IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

Case No. 83356

GREGORY GARMONG,

Appellant

--against--

WESPAC; GREG CHRISTIAN,

Respondents

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

APPELLANT'S APPENDIX VOLUME 3

Carl M. Hebert, Esq.
Nevada Bar No. 250
2215 Stone View Drive
Sparks, Nevada 89436
(775) 323-5556

Attorney for Appellant
Gregory Garmong

INDEX TO APPELLANT'S APPENDIX

DOCUMENT	VOLUME/PAGE
Affidavit of Service re: WESPAC Filed: September 8, 2012	1/JA 10
Affidavit of Service re: Greg Christian Filed: September 8, 2012	1/JA 11
Amended Complaint Filed: September 18, 2017	1/JA 20-30
Answer of Defendants Filed: October 16, 2017	1/JA 46-55
Appellant's Opening Brief in Garmong v. Wespac, appeal no. 80376, filed May 27, 2020	8/JA 1240-1317
Arbitration Tuesday, October 16, 2018 Reno, Nevada	4/JA 475-617
Complaint Filed: May 9, 2012	1/JA 1-9
Declaration of Carl M. Hebert, signed April 27, 2021	8/JA 1424
Defendants' Arbitration Brief Filed: October 9, 2018	3/JA 455-474
Defendants' Motion for Attorney's Fees Filed: August 8, 2019	7/JA 1131
Defendants' Opposition to Plaintiff's Motion for Extension of Time, filed May 6, 2021	9/JA 1429-1435

Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment
Filed: December 21, 2017 — 3/JA 246-282

Defendants' Opposition to Plaintiff's Motion for Reconsideration of Order Denying Plaintiff's Motion for Summary Judgment
Filed: March 8, 2018 — 3/JA 380-390

Defendants' Opposition to Plaintiff's Motion to Strike, filed May 5, 2021 — 8/JA 1425-1428

Defendants' Opposition to 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
Filed: May 9, 2019 — 6/JA 1016-1025

Defendants' Opposition to 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
Filed: May 9, 2019 — 6/JA 1026-1080

Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reduce Award to Judgment, Including, Attorneys' Fees and Costs
Filed: April 15, 2019 — 5/JA 784-818

Defendants' Second Amended Motion for Attorney's Fees, filed February 18, 2021 — 8/JA 1331-1336

Discovery Plan and Scheduling Order
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Exhibit 1 to Defendants' Second Amended Motion for Attorney's Fees, filed February 18, 2021	8/JA 1337-1339
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Motion for Extension of Time to File Opposition to Defendants' Second Amended Motion for Attorney's Fees and Costs; Opposition Points and Authorities, filed April 27, 2021	8/JA 1418-1423

Motion to Strike Bradley Declaration Attached To Reply in Support of Motion for Attorney Fees and Costs Filed: March 16, 2019	5/JA 763-772
Motion to Strike Declaration of Thomas C. Bradley in Support of Second Amended Motion for Attorney's and Costs, filed April 26, 2021	8/JA 1414-1417
Notice of Appeal Filed: January 7, 2020	7/JA 1238-1239
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Plaintiff's Motion to Vacate Arbitrator's Final Award Filed: April 22, 2019	5/JA 875-922
Plaintiff's Opposition to Defendants' Motion to Confirm Arbitrator's Award Filed: April 25, 2019	5 & 6/JA 923-1015
Plaintiff's Reply to Defendants' Opposition to 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 Filed: May 20, 2019	6/JA 1081-1094
Plaintiff's Reply Points and Authorities in Support of Motion to Strike Filed: March 22, 2019	5/JA 776-783
Plaintiff's Hearing Brief Filed: October 9, 2018	3/JA 395-454
Plaintiff's Motion for Partial Summary Judgment Filed: November 30, 2017	1, 2 &3 /JA 59-245
Plaintiff's Motion for Reconsideration of Order Denying Plaintiff's Motion for Partial Summary Judgment Filed: February 12, 2018	3/JA 370-379
Plaintiff's Motion to Alter or Amend "Order re Motions" Entered August 8, 2019 Filed: September 5, 2019	7/JA 1148-1175

Plaintiff's Objection Pursuant to NRS 38.231(3) And 38.241(1)(e) that there is no Agreement to Arbitrate; Notification of Objection to the Court Filed: March 27, 2017	1/JA 12-13
Plaintiff's Opposition to Defendants' Motion for Attorney Fees and Costs; Motion to Retax Costs Filed: March 6, 2019	5/JA 695-726
Plaintiff's Post Hearing Brief Filed: November 29, 2018	4/JA 630-654
Plaintiff's Reply Points and Authorities in Support of Motion to Alter or Amend "Order re Motions" Entered on August 8, 2019	7/JA 1186-1205
Plaintiff's Reply Points and Authorities in Support of Motion for Partial Summary Judgment, dated January 11, 2018	3/JA 283-365
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, filed May 13, 2021	9/JA 1447-1453
Reply to Defendants' Opposition to Plaintiff's Motion to Strike, filed May 12, 2021	9/JA 1440-1446
Reply to Opposition to Motion for Attorney Fees and Costs and Opposition to Motion to Retax Costs Filed: March 14, 2019	5/JA 739-762
Second Order re Scheduling Filed: November 22, 2017	1/JA 56-58
Stipulation Filed: August 16, 2019	7/JA 1142-1146

Transcript of Proceedings 4/JA 618-629
Arbitration
Thursday, October 18, 2018

8. **Liability.** WA does not guarantee the future performance of the Portfolio Assets, any specific level of the performance, or the success of any investment decision or strategy. Client understands that the investment decisions made by WA are subject to various market, currency, economic and business risks and those decisions will not always be profitable. Except as may otherwise by provided by law, WA will not be liable to Client for: a) any loss Client may suffer by reason of any investment decision made or other action taken or omitted in good faith by WA with the degree of skill, care, prudence or diligence under the circumstances that a prudent person acting in a like capacity would use; b) any loss arising from WA's adherence to the Client's instructions; c) any act or failure to act by the Custodian, any broker or dealer to which WA directs transactions for the Portfolio Assets or by any other third party; or d) its failure to purchase or sell any security on the basis of information known to any principal or employee of WA where the utilization of such information might constitute a violation of any federal or state laws, rules or regulations or a breach of any fiduciary or confidential relationship between any principal or employee of WA and any other person or persons. Federal and various state securities laws impose liability under certain circumstances on persons who act in good faith and therefore nothing in this Agreement shall waive or limit any rights, which Client may have under those laws.

9. **Confidentiality.** All information and advice furnished by either party to the other shall be treated as confidential information and shall not be disclosed to third parties except as required by law or with consent.

10. **Service to Other Clients.** WA acts as adviser to other clients and may give advice and take action with respect to such other clients' accounts which may differ from the action taken by WA with respect to the Portfolio Assets. WA agrees to act in a manner consistent with its fiduciary obligations to deal fairly with all clients when taking investment actions. WA shall have no obligation to purchase, sell or recommend for the Portfolio Assets any security which may be purchased or sold by WA, its principals, affiliates, employees or for the accounts of any other client. Client recognizes that transactions in a specific security may not be accomplished for all client accounts at the same time or at the same price.

11. **Termination.** This agreement may be terminated at any time by either party giving the other written notice of termination. However, this Agreement shall continue in effect until so terminated. Termination shall be effective when a notice of termination, properly executed, is actually received. Upon termination, any fees paid in advance will be prorated to the date of termination and any excess will be refunded to Client. If this Agreement is terminated by Client within five business days of the date it is executed or accepted, such termination shall be without penalty or liability for payment of fees. If Client is an individual, this Agreement shall terminate upon the death or adjudicated incapacity of Client, but shall take effect only upon actual receipt by WA of written notice of Client's death or adjudicated incapacity. Upon notice of termination, WA shall notify Custodian to deliver all assets held pursuant to this Agreement, according to Client's written instructions.

12. **Notices.** Unless otherwise specified herein, all notices, instructions, and advice with respect to all matters contemplated by this Agreement shall be deemed duly given when received in writing at the address set forth herein. Copies of all notices affecting the Custodian shall also be directed to the Custodian at the address which Client designates. Addresses may be changed by notice to the other parties given in accordance with this paragraph. WA may rely on any notice from any person reasonably believed by WA to be genuine and to have authority to give such notice. All written notices shall be addressed to: a) WESPAC , 2001 Broadway, 2nd Floor, Oakland, California 94612; and b) Client at the address set forth in the Confidential Client Profile attached hereto.

13. **Assignability.** This Agreement may not be assigned by WA without the prior consent of the Client. This Agreement may not be assigned by Client without the prior consent of WA.

14. **Miscellaneous.** This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties with respect to the management of the Portfolio Assets, supersedes all prior agreements, and, except as otherwise provided herein, may be amended only with a written document signed by the parties. This Agreement shall be governed by the laws of the State where the agreement is governed and so executed. If any provision of this Agreement is held to be unenforceable, such unenforceability shall not affect the remainder of this Agreement. This Agreement may be signed in one or more counterparts. and when taken together shall create a valid and binding Agreement as though all signatures appeared on the same document. The captions in this Agreement are otherwise for convenience of reference only and in no way define or limit any of the provisions hereof or otherwise affect their construction or effect. Except as otherwise provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors. No party intends for this Agreement to benefit any third party not expressly named in this Agreement.

15. **Acknowledgment of Receipt of Form ADV Part II.** Client hereby acknowledges that Client has received and had an opportunity to read WA's Form ADV Part II as required by Rule 204-3 of the Investment Advisers Act of 1940. WA's ADV Part II contains a clear and conspicuous notice of WA's privacy policy.

16. **Arbitration. The parties waive their right to seek remedies in court, including any right to a jury trial.** The parties agree that in the event of any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio Assets, such dispute shall be resolved exclusively by arbitration to be conducted only in the county and state at the time of such dispute in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS.) applying the laws of the State where the agreement is governed and executed. Disputes shall not be resolved in any other forum or venue. The parties agree that such arbitration shall be conducted by an arbitrator who is experienced in dispute resolution regarding the securities business, that discovery shall not be permitted except as required by the rules of JAMS, that the arbitration award shall not include factual findings or conclusions of law, and that no punitive damages shall be awarded. The parties

understand that the party's right to appeal or to seek modification of any ruling or award of the arbitrator is severely limited. Any award rendered by the arbitrator shall be final and binding, and judgment may be entered on it in any court of competent jurisdiction in the county and state of the principal office of WA at the time such award is rendered, or as otherwise provided by law.

The effective date of this Agreement shall be the date of its acceptance by WA.

Agreed to this 31 day of August of the year 2005.

State: ☐ California ☒ Nevada ☐ other _____

Gregory Carmona
Client Name

Gregory Carmona
Client Signature

Client Signature

AGREED AND ACCEPTED BY INVESTMENT ADVISER: WESPAC ADVISORS, LLC

By: Greg Christie

Title: CEO

Date: 8/31/05

EXHIBIT A - FEE SCHEDULE

The following fees will apply to investment management services for this account. The annual Management Fee is paid quarterly in advance. If the account is opened after the start of a calendar quarter, the initial feel will be prorated from the date of acceptance be WA though the end of the quarter. Thereafter, unless otherwise provided, the quarterly fee is based on the account's market value on the last day of the previous calendar quarter. There is an initial account set-up fee $250.

Fundamental Analysis Management	**Asset Value**	**Annual Advisory Fee**
1. **Institutional Equities**		
	First $1,000,000	0.75%
(Min. $100,000)	Next $1,000,000	0.65%
2. **WESPAC Growth**	Over $2,000,000	0.50%
(Min. $100.000)		
Technical Analysis Management		
3. **Growth & Income**		
	First $1,000,000	~~1.00%~~ .075
w/individual securities	Next $1,000,000	0.75%
(Min. $500,000)	Over $2,000,000	0.60%
4. **RMAP Equities**	First $1,000,000	0.75%
(Min $250,000)	Next $1,000,000	0.65%
	Over $2,000,000	0.50%
5. **RMAP Plus**		
	First $ 500,000	1.00%
(Min. $250,000)	Next $ 500,000	0.75%
	Over $1,000,000	0.50%
6. **Option Income.**		
	First $1,000,000	1.00%
(Min. $500.000)	Next $1,000,000	0.75%
	Over $2,000,000	0.50%
Active Municipal Management		
7. **Tax Preferred Income**	First $1,000,000	0.50%
(Min. $500,000)	Next $1,000,000	0.40%

.075 Retro to $ one. ae

Please Initial

Client Acknowledgement: _____

WESPAC

Offices located nationally

Reno Office
10425 Double R Blvd.
Reno, NV. 89521
p. 888.695.2869
renowespac@wespac.net
www.wespac.net

Oakland Office
2001 Broadway
2nd Floor
Oakland, CA. 94612

So. California Office
655 North Central Avenue
17th Floor
Glendale, CA. 91230

Tuesday, September 30, 2008

Dear Greg,

We are in receipt of your letters sent via fax on Sunday, September 28, 2008 and Friday, September 26th. I understand and empathize with your concern over your losses. No one enjoys losing money. However, everyone knows that there is risk in the financial markets and to gain the long term benefits associated with investing in the markets, an investor must be willing to accept the risk of loss from time to time.

Regarding the specific allegations in your letter, I respectfully disagree with your recollection of events. You never told me that "there could not be losses from my accounts in 2008." If any client had told me that I would have offered you two alternatives; (1) go to 100% cash or (2) to close your accounts.

My understanding of our past conversations was that you did want me to take steps to be more conservative if the stock market declines. I complied with those instructions by raising cash and selling what we believed were weak holdings. Unfortunately, due to unusual financial times in which we find our country today, these steps were not sufficient to protect your accounts from loss of capital.

Regarding the requirements you have demanded in order to maintain our professional relationship, I cannot comply. However, if you wish to continue our relationship I would recommend that in the near term we stay with our current allocations and continue to monitor your accounts. During our conversation yesterday at lunch you mentioned that the market would probably rally through the election and then run into trouble again. If this is the case then you would afford yourself the opportunity to recoup some of the losses and hopefully allow the markets to start trading in a more normal fashion. I am more than happy to meet with you on Wednesday as discussed and map out a workable solution.

Thank you for the opportunity to manage your funds.

Sincerely,

Greg Christian

MEMBER
SCHWAB *advisor network*®
Independent investment advice powered by investor evaluation and selection.*

CONFIDENTIAL

* Schwab has not prepared, reviewed or verified the information contained in this document, and Schwab makes no representation or warranty about its accuracy or completeness. Ask advisor for more important information.

WESPAC

Offices located nationally

Reno Office
10425 Double R Blvd.
Reno, NV. 89521
p. 888.695.2869
renowespac@wespac.net
www.wespac.net

Oakland Office
2001 Broadway
2nd Floor
Oakland, CA. 94612

So. California Office
655 North Central Avenue
17th Floor
Glendale, CA. 91230

Wednesday, October 29, 2008

Greg,

I am in receipt of your fax dated October, 24 2008 regarding account number xxxx-0713. We have attempted to handle your investment accounts to the best of our abilities based upon our previous meetings and conversations. During our last conversation you decided to sell out your retirement accounts and to keep the individual account invested. I did not beg, I simply advised you to not sell out the equities in your account since I believed they were oversold. However, we can not continue to work with your accounts under the constant threats that you have recently been verbalizing and faxing. At no time did I or anyone at Wespac imply that you would not suffer any losses in 2008 in any of your accounts. At this point I need to advise you to either let us continue managing the accounts or you should look elsewhere to find a manger that better fits your needs. Unless we hear otherwise I will assume that we should leave the retirement accounts in money market and continue to manage the 0713 account in the same fashion.

Kind regards,

Greg Christian

MEMBER
SCHWAB *advisor network*®
Independent investment advisor prescreened for investor evaluation and selection.*

CONFIDENTIAL

* Schwab has not prepared, reviewed or verified the information contained in this document, and Schwab makes no representation or warranty about its accuracy or completeness. Ask advisor for more important information.

A FOCUS FINANCIAL PARTNER

Oakland
2001 Broadway, 2nd Floor
Oakland, CA 94612
800-535-4253 p
510-287-5282 f

Fresno
7030 N. Fruit Avenue, Suite 120
Fresno, CA 93711
800-535-4253 p
510-287-5282 f

Reno
689 Sierra Rose Drive, Suite A2
Reno, NV 89511
888-695-2869 p
775-825-9655 f

Internet
www.wespac.net
www.retirementvista.com

April 23, 2013

To: Charles Schwab Advisor Relations

From: Greg Christian

Re: Gregory Garmong answers to Exhibit A

1. Yes, Mr. Garmong sent us a written complaint on September 26, 2008. (see attached) This complaint was sent along to Charles Schwab and discussed with the Reno branch manager and Schwab FC.
2. We did respond to Mr. Garmong on September, 30 2008 (see attached)
3. We determined Mr. Garmongs account objectives were appropriate for him after numerous meetings and client profiles .(attached)
4. We have no plans of entering into a settlement offer with Mr. Garmong. We acted completely within our fiduciary duties to manage his assets in accordance with stated objectives.
5. We have not and do not intend to reimburse management fees.
6. Aside from previously disclosed events to Schwab , no clients referred or non-referred have filed or threatened litigation or arbitration.
7. There have been no complaints to the SEC or any other regulatory body.

DECLARATION OF GREGORY GARMONG

I, Gregory Garmong, declare the following facts to be true of my own personal knowledge, except for those facts stated upon information and belief, and I believe those facts to be true.

1. I am the Plaintiff in Case No. CV12-01271, Gregory Garmong v. Wespac et al. This Declaration is submitted in support of "Plaintiff's Motion for Summary Judgment" in that proceeding.

2. In this Declaration, I make references to documents already produced by the parties in this suit, according to their numbering by the producing party. Numbering WESPAC xxxxxxx refers to documents produced by Defendants, and numbering GG xxxx refers to documents produced by me.

3. Authentication of documents

Exhibit 1, Document GG 0340–GG 0341, is a true, complete, and correct copy of a document that I received from Defendants in about July-August 2005.

Exhibit 2, Document GG 0342--GG 0357, is a true, complete, and correct copy of a document that I received from Defendants in about July-August 2005.

Exhibit 3, Document GG 0003-GG 0020, is a true, complete, and correct copy of a letter that I prepared, signed, and mailed to Defendants on October 22, 2007.

Exhibit 4, Document GG 0023, is a true, complete, and correct copy of a fax that I prepared and transmitted to Defendants on January 21, 2008.

Exhibit 5, Document GG0025, is a true, complete, and correct copy of a fax that I prepared and transmitted to Defendants on March 17, 2008.

Exhibit 6, Document GG 0026-GG 0027, is a true, complete, and correct copy of a fax that I prepared and transmitted to Defendants on July 15, 2008.

Exhibit 7, Document GG 0029--GG 0031, is a true, complete, and correct copy of a fax that I prepared and transmitted to Defendants on September 26, 2008.

Exhibit 8, Document GG 0033, is a true, complete, and correct copy of a fax that I prepared and transmitted to Defendants on October 24, 2008.

Exhibit 9, Documents GG 0034-GG 0333, are true, complete, and correct copies of the data side of monthly reports that I received by mail from Charles Schwab Co. ("Schwab") a few days after the dates shown on the respective documents. I have not included the reverse sides of these documents, which did not include data, but only printed descriptive material.

Exhibit 10, Document GG 0334, is a true, complete, and correct copy of dollar amounts for "change in investment value," that I compiled from documents GG 0034-GG 0333.

Exhibit 11, Document GG 0335, is a true, complete, and correct copy of dollar amounts for "advisor fees" paid to Defendants, that I compiled from documents GG 0034-GG 0333.

Exhibit 12, Document GG 0358–GG 0373, is a true, complete, and correct copy of SEC Form ADV-II for Defendant Wespac that I received from Wespac some time in the period of about July-August 2005.

Exhibit 13, Document GG 0336, is a true, complete, and correct copy of a document that I downloaded from the internet in November 2016.

Exhibit 14, Document GG 0378-GG 0403, is a true, complete, and correct copy of a document that I downloaded from the internet in November 2016.

Exhibit 15, Document GG 0404–GG 0433, is a true, complete, and correct copy of a document that I downloaded from the internet in November 2016.

Exhibit 16, Documents GG 0337 and GG 0338–GG 0339, are true, complete, and correct copies of two related documents that I downloaded from the internet in November 2016.

Exhibit 17, Document WESPAC 000039-WESPAC 00047, is a true, complete, and correct copy of a document that I completed in my handwriting and signed on August 18, 2005 and gave to Wespac, using a blank form provided to me by Defendant Wespac. Document WESPAC 000039-WESPAC 00047 was produced by the Defendants in the initial production of documents in this arbitration.

Exhibit 18, Document WESPAC 000048-WESPAC 000054, is a true, correct, and complete copy of Exhibit 1 to Defendants' Motion to Dismiss and to Compel Arbitration dated, served, and filed in this case on September 19, 2012. Exhibit 18 was authenticated in the Affidavit of Greg Christian dated September 19, 2012 and attached to the Motion to Dismiss and to Compel Arbitration. The Affidavit of Greg Christian states, at 1:22-23, "Attached hereto is a true, complete, and correct copy of the Investment Management Agreement signed by me and Gregory Garmong. (See Exhibit 1)." I signed Exhibit 1. Document WESPAC 000039-WESPAC 00047 was produced by the Defendants in the initial production of documents in this arbitration.

Exhibit 19, Document WESPAC 000567, is a letter sent to me by Defendant Christian. The document was produced by the Defendants in the initial production of documents in this arbitration.

Exhibit 20, Document WESPAC 000573, is a letter sent to me by Defendant Christian. The document was produced by the Defendants in the initial production of documents in this arbitration.

Exhibit 21, Document WESPAC 000579, is a letter from Wespac to Schwab. This document was produced by the Defendants in the initial production of documents in this arbitration.

4. I was over 60 years old in August 2005. Defendants were fully aware of my exact age from about July-August 2005. See Exhibit 17, document page WESPAC 000042, where I provided my birth date to Defendants.

5. I first encountered Defendants in 2005. I was referred to Defendants by Schwab, custodian of some of my financial assets, pursuant to an undisclosed financial kickback arrangement between Schwab and Defendants. At the time, Defendants represented and characterized themselves in their advertising to the public and to the government as "investment advisors". Exhibit 18 (WESPAC 000048-WESPAC 000054, Preamble and, inter alia, ¶¶ 1, 6; GG 0340; GG 0343; GG 0345; GG 0349; GG 0360; GG 0362; GG 0363; GG 0366), as financial planners (GG 0341,

GG 0343, GG 0361, GG 0364, GG 0366) and as investment/financial managers (WESPAC 000050-WESPAC 00051, ¶5, GG 0364, inter alia, GG 0361; GG 0366, GG 0370). Defendants represented themselves as providing outstanding-quality services, superior to those of other businesses in their field, and that they should be trusted. See the sales and advertising brochures at Exhibit 1 (GG 0340–GG 0341) and Exhibit 2 (GG 0342—GG 0357.)

