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Elizabeth A. Brown
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IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY O. GARMONG,

Appellant,

Case No. 83356

v.

WESPAC; GREG CHRISTIAN,

Respondents.
_____/

Appeal from the Second Judicial District Court

RESPONDENTS' APPENDIX

INDEX TO RESPONDENTS' APPENDIX

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 14th day of February, 2022, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **RESPONDENTS' APPENDIX** on the following:

Carl M. Hebert, Esq.
2215 Stone View Drive
Sparks, Nevada 89436
Counsel for Appellant

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

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Clerk of the Court
Transaction # 7782911

CODE NO. 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

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

Defendants.
_____/

Case No. CV12-01271

Dept. No. 6

ORDER HOLDING ISSUANCE OF ORDER ON DEFENDANTS' AMENDED MOTION FOR ATTORNEY'S FEES IN ABEYANCE

Before this Court is *Defendants' Amended Motion for Attorney's Fees* ("*Motion*") filed by Defendants WESPAC and GREG CHRISTIAN (collectively "Defendants" unless individually referenced), through their attorney of record, Thomas C. Bradley, Esq. The *Motion* seeks an award of additional attorney's fees in the amount of $32,523.50.

No opposition or reply was filed, and the matter was submitted for decision.

I. PROCEDURAL BACKGROUND.

This is an action for breach of a financial management agreement and carries with it a robust procedural history. Mr. Garmong filed his *Complaint* on May 9, 2012. On September 19, 2012, Defendants filed their *Motion to Dismiss and Compel Arbitration*. On

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

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

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

On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*, arguing the JAMS arbitrators were prejudiced against Mr. Garmong. This matter was fully briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration* requiring three arbitrators. The parties then stipulated to select one arbitrator, to reduce costs. *Stipulation to Select One Arbitrator*, October 17, 2016. In accordance, this Court entered its *Order*

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

Appointing Arbitrator on October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator. After it was determined Mr. Ornstil was unavailable, Mr. Garmong stipulated to the appointment of either retired Judge Phillip M. Pro,[2] or Lawrence R. Mills. Esq.

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

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

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

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

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

Motion to Disqualify Arbitrator Pro; Order Denying Motion to Vacate Order Denying Motion for Summary Judgment; Order Denying Motion to Appoint New Arbitrator ("*Arbitrator Order*") on November 11, 2019.

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

Judge Pro found Mr. Garmong's claims, for: (1) Breach of Contract, (2) Breach of Implied Warranty, (3) Breach of the Implied Covenant of Good Faith and Fair Dealing, (4) Nevada's Deceptive Trade Practices Act, (5) Breach of Fiduciary Duty of Full Disclosure, (6) Intentional Infliction of Emotional Distress and (7) Unjust Enrichment, all failed as a matter of law because Mr. Garmong did not establish his claims by a preponderance of the evidence. *Final Award*, p. 8-9. Furthermore, after weighing the necessary factors required by Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), Judge Pro found Defendants were entitled to an award of reasonable attorneys' fees in the total sum of $111,649.96. *Final Award*, p. 11.

After the *Final Award,* the litigation proceeded with several filings. On August 8, 2019, this Court entered its *Order Re Motions* ("*ORM*"): (1) granting *Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reducing Award to Judgment, Including,*

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

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

On December 6, 2019, this Court entered its *Order Denying Motion to Alter or Amend Judgment* ("*AA Order*") maintaining its prior rulings within the *ORM*. On January 7, 2020, Mr. Garmong filed his *Notice of Appeal* to the Nevada Supreme Court regarding this Court's *Arbitrator Order*, *ORM*, and *AA Order*.

In the present *Motion*, counsel for Defendants moves, pursuant to NRS 38.239, 38.241, 38.242, and 38.243(3), for an award of attorney's fees incurred to confirm the *Final* Award, and oppose Mr. Garmong's *Motion to Alter or Amend the Judgment*, and for inclusion of additional fees in the final Judgment amount. *Motion*, p. 2. Lastly, counsel provides the requisite analysis under Brunzell v. Golden Gate National Bank, 85 Nev.at 349, 455 P.2d at 33 to support his *Motion*.

II. APPLICABLE LAW AND ANALYSIS.

Chapter 38 of the Nevada Revised Statutes addresses attorney's fees under the Uniform Arbitration Act of 2000. After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the Court for an order confirming the award at which time the Court shall issue a confirming order. NRS 38.239. If the Court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending. NRS 38.241(4). Unless a motion to vacate is pending, the Court shall confirm the award. NRS 38.242(2). On application of a prevailing party under NRS 38.239, 38.241 or 38.242, the Court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying or correcting an award. NRS 38.243(3).

Accordingly, this Court examines the reasonableness of Defendants' attorney's fees under the factors set forth in Brunzell:

> (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.

85 Nev. at 349, 455 P.2d at 33..

The *Notice of Appeal* filed January 7, 2020 does not divest this Court of jurisdiction to decide the instant *Motion*, or to determine costs. See Kantor v. Kantor, 116 Nev. 886, 864, 9 P.3d 825, 380 (2000) (motion for attorney's fees was collateral and did not affect merits of

appeal); Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 417 (2000) (existence of a proper appeal does not divest court of jurisdiction to determine costs).

The district court's decision to award attorney fees is within its discretion and will not be disturbed on appeal absent a manifest abuse of discretion. Capanna v. Orth, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018). Furthermore, district courts have great discretion to award attorney fees, and this discretion is tempered only by reason and fairness. Haley v. Dist. Ct., 128 Nev. 171, 178, 273 P.3d 855, 860 (2012).

In this case, the Court recognizes Mr. Garmong's *Notice of Appeal* seeks appellate review of three substantial orders issued by this Court. As a result, the Court exercises its discretion and shall hold any rulings on additional fees in abeyance until the Nevada Supreme Court renders its decision on this Court's *Arbitrator Order*, *ORM Order*, and *AA Order*, after which *Motion* may be resubmitted should legal grounds exist. See Capanna, 134 Nev. at 895, 432 P.3d at 734; Haley, 128 Nev. at 178, 273 P.3d at 860.

III. CONCLUSION AND ORDER.

For the foregoing reasons, and good cause appearing therefor,

IT IS HEREBY ORDERED Defendants' *Amended Motion for Attorney's Fees* ("*Motion*") is **HELD IN ABEYANCE**. Defendants shall resubmit after disposition of the current appeal. This *Order* does not affect the $111,649.96 in attorney's fees and costs previously confirmed by this Court prior to the appeal.

Dated this 9th day of March, 2020.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 9th day of March, 2020, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

THOMAS BRADLEY, ESQ.

CARL HEBERT, ESQ.

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

Shari Bore

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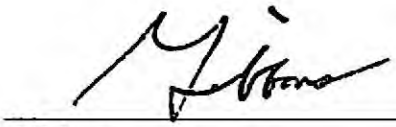
[2]Generally, "a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court." *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). However, the district court maintains jurisdiction over issues that are collateral to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

Therefore, we

ORDER the judgment of the district court AFFIRMED.



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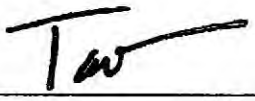
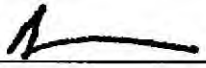


_____, J.
Tao



_____, J.
Bulla

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).

Case No. 80376 COA

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY GARMONG,

Appellant

--against–

WESPAC; GREG CHRISTIAN; DOES 1-10, inclusive

Respondents

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

PETITION FOR REHEARING

Carl M. Hebert, Esq.
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2215 Stone View Drive
Reno, NV 89436
(775) 323-5556

Attorney for Appellant
Gregory Garmong

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 Garmong

Appellant Garmong petitions for rehearing pursuant to NRAP 40.

I. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (PMPSJ)

A. The Order of Affirmance ("Order") overlooked or misapprehended the mandatory requirement that this Court must review the arbitrator's decision and the district court's affirmance of the denial of Plaintiff's Motion for Partial Summary Judgment ("PMPSJ") *de novo*, without deference to the arbitrator's or the district court's findings.

The first sentence of the Order observes, Garmong "appeals a district court order confirming an arbitration award[.]" The governing law for review of a district court's denial of a motion for summary judgment is set forth in GES, Inc. v. Corbitt, 117 Nev. 265, 268 (2001), discussed at Reply 6:

> [W]e may review the propriety of the district court's summary judgment ruling[.] Our review is de novo and without deference to the district court's findings. Summary judgment is appropriate only when there are no material issues of fact and the moving party is entitled to judgment as a matter of law.

See also Benchmark Ins. Co. v. Sparks, 127 Nev. 407, 411 (2011) and Cromer v. Wilson, 126 Nev. 106, 109 (2010).

A District Court's confirmation of an arbitrator's award is reviewed *de novo* without deference to the arbitrator's findings. Thomas v. City of North Las Vegas, 122 Nev. 82, 97 (2006). Appellant's Opening Brief ("AOB") 5.

The Order overlooks or misapprehends the requirement that this Court must review the arbitrator's denial and the District Court's denial of PMPSJ "de novo and without deference to the district court's findings" or the arbitrator's findings. The statement of Order at 5 suggesting deference to the arbitrator's decision is error.

