds and the common law grounds for vacating the arbitrator's Final Award.

**3. *De novo* review of decision on motion for summary judgment.**

If the Supreme Court is called upon to review a decision on a motion for summary judgment because the arbitrator's decision is vacated, that review is *de novo*. Wood v. Safeway, Inc., 121 Nev. at 729, 121 P.3d at 1029.

## VI. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT-- THE ARBITRATOR DISREGARDED THE UNDISPUTED MATERIAL FACTS YET HELD "MANY OF THE FACTS RELIED UPON BY CLAIMANT ARE INDEED 'UNDISPUTED,' " BUT THEN DISREGARDED THE ANALYSIS MANDATED BY LAW

### A. History of summary judgment proceeding.

#### 1. Before the arbitrator.

On August 11, 2017, after a telephone conference between the attorneys for the parties and the arbitrator, the arbitrator issued a "Discovery Plan and Scheduling Order" ("Scheduling Order", JA 1/0014-0016). Scheduling Order ¶ 6 provided that "The Parties may bring motions for summary judgment, pursuant to NRCP 56."

On November 22, 2017, the arbitrator issued Second Scheduling Order, (JA 1/0056-0058), which provided that "the arbitrator hereby sets November 30, 2017, as the deadline for dispositive motions by either party."

Garmong timely served PMPSJ (JA 1/0059-0245). Wespac served an Opposition, (JA 3/0246-0282), and Garmong served a Reply (JA 3/0283-0365). The arbitrator issued an Order denying PMPSJ, (JA 3/0366-0369).

Garmong moved for reconsideration, (JA 3/0370-0379), and Wespac opposed, (JA 3/0380-0390). The arbitrator issued Order denying the motion for

reconsideration, (JA 3/0391-0394).

**2. Before the District Court.**

Pursuant to NRS 38.241, Garmong filed a motion (JA 5/0820-0849) to vacate the arbitrator's denial of PMPSJ. Wespac filed an Opposition (JA 6/1016-1025), and Garmong filed a Reply (JA 6/1081-1094). The District Court denied the Motion to Vacate (JA 6/1095-1111).

Garmong filed a Motion to Alter or Amend the Order of the District Court confirming the arbitrator's award (JA 7/1148-1175), Wespac opposed (JA 7/1176-1185), and Garmong replied (JA 7/1186-1205). The District Court denied the Motion to Reconsider (JA 7/1206-1220).

The arbitrator also awarded attorney's fees to Wespac (JA5/0735-0736) in his Final Award. In the District Court, Garmong moved to vacate the award of fees (JA 5/0851-0874), and the District Court affirmed (JA 6/1095-1111).

**B. The procedural law of adjudicating motions for summary judgment.**

In the prior version of NRCP 56 under which PMPSJ was filed and decided, NRCP 56(c)[2] provides in relevant part:

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[2] This Court recently decided in Nalder v. Lewis, 136 Nev. Adv. Op. 24 at *10 n. 6 (2020), that the prior version of a revised rule, in effect at the time the case was

> (c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Applying Rule 56, Wood v. Safeway, Inc., 121 Nev.724, 729, 121 P.3d 1026, 1029 (2005) held:

> Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'

That is, deciding a motion for summary judgment involves two steps. The arbitrator first must identify the undisputed material facts, if any, and, second, must determine whether those undisputed material facts entitle the moving party to judgment as a matter of law. With these requirements in mind, PMPSJ included and supported with reference to the evidentiary record a set of twenty Undisputed Material Facts ("UMFs"), (JA 01/0061:21-0066:10).

The initial burden is on the moving party to "demonstrate that no genuine issue of material fact remains." If the moving party meets this initial burden, as PMPSJ did, Wood v. Safeway, 121 Nev. at 732, 121 P.3d at 1031, requires:

> The nonmoving party 'must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have

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before the District Court, is to be applied.

> summary judgment entered against him.' The nonmoving party " 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.' "

The next step under Wood v. Safeway is to determine whether "the moving party is entitled to a judgment as a matter of law." Following this determination process is mandatory, not discretionary, if there are undisputed material facts.

The arbitrator's Orders did not follow these procedural steps.

**C. The arbitrator's Orders disregarded both the facts and the applicable procedural, evidentiary and substantive law of summary judgment.**

The arbitrator's Orders denying PMPSJ (JA 3/0366-0369 and 3/0391-0394), were arbitrary and capricious in that they disregarded the undisputed material facts–not a single one of them was mentioned, although the arbitrator candidly admitted that many (in fact, all) were "undisputed." Order at JA 3/0367 indicated awareness of the procedural requirements of Wood v. Safeway, but then disregarded Wood v. Safeway by not applying its holdings a single time as to either facts or law. The Orders disregarded the procedural, evidentiary, and substantive law applying to each of the claims of the FAC.

**1. The Orders disregarded the UMFs established by PMPSJ, which were not disputed by Wespac.**

PMPSJ stated and properly supported with reference to evidence twenty

UMFs, (JA 1/0061:21-0066:10).

Wespac did not dispute any of these UMFs with evidence–valid affidavits or otherwise. Wespac submitted a purported Christian Declaration (JA 3/0265-0270), that did not meet the evidentiary requirements of NRCP 56(e), see Reply (JA 3/0290:8-16 and 03/0292:1-23), because it was not made on the "personal knowledge" of the declarant (JA 3/265:9-12), as required by NRCP 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge[.]"), as well as for other reasons discussed at JA 03/0290:8-0308:12.

The arbitrator's disregard of UMF 12 (JA 1/0064:26-28), "At all times relevant to this matter Plaintiff was over the age of 60 and Defendants knew he was over the age of 60" is of special significance. As discussed below in § IX.A.2-3, the State of Nevada has provided special protection for those over age 60 against deceitful investment advisors like Defendants.

In its Opposition (JA 3/0246-0282), Wespac did not properly dispute any of the UMFs by presenting any admissible evidence, or dispute the governing law. As provided in NRCP 56(c), quoted above, where there are no undisputed material facts, "The judgment sought shall be rendered forthwith[.]" The arbitrator disregarded this mandatory procedure, as well as the applicable evidentiary rules and the applicable substantive rules.

Had the arbitrator followed the mandatory procedure of Wood v. Safeway, this case would have properly been decided by summary judgment at that stage of the arbitration and not proceeded further.

**2. The arbitrator's Orders admitted that the material facts of PMPSJ were undisputed, and then disregarded the UMFs**.

Arbitrator's Order JA 3/0392:3 admitted that **"Many of the facts relied upon by Claimant are indeed 'undisputed.' "** (Emphasis added). The Order did not identify which UMFs were undisputed, as the analysis of Wood v. Safeway requires. That is, the Order admitted the first step of Wood v. Safeway, that facts were undisputed, but then disregarded completion of the first step to identify undisputed UMFs, and totally disregarded the second step of the analysis.

The arbitrator also disregarded the fact that all of Plaintiff's UMFs were established for trial. See the prior version of NRCP 56(d).

**3. The arbitrator's Orders disregarded the evidentiary law governing summary judgment.**

Plaintiff's Reply (JA 03/0283-0308:12) and Motion for Reconsideration (JA 3/0375:11-18) discussed the mandatory law of evidence and admissibility of evidence in summary judgment proceedings, and the reasons that this law required exclusion of the material submitted by Defendants. The two Orders (JA 3/0366 and

0391) disregarded this mandatory law completely.

NRCP 56(e) provides:

> Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Adherence to NRCP 56(e)'s standard of admissible evidence to dispute material facts is mandatory and the arbitrator's consideration of the Christian Affidavit, which does not comply with the rule, constitutes reversible error. Havas v. Hughes Estate, 98 Nev. 172, 173, 643 P.2d 1220, 1221 (1982). The "personal knowledge" requirement is mandatory, Coblentz v. Hotel Employees & Restaurant Employees Union, 112 Nev. 1161, 1172, 925 P.2d 496, 502 (1996). ("Affidavits supporting or opposing a motion for summary judgment shall be made on personal knowledge[.]") The requirement for attachment of sworn or certified copies of exhibits is likewise mandatory. Havas, 98 Nev. at 173, 643 P.2d at 1221. The Christian Declaration (JA 3/0264-270, especially 03/0265:9-13) was not made on

"personal knowledge."

The two Orders (JA 3/0366 and 0391) disregarded this mandatory law completely. There is not one word in either Order addressing the matters of evidence and admissibility, even though the authority cited in the prior paragraph makes consideration of such matters mandatory. See also State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011), dealing with evidence.

The arbitrator's two orders (JA 3/0366-0369 and 3/0391-0394) make no mention of the evidentiary law.

**4. The arbitrator's Orders disregarded the substantive law of the Claims.**

**a. The content of the arbitrator's Orders**

Addressing the second step of Wood v. Safeway, PMPSJ (JA 1/0066:12-1/104:7) demonstrated how each Claim of the FAC was supported by various of UMFs 1-20. For each claim, the nature of the claim and the specific elements of the respective claim were stated with reference to the governing law, followed by a section "Application to the Present Facts" in which the governing law was applied on an element-by-element basis to the appropriate UMFs.

Most of the arbitrator's 2-1/2 page Order (JA 3/0366-0368) dealt with history

and the contentions of the parties. The Order at JA 3/0367, fourth paragraph, indicated that it was aware of some relevant law, but thereafter disregarded and ignored that law.

The paragraph bridging pages JA 3/0367-0368 and the first paragraph on page JA 03/0368, a total of 10 lines, was the entirety of the substance of the Order dealing with resolution of PMPSJ. After noting that the parties had expended much energy and time on the Motion, Opposition and Reply, "nearly 100 pages accompanied by voluminous declarations and exhibits," the Order stated: "Under the circumstances, the Arbitrator finds the claims in dispute are not amenable to resolution on summary judgment." The basis of this statement was apparently that "Moreover, it appears that issues of fact and credibility pervade in assessing the merit of the claims in dispute." There was no discussion of any basis for the contention that there were issues of fact and credibility. Moreover, this statement contradicts the admission that "Many of the facts relied upon by Claimant are indeed 'undisputed.'" No specification was made of the facts that were not in dispute.

There was no mention or discussion at all in either Order (JA 3/0366 and 03/0391) of the UMFs set forth at PMPSJ JA 1/0061:22-0066:10. "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." Wood v. Safeway, 121 Nev. at 731,

121 P.3d at 1031.

Having made this admission that there were undisputed material facts, the arbitrator was required by Wood v. Safeway to evaluate the Claims. The Order disregarded this mandate. The Order did not address a single one of the twelve Claims of the FAC and whether those undisputed facts were sufficient to require decision in favor of Garmong on any of the Claims, thereby disregarding the governing law.

**b. The Orders did not even mention the Claims.**

Garmong does not contend that the arbitrator made an error in attempting to apply the law and in his interpretation of the law. To the contrary, it is apparent from the arbitrator's two Orders (JA 3/0366 and 3/0391) that he completely disregarded the governing procedural, evidentiary and substantive law. There was no arbitrator's interpretation to dispute. The arbitrator did not mention the law at all, thereby manifestly disregarding it. Such manifest disregard of the law is a basis for vacating the arbitrator's decision on PMPSJ.

All of the law disregarded by the arbitrator was either known to the arbitrator or disclosed to the arbitrator by Garmong in his briefs. The Orders evidence the disregard and refusal of the arbitrator to consider the law. The following discussion identifies and discusses other specific instances of the arbitrator's manifest disregard

of the well-defined, explicit and clearly applicable law. All of the law disregarded by the arbitrator here meets that standard.

A review of the two Orders (JA 3/0366 and 0391) shows that the arbitrator did not address at all, and utterly and manifestly disregarded, the substantive law of the Claims. Not one word! The arbitrator instead candidly admitted that "Many of the facts relied upon by Claimant are indeed 'undisputed,'" but disregarded the UMFs, and disregarded the controlling substantive law, based upon a legally incorrect concept of including a "merits hearing" as part of a summary judgment proceeding.

This following discussion addresses the substantive legal authority governing each of the Claims, and references the location in the PMPSJ where it was discussed. All of this law was well-defined, explicit, clearly applicable and correct, and the arbitrator and the Defendants did not dispute it. The arbitrator willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore this legal authority in preparing the two Orders. The two Orders provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

PMPSJ at JA 1/0066:15-0068:13 demonstrated the elements of the First Claim for Relief, Breach of Contract. As stated there, the facts sufficient to demonstrate the elements were found in UMFs 1, 3, 4-11, and 13-19. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the

two Orders.