6. In August 2005, Defendant Christian, acting on behalf of Defendant Wespac, and I signed a document entitled Investment Management Agreement (Exhibit 18, sometimes termed "Agreement") whereby Defendants would provide investment advice, financial planning, and investment/financial management services to me for a specified group of my "managed accounts" held at Schwab. (Exhibit 18, WESPAC 000048-WESPAC 000054) My sole contact to Wespac at all relevant times was Defendant Christian. The Agreement provided that I would pay Defendant Wespac a fee for performing its duties, termed an "advisor fee," would give Wespac access to my managed accounts at Schwab, and would keep Wespac informed in writing of my financial status, objectives, and instructions. The Agreement provided that Defendants would manage my managed accounts according to investment objectives and instructions provided in writing by me initially and according to any changes provided by me in writing. The initial investment objectives were set forth in a Confidential Client Profile (Exhibit 17, WESPAC 000039-WESPAC 00047) and orally. I did not receive a copy of the Confidential Client Profile that is found at WESPAC 000039-WESPAC 00047 prior to its production as document WESPAC 000039-WESPAC 00047 in this case.

7. Defendant Wespac prepared a draft of the document termed Investment Management Agreement, after discussions a few changes were made, and the document was signed. The signed "Investment Management Agreement" is found as Exhibit 18 at WESPAC 000048-WESPAC 000054. Defendants Wespac and Christian refused to produce the Confidential Client Profile Exhibit 17 earlier in this

lawsuit, despite my multiple requests that they do so.

8. The collection of pages found at WESPAC 000039-WESPAC 000054 is not complete, although the pages are arranged and presented to suggest they are a single complete document. I can tell this because the Confidential Client Profile (WESPAC 000039-WESPAC 00047) has original page numbers 1-9 in the lower right hand corner of each page, and the Investment Management Agreement (WESPAC 000048-WESPAC 000054) has original page numbers 12-18 in the lower right hand corner of each page. Clearly, original pages 10-11 are missing. Moreover, the collection of pages calls for three different Exhibits A and three different Exhibits B, and none of these exhibits were provided.

9. To the extent that there is no valid written contract, Defendants and I proceeded under the terms of an oral contract having the provisions generally found in ¶¶ 1-15 of the Investment Management Agreement (Exhibit 18, WESPAC 000048-WESPAC 000053).

10. The Investment Management Agreement (Exhibit 18, WESPAC 000048-WESPAC 000054) states in ¶ 5 (document pages WESPAC 000050-WESPAC 000051),

> 5. Discretionary Authority. WA [as defined in the Preamble as Wespac Associates] shall have designated full power and authority to make all investment decisions for Portfolio Assets [as defined in ¶ 3(1), the managed accounts], including decisions to buy and sell any domestic or foreign security, except to the extent Client [as defined in preamble, Plaintiff], except to the extent Client provides written instructions limiting such authority. Although WA may make investment decisions without prior consultation with or further consent from Client, all such decisions shall be made in accordance with the investment objectives of which Client has informed, and may inform, WA from time to time in writing. Client appoints WA agent and attorney-in-fact..." [bracketed explanation added]

11. Prior to October 2007, my working relation with Defendants was that Defendants proposed the strategy and tactics of the managed accounts, and I made the final decisions on actions to take. As a result, I was involved in the day-to-day management of the managed accounts. My initial written objectives and instructions

to the Defendants were set forth in the Confidential Client Profile, Exhibit 17 (WESPAC 000039-WESPAC 00047), and decisions were made in accordance with the objectives and instructions of the Confidential Client Profile.

12. I commenced retirement in August 2007, and my financial situation changed. I was no longer able to earn enough money to replace any capital losses in the accounts managed by Defendants, and I therefore became even more conservative. In October 2007, my relation with Defendants also changed. (Exhibit 3, GG 0003-GG 0020.) At Defendants' suggestion, Defendants took over sole management of the managed accounts as provided in the Investment Management Agreement at ¶ 5 (document pages WESPAC 000050-WESPAC 000051), quoted in ¶ 10 above, and I ceased playing an active role. At the same time, I gave the Defendants both orally and in writing additional objectives and instructions beyond those of the Confidential Client Profile (Exhibit 17, WESPAC 000039-WESPAC 00047). These additional objectives and instructions were in accordance with the Investment Management Agreement ¶ 2 (document page WESPAC 000048), which provides in part: "In the event Client's financial situation changes, Client agrees to notify WA in writing of the changes and new investment objectives, if different from those described." It was my understanding from the terms of Investment Management Agreement ¶ 5, quoted above, that Defendants would thereafter adhere to those additional objectives and instructions. I fired Defendants in November 2008 because they failed to follow my investment objectives and instructions.

13. The additional objectives and instructions emphasized that I was now retired, had to rely on my savings to support me for the rest of my life, had sufficient savings even without any return on capital, and that my primary objective was now to avoid any losses in capital. I gave these instructions to Defendant Christian both orally and in writing. My additional objectives and instructions are found in my letter of October 22, 2007 (Exhibit 3, GG 0003-GG 0020). They are repeated and reconfirmed in my fax of January 21, 2008 (Exhibit 4, GG 0023), my fax of March

17, 2008 (Exhibit 5, GG 0025), my fax of July 15, 2008 (Exhibit 6, GG 0026-GG 0027), my fax of September 26, 2008 (Exhibit 7, GG 0029-GG 0031), and my fax of October 24, 2008 (Exhibit 8, GG 0033).

14. My letter of October 22, 2007 (Exhibit 3, GG 0003-GG 0020), at document page GG 0004) to Wespac states in part:

> The basic instruction in the Client Profile and that I gave you and Wespac orally when I started with you in 2005 was to manage my accounts generally conservatively. Now I want to emphasize that instruction even more. It is really important to me that you structure and manage my accounts so that they do not lose capital if the markets decline, as I believe they may, and if the markets do decline, to sell out the losers. I want to confirm to you what I said at the meeting, and to instruct you that I am willing to sacrifice potential gains to avoid losses. If the stock markets do well in 2008 and after that, I won't blame you if I don't have big gains, as long as I don't have big losses if the markets decline. You said that you would follow that approach.

15. My fax of January 21, 2008 (Exhibit 4, GG 0023) to Wespac states in part:

> As I told you, I'll sacrifice potential gains to ensure that I don't have capital losses. Now that I'm retired and won't be adding to my accounts, I have to avoid capital losses. I'll assume that everything is under control under that guideline,

16. My fax of March 17, 2008 (Exhibit 5, GG 0025) to Wespac states in part: "As had said before, my big concern is losing money on these accounts."

17. My fax of July 15, 2008 (Exhibit 6, GG 0026) to Wespac states in part:

> At your suggestion, I had left my accounts in the sole care of Wespac for the first half of 2008. You advised me not to worry, and let Wespac handle the management. So, I did.
>
> I decided a few days ago that it would be reasonable to do an evaluation at the halfway point of the year. I assembled all the performance data since the beginning of the year.
>
> The results are mixed, and in one respect very disturbing in light of my direction to Wespac that I expected the stock market to decline in 2008 and wanted to sacrifice potential gains to avoid loss.

18. Prior to my fax of September 26, 2008 (Exhibit 7, GG 0029-GG 0031), Defendants had never responded to or disagreed with any of the objectives and instructions that I gave them, or suggested that they could not, or would not, adhere

to them in managing the managing accounts. (Exhibit 19, WESPAC 000567; same document is Exhibit 1 to Defendants' Opening Arbitration Brief.) By September 30, 2008, nearly all of the losses from my accounts that were being managed by Defendants had already been sustained. (Exhibits 9-11)

19. Defendants had an obligation and duty under the Investment Management Agreement (Exhibit 18, WESPAC 000048-WESPAC 000054) to manage my Portfolio Assets (i.e., managed accounts), as stated in ¶ 5 quoted more fully above in ¶ 10 and repeated here,

> Although WA may make investment decisions without prior consultation with or further consent from Client, all such decisions shall be made in accordance with the investment objectives of which Client has informed, and may inform, WA from time to time in writing.

20. I had three obligations and duties under the Investment Management Agreement (Exhibit 17, WESPAC 000048-WESPAC 000054). The first was to pay the "advisor fees" (also termed "management fees") of Defendants (Investment Management Agreement ¶ 3(4)); the second was to provide access to the managed accounts held by Schwab to Defendants (Investment Management Agreement ¶ 3(2)); the third was to notify Defendants in writing of any changes in personal status, investment objectives and instructions (Investment Management Agreement ¶ 2).

21. I fulfilled all of my obligations fully and in a timely manner. The first obligation, payment of "advisor fees," was set up in paperwork prepared and filed by Defendants as an automatic quarterly payment from each of the managed accounts directly to Wespac. The second obligation, access to the managed accounts, was also set up in paperwork prepared and filed by Defendants. I satisfied the third obligation, notification of changes, in the letters and faxes referenced above.

22. During the period October 2007 to November 2008, under Defendants' sole management, Defendants failed to follow my written investment objectives and instructions. The result was that my managed accounts experienced a loss in value of capital of $580,649.82. (Exhibit 9, GG 0034-GG 0333, summarized in Exhibit 10,

GG 0334) During that same period Defendants charged me $21,283.29 in "advisor fees" (Exhibit 9, GG 0034-GG 0333, summarized in Exhibit 11, GG 0335).

23. When I orally inquired of Defendant Christian why he had not properly managed my managed accounts according to the objectives and instructions, he responded orally that there were two primary reasons: first, so much new business had come into Wespac that he did not have time to give my managed accounts sufficient attention and, second, that I had not been sufficiently vociferous and forceful in my earlier complaints. I replied that attention to my managed accounts should have taken precedence over new business, and that I was paying him to manage my accounts properly and he had failed to do so. Defendant Christian had no reply to those points. Defendant Christian also bragged to me that his other clients were doing well. (Exhibit 7, GG 0031)

24. In November 2016, I began investigating whether Defendants had complied with the rules of the Securities Exchange Commission ("SEC") and the law of Nevada. I had not done any such investigation previously, as Defendants should have informed me earlier according to their fiduciary duty of full disclosure, if they had not complied with the laws.

25. I discovered on the SEC website an SEC document presenting SEC Rules found in 17 CFR Parts 270, 275, and 279 (Exhibit 14, GG 0378–GG 0403). These rules required that, effective August 31, 2004 with a compliance date of January 7, 2005, investment advisors must prepare a Code of Ethics. Pages 7-8/26 of Exhibit 14 (document pages GG 0384-5) provides that Investment Advisors are required by law to describe their Codes of Ethics to their Clients in their Form ADV-II, and also to offer to make a copy of their Code of Ethics available to their Clients upon request.

26. In reviewing the Form ADV-II provided to me by Defendants in July-August 2005 (Exhibit 12, GG 0358–GG 0373), I did not find any mention that Defendants had a Code of Ethics, or any offer to make a copy of a Code of Ethics

available to me upon request, as required by the SEC. This was the only Form ADV-II that I received from Defendants.

27. Defendant Wespac had not informed me in 2005-2008 that it was not prepared a Code of Ethics, and was therefore in violation of the SEC law. I had to discover that for myself in November 2016.

28. I also discovered a set of Best Practices prepared by an industry group, the Investment Advisor Association, and dated July 20, 2004 concerning the SEC's requirement of preparing a Code of Ethics (Exhibit 15, GG 0404–GG 0433). This document summarized the SEC requirements regarding the Form ADV-II (GG 0431).

29. Defendant Wespac did not produce a Code of Ethics in its initial production of some 656 pages of documents.

30. In November 2016 I searched the website of the Nevada Secretary of State and found that Defendant Wespac had not become registered as a foreign LLC as required by NRS 86.544, until October 22, 2008 (Exhibit 16, GG 0337-GG 0339).

31. Defendants Wespac and Christian concealed from me in 2005-2008 that Defendant Wespac was not registered as a foreign LLC in Nevada, and was therefore in violation of Nevada law. I had to discover that for myself in November 2016.

32. In November 2016, I discovered that Defendant Wespac had become licensed as an investment advisor in Nevada, as required by NRS 90.330, only on September 24, 2008. This date was long after it had started doing business with me, and near the end of the relation with me. (Exhibit 13, GG 0336).

33. Defendants Wespac and Christian concealed from me in 2005-2008 that Defendant Wespac was not properly licensed as an investment advisor in Nevada. I had to discover that for myself in November 2016.

34. Defendants concealed from me in 2005-2008 that Defendant Christian had been previously disciplined and suspended by the SEC. I first learned that information when I read Defendants' Opening Arbitration Brief, page 4:26-5:4.

35. If Defendants had disclosed to me in July-August 2005 during my initial

discussions with Defendants when they were persuading me to become their client, and in August 2005-2008 after I became their client, any or all of the facts that Defendants refused to comply with the lawful requirements of the SEC and the State of Nevada, and had no Code of Ethics as required by the SEC, and that Defendant Christian had been previously disciplined and suspended by the SEC, I never would have even considered doing business with them because I would have been on notice that Defendants were fundamentally dishonest. Defendants' refusal to obey the federal and state laws, and Defendant Christian discipline by the SEC, strongly indicate a willingness to engage in other wrongful, illegal, injurious misconduct, such as breaching a private contract and its associated provisions, violating conditions imposed by law such as fiduciary duty, and violating other federal and state laws. The concealment from me by Defendants of this information caused me to do business with them, when otherwise I would have refused if I had known the information, and led to great harm to me.

The undersigned hereby affirms this document does not contain a social security number.

This Declaration is made pursuant to NRS 53.045.

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

Executed on November 15, 2017 at Smith, Nevada.

Gregory Garmong

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Judicial Arbitration and Mediation Service

Las Vegas, Nevada

GREGORY GARMONG,

Plaintiff,

Case No. 1260003474

v.

WESPAC, GREG CHRISTIAN, and
Does 1-10,

Defendants.

_____/

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Wespac and Greg Christian hereby oppose Plaintiff Gregory Garmong's *Motion For Partial Summary Judgment*. Defendants' *Opposition* is based on the following Points and Authorities, the attached affidavit of Greg Christian, filed on behalf of both Defendants, and all other pleadings, briefs, and exhibits identified below.

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POINTS AND AUTHORITIES

I. Summary

Defendants, Greg Christian and Wespac, deny that they are liable to Plaintiff, deny they caused Plaintiff to suffer any damages, and emphasize that had Plaintiff followed Defendants' advice that Plaintiff's accounts would have more than doubled in value by 2017.

From 2005 to 2007, Plaintiff was satisfied with Defendants' advice and recommendations. Plaintiff's accounts, however, were negatively impacted by the great recession in 2008 and 2009. Plaintiff then lost sight of his stated long-term financial objectives. Against Mr. Christian's advice, Plaintiff decided to terminate Mr. Christian and transfer his accounts to another broker at the very bottom of the market. Plaintiff is now trying to hold Defendants financially responsible for the consequences of his decision to terminate his relationship with Defendants at the bottom of the market.

II. Background

In August 2005, Garmong and Defendants entered into a written "Investment Management Agreement" whereby Wespac would provide financial advice and services to Plaintiff. On March 9, 2009, Garmong terminated the contract with Defendants.

On May 9, 2012 Garmong filed a *Complaint* in Nevada Second Judicial District Court alleging that Defendants had breached the "Investment Management Agreement." In response, Defendants 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.

On October 29, 2012, Plaintiff filed an *Opposition To Defendants' Motion To Dismiss And To Compel Arbitration*. In his *Opposition*, Garmong claimed that because the arbitration clause of the Agreement was unconscionable, he would not arbitrate his disputes with Defendants, and would instead engage in nonbinding mediation. *Opposition* at 12:26-13:1. On December 3, 2012,

Defendants filed a reply to Plaintiff's *Opposition*.

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." As a result of this finding, the Court ordered the parties to engage in binding arbitration and stayed further judicial proceedings pending the arbitration.

III. Summary Judgment Standard

NRCP Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. However, in deciding whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought; the factual allegations, evidence, and all reasonable inferences in favor of that party must be presumed correct." *NGA #2 Limited Liability Co. v. Rains*, 113 Nev. 1151, 1157, 946 P.2d 163, 167 (1997) citing *Ferreira v. P.C.H. Inc.*, 105 Nev. 305, 306, 774 P.2d 1041, 1042 (1989). "A litigant has a right to a trial when there remains the slightest doubt as to remaining issues of fact." *NGA #2*, 946 P.2d at 167 citing *Clauson v. Lloyd*, 103 Nev. 432, 435, 743 P.2d 631, 632 (1987); *Pine v. Leavvitt*, 84 Nev.507, 513, 445 P.2d 942 ("NRCP 56(c) authorizes summary judgment only where . . . the truth is clearly evident and no genuine issue remains for trial.")

NRCP 56(c) further requires that "[m]otions for summary judgment and responses thereto shall include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely at issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies."

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IV. Material Facts Not At Issue

Defendants do not dispute the following material facts:

1. The parties entered into a written "Investment Management Agreement" in or about August 2005.

2. Beginning in 2008, the stock market, after a lengthy period of appreciation, rapidly decreased in value.

3. Chart showing the values of the S&P 500 and NASDAQ from October 2005 through February 2009, attached as an Exhibit to Defendants' *Opening Arbitration Brief.*

For a non-exhaustive list, see Exhibit 2.

V. Material Facts At Issue

Mr. Garmong's fifty-page *Motion for Summary Judgment* was convoluted, hard to comprehend, and its reasoning highly questionable. Defendants, 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. The Plaintiff's *Motion for Summary Judgment* was so voluminous, Defendants may have failed to specifically identify each and every detail material fact in dispute but believe that Mr. Christian's Affidavit adequately refutes the Plaintiff's baseless claims. Defendants hereby incorporate the Affidavit of Greg Christian, attached as Exhibit 1, in defense to all the claims discussed below. Rather than attempt to dissect Mr. Garmong's *Motion for Summary Judgment*, Defendants will instead focus on each claim brought by Mr. Garmong and explain which material facts are disputed.

For a non-exhaustive list, see Exhibit 3.

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VI. Legal Argument

1. Breach of Contract Claim

Under Nevada law:

> To prevail on a breach of contract claim, a plaintiff must prove: (1) the existence of a valid contract; (2) a breach of that contract by defendant; and (3) damages resulting from the defendant's breach.

Shaw v. Citimortgage, Inc., 201 F.Supp.3d 1222, 1248 (D.Nev. 2016).

Here, Plaintiff alleges that Defendants breached the Agreement by "fail[ing] to manage Plaintiff's managed accounts according to his investment objective and instructions not to lose capital." *Motion For Partial Summary Judgment* ("Motion") at 10:3-4. Plaintiff further alleges that "Defendants' breach was the proximate cause of Plaintiff's loss, inasmuch as Defendants had sole responsibility for managing the managed accounts." *Motion* at 10:7-8.

Plaintiff fails to allege exactly what was "unsuitable" about the investments that Defendant Christian recommended, except that they declined in value. But an investment is not unsuitable just because it declines in value at some point. In fact, because of the economic situation in late 2008 and 2009, most types of investments sustained sharp declines. Subsequent events have demonstrated that Mr. Christian's advice to Plaintiff that Plaintiff should stay the course would have prevented the purported losses about which he now complains.

Mr. Christian fulfilled his responsibility to the Plaintiff. He inquired about his financial situation and objectives when Plaintiff first opened his accounts, and he continued these discussions with Plaintiff, through phone calls, personal meetings, and written communications, up to the point that he transferred his accounts to another broker. Based upon these discussions, Mr. Christian had a reasonable basis to believe not only that his recommendations were sound, but that they were appropriate and suitable for the Plaintiff – both as individual transactions and in light of his entire portfolio. The information Mr. Christian provided the Plaintiff throughout their relationship was accurate and fulfilled his obligation to the Plaintiff.

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Mr. Christian made recommendations to the Plaintiff and monitored his accounts. Mr. Christian acted reasonably to ensure that the Plaintiff appreciated the risk of his investment decisions and did his best to discourage him from making decisions that he believed were inconsistent with his investment objectives. Plaintiff did not rely on Mr. Christian's advice to stay the course, he disregarded it. Plaintiff cannot blame Mr. Christian for giving bad advice when it was his disregard of that advice which caused his losses.

As stated in Defendant Christian's Affidavit, a letter instructing him to assume complete control over Mr. Garmong's accounts was never received by Mr. Christian, nor did Mr. Garmong ever ask Mr. Christian, at any time, either in writing or in person, to solely manage Plaintiff's accounts without any input from Plaintiff. Mr. Christian believes the self-serving letter, allegedly dated October 11, 2017, was fraudulently created by Mr. Garmong to provide false evidence to support Plaintiff's claims in this litigation.

Although Mr. Christian technically possessed discretionary control over Mr. Garmong's accounts, in reality, Mr. Garmong insisted upon reviewing and approving all important investment strategies before the strategies were implemented. In fact, Mr. Garmong approved of all important investment strategies and investment recommendations that were made throughout the life of the accounts.

For a limited time period, Mr Garmong did allow Defendants to invest his taxable account in Wespac's "Income and Growth Portfolio." Mr. Garmong selected that model portfolio from a variety of other Wespac model portfolios, some of which were designed to have lower risk than the portfolio selected by Mr. Garmong. Within the "Income and Growth Portfolio," the Defendants exercised discretion to make security transactions to keep the portfolio aligned with the model portfolio's investment objectives and target holdings.

Mr. Christian's investment advice to Mr. Garmong was at all times suitable and prudent. As a result, any monetary losses suffered by Plaintiff were not proximately caused by Defendants,

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and summary judgment is not appropriate. Accordingly, Defendants deny that they breached any terms of the agreement and deny that Plaintiff suffered any damages. See Affidavit of Greg Christian, attached as Exhibit 1.

2. Breach of Implied Warranty Claim

To state a claim for breach of warranty: "[A] plaintiff must prove that a warranty existed, the defendant breached the warranty, and the defendant's breach was the proximate case of the loss sustained." *Nevada Contract Services, Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157, 161, 68 P.3d 896, 899 (2003).

Here, Plaintiff has asserted that an implied warranty existed in the Agreement signed by the parties. Despite diligent research, Defendants have been unable to locate one case in which a court found an implied warranty to exist in a contract solely for services. See, e.g. *Lufthansa Cargo A.G. v. County of Wayne*, 2002 WL 31008373 at *5 (E.D.Mich)("Plaintiff's claim for breach of implied warranty fails as a matter of law. A breach of implied warranty claim cannot be alleged in the context of a 'contract' for services . . .".); *Anthony Equip. Corp. v. Irwin Steel Erectors, Inc.*, 115 S.W.3d 191, 209 (Ct.App.Tx. 2003)("The Texas Supreme Court has recognized an implied warranty for services only when the services related to the repair or modification of existing tangible goods or property."); *Rochester Fund Municipals v.Amsterdam Municipal Leasing Corp.*, 746 N.Y.S.2d 512, 515, 296 A.D.2d 785, 787 ("'No warranty attaches to the performance of a service.'")(quoting *Aegis Prods. v. Arriflex Corp. Of Am.*, 25 A.D.2d 639, 639, 268 N.Y.S.2d 185); *City Services Contracting, Inc. v. Olen Properties Corp.*, 2002 WL 2017182 (Ct.App.4th Dist. Cal.)(UNPUBLISHED); ("'the well settled rule in California is that where the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply.'")(quoting *Allied Properties v. John A. Blume & Associates*, 25 CalApp.3d 848, 855, 102 Cal.Rptr.259 (1972).

The single case cited by Plaintiff, *Canyon Villas Apt. Corp. v. Robert Dillon Framing, Inc.*,

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2013 WL 3984885, was a construction defect case wherein a property owner had brought an action against a subcontractor for breach of implied warranty of workmanship – it was not an action based on a contract solely for services. As case law makes clear, an implied warranty did not exist in the parties' Agreement, and this claim should be ignored.