The arbitrator, the district court, and the Order did not evaluate and decide PMPSJ according to the law, or make findings of fact or conclusions of law. This Court must now do what it is required on all motions for summary judgment: Evaluate *de novo* the Undisputed Material Facts ("UMFs") and their support set forth in PMPSJ, evaluate Defendants' Opposition to PMPSJ and its support, evaluate Plaintiff's Reply, and apply the substantive law to the UMFs. In doing this *de novo* evaluation, this Court will find that Defendants did not submit any admissible evidence in opposition. All Garmong's UMFs were in fact undisputed, the substantive law is clear, and PMPSJ must be granted.

B. If this Court follows the law of Nevada, it has no choice but to reverse the District Court and arbitrator and grant PMPSJ.

UMFs 12-20 (JA 1/65:1-66:66:9), if undisputed, are sufficient to establish liability under the Fifth Claim (JA 1/088:2-7), Sixth Claim (JA 1/091:1-10), Seventh Claim (any of JA 1/093:18-094:5; JA 1/094:17-095:3; JA 1/095:6-15), and Tenth Claim (JA 100:12-18).

The Order overlooked or misapprehended that Wespac/Christian did not

attempt to dispute UMFs 12-20 or even mention these UMFs (JA 3/374:18-23). The Court must review Defendants' Opposition to PMPSJ starting at JA 3/246, and it will find no mention at all of UMFs 12-20.

Because UMFs 12-20 are undisputed, under the applicable law the Fifth, Sixth, Seventh, and Tenth Claims are established. (JA 1/84:9-101:2).

The following sections discuss specific errors in the Order, but pursuant to GES the Court will have to return to the original papers filed in relation to PMPSJ.

C. The Order and the arbitrator overlooked or misapprehended the requirement to follow the procedural law of summary judgment.

The Order does not mention either NRCP 56 in the context of deciding summary judgment motions, or the leading case on summary judgment motions that is discussed extensively in AOB, Wood v. Safeway, 121 Nev. 724 (2005). The arbitrator's orders (3/0366-0369 and 3/0391-039) denied PMPSJ but admitted that "Many of the facts relied upon by Claimant are indeed 'undisputed.' " (JA 3/0392:3). The orders did not discuss a single material fact and did not identify a single material fact in dispute, nor did the arbitrator discuss a single claim.

The Order overlooked or misapprehended that the arbitrator refused to follow the controlling procedural legal authority for analyzing and deciding motions for summary judgment, Wood v. Safeway, Inc., (AOB 2, 10-11, 13, 15-17), which requires the court first to identify which material facts are undisputed, and then to

apply the substantive law to those undisputed material facts.[1] The Order overlooked or misapprehended that the arbitrator refused to identify the specific UMFs that were "undisputed" and refused to discuss a single claim at issue.

Order at 3 includes a block-indented quote from JA 3/392, admitting that "Many of the facts relied upon by Claimant are indeed 'undisputed.' " The quote goes on to state that "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." In the second following paragraph, the arbitrator explained the purpose of the "merit hearing": "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, Gregory Garmong and Greg Christian, and on the Arbitrator's opportunity to weigh and assess the credibility of each witness, and all the evidence in that context." This was the sole justification that the arbitrator used to deny PMPSJ.

The Order overlooks or misapprehends the absolute bar to performing a "merit hearing" to evaluate credibility as part of a summary judgment proceeding. The arbitrator refused to decide PMPSJ according to the procedure of Wood on a theory that a "merits" hearing was required as part of the summary judgment proceeding

[1] Indeed, all of the UMFs presented at PMPSJ JA 1/061-066 were undisputed.

" to test the credibility" of the main witnesses. JA 3/392. The Order at 6 justifies this position on a theory that "The arbitrator correctly decided that the material facts centered on alleged verbal conversations between individuals." There were no "verbal conversations" introduced in the summary judgment proceeding, only the paper record with evidence. If there were "conversations," they necessarily were set forth in declarations, which could be disputed.

The order overlooked and misapprehended authority providing that witness credibility may not be assessed in summary judgment proceedings. Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14 (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.") This authority was discussed at AOB 22-23.

In view of the arbitrator's admission that "Many of the facts relied upon by Claimant are indeed 'undisputed'" and in view of the absolute ban by the Nevada Supreme Court on testing of credibility in a summary judgment proceeding, the judgment of the District Court was easily reversible as a clear error of law.

D. The Order overlooked or misapprehended the distinction between the summary judgment proceedings and the later hearing.

The two full paragraphs on pg. 6 of the Order seek to justify the arbitrator's decision on PMPSJ by his unrelated actions after the hearing, some 20 months later in the case. The first paragraph refers to "alleged verbal conversations," but as

discussed above, verbal conversations are relevant to motions for summary judgment only if set forth in a declaration or authenticated transcript. The second paragraphs refers to "in his award," which occurred long after the decision on PMPSJ.

The Order overlooks or misapprehends that Garmong appealed only the denial of PMPSJ, not the results of any hearing. This is an important distinction, because the Order improperly attempts to mix arguments and positions from the two distinct proceedings.

In the second paragraph on page 6, the Order relies on alleged analysis by the arbitrator in the hearing. Inasmuch as the Order does not cite any such alleged "analysis" related to the decision on the PMPSJ, it tacitly concedes that there was no such analysis related to the decision on PMPSJ. The date of PMPSJ was November 20, 2017. (1 JA 59-110). The date of the "award" was April 11, 2019, about 20 months later. The merits must be decided based solely upon the PMPSJ papers and decisions.

This second paragraph deals in part with the information concealed from Garmong by Wespac/Christian, and which is alleged in UMFs 16-20 of PMPSJ (JA 1/065-066). The Order overlooks or misapprehends the fact that Wespac/Christian never even attempted to dispute any of the undisputed material facts, including UMFs 16-20. JA 3/286:9-10; 3/288:4-8.

E. Specific facts and law overlooked or misapprehended by the arbitrator, the District Court, and the Order.

AOB 34-49 lists and discusses specific facts and law overlooked or disregarded by the arbitrator, discussed in the AOB, and then overlooked or disregarded by the Order. NRAP 40(a)(2) requires that this Petition for Rehearing address these overlooked or disregarded facts and law.

The arbitrator and the Order overlooked or misapprehended the fraudulent misrepresentations and concealments made to Garmong by Wespac/Christian.

1. Wespac/Christian had a fiduciary duty to Garmong, which they violated. The arbitrator overlooked or misapprehended this fiduciary duty in deciding PMPSJ.

Other than describing the claims, the Order makes no mention of the fiduciary duty of Wespac/Christian to Garmong. This fiduciary duty was a key part of PMPSJ, because it required Wespac/Christian to make full and fair disclosures to Garmong.

The arbitrator disregarded the following misrepresentations and concealments by Wespac/Christian in violaiton of their fiducairy duty.

Wespac/Christian were investment advisors and financial planners. (1/JA 139 to 2/JA 154; 2/JA 224 to 3/JA 231). As a matter of law, financial planners have a fiduciary duty to a client like Garmong. NRS 628A.010(3); NRS 628A.020; Randono v. Turk, 86 Nev. 123, 129 (1970); Perry v. Jordan, 111 Nev. 943, 947 (1995).

All were cited at AOB 24.

2. The Order and the arbitrator overlooked or misapprehended the facts and law establishing violations of NRS 628A.030 by Wespac/Christian in concealing Christian's prior disciplining by the SEC for fraudulent securities practices.

Wespac/Christian first revealed on September 18, 2017 (JA 1/0034:26-0035:4) that Christian had been disciplined and suspended from practice by the SEC for fraudulent securities practices. Garmong first learned of this deception during this lawsuit. UMF 19 (JA 1/0065:26-0066:4) and Garmong Declaration ¶ 34 (JA 3/244:25-27) AOB 26-28.

3. The Order and the arbitrator overlooked or misapprehended 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 concealed that fact from Garmong.

Wespac/Christian were "investment advisors." 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). JA 1/0035:14; JA 1/0034:25; JA 1/0147l; AOB 28-29) JA 1/0065:10-16 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. JA 2/0155. Wespac/Christian concealed this violation of law from Garmong.

4. The Order and the arbitrator overlooked or misapprehended 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." JA 1/94:15-95:3. PMPSJ (JA 1/0212-0214; AOB 30-31) 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. (JA 1/0230; UMF 18 (JA 1/0065:22-25). Wespac/Christian concealed this violation from Garmong.

5. The Order and the arbitrator overlooked or misapprehended 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 investment advisors to have a Code of Ethics and to disclose that Code to customers. JA 1/0156; 1/0162-163; AOB 31. Wespac/Christian had no such Code, and failed to disclose its absence to Garmong in violation of NRS 628A.030(2)(a). Garmong Declaration JA 3/244 ¶¶ 24-29; Exhibits 14-15 to PMPSJ.

6. The Order and the arbitrator overlooked or misapprehended the three fraudulent Christian affidavits filed in this lawsuit.

Defendant Christian filed three false and fraudulent affidavits in this lawsuit. (JA 3/331-333; 3/347-348; 3/350; AOB 32-33). 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) overlooked or misapprehended the fraudulent affidavits.

7. The Order and the arbitrator overlooked or misapprehended 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 fraud and fraudulent concealment discussed in subsections a-e are highly material. Garmong would not have done business with Wespac/Christian if they had disclosed this information. Garmong Declaration JA 3/244-245, ¶ 35; AOB 33-35.

8. The Order and the arbitrator overlooked or misapprehended the liability of Wespac and Christian under NRS Ch. 628A.

See Perry, Randono, NRS 628A.020, NRS 628A.030 discussed at AOB 35-37. The holdings of all of these case authorities and laws were overlooked or misapprehended by the Order and the arbitrator.