PMPSJ at JA 1/0068:14-0069:25 demonstrated the elements of the Second Claim for Relief, Breach of Implied Warranty in Contract. As stated there, the facts sufficient to demonstrate the elements were found in UMFs 1 and 6-11. These UMFs, their evidentiary bases, and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0069:26-0073:9 demonstrated the elements of the Third Claim for Relief, Contractual Breach of Implied Covenant of Good Faith and Fair Dealing. The facts sufficient to demonstrate the elements were found in UMFs 1, 3-7, and 9-11. These UMFs, their evidentiary bases, and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0073:10-0084:8 demonstrated the elements of the Fourth Claim for Relief, Tortious Breach of Implied Covenant of Good Faith and Fair Dealing. The facts sufficient to demonstrate the elements were found in UMFs 1, and 3-21. These UMFs, their evidentiary bases, and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0084:9-0089:1 demonstrated the elements of the Fifth Claim for Relief, Breach of Nevada Deceptive Trade Practices Act, NRS Ch. 598. The facts sufficient to demonstrate the elements are found in UMFs 3, 6, 7-9, 11-20. These

UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0089:2-0092:15 demonstrated the elements of the Sixth Claim for Relief, Breach of Fiduciary Duty. The facts sufficient to demonstrate the elements were found in UMFs 19-20. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0092:16-0095:24 demonstrated the elements of the Seventh Claim for Relief, Breach of Fiduciary Duty of Full Disclosure. The facts sufficient to demonstrate the elements are found in UMFs 13-18. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0095:25-0098:1 demonstrated the elements of the Eighth Claim for Relief, Breach of Agency. The facts sufficient to demonstrate the elements are found in UMFs 1 and 4-9. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

(The Ninth and Eleventh Claims for Relief were not included in PMPSJ.)

PMPSJ at JA 1/98:2-0101:2 demonstrated the elements of the Tenth Claim for Relief, Breach of NRS 628A.030. The facts sufficient to demonstrate the elements were found in UMFs 1, 8-9, 13-19. These UMFs, their evidentiary bases

and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/0101:3-0102:5 demonstrated the elements of the Twelfth Claim for Relief, Unjust Enrichment. The facts sufficient to demonstrate the elements were found in UMFs 4 and 6-9. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

PMPSJ at JA 1/102:6-104:7 demonstrated the elements of Statutory Doubling of Damages Pursuant to NRS 41.1395. The facts sufficient to demonstrate the elements were found in UMFs 9 and 12 and UMFs cited in respect to individual claims. These UMFs, their evidentiary bases and the substantive law were completely disregarded by the arbitrator in the two Orders.

Additionally, PMPSJ at JA 1/0104:8-0107:7 demonstrated the basis for the dollar amounts of damages to be awarded.

The arbitrator was aware and conscious of all of these UMFs and the procedural, evidentiary and substantive law, as they were discussed in PMPSJ and the Reply and chose to disregard and ignore the facts and law, as they were not cited or applied in either of the arbitrator's Orders.

**D. The arbitrator's second Order, following Garmong's request for reconsideration, presented as the sole excuse for failing to follow the law of Wood v. Safeway and the substantive law by calling for credibility determination as part of a summary judgment proceeding, thereby disregarding the authority that such credibility determinations are contrary to law.**

Garmong pressed for reconsideration and a better explanation of the initial Order.

The arbitrator issued the Order Denying Reconsideration (JA 03/0391-0394) presenting as his sole excuse for denying PMPSJ, a contention that a "merits hearing" must be held as part of the resolution of PMPSJ. See Order Denying Reconsideration (JA 3/0392, third paragraph), stating: "A merits hearing is particularly appropriate where, as here, the resolution of the claims is so heavily dependent on the opportunity of the parties to test the credibility of the two principle [sic] witnesses[.]"

The arbitrator was fully aware that the credibility of affiants/declarants may not be determined by the arbitrator on summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), referenced generally by the arbitrator in Order JA 3/0367, fourth paragraph, states: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury

functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." See also Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002) ("Neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion [for summary judgment] or the opposition.").

The arbitrator was aware of the law forbidding credibility determinations on motions for summary judgment, and chose to manifestly disregard and deliberately ignore it in the present case as an excuse to reject the approach mandated by NRCP Rule 56 and Wood v. Safeway.

### E. The arbitrator's decision on PMPSJ must be vacated and reversed.

As provided in Clark County Educ. Ass'n, *supra*, the arbitrator's denial of PMPSJ must be reversed.

## VII. THE ARBITRATOR DISREGARDED THE OVERT INTENTIONAL FRAUD AND DECEPTION BY WESPAC

The parties and the arbitrator agreed that Wespac and Christian had a fiduciary duty, a duty of confidentiality and contractual duties to Garmong. The evidence in PMPSJ clearly established that Wespac and Christian had intentionally deceived Garmong prior to and during the time that he employed them to manage his retirement savings, in violation of their duties to him. The arbitrator disregarded

these deceptions in his Orders, refusing even to discuss them, and the District Court affirmed.

**A. The arbitrator disregarded the legal duty of full disclosure of a fiduciary, those in a confidential relation, and under contract principles.**

Wespac and Christian entered into a relation with Garmong whereby they agreed to act as his financial planners and investment advisors, in return for pay. NRS 628A.010(3) and NRS 628A.020 provide that a financial planner has a fiduciary duty to his client. The common law expressed in case authority states that an investment advisor or financial planner has a confidential relation, and thus a fiduciary duty, to his client, including duties of full and fair disclosure, loyalty, and good faith and fair dealing. Randono v. Turk, 86 Nev. 123, 129, 466 P.2d 218, 222 (1970); Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335, 338 (1995) (confidential relationship).

Perry held: "When a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party." Further, Perry stated, 111 Nev. at 948, 900 P.2d at 338: "Perry held a duty to act with the utmost good faith, based on her confidential relationship with Jordan. This duty requires affirmative disclosure and avoidance of self dealing." The

duty of full disclosure by Wespac and Christian arose no later than the time Garmong first gave them confidential information on August 18, 2005 (JA 2/0215-0223), even before they entered a formal relation on August 31, 2005 (JA 1/0224-2/0231), and continued during the entire time of their relation and thereafter. See PMPSJ 1/0089:7-0090:5.

The duty of full disclosure also arises under Nevada common law of contracts. "[A]n implied covenant of good faith and fair dealing exists in *all* contracts." (Italics in original). A.C. Shaw Construction v. Washoe County, 105 Nev. 913, 914, 784 P.2d 9, 11 (1989). "Every contract imposes upon each party an implied duty of good faith and fair dealing in its performance and its enforcement." J.A. Jones Constr. v. Lehrer McGovern Bovis, 120 Nev. 277, 286, 89 P.3d 1009, 1015 (2004). The implied covenant prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other. The parties must make a full and fair disclosure of material facts.

**B. The arbitrator disregarded the facts and law establishing violations of NRS 628A.030 by Wespac and Christian.**

Defendants Wespac and Christian deceived the elderly in order to deprive them of their life savings, and Garmong was one of their victims. This practice was condoned by the arbitrator.

Wespac and Christian have a long history of failing to obey federal and Nevada law governing financial planners and securities advisors, and concealing material information from their clients such as Garmong. Wespac concealed material information from Garmong, as set forth in the following seven subsections.

All of these violations and deceptions were established in the UMFs of PMPSJ and/or the Reply, and at the arbitration hearing, where Wespac and Christian had every opportunity to counter them with their own testimony and exhibits, yet the arbitrator disregarded them.

**1. The arbitrator disregarded the facts establishing the prior discipline and suspension by the SEC of Defendant Christian for defrauding securities clients and concealment from Garmong**

Wespac and Christian were "financial planners" under the definition of that term set forth in NRS 628A.010(3). "Financial planners" have a fiduciary duty to their clients, under both statutory (NRS 628A.010(3) and NRS 628A.020) and common law. Randono v. Turk, 86 Nev. at 129, 466 P.2d at 222. (JA 1/0089:4-19).

Wespac and Christian first revealed in their Opening Arbitration Brief filed September 18, 2017, at JA 1/0034:26-0035:4, what they had long known but concealed from Garmong–that Christian had been disciplined and suspended from practice by the SEC for fraudulent securities practices, well before Defendants were

misrepresented to Garmong as honest, trustworthy financial planners and investment advisors. Wespac and Christian actively concealed from Garmong the discipline and suspension of Christian by the SEC during the period that they were conducting their fraud upon him. This deception was established in UMF 19, which was disregarded by the arbitrator. Garmong first learned of this deception during this lawsuit. UMF 19 (JA 1/0065:26-0066:4) and Declaration ¶ 34 (JA 3/244:28-245:14).

Wespac and Christian did not dispute that they had concealed this information from Garmong in violation of NRS 628A.030(2)(a). Christian admitted that he and Wespac had a duty to make this disclosure and that it intentionally failed to do so (JA 4/621:21-622:11). Christian proudly testified:

> Q· · And you've heard the discussion about fiduciary duties?
>
> A· · Correct.
>
> Q· · And you said in your deposition that you probably gave us the best definition of fiduciary duty, and that is to always act in the client's best interest; are you staying with that?
>
> A· · Correct.
>
> Q· · Now, it's important as a fiduciary, wouldn't you agree, to be open and honest and clear about what you're doing to the client; isn't it?
>
> A· · Yes.
>
> Q· · So when you first met with Mr. Garmong, did you tell him about your SEC discipline and suspension from 1992?

A· · I did not.

Concealment of this highly material information is a violation of NRS 628.030(c).

This is the most unconscionable of the concealments. It is hard to imagine a financial planner/advisor, having a statutory fiduciary duty to a client, concealing this information, and even harder to imagine an arbitrator and a Court disregarding the concealment from an elderly person to establish a relation of trust.

**2. The arbitrator disregarded the facts and law establishing the failure of Wespac to obey Nevada law requiring that it become licensed as an investment advisor, NRS 90.330, and concealment from Garmong**.

Wespac and Christian were also "investment advisors." (JA 1/0035:14; JA 1/0034:25; JA 1/0147).

NRS 90.330(1) provides: "It is unlawful for any person to transact business in this State as an investment adviser or as a representative of an investment adviser unless licensed or exempt from licensing under this chapter." (JA 1/0087:13-17; 1/0095:4-21).

PMPSJ UMF 15 (PMPSJ JA 1/0065:10-16; JA 2/0155) established that Wespac did not register as an investment advisor until September 24, 2008, long after Wespac started delivering investment advice to Garmong on August 31, 2005

(PMPSJ JA 1/0230).

Garmong testified at the hearing that Wespac had never informed him that it was not properly licensed as an investment advisor. JA 1/0503:25-0504:3. Wespac's "compliance officer" Williams admitted that Wespac had been doing business in Nevada long before it registered as an investment advisor. (JA 4/603:4-11).

Wespac failed to register as an investment advisor as required by NRS 90.330(1) before it began doing business in Nevada. Concealment of this failure by Wespac and Christian was a violation of NRS 628A.030(2)(a) and (c).

**3. The arbitrator disregarded the facts and law establishing Wespac's failure to have the required insurance or bond, NRS 628A.040, and concealment from Garmong**.

NRS 628A.040 provides: "A financial planner shall maintain insurance covering liability for errors or omissions, or a surety bond to compensate clients for losses actionable pursuant to this chapter, in an amount of $1,000,000 or more."

Wespac and Christian did not have insurance or a surety bond in the required amount until nearly the end of their relation with Garmong, if at all, a violation of NRS 628A.040, and concealed that failure from Garmong, a violation of NRS 628A.030(2)(a) and (c).

At the hearing Garmong testified that he had requested in discovery proof of Wespac's

insurance but had not received any proof. (JA 4/0504:5-14). At the hearing Wespac's compliance officer Williams testified (JA 4/0595:3-0599:24) concerning insurance and produced an Insurance Policy (JA 4/0627-0629) with an effective date of January 26, 2009, but could not produce evidence of earlier insurance. Wespac and Christian operated without insurance for years after they started providing financial planning advice to Garmong on August 31, 2005 (PMPSJ JA 1/0230), contrary to NRS 628A.040, and concealed this statutory violation from Garmong.

Concealment of this failure by Wespac and Christian is a violation of NRS 628A.030(2)(a) and (c).

**4. The arbitrator disregarded the facts and law establishing Wespac's failure to register as a foreign LLC, NRS 86.544, and concealment from Garmong**.

NRS 86.544(1) provides: "Before transacting business in this State, a foreign limited-liability company must register with the Secretary of State." PMPSJ JA 1/94:15-95:3.

Wespac was a foreign limited liability company. PMPSJ (JA 1/0212-0214) establishes that Wespac did not register with Nevada as a foreign LLC until October 15, 2008, more than 3 years after commencing business with Garmong on August 31, 2005 (PMPSJ JA 1/0230). That is, Wespac did not register with Secretary of State before transacting business in Nevada with Garmong for several years, a violation of NRS 86.544(1), and concealed this information from Garmong, violations of NRS 628A.030(2)(a) and (c).

PMPSJ UMF 18 (JA 1/0065:22-25) asserted and supported this fact, and Wespac did not dispute it. At the hearing, Garmong testified that Wespac had never disclosed to him that it was not properly registered as a foreign LLC. JA 4/0503:21-24. Wespac's compliance officer Williams confirmed that Wespac did not register in Nevada as a foreign LLC until October 15, 2008 (JA 4/0609:15-0610:3), over three years after it started doing business with Garmong (PMPSJ JA 1/0230).