To the extent that a warranty for investment advice services may exist, Defendants deny that they failed to provide inadequate services, that at all times Defendants provided suitable investment advice, and deny that Plaintiff suffered damages. See Affidavit of Greg Christian, attached as Exhibit 1.

3. <u>Contractual Breach of Implied Covenant of Good Faith and Fair Dealing Claim</u>

According to the Nevada Supreme Court, to establish a claim for breach of the implied covenants of good faith and fair dealing, a plaintiff must prove:

> (1) the existence of a contract between the parties;
> (2) that defendant breached its duty of good faith and fair dealing by acting in a manner unfaithful to the purpose of the contract; and
> (3) the plaintiff's justified expectations under the contract were denied.

Shaw v. Citimortgage, Inc., 201 F.Supp.3d 1222, 1251 (D.Nev. 2016).

As further explained by the Court, the implied covenants "'Prohibits arbitrary or unfair actions by one party that work to the disadvantage of the other.'" *Id.* (Quoting *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420, 427 (2007).

Here, the parties agree that a contract existed between them, however, Defendant Christian asserts that Plaintiff Garmong never instructed him to make changes to Plaintiff's investment accounts without Mr. Garmong's approval. At all times, his investment advice to Mr. Garmong was suitable and prudent. In addition, Mr. Garmong asserted control to make the final decision on all important investment strategies and to pre-approve of all material investment decisions. Defendants were faithful at all times to the purpose of the parties' Agreement. In any event, Defendants deny that they violated the covenant of good faith and fair dealing and deny that Plaintiff suffered damages. See Affidavit of Greg Christian, attached as Exhibit 1.

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4. Tortious Breach of Implied Covenant of Good Faith and Fair Dealing

A claim for tortious breach of the implied covenants is similar to a contractual breach of the implied covenants, but also requires that a special relationship of trust and dependency existed between the parties. *Andreatta v. Eldorado Resorts*, 214 F.Supp. 3d 943, 957 (D.Nev. 2016). "This additional tort liability is allowed only in cases where 'ordinary contract damages do not adequately compensate the victim because they do not require the party in the superior or entrusted position . . . to account adequately for grievous and perfidious misconduct, and contract damages do not make the aggrieved, weaker, 'trusting' party 'whole.'" *Id.*

A federal court has further explained that "an action in tort for breach of the covenant arises only 'in rare and exceptional cases' when there is a special relationship between the victim and tortfeasor. A special relationship is 'characterized by elements of public interest, adhesion, and fiduciary responsibility.'" *Max Baer Productions, Ltd. v. Riverwood Partners, LLC*, 2010 WL 3743926 at *5 (D.Nev.). As examples of a special relationship, the court sited relationships "between insurers and insureds, partners of partnerships, and franchisees and franchisers." *Id.* "In addition, we have extended the tort remedy to certain situations in which one party holds '<u>vastly superior bargaining power</u>.'" *Id.* (emphasis added).

Here, as set forth in *Plaintiff's Pre-Hearing Statement*, Mr. Garmong was hardly a weaker and dependent party. Rather, Mr. Garmong had obtained a doctorate from MIT and a combined J.D. and M.B.A. from UCLA before spending nearly thirty years as a patent attorney. *Plaintiff's Pre-Hearing Statement* at 3:3-15. Mr. Garmong was also an experienced investor who transferred numerous securities, not cash, into the accounts managed by Defendants.

In addition, contrary to Plaintiff's representations that he had not been given a copy of the "Investment Management Agreement" to study and to have legal counsel review before signing, "Mr. Garmong was given a copy of the 'Investment Management Agreement' to take with him and review, and then kept the Agreement for at least a week before he returned his annotated copy

to Westpac's (sic) office." Defendants' *Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* at 6:6-9.

Further, despite Plaintiff's claims that he was unable to negotiate as to the terms of the Agreement, the notes, underlines and cross-outs contained in Mr. Garmong's copy of the Agreement, prove otherwise. Defendants' *Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* at 6:11-14. In addition, despite Plaintiff's claims that "[t]here was no fair negotiation of the terms of the Agreement . . .". Defendant Christian has stated that he made the changes requested by Mr. Garmong to the "Investment Management Agreement." Affidavit of Greg Christian dated December 3, 2012, attached as Exhibit 1 to *Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* at ¶4 and Declaration of Gregory Garmong dated October 29, 2012, attached as Exhibit 1 to *Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* at ¶8. Here, the Agreement was not one of adhesion nor were Defendants a party with "vastly superior bargaining power."

Further, because Defendants never assumed sole control over Gregory Garmong's accounts, Mr. Garmong remained in control of making all important investment strategies and approved of all material investment recommendations throughout the parties' relationship. As a result, Plaintiff had not established that Defendants breached the implied covenant of good faith and fair dealing or that Defendants' conduct was grievous and perfidious. In any event, the Defendants deny they violated any applicable covenant of good faith and fair dealing and deny that Plaintiff suffered any damages. See Affidavit of Greg Christian, attached as Exhibit 1.

5. <u>Breach of Nevada Deceptive Trade Practices Act Claim</u>

"Under NDTPA's [Nevada Deceptive Trade Practices Act] plain language, to establish a cause of action, a plaintiff must show a defendant engaged in a consumer fraud of which the plaintiff was a victim. Because a prevailing party may recover 'damages that he has sustained,' a

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plaintiff also must demonstrate damages. Implicit in that language is a causation requirement." *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657 (D.Nev. 2009)(emphasis added). As further stated by the *Picus* Court, "Under Nevada Revised Statutes §41.600(3) a party can recover only those damages sustained as a result of the defendant's act of consumer fraud." *Id.*

The law does not support a "rearview" analysis of investment recommendations. The Plaintiff must demonstrate that the quality of the investment when it was purchased deviated from his or her investment goals. [citing cases] *Keenan, M.D., et al. v. D.H. Blair & Co., Inc.*, 838 F. Supp. 82, 87 (S.D.N.Y. 1993). A subsequent diminution in value reveals nothing about the quality of the investment when it was purchased and does not illuminate the reasons why the stock was unsuitable for investment objectives. *Id.* Conclusory allegations regarding inappropriate investments are not sufficient. *Id.* "[A]ny investment that turns out badly can appear to be – in hindsight a low return, high risk investment..." *Olkley v. Hyperion 1999 Term Trust, Inc.*, 98 F.3d 2, 8 (2nd Cir. 1996). "It is the very nature of the securities markets that even the most exhaustively researched predictions are fallible..." "Not every bad investment is a product of misrepresentation." *Id.* To recover in a securities case, a customer "must offer more than allegations that [his] portfolios failed to perform as predicted." *Id.*

As previously stated, Defendant Christian has asserted that Plaintiff Garmong never instructed him to assume complete control over Plaintiff's investment accounts without input from Mr. Garmong, and that Mr. Garmong was in control of making all important investment strategies and approved of all investment recommendations made by Defendants. Mr. Christian has further stated that any losses suffered by Mr. Garmong were directly attributable to the sharp declines in the overall stock market and were not the result of Defendants failure to follow Mr. Garmong's investment objective and instructions. As a result, Plaintiff cannot establish the causation element of his claim and summary judgment should be denied. In any event, Defendants deny that they committed any acts prohibited by the Nevada Deceptive Trade Practices Act and deny that Plaintiff

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suffered any damages. See Affidavit of Greg Christian, attached as Exhibit 1.

6. Breach of Fiduciary Duty Claim

Plaintiff's breach of fiduciary duty claims are premised on his allegations of unsuitability. However, Plaintiff has failed to present any evidence that the investments recommended were unsuitable. The investments recommended and trades made were all suitable based on Plaintiff's objectives, risk tolerance and financial situation. The suitability obligation, however, is not tantamount to an investment insurance policy which protects against losses. At the proper time, Defendants will present expert evidence on this issue.

According to the Nevada Supreme Court, "a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship." *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009).

In alleging breach of fiduciary duty, Plaintiff has ignored the universal common law, which holds that no such duty exists on these facts. The universal common law states:

> Absent a special agreement to the contrary, a licensed broker owes his customer only the duty to exercise due care in executing all instructions expressly given to him by the principal. He is not a guarantor or insurer against loss sustained by his customer. *See, Drake-Jones Co. v. Drogseth,* 188 Minn. 133, 246 N.W. 664 (1933); *Meyer, Law of Stockbrokers and Stock Exchanges,* §§ 47(b); 12 Am. Jur. 2d. Broker § 122.

Rude v. Larson, 207 N.W.2d 709, 711 (Minn. 1973).

Put another way, "the federal laws are not a panacea for all the losses suffered in the stock market upon the recommendation of brokers. The mere act of giving investment recommendations does not establish a fiduciary duty." *Hotmar v. Lowell H. Listrom & Co., Inc.*, 808 F.2d 1384 (10th Cir. 1987).

As stated above, Plaintiff Garmong never instructed Mr. Christian to assume complete control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong were not caused by Defendant Christian's failure to follow Mr. Garmong's investment

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instructions, but were due solely to the sharp declines in the stock market. Further, Mr. Garmong never instructed Defendants to assume complete control over his investment accounts, and instead, remained in control of all important investment strategies and approved of all recommendations made by Defendants throughout their relationship. As a result, Defendants never breached their fiduciary duty to Plaintiff.

Further, Defendants adamantly deny that they ever concealed any information from Plaintiff, let alone "as part of a deliberate, intentional, willful, and conscious program of dishonesty, deceit, and fraud, planned and perpetrated even from before the first meeting of Defendants and Plaintiff and continuing after the Investment Management Agreement, exhibit 18, was signed." *Plaintiff's Motion For Partial Summary Judgment* at 33:14-19. Such accusations are ludicrous.

In any event, Defendants deny any applicable duty owed to Plaintiff and maintain that they provided suitable investment advice to Plaintiffs at all times. Defendants further deny Plaintiff suffered any damages. See Affidavit of Greg Christian, attached as Exhibit 1.

7. <u>Breach of Fiduciary Duty of Full Disclosure Claim</u>

Defendants incorporate their response as if set fully herein to their Breach of Fiduciary Duty section discussed above. See Affidavit of Greg Christian, attached as Exhibit 1.

8. <u>Breach of Agency Claim</u>

According to the Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006), "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."

As previously stated, Plaintiff Garmong never instructed Mr. Christian to assume complete control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong were not caused by Defendant Christian's failure to follow Mr. Garmong's investment

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instructions, but were due solely to the sharp declines in the stock market. Further, Mr. Garmong never instructed Defendants to assume complete control over his investment accounts, and instead, remained in control of all important investment strategies and approved of all recommendations made by Defendants throughout their relationship. Indeed, as Mr. Christian stated in his Affidavit, "If Mr. Garmong had followed my advice to stay in the market and not panic, his accounts would likely have tripled in value since March 2009." As a result, Defendants never breached their agency duty to Plaintiff. In any event, Defendants deny committing any breach of agency duty that may have been owed to Plaintiff and deny that Plaintiff was damaged. See Affidavit of Greg Christian, attached as Exhibit 1.

9. Negligence Claim

To the extent that Mr. Garmong seeks summary judgment on the claim of negligence, Mr. Garmong must prove:

a) That the defendant was negligent; and

b) That the defendant's negligence was the proximate legal cause of damage to the plaintiff.

Nevada Jury Instructions 4.02

In any event, Defendants deny that they were negligent in any manner in this case and deny that Mr. Garmong suffered any damages. See Affidavit of Greg Christian, attached as Exhibit 1.

10. Breach of NRS 628A.030 Claim

NRS 628A.030 provides:

> 1. If loss results from following a financial planner's advice under any of the circumstances listed in subsection 2, the client may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney' fees.
>
> 2. The circumstances giving rise to liability of a financial planner are that the financial planner:
>
> (a) Violated any element of his or her fiduciary duty;
>
> (b) Was grossly negligent in selecting the course of action advised, in the light of all the client's circumstances known to the financial planner; or
>
> (c) Violated any law of this State in recommending the investment or service.

As previously stated, Plaintiff Garmong never instructed Mr. Christian to assume complete

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control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong were not caused by Defendant Christian's failure to follow Mr. Garmong's investment instructions, but were due solely to the sharp declines in the stock market. Further, Mr. Garmong never instructed Defendants to assume complete control over his investment accounts, and instead, remained in control of all important investment strategies and approved of all recommendations made by Defendants throughout their relationship.

Defendants deny they were grossly negligent. The duties of brokers to their customers are limited. They are not insurers against investment risk. That is the obligation that Plaintiff wishes to impose on Defendants. Unfortunately for Plaintiff, this is directly contrary to well established law. A stockbroker is simply not an insurer of his investment advice. *Powers v. Francis I. duPont Co.*, 344 F. Supp. 429 (E.D. Pa. 1972).

As a result, Defendants never violated any element of a fiduciary duty to Plaintiff, nor were Defendants "grossly negligent in selecting the course of action" they advised. Further, Plaintiff has pointed to no law Defendants violated "in recommending" any investment to Mr. Garmong. The violations of Nevada law alleged by Plaintiff had nothing to do with any recommendations Mr. Christian may have made. Further, Defendants deny that they violated Nevada law. In any event, Defendants deny they violated NRS 628A.030 in any manner and deny that Plaintiff was damaged. See Affidavit of Greg Christian, attached as Exhibit 1.

11. <u>Unjust Enrichment Claim</u>

"An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Leasepartners Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997). Here, the parties agree that they entered into a written "Investment Management Agreement" (See Material Facts Not In Issue, above). The "advisor fees" Plaintiff now complains about by Plaintiff were included in that Agreement. In any event, Defendants deny that they were

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unjustly enriched and affirm that they earned all fees paid to them. See Affidavit of Greg Christian, attached as Exhibit 1.

12. <u>Intentional Infliction of Emotional Distress Claim</u>

To the extent that Mr. Garmong seeks summary judgment on his claim of intentional infliction of emotional distress, Mr. Garmong must prove all the elements for that cause of action. In Nevada, the elements of a cause of action for intentional infliction of emotional distress are: "'(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation.' " *Posadas v. City of Reno,* 851 P.2d 438, 444 (Nev.1993) (quoting *Star v. Rabello,* 625 P.2d 90, 91–92 (Nev.1981)). "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Maduike v. Agency Rent–A–Car,* 953 P.2d 24, 26 (Nev.1998) (quotation omitted). "Liability for emotional distress generally does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Burns,* 175 F.Supp.2d at 1268 (quotations omitted).

In any event, Defendants deny that they engaged in extreme and outrageous conduct with the intent, or reckless disregard for Mr. Garmong's emotional distress and deny that Mr. Garmong suffered any injuries by Defendant' conduct. See Affidavit of Greg Christian, attached as Exhibit 1.

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VII. Damages Claim

NRS 41.1395, in pertinent part, states:

"(2) If it is established by a preponderance of the evidence that a person who is liable for damages pursuant to this section acted with recklessness, oppression, fraud or malice, the court shall order the person to pay the attorney's fees and costs of the person who initiated the lawsuit."

NRS 41.1395(2)(emphasis added).

Subsection (4)(b) defines "exploitation" as:

"any act taken by a person who has the trust and confidence of an older person or a vulnerable person or any use of the power of attorney or guardian ship of an older person or a vulnerable person to:

(1) Obtain control, through deception, intimidation or undue influence, over the money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that person's money, assets or property; or

(2) Convert money, assets or property of the older person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that person's money, assets or property.

NRS 41.1395(4)((b) and (b)(1).

Defendants adamantly deny that they engaged in a "deliberate, intentional, willful, and conscious" plot "of dishonesty, deceit, and fraud" before they even met Plaintiff. These wild accusations are specifically denied by the Defendants and not supported by any evidence and thus do not support Plaintiff's claim for doubling of damages pursuant to NRS 41.1395. *Motion* at 33:15-17. Punitive damages are likewise unavailable as Plaintiff has failed to establish that Defendants engaged in any fraudulent conduct with the intent to depriving Plaintiff of his money or assets. Defendants deny they engaged in any fraudulent activity and at all times provided suitable investment advice. See Affidavit of Greg Christian, attached as Exhibit 1.

VIII. Pursuant to Rule 56(f) Defendants Request a Continuance to Provide Defendants with the Opportunity to Obtain Discovery

If the Arbitrator believes that any potion of Plaintiff's *Motion for Summary Judgment* should be refuted by evidence, in addition to Defendants' affidavit, then Defendants request a continuance pursuant to NRCP 56(f) to engage in discovery. See *Halimi v. Blacketar*, 105 Nev

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105, 770 P.2d 531 (1989).

Mr. Garmong has failed to provide all his account statements, starting with the time when his accounts were opened and the accounts were profitable. Mr. Garmong also refuses to disclose how he invested his funds after he terminated Mr. Christian. Defendants intend to serve Plaintiff with written discovery requests within a few weeks. Defendants wish also to depose Mr. Garmong especially with regard to his creation of self-serving evidence and his alleged conversations with Defendants.

Defendants also wish to retain an expert to review the discovery and provide the arbitrator with his or her opinions regarding the suitability of Defendants' investment recommendations and the extent, if any, of damages suffered by Plaintiff.

These are critical facts which must be the subject of discovery. As a result, until additional discovery has been completed, Defendants are unable to fully oppose *Plaintiff's Motion For Partial Summary Judgment*. *See* NRCP 56(f).

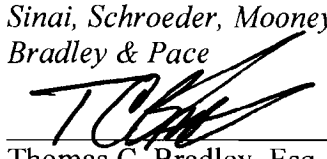
IX. Conclusion

NRCP Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Here, as discussed above, numerous genuine issues of material fact exist. As a result, Defendants Wespac and Greg Christian respectfully request that Plaintiff Gregory Garmong's *Motion For Partial Summary Judgment* be immediately denied in its entirety.

Submitted this 21 day of Dec., 2017.

Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace



Thomas C. Bradley, Esq.
Attorney for Defendants

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EXHIBIT 1

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AFFIDAVIT OF GREG CHRISTIAN

STATE of NEVADA)
) ss.
COUNTY OF WASHOE)

I, GREG CHRISTIAN, being first duly sworn, do hereby swear under penalty of perjury to the following:

1. I am a named Defendant in this case and a Registered Investment Advisor with Wespac.

2. This affidavit is filed on behalf of both myself and Wespac and I swear to the averments in this affidavit, both in my individual capacity and as an authorized representative of Wespac Advisors LLC..

3. In or about July 2005, as a registered investment advisor with Wespac Advisors, I met with Gregory Garmong to discuss the possibility of Mr. Garmong becoming a client of Wespac. During the meeting, I gave Mr. Garmong a copy of Wespac's Investment Management Agreement. Mr. Garmong took that copy of the Agreement with him when he left our meeting.

4. Approximately a week later, Mr. Garmong returned to my office with his copy of the Agreement. Mr. Garmong had made numerous notes, underlines and cross-outs in his copy of the Agreement. Clearly he was provided with every opportunity to review and/or object and to seek independent legal advice regarding any and all terms.

5. At the meeting, Mr. Garmong then requested that I make changes to the Investment Management Agreement which I agreed to do.

6. Mr. Garmong then agreed to retain me and Wespac as his financial advisors and signed the agreement.

7. In or about September 2005, Mr. Garmong transferred securities into five new accounts at Charles Schwab to be managed by Wespac Advisors and myself. These five accounts consisted of

two Qualified Retirement Accounts, a defined benefit account, an IRA, and an individual account.

8. Over the course of the multiple year relationship, Mr. Garmong and I had frequent in-depth communications to develop and implement Mr. Garmong's investment strategy. Throughout the relationship, Mr. Garmong received extensive and complete disclosures about investments that I recommended and Mr. Garmong was fully aware of the risks and fees associated with the investments. There were also frequent discussions whether to hold on to or to trade numerous securities that Mr. Garmong had transferred into the accounts. Mr. Garmong acknowledged that he knew the investments were not guaranteed against market loss or fluctuations in value. At all times during my relationship with Mr. Garmong, my investment advice to Mr. Garmong was suitable and prudent and I provided full and complete disclosures of risk.

9. Over the duration of all of the accounts, the Defined Benefit account and the two Qualified Retirement accounts were profitable.

10. Initially, the IRA and the individual account increased in value, and the gains were consistent with the performance of the overall stock market. These two accounts, like the rest of the overall stock market, began to suffer declines beginning in the fall of 2007 and continuing into 2009.

11. Throughout the decline in value of his accounts, Mr. Garmong and I spoke frequently about the market, his investments, his risk tolerance, and investment goals. I always provided honest and truthful advice and disclosed the risks of the investment strategies. I advised Mr. Garmong that while I did not know how long the market downturn would last, based upon his experience and education I believed there would be a recovery. Based upon Mr. Garmong's expressed objective of long-term investing and willingness to accept risk and volatility, I told Mr. Garmong not to panic and to stay in the stock market. If Mr. Garmong had followed my advice and continued to make reasonable and suitable investments in the stock market, his accounts would have more than doubled in value since 2009.

12. On September 26, 2008, Mr. Garmong faxed me a letter that stated, "I specifically

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instructed you that there could not be losses from my accounts in 2008, and that they must be managed accordingly."

13. On September 30, 2008, I sent Mr. Garmong a letter that stated, "[w]e are in receipt of your letters sent via fax on Sunday, September 28, 2008 and Friday, September 26th. . . . Regarding the specific allegations in your letter, I respectfully disagree with your recollection of events. You never told me that 'there could not be losses from my accounts in 2008.' If any client had told me that I would have offered you two alternatives; (1) go to 100% cash or (2) to close your accounts."

14. I was never told by Gregory Garmong, either in person or in writing, that there could not be losses from his accounts during 2008.

15. I never urged Gregory Garmong to allow Wespac and myself to take over sole management of his accounts at any time.

16. Although I technically possessed discretionary control over Mr. Garmong's accounts, in reality, Mr. Garmong insisted upon reviewing and approving all important investment strategies before the strategies were implemented. In fact, Mr. Garmong approved of all important investment strategies and investment recommendations that were made throughout our professional relationship. For a limited time period, Mr Garmong did allow me to invest his taxable account in Wespac's "Income and Growth Portfolio." Mr. Garmong selected that model portfolio from a variety of other Wespac model portfolios some of which were designed to have lower risk than the Portfolio selected by Mr. Garmong. Within the "Income and Growth Portfolio," the Defendants exercised discretion to make security transactions to keep the portfolio aligned with the model portfolio's investment objectives and target holdings.

17. I never received the letter allegedly dated October 22, 2007 from Gregory Garmong. I believe that the self-serving letter was drafted during the course of litigation to fraudulently support his claims.

18. I believe that the claims asserted in this matter are nothing more than dissatisfaction with a market downturn in 2008 and 2009 and a wrongful attempt to place blame on Defendants.

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19. Ultimately, Mr. Garmong chose not to follow my advice and terminated my services in March 2009.

20. I believe any losses suffered by Mr. Garmong in some of his accounts were directly attributable to the sharp declines in the overall stock market and not the result of Defendants failure to follow Mr. Garmong's investment objective and instructions.

21. To the extent that the law recognizes a warranty for investment advice services, Defendants deny that they failed to provide adequate services. At all times, Defendants provided suitable investment advice and kept Mr. Garmong fully apprised of the risks. Mr. Garmong approved the investment strategies and trading decisions.

22. To the extent that any covenant of good faith and fair dealing may apply in this case, Defendants deny that they violated any covenant of good faith and fair dealing. At all times, Defendants provided suitable investment advice and kept Mr. Garmong fully apprised of the risks. Mr. Garmong approved the investment strategies and trading decisions.