9. The Order and the arbitrator overlooked or misapprehended the liability of Wespac/Christian under NRS Ch. 598. AOB 37.

The liability and damages of Wespac and Christian are discussed at JA1/0084:9-0089:1. The Order and the arbitrator's Orders (JA 3/0366 and 3/0391) overlooked or misapprehended these facts and governing law.

10. The Order and the arbitrator overlooked or misapprehended the liability of Wespac/Christian under Breach of Fiduciary Duty. AOB 37.

The status of Wespac/Christian as fiduciaries for Garmong is undisputed. The fiduciary relationship is a key fact of this case that was argued at length in PMPSJ and in the AOB at, for example, pgs. 1, 20, 23-24, 26-28, 34-37, and 48. Yet the Order and the arbitrator completely overlooked or misapprehended this key fact. Other than listing the claims of the FAC at pg. 2-3, the Order never discusses the fiduciary status of Wespac/Christian and their obligations to Garmong. There is no explanation why both the arbitrator and the Order decided to disregard the fiduciary obligations of Wespac/Christian.

F. Statutory Grounds for Reversing the Arbitrator's Decision on PMPSJ.

1. The Order and the arbitrator overlooked or misapprehended that the decision on PMPSJ in favor of Wespac/Christian was procured by fraud. AOB 38-41.

The Order overlooks or misapprehends NRS 42.005 and Nelson v. Heer, 123 Nev. 217, 225 (2007).

The Order also overlooks or misapprehends the fraud practiced by Wespac/Christian upon Garmong and upon the Court. These frauds are described above.

Order at 7 argues that Garmong has not met his burden of demonstrating fraud.

The Order overlooks or misapprehends perhaps the most egregious fraud, Christian's concealment of his disciplining and suspension by the SEC for fraudulent conduct. Christian never disputed this fraud in relation to PMPSJ or otherwise.

The Order overlooks or misapprehends that Wespac/Christian did not dispute their fraudulent conduct in not disclosing that they had willfully violated their fiduciary duty, and concealed those violations from Garmong. The Order also overlooks or misapprehends the factual evidence that Garmong would never have dealt with Wespac/Christian if they had been honest and forthcoming and disclosed this information. JA 3/244-245, ¶ 35.

Order at 7 seeks to defend Wespac/Christian's fraud by arguing "Garmong alleges that Christian provided false information to the arbitrator." This is not accurate. The Order overlooks or misapprehends that fact that Garmong's allegation was much broader, and neither Wespac/Christian nor the Order indicate a source for this purported statement.

2. The Order and the arbitrator overlooked or misapprehended that no complete, unambiguous contract including an arbitration clause was ever made of record; there was no agreement to arbitrate. (NRS 34.241(1)(e)).

As discussed at AOB 41-45, there is no complete contract with an arbitration clause of record in this case. JA 3/0285:18-25 and 3/0298:5-0301:11. Any such contract would necessarily have included an Agreement, a completed Confidential Client Profile including completed pages 10-11, three different documents named "Exhibit A" and three different documents named "Exhibit B." The Order overlooked or misapprehended Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107 (1985), discussed at AOB 42-43, holding that the party asserting the agreement to arbitrate has the "burden of showing that a binding agreement existed." Defendants in this case have never done so.

Upon rehearing, the Court can easily resolve this issue by pointing out precisely where in the record there is such a complete, integrated, binding agreement.

G. Nonstatutory Grounds for Reversing the Arbitrator's Decision on PMPSJ (AOB 45-48).

The Order and the arbitrator overlooked or misapprehended Garmong's special factual circumstances of being elderly, that is, over 60 years of age during the entire time of the dealings with Westpac/Christian and their dissipation of his retirement savings and taking of fees from him. The Order also overlooks or apprehends

governing law, including NRS 598.0933 and 598.0977, and case authority such as 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."), Parsons v. First Investors Corp., 122 F.3d 525, 530 (8th Cir. 1997), ("Fraudulent representations which put the life savings of the elderly at risk are reprehensible and deserve punishment."); Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598 (2000); Estate of Wildhaber ex rel. Halbrook v. Life Care Centers, 2012 WL 5287980 (D. Nev. 2012). See also "Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse," 41 San Diego L. Rev. 505 (2004) and many other law review articles and treatises on this subject.

Parsons might have been speaking to the facts of the present case, where Defendants established trust by a series of fraudulent misrepresentations, thereafter recklessly dissipating the life savings of an elderly person. All of this authority was known to, and overlooked or misapprehended by, the arbitrator and the Order, see JA 1/0080:18-0081:1.

II. ATTORNEYS FEES

The Order overlooked or misapprehended the precedent that "[W]hen the attorney fees matter implicates questions of law, the proper review is de novo." Thomas v. City of North Las Vegas, 122 Nev. 82, 90 (2006). Here, the attorney fees matter involves interpretation of NRCP 68, JAMS Rule 24, and several case

authorities. The Order did not review the attorneys fees matter *de novo*.

If the arbitrator had properly ruled on PMPSJ, the issue of an offer of judgment and Rule 68 would never have arisen.

The Order recognizes that the parties agreed and the arbitrator ordered, JA 1/14 ¶ 1, that the arbitration would be governed by certain rules, which agreement and order did not include Rule 68. Yet the arbitrator awarded attorneys fees under Rule 68. The foundation of the award is that the arbitrator changed the governing rules without notice to the parties.

Two principles of law, both overlooked or misapprehended by the Order, prohibit the arbitrator from unilaterally changing the governing rules previously agreed upon by the parties. First, the Order and the arbitrator overlooked or misapprehended JAMS Rule 24(c), quoted at AOB 50, stating: "The arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement." The arbitrator has no authority to select rules that the parties had not agreed upon. Second, the Order and the arbitrator overlooked the fact that an agreement between the parties was a contract binding both parties, and that an arbitrator may not modify the contract without consent of both parties. The Order overlooked or misapprehended All Star Bonding v. State of Nevada, 119 Nev. 47, 49 (2003), see AOB 43: "We have previously stated that the court should not revise a contract under the guise of construing it. Further, neither a court of law nor a court

of equity can interpolate in a contract what the contract does not contain." Neither a court nor an arbitrator may unilaterally change the terms of the contractual agreement between two parties, such as the agreement in this case that excluded Rule 68. JA 1/14 ¶ 1.

The Order and the arbitrator also overlooked or misapprehended the fact that, as discussed at AOB 52: "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." Wespac/Christian, the arbitrator, the District Court, nor this Court ever identified any subsequent agreement or order reflecting a change in the original agreement and order, JA 1/14 ¶ 1, that excluded Rule 68, nor any order of the arbitrator that purported to include Rule 68.

The arbitrator's action are readily refuted. First, Order at 9 argues that Garmong never objected to the Scheduling Order. Nor, it must be noted, did Wespac/Christian. All parties were satisfied with the Scheduling Order, JA 1/14-15, which excluded Rule 68. The Order does not suggest that Wespac/Christian ever sought to revise their agreement with Garmong or sought to amend the Scheduling Order to include Rule 68.

Second, Order at 9 states that the Scheduling Order "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." The Order overlooks or misapprehends that any authority of the arbitrator was limited by the rules governing him, specifically JAMS Rule 24(c),(g) quoted at AOB 50-51. The arbitrator does not have unfettered discretion to select additional rules, unless the parties agree to the change. That is why the Scheduling Order JA 1/14, ¶ 1, expressly stated that "The parties have agreed . . . ." The record reflects that the parties never agreed to add Rule 68, and the arbitrator never issued an order adding Rule 68.

Third, Order at 9-10 states: "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." In making this statement, the Order overlooked or misapprehended terms of the Scheduling Order, JA 1/14-15. JA 1/15, ¶ 6 which states: "The parties may bring motions for summary judgment, pursuant to NRCP 56." JA 1/14, ¶ 1 expressly includes "Washoe District Court Rule 12," whose subsections

(8) and (9) permit "rehearing" and "reconsideration" of decisions on motions. Garmong, unlike Wespac/Christian, played by the rules.

Fourth, Order at 10 states: "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." This is inverted logic. The Order overlooks or misapprehends that there had already been an agreement and order that excluded Rule 68. The shoe was on the other foot. If Wespac/Christian sought to revise the scope of the Scheduling Order to add Rule 68, they had first to persuade Garmong to modify the original agreement of the parties, JA 1/14 ¶ 1, and then move the arbitrator to amend the Scheduling Order. There is no authority suggesting that Garmong needed to move the arbitrator to follow an existing agreement and order.

Fifth, Order at 10 states: "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." This position is ostensibly supported by the four arguments just discussed, all of which are demonstrably incorrect. Inasmuch as the Order's defense of the award of attorneys fees is based entirely upon the four arguments, all of which are demonstrably incorrect, the award of attorney's fees must be reversed.

In making these remarks, the Order never addresses JAMS Rule 24(c) or All Star Bonding, both of which prohibit unilateral modification.

Order at 9 states, "[Garmong] 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 Order overlooks that Garmong never argues that he "mistakenly" did anything, other than trust the Scheduling Order, the arbitrator and the law. The Scheduling Order embodied an agreement between the parties and the arbitrator's responsive order that listed applicable rules, and NRCP 68 was not among them.