**5. The arbitrator disregarded the facts and law establishing Wespac's violation of federal SEC law requiring a Code of Ethics, and concealing that deficiency from Garmong.**

The SEC required all investment advisors to prepare a Code of Ethics and, upon request, provide that Code of Ethics to clients by the compliance date of January 7, 2005 or for new clients, whenever they became clients. PMPSJ JA 1/0156; 1/0162-163. Not surprisingly, Wespac and Christian prepared no Code of Ethics by the compliance date (4:0611:6-0615:17), as ethics were apparently foreign to their mode of business. They concealed from Garmong their failure to prepare a Code of Ethics. (JA 4/503:5-9).

Wespac and Christian violated the SEC requirement of having a Code of Ethics by January 7, 2005, and concealed that violation from Garmong, a violation of NRS 628A.030(2)(a).

**6. The arbitrator disregarded the facts establishing Christian's false statements to the SEC that he had no other business interests outside Wespac, and concealing those misrepresentations from Garmong.**

Wespac and Christian made false representations to the SEC concerning the fact that Christian had business interests outside Wespac that took his time and attention away from his fiduciary duty in advising Garmong (JA 4/557, ¶ 13). Christian concealed those misrepresentations and the business interests from Garmong, a violation of NRS 628A.030(2)(a).

At the hearing, Garmong testified that he had learned during the lawsuit that Christian was operating, with Wespac's approval, a conflicting investment business called "Fusion" during most of the period he acted as investment advisor to Garmong, and that Christian concealed this conflict from Garmong until the present lawsuit. (JA 4/0509:8-18). Garmong testified that he had learned in Christian's deposition of the conflict and that he was not devoting sufficient time to his representation of Garmong. When Wespac was acquired by another company, Christian was required to cease the conflicting business. (JA 4/0592:1-22).

**7. The arbitrator disregarded the three fraudulent Christian affidavits filed in this lawsuit.**

To induce the District Court to refer the matter to arbitration, Christian filed three

false and fraudulent affidavits in this lawsuit.. (JA 3/331-333; 3/347-348; 3/350). These fraudulent affidavits addressed the purported Investment Management Agreement presented by Wespac at the time and its constantly changing versions. (JA 3/338-344).

The fraudulent affidavits are discussed in detail in Plaintiff's Reply to Opposition to PMPSJ at JA 3/297:20-301:11.

The arbitrator's Orders denying PMPSJ (JA 3/0366 and 3/0391) disregarded the fraudulent affidavits.

**C. The arbitrator disregarded the significance of these violations. If Wespac and Christian had been truthful, Garmong would never have done business with them, they would not have depleted his retirement savings and they would not have gotten the payments he made to them.**

The reason that the above-listed misrepresentations and concealments are material and important is that Garmong never wavered in his insistence that he would never have dealt with Wespac and Christian if he had known of the concealed information.

In PMPSJ Declaration ¶ 35 (JA 3/244:28-245:14), Garmong testified:

> If Defendants had disclosed to me in July-August 2005 during my initial discussions with Defendants when they were persuading me to become their client, and in August 2005-2008 after I became their client, any or all of the facts that Defendants refused to comply with the lawful requirements of the SEC and the State of Nevada, and had no Code of Ethics as required by the SEC, and that Defendant Christian had been previously disciplined and suspended by the SEC, I never would have even considered doing business

with them because I would have been on notice that Defendants were fundamentally dishonest. Defendants' refusal to obey the federal and state laws, and Defendant Christian's discipline by the SEC, strongly indicate a willingness to engage in other wrongful, illegal, injurious misconduct, such as breaching a private contract and its associated provisions, violating conditions imposed by law such as fiduciary duty, and violating other federal and state laws. The concealment from me by Defendants of this information caused me to do business with them, when otherwise I would have refused if I had known the information, and led to great harm to me.

Later, Garmong orally testified at the hearing to the same point. (JA 4/0505:3-507:14).

Q· ·If you had that knowledge -- and I've taken you through what they didn't tell you -- if you had that knowledge, would you have done business with them in August of 2005?

A· ·The answer is no, nor would I have done business with them at a later time.

Q· ·And why is that?

A· ·A couple of reasons.· First of all, one of the big arguments made by Mr. Christian was that Wespac and Mr. Christian were worthy of trust. They were, after all, taking over the management of my life savings, what I expected to have in retirement.

I had to trust them to do what they were supposed to do and honor the Investment Management Agreement. So if they didn't disclose important information like this to me, I think it would be reasonable for me to be suspicious about whether they were honest and would properly deal with me.

Just the notion that all of this important information is concealed by someone who is asking for your trust is just alien to the granting of that trust, when -- let me put it this way:· When I learned about these failures of disclosure and violations of law much later in 2016 -- '16 or '17 I was dumbfounded.· I've been dumbfounded several times in this case and that was one of them.

The other thing is -- the other part of my concern is, if someone will not obey the law of the SEC, the federal law governing their industry and will not

> obey the law of the State of Nevada governing their specific industry, why should I expect that they would agree to honor the terms of a private contract with an individual?
>
> Those two things together, the violation of trust and the willingness to scofflaws, if everyone knows that term, to me is just beyond the pale. **I never, never, never would have remotely considered doing business with them if they had made any of those disclosures to me, particularly because, as I said, the matters at issue here were not whether they violated some traffic code or something like that. These issues went precisely to the nature of their dealings with the government and the failure to disclose went to their dealings with me.**

(Emphasis added).

In short, if Wespac and Christian had been forthcoming in their fiduciary duties of full disclosure, Garmong would never have fallen into their hands.

The arbitrator disregarded these fraudulent acts perpetrated by Wespac and Christian, as well as the governing law, and disregarded Garmong's reasons that such dishonesty was important to him.

**D. The arbitrator disregarded the liability of Wespac and Christian under NRS Ch. 628A.**

Wespac and Christian owed a duty of full disclosure under the fiduciary-like confidential relation of Perry before their contractual relation was established, and under Randono and NRS 628A.020 after their relation was established. But in fact what happened was that Wespac and Christian concealed their violations shown above.

Randono, 86 Nev. 129, 466 P.2d 222, held:

> Additionally, in G. Bogert, The Law of Trusts and Trustees, s 482 (2d ed. 1960), it is written, '**Investment advisors** have been held to occupy a confidential relation toward those advised.' In that same work, at s 483, it is provided, 'Where a trustee or other fiduciary holds property to be used for the benefit of his cestui, it is, of course, a breach of his trust to employ the property for his own private advantage, as where he spends or consumes it for his own benefit, or uses it directly to acquire other property in his own name. This civil wrong, the breach of trust, is as reprehensible as the criminal act of embezzlement, from the point of view of equity. It is readily admitted to be a sufficient basis for charging the fiduciary with a constructive trust as to any avails of the breach of his express trust.'

(Emphasis added).

These were violations of NRS 628A.020(2)(a) and (c). Of these violations, the concealment of Christian's prior discipline and suspension by the SEC is by far the most reprehensible, as Christian had represented himself to Garmong as an honest financial planner and investment advisor in order to gain Garmong's trust.

The various failures of Wespac and Christian to conform to Nevada law, and the law itself, were called to the attention of the arbitrator in PMPSJ. (JA 1/0065:1-0066:4; 0090:2-101:2) The arbitrator disregarded all the facts and all the law.

NRS 628A.030 provides:

> Liability of financial planner.
>
> 1. If loss results from following a financial planner's advice under any of the circumstances listed in subsection 2, the client may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney's fees.
> 2. The circumstances giving rise to liability of a financial planner are that the financial planner:

(a) Violated any element of his or her fiduciary duty;
(b) Was grossly negligent in selecting the course of action advised, in the light of all the client's circumstances known to the financial planner; or
(c) Violated any law of this State in recommending the investment or service.

As set forth above, Wespac and Christian violated NRS 628A.030(2)(a) by failing to disclose Christian's prior discipline and suspension by the SEC, and in the other ways described above, and concealed those violations from Garmong.

NRS 628A.030(1) provides that Garmong "may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney's fees."

**E. The arbitrator disregarded the liability of Wespac and Christian under NRS Ch. 598.**

The liability and damages of Wespac and Christian are discussed at PMPSJ JA1/0084:9-0089:1. The arbitrator's Orders (JA 3/0366 and 3/0391) disregarded the facts and governing law of the Fifth Claim.

**F. The arbitrator disregarded the liability of Wespac and Christian under Breach of Fiduciary Duty**.

The liability and damages of Wespac and Christian are discussed at PMPSJ, JA 1/0089:2-0095:24. The arbitrator's Orders (JA 3/0366 and 3/0391) disregarded the facts and governing law of the Sixth and Seventh Claims.

### G. The arbitrator disregarded the amounts of dollar damages.

The contract damages and fraud by Wespac and Christian led directly to damages of over $500,000.00, by the most conservative calculations, and over $9 million by the most liberal calculation (JA 1/0104:8-0107:7; 0137-0138), plus the costs of litigation.

## VIII. STATUTORY GROUNDS FOR VACATING THE ARBITRATOR'S SUMMARY JUDGMENT DECISION

### A. Statutory authority for vacating the arbitrator's final award.

NRS 38.241(1) sets forth the mandatory ("shall vacate") statutory grounds for vacating an arbitrator's final award. Relevant provisions include:

> 1. Upon motion to the court by a party to an arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if:
> (a) The award was procured by corruption, fraud or other undue means;
> . . . .
> (d) An arbitrator exceeded his or her powers;
> (e) There was no agreement to arbitrate, unless the movant participated in the arbitral proceeding without raising the objection under subsection 3 of NRS 38.231 not later than the beginning of the arbitral hearing.

### B. First statutory ground: Wespac procured the award by fraud. (NRS 34.241(1)(a))

The elements of fraud are found in NRS 42.005:

> Definitions; exceptions. As used in this chapter, unless the context otherwise requires and except as otherwise provided in subsection 5 of NRS 42.005:
> 2. "Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person

of his or her rights or property or to otherwise injure another person.

Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007), held

> Intentional misrepresentation is established by three factors: (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance. With respect to the false representation element, the suppression or omission " 'of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist.' "

Wespac and Christian clearly defrauded Garmong by their concealment of the undisputed facts discussed in § VII.B. above. These concealments constitute fraud under the definition of NRS 42.005. Wespac concealed material facts, with the intent to induce Garmong to trust Wespac and Christian, and to pay them money as investment managers, and as a result they purloined management fees from Garmong.

As a separate basis of fraud, Defendants submitted three false Affidavits of Defendant Greg Christian, see § VII.B.7 above and Reply (JA 3/0297:20-0301:11), to induce the Court to refer the matter to arbitration. The Orders (JA 3/0366 and 3/0391) ignored the fraud upon Garmong and upon the Court perpetrated by the three false Affidavits. The First Christian Affidavit (JA 3/0332) falsely swore under oath that Agreement Version 1 (JA 3/0338-0344) was "true, correct, and complete." After prodding by Plaintiff, the Second Christian Affidavit (JA 3/0347-0348) falsely swore under oath that the apparent inconsistencies were simply a word processing error. After yet further pointed inquiry by

Plaintiff, the Third Christian Affidavit (JA 3/0350) falsely swore under oath that the blank-form Confidential Client Profile ("Profile") (JA 3/0353-0365) was "true, correct, and complete" and was part of Agreement Version 1, failed to produce the actual completed Profile referenced in Agreement Version 1, and did not produce the three Exhibits A and three Exhibits B referenced in the Agreement.

Defendants were successful in their strategy of withholding the completed partial Profile (JA 2/0215-0223) from the District Court and this Court earlier in this litigation. They only finally produced it during the arbitration as JA 2/0215-0223 when production suited their purposes, but still concealed the Exhibits A and B, and the complete Profile including completed critical pages 10-11.[3]

As discussed in Garmong Declaration ¶¶ 7-8 (JA 3/0238:24-0239:10), Defendants did not during the course of their business relation with Plaintiff, and have never to this day in the lawsuit, produced an entire, "true, correct, and complete" copy of the Investment Management Agreement ("purported Agreement") including the still-missing pages, the three

[3] When Defendants and their counsel first presented the Profile at the outset of the lawsuit as a blank-form document (JA 3/0353-0365), which the Third Christian Affidavit (JA 3/0350) swore was "true, correct, and complete" even though it was blank, it was an 11-page document including pages 10-11 (JA 3/0364-0365–note the original page numbers in the lower right of each page). When Defendants later presented a completed form of the Profile (JA 02/0215-0223), it had only 9 pages. Missing pages 10-11 would have provided critical facts to support Plaintiff's case, but Defendants simply made those pages disappear. This was emblematic of Garmong's dealing with Wespac.

Exhibits A and three Exhibits B referenced in the document, and the completed critical pages 10-11 of the Profile.

**C. Second statutory ground: No complete, unambiguous Contract including an arbitration clause was ever made of record; there was no Agreement to arbitrate. (NRS 34.241(1)(e)).**

On March 27, 2017, Plaintiff filed with the District Court "Plaintiff's Objection Pursuant to NRS § 38.231(3) and § 38.241(1)(e) that there is no Agreement to Arbitrate; Notification of Objection to the Court." (JA 01/0012-0013). Such a filing is a prerequisite to contesting the agreement to arbitrate under NRS § 34.241(1)(e).