23. In the initial meeting, Mr. Garmong informed me that he had obtained a doctorate from MIT and worked nearly thirty years as a licensed patent attorney. In my opinion, Mr. Garmong was hardly a weaker and dependent party.

24. Mr. Garmong was an experienced investor who transferred numerous securities, not cash, into the accounts managed by Defendants.

25. To the extent that the Nevada Deceptive Trade Practices Acts may apply to this case, Defendants deny that they committed any such acts of deceptive trade practices. At all times, Defendants provided suitable investment advice and kept Mr. Garmong fully apprised of the risks. Mr. Garmong approved the investment strategies and trading decisions.

26. To the extent that a fiduciary duty may exist in this case, Defendants deny breaching any such duty. At all times, Defendants provided suitable investment advice and kept Mr. Garmong fully apprised of the risks. Mr. Garmong approved the investment strategies and trading decisions.

27. To the extent that gross negligence may apply in this case, Defendants deny that they were

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"grossly negligent in selecting the course of action" regarding Mr. Garmong's investments or in any other manner. At all times, Defendants provided suitable investment advice and kept Mr. Garmong fully apprised of the risks. Mr. Garmong approved the investment strategies and trading decisions.

28. Defendants deny that they violated any applicable Nevada law in connection with this case.

29. To the extent that Mr. Garmong is claiming unjust enrichment, Defendants deny that they were unjustly enriched and affirm that they earned all fees paid to them.

30. To the extent that Mr. Garmong is claiming negligence, Defendants deny that they were negligent in any manner in this case and deny that Mr. Garmong suffered any damages. At all times, Defendants provided suitable investment advice and kept Mr. Garmong fully apprised of the risks. Mr. Garmong approved the investment strategies and trading decisions.

31. To the extent that Mr. Garmong is claiming intentional infliction of emotional distress, Defendants deny that they engaged in extreme and outrageous conduct with the intent, or reckless disregard for causing Mr. Garmong emotional distress any manner in this case and deny that Mr. Garmong was damaged by Defendants' conduct.

32. In conclusion, I fulfilled my responsibility to the Plaintiff. I inquired about his financial situation and objectives when Plaintiff first opened his accounts, and I continued these discussions with Plaintiff up to the point that he closed his accounts. Based upon these discussions, I had a reasonable basis to believe not only that my recommendations were sound, but that they were appropriate and suitable for the Plaintiff – both as individual transactions and in light of his entire portfolio. The information I provided the Plaintiff throughout their relationship was accurate and fulfilled my obligation to the Plaintiff. I routinely monitored his accounts and I acted reasonably to ensure that the Plaintiff appreciated the risk of his investment decisions and did my best to discourage him from making decisions that I believed were inconsistent with his investment objectives.

33. To the extent the Arbitrator believes that additional evidence is needed to rebut Plaintiff's

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accusations, Defendants request a continuance to engage in critical discovery. Mr. Garmong has failed to provide all his account statements, starting with the time when his accounts were opened and the parties' business relationship began. By doing so, Mr. Garmong wishes to ignore the profits gained in his accounts before the great recession began in 2007. Mr. Garmong also refused to provide copies of his account statements demonstrating what investments he retained following his termination of Defendants. If Mr. Garmong continued with the same investment strategy, he cannot now complaint Defendants' investment strategy was unsuitable. I have also instructed my counsel to obtain an expert to review the completed discovery and provide an expert opinion as to liability and damages. As a result, until additional discovery has been completed, my counsel is not able to fully oppose *Plaintiff's Motion For Partial Summary Judgment* and I would respectfully ask for the opportunity to conduct critical discovery if the Arbitrator deems necessary.

Further affiant sayeth naught.

Dated this 21 day of December, 2017.

GREG CHRISTIAN

SWORN and SUBSCRIBED to before me

this 21st *day of* December, *2017.*

KIMBERLY E. WOOD
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 16-1429-2 - Expires February 1, 2020

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EXHIBIT 2

EXHIBIT 2

Material Facts Not At Issue

1. The parties entered into a written "Investment Management Agreement" in August 2005.

a. "Investment Management Agreement" attached as Exhibit 1 to Defendants' *Motion To Dismiss And To Compel Arbitration*, filed September 15, 2012.

b. Defendants' *Motion To Dismiss And To Compel Arbitration*, filed September 15, 2012 at 2:16 ("This Agreement is a valid and fully enforceable agreement.")

c. *Defendants' Opposition To Plaintiff's Combined Motions For Leave To Rehear And For Rehearing Of The Order Of December 13, 2012, Compelling Arbitration And Request For Attorney's Fees*, filed January 9, 2013 at 2:3-5 ("On or about August 31, 2005, Plaintiff Gregory Garmong ("Garmong") and Defendant Wespac entered into an "Investment Management Agreement" whereby Garmong retained Wespac as his investment advisor.");

d. *Complaint*, filed May 8, 2012 at ¶7 ("At a time prior to 2007, Plaintiff entered a contract ("Contract") with Defendants and became a client of Defendants.")

e. *Plaintiff's Motion For Partial Summary Judgment*, Exhibit 22, Declaration of Gregory Garmong dated November 15, 2017 at ¶6 ("In August 2005 Defendant Christian , acting on behalf of Defendant Westpac, and I signed a document entitled Investment Management Agreement . . .".)

f. Affidavit of Greg Christian, dated December 21, 2017 at ¶ 6.

2. Beginning in 2008, the stock market, after a lengthy period of appreciation, rapidly decreased in value.

a. Chart showing the values of the S&P 500 and NASDAQ from October 2005 through February 2009, attached as Exhibit 2 to Defendants' *Opening Arbitration Brief.*

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b. Defendants' *Opening Arbitration Brief* at 1:18 - 2:7.

c. March 17, 2008 FAX from Plaintiff Garmong to Defendant Greg Christian ("The volatility [of the markets] is just driving me nuts . . . I read stuff like this Bear Sterns story and don't understand the details, but the point for people like me, I guess, is that the Fed is so worried about the financial system going to hell that it is bailing out what was the fifth largest investment bank . . .")

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EXHIBIT 3

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Material Facts At Issue

This list includes many, but not all material facts at issue.

1. Whether the written "Investment Management Agreement" was a contract of adhesion that Defendants compelled Plaintiff to sign.

a. Declaration of Gregory Garmong dated October 29, 2012, attached as Exhibit 1 to *Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration*:

- "At the time I signed the Wespac Investment Management Agreement . . . I did not have legal counsel regarding the Agreement. I was given this document to sign at the office of Wespac in Reno. I was not given an opportunity to take it away and study it or obtain legal counsel to review it." at ¶1
- "The Agreement was prepared by the Defendants. There was no fair negotiation of the terms of the Agreement . . .". at ¶8.
- "I never received even a partial copy of the Agreement for my own use until it was sent to me as Exhibit 1 to the Motion brought by the defendants." at ¶2

b. Declaration of Gregory Garmong dated January 31, 2014, attached as Exhibit 1 to *Plaintiff's Response To Order Of January 13, 2014*:

- "I was not able to conduct a negotiation with Defendants as to the terms of the incomplete Agreement . . .".

c. Defendants' *Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration.*

- "Mr. Garmong was given a copy of the seven page "Investment Management Agreement" to take with him and review, and then kept the Agreement for at least a week

before he returned his annotated copy to Westpac's (sic) office." at 6:6-9.

• "[B]ecause of the notes, underlines and cross-outs contained in Mr. Garmong's copy of the Agreement, it is clear that he was provided with every opportunity to review and/or object and to seek independent legal advice regarding any and all terms . . .". at 6:11-14.

d. Affidavit of Greg Christian dated December 3, 2012, attached as Exhibit 1 to *Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* .

• "In or about July 2005, as a registered investment advisor with Wespac Advisors, LLC, I met with Plaintiff Gregory Garmong to discuss the possibility of Mr. Garmong becoming a client of Wespac . . . During the meeting, I gave Mr. Garmong a copy of Wespac's Investment Management Agreement. Mr. Garmong took that copy of the Agreement with him when he left our meeting." at ¶¶2 and 3.

• "Mr. Garmong requested that I make changes to the Investment Management Agreement which I agreed to do. . . . Mr. Garmong then requested more changes which I also agreed to incorporate within our final Agreement." at ¶4.

e. Copy of Investment Management Agreement with markings made by Plaintiff Garmong. Attached as Exhibit 2 to *Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration.*

f. Affidavit of Greg Christian dated December 21, 2017 attached to *Defendants' Opposition To Plaintiff's Motion For Partial Summary Judgment* at ¶¶ 3 -5.

• "During the meeting, I gave Mr. Garmong a copy of Wespac's Investment Management Agreement. Mr. Garmong took that copy of the Agreement with him when he left our meeting."

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• "Approximately a week later, Mr. Garmong returned to my office with his copy of hte Agreement. Mr. Garmong had made numerous notes, underlines and crossouts in his copy of the Agreement. Clearly he was provided with every opportunity to review and/or object and to seek independent legal advice regarding any and all terms."

• "At the meeting, Mr. Garmong then requested that I make changes to the Investment Management Agreement which I agreed to do. Mr. Garmong later requested more changers which I also agreed to incorporate within our final Agreement."

• "In the initial meeting, Mr. Garmong informed me that he had obtained a doctorate from MIT in metallurgical engineering and a combined J.D. and M.B.A. from UCLA before spending nearly thirty years as a patent attorney. In my opinion, Mr. Garmong was hardly a weaker and dependent party. At ¶ 23.

2. Whether after October 2007 Defendants were in sole control of Plaintiff's managed accounts.

a. *Plaintiff's Motion For Partial Summary Judgment*

• "On October 22, 2007, effective immediately, Plaintiff informed Defendants in writing and orally . . .[that] . . . Defendants would assume sole responsibility for the management of Plaintiff's managed accounts, as proposed by Defendants." at 5:8-17.

• "After Defendants took over sole management of Plaintiff's managed accounts in October 2007, Defendants failed to follow Plaintiff's investment objectives and instructions, with the result that the managed accounts lost $580,649.82 in value of invested capital in the 13 months period from October 2007 to November 2008, inclusive." at 6:9-13

• "At Defendants' urging Plaintiff appointed Defendants as solely responsible for

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managing his managed accounts. Plaintiff would no longer be involved in the management." at 9:19-21.

b. Declaration of Gregory Garmong, Exhibit 22 to *Plaintiff's Motion For Partial Summary Judgment*

• "At Defendants' suggestion, Defendants took over sole management of the managed accounts as provided in the Investment Management Agreement at ¶5 . . . and I ceased playing an active role." at 6:8-11.

c. Copy of letter dated October 22, 2007 from Plaintiff Garmong to Defendant Greg Christian, attached as Exhibit 3 to *Plaintiff's Motion For Partial Summary Judgment*

• "I agree to turn over the management of my retirement and savings investment accounts over to you entirely, under the condition that you manage them very conservatively." at pg. 1.

d. Copy of FAX dated September 26, 2008 from Plaintiff Garmong to Defendant Greg Christian, attached as Exhibit 7 to *Plaintiff's Motion For Partial Summary Judgment*

• "I am deeply upset at what you have done to me, not only in destroying so much of my retirement funds, but also in utterly ignoring my instructions to you that have been repeated time and again over the last year." at pg. 1.

• "I specifically instructed you that there could not be losses from my accounts in 2008, and that they must be managed accordingly." at pg. 1.

e. Copy of letter dated September 30, 2008 from Defendant Greg Christian to Plaintiff Gregory Garmong. Attached as Exhibit 1 to Defendants' *Opening Arbitration Brief.*

• "We are in receipt of you letters sent via fax on Sunday, September 28, 2008 and

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Friday, September 26th. . . . Regarding the specific allegations in your letter, I respectfully disagree with your recollection of events. You never told me that 'there could not be losses from my accounts in 2008.' If any client had told me that I would have offered you two alternatives; (1) go to 100% cash or (2) to close your accounts."

f. Affidavit of Greg Christian, dated December 21, 2017 attached to Defendants' *Opposition to Plaintiff's Motion For Partial Summary Judgment.*

• "I was never told by Gregory Garmong, either in person or in writing, that there could not be losses from his accounts during 2008." At ¶ 14.

• "I never urged Gregory Garmong to allow Wespac and myself to take over sole management of his accounts at any time." At ¶ 15.

• "Although I technically possessed discretionary control over Mr. Garmong's accounts, in reality, Mr. Garmong insisted upon reviewing and approving all important investment strategies before the strategies were implemented. In fac, Mr. Garmong approved of all important investment strategies and investment recommendations that were made throughout our professional relationship." at ¶16.

• "I never received the letter allegedly dated October 22, 2007 from Gregory Garmong, I believe that the self-serving letter was drafted during the course of litigation to fraudulently support his claims." at ¶ 17.

3. <u>Whether Defendants breached their contractual, fiduciary and agency duties by failing to follow Plaintiff's investment objectives and instructions</u>.

a. *Plaintiff's Motion for Partial Summary Judgment*

• "During October, 2007- November, 2008, Defendants failed to manage Plaintiff's

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managed accounts according to his investment objective and instructions not to lose capital." at 10:2-4.

• "Defendant failed to manage the managed accounts so as to avoid loss of capital, the objective and instruction that Plaintiff had given them." At 11:14-16.

b. Affidavit of Greg Christian dated December 21, 2017 attached to *Defendants' Opposition to Motion For Partial Summary Judgment.*

• "At all times, Defendants provided suitable investment advice and kept Mr. Garmong fully apprised of the risks. Mr. Garmong approved the investment strategies and trading decisions. At ¶¶ 21, 22, 24, 25, 26.

• "In about September 2005, Mr. Garmong transferred securities into five new accounts at Charles Schwab to be managed by Wespac Advisors and myself. These five accounts consisted of two Qualified Retirement Accounts, a defined benefit account, an IRA, and an individual account." At ¶ 7.

• "Over the duration of all of the accounts the Defined Benefit account and the two Qualified Retirement accounts were profitable." at ¶ 9

• "Initially, the IRA and the individual account increased in value, and the gains were consistent with the performance of the overall stock market. These two accounts, like the rest of the overall stock market, began to suffer declines in the fall of 2007 and continuing into 2009." at ¶10.

•"Throughout the decline in value of his accounts, Mr. Garmong and I spoke frequently about the market, his investments, his risk tolerance, and investment goals. I always provided hones and truthful advice and disclosed the risks of the investment strategies."

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At ¶ 11.

• "Based upon Mr. Garmong's expressed objective of long-term investing and willingness to accept risk and volatility, I told Mr Garmong not to panic and to stay in the stock market. If Mr. Garmong had followed my advice and continued to make reasonable and suitable investments in the stock market, his accounts would have tripled in value since 2009." at ¶11.

• "Ultimately, Mr. Garmong chose not to follow my advice and terminated my services in March 2009." at ¶19.

• "I believe any losses suffered by Mr. Garmong in some of his accounts were directly attributable to the sharp declines in the overall stock market and not the result of Defendants' failure to follow Mr. Garmong's investment objective and instructions." at ¶20.

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JAMS ARBITRATION CASE REFERENCE NO. 1260003474

GREGORY GARMONG, Plaintiff, vs. WESPAC; GREG CHRISTIAN, Defendants.	**PLAINTIFF'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Garmong submits the following reply points and authorities in support of his motion for partial summary judgment.

Defendants' opposition starts by stating, and attempting to convince the Arbitrator to use, an incorrect "slightest doubt" legal standard for deciding a motion for summary judgment. The opposition employs the incorrect standard throughout, reaching consistently wrong results.

1.

SUMMARY JUDGMENT STANDARD

The opposition, at 3:7-20, relying entirely on pre-2005 authority, argues the now-discredited "slightest doubt" standard for deciding a motion for summary judgement: "A litigant has a right to trial when there remains the slightest doubt as to remaining issues of fact." Opposition 3:16-17.

In Wood v. Safeway, 121 Nev. 724, 729-732, 121 P.3d 1026, 1029-1031 (2005), the Nevada Supreme Court expressly rejected the "slightest doubt" standard. The proper standard is referenced at plaintiff's motion for partial summary judgment 3:10-21, citing Wood. Because Wood clearly sets forth the governing standards, there follows an

extended quotation of the relevant principles, with footnotes deleted, and with case identifiers added in brackets.

> In 1986, the United States Supreme Court decided two cases that undermine the "slightest doubt" standard: *Celotex Corp. v. Catrett* [477 U.S. 317(1986)] and *Anderson v. Liberty Lobby, Inc.* [477 U.S. 242 (1986)]. While not addressing the "slightest doubt" standard directly, the Supreme Court in *Celotex* noted that Rule 56 should not be regarded as a "disfavored procedural shortcut" but instead as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. In *Liberty Lobby*, the Supreme Court went further in abrogating the slightest doubt standard when it focused on the rule's requirement that there be no "genuine" issues of "material" fact[.]
>
> By its very terms [the summary judgment standard] provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.
>
> [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.
>
> *Liberty Lobby* is incompatible with the slightest doubt standard because colorable evidence may, in any given case, raise doubts as to a factual dispute between the parties while, at the same time, not being probative on the operative facts that are significant to the outcome under the controlling law . . . .
>
> "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." [Quoting from *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986)].
>
> We take this opportunity to put to rest any questions regarding the continued viability of the "slightest doubt" standard. We now adopt the standard employed in *Liberty Lobby*, *Celotex*, and *Matsushita*. Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.
>
> While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." The nonmoving party "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and

conjecture.' "

> To the extent that Doe relies on the "slightest doubt" standard, our discussion above abrogates that standard from Nevada's summary judgment law and renders her arguments irrelevant.

[Emphasis added].

Notably, Defendants' opposition never raises any question whether the "moving party has carried its burden under Rule 56(c)," and it clearly has.

Defendants' opposition is grounded entirely upon the "slightest doubt" standard rejected by the United States Supreme Court 22 years ago, and rejected by the Nevada Supreme Court 13 years ago. The consequences of Defendants' pervasive legal error will be addressed in detail below.

2.

MATERIAL FACTS NOT IN ISSUE AND IN ISSUE

Opposition at 4:1-22 presents its contentions of the material facts not in issue and in issue. These contentions reveal much about the fallacies of the positions taken by the Defendants.

2. A. Defendants' Contentions of Material Facts Not In Issue.

Defendants' opposition lists at 4:1-9 what it contends are material facts not in issue. See also Exhibit 2 to the opposition.

As to the first contention, Plaintiff agrees that a document entitled "Investment Management Agreement" was signed. See Plaintiff's UMF 1. (All references to UMFs 1-20 are to the undisputed material facts set forth at Plaintiff's Motion 3:22-8:10). Whether it is a valid written contract remains questionable, see Declaration of Gregory Garmong submitted with Plaintiff's Motion ("Garmong Declaration") ¶¶ 6-9. Defendants have never provided a complete copy of the "Agreement," including all of its indicated exhibits, and no complete copy is of record.

The second and third contentions are perfect examples of immaterial "facts" and "gossamer threads of whimsy, speculation, and conjecture" condemned by Wood in its rejection of the "slightest doubt" standard. "Material facts" must be addressed to the

Motion as presented by the Plaintiff. Also, if Plaintiff had wanted to have his life savings governed by the fluctuations of the stock market, as Defendants argue, he would not have hired Defendants and instructed them to manage his accounts conservatively to avoid losing capital and stated that he was willing to forego gains to avoid losses. (UMF 4-7). Nor would he have paid them $21,283.29 in "advisor fees" (UMF 9) to accomplish his instructions and objectives, with the result that they wasted $580,649.82 of his life savings in thirteen months (UMF 8).

2. B. Defendants' Contentions of Material Facts In Issue

Defendants' opposition at 4:10-22 addresses this subject, but does not actually list any material facts in dispute.

As quoted at Plaintiff's Motion 2:22-27 and Defendants' opposition 3:20-25, NRCP 56(c) requires that the opposition "shall include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue." (Emphasis added). There is a good reason for this provision. A motion for summary judgment is a highly formalized proceeding that may result in final disposition of a lawsuit. The moving and opposing parties are therefore required to specify, for the benefit of each other but even more for the Court–here the Arbitrator--exactly what their factual contentions are.

The discussion at opposition 4:15-17 admits that "Defendants may have failed to identify each and every detail material fact in dispute but believe that Mr. Christian's affidavit adequately refutes Plaintiff's baseless claims." (emphasis added). That statement is a straightforward admission of Defendants' intentional failure to follow the mandatory procedure of NRCP 56(c) by providing a "concise statement setting forth each" material fact in dispute. This omission to follow NRCP 56(c) is magnified by the manner in which the Affidavit of Greg Christian ("Christian Affidavit") is referenced in Defendants' discussion of the Claims. In all cases, it is referenced as "See Affidavit of Greg Christian, attached as Exhibit 1" at the conclusion of a mixed discussion of asserted facts and law. (See, e.g., Opposition 7:2-3; 8:7-8; 8:24-25; 10:21; 12:1; 13:14; 13:17, 14:9; 14:15-16; 15:18; 16:1-2;

16:18-19; 17:20).

Never, not a single time, is the location in the Affidavit that is relied upon specified–that puzzle is left for the Arbitrator and the Plaintiff to figure out.

Finally, at 4:22, the opposition states, "For a non-exhaustive list, see Exhibit 3." This reference to a "non-exhaustive list" is an attempt to avoid Defendants' obligation to state each fact they assert is in issue, an approach repeated subsequently at opposition 17:21-18:13. That is, Defendants argue, if we lose with this incomplete opposition, we want another shot later. This impermissible approach is discussed more fully below in § 6.

The "non-exhaustive list" of opposition Exhibit 3 includes the following:

#1. "Whether the written 'Investment Management Agreement' was a contract of adhesion that Defendants compelled Plaintiff to sign." This is another non-issue, of the type condemned by Wood in its rejection of the "slightest doubt" standard. Nowhere in Plaintiff's Motion or the Garmong Declaration is there any reference to this non-issue. Defendants raise this straw-man argument to attempt to create a triable issue where none exists.

#2. "Whether after October 2007 Defendants were in sole control of Plaintiff's managed assets."

#3. "Whether Defendants breached their contractual, fiduciary, and agency duties by failing to follow Plaintiff's investment objectives and instructions." Point #3 is not a factual dispute, but an ultimate legal determination.

There are two types of factual bases cited to support the claim of disputed material facts for items #1-#3, documents and the Christian Affidavit. First, documents which are referenced but not attached and sworn or certified must be disregarded. See NRCP 56(e) and Havas v. Hughes Estate, 98 Nev. 172, 173, 643 P.2d 1220, 1221 (1982). Second, the Christian Affidavit does not conform to NRCP 56(e), must be disregarded in its entirety for the reasons discussed in § 3.D, and should be disregarded in its entirety for the reasons discussed in § 3.E. Specific paragraphs of the Christian Affidavit should be disregarded for the reasons discussed in § 3.E and § 3.F. Third, regarding Point #3, not once does the

argument following the statement of Point #3 ever assert that Defendants followed Plaintiff's investment objectives and instructions, as set forth in UMFs 4-7. Defendants argue that they did what they wanted to do, not what Plaintiff instructed them to do.

2.C. The Opposition does not dispute any of Plaintiff's Undisputed Material Facts ("UMFs").

Plaintiff's Motion at 3:21-8:10 lists and factually supports 20 UMFs.

Defendants' opposition does not address or dispute them at all, thus admitting them in their entireties.

3.

EVALUATION OF THE EVIDENCE, OBJECTION REQUIRING THAT THE CHRISTIAN AFFIDAVIT MUST BE DISREGARDED, AND REQUEST THAT THE ARBITRATOR EXERCISE HIS DISCRETION AND NOT CONSIDER ALL OR PARTS OF THE CHRISTIAN AFFIDAVIT.