The Order overlooks or misapprehends case authority such as Nagib v. Conner, 192 F.3d 127 at *4 (5th Cir. 1999), discussed at AOB 56, that litigants should be able to trust judges (and arbitrators) not to mislead them. That is what happened here. The arbitrator issued the Scheduling Order which did not include Rule 68 as a governing rule, and never said another word until 20 months later when, without modifying the Scheduling Order, he invoked Rule 68 against Garmong.

III. SUMMARY AND CONCLUSION

The Order overlooked or misapprehended virtually every fact and legal authority presented in the AOB. Most egregious was the arbitrator's cavalier treatment of PMPSJ and the addition of Rule 68. The Court must undertake a full-

scale *de novo* review of the orders of the District Court and the arbitrator, and reverse their decisions.

A disreputable California company defrauded an elderly Nevada citizen by concealing the disciplining and suspension of its agent by the SEC and refusing to follow Nevada's laws. This Court should not let stand an arbitration decision which endorses such conduct.

DATED this 4th day of January, 2021.

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

Counsel for appellant Garmong

ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 petition has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman.

2. I further certify that this petition 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 **4,343** words.

3. Finally, I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition 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 petition is not in conformity with the requirements of the Nevada

Rules of Appellate Procedure.

DATED this 4th day of January, 2021.

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

Counsel for Appellant Garmong

PROOF OF SERVICE

I, Carl M. Hebert, certify that, on January 4, 2021, I served the appellant's Petition for Rehearing on Thomas C. Bradley, Esq., counsel for respondents Wespac and Greg Christian, through the Court's electronic filing system to his e-mail address, tom@tombradleylaw.com, consistent with Nevada Electronic Filing and Conversion Rule 9(c).

DATED this 4th day of January, 2021.

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

Counsel for appellant Garmong

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 80376-COA

FILED

FEB 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

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

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

_____/

CASE NO. CV12-01271

DEPT. NO. 6

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*
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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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> (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.
435 Marsh Avenue
Reno, Nevada 89509
(775) 323-5178
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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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INDEX OF EXHIBITS

Exhibit No.	Description	No. of Pages
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

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

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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.

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Jacqueline Bryant
Clerk of the Court
Transaction # 8317488

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.
_____/

STIPULATION FOR EXTENSION OF TIME TO OPPOSE DEFENDANTS' SECOND AMENDED MOTION FOR ATTORNEYS FEES

The parties to this action, through their respective undersigned counsel of record, enter into the following stipulation.

This case is currently on appeal. The plaintiff intends to petition for review by the Supreme Court the Order of Affirmance issued by the Court of Appeals in appeal no. 80376-COA.

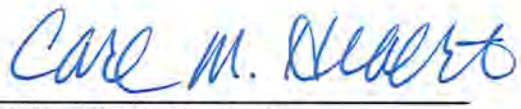
On February 18, 2021 the defendants filed their second amended motion for attorney's fees. Opposition points and authorities are currently due on March 4, 2021.

It makes sense to the parties, in the interest of efficiency, to defer any ruling on attorney's fees until the conclusion of the appeal. They therefore stipulate that the plaintiff

may have to and including 10 calendar days after the Nevada Supreme Court acts on the petition for review under NRAP 40B in which to file points and authorities in opposition to the defendants' second amended motion for attorney's fees.

THE UNDERSIGNED HEREBY AFFIRMS THAT THIS DOCUMENT DOES NOT CONTAIN A SOCIAL SECURITY NUMBER OR OTHER PERSONALLY IDENTIFYING INFORMATION.

DATED this 26th day of February, 2021.



CARL M. HEBERT, ESQ.

Counsel for Plaintiff Garmong

DATED this 26th day of February, 2021.

THOMAS C. BRADLEY, ESQ.

Counsel for Defendants WESPAC and Greg Christian

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Jacqueline Bryant
Clerk of the Court
Transaction # 8319278

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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

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 80376

FILED

APR 06 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER DENYING PETITION FOR REVIEW

Review denied. NRAP 40B.

It is so ORDERED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

_____, J.
Pickering

_____, J.
Herndon

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

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

REQUEST FOR SUBMISSION

Defendants WESPAC and Greg Christian, by and through their counsel, Thomas C. Bradley, Esq., hereby request to submit their Second Amended Motion for Attorney's Fees. Second Judicial District Court Rule 13(3) provides that a party opposing a motion shall serve and file a written opposition within ten (10) days after the motion was served, "together with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing why the motion should be denied." If the opposing party **fails** to serve and **file** the **opposition**, the district court has the discretion to construe that failure as an admission that the motion is meritorious and consent to granting the motion.

On March 1, 2021, this Court entered an Order, pursuant to stipulation, requiring Mr. Garmong to file his opposition to the Second Amended Motion for Attorney's Fees within ten (10)

days following the Supreme Court's decision on the petition for review. The Nevada Supreme Court issued its denial of the petition on April 6, 2021. Accordingly, Mr. Garmong's opposition was due to be filed on or before April 16, 2021, and his failure to do so constitutes an admission that the motion is meritorious and consents to this Court granting the motion.

Attached as Exhibit "1" is a Proposed Judgment and Order in this matter.

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

DATED this 21st day of April, 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 21st day of April, 2021.

By: _____
Employee of THOMAS C. BRADLEY, Esq.

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

INDEX OF EXHIBITS

Exhibit No.	Description	No. of Pages
1	Proposed Order	3

THOMAS C. BRADLEY, ESQ.
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EXHIBIT 1

EXHIBIT 1

CODE: 1845
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

_____/

CASE NO. CV12-01271

DEPT. NO. 6

JUDGMENT AND ORDER CONFIRMING ARBITRATION AWARD, INCLUDING AWARD OF ATTORNEYS' FEES AND COSTS

On April 11, 2019, Judge Pro, the JAMS Arbitrator, who was appointed by this Court issued his Final Award. In the Final Award, Judge Pro awarded $111,649.96 as reasonable attorneys' fees and costs. On April 15, 2019, Defendants WESPAC and Greg Christian filed a Petition for Confirmation of Arbitration, Including the Award of Attorneys' Fees and Costs. Plaintiff Greg Garmong subsequently 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 9, 2019, this Court confirmed the Arbitration Award including the Arbitrator's award of fees and costs in the amount of $111,649.96. **Accordingly, Defendants WESPAC and GREG CHRISTIAN, shall recover from the Plaintiff, GREGORY GARMONG, the sum of**

$111,649.96 together with interest thereon at the rate of 7.5% per annum as provided by law from August 9, 2019, until satisfied in full.

On December 6, 2019, this Court denied Mr. Garmong's Motion to Alter or Amend Judgment. On December 9, 2019, Defendants filed an Amended Motion for Attorney's Fees. On February 18, 2021, Defendants filed a Second Amended Motion for Attorney's Fees. On March 1, 2021, this Court entered an Order, pursuant to stipulation, requiring Mr. Garmong to file his opposition to the Second Amended Motion for Attorney's Fees within ten (10) days following the Supreme Court's decision on the petition for review. The Nevada Supreme Court issued its denial of the petition on April 6, 2021. Accordingly, Mr. Garmong's opposition was due to be filed on or before April 16, 2021. Mr. Garmong did not timely file an opposition and his failure to do so constitutes an admission that the motion is meritorious and consents to this Court granting the motion.

Having reviewed the Defendants' Second Amended Motion for Attorney's Fees and having considered all relevant pleadings and papers filed in this case, this Court also awards Defendants' additional attorney's fees in the amount of $45,084.50 which represents the fees incurred to support, confirm, and defend the Arbitration Award before this Court and the Nevada Court of Appeals.

Accordingly, Defendants WESPAC and GREG CHRISTIAN, shall ALSO recover from the Plaintiff, GREGORY GARMONG, the sum of $45,084.50 together with interest thereon at the rate of 7.5% per annum as provided by law from today's date until satisfied in full.

DATED this _____ date of _____, 2021.

_____
DISTRICT JUDGE

Prepared and Submitted by:

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

THOMAS C. BRADLEY, ESQ.
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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.
_____/

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

EXHIBIT 1

EXHIBIT 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

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CV12-01271
2021-06-11 11:25:40 AM
Alicia L. Lerud
Clerk of the Court
Transaction # 8491419

CODE NO. 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

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

Defendants.
_____/

Case No. CV12-01271

Dept. No. 6

ORDER DENYING MOTION FOR EXTENSION OF TIME TO FILE OPPOSITION TO DEFENDANTS' SECOND AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS

Before this Court is a *Motion for Extension of Time to File Opposition to Defendants' Second Amended Motion for Attorney's Fees and Costs; Opposition Points and Authorities* ("*Motion*") filed by Plaintiff GREGORY O. GARMONG ("Mr. Garmong"), by and through his attorney of record, Carl M. Herbert, Esq.

Defendants WESPAC and GREG CHRISTIAN (collectively "Defendants" unless individually referenced) filed the *Defendants' Opposition to Plaintiff's Motion for Extension of Time* ("*Opposition*") by and through their attorney of record, Thomas C. Bradley, Esq.