As established at PMPSJ Reply (JA 3/0285:18-25 and 3/0298:5-0301:11), Defendants never submitted a complete copy of the purported Agreement. They never attempted to provide a copy to Plaintiff of any purported Agreement during the course of the relationship, but only after the lawsuit was filed. (JA 4/479:13-16). Defendants argued a purported Contract that they alleged contained a provision to arbitrate. The Contract was to have included an Agreement, a Confidential Client Profile including completed pages 10-11, three different documents confusingly named "Exhibit A" and three different documents confusingly named "Exhibit B. To support this argument, Defendants made of record two different version of the Agreement, two different versions of the Profile, an unauthenticated and unsigned one out of three Exhibits A called for in the purported Contract, and none out

of three Exhibits B called for in the purported Contract. Defendant Christian stated under oath that he was "guessing" that one of the papers Defendants called an Exhibit B was "obviously" an Exhibit A. He blamed the typist for what he characterized as a "typo" error, and the arbitrator accepted this story. (JA 4/624:20-0625:7). Additionally, when all of the different versions were sorted out, they were missing crucial completed pages 10-11 of the Profile, which would have strongly supported Plaintiff's case.

Defendants never made of record a complete Contract, because ¶ 14 (JA 3/0229) of the purported Agreement provides that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties." (Emphasis added). The arbitrator therefore did not have a complete Contract to adjudicate and consequently exceeded his authority.

NRS 38.221(1) requires that the party asserting an agreement to arbitrate, here Defendants, demonstrate a valid agreement that includes an arbitration provision. Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) held:

> NRS 38.045 provides that if a party requests a court to compel arbitration pursuant to a written agreement to arbitrate, and the opposing party denies the existence of such an agreement, the court shall summarily determine the issue. See Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 729, 558 P.2d 517, 521–522 (1976). Since appellant [in the present case Respondent Wespac] set up the existence of the agreement to preclude the lawsuit from proceeding, it had the burden of showing that a binding agreement existed. After reviewing the facts,

> we cannot say that the district court erred in finding that appellant did not sustain that burden.

In the present case, Defendants have never met this burden of "showing that a binding agreement existed." They have never even attempted to meet this burden, other than the three demonstrably false Christian Affidavits.

As discussed at JA 5/0880:8-21, any "agreement to arbitrate" must be a complete contract for any portion of it to be valid and enforceable. NRS 38.221(3). An incomplete collection of paper purporting to be an "Agreement" or contract cannot be enforced. See Dodge Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-4 (1930) ("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."); All Star Bonding v. State of Nevada, 119 Nev. 47, 49, 62 P.3d 1124 (2003) ("[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain."); May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite.").

Defendants prepared the incomplete collection of paper they assert is a Contract and forced it on the Plaintiff. Any incompleteness or ambiguity must therefore be interpreted against Defendants' interests. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 (1995).

NRS 38.219(2) requires that the District Court "shall decide whether an agreement to arbitrate exists." NRS 38.219(1) mandates that the District Court may not approve an agreement to arbitrate if there is a ground at law or in equity for revocation of a contract. Incompleteness is such a ground for revocation.

The "Contract" must also be interpreted against Defendants because they refused to provide all of the parts of the Contract, in an unambiguous form. There is no question that Defendants had possession, custody, and control of all of the parts of the alleged Contract, if such ever existed. They prepared the papers, and never gave a copy of them to Plaintiff until the present lawsuit was filed. (JA 4/0478:25-0480:10). The unavailability of material evidence, through destruction or spoilation, results in either an adverse inference or a rebuttable presumption under NRS 47.250(3), against the controlling party. Bass-Davis v. Davis, 122 Nev. 442, 445, 451-453, 134 P.3d 103, 105, 109-10 (2006). In the present case, it is not necessary to determine whether Defendants lost or destroyed the three relevant Exhibits A, the three relevant Exhibits B, and the missing pages 10-11. Defendants did not produce two of the three Exhibits A, any of the three Exhibits B, or the crucial missing pages 10-11 of the Profile, and they are not part of the record. The Court may not infer some content from the missing Exhibits A and Exhibits B in order to sustain the Contract. All Star Bonding, *supra* JA 5/0881:22-0882:7

To enforce an arbitration provision, Defendants had an obligation to place into the

record a complete Contract that unambiguously included all of the pieces–one unambiguous Agreement, one unambiguous Profile, the missing pages 10-11 of the Profile, three separate Exhibits A, and three separate Exhibits B. They did not do so.

## IX. NONSTATUTORY GROUNDS FOR VACATING ARBITRATOR'S AWARD

### A. The arbitrator's Final Award was arbitrary, capricious, or was unsupported by the agreement, and disregarded the facts or the terms of the arbitration agreement.

Wichinsky v. Mosa, 109 Nev. 84, 89, 847 P.2d 727, 731 (1993) held in respect to an arbitrator's award, " If an award is determined to be arbitrary, capricious, or unsupported by the agreement, it may not be enforced." "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).

The arbitrator's Final Award was not supported by the facts. The following subsections address specific instances where the arbitrator disregarded the facts.

#### 1. The previously established discussed nonstatutory grounds.

Multiple nonstatutory grounds for vacating the arbitrator's award are discussed in § VI.C. These grounds include, among others, complete disregard of the procedural,

evidentiary, and substantive law of summary judgment, and complete disregard of the law of false statements and concealed facts by a fiduciary.

**2. The arbitrator manifestly disregarded the fact that Plaintiff was an elderly person over the age of 60 years, and disregarded the provisions of NRS 598.0933 and 598.0977 that grant special protection to the elderly.**

In deciding PMPSJ, the arbitrator disregarded the fact that Plaintiff was over the age of 60; see PMPSJ UMF 12, JA 1/0064:26-28.

A private cause of action is not available under NRS Ch. 598 to everyone. It is available only for persons over age 60 and those with a disability. The disregard of this fact is of special importance because there is a private cause of action under NRS Ch. 598 only for persons over age 60 and persons with a disability. NRS 598.0977.

The arbitrator also disregarded the law that NRS 598.0933 and 598.0977 grant special protection to such persons. PMPSJ, JA 1/0085:17-0086:4.

The arbitrator further disregarded the policy favoring protection of the elderly from Defendants and their ilk. PMPSJ, JA 1/0080:18-0081:1. It is difficult to understand the treatment of the elderly by the arbitrator in the face of statute and case authority to the contrary.

**3. The arbitrator disregarded the reprehensible preying of Defendants upon the elderly.**

The arbitrator disregarded the special protection against those who prey upon the elderly granted by the Nevada legislature in NRS 598.0933 and 598.0977, and the case authority. (PMPSJ 1/0080:18-0081:9). Plaintiff was 61 years old when Defendants first started manipulating him. At that time he was very specific about disclosing his age, and that he needed financial guidance to conserve and protect his savings for retirement. Profile, JA 1/0216 and 0223. The arbitrator disregarded these special circumstances. Plaintiff was a perfect target; he was elderly, he had worked hard all his life and saved for his retirement, and he had enough saved to make the Defendants' efforts worthwhile.

Courts have taken a special interest in protecting the elderly from physical and financial abuse. See, for example, Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043 (2000) and Estate of Wildhaber ex rel. Halbrook v. Life Care Centers, 2012 WL 5287980 (D. Nev. 2012). As the U.S. Supreme Court has stated in Washington v. Glucksberg, 521 U.S. 702, 731 (1997), "[T]he State has an interest in protecting vulnerable groups-including the poor, the elderly, and disabled persons-from abuse, neglect, and mistakes."

In Parsons v. First Investors Corp., 122 F.3d 525, 530 (8th Cir. 1997), the Eighth Circuit quoted with approval the district court in upholding punitive damages against those

who, like Defendants, prey especially on the elderly: "Fraudulent representations which put the life savings of the elderly at risk are reprehensible and deserve punishment." Parsons might have been speaking to the facts of the present case, where Defendants established trust by a series of fraudulent representations, thereafter to recklessly dissipate the life savings of an elderly person. All of this authority was known to, and disregarded by, the arbitrator, see PMPSJ JA1/0080:18-0081:1.

To induce him to entrust a portion of his life savings, to be used for his retirement, Defendants concealed their misdeeds from Plaintiff, see UMF 13-20 at PMPSJ JA 1/0065:1-0066:10. Never once did Defendants notify Plaintiff that they would not, or could not, manage his accounts as he had instructed them. (UMFs 6,7 at JA 1/0063:8-0064:8). In a letter of September 30, 2008 (PMPSJ JA 1/0232), when under Defendants' fiduciary management Plaintiff's retirement accounts had lost over $500,000.00 in capital value in a year, Defendant Christian blithely informed Plaintiff that he knew all along how to have avoided the wasting of Plaintiff's life savings: "Go to 100% cash" for the duration of the decline in the stock markets. But he did not do that, contrary to his contractual, fiduciary, and agency duties. Mr. Christian was too busy running his conflicting business, Fusion, to pay attention to Garmong's precipitous losses.

The arbitrator disregarded these facts, and the violations resulting from the concealing of these facts by Defendants.

**B. The arbitrator manifestly disregarded the governing statutory and case-authority law.**

The arbitrator manifestly disregarded and ignored the well-established evidentiary and substantive law in multiple areas. Plaintiff does not contend that the arbitrator made an error of law, because it is apparent that he did not apply the governing law at all. In the present case, the arbitrator ignored the law known or communicated to him. Plaintiff again emphasizes that he is not disputing the arbitrator's interpretation of the law. There is no interpretation to dispute, only disregard. The arbitrator ignored the law and did not mention it at all. Such manifest disregard of the law is a basis for vacating the arbitrator's Final Award on PMPSJ.

As discussed in §VI.C. above, the arbitrator manifestly disregarded the law, which he already knew or had communicated to him in PMPSJ. The "concrete evidence" of intent to disregard is found in the two Orders (JA 3/0366 and 3/0391), where the procedural law is mentioned but not followed, and the evidentiary and substantive law are not mentioned at all.

## X. ATTORNEYS FEES

U.S. Design & Const. Corp. v. International Broth. of Elec. Workers, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002) held: "A district court is not permitted to award attorney fees or costs unless authorized to do so by a statute, rule or contract." See also Henry Prods., Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998). The first step of the inquiry into

the award of attorneys' fees and/or costs is whether there is a statute, rule, or contract applicable to this arbitration that authorizes an award attorneys' fees and costs.

Wespac sought an award of attorney's fees based on NRCP Rule 68. Pursuant to JAMS Rule 24, the Order of August 11, 2017, and the Agreement of the parties expressed in the Order of August 11, 2017 (JA 1/0014:17-20), NRCP Rule 68 was excluded from the set of rules governing the arbitration.

There was no statute, rule or contract term authorizing an award of attorney's fees under Rule 68 in the arbitration.

**A. The arbitrator disregarded the JAMS rule providing that the parties and the arbitrator may agree on the rules governing the arbitration, and that the arbitrator "shall" be guided by those rules agreed upon by the Parties.**

The arbitration was governed in part by the rules of JAMS. JAMS Rule 24 provides in relevant part:

> (c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.
>
> (g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable

law.

(Emphasis added).

There was an agreement between the parties (JA 1/0014:17-20) listing a number of civil rules to be included in the governing law of the arbitration, but excluding Nevada Rule of Civil Procedure 68 from the rules governing the arbitration. Thus, the arbitrator "shall be guided" by those rules agreed upon by the Parties. Adherence by the arbitrator to the agreement of the parties is mandatory. The arbitrator had no choice but to follow the "rules of law agreed upon by the Parties." Instead, he elected to disregard the rules of JAMS and the agreement of the parties.

Notably, the original Agreement (JA 1/0224-02/230) had no provision for fee shifting.

**B. The arbitrator disregarded the fact that at the outset of arbitration, the parties agreed, and the arbitrator ordered, that NRCP 68 would not be included in the governing rules of the arbitration.**

During the course of the arbitration process, and as permitted by the rules, the parties and the arbitrator agreed that only certain of the Nevada Rules of Civil Procedure would be applied to govern the arbitration, and the arbitrator also entered an order to the same effect. On August 11, 2017, after a telephone conference between the attorneys for the parties and the arbitrator, in which the parties were heard, the arbitrator entered a "Discovery Plan and Scheduling Order" ("Scheduling Order", JA 1/0014:17-20). One purpose of this Scheduling

Order was to record and give notice to the parties and to the arbitrator exactly what rules would govern the arbitration. The Scheduling Order, stated,

> "The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure and the deadlines for filing Oppositions and Replies found in Washoe District Court Rule 12 will generally govern this case unless the arbitrator rules otherwise."

The parties did not agree that fee shifting pursuant to NRCP 68 would be part of the arbitration and there was no other applicable law.

Scheduling Order at 2:23 also entered an order to the same effect, stating, "IT IS SO ORDERED." followed by the arbitrator's signature.

In their agreement, and as ordered by the arbitrator, there was no provision that NRCP Rule 68 would be applicable law in the arbitration. NRCP Rule 68 is therefore not "applicable law."