3. A. Legal requirements of evidence submitted to support and oppose a motion for summary judgment.

(a) Requirements of NRCP 56(e).

NRCP 56(e) provides in pertinent part:

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

(emphasis added).

Adherence to NRCP 56(e) concerning the use of admissible evidence is mandatory and reliance upon an affidavit which does not comply with the rule may constitute reversible error. Havas v. Hughes Estate, 98 Nev. 172, 173, 643 P.2d 1220, 1221 (1982).

The "personal knowledge" requirement is also mandatory, Coblentz v. Hotel Employees & Restaurant Employees Union, 112 Nev. 1161, 1172, 925 P.2d 496, 502

(1996); Gunlord Corp. v. Bozzano, 95 Nev. 243, 245, 591 P.2d 1149, 1150-51 (1979).

Finally, the requirement for attachment of sworn or certified copies of referenced papers is likewise mandatory. Havas, 98 Nev. at 173, 643 P.2d at 1221.

(b) Affidavits must have factual support in the record.

The Nevada Supreme Court has repeatedly held that a party may not obtain or oppose summary judgment with conclusory affidavits that are not supported by the record, or conflict with the record. Allowing conclusory affidavits would defeat the purpose of NRCP 56 as stated in the above quotation from Wood. See also Clauson v. Lloyd, 103 Nev. 432, 435, 743 P.2d 631, 633 (1987). Catrone v. 105 Casino Corp., 82 Nev. 166, 170-171, 414 P.2d 106, 109 (1966), explains:

> The affidavit of Catrone does deal with this issue but in an impermissible manner. He stated that Detective Compton was extremely friendly to Van Santen and investigated the incident for the purpose of exonerating the Club from liability. This is a conclusion without factual support in the record. The affiant's statement would not be admissible evidence at trial and is equally ineffective for the purpose of defeating a motion for summary judgment. . Bond v. Stardust, 82 Nev. 47, 410 P.2d 472 (1966); Dredge Corp. v. Husite Co., 78 Nev. 69, 369 P.2d 676 (1962).

Accord, Serrett v. Kimber, 110 Nev. 486, 492-93, 874 P.2d 747, 751-2 (1994) ("affidavits are ineffective when they state conclusion[s] without factual support in the record"); Dennison v. Allen Group Leasing Corp., 110 Nev. 181, 185, 871 P.2d 288, 290-91 (1994);

3.B. Overview and comparison of the evidence submitted by the parties.

(a) Plaintiff's evidence.

Plaintiff submitted the Garmong Declaration and 21 Exhibits. The Garmong Declaration at 1:3-5 states that he "declare[s] the following facts to be true of my own personal knowledge[.]" All of the averments of the Garmong Declaration were based upon Dr. Garmong's "own personal knowledge."

The Garmong Declaration, ¶ 3, 1:13-3:18, carefully authenticated each of the 21 Exhibits. Plaintiff's 21 Exhibits were not disputed or challenged by Defendants, and must be accepted as true, complete, correct, and authentic. Defendants took the position that

Defendant Christian had not personally received the mailed Exhibit 3, see Christian Affidavit ¶ 17, 3:22-24. Defendants did not, however, assert that the content of Exhibit 3 is not complete, true, and correct, or that it does not reflect the true state of the facts as of its date. Their objection goes only to whether Exhibit 3 provided notice to Defendant Christian. As will be discussed, his denial of receipt is questionable.

The remaining paragraphs of the Garmong Declaration were supported by in-text references to the Exhibits, which corroborated the statements.

(b) Defendants' evidence.

Defendants submitted the Christian Affidavit, and no exhibits to corroborate its statements.

Significantly, the Christian Affidavit does not claim that its averments are made with the personal knowledge of the affiant, and numerous statements are made upon "belief." An affidavit opposing a motion for summary judgment must be made upon the personal knowledge of the affiant, and not upon belief, and the Christian Affidavit was not made on personal knowledge. Documents referenced by the Christian Affidavit had to be attached and properly authenticated. Havas, 98 Nev. at 173, 643 P.2d at 1221. None were.

3.C. The Christian Affidavit is limited in scope, and does not present any facts relating to the illegal activities of the Defendants and the concealment of those activities from Plaintiff.

The scope of the only purported evidence submitted by Defendants, the Christian Affidavit, is severely limited in at least two ways.

(a) The Christian Affidavit, like the opposition generally, refuses to address the illegal activities of the Defendants and the concealment of those activities from Plaintiff, by presenting any facts.

Plaintiff's Motion and the Garmong Declaration generally deal with three broad classes of facts: The business relation between Plaintiff and Defendants (Garmong Declaration ¶¶ 5-23), the failures of the Defendants to meet their legal obligations and the concealment of those failures from Plaintiff (Garmong Declaration ¶¶ 24-33, 35), and the

concealment of Defendant Christian's previous illegal activities in regard to investment clients and his suspension by the SEC (Garmong Declaration ¶¶ 34-35).

Neither the opposition nor the Christian Affidavit even attempt to address factually or legally the second and third classes, the failures of Defendants to meet their legal obligations, their concealment of the failures to meet their legal obligations, and the intentional concealment of the illegal activities and suspension by the SEC of Defendant Christian. In the present case, it is not the illegal activities that are relevant, but their concealment.

The refusal of Defendants to address the second and third classes factually and legally has important consequences. First, as set forth in Garmong Declaration ¶ 35, Dr. Garmong would not have dealt with Defendants at all if he had been informed of these illegal practices of Defendants, Defendant Christian's illegal activities perpetrated against prior clients and his suspension by the SEC.

Second, as will be discussed in § 4, the illegal activities of Defendants and their fraudulent concealment from Plaintiff are sufficient in themselves to require summary judgment for Plaintiff as to the Fifth (§ 4.E.), Sixth (§ 4.F.), Seventh (§ 4.G.), and Tenth (§ 4.J.) Claims, and the Doubling of Damages (§ 4.M.). Each of these Claims includes as one of its grounds of liability illegal activity or concealment of illegal activity.

(b) The Opposition and the Christian Affidavit both admit that the evidence submitted by the Defendants is incomplete.

Opposition at 4:15-17 and 18:11-13, and Christian Affidavit at ¶ 33, both assert that Defendants have not attempted to present a complete and sufficient defense. These statements are in the context of requesting an opportunity to present a second defense if the first defense is unsuccessful, by seeking more discovery. But, as demonstrated in § 6 below, Defendants impermissibly seek to conduct discovery outside the scope permitted by Wood to oppose the current motion for summary judgment.

3. D. The Christian Affidavit is not made on the personal knowledge of the affiant and therefore must be disregarded in its entirety.

As discussed above in § 3A., NRCP 56(e) requires that "affidavits shall be made on personal knowledge." Coblentz v. Hotel Employees & Restaurant Employees Union, 112 Nev. 1161, 1172, 925 P.2d 496, 502 (1996).

An affidavit submitted in opposition to a motion for summary judgement is strictly interpreted as to the mandatory requirements of NRCP 56(e), primarily because the affiant is not subject to cross-examination. Coblentz, *Id.*; Gunlord Corp. v. Bozzano, 95 Nev. at 245, 591 P.2d at 1150-1. In cross-examination, the affiant's personal knowledge, as distinct from knowledge from other sources, may be explored.

In the present case, Christian Affidavit, at ¶ 2, 1:10-13, swears to the averments, but carefully never claims that the purported "facts" set forth in the Affidavit are within the affiant's personal knowledge, or where the affiant obtained his knowledge. At several locations, e.g., ¶¶ 17-18, 20, the averments are made on "belief." As to the other averments, there is no indication of whether the statements are made on the affiant's personal knowledge, or on information conveyed to him by another person, or found in unidentified documents, or based in some other source.

In view of the fact that, as discussed in detail in the following § 3.E, Defendants have a long and extensive record of concealment of highly material information from Plaintiff and from the Courts, and misrepresentations, Plaintiff's concerns are well founded.

Because the Christian Affidavit is not based upon the affiant's personal knowledge, it must be disregarded in its entirety.

3.E. Grounds for discretionary disregarding of all or parts of the Christian Affidavit.

Even if the Christian Affidavit is not disregarded in its entirety because it is not made on "personal knowledge," all or portions should be disregarded at the Arbitrator's discretion.

(a) The Arbitrator should exercise his discretion and disregard all or parts of the Christian Affidavit because it is "incredible."

The Arbitrator may not weigh the opposing evidence in considering a motion for summary judgment. However, he may disregard evidence if it is incredible (that is, not credible) or falls within the *falsus doctrine* (discussed in the following § 3.E.(b)). Nevada State Bank v. Jamison Family Partnership, 106 Nev. 792, 802, 801 P.2d 1377, 1383 (1990), held: "'[The] trial court should not pass upon the credibility of opposing affidavits, unless the evidence tendered by them is too incredible to be accepted by reasonable minds.' Short v. Hotel Riviera, Inc., 79 Nev. 94, 103, 378 P.2d 979, 984 (1963), quoting 6 Moore, Federal Practice."

The Arbitrator has wide latitude in deciding whether to disregard none, all, or parts of an affidavit. If the Arbitrator disregards all or parts of an affidavit, he is not open to criticism that he is weighing opposing evidence. Instead, it is as though the disregarded portions were never submitted at all.

Nevada authorities have not addressed in detail the meaning of the term they use, "incredible." Other courts have.

The leading case of Johnson v. Washington Metropolitan Area Transit Authority, 883 F.2d 125, 128 (D.C. Cir. 1989) has elaborated upon the meaning of "incredible":

> Judges may, under certain circumstances, lawfully put aside testimony that is so undermined as to be incredible. The removal of a factual question from the jury is most likely when a plaintiff's claim is supported solely by the plaintiff's own self-serving testimony, unsupported by corroborating evidence, and undermined either by other credible evidence, physical impossibility or other persuasive evidence that the plaintiff has deliberately committed perjury.

This principle was brought to the Ninth Circuit and applied to affidavits in opposition to summary judgment in Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996), holding,

> Her deposition testimony in this case in support of her ADA claim to the effect that she was *not* totally disabled is uncorroborated and self-serving. Moreover, this deposition testimony flatly contradicts both her prior sworn

> statements and the medical evidence. As such, we conclude her deposition testimony does not present "a sufficient disagreement to require submission to a jury." [Citation omitted]. . . . Kennedy had to present evidence in the district court to create at least a genuine issue of material fact on the question whether she was a qualified individual with a disability under the ADA. This she did not do.

(Emphasis in original).

Jones v. Tozzi, 2007 WL 433116 at *12-*14 (D. Cal. 2007), citing Applause and extensively quoting Johnson, also applies the principle to summary judgment affidavits. After considering the case authority cited by Johnson, Tozzi concludes, " Notably, in each of the cited cases, the self-serving evidence was undermined or contradicted either by disinterested witness statements or by undisputed evidence." Tozzi quotes Guthrie v. Darosa, 1998 WL 227151 (N.D. Cal. 1998), also a summary judgment case and also quoting Johnson, holding, "In other words, courts may deem declarations to be so incredible that they are unworthy of consideration."

The most likely indicia of a determination of "incredible" are, as stated in these four decisions, the affidavit or declaration is self-serving, is unsupported by corroborating evidence, is contrary to undisputed evidence, or is undermined either by other credible evidence, physical impossibility, or other persuasive evidence that the party has deliberately committed perjury.

Most, if not all, of these indicia are present in the Christian Affidavit. It is unquestionably a self-serving affidavit by an interested party. It is unsupported by any corroborating evidence–no exhibits were submitted for consideration with the Christian Affidavit and authenticated, as required by NRCP 56(e) for appropriately submitted documentary evidence. And, as will be demonstrated in the following § 3.F, several of the key paragraphs are flatly contradicted by uncontested, credible documentary evidence.

(b) Defendant Christian has a long history in this case of falsity to, and concealment from, Plaintiff, and of withholding evidence from, and falsifying submissions to, the Court. The Arbitrator should exercise his discretion and disregard all or parts of the Christian Affidavit under the *falsus doctrine*.

(i) Legal principle of *falsus in uno, falsus in omnibus*.

The viability of the legal system depends upon persons telling the truth, particularly when under oath. When a person has a history of dishonesty and falsification, both within and without the legal system, that history may bear upon their current testimony. Although the court or arbitrator deciding a motion for summary judgment may not weigh conflicting evidence, he may within his discretion decide to disregard evidence.

The Arbitrator has the discretion to apply the *falsus doctrine*, *"falsus in uno, falsus in omnibus*,"--false in one thing, false in everything.

This principle was recognized as early as 1862 by the United States Supreme Court in U.S. v. Castillero, 67 U.S. 17, 64 (1862), applying the *falsus doctrine* to pre-litigation acts not under oath as well as perjury, holding

> He who spoils the evidence or perverts the means of ascertaining the truth, or otherwise poisons the stream of justice, especially if he does so by putting false papers into the case ceases to stand on the same level with honest suitors. Common sense applied to common affairs follows the same rule; a knave once detected in trying to cheat you is never trusted again. It is a maxim of the common law, as it was of the Roman law, and a rule of logic which all experience proves to be sound, that *qui semel est malus, semper presumitur esse malus in eodem genere*. When, therefore, a fraud is discovered in one paper, all other papers produced by the same party are presumed to be fraudulent. This presumption is not slight or easily repelled.
>
> . . . .
>
> When it is once ascertained that a witness is capable of committing perjury, all he swears to is rejected as false. In reason and in law the rule is the same when a party is found to be capable of forgery: the papers not known to be fabricated must share the fate of those which are proved to be spurious; for every thing is corrupt that comes from a corrupted source. *Falsus in uno, falsus in omnibus.*

More recently, the *falsus doctrine* was applied to false statements under oath by the Ninth Circuit in Shouchen Yang v. Lynch, 822 F.3d 504, 508 (9th Cir 2016). Although Plaintiff has found no application of the principle by that name in Nevada state

jurisprudence, it has been applied under that name by other state courts. Examples include: John C. Bose Consulting Engineer, LLC v. John T. Campo, 978 So.2d 1033, 1036 (La. App. 2008) (concurring opinion); U.S. Bank Nat. Ass'n v. Mathon, 920 N.Y.S.2d 245 (Supreme Court, Suffolk County, NY 2010); Noryb Ventures, Inc. v. Mankovsky, 17 N.Y.S.3d 384 (Supreme Court, New York County, NY 2015) (applying *falsus doctrine* on a statement-by-statement basis to the witness' testimony); Ryan v. Prescott, 969 N.Y.S.2d 806 (Supreme Court, Albany County, NY 2013) (applying the *falsus doctrine* to the entirety of the witness' testimony); State v. Garfield, 2015 WL 249717 (App. Wash. 2015).

Under the *falsus doctrine*, if a person has a history of dishonesty either in court proceedings or outside court proceedings, that person may well be dishonest in the matter at issue and his testimony may properly be disregarded either in whole or in part.

(ii) Application of the *falsus doctrine* in the present case.

Pre-litigation acts established by documentary evidence.

In considering the following actions by the Defendants, the Arbitrator may wish to keep in mind that, during their dealings with Plaintiff, they had a fiduciary duty of full disclosure and honesty to Plaintiff, under Nevada statute, Nevada common law, and the contractual Investment Management Agreement. See Motion 31:4-19.

- Defendant Christian was disciplined for fraudulent actions against clients and suspended by the SEC in 1992. UMF 19. He and Defendant Wespac were fully aware of those facts prior to the date that Defendants first sought to sell their services to Plaintiff, and when they sold their services to Plaintiff. Defendant Christian concealed that information from Plaintiff at that time, and at all times, during their business relation. See UMFs 19-20, Garmong Declaration ¶¶ 34-35; Defendants' Opening Arbitration Brief, page 4:26-5:4. As held by Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007), "the suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist." Defendants Wespac and Christian were bound to disclose the information not only in good faith, but by their fiduciary duty to Plaintiff. The Opposition

and the Christian Affidavit do not address these deceptive acts at all, and do not deny deceiving Plaintiff by withholding this information from him.

- Defendants failed to adopt a Code of Ethics as mandated by the SEC, and concealed their failure to conform to the SEC rules from Plaintiff before they first sought to sell their services to Plaintiff, when they sold their services to Plaintiff, and at all times during their business relation. See UMFs13-14; Garmong Declaration ¶¶ 24-29; Exhibits 14-15.

- Defendants engaged in "unlawful" activities by failing to register as investment advisors, as required by NRS 90.330, from August 2005 until September 24, 2008, nearly the end of the period they dealt with Plaintiff. Defendants concealed from, and never disclosed to, Plaintiff that they did not comply with NRS 90.330 by failing to register. See UMFs 15-16 and Garmong Declaration ¶¶ 32-33; Motion Exhibit 13.

- Defendant Wespac failed to register as a foreign LLC in violation of Nevada statute NRS 86.544, until October 22, 2008, nearly the end of the period it dealt with Plaintiff. Defendant Wespac concealed from, and never disclosed to, Plaintiff that it had failed to register as a foreign LLC in violation of NRS 86.544. See UMFs 17-18; Garmong Declaration ¶¶ 30-31; Exhibit 16.

There were other failures of disclosure and misrepresentations, but those listed above are completely documented and beyond question.

<u>Defendant Christian's sworn statements during this litigation, but before this summary judgment proceeding, are established by documentary evidence to be false.</u>

The Christian Affidavit submitted with the Opposition is not the first affidavit submitted by Defendant Christian in this lawsuit. At the outset of the lawsuit, Defendants sought to demonstrate the existence of an agreement to arbitrate, NRS 38.221(1). At the time it suited the purposes of the litigation strategy of Defendants not to submit to the District Court the completed Confidential Client Profile that is an integral part of the Investment Management Agreement, Plaintiff's Exhibit 18. Defendant Christian submitted three affidavits, each of which was plainly false, to avoid production of the completed

Confidential Client Profile. It now suits the litigation strategy of Defendants to produce the completed Confidential Client Profile, and they have done so as part of their initial production in the arbitration as WESPAC 000039-000047, which was marked by Plaintiff as Exhibit 17.

First Christian Affidavit. Defendants' original Motion to Dismiss and to Compel Arbitration of September 19, 2012 ("Motion to Compel," Exhibit 22 hereto) included an Affidavit of Greg Christian ("First Christian Affidavit", Exhibit 23) (Plaintiff marks Reply Exhibits 22-27 consecutively with those attached to the Motion. Copies of newly identified Exhibits 22-27 are submitted herewith, and are authenticated at ¶ 2 of the Reply Declaration of Gregory Garmong submitted with this reply). The First Christian Affidavit, Exhibit 23, swore under oath in ¶ 2: "Attached is a true, correct, and complete copy of the Investment Management Agreement." The document sworn to be a "complete" Investment Management Agreement ("Agreement Version 1") was an exhibit to Defendants' Motion to Compel, and is included here in its entirety as Exhibit 24.

Exhibit 24 states in ¶ 14: "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties."(emphasis added). That is, the Confidential Client Profile was necessarily a part of the Agreement, and had to be submitted as part of any "true, correct, and complete" Agreement. But no Confidential Client Profile was included in the exhibit that Defendant Christian swore under oath to be "a true, correct, and complete" copy of the Investment Management Agreement. Plaintiff pointed out at the time that there was clearly material missing from Exhibit 24, including at least the Confidential Client Profile. But more importantly from the standpoint of the currently submitted Christian Affidavit, the First Christian Affidavit was clearly false, and knowingly false. Defendants had the actual Confidential Client Profile in their possession in 2012, inasmuch as they later produced it in the arbitration as WESPAC 000039-000047, and now marked as Plaintiff's Exhibit 17. But in 2012, it suited the purposes of Defendants' litigation strategy to withhold that part of the Agreement from the Court and to swear falsely in the First Christian Affidavit.

Plaintiff persisted in pointing out these facial inconsistencies in Agreement Version 1, which resulted in . . . .

Second Christian Affidavit. Defendants then filed on December 3, 2012 a second Affidavit of Greg Christian ("Second Christian Affidavit"), Exhibit 25 hereto. Paragraphs 5-6 of the Second Christian Affidavit state, at 3:1-7:

> 5. The copy of the Investment Management Agreement which was attached as Exhibit 1 to my affidavit filed September 19, 2012 was a true, correct, and complete copy of the Investment Management Agreement signed by me and Gregory Garmong . . . .
> "6. I am informed, believe and therefore allege that the incorrect page numbering on the Investment Management Agreement attached to my September 19, 2012 affidavit occurred solely as the result of a word processing and/or computer error.

Thus, Defendant Christian again swore under oath that the Agreement Version 1 is a "true, correct, and complete" document, and that its only fault was "incorrect page numbering . . . as a result of a word processing and/or computer error." The Confidential Client Profile was still withheld.

The assertion of "incorrect page numbering" refers to the fact that Plaintiff had pointed out that Agreement Version 1, Exhibit 24, begins on a page numbered in the lower right-hand corner as "page 12." The point of ¶ 5 of the Second Christian Affidavit was to represent to the Court that the paper presented as the Agreement was "true, correct, and complete," and that there were no attachments or exhibits. Then ¶ 6 represents that the page numbering of Exhibit 1 beginning at "page 12" was a "word processing and/or computer error."

The objective of the Second Christian Affidavit was to avoid producing to the District Court the Confidential Client Profile.

Paragraphs 5-6 of the Second Christian Affidavit are completely false. There were pages prior to page 12, and there were exhibits including the Confidential Client Profile. Plaintiff persisted in pointing out the facial inconsistencies in Agreement Version 1, which resulted in. . . .

Third Christian Affidavit.

Defendants submitted a Third Christian Affidavit (Exhibit 26) to the Court on January 9, 2013, stating (¶ 2, 1:10-12): "2. Attached hereto is a true, correct, and complete copy of the Confidential Client Profile which comprised the first eleven pages of the document which included the Investment Management Agreement (See Exhibit 1). (This reference to "Exhibit 1" is to the exhibit submitted with the Third Christian Affidavit, which is Exhibit 27 submitted with Plaintiff's Reply). This statement, sworn under oath of the Third Christian Affidavit, Exhibit 26, is also intentionally false, because the submitted Confidential Client Profile (Exhibit 27) was a blank form only and was not completed. (The Arbitrator can also verify that Exhibit 27 has 13 pages, not 11 as sworn by the Third Christian Affidavit.) Agreement Version 1, Exhibit 24, at ¶¶ 12 and 14, makes clear that the Confidential Client Profile had to be completed, not blank. Defendants had the completed Confidential Client Profile in their possession the entire time of the three 2012-2013 Christian Affidavits, but chose to submit the blank form Exhibit 27 and continue to conceal the completed Exhibit 17. Additionally, the Table of Contents of Exhibit 27 calls for Exhibit A and Exhibit B as part of the Confidential Client Profile. Exhibit A and Exhibit B were not provided, and accordingly even the blank-form Confidential Client Profile was not "complete."

Summary of the First-Third Christian Affidavits submitted earlier in this lawsuit in an attempt to deceive the District Court and the Supreme Court.

The First Christian Affidavit (Exhibit 23) falsely swore under oath that Agreement Version 1 (Exhibit 24) was "true, correct, and complete." After prodding by Plaintiff, the Second Christian Affidavit (Exhibit 25) falsely swore under oath that the apparent inconsistencies were simply a word processing error. After yet further prodding by Plaintiff, the Third Christian Affidavit (Exhibit 26) falsely swore under oath that the blank-form Confidential Client Profile (Exhibit 27) was "true, correct, and complete" and was part of Agreement Version 1, failed to produce the actual completed Confidential Client Profile (now Exhibit 17) referenced in Agreement Version 1, and did not produce the Exhibit A and

Exhibit B referenced in Exhibit 27.