/ /

/ /

Mr. Garmong filed the *Reply Points and Authorities in Support of Motion for Extension of Time and Opposition to the Defendants' Second Amended Motion for Attorney's Fees and Costs* ("*Reply*") and the matter was thereafter submitted to the Court for consideration.[1]

I. PROCEDURAL BACKGROUND.

This is an action for breach of a financial management agreement and carries with it a robust procedural history. Mr. Garmong filed his *Complaint* on May 9, 2012, alleging the following claims for relief:

1) Breach of Contract;
2) Breach of Nevada Deceptive Trade Practices Act;
3) Breach of Implied Covenant of Good Faith and Fair Dealing;
4) Unjust Enrichment;
5) Breach of Fiduciary Duty;
6) Malpractice; and
7) Negligence.

On September 19, 2012, Defendants filed their *Motion to Dismiss and Compel Arbitration*. On December 13, 2012, the Court entered its *Order* granting Defendants' request to compel arbitration but denying the motion to dismiss. Mr. Garmong then filed his *Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13, 2012 Compelling Arbitration* ("*Reconsider Motion*"). The motion was opposed by Defendants. Mr. Garmong did not file a reply and this case was stagnant for nearly a year

[1] Also currently pending before the Court is Defendants' *Second Amended Motion for Attorney's Fees* and Mr. Garmong's *Motion to Strike Declaration of Thomas C. Bradley in Support of Second Amended Motion for Attorney's Fees and Costs*. Both the aforementioned motions were submitted before the instant *Motion*, however, the Court finds it necessary to decide the motions out of order to keep a clean record.

until January 13, 2014, when the Court entered its *Order to Proceed*. Mr. Garmong filed his reply on February 3, 2014. The *Reconsider Motion* was denied on April 2, 2014.

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

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

On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*, arguing the JAMS arbitrators were prejudiced against Mr. Garmong. This matter was fully briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration* requiring each party to submit three arbitrators to the Court so the Court could select one name to act as arbitrator. The parties then stipulated to select one arbitrator, to reduce costs. *Stipulation to Select One Arbitrator*, October 17, 2016. In accordance, this Court entered its *Order Appointing Arbitrator* on October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator. After it was determined Mr. Ornstil was unavailable, Mr. Garmong stipulated to the appointment of either retired Judge Phillip M. Pro,[2] or Lawrence R. Mills. Esq.

On November 13, 2017, this Court entered its *Order Granting Motion to Strike,* which stayed the proceeding pending the outcome of the arbitration, and directed the parties to file

[2] Mr. Garmong stipulated to Judge Pro despite previously moving to preclude a judge from serving as an arbitrator.

an amended complaint and other responsive papers at the direction of Judge Phillip M. Pro. *Order Granting Motion to Strike*, p. 2. On February 21, 2017, this Court entered its *Order Appointing Arbitrator*, appointing Judge Phillip M. Pro ("Judge Pro").

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

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

In the responsive briefs, the parties state they attended their first arbitration conference in April 2017. The Court acknowledged sufficient cause was shown in the *Order* entered June 30, 2017.

On July 22, 2018, without asking for leave of Court to lift the stay, Mr. Garmong filed his *Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator* ("*Motion to Disqualify*"). The Court thereafter entered its *Order Denying Plaintiff's Motion to Disqualify Arbitrator Pro; Order Denying Motion to Vacate Order Denying Motion for Summary Judgment; Order Denying Motion to Appoint New Arbitrator* ("*Arbitrator Order*") on November 11, 2019.

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

Judge Pro found Mr. Garmong's claims, for: (1) Breach of Contract, (2) Breach of Implied Warranty, (3) Breach of the Implied Covenant of Good Faith and Fair Dealing, (4) Nevada's Deceptive Trade Practices Act, (5) Breach of Fiduciary Duty of Full Disclosure, (6) Intentional Infliction of Emotional Distress and (7) Unjust Enrichment all failed as a matter of law because Mr. Garmong did not establish his claims by a preponderance of the evidence. See *Final Award*, p. 8-9. Furthermore, after weighing the necessary factors required by Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), Judge Pro found Defendants were entitled to an award of reasonable attorneys' fees in the total sum of $111,649.96. *Final Award*, p. 11.

After the *Final Award,* the litigation proceeded with several filings. On August 8, 2019, this Court entered its *Order Re Motions* (*"ORM*"): (1) granting *Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reducing Award to Judgment, Including, Attorneys' Fees and Costs*; (2) denying *Plaintiff's Motion to Vacate Arbitrator's Final Award*; (3) denying *Plaintiff's Motion to Vacate Arbitrator's Award of Attorneys' Fees*; (4) denying *Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial*

Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment ("*Motion to Vacate MSJ Decision*"); and, (5) granting *Defendants' Motion for an Order to File Exhibit as Confidential*. *ORM*, p. 15-16.

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

On December 6, 2019, this Court entered its *Order Denying Motion to Alter or Amend Judgment* ("*AA Order*") maintaining its prior rulings within the *ORM*. On January 7, 2020, Mr. Garmong filed his *Notice of Appeal* to the Nevada Supreme Court regarding this Court's *Arbitrator Order*, *ORM*, and *AA Order*.

On December 9, 2019, the *Defendants' Amended Motion for Attorney's Fees* was filed. Mr. Garmong filed his *Notice of Appeal* on January 7, 2020, and the Court entered the *Order Holding Issuance of Order on Defendants' Amended Motion for Attorney's Fees in Abeyance*. On December 1, 2020, the Nevada Supreme Court issued its *Order of Affirmance* upholding this Court's judgment in its entirety and noting Defendants may seek amended fees pursuant to the fee shifting provision in NRCP 68 that extends to fees incurred on and after appeal.

On February 18, 2021, Defendants filed the *Defendants' Second Amended Motion for Attorney's Fees*. On February 22, 2021, the Nevada Supreme Court entered its *Order Denying Rehearing* pursuant to NRAP 40(c). Next, the parties entered into a stipulation to

extending the time for Mr. Garmong to file an opposition to the *Defendants' Second Amended Motion for Attorney's Fees.* The stipulation is memorialized in the *Order Extending Time for Plaintiff to File Points and Authorities in Opposition to the Defendants' Second Amended Motion for Fees* entered by the Court on March 1, 2021 and allows Mr. Garmong ten calendar days after the Nevada Supreme Court acts on Mr. Garmong's petition for review of the *Order of Affirmance*. On April 6, 2021, the Nevada Supreme Court entered the *Order Denying Petition for Review*. On April 21, 2021, Mr. Bradley, counsel for Defendants, filed a *Request for Submission* for *Defendants' Second Amended Motion for Attorney's Fees*.

On April 26, 2021, Mr. Garmong filed his *Motion to Strike Declaration of Thomas C. Bradley in Support of Second Amended Motion for Attorney's Fees and Costs* ("*Motion to Strike*"). On April 27, 2021, Mr. Garmong filed the instant *Motion*.

In the *Motion*, Mr. Garmong states the deadline for him to file his opposition was April 16, 2021, and counsel overlooked deadline. *Motion*, p. 2. Mr. Garmong notes counsel has worked together on extensions of time and have liberally granted extensions, however, when counsel for Defendants noticed Mr. Garmong had not filed an opposition, he submitted the *Defendants' Second Amended Motion for Attorney's Fees* instead of reaching out to counsel pursuant to Rule of Professional Conduct ("RPC") Rule 3.5A. *Motion*, p. 3. Mr. Garmong likens the situation to Defendants seeking a default against Mr. Garmong. Id. Mr. Garmong argues there is a preference to decide cases on the merits and then addresses the merits of the *Defendants' Second Amended Motion for Attorney's Fees* and Mr. Garmong's *Motion to Strike*. *Motion*, p. 4.

In the *Opposition*, Defendants note District Court Rule 13(3) carries no requirement that counsel remind the opposing party of their duty to timely file an opposition. *Opposition*, p. 2. Defendants state Mr. Garmong's reliance on RPC 3.5A is misplaced because Rule 3.5A applies when counsel seeks entry of a default or complete dismissal of an action and does not relate to a litigant's responsibility to timely file a pleading. Id. Defendant likewise argues the merits of the *Defendants' Second Amended Motion for Attorney's Fees* and the *Motion to Strike*.[3] *Opposition*, pp. 2-4. Defendants next contend Mr. Garmong is a vexatious litigant who has filed frivolous, unsuccessful cases against multiple defendants and therefore Mr. Garmong is not entitled to an extension of time. *Opposition*, p. 4.

In the *Reply*, Mr. Garmong notes Defendants filed a *Request for Submission* for the instant *Motion*, however, the Defendants' *Request for Submission* was premature because DCR 13(4) was amended and allowed seven days for a reply brief to be filed. *Reply*, p. 2. Mr. Garmong maintains there will be no prejudice to Defendants if he is granted a short extension of time as the *Motion* has effectively been pending since August 8, 2019. *Reply*, p. 3. Mr. Garmong denies he is a vexatious and notes he has never been declared a vexatious litigant by any court, nor has this Court sanctioned Mr. Garmong for bad faith litigation. *Reply*, pp. 6-7.

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[3] Pursuant to Washoe District Court Rule 10(3)(a), "[a]ny motion, opposition, reply, etc., must be filed as a separate document unless it is pleaded in the alternative." Mr. Garmong does not plead in the alternative and the Court declines to consider these matters here as each will be decided on the merits in their respective orders.

II. APPLICABLE LAW AND ANALYSIS.

Nevada Rules of Civil Procedure Rule 6 governs extending time and states, in pertinent part:

> (1) In General. When an act may or must be done within a specified time:
> (A) the parties may obtain an extension of time by stipulation if approved by the court, provided that the stipulation is submitted to the court before the original time or its extension expires; or
> (B) the court may, for good cause, extend the time:
> (i) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
> (ii) on motion made after the time has expired if the party failed to act because of excusable neglect.
> (2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(c)(1), and must not extend the time after it has expired under Rule 54(d)(2).