This aspect of the Scheduling Order, expressly stating the rules that would govern the arbitration, was not altered or amended by any subsequent orders issued by the arbitrator. Indeed, this aspect of the Scheduling Order was not ever altered or amended by the arbitrator, nor did the parties ever change their contractual agreement as stated in the Scheduling Order.

Plaintiff adhered to the agreement and Scheduling Order throughout the period of the arbitration. Wespac decided that it would break the agreement with Garmong and violate

the arbitrator's Order. Wespac served an Offer of Judgment pursuant to NRCP Rule 68 (JA 1/0017-0018) in the arbitration on September 12, 2017, almost exactly one month after they agreed that Offers of Judgment pursuant to NRCP 68 would not be included within the scope of rules governing the arbitration, and the arbitrator had so ordered. This dishonest approach was consistent with Wespac's prior dealings. Wespac did not, then or later, seek to modify their agreement with Garmong, or move the arbitrator for relief from the terms of the Scheduling Order so as to include NRCP 68 in the rules governing the arbitration. Plaintiff did not accept Wespac's Offer of Judgment under NRCP 68, because the parties had agreed, and the arbitrator had ordered, that NRCP 68 would not be applicable to this arbitration.

On February 15, 2019, after an Interim Award in their favor, Wespac filed a Motion for Attorney Fees pursuant to Rule 68 and Costs (JA 4/0666-0694). This Motion was based solely on their purported Offer of Judgment of September 12, 2017. Garmong filed an Opposition (JA 04/0695-0726) based upon several grounds, primarily that the rules of the arbitration did not permit offers of judgment.

The Scheduling Order provided that only certain enumerated rules of the NRCP would "govern this case unless the arbitrator rules otherwise." Neither the Final Award nor any other order of the arbitrator attempted to rule that the Scheduling Order should be modified to add Rule 68 to the enumerated rules governing the arbitration, and that Rule 68 should be retroactively made part of the rules governing the arbitration. Had the Final

Award attempted to make such a finding, the retroactive nature of the arbitrator's attempt to add Rule 68 would have been clear. And, in any event, the arbitrator could not alter the terms of the contractual agreement between the parties.

The arbitrator's award is truly outrageous. After the parties agreed, and the arbitrator ordered, that "The parties have agreed that only Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, 37 (and 56) of the Nevada Rules of Civil Procedure" would govern the case, as set out in the Scheduling Order, the arbitrator sought unilaterally, without notice, and retroactively to alter that agreement of the parties, and his own Order to add Rule 68, twenty months after the parties had made their agreement and the Scheduling Order was entered.

**C. The arbitrator disregarded JAMS Rule 24's limitation of the award of attorney's fees to grounds agreed to by the parties, and that the parties had not agreed that NRCP 68 would be a governing rule of the arbitration.**

The arbitrator had no discretion to grant attorneys fees contrary to the agreement of the parties. JAMS Rule 24(c) states, "The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement." JAMS Rule 24(g) states, "The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law."

Here, the parties agreed to the governing rules of the arbitration, and those rules did

not include NRCP Rule 68.

Conversely stated, nowhere did the parties agree that Rule 68 would have effect in the arbitration.

In the arbitrator's Final Award of April 11, 2019, the arbitrator granted Wespac's Motion, and awarded Wespac attorney's fees based upon NRCP 68 that was not part of the governing law of the arbitration. JA 5/0736-0737.

**D. The arbitrator disregarded the fact that the Order set forth separate (1) agreement between the parties and (2) an order of the arbitrator that NRCP 68 would not be part of the governing law of the arbitration. Neither subsequently changed.**

The paragraph quoted *supra* from the Scheduling Order included both an agreement between the parties and an order of the arbitrator, each setting forth the governing rules of the arbitration as permitted by JAMS Rule 24. The agreement between the parties could be modified only by a subsequent new agreement between the parties, and there was no such new agreement. The arbitrator has no authority to change the agreement between the parties contrary to the JAMS rules. The arbitrator does have the authority to change his own order, but he never did so, nor did he give Garmong notice that he intended to do so. The record contains no evidence of the arbitrator ever ruling that NRCP 68 would be included in the rules governing the arbitration.

**E. The arbitrator disregarded the legal principle that parties must be able to trust the representations made by the arbitrator.**

As noted, the arbitrator ordered, and the parties agreed, as to the provisions of NRCP that would govern the arbitration. NRCP 68 was not included in that list.

Courts have held that litigants must be able to trust and rely upon the pronouncements of judges, which presumably includes arbitrators. Nagib v. Conner, 192 F.3d 127 at *4 (5th Cir. 1999) held:

> Litigants need to be able to trust the oral pronouncements of district court judges," United States v. Buchanan, 59 F.3d 914, 918 (9th Cir.1995), and requiring district courts to refrain from providing mis-information, unlike affirmatively requiring them to provide information, does not impose a significant burden.

Similarly, Buchanan, 59 F.3d at 918 held, "Litigants need to be able to trust the oral pronouncements of district court judges." This presumably includes written orders as well, and applies to arbitrators as well as judges.

Naively, Garmong trusted the written and oral pronouncements of the arbitrator, as well as the contractual agreement with the Defendants.

**F. The arbitrator disregarded the fact that Plaintiff should have prevailed in PMPSJ and the hearing under the facts and law, and that there could be no award of attorney's fees to Wespac.**

The arbitrator disregarded the fact Plaintiff should have prevailed at both the PMPSJ

and the hearing, and that therefore Defendants should not have any basis for an award of attorney's fees on any theory.

## XI. SUMMARY AND CONCLUSION

The arbitrator disregarded every applicable principle of procedural, evidentiary and substantive law. He also violated the mandatory statutory requirements of NRS 38.241(1). Under Clark County, the arbitrator's orders on summary judgment and award of fees must be reversed.

The Defendants used falsification and concealment to gain a fiduciary position with Plaintiff, and then violated that trust to waste a large amount of his retirement savings. In ruling on PMPSJ, the arbitrator disregarded all of the UMFs and the governing law, and denied PMPSJ on the argument that he needed to conduct a "merits evidentiary" hearing as part of a summary judgment proceeding to assess credibility. The arbitrator disregarded the legal authority that such a "merits hearing" is strictly forbidden by law, by both the US Supreme Court and this Court.

Appellant Garmong respectfully requests that this Court reverse the judgment and award of attorney's fees entered by the District Court, vacate the arbitration award and attorney's fees entered after the award and remand the case to the District Court for trial on

the merits.

DATED this 27th day of May, 2020.

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

Counsel for appellant Garmong

## ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **13,342** words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules

of Appellate Procedure.

DATED this 27th day of May, 2020.

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

Counsel for Appellant

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY O. GARMONG,
Appellant,
vs.
WESPAC; AND GREG CHRISTIAN,
Respondents.

No. 80376-COA



*ORDER OF AFFIRMANCE*

Gregory O. Garmong appeals a district court order confirming an arbitration award, and an order denying his motion to alter or amend the order. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

A few years before the 2008 Recession, Garmong contracted with WESPAC Advisors, LLC (Wespac) to receive professional investment advice and management of his retirement savings, anticipating that he would soon retire.[1] When Garmong signed the agreement, he gave express directions that his objective was to increase his investment value moderately, while minimizing his potential loss of capital. As an arbitrator later found, Garmong and Wespac's relationship went well for the most part, as the two "worked reasonably well together to advance Garmong's investment goals."

However, in 2007, Garmong decided to retire as he was going through a litigious divorce. He reevaluated his financial circumstances, consulted with Greg Christian, Garmong's main contact from Wespac, and authorized Wespac to handle his accounts completely. According to

[1]We do not recount the facts except as necessary to our disposition.

Garmong, he verbally told Wespac at the time that his new objective was to not lose capital, but Christian would later testify that this did not happen. Garmong would later claim that, shortly after the discussion, he sent a letter that memorialized his decision for Wespac to manage his accounts and the new objective, attaching eighteen pages of news articles describing the impending housing crisis. Wespac denied ever receiving this letter, and an arbitrator later found that Wespac never received the letter and that it seemed suspiciously prepared for litigation.

At the start of the 2008 Recession, Garmong's accounts suffered losses that steadily increased as the economy worsened. Specifically, Garmong alleged that he lost $580,649.82 from his capital accounts. In an email exchange at the end of October 2008, Garmong claimed that he had previously told Christian some time ago that the new objective was not losing any capital. Christian responded by denying that Garmong had said any such thing, and if Garmong had said his objective was truly not to lose any capital, then he would have recommended closing the investment account and shifting his assets to 100% cash. Garmong eventually ended the relationship with Wespac and Christian in 2009 and brought suit in district court.

In his operative complaint, Garmong asserted the following claims: (1) breach of contract, (2) breach of implied warranty in contract, (3) contractual breach of implied covenant of good faith and fair dealing, (4) tortious breach of implied covenant of good faith and fair dealing, (5) breach of Nevada Deceptive Trade Practices Act, (6) breach of fiduciary duty, (7) breach of fiduciary duty of full disclosure, (8) breach of agency, (9) negligence, (10) breach of NRS 628A.030, (11) intentional infliction of

emotional distress; (12) unjust enrichment, and (13) a request for doubling damages pursuant to NRS 41.1395.

After five years of litigation in the district court, the parties stipulated to proceed to binding arbitration pursuant to a mandatory arbitration clause in the investment management agreement. Early in the arbitration, the parties stipulated that various provisions of the Nevada Rules of Civil Procedure would govern the arbitration. The arbitrator formalized these stipulations in a discovery plan and scheduling order, but added that those rules would govern "unless the [a]rbitrator rules otherwise." Shortly afterward, Wespac and Christian made an offer of judgment pursuant to NRCP 68, which Garmong rejected.

Garmong then filed a motion for partial summary judgment, claiming that various undisputed material facts, supported by his affidavit, necessitated an award in his favor as a matter of law. The arbitrator denied the motion, determining that the motion and the opposition presented genuine issues of material fact.

Dissatisfied, Garmong filed a motion for reconsideration. The arbitrator denied the motion, stating:

> The exhaustive analysis provided in [Garmong's] original motion, and the voluminous declarations and exhibits attached thereto articulate [Garmong's] view of the evidence supporting his claims. Many of the facts relied upon by [Garmong] are indeed "undisputed." Viewed in context, however, the conclusion of the [a]rbitrator then, and now is that they do not entitle [Garmong] to judgment as a matter of law without first affording [Wespac and Christian] the opportunity to defend the claims at a merit hearing.

Thereafter, the arbitrator heard evidence from Garmong, Christian, and Bruce Cramer, an expert witness for Wespac. At the end of

the hearings, the arbitrator determined that Garmong failed to prove his claims. Moreover, after allowing the parties to brief the issue, the arbitrator awarded attorney fees and costs in the amount of $111,649.96 to Wespac and Christian.

Wespac and Christian then petitioned the district court to confirm the arbitration award. Garmong filed motions to (1) vacate the arbitrator's award (2) reconsider and grant Garmong's previously denied partial motion for summary judgment and (3) vacate the arbitrator's award of attorney fees and costs. The district court entered an order confirming the arbitration award and denying Garmong's various motions. In addition, the district court denied Garmong's subsequent motion to alter or amend. Garmong now appeals.

*Standard of Review*

We review a district court decision to confirm an arbitration award de novo. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). But the scope of the district court's review of an arbitration award (and, consequently, our own de novo review of the district court's decision) is limited, and is "nothing like the scope of an appellate court's review of a trial court's decision." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004). "A reviewing court should not concern itself with the 'correctness' of an arbitration award and thus does not review the merits of the dispute." *Bohlmann v. Printz*, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004) (quoting *Thompson v. Tega–Rand Int'l.*, 740 F.2d 762, 763 (9th Cir. 1984)), *overruled on other grounds by Bass–Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006).

Rather, courts give considerable deference to the arbitrator's decision. *Knickmeyer v. State ex rel. Eighth Judicial Dist. Court*, 133 Nev. 675, 676-77, 408 P.3d 161, 164 (Ct. App. 2017). "Judicial review is limited to inquiring only whether a petitioner has proven, clearly and convincingly, that one of the following is true: the arbitrator's actions were arbitrary, capricious, or unsupported by the agreement; the arbitrator manifestly disregarded the law; or one of the specific statutory grounds set forth in NRS 38.241(1) was met." *Id.*

*Manifest Disregard of the Law*

First, Garmong claims that the arbitrator manifestly disregarded the summary judgment standard by not mechanically delineating which material issues were in dispute, and failing to explain why the undisputed material facts did not entitle him to summary judgment. Moreover, Garmong argues that the arbitrator made impermissible credibility determinations when considering summary judgment, and ignored several critical facts regarding liability in its award.