Defendants were successful in their strategy of withholding the completed Confidential Client Profile (Exhibit 17) from the District Court and the Supreme Court earlier in this litigation. They only finally produced it during the arbitration as WESPAC 000039-000047 when production suited their purposes, but still concealed the Exhibits A and B.

As discussed in Garmong Declaration ¶¶ 7-8, Defendants did not during the course of their business relation with Plaintiff, and have never to this day in the lawsuit, produced an entire, "true, correct, and complete" copy of the Investment Management Agreement including the still-missing pages and the three Exhibits A and three Exhibits B referenced in the document. Production of the entire, complete Investment Management Agreement still does not suit the litigation-strategy purposes of Defendants.

(iii) Summary of factual support for application of the *falsus doctrine* in this case.

Plaintiff urges the Arbitrator to exercise his discretion and disregard some or all of the Christian Affidavit submitted with Defendants' Opposition, as permitted by the authority discussed in § 3.E (a) (incredibility doctrine) and § 3.E (b) (i) (*falsus doctrine*) above.

The factual bases of such an exercise of discretion are set forth in § 3.E (a) and § 3.E (b)(ii) above. These bases include making incredible statements not supported or corroborated by anything and often contrary to the documentary evidence, pre-litigation concealment of material information from Plaintiff (Defendants' client and principal in the fiduciary relation), and overt concealment and misrepresentations under oath to the Court during the earlier course of the litigation.

The Courts have based application of the *falsus doctrine* on both statements made outside of court and statements made in court under oath, including statements made in the proceeding then underway to raise credibility doubts about other statements made in the proceeding. As will be discussed in the following § 3.F, some of the unsupported, uncorroborated statements in the Christian Affidavit that are inconsistent with unquestioned documentary evidence are so incredible that they provide the basis for application of the

falsus doctrine against other statements in the Christian Affidavit.

3.F. Specific paragraphs of the Christian Affidavit that must or should be disregarded.

As discussed above in § 3.D, the Arbitrator must disregard the entire Christian Affidavit because it is not shown to be based upon the personal knowledge of the affiant. As discussed above in § 3.E (b), the Arbitrator should exercise his discretion and disregard the entire Christian Affidavit under the *falsus doctrine*.

But if the Christian Affidavit is not disregarded in its entirety, specific paragraphs should be disregarded under either the incredibility doctrine or the *falsus doctrine* for the reasons stated next.

This discussion addresses Christian Affidavit ¶ 28 first, because it illustrates just how far the Defendants will go with naked denials to be untruthful in an attempt to create a triable issue, even when confronted with irrefutable documentary evidence of the truth. Christian Affidavit ¶ 28 states, "Defendants deny that they violated any applicable Nevada law in connection with this case." The Arbitrator should disregard this statement for four reasons. First, it is a statement of a legal conclusion, not a fact, and the Christian Affidavit does not demonstrate that Defendant Christian is qualified or knowledgeable in the area of Defendants' compliance with the laws of Nevada. Second, this statement, an attempt to create a triable issue, is utterly incredible and unbelievable, as it is plainly contradicted by uncontested documentary evidence. Plaintiff's Exhibit 13, a FINRA document submitted to the State of Nevada as proof of compliance with NRS 90.330, plainly shows that Defendant Wespac was in violation of NRS 90.330 during the period from August, 2005, the start of Dr. Garmong's relationship with Defendants, until September 24, 2008, near the end of Dr. Garmong's relationship with Defendants. See Garmong Declaration ¶ 32. Plaintiff's Exhibit 16, an official State of Nevada document downloaded from the Secretary of State's "Entity Actions" website page, plainly shows that Defendant Wespac was in violation of NRS 86.544 during the period August, 2005 until October 22, 2008, also near the end of Dr. Garmong's relationship with Defendants. See Garmong Declaration

¶ 30. Third, the fact that Defendants did attempt to come into compliance with NRS 90.330 and NRS 86.544, after being long in violation of these statutes, but did not disclose this noncompliance to Plaintiff, demonstrates that they had a state of mind to conceal the noncompliance and legal violation from Plaintiff. If they deny the violation now that it has been revealed, they certainly confirm their intent to deceive Plaintiff while he was their client and they had a fiduciary duty of full disclosure to him. Fourth, as discussed above in relation to the *falsus doctrine*, Defendant Christian will say anything under oath, regardless of its untruth, to support Defendants' case. The legal system depends upon witnesses telling the truth under oath, and Defendant Christian has shown that he willingly perjures himself in litigation. Their same rationale holds with Defendants' concealment of their breaking of the SEC's laws and Defendant Christian's lawbreaking and suspension by the SEC See Garmong Declaration §§ 24-29 and 34-35.

Others of the averments of the Christian Affidavit have similar issues with untruthfulness. Based upon these misrepresentations to the Court, the Arbitrator would be well-justified in disregarding the entire Christian Affidavit.

It is not reasonable to believe anything Defendant Christian says.

Turning to the other paragraphs. . . .

Christian Affidavit ¶¶ 3-6. These paragraphs discuss what is apparently represented to be a draft of an Investment Management Agreement. The document under discussion is not provided as an exhibit, or otherwise identified in the Christian Affidavit, is not authenticated, and must be disregarded. NRCP 56(e), Havas, 98 Nev. at 173, 643 P.2d at 1221. No one knows if the alleged document of ¶¶ 3-6 is related to Exhibits 18 and 24.

Christian Affidavit ¶ 7. This paragraph states that "In or about September 2005, Mr. Garmong transferred securities into five new accounts at Charles Schwab to be managed by Wespac advisors and myself." It then purports to identify the specific types of accounts. The alleged acts are those of another person, not Mr. Christian. There is no showing as to where Defendant Christian allegedly obtained this information. There are no

documentary exhibits to corroborate this statement of ¶ 7. Accordingly, it violates the document requirement of NRCP 56(e) and relevant authority.

Christian Affidavit ¶ 8. Bearing in mind that the Christian Affidavit is self-serving and is not corroborated in any way, this paragraph has multiple flaws. It does not identify any dates or modes of the "communications" or "disclosures" alleged at 2:2-5 and 2:6-7. At 2:5-6 and 2:8-9, it speculates that "Mr Garmong was fully aware of the risks" and "acknowledged" certain facts. Yet there is no evidence of how the affiant knew that another person was "fully aware" and "acknowledged" the facts. He does not purport to quote or paraphrase Mr. Garmong, just to state Mr. Garmong's state of mind. There are no written exhibits to corroborate these self-serving statements of ¶ 8. The last sentence of ¶ 8 at 2:8-10 is a classic conclusory statement without any facts to back it up: "My investment advice to Mr. Garmong was suitable and prudent"– whatever that means in light of wasting $580,649.82 of Mr. Garmong's assets in 13 months, and charging him $21,283.29.

Most notably, neither here nor elsewhere does the Christian Affidavit ever assert that it followed Mr. Garmong's instructions to manage the accounts conservatively and not to lose capital from the accounts.

Christian Affidavit ¶¶ 9-10. These allegations about profitability and declines "of these two accounts" are not corroborated by any documents. Reports of market value of securities give the best evidence of their profitability and declines, and Defendants have elected to withhold from the Arbitrator and from Plaintiff the documentation, if any, upon which they base their speculation. By contrast, Plaintiff provided the complete account statements for the accounts involved, during the period at issue, as Plaintiff's Exhibit 9.

Christian Affidavit ¶ 11. Once again, a self-serving paragraph has no corroborating documentation. No dates are given for the "frequent" discussions, nor is there any explanation of what "frequent" means. Further, much of the Affidavit does not make rational sense. Christian Affidavit at 2:20-21 states, "based upon his [referring to Plaintiff's] experience and education I believed there would be a recovery." There is no explanation

of how Dr. Garmong's experience and education in metallurgy, mechanical engineering, and patent law would have any relation to whether a recovery might occur. Dr. Garmong had hired and paid for Defendants' experience and education. Had he wanted to rely on his own education and experience, he would not have hired Defendants. Lastly, at 2:23-25, the Christian Affidavit seeks to raise a completely irrelevant argument about future stock market returns, an argument based upon the "slightest doubt" approach adopted by Defendants but discarded by Wood v. Safeway. The issue is whether Defendants followed the instructions given to them by Dr. Garmong during the period October 2007-November 2008, not whether an approach would have worked out 10 years in the future.

Christian Affidavit ¶ 12-13. These paragraphs are apparently intended to rely on documents that were not affixed to the Christian Affidavit as exhibits. These paragraphs must be excluded under NRCP 56(e) and Havas, 98 Nev. at 173, 643 P.2d at 1221.

Christian Affidavit ¶ 14. This paragraph should be disregarded as incredible, self-serving, uncorroborated by evidence, and contrary to credible, unchallenged documentary evidence already of record. Christian Affidavit 3:8-9 states, "I was never told by Gregory Garmong, either in person or in writing, that there could not be losses from his accounts in 2008." Yet Plaintiff's Exhibit 4, a fax sent January 21, 2008, clearly states in ¶ 3, "As I told you, I'll sacrifice potential gains to ensure that I don't have capital losses. Now that I'm retired and won't be adding to my accounts, I have to avoid capital losses. I'll assume that everything is under control under that guideline[.]" There was no response from Defendants, then or now, thereby acknowledging this instruction by their silence. A few months later, Plaintiff sent another fax, stating in the fourth paragraph of Exhibit 5, "As I had said before, my big concern is losing money on these accounts. The volatility is just driving me nuts, and that mental insecurity is what I hoped to avoid." There was no response from Defendants, then or now. And a few months after that, Plaintiff sent another fax, stating in the fourth paragraph of Exhibit 6, "The results are mixed, and in one respect very disturbing in light of my direction to Wespac that I expected the stock market to decline in 2008 and wanted to sacrifice potential gains to avoid loss." Again, no

response from Defendants, then or now.

The Christian Affidavit does not assert that he and Wespac did not receive Exhibits 4-6, which confirm and corroborate the basic instruction and objective set forth in the letter Exhibit 3, which states:

> When we met recently, we discussed the current state of my investments that you manage. I expressed my concern about the volatility of the financial markets. You said not to worry, that you would be watching my accounts carefully.
>
> I have retired as of August 31, 2007, 15 months before I reach age 65, and am winding down my practice although that will take 6-12 months because some long-time clients have asked me to complete work already started for them, and I agreed. As we discussed, I am in the midst of a difficult, contentious divorce. I am also involved heavily in my search-and-rescue work and volunteer firefighting, and taking a lot of EMT, paramedic, firefighting, and mountaineering training. These occupy much time, attention, and energy. As much as I hate to admit it, I am finding that as I approach age 64 my ability to handle some things is diminishing. So I am not able to contribute as much to the management of my accounts as I have in the past. That is why I hired you.
>
> With all that in mind, you proposed that you would take over sole management of my investment accounts without input or attention from me. Your proposal was unexpected, but I very much appreciate it, as it eases many of my concerns. But, as you can appreciate, that is an enormous step for me, as I have taken sole responsibility for my finances since my late teens.
>
> After having thought about it some more, I agree to turn the management of my retirement and savings investment accounts over to you entirely, under the condition that you manage them very conservatively. I've now had a chance to think more about the approach you propose, and I want to re-state and re-emphasize the general instructions that I gave you at the meeting: it is important that my investment accounts be managed very conservatively, and that they not lose money. The psychological impact of entering retirement is greater than I had expected it to be, the main effect being that I realize that I cannot earn any more and have to depend upon my savings and investments to support myself the rest of my life, as I have no pension other than social security. My savings are sufficiently large that I will be OK even if they do not earn any return, and I just draw on the capital, particularly after I complete the alimony.
>
> The basic instruction in the Client Profile and that I gave you and Wespac orally when I started with you in 2005 was to manage my accounts generally conservatively. Now I want to emphasize that instruction even more. It is really important to me that you structure and manage my accounts so that they do not lose capital if the markets decline, as I believe they may, and if the markets do decline, to sell out the losers. I want to confirm to you what I said at the meeting, and to instruct you that I am willing to sacrifice potential gains to avoid losses. If the stock markets do well in 2008 and after that, I won't blame you if I don't have big gains, as long as I don't have big losses if the markets decline. You said that you would follow that approach.

For the Christian Affidavit to assert, in a self-serving, uncorroborated attempt contrary to multiple written Exhibits, that Dr. Garmong had not given him instructions not to lose capital, is simply incredible.

Christian Affidavit ¶ 15. This paragraph states, "I never urged Gregory Garmong to allow Wespac and myself to take over sole management of his accounts at any time." Once again, as with ¶ 14, this is a self-serving, uncorroborated, completely incredible statement made in an attempt to create a triable issue, that is contrary to an undisputed document already of record, and should be disregarded by the Arbitrator. The second paragraph of the fax Exhibit 6, referenced above, states, "At your suggestion, I had left my accounts in the sole care of Wespac for the first half of 2008. You advised me not to worry, and let Wespac handle the management. So, I did." This statement confirms and corroborates the instructions and objectives that Plaintiff gave to Defendants in Exhibit 3. For Defendants to claim that they were not given these instructions and objectives set forth in Plaintiff's Exhibits 3-6 is beyond the bounds of credibility, and justifies disregarding these paragraphs of the Christian Declaration.

Christian Affidavit ¶ 17, first sentence. This ¶ 17 has two sentences, which must be addressed differently. The first sentence states, "I never received the letter allegedly dated October 22, 2007 from Gregory Garmong." This is simply an argument that Defendant Christian personally did not receive the letter, Plaintiff's Exhibit 3. It does not address whether Defendant Wespac received the letter. Further, it does not deny the substance of the letter or the information conveyed orally in the meeting referenced in the letter, of which the letter was a confirmation. The first sentence is uncorroborated and contrary to the unchallenged ¶ 3, pg. 1:18-19 of the Garmong Declaration. For its truth there must be reliance on Defendant Christian's history of truthfulness in affidavits in this case, which is nil.

Christian Affidavit ¶ 17, second sentence; and also ¶¶ 18, 20, and 23 (second sentence). These paragraphs are, by their wording, statements of Defendant Christian's "belief" and "opinion," not statements of purported fact. They are not admissible evidence

under NRCP 56(e), and must be disregarded.

Christian Affidavit ¶ 19. This paragraph is also incredible, in that it suggests that Defendants were giving "advice" to Dr. Garmong for him to take action. In fact they had sole control over his accounts, see Exhibits 3 and 6 quoted above, and the admission of responsibility in Christian Affidavit ¶ 16.

Christian Affidavit ¶¶ 21, 22, 25, 26, 27, 29, 30 and 31. These paragraphs do not state any facts. They are legal conclusions designed to parrot and deny elements of the respective Claims. They are not admissible. They are the functional equivalent of adopting denials in a pleading, which is specifically prohibited by NRCP 56(e).

Christian Affidavit ¶ 24. This statement that Dr. Garmong was an "experienced" investor is a conclusory statement of opinion not supported by any documentary evidence, and must be disregarded.

4.

RESPONSE TO DEFENDANTS' CLAIM-SPECIFIC ARGUMENTS.

Opposition at 5:1-16:18 addresses the Claims for which summary judgment is sought, and even two Claims for which summary judgment is not sought. This Reply will address these arguments in turn.

At several points, the Opposition notes that the Motion was 50 pages in length, apparently to contrast the brevity of their Opposition. There are several reasons. Plaintiff was obligated to demonstrate legally and factually each element of the 10 Claims for which summary judgment was sought, and the request for doubling of damages The Opposition in every case concedes by not addressing, and does not discuss, most of the elements of each claim, basing its defense on attempting to negate one of the several elements. Further, the Opposition admits that it does not purport to present a complete opposition, see for example Opposition 4:15-17 and 18:11-13.

Plaintiff will respond to the allegations of the opposition. For each Claim, the relevant pages and lines of Plaintiff's Motion and Defendants' Opposition are identified.

4.A. First Claim–Breach of Contract (Motion 8:15-10:13; Opposition 5:2-7:3).

There are four elements to establish breach of contract, see Motion 8:17-27, which the Motion demonstrates at 9:1-10:13 are met.

The Opposition does not dispute, or event address the first, second, and fourth elements, thereby conceding them.

The basis of the third element, breach of the contract by Defendants, Motion 9:7-10:1, is that Defendants did not follow Plaintiff's instruction that Defendants "would manage the managed accounts solely at their discretion but in strict accordance with the objectives and instructions given them by Plaintiff (UMF 3-7; Exhibit 18, ¶ 5). Plaintiff provided Defendants in writing an objective and instruction that they were not to lose capital (i.e., principal) from the managed accounts." (UMF 6; Exhibits 3 and 4)

The Opposition does not address this subject at all. Instead, it seeks to shift the discourse from specific instructions to generalities, unsupported by any objective evidence. The Opposition starts with a general discussion of "unsuitable" investments (Opposition 5:11-17), fulfilling responsibilities (Opposition 5:18:25), making recommendations (Opposition 6:1-6), a contention that defendant Christian never received a particular letter (Opposition 6:7-12), a "limited income portfolio" (Opposition 6:18-23), and suitability of advice (Opposition 6:24-7:3). None of these arguments address the allegations of the Complaint and the UMFs that form the basis of the third element. They are all the kind of spurious argument, unrelated to the material facts underlying the motion for summary judgment, that are condemned by Wood in its rejection of the "slightest doubt" standard, but which forms the legal basis of the Opposition.

Buried in the arguments of the Opposition at 6:13-23 are the stark admissions that "Mr. Christian technically possessed discretionary control over Mr. Garmong's accounts" and "the Defendants exercised discretion." These admissions are entirely consistent with the discretionary power of Defendants as set forth in ¶ 5 of the Investment Management Agreement, Exhibit 18 to the Motion. This ¶ 5 states, in the sentence bridging pages WESPAC 000050-WESPAC 000051, "Although WA [Wespac Associates] may make investment decisions without prior consultation with or further consent from Client, all such

investment decisions shall be made in accordance with the investment objectives of which Client has informed, and may inform, WA from time to time in writing." Although the Opposition attempts to temper this contractual obligation of Defendants, there it is in writing in the Investment Management Agreement and in Defendants' admissions. Defendants had "discretionary control" over Plaintiff's managed accounts, but they did not follow the instructions and objectives he gave them.

4.B. Second Claim–breach of implied warranty (Motion 10:14-11:25; Opposition 7:4-8:8).

Motion 10:15-11:3 sets out the three elements of a claim for breach of implied warranty, and at 11:4-25 demonstrates that all three elements are met in the present circumstances.

The Opposition does not disagree with the elements of the cause of action and that they are met in the present circumstances. Instead, Opposition sole argument, at 7:9-8:4, is that a claim for breach of implied warrant does not apply to a service contract. If a claim for breach of implied warranty does apply to a service contract, Defendants necessarily lose on this Second Claim.

The Opposition's position is directly contrary to the plain wording of the Nevada Supreme Court in Robert Dillon Framing, Inc. v. Canyon Villas Apartment Corp., 2013 WL 3984885 at *3 (Nevada 2013), quoted at Motion 10:18-24 and holding

> An implied warranty of workmanship accompanies a service contract as a matter of law. In this covenant, the performing party promises he will perform with care, skill, reasonable expediency, and faithfulness. 23 Richard A. Lord, Williston on Contracts ¶ 63:25, at 525 (4th ed.2002). And because the warranty of workmanship addresses the quality of workmanship expected of a promisor, the warranty sounds in contract.

(Emphasis added); A.C. Shaw Construction, Inc. v. Washoe County, 105 Nev. 913, 784 P.2d 9 (1989) (All contracts in Nevada contain an implied covenant of good faith and fair dealing).

Defendants' argument has two parts. First, the Opposition 7:9-24 cites case authority from a number of other jurisdictions, which have a different approach. Such

authority does not overcome governing authority from the Nevada Supreme Court, relying on an authoritative treatise, Williston on Contracts.

Second, the Opposition at 7:25-8:4 attempts to distinguish Robert Dillon Framing on the facts, arguing that "a property owner had brought an action against a subcontractor for breach of implied warranty of workmanship–it was not an action based on a contract solely for services." There are three responses. First, the Nevada Supreme Court did not limit its holding as the Defendants here argue, instead holding, "An implied warranty of workmanship accompanies a service contract as a matter of law." The decision did not focus on the scope of the contract, but on whether it was a service contract. Second, workmanship is services. Third, the complaint in Robert Dillon Framing was for breach of implied warranty of workmanship on services.

4.C. Third Claim--Contractual Breach of Implied Covenant of Good Faith and Fair Dealing (Motion 11:26-15:9; Opposition 8:9-25).

Motion at 12:1-12 sets forth the four elements that must be proved to establish a breach. Motion at 12:13-15:9 demonstrates that Plaintiff has established the four elements under the present facts.

Opposition 8:18-25 makes a number of assertions that are unconnected to any disputed or undisputed material facts. But nothing relates to whether Defendants followed, or attempted to follow, Plaintiff's investment objectives and instructions to manage Plaintiff's accounts so as "not to lose capital." That was the result that Plaintiff had a right to expect according to the contract, Exhibit 18, ¶ 5, quoted above in § 4.A, and Defendants denied him while charging him over $20,000 in "advisor fees." Instead, Opposition 8:18-25 focuses solely on the approach Defendants took, not whether they sought to, or did, follow the instructions and objectives Plaintiff gave them.

4.D. Fourth Claim--Tortious Breach of Implied Covenant of Good Faith and Fair Dealing (Motion 15:10-26:8; Opposition 9:1-10:21).

Motion 16:16-28 sets forth the five elements of this cause of action. Motion 17:1-26:8 demonstrates that Plaintiff has established the five elements under the present facts.

The primary argument of the Opposition at 9:9-21 is directed toward the second element, disputing the existence of "a special element of reliance or fiduciary duty associated with the contract." Although Opposition 9:11-12 admits that a fiduciary falls within the second element, it implicitly denies that it was a fiduciary. This is nonsense. The Defendants agree that they were investment advisors and investment managers, who have a fiduciary duty toward Plaintiff as a matter of law, as established by statute, common law and the provisions of Defendants' own Investment Management Agreement and Wespac's Form ADV-II. For details, see Motion 31:3-19 and the discussion of the first three paragraphs under § 4.F below, and also uncontested UMFs 1 and 3.

Opposition at 9:17-21 argues that Plaintiff was not a "weaker and dependent party," another type of special element of reliance, because he has a Ph.D. in metallurgy and was a patent attorney for nearly 30 years. Certainly if Plaintiff had sought advice from Defendants in relation to metallurgy, mechanical engineering, or patent law, he would not have been the weaker party. But he sought advice in relation to the supposed expertise of Defendants, investment advice and financial management, where he was decidedly the weaker party.

Opposition at 9:22-10:14 raises some straw men that were never asserted as factual or legal bases of the Motion, nor does the Opposition suggest they were. The arguments reflect the attempt to raise new arguments by application of the discredited "slightest doubt" standard. The Motion does not raise any of arguments set forth at 9:22-10:14. Neither Plaintiff nor the Arbitrator has ever seen the complete Investment Management Agreement, as the entire Investment Management Agreement is not part of the record. See Garmong Declaration ¶¶ 7-8.