NRCP 6(b)(1)-(2). In Huckabay Props. V. NC Auto Parts, 130 Nev. 196, 198, 322 P.3d 429, 430 (2014), the Nevada Supreme Court explained the policy of deciding cases on the merits "is not absolute and must be balanced against countervailing policy considerations." These considerations include "the public's interest in expeditious resolution of appeals, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, ad judicial administrations concerns, such as the court's need to manage its sizeable and growing docket." Id., 130 Nev. at 198, 322 P.3d at 430-31.

The Court does not find good cause exists to extend the deadline for Mr. Garmong to file an opposition in light of the policy considerations discussed in Huckabay Props. Mr. Garmong has received an adverse judgment through arbitration which has been reviewed by the Nevada Supreme Court and affirmed in its entirety; the petition for rehearing was denied; and, Mr. Garmong's petition for review was denied. See *Order of Affirmance*, p. 10. As Huckabay Props describes, there is a strong public interest in resolving cases

expeditiously and this case has languished for over nine years. The parties' interests in reaching a stable and final judgment are high as the parties have undoubtedly lost time at great expense over the past nine years and allowing further litigation of attorney's fees after the arbitrator's award has been confirmed only extends that time and expense for both parties.

Defendants would suffer prejudice as they would have to again incur costs to file a reply to Mr. Garmong's opposition and may have to field a motion for reconsideration. Mr. Garmong missed his deadline even after the parties stipulated to allow Mr. Garmong to respond after the Nevada Supreme Court acted on his petition for review, and Mr. Garmong notes Defendants have been generous with extensions in the past.[4] Nothing requires Defendants to do so now at the end of litigation as RPC 3.5A applies to defaults. It is also worth noting Defendants filed the *Request for Submission* five days after Mr. Garmong's opposition was due, giving Mr. Garmong further time to respond. Mr. Garmong's argument that Defendants would not suffer prejudice because the *Defendants' Second Amended Motion for Attorney's Fees* has been pending since August of 2019, illustrates the point that Defendants have had judgment in their favor for nearly two years and, yet, this case still has not concluded. Finally, this Court has an interest in concluding this litigation and efficiently manage its remaining docket.

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[4] See *Order Extending Time for Plaintiff to File Points and Authorities in Opposition to the Defendants' Second Amended Motion for Fees* entered by the Court on March 1, 2021.

III. ORDER.

For the foregoing reasons, and good cause appearing therefor,

IT IS HEREBY ORDERED *Motion for Extension of Time to File Opposition to Defendants' Second Amended Motion for Attorney's Fees and Costs* is DENIED.

Dated this 11th day of June, 2021.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 11th day of June, 2021, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of eletronic filing to the following:

CARL HEBERT, ESQ.
THOMAS BRADLEY, ESQ.

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

Heidi Boe

F I L E D
Electronically
CV12-01271
2021-07-07 02:00:09 PM
Alicia L. Lerud
Clerk of the Court
Transaction # 8531218

CODE NO. 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

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

Defendants.
_____/

Case No. CV12-01271

Dept. No. 6

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

Before this Court is a *Motion to Strike Declaration of Thomas C. Bradley in Support of Second Amended Motion for Attorney's Fees and Costs* ("*Motion*") filed by Plaintiff GREGORY O. GARMONG ("Mr. Garmong"), by and through his counsel, Carl M. Herbert, Esq.

Defendants WESPAC and GREG CHRISTIAN (collectively "Defendants" unless individually referenced) filed *Defendants' Opposition to Plaintiff's Motion to Strike* ("*Opposition*"), by and through their counsel, Thomas C. Bradley, Esq.

Mr. Garmong filed his *Reply to Defendants' Opposition to Plaintiff's Motion to Strike* ("*Reply*") and the matter was thereafter submitted to the Court for consideration.

I. PROCEDURAL BACKGROUND.

This is an action for breach of a financial management agreement and carries with it a robust procedural history. Mr. Garmong filed his *Complaint* on May 9, 2012, alleging the following claims for relief:

1) Breach of Contract;
2) Breach of Nevada Deceptive Trade Practices Act;
3) Breach of Implied Covenant of Good Faith and Fair Dealing;
4) Unjust Enrichment;
5) Breach of Fiduciary Duty;
6) Malpractice; and
7) Negligence.

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

Mr. Garmong then sought writ relief from the Nevada Supreme Court. On December 18, 2014, the Nevada Supreme Court entered its *Order Denying Petition for Writ of Mandamus or Prohibition*. The Supreme Court next entered its *Order Denying Rehearing*

on March 18, 2015, and, subsequently, entered its *Order Denying En Banc Reconsideration* on May 1, 2015.

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

On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*, arguing the JAMS arbitrators were prejudiced against Mr. Garmong. This matter was fully briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration* requiring each party to submit three arbitrators to the Court so the Court could select one name to act as arbitrator. The parties then stipulated to select one arbitrator, to reduce costs. *Stipulation to Select One Arbitrator*, October 17, 2016. In accordance, this Court entered its *Order Appointing Arbitrator* on October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator. After it was determined Mr. Ornstil was unavailable, Mr. Garmong stipulated to the appointment of either retired Judge Phillip M. Pro,[1] or Lawrence R. Mills. Esq.

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

On March 27, 2017, Mr. Garmong filed *Plaintiff's Objection Pursuant to NRS 38.231(3) and 38.241(e) That There is No Agreement to Arbitrate; Notification of Objection*

[1] Mr. Garmong stipulated to Judge Pro despite previously moving to preclude a judge from serving as an arbitrator.

to the Court. Despite prior determinative orders from this Court, Mr. Garmong again objected to arbitration on the basis there was no agreement to arbitrate.

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

In the responsive briefs, the parties state they attended their first arbitration conference in April 2017. The Court acknowledged sufficient cause was shown in the *Order* entered June 30, 2017.

On July 22, 2018, without asking for leave of Court to lift the stay, Mr. Garmong filed his *Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator* ("*Motion to Disqualify*"). The Court thereafter entered its *Order Denying Plaintiff's Motion to Disqualify Arbitrator Pro; Order Denying Motion to Vacate Order Denying Motion for Summary Judgment; Order Denying Motion to Appoint New Arbitrator* ("*Arbitrator Order*") on November 11, 2019.

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

arbitration, Defendants' *Motion for Sanctions* was moot. Additionally, the Court took notice of Defendants' *Notice of Completion of Arbitration* and determined there were additional decisions to be rendered regarding the *Notice of Completion of Arbitration.*

Judge Pro found Mr. Garmong's claims for: (1) Breach of Contract; (2) Breach of Implied Warranty; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Nevada's Deceptive Trade Practices Act; (5) Breach of Fiduciary Duty of Full Disclosure, (6) Intentional Infliction of Emotional Distress; and (7) Unjust Enrichment all failed as a matter of law because Mr. Garmong did not establish his claims by a preponderance of the evidence. See *Final Award*, p. 8-9. Furthermore, after weighing the necessary factors required by Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), Judge Pro found Defendants were entitled to an award of reasonable attorneys' fees in the total sum of $111,649.96. *Final Award*, p. 11.

After the *Final Award,* the litigation proceeded with several filings. On August 8, 2019, this Court entered its *Order Re Motions* (*"ORM*"): (1) granting *Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reducing Award to Judgment, Including, Attorneys' Fees and Costs*; (2) denying *Plaintiff's Motion to Vacate Arbitrator's Final Award*; (3) denying *Plaintiff's Motion to Vacate Arbitrator's Award of Attorneys' Fees*; (4) denying *Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment* ("*Motion to Vacate MSJ Decision*"); and (5) granting *Defendants' Motion for an Order to File Exhibit as Confidential*. *ORM*, p. 15-16.

On August 27, 2019, this Court entered its *Order* directing and allowing, respectively: (1) WESPAC to an *Amended Motion for the Award of Attorneys' Fees*; (2) Mr. Garmong the

standard response time to file and serve his opposition to Defendants' *Amended Motion for the Award of Attorneys' Fees*; and (3) WESPAC was not required to file a *Proposed Final Judgment* until ten (10) days following this Court's ruling on WESPAC's *Amended Motion for the Award of Attorneys' Fees*. *Order*, p. 1.

On December 6, 2019, this Court entered its *Order Denying Motion to Alter or Amend Judgment* ("*AA Order*") maintaining its prior rulings within the *ORM*. On January 7, 2020, Mr. Garmong filed his *Notice of Appeal* to the Nevada Supreme Court regarding this Court's *Arbitrator Order*, *ORM*, and *AA Order*.

On December 9, 2019, the *Defendants' Amended Motion for Attorney's Fees* was filed. Mr. Garmong filed his *Notice of Appeal* on January 7, 2020, and the Court entered the *Order Holding Issuance of Order on Defendants' Amended Motion for Attorney's Fees in Abeyance*. On December 1, 2020, the Nevada Court of Appeals issued its *Order of Affirmance* upholding this Court's judgment in its entirety and noting Defendants may seek amended fees pursuant to the fee shifting provision in NRCP 68 that extends to fees incurred on and after appeal.