Manifest disregard requires more than a mere error in the law or failure from the arbitrator to understand the law or apply it correctly. *See Bohlmann*, 120 Nev. at 545-47, 96 P.3d at 1156-58. Manifest disregard occurs only when an arbitrator ignores the law by "recogniz[ing] that the law absolutely requires a given result and nonetheless refuses to apply the law correctly." *Id.* at 545, 96 P.3d at 1156. Judicial inquiry under this standard is "extremely limited," *see id.* at 547, 96 P.3d at 1158, and "is a virtually insurmountable standard of review." *Id.* at 547 n.5, 96 P.3d at 1158 n.5.

Garmong has not shown that the arbitrator manifestly disregarded the law. To the contrary, his arguments expressly concede that

the arbitrator identified the proper summary judgment standard but merely applied it wrongly to the facts, and then failed to include detailed findings in its denial of summary judgment. Thus, Garmong essentially alleges that the arbitrator applied the correct law but reached the wrong result, not that it manifestly disregarded the law itself. Further, the record reveals that the arbitrator's decision was correct. Contrary to Garmong's position, Wespac and Christian disputed most of what Garmong characterized as "undisputed material facts," and they disputed whether the facts gave rise to liability.

The arbitrator correctly decided that the material facts centered on alleged verbal conversations between individuals who later disputed what was said, and that resolving those disputes required an assessment of witness credibility far beyond the scope of a motion for summary judgment. The arbitrator correctly concluded that it could only assess the credibility of the parties at a hearing on the merits with live testimony and cross-examination to determine which version of the events was more likely, (i.e., whether it was Wespac's investment decisions that caused a loss to Garmong's account or the 2008 Recession). Thus, rather than manifestly disregarding the law, the arbitrator correctly applied the law to the facts.

Garmong also argues that the arbitrator manifestly disregarded his various allegations that Wespac and Christian concealed information from him. We disagree. In its award, the arbitrator analyzed each of Garmong's theories of liability and discussed why each failed based on the evidence presented to the arbitrator. The arbitrator presented the correct legal standard and analyzed why each of Garmong's theories failed. Thus, the arbitrator did not manifestly disregard the law.

*NRS 38.241*

Garmong challenges the arbitrator's award under two statutory grounds: NRS 38.241(1)(a) and NRS 38.241(1)(e). He claims that Christian submitted three false affidavits to the arbitrator that provided a version of the confidential client profile that was missing the final two pages. Garmong claims that withholding this part of the confidential client profile proved that Wespac and Christian failed to produce an enforceable agreement to arbitrate.

NRS 38.241(a) provides that a court may vacate an award if "[t]he award was procured by corruption, fraud or other undue means." NRS 38.241(e) provides, in pertinent part, that a court may vacate an arbitration award if "[t]here was no agreement to arbitrate."

Garmong has not met his burden of showing that either provision applies. *See Knickmeyer*, 133 Nev. at 677, 408 P.3d at 164 (the party challenging an arbitration award has the burden to demonstrate, by clear and convincing evidence, that one of the statutory grounds under NRS 38.241 was met). First, Garmong alleges that Christian provided false information to the arbitrator, but in so doing he merely asserts that the arbitrator should have believed his evidence over Christian's, not that Christian's evidence was objectively false in some provable way. In other words, Garmong invites us to substitute our own assessment of the witness's credibility for that of the arbitrator, which would be improper. Second, Garmong seems to allege that there was no enforceable agreement to arbitrate because the only version of the document that Christian provided was supposedly missing some pages from a confidential client profile. But Garmong ignores that the matter was in arbitration in the first place because he stipulated that the contract required it. Moreover, the

arbitrator's written award makes clear that it relied upon the totality of evidence presented during the arbitration hearing, not the document that included the allegedly missing pages. Therefore, Garmong has not shown that the award was procured by undue means.

Furthermore, the record indicates that the confidential client profile was part of a separate prerequisite questionnaire that Wespac requires potential new clients to fill out before entering into the final agreement rather than the investment management agreement itself. At the very least, Garmong bears the burden to show that the missing pages were what he says they are rather than what the arbitrator found they were, and he has failed to meet his burden. Thus, Garmong has not demonstrated by clear and convincing evidence that we should vacate the arbitrator's award under statutory grounds.

*Attorney Fees and Costs*

Garmong claims that the arbitrator's award of attorney fees was not permitted by statute, rule, or contract. The arbitrator awarded fees pursuant to NRCP 68 based upon Garmong's failure to accept an offer of judgment, and Wespac and Christian's status as the prevailing parties in the arbitration.

NRCP 68 penalizes parties that reject, or do not timely accept, a reasonable pre-trial offer of judgment and fail to obtain a more favorable judgment, requiring that the offeree "pay the offeror's post-offer costs and expenses." NRCP 68(f)(1)(B). This court reviews an award of attorney fees after an arbitration under the same standard as an order confirming or vacating an arbitrator's award. *See WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. 884, 887, 360 P.3d 1145, 1147 (2015). Nevada's Uniform Arbitration Act is deferential to an arbitrator's decision to grant attorney

fees, providing that: "[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitral proceeding." NRS 38.238(1). Additionally, under rule 24(g) of the "Comprehensive Arbitration Rules & Procedures" promulgated by Judicial Arbitration and Mediation Services, Inc. (JAMS), the arbitrator may award attorney fees and costs if allowed by the parties' agreement or by applicable law.

The record indicates that the parties agreed to conduct the arbitration under at least some of the provisions of the Nevada Rules of Civil Procedure. However, Garmong argues that NRCP 68 did not apply because, following a telephonic hearing, the arbitrator filed a scheduling order in which it formalized an agreement between the parties to only use certain Nevada Rules of Civil Procedure, not all of them. He argues that he mistakenly accepted and relied on the arbitrator's scheduling order in good faith and did not respond to the NRCP 68 offer of judgment because he interpreted the arbitrator's scheduling order to not encompass NRCP 68.

The scheduling order (to which Garmong never objected) lists a few procedural rules that would govern, but it also expressly reserves the right of the arbitrator to apply other rules, providing that various listed rules will govern "unless the [a]rbitrator rules otherwise." Thus, the scheduling order clearly and expressly confers authority on the arbitrator to decide which rules apply.

Notwithstanding this language, Garmong suggests that the arbitrator could not have applied NRCP 68 if the scheduling order did not specifically list it. But during the proceedings, both parties utilized and relied upon other provisions of the NRCP that are also not mentioned in the

scheduling order. For example, the scheduling order does not specifically mention either motions for summary judgment under NRCP 56 nor motions for reconsideration, yet Garmong filed both such motions himself, indicating that he clearly understood the scheduling order to encompass provisions of the NRCP not specifically listed. Indeed, Garmong never objected to the service of the offer of judgment as impermissible under the scheduling order, nor had he made any effort to seek a ruling from the arbitrator as to NRCP 68's applicability to the proceedings. Thus, the most reasonable interpretation of the scheduling order—an interpretation confirmed by the parties' subsequent mutual conduct during the proceedings—is that the arbitrator could apply all rules of the NRCP that he deemed appropriate, including NRCP 68.

In addition to the arbitrator's award of fees, respondents request that we award additional attorney fees and costs incurred during appeal arising from Garmong's failure to accept the offer of judgment pursuant to NRCP 68. The Nevada Supreme Court has held that the fee-shifting provision in NRCP 68 extends to fees incurred on and after appeal. *See In re Estate & Living Tr. of Rose Miller*, 125 Nev. 550, 555, 216 P.3d 239, 243 (2009). Thus, Garmong's failure to accept the offer of judgment may justify an award for attorney fees and costs incurred during and after appeal, but this issue should be presented to the district court or arbitrator in the first instance.[2] Accordingly, we affirm the judgment of the district court in its entirety.

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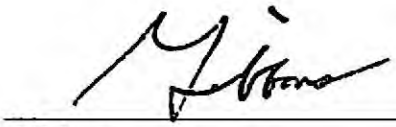
[2]Generally, "a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court." *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). However, the district court maintains jurisdiction over issues that are collateral to the

Therefore, we

ORDER the judgment of the district court AFFIRMED.



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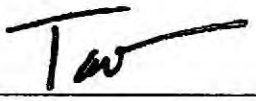

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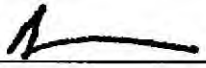

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cc: Hon. Lynne K. Simons, District Judge
Carl M. Hebert
Law Offices of Thomas C. Bradley
Washoe District Court Clerk

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issues raised on appeal, such as attorney fees and costs. *See Kantor v. Kantor*, 116 Nev. 886, 895, 8 P.3d 825, 829 (2000).

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Clerk of the Court
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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.
_____/

---

**ORDER EXTENDING TIME FOR PLAINTIFF TO FILE POINTS AND AUTHORITIES IN OPPOSITION TO THE DEFENDANTS' SECOND AMENDED MOTION FOR FEES**

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The parties have stipulated that the plaintiff may have additional time to file an opposition to the defendants' second amended motion for attorney's fees filed on February 18, 2021. Good cause appearing,

IT IS ORDERED the plaintiff may have to and including 10 calendar days after the Nevada Supreme Court has acted on the plaintiff's petition for review of the Order of Affirmance of the Court of Appeals entered in appeal no. 80376-COA in which to file points and

authorities in opposition to the defendants' second amended motion for attorney's fees.

DATED this 1st day of March, 2021.

DISTRICT JUDGE

CODE: 1120
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

**DEFENDANTS' SECOND AMENDED MOTION FOR ATTORNEY'S FEES**

Defendants WESPAC and Greg Christian, by and through their counsel, Thomas C. Bradley, Esq., hereby file a second amended motion seeking an award of attorney's fees. This Second Amended Motion is based upon the accompanying Memorandum of Points and Authorities, Declaration of Thomas C. Bradley, the Exhibits attached hereto, 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 18th day of February, 2021.

/s/ *Thomas C. Bradley*_____
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. On December 6, 2019, this Court denied Mr. Garmong's Motion to Alter or Amend Judgment. Pursuant to this Court's Order dated August 27, 2019, Defendants were granted ten (10) days following the Courts decision on Garmong's Motion to Alter or Amend the Judgment in which to file an Amended Motion for Attorney's Fees. On March 9, 2020, this Court issued an order holding Defendants' Amended Motion for Attorney's Fees in abeyance, pending appeal. On December 1, 2020, the Nevada Court of Appeals issued an Order affirming this Court's affirmation of the Arbitration Award. On February 17, 2021, the Court of Appeals denied Mr. Garmong's Petition for Rehearing. Defendants are now seeking an award of the attorney's fees incurred: (1) to confirm the award before this Court and oppose the Motion to Alter or Amend the Judgment: (2) to confirm the award on appeal to the Nevada Court of Appeals.

## 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:

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Tom@TomBradleyLaw.com

> (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 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 and 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. *See* Exhibit "2." Defendants also incurred additional

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attorney fees in the amount of $4,819.00 to research and draft the Opposition to Mr. Garmong's Motion to Alter or Amend Judgment. A true and correct copy of the invoice paid by Wespac is attached as Exhibit "3." To support and defend the District Court's Order of Affirmance before the Nevada Court of Appeals, Defendants also incurred additional attorney's fees in the amount of $12,561.00. *See* Exhibits "4" and "5." A copy of the Answering Brief filed before the Nevada Court of Appeals is attached as Exhibit "6." Thus, total fees incurred and paid since the arbitration are $45,084.50.

## 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 $45,084.50 of attorney fees incurred in the confirmation of the Arbitration Award before this Court and the Nevada Court of Appeals for a total of $156,734.46.

DATED this 18th day of February, 2021.

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

**THOMAS C. BRADLEY, ESQ.**
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Reno, Nevada 89509
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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 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:

_X_ Second Judicial District Court eFlex system

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

DATED this 18 day of February, 2021.

By: _____
Employee of Thomas C. Bradley, Esq.

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
Reno, Nevada 89509
(775) 323-5178
(775) 323-0709
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| 1 | Declaration of Thomas C. Bradley | 3 |
| 2 | Wespac Invoice (dated 06/01/2019) | 3 |
| 3 | Wespac Invoice (dated 09/26/2019) | 2 |
| 4 | Wespac Invoice (dated 06/26/2020) | 2 |
| 5 | Wespac Invoice (dated 01/11/2021) | 2 |
| 6 | Answering Brief filed in Nevada Court of Appeals, Case No 80376 | 65 |

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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.

7. To support, confirm, and defend the District Court's Order of Affirmance before the Nevada Court of Appeals, I hereby certify that I performed 31.8 hours of legal work. I believe that I provided zealous and superior representation before the Nevada Court of Appeals on behalf of my clients. I charged $395 per hour for my legal work. Accordingly, I billed the Defendants a total of $12,561.00 while the case was on Appeal.

8. Thus, total fees and costs incurred and paid by the Defendants following the Arbitration Award are $45,084.50.

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

DATED this 18th day of February, 2021.

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

# EXHIBIT 2

# EXHIBIT 2

THOMAS C. BRADLEY, ESQ.