Opposition at 10:15-21 makes some unsupported arguments. The conclusion is the unsupported assertion that there was no "grievous and perfidious conduct." Yet none of the UMFs are disputed and no factual support is presented to dispute the factual and legal arguments at Motion 17:9-23:11.

4.E. Fifth Claim--Breach of Nevada Deceptive Trade Practices Act, NRS Ch. 598. (Motion 26:9-31:1; Opposition 10:22-12:1).

Motion 28:4-19 sets forth the three elements of this cause of action. Motion 28:21-31:1 demonstrates that Plaintiff has established the three elements under the present facts.

The Opposition does not dispute that Plaintiff has standing as demonstrated at Motion 28:21-23, or that the Defendants engaged in acts of consumer fraud as enumerated at Motion 28:26-30:7, or that there are damages as stated at Motion 30:16-27. The Opposition at 10:23-12:1 instead focuses on the causation element. Defendants' sole argument is that stockbrokers cannot be liable when stocks purchased do not perform well.

Defendants' argument fails because they were not stockbrokers in their relation with Plaintiff, and instead were investment advisors and planners. See UMF 1, not disputed by Defendants, establishing that the Defendants would "provide financial advice, planning and management services to Plaintiff for a specified group of 'managed accounts' held at Charles Schwab Co." Plaintiff paid Schwab to execute trades, and separately paid Defendants for financial advice, planning, and management services. Also, see the Investment Management Agreement, Motion Exhibit 18, at ¶¶ 2-4, establishing that all assets would be held by a "custodian" stockbroker, in this case Schwab, and that Defendants Wespac and Christian would provide investment advice and financial planning, and would not act as stockbrokers. Contrary to the law cited from other jurisdictions relating to stockbrokers, Nevada's NRS Ch. 628A, specifically NRS 628A.030, makes financial planners liable for the consequences of their faulty advice.

The Opposition completely ignores the other grounds for a finding of breach of the deceptive trade practices act, as discussed at Motion 28:28-30:7. They do not ever assert that they followed Plaintiff's instructions; they refuse to address their failures to follow Nevada and federal SEC law, and their concealment of that lawlessness from Plaintiff; and they do not dispute that they failed to disclose material facts. The establishment of any of these grounds is sufficient to demonstrate liability under NRS Ch. 598.

4.F. Sixth Claim--Breach of Fiduciary Duty (Motion 31:2-34:15; Opposition 11:2-12:14).

Motion 31:3-19 and UMFs 1 and 3 establish that Defendants had a fiduciary duty to Plaintiff under Nevada statutes, NRS 628A.010(3) and NRS 628A.020, Nevada common law (Randono v. Turk, 86 Nev. 123, 129, 466 P.2d 218, 222 (1970)), the Investment Management Agreement, Motion Exhibit 18, ¶ 3(3) (document page WESPAC 000049, admitting "its fiduciary obligations to Client"); and the provisions of the SEC Form ADV-II, Motion Exhibit 12, document page GG 0371.

Establishing Defendants' fiduciary duty to Plaintiff on multiple grounds as a matter of Nevada law and the Agreement Exhibit 18 and SEC Form ADV-II is important, because, incredibly, Defendants primary defense is denial of any fiduciary duty to Plaintiff, Opposition 12:3-22. To establish this defense, the Opposition at 12:12-22 cites and quotes several decisions from other jurisdictions dealing with the obligations of stockbrokers.

As discussed above, Defendants were not stockbrokers in their relation with Plaintiff, and instead were financial and investment advisors and planners. See UMF 1, not disputed by Defendants, establishing that the Defendants would "provide financial advice, planning and management services to Plaintiff for a specified group of "managed accounts" held at Charles Schwab Co." Also, see the Investment Management Agreement, Motion Exhibit 18, at ¶¶ 2-4, establishing that all assets would be held by a "custodian" broker, in this case Schwab, and that Defendants Wespac and Christian would provide investment advice and financial planning, and would not act as stockbroker. Contrary to Defendants' cited extra-jurisdictional law relating to stockbrokers, in Nevada NRS Ch. 628A, specifically NRS 628A.030, makes financial planners liable for the consequences of their faulty advice.

The remainder of the Opposition argument at 12:23-13:14 constitutes general conclusory denials that do not deal at all with the subject matter of this Sixth Claim. It is as though Defendants either did not read, or hope to avoid by refusal to discuss, the pertinent portion of the Motion at 33:1-22, which bases this Sixth Claim entirely on the

fraudulent concealment by Defendants of Defendant Christian's prior illegal activities, for which he was suspended by the SEC. UMF 20, which Opposition did not dispute or even mention, states, "If Defendants had not concealed from him, and instead had disclosed to Plaintiff that they did not meet the requirements of federal SEC law and Nevada state law, or that Defendant Christian had been previously disciplined and suspended by the SEC, Plaintiff would have been on notice and would never have dealt with them."

At Opposition 13:6-7, "Defendants adamantly deny that they ever concealed any information from Plaintiff." This flies in the face of UMFs 16, 18, and 19, which Defendants do not dispute.

4.G. Seventh Claim--Breach of Fiduciary Duty of Full Disclosure (Motion 34:17-37:24; Opposition 13:15-17).

This Seventh Claim is based upon the same legal principles as the Sixth Claim. Motion 34:27-34:21 demonstrates that the elements of the cause of action are met for the present factual circumstances.

Remarkably, the Opposition manages to address this Seventh Claim in two sentences, accomplishing this brevity by declining to address the facts at all. Defendants do not dispute that they violated, and concealed from Plaintiff their violation, of SEC law (UMF 13-14; Motion, 35:6-36:14); that they violated, and concealed from Plaintiff, their violation of Nevada's requirement of registration of a foreign LLC (UMF 17-18; Motion, 36:15-37:3), and that they violated, and concealed from Plaintiff their violation, of Nevada's requirement of registration of investment advisors (UMF 15-16; Motion, 37:4-23).

Each of these concealments is a violation of Defendants' fiduciary duty to disclose material information. As UMF 20 states, if Defendants had disclosed this information, Plaintiff would never have dealt with them.

4.H. Eighth Claim--Breach of Agency (Motion 37:25-40:1; Opposition 13:18-14:9).

Motion 38:15-23 sets forth the four elements of this cause of action. Motion 38:24-40:1 demonstrates that Plaintiff has established the four elements under the present facts.

The defense of the Opposition is difficult to follow. It does not dispute either the law or any of the UMFs upon which the Eighth Claim is based. Instead, it asserts that if Dr. Garmong had followed Defendants' advice, his investments "would likely have tripled in value since March 2009." (Defendants cannot get their stories straight, inasmuch as they are not constrained by actual facts. Christian Affidavit states in ¶ 11, 2:22-25, that Plaintiff's investments "would have more than doubled in value since 2009.")

In any event, that is not how Plaintiff instructed his agents, the Defendants. Plaintiff's paragraph 3 of Exhibit 4, a fax sent to Defendants on January 21, 2008, clearly states "As I told you, I'll sacrifice potential gains to ensure that I don't have capital losses. Now that I'm retired and won't be adding to my accounts, I have to avoid capital losses." Defendants do not deny they willfully disregarded the instructions of their principal, see Motion 38:2-3.

4.I. The Ninth Claim (Motion: Ninth Claim not part of Motion; Opposition 14:10-16).

The Ninth Claim was not part of Plaintiff's Motion for Summary Judgment, see Motion 1:14-16. It is unclear why Defendants raised in their Opposition this straw man issue of the Ninth Claim.

4.J. Tenth Claim--Breach of NRS 628A.030 (Motion 40:2-43:2; Opposition 14:16-15:18).

Motion 41:13-25 sets forth the three elements of this cause of action. Motion 41:27-43:2 demonstrates that the three elements are established under the present facts.

The Opposition does not dispute that Defendants are financial planners, the first element, although they continue to attempt to confuse the issue by citing case authority from other jurisdictions dealing with stock brokers (Opposition 15:7-11). Defendants were financial planners, not stock brokers, in their relation with Plaintiff.

The Opposition does not dispute that Defendants concealed highly material information and did not follow Dr. Garmong's instructions, (the (a) variant of the second element). Nor does it dispute with any credible facts that Defendants were in violation of

NRS 86.544 and NRS 90.330(1), (the (c) variant of the second element), see the discussion of Christian Affidavit ¶ 28 in §§ 3.C and 3.F *supra*.

Once again, the Opposition at 14:25-15:6 argues that it was just Plaintiff's bad luck that the stock market declined. The reason that Dr. Garmong hired Defendants and paid them $21,283.29 in "advisor fees" (UMF 9) was to follow his instructions not to lose capital, and to protect him against such vagaries of the stock market. He was willing, Plaintiff instructed Defendants, to forego potential gains to protect against losses. Instead, they did nothing to protect him, with the result that they wasted $580,649.82 of his life savings in thirteen months (UMF 8).

The Opposition makes a naked denial of any damages, the third element, without citing any supporting facts.

4K. The Eleventh Claim–Intentional Infliction of Emotional Distress (Motion: Eleventh Claim not part of Motion; Opposition 16:3-18).

The Eleventh Claim was not part of Plaintiff's Motion for Summary Judgment, see Motion 1:14-16. It is unclear why Defendants raised in their Opposition this straw man issue of the Eleventh Claim.

4.L. Twelfth Claim--Unjust Enrichment (Motion 43:3-44:5; Opposition 15:19-16:2).

Motion 43:12-22 sets forth the three elements of this cause of action. Motion 43:23-44:5 demonstrates that Plaintiff has established the three elements under the present facts.

The Opposition takes the position that there is a written contract, and that therefore this claim is effectively moot. However, that determination depends upon whether the Arbitrator reaches the same conclusion. If so, Plaintiff agrees that the Twelfth Claim is moot; if not, it remains applicable.

4.M. Doubling of Damages Pursuant to NRS 41.1395 (Motion 44:6-46:7; Opposition 17:1-20).

Motion 45:15-22 sets forth the three elements of this cause of action. Motion 45:23-

46:7 demonstrates that Plaintiff has established the three elements under the present facts.

The Opposition at 17:1-12 directs the first half of its discussion to quoting the law already presented at Motion 44:13-45:11. From there, the Opposition does not mention or dispute the first element, that Plaintiff was over 60 years old at all relevant times.

The Opposition does not mention or dispute the second element, that Plaintiff was deprived of a great deal of money as a result of Defendants' activities.

The Opposition does not mention or disagree that Plaintiff was deprived of money as a result of Defendants' financial exploitation of him.

The Opposition at 17:13-20 repeats its litany of factually unsupported denials. These denials do not create a triable issue or controvert the legal elements under the principles of Wood v. Safeway.

5.

TYPES AND AMOUNTS OF DAMAGES

The types and amounts of damages that the Arbitrator may award were discussed for the respective Claims in Plaintiff's Motion.

Motion at 46:8-50:7 summarizes the types and amounts of damages.

The Opposition does not discuss damages at all or dispute Plaintiff's position, either in relation to the respective Claims, or in response to Motion 46:8-50:7, thereby conceding Plaintiff's position that he should be awarded the maximum amount of damages.

6.

DEFENDANTS' REQUEST FOR ADDITIONAL DISCOVERY MUST BE DENIED

Opposition at 17:21-18:13 demands a second bite at the apple in the event the Arbitrator finds against them on the record and papers as they stand now: "If the Arbitrator believes that any portion of Plaintiff's *Motion for Summary Judgment* should be refuted by evidence, in addition to Defendants' affidavit, then Defendants request a continuance pursuant to NRCP 56(f) to conduct discovery." See also Christian Affidavit ¶ 33 at 5:26-6:11.

Both the Opposition and the Christian Affidavit suggest that the discovery they seek is Plaintiff's account statements from the time his accounts were opened but before he dealt with Defendants, and after the time he dealt with Defendants. They also want to retain an expert to determine liability and damages.

The Christian Affidavit does not indicate how such discovery might create or result in a triable issue of fact, based upon the motion for summary judgment as presented by Plaintiff. As held in Aviation Ventures, Inc. v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005): "[A] motion for a continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact." This showing must be made by affidavit, see footnote 4 of Aviation Ventures, quoting Bakerink v. Orthopaedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978).

Additionally, Defendants cite no authority justifying their second-bite-at-the-apple theory–that if the Arbitrator determines that they should have submitted better evidence, then they should be permitted to conduct discovery to try to submit better evidence. To the contrary, a party opposing summary judgment must put its best case forward in its Opposition, as motions are not adjudicated piecemeal.

The types of additional discovery listed in the Opposition have no relevance to the issues and UMFs as presented in Plaintiff's Motion. They are based entirely on the erroneous view of summary judgment as having a "slightest doubt" standard, decisively rejected by Wood, as discussed above in § 1. The Opposition gives no explanation as to why prior or subsequent performance relates in any way to the dispositive UMFs of the Motion, or how prior or subsequent performance would have affected Defendants' refusal to follow Plaintiff's instructions and objectives. (UMFs 4-7).

Nor does the Opposition explain how the additional discovery would affect in any way the uncontested lawbreaking of Defendants in violating federal SEC rules, and Nevada state laws, all directly pertinent to their business relation to Plaintiff. Nor do they explain how additional discovery would affect their concealment of Defendant Christian's

prior improper conduct with clients, UMF 19. They do not contest UMF 20, stating, " If Defendants had not concealed from him, and instead had disclosed to Plaintiff that they did not meet the requirements of federal SEC law and Nevada state law, or that Defendant Christian had been previously disciplined and suspended by the SEC, Plaintiff would have been on notice and would never have dealt with them." As discussed, these violations by Defendants are fully sufficient to support a finding in favor of Plaintiff on the Fifth, Sixth, Seventh, and Tenth Claims, and on Doubling of Damages.

If Defendants had any valid basis for seeking discovery under NRCP 56(f), they had more than sufficient time to file a request with the Arbitrator, and they failed to do so. Any failure to obtain further discovery is their own fault.

7.

CONCLUSION

Plaintiff is entitled to partial summary judgment in his favor at this time, and urges the Arbitrator to make that determination now.

DATED this11th day of January, 2018.

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

Counsel for plaintiff

INDEX OF EXHIBITS

No*.	Description	Pages
22	Defendants' Motion to Compel	5
23	First Christian Affidavit	4
24	Version 1 of Investment Management Agreement	9
25	Second Christian Affidavit	3
26	Third Christian Affidavit	2
27	Blank form Confidential Client Profile	14

*-Exhibit numbering continues in sequence from Motion for Partial Summary Judgment

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CARL M. HEBERT, ESQ., and that on January 11, 2018, I

_____hand-delivered

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

___X__ e-mailed

_____telefaxed, followed by mailing on the next business day,

a copy of the attached

PLAINTIFF'S REPLY POINTS AND_AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

addressed to:

Hon. Phillip Pro (Ret.) Arbitrator
JAMS
3800 Howard Hughes Parkway
11th Floor
Las Vegas, NV 89169
702-457-5267

Thomas C. Bradley, Esq. Counsel for defendants
448 Hill Street
Reno, NV 89501
775-323-5178

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

DECLARATION OF GREGORY GARMONG

I, Gregory Garmong, declare the following facts to be true of my own personal knowledge, except for those facts stated upon information and belief, and I believe those facts to be true. I am competent to testify to these facts if called upon.

1. I am the Plaintiff in Case No. CV12-01271, Gregory Garmong v. Wespac et al, in the Second Judicial District Court of the State of Nevada in and for Washoe County, and in a JAMS arbitration proceeding of the same name, reference number 1260003474. This Declaration is submitted in support of "Plaintiff's Reply to 'Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment' " in that proceeding.

2. Authentication of documents.

Exhibit 22 is a true, complete and correct copy of a Motion to Compel filed in this case by Defendants with the Court on September 19, 2012, as served on Plaintiff by Defendants.

Exhibit 23 is a true, complete and correct copy of an Affidavit of Greg Christian ("First Christian Affidavit") submitted to the Court with Exhibit 22, as served on Plaintiff by Defendants.

Exhibit 24 is a true, complete, and correct copy of Version 1 of an Investment Management Agreement submitted to the Court with Exhibits 22 and 23, and referenced by the First Christian Affidavit Exhibit 23, as served on Plaintiff by Defendants.

Exhibit 25 is a true, complete, and correct copy of an Affidavit of Greg Christian ("Second Christian Affidavit") submitted to the Court on December 3, 2012, as served on Plaintiff by Defendants.

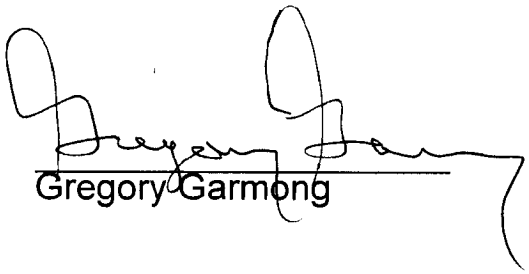
Exhibit 26 is a true, complete, and correct copy of an Affidavit of Greg Christian ("Third Christian Affidavit") submitted to the Court on January 8, 2013, as served on Plaintiff by Defendants.

Exhibit 27 is a true, complete and correct copy of a blank form used to

prepare the Confidential Client Profile submitted to the Court with Exhibit 26 and referenced therein, as served on Plaintiff by Defendants.

This Declaration is made pursuant to NRS 53.045.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 10th, 2018 at Reno, Nevada.



Gregory Garmong

EXHIBIT 22

EXHIBIT 22

FILED
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CV12-01271 OC-9900038888-045
GREGORY GARMONG VS WESPAC ET 5 Pages
District Court 09/19/2012 04:21 PM
Washoe County 2270
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Fax: (775) 323-0709
Counsel for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

vs.

WESPAC, GREG CHRISTIAN, and
Does 1 - 10,
Defendants.

Case No. CV 12-01271

Dept. No. 6

MOTION TO DISMISS AND TO COMPEL ARBITRATION

Defendants, WESPAC and GREG CHRISTIAN, by and through their attorney of record, THOMAS C. BRADLEY, ESQ., of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace,* hereby move to dismiss pursuant to N.R.C.P. 12(b) (1) and to compel arbitration pursuant to NRS 38.221.

This motion is based on the Points and Authorities filed herein hereto and the papers and pleading filed herein.

DATED this 19th day of Sept., 2012

Sinai, Schroeder, Mooney,
Boetsch, Bradley & Pace

Thomas C. Bradley, Esq.
Attorney for Defendants

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
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POINTS AND AUTHORITIES

Defendant Greg Christian is a registered Investment Advisor for Wespac and he assists persons who wish to invest their savings. On May 9, 2012, Plaintiff Gregory Gamong, filed suit in this case against Wespac and Greg Christian alleging a breach of contract, presumably the Investment Management Agreement,. and breach of fiduciary duty to invest his Portfolio assets in a suitable manner.

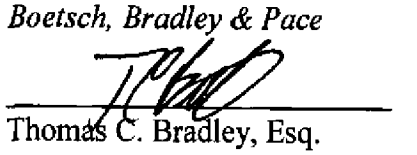
Mr. Garmong, however, previously agreed to arbitrate this matter by agreeing to and signing an Investment Management Agreement. The Investment Management Agreement specifically provided that "any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio assets, such dispute shall be resolved exclusively by arbitration in accordance with the rules of the Judicial Arbitration and Mediation Service (JAMS) applying the laws of the state where the agreement is governed and executed. *See Exhibit One Investment Management Agreement.*

This Agreement is a valid and fully enforceable agreement. Accordingly, this Court should dismiss this action pursuant to N.R.C.P. 12(b) (1) and to order the parties to arbitrate their dispute as agreed by the parties pursuant to NRS 38.221.

The undersigned does hereby affirm, pursuant to NRS 239B.030, that the preceding document does not contain the social security number of any person.

DATED this 19th day of Sept., 2012

Sinai, Schroeder, Mooney,
Boetsch, Bradley & Pace



Thomas C. Bradley, Esq.
Attorney for Defendants

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace,* and that on the 19th day of Sept., 2012, I deposited for mailing in the United States Mail a true and correct copy of the foregoing document, MOTION TO DISMISS AND TO COMPEL ARBITRATION addressed to:

Gregory Garmong
11 Dee Court
Smith, NV 89430

Thomas Bradley

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
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IN THE FAMILY DIVISION
OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

Motion To Compel Arbitration
(Title of Document)

filed in case number: CV12-01271

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

_____
(State specific state or federal law)

-OR-

☐ For the administration of a public program

-OR-

☐ For an application for a federal or state grant

Date: 9/19/12

(Signature)

Molly E. Stewart
(Print name)

Legal Secretary
(Attorney for)

EXHIBIT INDEX

1) Investment Management Agreement 7 pages

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

EXHIBIT 23

EXHIBIT 23

CV12-01271 DC-9900038888-047
GREGORY GARMONG VS WESPAC ET 4 Pages
District Court 09/19/2012 04 22 PM
Washoe County 1046
SMORTEMC

Code No. 1046
Thomas C. Bradley, Esq.
Bar No. 1621
448 Hill Street
Reno, Nevada 89501
Telephone (775) 323-5178
Fax: (775) 323-0709
Counsel for Defendants

FILED
2012 SEP 19 PM 4: 22

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

vs.

WESPAC, GREG CHRISTIAN, and
Does 1 - 10,
Defendants.

Case No. CV 12-01271

Dept. No. 6

AFFIDAVIT OF GREG CHRISTIAN

STATE of NEVADA)
) ss.
COUNTY OF WASHOE)

I, GREG CHRISTIAN, being first duly sworn, do hereby swear under penalty of perjury to the following:

1. I am the named Defendant in this case and a registered investment advisor of Wespac.

2. Attached hereto is a true, correct, and complete copy of the Investment Management Agreement signed by me and Gregory Garmong. (See Exhibit 1).

GREG CHRISTIAN

SWORN and SUBSCRIBED to before me this 19th day of September, 2012.

Maureen Maher

MAUREEN MAHER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 94-2091-2 - Expires April 26, 2015

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE and that on the 17th day of September 2012, pursuant to N.R.C.P. 5(b), I deposited in the U.S. Mail, first class postage pre-paid, at Reno, Nevada, a true and correct copy of the foregoing document for mailing to:

Gregory Garmong
11 Dee Court
Smith, Nevada 89430

MOLLY E. STEWART

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed.

__X__ Document does not contain the social security number of any person.

– OR –

_____ Document contains the social security number of a person as required by:

_____ A specific state of federal law, to wit:

_____

– OR –

_____ For the administration of a public program

_____ For an application for a federal or state grant

Date September 6, 2012

Attorney

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

EXHIBIT INDEX

1) Investment Management Agreement 7 pages

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

EXHIBIT 24

EXHIBIT 24

CV12-01271 DC-9900038888-046
GREGORY GARMONG VS WESPAC ET 8 Pages
District Court 09/19/2012 04 21 PM
Washoe County 2270
EX1 SMARTFNC

EXHIBIT 1

EXHIBIT 1

INVESTMENT MANAGEMENT AGREEMENT

This Investment Management Agreement (the "Agreement") is entered into between WESPAC Advisors, LLC (.WA"), an investment advisor registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940, as amended, and Gregory Garmong ("Client"). In consideration of the mutual promises, covenants, representations, and undertakings set forth herein, the parties agree as follows:

1. **Appointment.** Client appoints WA as investment adviser of the Portfolio Assets (as hereinafter defined) with designated investment authority over the Portfolio Assets, and WA agrees to serve in that capacity on the terms and conditions as set forth in this Agreement.