On February 18, 2021, Defendants filed the *Defendants' Second Amended Motion for Attorney's Fees*. On February 22, 2021, the Nevada Court of Appeals entered its *Order Denying Rehearing* pursuant to NRAP 40(c). Next, the parties entered into a stipulation to extend the time for Mr. Garmong to file an opposition to the *Defendants' Second Amended Motion for Attorney's Fees.* The stipulation is memorialized in the *Order Extending Time for Plaintiff to File Points and Authorities in Opposition to the Defendants' Second Amended Motion for Fees* entered by the Court on March 1, 2021 and allows Mr. Garmong ten (10) calendar days after the Nevada Supreme Court acts on Mr. Garmong's petition for review of

the *Order of Affirmance*. On April 6, 2021, the Nevada Supreme Court entered the *Order Denying Petition for Review*. On April 21, 2021, Mr. Bradley, counsel for Defendants, filed a *Request for Submission* for *Defendants' Second Amended Motion for Attorney's Fees*. The instant briefing followed.

In the *Motion*, Mr. Garmong moves to strike the declaration of Mr. Bradley filed in support of the Defendants' *Second Amended Motion for Attorney's Fees*. *Motion*, p. 1. Mr. Garmong argues declarations in support of attorney's fee awards should be based upon personal knowledge and Mr. Bradley's is legally insufficient because it does not include a statement regarding personal knowledge. *Motion*, p. 3.

In the *Opposition*, Defendants acknowledge the law requires declarations to contain information within the declarant's own personal knowledge, however, there is no requirement that the declaration include the words "personal knowledge" as long as the averments are within the declarant's personal knowledge. *Opposition*, p. 2. Defendants confirm the information presented in the declaration is within Mr. Bradley's personal knowledge and provide an updated declaration including the words personal knowledge. Id.

In the *Reply*, Mr. Garmong argues the second declaration is an admission the first declaration was legally insufficient, and the rules expressly require service of a proper declaration with the *Second Amended Motion for Attorney's Fees*. *Reply*, p. 2. Mr. Garmong contends the rules do not allow a party to file a second legally sufficient declaration and reply briefs cannot contain new arguments or evidence. Id. Mr. Garmong next argues the first and second declarations do not indicate if Mr. Bradley bills and collects from other clients at a comparable rate nor do they compare Mr. Bradley's rates to other Reno attorneys. *Reply*, p. 4.

II. APPLICABLE LAW AND ANALYSIS.

Pursuant to NRCP 56(c)(4), an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. "An affidavit which states no fact within the knowledge of the person making it would be of but little weight in any legal proceeding." Morgan v. Board of Com'rs of Eureka Cty., 9 Nev. 360, 368 (1874).

The Court is satisfied Mr. Bradley's first declaration is legally sufficient because "it states positively the facts and circumstances upon which such belief is founded" as required by Morgan. Id. For example, Mr. Bradley details the ten reasons he believes his hourly rate of $395.00 per hour is fair. Additionally, Mr. Garmong cites no authority which strictly requires the words "personal knowledge" to be included in the declaration and it is clear Mr. Bradley's declaration is based on facts he has personal knowledge of.

As Mr. Garmong's *Reply* states, new arguments and evidence should not be made in a reply brief. Mr. Garmong first raises arguments about the contents of Mr. Bradley's billing statements in the *Reply* which the Court cannot consider. Mr. Garmong asserts Mr. Bradley does not compare his rates to other attorneys and does not state whether he bills other clients at the same rate. The Court does not consider those arguments as they are not properly raised.

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III. ORDER.

For the foregoing reasons, and good cause appearing therefor,

IT IS HEREBY ORDERED *Motion to Strike Declaration of Thomas C. Bradley in Support of Second Amended Motion for Attorney's Fees and Costs* is DENIED.

DATED this 7th day of July, 2021.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 7th day of July, 2021, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

CARL HEBERT, ESQ.
THOMAS BRADLEY, ESQ.

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

Holly Longe

F I L E D
Electronically
CV12-01271
2021-07-12 11:52:46 AM
Alicia L. Lerud
Clerk of the Court
Transaction # 8537770

CODE NO. 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

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

Defendants.
_____/

Case No. CV12-01271

Dept. No. 6

ORDER GRANTING DEFENDANTS' SECOND AMENDED MOTION FOR ATTORNEY'S FEES; ORDER CONFIRMING ARBITRATOR'S FINAL AWARD

Before this Court is *Defendants' Second Amended Motion for Attorney's Fees* ("*Motion*") filed by Defendants WESPAC and GREG CHRISTIAN (collectively "Defendants" unless individually referenced).

Plaintiff GREGORY O. GARMONG ("Mr. Garmong") did not timely file an opposition but instead filed a *Motion for Extension of Time to File Opposition to Defendants' Second Amended Motion for Attorney's Fees and Costs.*

Next, the Court entered its *Order Denying Motion for Extension of Time to File Opposition to Defendants' Second Amended Motion for Attorney's Fees and Costs*, finding

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good cause did not exist to extend the deadline for Mr. Garmong to oppose the *Motion* and Defendants would be prejudiced by further extension.

I. PROCEDURAL BACKGROUND.

This is an action for breach of a financial management agreement and carries with it a robust procedural history. Mr. Garmong filed his *Complaint* on May 9, 2012, alleging the following claims for relief:

1) Breach of Contract;
2) Breach of Nevada Deceptive Trade Practices Act;
3) Breach of Implied Covenant of Good Faith and Fair Dealing;
4) Unjust Enrichment;
5) Breach of Fiduciary Duty;
6) Malpractice; and
7) Negligence.

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

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

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

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

On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*, arguing the JAMS arbitrators were prejudiced against Mr. Garmong. This matter was fully briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration* requiring each party to submit three arbitrators to the Court so the Court could select one name to act as arbitrator. The parties then stipulated to select one arbitrator, to reduce costs. *Stipulation to Select One Arbitrator*, October 17, 2016. In accordance, this Court entered its *Order Appointing Arbitrator* on October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator. After it was determined Mr. Ornstil was unavailable, Mr. Garmong stipulated to the appointment of either retired Judge Philip M. Pro,[2] or Lawrence R. Mills. Esq.

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

[2] Mr. Garmong stipulated to Judge Pro despite previously moving to preclude a judge from serving as an arbitrator.

Appointing Arbitrator, appointing Honorable Philip M. Pro (Ret.) ("Judge Pro").

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

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

In the responsive briefs, the parties state they attended their first arbitration conference in April 2017. The Court acknowledged sufficient cause was shown in the *Order* entered June 30, 2017.

On July 22, 2018, without asking for leave of Court to lift the stay, Mr. Garmong filed his *Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator.* The Court thereafter entered its *Order Denying Plaintiff's Motion to Disqualify Arbitrator Pro; Order Denying Motion to Vacate Order Denying Motion for Summary Judgment; Order Denying Motion to Appoint New Arbitrator* ("*Arbitrator Order*") on November 11, 2019.

Defendants thereafter filed *Defendants' Motion for Limited Relief From Stay to File Motion for Attorney's Fees and Sanctions* ("*Motion for Sanctions*") requesting limited relief

from this Court's order staying the proceeding pending the outcome of arbitration. While the *Motion for Sanctions* was under consideration, Defendants filed their *Notice of Completion of Arbitration Hearing* on October 22, 2018. The Court found, with completion of the arbitration, Defendants' *Motion for Sanctions* was moot. Additionally, the Court took notice of Defendants' *Notice of Completion of Arbitration* and determined there were additional decisions to be rendered regarding the *Notice of Completion of Arbitration.*

Judge Pro found Mr. Garmong's claims, for: (1) Breach of Contract; (2) Breach of Implied Warranty; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Nevada's Deceptive Trade Practices Act; (5) Breach of Fiduciary Duty of Full Disclosure; (6) Intentional Infliction of Emotional Distress; and, (7) Unjust Enrichment all failed as a matter of law because Mr. Garmong did not establish his claims by a preponderance of the evidence. See *Final Award*, p. 8-9. Furthermore, after weighing the necessary factors required by Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), Judge Pro found Defendants were entitled to an award of reasonable attorneys' fees in the total sum of $111,649.96. *Final Award*, p. 11.

After the *Final Award,* the litigation proceeded with several filings. On August 8, 2019, this Court entered its *Order Re Motions* (*"ORM*"): (1) granting *Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reducing Award to Judgment, Including, Attorneys' Fees and Costs*; (2) denying *Plaintiff's Motion to Vacate Arbitrator's Final Award*; (3) denying *Plaintiff's Motion to Vacate Arbitrator's Award of Attorneys' Fees*; (4) denying *Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial*

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Summary Judgment; and, (5) granting *Defendants' Motion for an Order to File Exhibit as Confidential*. *ORM*, p. 15-16.

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

On December 6, 2019, this Court entered its *Order Denying Motion to Alter or Amend Judgment* ("*AA Order*") maintaining its prior rulings within the *ORM*. On January 7, 2020, Mr. Garmong filed his *Notice of Appeal* to the Nevada Supreme Court regarding this Court's *Arbitrator Order*, *ORM*, and *AA Order*.

On December 9, 2019, the *Defendants' Amended Motion for Attorney's Fees* was filed. Mr. Garmong filed his *Notice of Appeal* on January 7, 2020, and the Court entered the *Order Holding Issuance of Order on Defendants' Amended Motion for Attorney's Fees in Abeyance*. On December 1, 2020, the Nevada Court of Appeals issued the *Order of Affirmance* upholding this Court's judgment in its entirety and noting Defendants may seek amended fees pursuant to the fee shifting provision in NRCP 68 that extends to fees incurred on and after appeal.