800-379-1130 T 775-323-5178
TOM@TOMBRADLEYLAW.COM
435 MARSH AVENUE RENO, NEVADA 89509
TOMBRADLEYLAW.COM

June 1, 2019

WESPAC
689 Sierra Rose Drive
Suite A-2
Reno, NV 89511

**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*** |

# EXHIBIT 3

# EXHIBIT 3

# Law Office of Thomas C. Bradley

## INVOICE

INVOICE NUMBER: 2

INVOICE DATE: SEPTEMBER 26, 2019

Wespac
Greg Christian
689 Sierra rose Drive
Ste A-2
Reno, NV 89511
UNITED STATES

| DATE | PROJECT | DESCRIPTION | HOURS | RATE | AMOUNT |
|---|---|---|---|---|---|
| AUG-08-19 | Garmong | Review court Order, Telephone conference with clients | 0.80 | $395.00 | $316.00 |
| AUG-12-19 | Garmong | 2 Telephone conferences with Opposing counsel re: extension of time, Draft proposed stipulation re: extension of time, Telephone conference with client | 0.80 | $395.00 | $316.00 |
| AUG-13-19 | Garmong | Telephone conference with Client | 0.20 | $395.00 | $79.00 |
| AUG-13-19 | Garmong | Telephone conference with Opposing Counsel, Revise proposed stipulation , Draft proposed order | 0.80 | $395.00 | $316.00 |
| AUG-21-19 | Garmong | Prepare pleadings to correct problem with Stipulation being stricken | 0.20 | $395.00 | $79.00 |
| AUG-29-19 | Garmong | Telephone conference with client re: status and standard for amending Judgment | 0.20 | $395.00 | $79.00 |
| SEP-05-19 | Garmong | Review and analysis and Legal research re: Garmong's Motion to Amend judgment, Telephone conference with Opposing Counsel, Telephone conference with client | 2.10 | $395.00 | $829.50 |
| SEP-06-19 | Garmong | Legal research law re: Motion to amend | 1.70 | $395.00 | $671.50 |
| SEP-09-19 | Garmong | Draft Opposition to Motion to Amend | 5.10 | $395.00 | $2,014.50 |
| SEP-25-19 | Garmong | Review Reply to Opposition to Motion to Amend Judgment, Legal research, Draft email to clients | 0.30 | $395.00 | $118.50 |
| | | **Total amount of this invoice** | | | **$4,819.00** |

# EXHIBIT 4

# EXHIBIT 4

# Law Office of Thomas C. Bradley

## INVOICE

INVOICE NUMBER: 01

INVOICE DATE: JUNE 26, 2020

Wespac
Greg Christian
689 Sierra Rose Drive
Ste A-2
Reno, NV 89511
UNITED STATES

| DATE | PROJECT | DESCRIPTION | HOURS | RATE | AMOUNT |
|---|---|---|---|---|---|
| MAY-07-20 | Garmong | Review appendix | 0.40 | $395.00 | $158.00 |
| MAY-28-20 | Garmong | Review Garmong's opening brief, Telephone conference with client | 1.50 | $395.00 | $592.50 |
| JUN-15-20 | Garmong | Legal research, Draft brief | 5.30 | $395.00 | $2,093.50 |
| JUN-16-20 | Garmong | Legal research, Draft brief | 5.40 | $395.00 | $2,133.00 |
| JUN-17-20 | Garmong | Legal research, Draft brief | 5.10 | $395.00 | $2,014.50 |
| JUN-18-20 | Garmong | Draft brief | 5.60 | $395.00 | $2,212.00 |
| JUN-19-20 | Garmong | Finalize brief | 1.90 | $395.00 | $750.50 |
| | | **Total amount of this invoice** | | | **$9,954.00** |

# EXHIBIT 5

# EXHIBIT 5

# Law Office of Thomas C. Bradley

## INVOICE

INVOICE NUMBER: 001

INVOICE DATE: JANUARY 11, 2021

Wespac
Greg Christian
689 Sierra Rose Drive
Ste A-2
Reno, NV 89511
UNITED STATES

| DATE | PROJECT | DESCRIPTION | HOURS | RATE | AMOUNT |
|---|---|---|---|---|---|
| DEC 2020 - JAN 2021 | Garmong | Review Order, Legal Research, Telephone conferences with Client, Telephone conference with corporate counsel, Legal Research: Petition for Rehearing, Review Petition for Rehearing, Legal Research: standards for rehearing | 6.60 | $395.00 | $2,607.00 |
| | | **Total amount of this invoice** | | | **$2,607.00** |

# EXHIBIT 6

# EXHIBIT 6

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Facsimile (775) 323-0709
Tom@TomBradleyLaw.com
Attorney for Respondents



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

GREGORY O. GARMONG,

Appellant, Case No. 80376

v.

WESPAC; GREG CHRISTIAN,

Respondents.
_____/

Appeal from the Second Judicial District Court

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

## NRAP 26.1 DISCLOSURE

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

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

Dated this 23rd of June, 2020.

By /s/ *Thomas C. Bradley*
THOMAS C. BRADLEY, ESQ.
Nevada Bar No. 1621
435 Marsh Avenue
Reno, Nevada 89509
Telephone (775) 323-5178

## JURISDICTIONAL STATEMENT

The basis for the jurisdiction of this Court is NRAP Rule 3A(b)(1): "A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." This is appeal from an order confirming an arbitration award. NRS 38.243(1). On March 11, 2019, the arbitrator issued his Final Award. JA 5:0727. Garmong requested that the Final Award be vacated by the District Court, and on August 8, 2019 the District Court entered an order confirming the arbitrator's Final Award. JA 6:1095.[1] Garmong moved to alter or amend this Order. Notice of entry of the District Court's Order Denying Motion to Alter or Amend was served and filed on December 9, 2019. JA 7:1221. Appellant Garmong his filed Notice of Appeal on January 7, 2020. JA 7:1238.

[1] References to the Joint Appendix ("JA") include the volume number, colon and the document number found in the lower right corner of each page.

## ROUTING STATEMENT

This is an appeal from the confirmation of an Arbitration Award in favor of the defendants/respondents and from a confirmation of an Arbitration Award of attorney's fees. It is presumptively assigned to the Court of Appeals. NRAP 17(b)(5) (Appeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case) and (7) (Appeals from postjudgment orders in civil cases).

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| C. Appellant failed to meet his burden of proving, by clear and convincing evidence, that the Arbitrator Intentionally disregarded material facts or intentionally refused to follow the law. | 29 |

D. Appellant failed to meet his burden of proving, by clear and convincing evidence, that he did not execute a valid and enforceable Arbitration Agreement. 31

E. Appellant failed to meet his burden of proving, by clear and convincing evidence, that the Award of Attorney's Fees violated Nevada Law. 33

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## I. INTRODUCTION

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

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

## II. STATEMENT OF THE ISSUES PRESENTED

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

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

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

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

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

## III. STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Petition for Writ of Mandamus or Prohibition*.

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

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

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

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

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

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

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

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

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

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

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

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

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

## IV. STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

**C. Mr. Garmong's suit was frivolous.**

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

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

> "Over the past fifteen years, I have carefully reviewed and analyzed hundreds of cases against SEC Registered Advisors, FINRA representatives, and other financial advisors alleging breach of fiduciary duty and other similarly related claims. Based upon the opinions and conclusions contained in my arbitration hearing testimony, **I believe**

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

JA 4:685 (emphasis added).

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

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

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

RA 1:0075.

/ / /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RA 1:0112.

**H. Mr. Garmong did not lose money.**

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

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

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

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

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

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

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

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

## I. Judge Pro's Arbitration Award

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Clearly, Wespac and Mr. Christian did not subvert those objectives by their actions.

- Christian acknowledged that Garmong's "life situation changed" when he retired but explained that he knew of Garmong's intended retirement from the beginning of their professional relationship and had factored that into the investment strategy employed for Garmong's accounts with Wespac.

- Christian testified that at the time of his meeting with Garmong in October 2007, Garmong understood his overall investment portfolio and that he was partially invested in stocks and that stocks could go down.

- I [the Arbitrator] asked Dr. Garmong why, in October 2007, he did not convert his stocks to all cash if his goal was solely to protect capital after his retirement and in the face of a worsening economy. Garmong responded, "Because you don't need to do that to get gains and preserve capital…What I was trying to do was to stay even with inflation and not lose purchasing power to inflation."

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

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

- A final factor which weighs against Garmong's claim that Wespac and Christian caused a loss in the value of his portfolio by failing to adhere to his investment objectives is that Garmong was free to terminate his relationship with Wespac and Christian at any time.

- Cramer further explained that the securities in Garmong's accounts with Wespac were not sold but were transferred to Fidelity and his analysis of available statements from the Fidelity account showed that Garmong generated a profit.

- On the record adduced in this case, I find that Dr. Garmong has failed to prove the liability of Wespac or Christian on any of his claims by a preponderance of the evidence.

JA 5:727-738.

## V. LEGAL ARGUMENT

### A. Standard of Review

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

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

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

App. 2017).

"The party seeking to attack the validity of an arbitration award has the burden of proving, ***by clear and convincing evidence***, the statutory or common-law ground relied upon for challenging the award." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P.3d 172, 176 (Nev. 2004)(emphasis added).

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

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

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

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

forecloses further dispute on those issues at the trial stage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Claimant's basis for reconsideration is grounded in the well settled law of Nevada that summary judgment shall be granted, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). That is precisely the standard applied by the Arbitrator in concluding that summary judgment was not warranted.
>
> The exhaustive analysis provided in Claimant's original motion, and the voluminous declarations and exhibits attached thereto articulate Claimants view of the evidence supporting his claims. Many of the facts relied upon by claimant are indeed "undisputed." Viewed in context, however, the conclusion of the Arbitrator then, and now is that they do not entitle Claimant to judgment as a matter of law without first

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

JA 3:391-394.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 1. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JA 5:727-738.

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

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

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

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

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

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

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

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

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

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

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

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

In Nevada, "the method upon which a reasonable fee is determined is subject to the discretion of the court,' which 'is tempered only by reason and fairness.'" Shuette v. Beazer Homes Holding Corp., 121 Nev. 837, 865, 124 P.3d 530, 548-49 (2005) (*quoting* University of Nevada v. Tarkanian, 110 Nev. 581, 591,

879 P. 2d 1180 (1994)). However, there are certain factors which the Court should analyze in determining the reasonableness of a fee award:

> 33. (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

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

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

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

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

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

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

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

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

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

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

In relevant part, the Discovery Order signed by Judge Pro stated "the parties have agreed that Rules 6, 16.1(a)(1) (A-D), 30, 33, 34,and 37 of the Nevada Rules of Civil Procedure and the deadlines for filing oppositions and replies to motions found in Washoe District Court Rule 12 will generally govern this case unless the Arbitrator rules otherwise." (underscoring added). JA 1:14.

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

> (c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.
> (d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and awards.

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

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

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

Under Nevada law:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/ / /

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

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

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

## VII. CONCLUSION

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

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

Dated this 23rd of June, 2020.

By /s/ Thomas C. Bradley
THOMAS C. BRADLEY, ESQ.
Nevada Bar No. 1621
435 Marsh Avenue
Reno, Nevada 89509
Telephone (775) 323-5178

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the following formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more and contains 12,472 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter

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relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd of June, 2020.

By /s/ *Thomas C. Bradley*

THOMAS C. BRADLEY, ESQ.
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435 Marsh Avenue
Reno, Nevada 89509
Telephone (775) 323-5178

## CERTIFICATE OF SERVICE BY ELECTRONIC FILING

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

Carl M. Hebert, Esq.
202 California Avenue
Reno, NV 89509
Counsel for Appellant

/s/ *Mehi Aonga*
An employee of
THOMAS C. BRADLEY, ESQ.

CARL M. HEBERT, ESQ.
Nevada Bar #250
2215 Stone View Drive
Sparks, NV 89436
(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.
_____/

---

**MOTION TO STRIKE DECLARATION OF THOMAS C. BRADLEY IN SUPPORT OF SECOND AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS**

---

Plaintiff Gregory O. Garmong moves to strike the declaration of Thomas C. Bradley given in support of the defendants' second amended motion for attorney's fees and costs filed on February 18, 2021. The basis for this motion is that declarations given in support of attorney's fees must be made on personal knowledge.

## INTRODUCTION

This was an action for negligent financial management advice against the defendants. An arbitrator decided for the defendants. Plaintiff Garmong filed a motion to vacate the arbitration award, among other post-award motions. The defendants moved to confirm the award. On August 8, 2019 the Court issued its order confirming the award and denying the plaintiff's post-award motions.

Defendants WESPAC and Christian (collectively "WESPAC") immediately filed a

motion for attorney's fees on August 8, 2019. In anticipation of the filing of a motion to alter or amend the order of August 8, 2019, which was functionally a judgment, the parties entered into a stipulation that WESPAC could file an amended motion for fees if the Court decided the plaintiff's motion to amend in favor of WESPAC. See the order on stipulation entered on August 27, 2019.

On December 6, 2019 this Court entered its order denying the plaintiff's motion to alter or amend the judgment under NRCP 59(e). WESPAC then filed its amended motion for fees on December 9, 2019. Garmong appealed. On March 9, 2020 the Court entered an order holding in abeyance the amended motion for fees until after the disposition of the appeal.