On February 18, 2021, Defendants filed the *Defendants' Second Amended Motion for Attorney's Fees*. On February 22, 2021, the Nevada Court of Appeals entered its *Order Denying Rehearing* pursuant to NRAP 40(c). Next, the parties entered into a stipulation to extend the time for Mr. Garmong to file an opposition to the *Defendants' Second Amended*

Motion for Attorney's Fees. The stipulation is memorialized in the *Order Extending Time for Plaintiff to File Points and Authorities in Opposition to the Defendants' Second Amended Motion for Fees* entered by the Court on March 1, 2021, and allows Mr. Garmong ten (10) calendar days after the Nevada Supreme Court acts on Mr. Garmong's petition for review of the *Order of Affirmance*. On April 6, 2021, the Nevada Supreme Court entered the *Order Denying Petition for Review*. The Court now considers the *Motion*.

In the *Motion*, Defendants note this Court previously confirmed the Arbitration Award, including the Arbitrator's award of fees and costs and states Defendants have now incurred substantial fees seeking confirmation of the Arbitration Award. *Motion*, p. 2. Defendants make their *Motion* pursuant to NRS 38.239, 38.241, 38.242, and 38.243(3). Id. Defendants verify the fees requested are reasonable considering the Brunzell factors. *Motion*, pp. 3-4.

II. APPLICABLE LAW AND ANALYSIS.

Chapter 38 of the Nevada Revised Statutes addresses attorney's fees under the Uniform Arbitration Act of 2000. After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the Court for an order confirming the award at which time the Court shall issue a confirming order. NRS 38.239. If the Court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending. NRS 38.241(4). Unless a motion to vacate is pending, the Court shall confirm the award. NRS 38.242(2). On application of a prevailing party under NRS 38.239, 38.241 or 38.242, the Court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying or correcting an award. NRS 38.243(3).

Accordingly, this Court examines the reasonableness of Defendants' attorney's fees under the factors set forth in Brunzell v. Golden Gate Nat. Bank:

> (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.

85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

The district court's decision to award attorney fees is within its discretion and will not be disturbed on appeal absent a manifest abuse of discretion. Capanna v. Orth, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018). Furthermore, district courts have great discretion to award attorney fees, and this discretion is tempered only by reason and fairness. Haley v. Dist. Ct., 128 Nev. 171, 178, 273 P.3d 855, 860 (2012).

The Court finds an additional award of attorney's fees is appropriate.[3] In the *Order re Motions* entered August 8, 2019, the Court affirmed the Arbitrator's award, and the Nevada Court of Appeals entered the *Order of Affirmance* confirming this Court's decision on December 1, 2020. The prerequisites to awarding attorney's fees in this matter have therefore been met. NRS 38.242(3).

The Court now evaluates the reasonableness of the fees Defendants requested pursuant to Brunzell. First, the quality of the advocates is high. The *Declaration of Thomas C. Bradley* ("*Bradley Decl.*") states Mr. Bradley has worked in private practice for over twenty years and has represented parties in over 200 securities arbitration cases. *Bradley Decl.*, ¶¶ 2. Mr. Bradley retained Mr. Michael Hume to assist Mr. Bradley and Mr. Hume

[3] The Court previously confirmed Judge Pro's award of $111,649.96 prior to Mr. Garmong's appeal of the Arbitrator's Award. See *Order Denying Motion to Alter or Amend Judgment* entered December 6, 2019, p. 13.

likewise has over twenty years of experience in securities arbitration, increasing the quality of the work provided. *Bradley Decl*., ¶ 5.

Second, the work done was complex as securities arbitration necessitates specialized knowledge. The case lasted over nine years, and Mr. Bradley verifies Mr. Garmong submitted detailed and voluminous motions against Defendants which Mr. Bradley navigated and responded to. *Bradley Decl*., ¶ 3. Mr. Bradley was successful in defending the Arbitrator's Award at the Nevada Court of Appeals and in defending against Mr. Garmong's motions since the *Order of Affirmance* issued.

Third, Mr. Bradley has represented Defendants in this matter since the inception of the case in May of 2012. Mr. Bradley successfully compelled arbitration and was generally successful in the motions he filed and defended against. Additionally, the record reflects Mr. Bradley worked to keep the case progressing as he promptly replied to motions when filed. Mr. Bradley has provided the Court with records of his billing statements detailing the work completed in this matter.

Fourth, Mr. Bradley achieved a favorable Arbitrator's Award for his clients and then defended the award at both the district court and appeals court level.

The Court has reviewed the *Bradley Decl*., the *Motion*, and the attached exhibits. The total amount of fees requested incurred in the confirmation of the Arbitrator's Award before this Court and the Nevada Court of Appeals totals $45,084.50. The final amount of fees incurred by Defendants in this suit totals $156,734.46.

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III. CONCLUSION AND ORDER.

For the foregoing reasons, and good cause appearing therefor,

IT IS HEREBY ORDERED Defendants' *Second Amended Motion for Attorney's Fees* is GRANTED.

IT IS FURTHER ORDERED pursuant to the *Order* entered August 27, 2019, Defendants shall have ten (10) days following the entry of this order to file a proposed Final Judgment.

Dated this 10th day of July, 2021.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 12th day of July, 2021, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

CARL HEBERT, ESQ.
THOMAS BRADLEY, ESQ.

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

Holly Longe

CODE: 1880
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

FINAL JUDGMENT

On April 11, 2019, Judge Pro, the JAMS Arbitrator who was appointed by this Court, issued his Final Arbitration Award. In the Final Arbitration Award, Judge Pro denied all of Plaintiff Garmong's claims and awarded Defendants WESPAC and GREG CHRISTIAN $111,649.96 as reasonable attorneys' fees and costs. On August 9, 2019, this Court confirmed the Final Arbitration Award including the Arbitrator's award of fees and costs in the amount of $111,649.96.

Accordingly, it is hereby Ordered that Defendants WESPAC and GREG CHRISTIAN, shall recover from the Plaintiff, GREGORY GARMONG, the sum of $111,649.96 together with interest thereon at the rate as provided by Nevada law from August 9, 2019, until satisfied in full.

Furthermore, on July 12, 2021, this Court granted the Defendants' Second Amended Motion for Attorney's Fees and awarded Defendants additional attorney's fees in the amount of $45,084.50

which represented the attorney fees incurred by Defendants to support, confirm, and defend the Final Arbitration Award before this Court and the Nevada Court of Appeals.

Accordingly, it is hereby Ordered that Defendants, WESPAC and GREG CHRISTIAN, shall ALSO recover from the Plaintiff, GREGORY GARMONG, the sum of $45,084.50 together with interest thereon at the rate as provided by Nevada law from July 12, 2021 until satisfied in full.

IT IS SO ORDERED.

DATED this 16th date of July, 2021.

DISTRICT JUDGE

Prepared and Submitted by:

/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

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 16th day of July, 2021, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

CARL HEBERT, ESQ.
THOMAS BRADLEY, ESQ.

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

Holly Longe

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

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

_____/

CASE NO. CV12-01271

DEPT. NO. 6

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that on the 16th day of July, 2021, the Court issued its Final Judgment in the above-captioned matter, a filed-stamped copy of which is attached.

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

DATED this 16th day of July, 2021.

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

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

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_____/

CASE NO. CV12-01271

DEPT. NO. 6

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Accordingly, it is hereby Ordered that Defendants WESPAC and GREG CHRISTIAN, shall recover from the Plaintiff, GREGORY GARMONG, the sum of $111,649.96 together with interest thereon at the rate as provided by Nevada law from August 9, 2019, until satisfied in full.

Furthermore, on July 12, 2021, this Court granted the Defendants' Second Amended Motion for Attorney's Fees and awarded Defendants additional attorney's fees in the amount of $45,084.50

which represented the attorney fees incurred by Defendants to support, confirm, and defend the Final Arbitration Award before this Court and the Nevada Court of Appeals.

Accordingly, it is hereby Ordered that Defendants, WESPAC and GREG CHRISTIAN, shall ALSO recover from the Plaintiff, GREGORY GARMONG, the sum of $45,084.50 together with interest thereon at the rate as provided by Nevada law from July 12, 2021 until satisfied in full.

IT IS SO ORDERED.

DATED this 16th date of July, 2021.

DISTRICT JUDGE

Prepared and Submitted by:

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

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

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I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 16th day of July, 2021, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

CARL HEBERT, ESQ.
THOMAS BRADLEY, ESQ.

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

Holly Longe

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 16th day of July, 2021.

By:___*/s/ Mehi Aonga*_____
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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.
_____/

NOTICE OF APPEAL

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

1. Final judgment, entered on July 16, 2021;

2 Order granting defendants' second amended motion for attorney's fees; Order confirming arbitrator's final award, entered on July 12, 2021;

3. Order denying plaintiff's motion for extension of time to file opposition to defendants' second amended motion for attorney's fees and costs, entered on June 11, 2021;

4. Order denying motion to strike declaration of Thomas C. Bradley in support of

second amended motion for attorney's fees and costs, entered on July 7, 2021.

DATED this 10th day of August, 2021.

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

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

Counsel for plaintiff/appellant
Gregory O. Garmong