The Court of Appeals issued its Order of Affirmance on December 1, 2020. Garmong moved for rehearing in that court. Rehearing was denied on February 17, 2021. On February 18, 2021 WESPAC filed its second amended motion for fees. Garmong then filed a petition for review before the Supreme Court, which denied it on April 6, 2021.

Previously, this Court entered an order on stipulation on March 1, 2021 granting Garmong 10 days after the conclusion of the appeal, and subsequent petitions for rehearing and review, within which to file an opposition to the second amended motion for fees.

Garmong now brings this motion to strike the declaration of Thomas C. Bradley given in support of the second amended motion for attorney's fees because it is not based on personal knowledge and is therefore legally insufficient to establish an award of fees.

**POINTS AND AUTHORITIES**

The second amended motion for fees filed on February 18, 2021 is accompanied by the declaration of Thomas C. Bradley, Esq., counsel for WESPAC. Motion, exhibit 1.

The declaration starts with: "I, Thomas C. Bradley, declare under penalty of perjury to the following[.]" It concludes with: "I swear under penalty of perjury that foregoing statements in this declaration are true and correct." The content of the declaration between these two statements is the justification for a post-arbitration award of fees to WESPAC in the amount of $48,084.50.

Declarations in support of attorney fee awards should be based upon personal knowledge. Muniz v. United Parcel Serv., Inc., 738 F.3d 214, 222 (9th Cir. 2013); Mardirossian & Assocs., Inc. v. Ersoff, 62 Cal.Rptr.3d 665, 674–75 (Cal. App. 2007). See Morgan v. Board of County Commissioners of Eureka County, 9 Nev. 360, 368 (1874) ("An affidavit which states no fact within the knowledge of the person making it would be of but little weight in any legal proceeding. Such an affidavit does not establish any fact required by the law to be established[.]").

An approved means for objecting to evidence is a motion to strike:

> 1. Except as otherwise provided in subsection 2 [plain error], error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection.
>
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

NRS 47.040 (emphasis added); Thomas v. Hardwick, 126 Nev. 142, 156, 231 P.3d 1111, 1120 (2010).

Declarant Bradley does not swear of his own personal knowledge to the facts stated in his declaration attached as Exhibit 1 to the second amended motion for fees. Therefore, the declaration should be stricken. As a result, the second amended motion for fees lacks adequate factual support and should be denied on that basis.

## CONCLUSION

Plaintiff Garmong respectfully requests that this Court strike the declaration of Thomas C. Bradley, Esq., exhibit 1 to the second amended motion for fees filed by WESPAC on February 18, 2021.

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

DATED this 26th day of April, 2021

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

Counsel for plaintiff Garmong

CARL M. HEBERT, ESQ.
Nevada Bar #250
2215 Stone View Drive
Sparks, NV 89436
(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.
_____/

---

**MOTION FOR EXTENSION OF TIME TO FILE OPPOSITION TO DEFENDANTS' SECOND AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS; OPPOSITION POINTS AND AUTHORITIES**

---

Plaintiff Gregory O. Garmong moves for an extension of time to file an opposition to defendants' second amended motion for attorney's fees and costs filed on February 18, 2021.

## INTRODUCTION

This was an action for negligent financial management advice against the defendants. An arbitrator decided for the defendants. Plaintiff Garmong filed a motion to vacate the arbitration award, among other post-award motions. The defendants moved to confirm the award. On August 8, 2019 the Court issued its order confirming the award and denying the plaintiff's post-award motions.

Defendants WESPAC and Christian (collectively "WESPAC") immediately filed a

motion for attorney's fees on August 8, 2019. In anticipation of the filing of a motion to alter or amend the order of August 8, 2019, which was functionally a judgment, the parties entered into a stipulation that WESPAC could file an amended motion for fees if the Court decided the plaintiff's motion to amend in favor of WESPAC. See the order on stipulation entered on August 27, 2019.

On December 6, 2019 this Court entered its order denying the plaintiff's motion to alter or amend the judgment under NRCP 59(e). WESPAC then filed its amended motion for fees on December 9, 2019. Garmong appealed. On March 9, 2020 the Court entered an order holding in abeyance the amended motion for fees until after the disposition of the appeal.

The Court of Appeals issued its Order of Affirmance on December 1, 2020. Garmong moved for rehearing in that court. Rehearing was denied on February 17, 2021. On February 18, 2021 WESPAC filed its second amended motion for fees. Garmong then filed a petition for review before the Supreme Court.

Previously, this Court entered an order on stipulation on March 1, 2021 granting Garmong 10 days after the conclusion of the appeal, and subsequent petitions for rehearing and review, within which to file an opposition to the second amended motion for fees. On April 6, 2021 the Supreme Court entered its order denying review under NRAP 40B.

**POINTS AND AUTHORITIES**

The deadline for the plaintiff to file points and authorities in opposition to the defendants' second amended motion for attorney's fees was April 16, 2021. Counsel for the plaintiff overlooked this deadline, which was triggered by the order of the Supreme Court denying review under NRAP 40B. The plaintiff now requests leave to file a late

opposition.

To the extent permitted by their clients, counsel have cooperated with each other on extensions of time and have liberally granted them. Concerning the motions for attorney's fees, counsel have already entered into one stipulation, filed on August 21, 2019, extending the time to allow the defendants to file an amended motion for fees after this Court's decision on the plaintiff's motion to alter or amend the omnibus order of August 8, 2019. This extension permitted the defendants to claim additional fees after that particular motion practice.

In this instance, when counsel for the defendants noticed that the plaintiff had not filed an opposition to the second amended motion for fees by April 16, 2021, he simply filed a request for submission. He did not inquire of plaintiff's counsel whether he intended to file an opposition. Rule of Professional Conduct Rule 3.5A, entitled "Relations With Opposing Counsel," states: "When a lawyer knows or reasonably should know the identity of a lawyer representing an opposing party, he or she should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed." Here, counsel for the defendants essentially took a default against the plaintiff on the second amended motion for fees by not inquiring of plaintiff's counsel whether he intended to file an opposition. This was a violation of RPC 3.5A, or at least the spirit of it, justifying an extension of time to file an opposition. It was not the fault of defendants' counsel that the plaintiff overlooked the deadline, but not "taking advantage of the lawyer by causing a default" required he at least call, which he did not. Exhibit 1, declaration of Carl M. Hebert, counsel for the plaintiff.

There is also this: "The district court must also consider this state's bedrock policy to decide cases on their merits whenever feasible[.]" Willard v. Berry-Hinckley Industries, 136 Nev. Adv. Op. 53 469 P.3d 176, 179 (2020).

Turning to the merits of the second amended motion for fees, declarations in support of attorney fee awards should be based upon personal knowledge. Muniz v. United Parcel Serv., Inc., 738 F.3d 214, 222 (9th Cir. 2013); Mardirossian & Assocs., Inc. v. Ersoff, 62 Cal.Rptr.3d 665, 674–75 (Cal. App. 2007). See Morgan v. Board of County Commissioners of Eureka County, 9 Nev. 360, 368 (1874) ("An affidavit which states no fact within the knowledge of the person making it would be of but little weight in any legal proceeding. Such an affidavit does not establish any fact required by the law to be established[.]").

Declarant Bradley did not swear of his own personal knowledge to the facts stated in his declaration attached as Exhibit 1 to the second amended motion for fees. Therefore, the declaration should be stricken. As a result, the second amended motion for fees lacks adequate factual support and should be denied on that basis.

In his declaration Mr. Bradley also claimed recovery of the costs of securities arbitration consultant Michael Hume for 31.75 hours of his services at a total price of $3,175.00. Exhibit 1 to second amended motion for fees, at ¶ 5. The time and effort expended by Mr. Hume is not reported by Mr. Bradley on personal knowledge and therefore this item of recovery should be denied.

The case of Muniz v. United Parcel Serv., Inc., 738 F.3d 214, 222 (9th Cir. 2013) is instructive. There plaintiff's counsel submitted a declaration in support of a motion for attorney's fees swearing to the hours that his paralegal (also his wife) spent on the case. There was no declaration from the paralegal. The 9th Circuit Court of Appeals rejected the

paralegal fees for lack of evidentiary support:

> Our decision on this issue is controlled by the Federal Rules of Evidence. Hearsay is a statement by someone who does not testify at a hearing and which is offered to prove the truth of the matter asserted in the statement. FED. R. EVID. 801(c). Here the matter asserted in the statement is the hours expended by Ms. Jaffe [the paralegal] in this case and contained in the spreadsheet. We are satisfied that the only reasonable interpretation of Mr. Jaffe's [plaintiff's counsel] declaration is that Ms. Jaffe provided this information to him. It was therefore hearsay and the district court's conclusion to the contrary clearly mistaken.

*Id.* at 223. Here, too, Mr. Bradley's declaration at ¶ 5 is hearsay and therefore cannot serve as a basis to recover Mr. Hume's consultant's fee.

There is an additional problem with Mr. Hume's fee. It was an item of costs under NRS 18.005 (5)(expert witnesses) or (17)(all other reasonable and necessary expenses). As such it should have been included in a memorandum of costs filed within 5 days from entry of judgment. NRS 18.110(1). There was no memorandum of costs filed in this case; consequently, the defendants cannot recover Mr. Hume's consulting fee.

## CONCLUSION

For the reasons stated above, plaintiff Garmong respectfully requests that this Court grant an extension of time to allow for the filing of an opposition to the defendants' second amended motion for attorney's fees.

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

DATED this 27th day of April, 2021.

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

Counsel for plaintiff Garmong

## INDEX OF EXHIBITS

| Number | Description | Pages |
|---|---|---|
| 1 | Declaration of Carl M. Hebert, Esq. | 1 |

## DECLARATION OF CARL M. HEBERT

I, CARL M. HEBERT, declare the following facts, knowing them to be true of my own personal knowledge:

1. I am counsel of record for the plaintiff in the above-captioned case.

2. This declaration is given in support of the plaintiff's motion for extension of time to oppose the defendants' second amended motion for fees filed February 18, 2021.

3. An opposition to the defendants' second amended motion for fees was due on April 16, 2021. I overlooked calendaring the opposition and did not timely file it.

4. I did not receive any contact from Thomas C. Bradley, counsel for the defendants, inquiring whether the plaintiff intended to oppose his motion for fees; instead, he simply filed a request for submission of the motion, with the effect that he took a default from the plaintiff.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4/27/21

Carl M. Hebert

CARL M. HEBERT

CODE: 2645
THOMAS C. BRADLEY, ESQ.
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435 Marsh Avenue
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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

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE**

Defendants Wespac and Greg Christian, by and through their counsel, Thomas C. Bradley, Esq., hereby oppose Plaintiff Gregory Garmong's *Motion to Strike the Declaration of Thomas C. Bradley in Support of Second Amended Motion for Attorney's Fees and Costs* ("Motion to Strike"). Defendants' *Opposition* is based on the following Points and Authorities, and all other pleadings, briefs, and exhibits identified below.

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

DATED this 5th day of May, 2021.

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

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
Reno, Nevada 89509
(775) 323-5178
(775) 323-0709
Tom@TomBradleyLaw.com

## POINTS AND AUTHORITIES

Mr. Garmong failed to timely file an opposition to Defendant's' Second Amended Motion for Attorney's Fees. In a desperate attempt to avoid his legal duty to timely file pleadings, Mr. Garmong filed the Motion to Strike. The Motion to Strike is frivolous. Although the law requires that a declaration contain information that is within the declarant's own "personal knowledge", there is no requirement that the declaration include the words “personal knowledge” as long as it is clear that the averments in the declaration are within the declarant's personal knowledge. For example, it is clearly within counsel's personal knowledge how much he charges his clients per hour, when and where he graduated from law school, his prior legal experience, whether or not he was president of the local chapter of the Inns of court, what his current hourly rate for security arbitration, the number of hours that he worked and billed on the instant case, and his personal supervision of Mr. Hume’s assistance on the case.

In any event, counsel has attached a supplemental declaration that includes the words “personal knowledge.” *See* Exhibit “1.”

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

DATED this 5th day of May, 2021.

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

**THOMAS C. BRADLEY, ESQ.**
435 Marsh Avenue
Reno, Nevada 89509
(775) 323-5178
(775) 323-0709
Tom@TomBradleyLaw.com

**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:

_X__ Second Judicial District Court EFlex system

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

DATED this 5th day of May, 2021.

By:___*Mehi Aonga*_____
Employee of THOMAS C. BRADLEY, Esq.

**THOMAS C. BRADLEY, ESQ.**
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## INDEX OF EXHIBITS

| Exhibit No. | Description | No. of Pages |
|---|---|---|
| 1 | Supplemental Declaration of Thomas C. Bradley | 3 |

**THOMAS C. BRADLEY, ESQ.**
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(775) 323-0709
Tom@TomBradleyLaw.com

## 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 8**

addressed to:

THOMAS C. BRADLEY, ESQ.
Bar No. 1621
435 Marsh Ave.
Reno, NV 89509
775-323-5178
tom@tombradleylaw.com

Counsel for defendants/respondents
WESPAC; Greg Christian

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