2. **Acknowledgments of Client**. Client represents and acknowledges that Client is the sole owner of the cash and securities described in Exhibit A (the "Initial Portfolio Assets"), and that the Portfolio Assets are and will remain at all times during the continuation of this Agreement free, clear, and unencumbered. Client acknowledges that Client has reviewed the investment policies of WA as set forth in WA's Form ADV Part II, a copy of which has been provided to Client, and that these investment policies meet Client's overall criterias. In the event Client's financial situation changes, Client agrees to notify WA in writing of the change and new investment objectives, if different from those described. Client acknowledges that in the process of active portfolio management, cash may be held in the portfolio account at the discretion of WA. Client agrees to give WA immediate notice of any deposit to or withdrawal from the Portfolio Assets and to promptly confirm the same in writing.

3. **Procedures**. The following procedures shall be followed by WA in performing the services called for by this Agreement:

    1. **Records.** WA shall keep separate and accurate records of all of the Initial Portfolio Assets and additions to, dispositions from, and changes in the Initial Portfolio Assets (the "Portfolio Assets"). WA shall provide Client with a written summary and appraisal of the Portfolio Assets at least once each calendar quarter. The portfolio appraisal statement shall list the Portfolio Assets as of the last business day of the immediately preceding quarter, and shall indicate the fair market value of the Portfolio Assets on that date as determined in Paragraph 4a hereof.

    2. **Custody of Portfolio Assets.** The Portfolio Assets subject to WA's supervision will be maintained in street name in Client's account at Charles Schwab & Co., Inc. or at a brokerage house, bank, trust company, or other firm (the "Custodian") selected by Client as set forth in the attached Confidential Client Profile. Client shall be responsible for all Custodians' fees incurred in maintaining Client's account(s). In no event shall WA act as Custodian, and nothing herein shall be construed to authorize WA to take possession of any cash or securities comprising the Portfolio Assets. Client shall instruct the Custodian to provide WA with confirmations of all transactions with respect to Portfolio Assets and shall instruct Custodian to provide to Client a monthly account statement indicating all amount dispersed from Client's accounts (including the amount of any fee paid pursuant to Client's authorization to WA), all transactions occurring in the account during the

period covered by the statement and all the funds, securities, and other properties in the account as of the end of the period, with a copy to WA. Client shall instruct Custodian to provide WA with such other periodic reports concerning the status of the Portfolio Assets as WA may reasonably request. It is agreed that WA, in the maintenance of its records, does not assume responsibility for the accuracy of information furnished by Client or any other party.

3. **Brokerage.** Client may instruct WA to utilize the services of designated broker(s) in all transactions involving Portfolio Assets separately designated in Exhibit B. If no broker(s) is designated by Client for Portfolio Asset transactions, WA may select broker(s), and such broker(s) may be broker(s) that provide research or other portfolio services to WA. In making any such selection, WA will take into consideration a number of factors including, without limitation: the overall direct net economic result to the Portfolio Assets (including commissions, which may not be the lowest available but which ordinarily will not be higher than the generally prevailing competitive range), the ability to effect the transaction where large block trades or other complicating factors are involved and the availability of the broker to stand ready to execute possibly difficult transactions in the future. WA may also take into consideration other matters involved in the receipt of brokerage and research services as contemplated by Section 28(c) of the Securities Exchange Act of 1934, as amended, and the regulations and interpretations of the Securities and Exchange Commission promulgated thereunder, without having to demonstrate that any such factor is of a direct benefit to the Portfolio Assets. If WA believes that the purchase or sale of a security is in Client's best interest along with the best interest of its other clients, WA may, but shall not be obligated to, aggregate the securities to be sold or purchased to obtain favorable execution or lower brokerage commissions, to the extent permitted by applicable laws and regulations. WA will allocate securities so purchased or sold, as well as the expenses incurred in the transactions, in the manner that it considers to be equitable and consistent with its fiduciary obligations to Client and its other clients.

Client shall be responsible for all brokerage charges in connection with the Portfolio Asset transactions. Brokers or dealers that WA selects to execute transactions may from time to time refer clients to WA. WA will not make commitments to any broker or dealer through brokerage or dealer transactions for client referrals; however, Client recognizes that a potential conflict of interest may arise between Client's interest in obtaining best price and execution and WA's interest in receiving further referrals.

4. **Services of Adviser.**

a. **Management Fee.** Client agrees to pay WA an investment management fee as determined in accordance with the schedule set forth as Exhibit A. One quarter of the annual fee due shall be payable in arear on the last day of each calendar quarter in which this Agreement is in force. All fees are determined on the basis of the market value of the Portfolio Assets as of the last day of the

calendar quarter. In computing the market value of any investment of the Portfolio Assets, each security listed on any national securities exchange shall be valued at the last quoted sale price on the valuation date on the principal exchange in which such security is traded. Any other security or asset shall be valued in a manner determined in good faith by WA to reflect its fair market value. If the account is opened after the start of a calendar quarter, the initial fee will be prorated from acceptance by WA through the end of the quarter. Notwithstanding the foregoing, for clients who request to have their fee calculated and determined by their Custodian, it is agreed that the fee will be calculated in the manner agreed upon with such Custodian. WA agrees to send a copy of the fee computation and billing, at least quarterly, to both Client and Custodian as required. In addition, Client will receive a portfolio appraisal as set forth in Paragraph 3. The fee schedule set forth in Exhibit B may be amended from time to time by WA upon thirty (30) days written notice to Client. If Client does not notify WA of termination within thirty (30) days of such notice, this Agreement will continue in effect under the terms and conditions as set forth herein with the revised fee schedule.

b. **Fee Billing Option.**

A) Client may authorize WA to invoice the Custodian for its fees, and Client may authorize the Custodian to pay such fees to WA directly from Client's account. WA will send a copy of its bill to Client prior to or at the time the original is sent to the Custodian.

B) Client may authorize WA to invoice Client directly for the payment of WA fees. Any such payment will be made by Client to WA by separate check and will not be deducted from amounts held in Clients account.

c. **Proxy Voting Option.**

WA is authorized to vote all proxies on behalf of the Portfolio Assets. Client will instruct the Custodian to forward all proxy materials to WA or its agent so that it may vote them accordingly. WA will report to Client at such time and in such manner as Client may reasonably request with respect to all proxy voting responsibilities exercised by WA for Client's account. Client may revoke WA's authority to vote proxies by notifying WA in writing of the revocation of the delegation of proxy voting authority.

[Please note that accounts subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, which choose this option must provide to WA a copy of Plan Documents showing that the right to vote proxies has been reserved to the trustees or other fiduciaries.]

5. **Discretionary Authority**. WA shall have designated full power and authority to make all investment decisions on a discretionary basis for Portfolio Assets, including decisions to buy and sell any domestic or foreign security, except to the extent Client provides written instructions limiting such authority. Although WA may make investment decisions without prior consultation with or further consent from Client, all such investment decisions shall be made in accordance with the

investment objectives of which Client has informed, and may inform, WA from time to time in writing. Client appoints WA as agent and attorney-in-fact to, and expressly authorizes WA in making its investment decisions to: a) make, order, and direct any and all transactions involving designated Portfolio Assets in Client's name and for Client's account and b) sell, convert, or exchange securities comprising part or all of the Portfolio Assets, to otherwise acquire and dispose of such securities; provided, however that nothing herein shall be construed to authorize WA to take custody or possession of any funds, securities or other property of which Client has any beneficial interest in any manner whatsoever. All transactions in Portfolio Assets will be done at WA's sole discretion and without obligation to first notify or consult with Client. Client agrees that WA will not advise or act for client in any legal proceedings, including bankruptcies or class actions, involving securities held or previously held as Portfolio Assets or the issuers of these securities.

6. **Representations of WA.** WA represents that it is registered with the Securities and Exchange Commission as an Investment Adviser under the Investment Advisers Act of 1940, as amended, and that such registration is currently in effect. If the Portfolio Assets are subject to ERISA, WA also acknowledges that it is a fiduciary as that term is defined in ERISA, with respect to the Portfolio Assets. In accordance with sections 405(b)(1), 405(c)(2) and 405(d) of ERISA, the fiduciary responsibilities of WA and any partner, employee or agent of WA shall be limited to his, her or its duties in managing the Portfolio Assets, and WA shall not be responsible for any other duties with respect to Client (specifically including evaluating the initial or continued appropriateness of Client's retention of WA or the diversification standard under section 404(a)(1) of ERISA).

7. **Representations of Client.** Client confirms that it has full power and authority to enter into this Agreement, that the employment of WA is authorized by its governing document relating to the Portfolio Assets and that the terms hereof do not violate any obligation by which Client is bound whether arising by contract, operation of law, or otherwise, and that: a) this contract has been duly authorized by appropriate action and is binding upon Client in accordance with its terms; and b) Client will deliver to WA such evidence of such authority as it may reasonably require, whether by way of a certified resolution, trust agreement, or otherwise. Client further agrees to provide WA with copies of all documents governing the Portfolio Assets. If the Portfolio Assets are subject to ERISA, Client hereby represents and confirms to WA that Client's employment of WA as the Investment Adviser to the Portfolio Assets, and any instruction Client has given to WA, is authorized by and does not violate any provision of any applicable plan or trust documents. Client hereby acknowledges that Client is a "named fiduciary" with respect to the control and management of the assets of Client's account, a trust qualified under Section 401 (a) of the Internal Revenue Code of 1986, and Client agrees to notify WA promptly of any change in the identity of the "named fiduciary" with respect to the account. In addition, in any directed brokerage transaction Client has determined, and will monitor the Portfolio Assets to assure, that the directed broker is capable of providing best execution for the account's brokerage transactions and that the commission rates that have been negotiated are reasonable in relation to the value of the brokerage and other services received.

8. **Liability.** WA does not guarantee the future performance of the Portfolio Assets, any specific level of the performance, or the success of any investment decision or strategy. Client understands that the investment decisions made by WA are subject to various market, currency, economic and business risks and those decisions will not always be profitable. Except as may otherwise by provided by law, WA will not be liable to Client for: a) any loss Client may suffer by reason of any investment decision made or other action taken or omitted in good faith by WA with the degree of skill, care, prudence or diligence under the circumstances that a prudent person acting in a like capacity would use; b) any loss arising from WA's adherence to the Client's instructions; c) any act or failure to act by the Custodian, any broker or dealer to which WA directs transactions for the Portfolio Assets or by any other third party; or d) its failure to purchase or sell any security on the basis of information known to any principal or employee of WA where the utilization of such information might constitute a violation of any federal or state laws, rules or regulations or a breach of any fiduciary or confidential relationship between any principal or employee of WA and any other person or persons. Federal and various state securities laws impose liability under certain circumstances on persons who act in good faith and therefore nothing in this Agreement shall waive or limit any rights, which Client may have under those laws.

9. ***Confidentiality.*** All information and advice furnished by either party to the other shall be treated as confidential information and shall not be disclosed to third parties except as required by law or with consent.

10. **Service to Other Clients.** WA acts as adviser to other clients and may give advice and take action with respect to such other clients' accounts which may differ from the action taken by WA with respect to the Portfolio Assets. WA agrees to act in a manner consistent with its fiduciary obligations to deal fairly with all clients when taking investment actions. WA shall have no obligation to purchase, sell or recommend for the Portfolio Assets any security which may be purchased or sold by WA, its principals, affiliates, employees or for the accounts of any other client. Client recognizes that transactions in a specific security may not be accomplished for all client accounts at the same time or at the same price.

11. **Termination.** This agreement may be terminated at any time by either party giving the other written notice of termination. However, this Agreement shall continue in effect until so terminated. Termination shall be effective when a notice of termination, properly executed, is actually received. Upon termination, any fees paid in advance will be prorated to the date of termination and any excess will be refunded to Client. If this Agreement is terminated by Client within five business days of the date it is executed or accepted, such termination shall be without penalty or liability for payment of fees. If Client is an individual, this Agreement shall terminate upon the death or adjudicated incapacity of Client, but shall take effect only upon actual receipt by WA of written notice of Client's death or adjudicated incapacity. Upon notice of termination, WA shall notify Custodian to deliver all assets held pursuant to this Agreement, according to Client's written instructions.

12. **Notices.** Unless otherwise specified herein. all notices, instructions, and advice with respect to all matters contemplated by this Agreement shall be deemed duly given when received in writing at the address set forth herein. Copies of all notices affecting the Custodian shall also be directed to the Custodian at the address which Client designates. Addresses may be changed by notice to the other parties given in accordance with this paragraph. WA may rely on any notice from any person reasonably believed by WA to be genuine and to have authority to give such notice. All written notices shall be addressed to: a) WESPAC , 2001 Broadway, 2nd Floor, Oakland, California 94612; and b) Client at the address set forth in the Confidential Client Profile attached hereto.

13. **Assignability.** This Agreement may not be assigned by WA without the prior consent of the Client. This Agreement may not be assigned by Client without the prior consent of WA.

14. **Miscellaneous.** This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties with respect to the management of the Portfolio Assets, supersedes all prior agreements, and, except as otherwise provided herein, may be amended only with a written document signed by the parties. This Agreement shall be governed by the laws of the State where the agreement is governed and so executed. If any provision of this Agreement is held to be unenforceable, such unenforceability shall not affect the remainder of this Agreement. This Agreement may be signed in one or more counterparts. and when taken together shall create a valid and binding Agreement as though all signatures appeared on the same document. The captions in this Agreement are otherwise for convenience of reference only and in no way define or limit any of the provisions hereof or otherwise affect their construction or effect. Except as otherwise provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors. No party intends for this Agreement to benefit any third party not expressly named in this Agreement.

15. **Acknowledgment of Receipt of Form ADV Part II.** Client hereby acknowledges that Client has received and had an opportunity to read WA's Form ADV Part II as required by Rule 204-3 of the Investment Advisers Act of 1940. WA's ADV Part II contains a clear and conspicuous notice of WA's privacy policy.

16. **Arbitration. The parties waive their right to seek remedies in court, including any right to a jury trial.** The parties agree that in the event of any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio Assets, such dispute shall be resolved exclusively by arbitration to be conducted only in the county and state at the time of such dispute in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS.) applying the laws of the State where the agreement is governed and executed. Disputes shall not be resolved in any other forum or venue. The parties agree that such arbitration shall be conducted by an arbitrator who is experienced in dispute resolution regarding the securities business, that discovery shall not be permitted except as required by the rules of JAMS, that the arbitration award shall not include factual findings or conclusions of law, and that no punitive damages shall be awarded. The parties

understand that the party's right to appeal or to seek modification of any ruling or award of the arbitrator is severely limited. Any award rendered by the arbitrator shall be final and binding, and judgment may be entered on it in any court of competent jurisdiction in the county and state of the principal office of WA at the time such award is rendered, or as otherwise provided by law.

The effective date of this Agreement shall be the date of its acceptance by WA.

Agreed to this 31 day of August of the year 2005.

State: ☐ California ☒ Nevada ☐ other _____

Gregory Garmong
Client Name

Gregory Garmong
Client Signature

Client Signature

AGREED AND ACCEPTED BY INVESTMENT ADVISER: WESPAC ADVISORS, LLC

By: Roy Christie

Title: EP

Date: 8/31/05

EXHIBIT 25

EXHIBIT 25

CV12-01271 DC-9900041019-013
GREGORY GARMONG VS WESPAC ET 3 Pages
District Court 12/03/2012 04 11 PM
Washoe County 3795
CV1 ACRACHAN

EXHIBIT 1

EXHIBIT 1

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

AFFIDAVIT OF GREG CHRISTIAN

STATE OF NEVADA)
)ss
COUNTY OF WASHOE)

GREG CHRISTIAN, after being duly sworn on oath, and under penalty of perjury, does hereby swear or affirm that the assertions contained in this affidavit are true to the best of his knowledge and belief, and as to those assertions stated upon information and belief, he likewise believes those assertions to be true to the best of his belief.

1. Affiant is over the age of eighteen years, and makes this affidavit of his own personal knowledge in support of *Defendants' Reply To Plaintiff's Opposition To Defendants' Motion To Dismiss And To Compel Arbitration.*

2. In or about July 2005, as a registered investment advisor with Wespac Advisors, LLC, I met with Plaintiff Gregory Garmong to discuss the possibility of Mr. Garmong becoming a client of Wespac. I recently reviewed the State Bar of California's website, which stated that Mr. Garmong was a licensed attorney in California from 1978 to 2008. He attended Massachusetts Institute of Technology and later UCLA Law School.

3. During the meeting, I gave Mr. Garmong a copy of Wespac's Investment Management Agreement. Mr. Garmong took that copy of the Agreement with him when he left our meeting.

4. Mr. Garmong requested that I make changes to the Investment Management Agreement which I agreed to do. See Exhibit 2. Mr. Garmong then requested more changes which I also agreed to incorporate within our final Agreement. See Exhibit 3. Mr. Garmong never requested that the terms requiring Arbitration be removed. He even joked that JAMS was full of retired Judges who were bozos, but at no time did he refuse to arbitrate any disputes.

Exhibit 1

5. The copy of the Investment Management Agreement which was attached as Exhibit 1 to my affidavit filed September 19, 2012 was a true, correct, and complete copy of the Investment Management Agreement signed by me and Gregory Garmong.

6. I am informed, believe and therefore allege that the incorrect page numbering on the Investment Management Agreement attached to my September 19, 2012 affidavit occurred solely as the result of a word processing and/or computer error.

Further, Affiant sayeth naught.

GREG CHRISTIAN

Subscribed and sworn to before me this 3rd day of December 2012.

Notary Public

MAUREEN MAHER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 94-2091-2 - Expires April 26, 2015

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

EXHIBIT 26

EXHIBIT 26

SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE
AN ASSOCIATION OF LAW OFFICES
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

AFFIDAVIT OF GREG CHRISTIAN

STATE of NEVADA)
) ss.
COUNTY OF WASHOE)

I, GREG CHRISTIAN, being first duly sworn, do hereby swear under penalty of perjury to the following:

1. I am the named Defendant in this case and a registered investment advisor of Wespac.

2. Attached hereto is a true, correct, and complete copy of the Confidential Client Profile which comprised the first eleven pages of the document which included the Investment Management Agreement. (See Exhibit 1).

GREG CHRISTIAN

SWORN and SUBSCRIBED to before me this 8th day of January, 2013.

MAUREEN MAHER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 94-2091-2 - Expires April 26, 2015

EXHIBIT 27

EXHIBIT 27

F I L E D
Electronically
01-09-2013:10:49:15 AM
Joey Orduna Hastings
Clerk of the Court
Transaction # 3452039

EXHIBIT 1

EXHIBIT 1

CONFIDENTIAL CLIENT PROFILE

Investment Objective Assessment/Engagment Agreement

Exhibit 1

Privacy Policy For Individual Clients

WESPAC Advisors, LLC is committed to protecting your privacy. To conduct regular business, we may collect non-public personal information from sources such as:

Information reported by you on applications or other forms you provide to us; and/or

Information about your transactions with us, our affiliates, or others.

WESPAC Advisors, LLC shares non-public information solely to service our client accounts. We do not disclose any non-public personal information about our customers or former customers to anyone, except as permitted by law. If you decide to close your account(s) or become an inactive client, we will adhere to the privacy policies and practices as described in this notice.

Information Safeguarding

WESPAC Advisors, LLC will internally safeguard your non-public personal information by restricting access to only WESPAC Advisors, LLC employees. WESPAC Advisors, LLC employees provide products or services to you and need access to your information to service your account. In addition, we will maintain physical, electronic, and procedural safeguards that meet federal and/or state standards to guard your non-public personal information.

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I. **Confidential Client Profile**.....Pg. 2 - 4
- Account Information
- Investment Objectives
- Target Portfolio Design

II. **Exhibits**.....Pg. 5 - 11

- Exhibit A: Fee Schedule
- Exhibit B: Portfolio Appraisal/Security Cost Basis Form

III. **Investment Management Agreement**.....Pg. 12 - 19

SUPPLEMENT CLIENT ATTACHMENT

Any additional information that relates to our duties and responsibilities as your investment advisor is required.

- Investment Policy Guidelines
- Partnership Agreement
- Corporate Resolution
- Plan/Trust Documents

  Provide the following (as applicable):
  - Title Page
  - Signature Page
  - Proxy Voting Responsibilities
  - Asset Allocation Parameters
  - Statements of Required Reports
  - Meeting Requirements
  - Investment Policy Guidelines
  - Cash Requirements
  - Restrictions on Securities
  - List of Trustees
  - Authorized Signature List

CONFIDENTIAL CLIENT PROFILE

Account Information

Answer all questions that apply

1. Account title (legal title as listed on investment management agreement)

_____

2. Primary contact person/trustee _____

3. Custodian _____ Account _____

4. Social Security/Tax ID Number Primary _____ Secondary _____

Mailing Address _____

City _____ State _____ Zip _____

Phone _____ Fax _____

E-mail _____

5. Should anyone else receive a copy of:

Quarterly reports? ☐ Yes ☐ No

Realized gain/loss reports? ☐ Yes ☐ No

Name _____ Relationship _____

Mailing Address _____

City _____ State _____ Zip _____

Phone _____ Fax _____

6. Account type

☐ Individual (taxable) ☐ IRA/IRA Rollover ☐ SEP

Account types listed below must enclose Plan Document, Partnership Agreement, Corporate Resolution, Trust Documentation, and/or Authorized *signature List.*

☐ Irrevocable Trust ☐ Profit Sharing ☐ Endowment

☐ Revocable Trust ☐ Money Purchase ☐ Foundation

☐ Public Employee ☐ Defined Benefit ☐ Taft-Hartley

☐ Corporation (taxable) ☐ Limited Liability Company ☐ 401 (K)

☐ S Corporation ☐ Partnership ☐ Other _____

☐ Non- Profit Corporation

7. Initial Investment ☐ Cash _____ or ☐ Cash/Securities* $ _____

**Please list all securities with cusip or ticker symbol. purchase date and cost basis on Exhibit A.*

8. Anticipated contributions $. ___ ☐ Monthly ☐ Quarterly ☐ Annually ☐ None

9. Anticipated withdrawals $. ___ ☐ Monthly ☐ Quarterly ☐ Annually ☐ None

CONFIDENTIAL CLIENT PROFILE

Investment Objectives

(For all accounts)

1. What is the purpose of your investment account?

_____

2. What year did you begin investing in Stocks? _____ Bonds? _____

3. Characterize your investment experience: ☐ Minimal ☐ Moderate ☐ Extensive

4. Are you currently using other money manager(s)? ☐ Yes ☐ No

5 Are you now a corporate officer, or do you now own 10 % or more of any publicly traded corporation?

☐ Yes ☐ No

6. *Account restrictions (e.g., social, religious, legal, etc.) or other specific intructions*.If left blank, it will be assumed none.* _____

_____

**WESPAC Advisors, LLC may require further information regarding account restrictions and/or specific instructions* before *proceeding with management of the account*

7. Is there any additional information which will help us more effectively manage your account?

(e.g., retirement, anticipated changes in financial circumstances, tax information, health, college expenses, etc.)

_____

_____

8. How would you broadly categorize this account's investment objective?

☐ **Aggressive Growth of Capital.** Primary objective is to produce maximum total return. Current income is not required. Can tolerate more than one year of negative absolute returns through difficult market periods.

☐ **Growth of Capital.** Production of income is secondary to capital appreciation. Can tolerate several consecutive quarters of negative absolute returns through difficult market periods.

☐ **Modest Growth of Capital.** Primary objective is to generate modest income with some capital appreciation and limited volatility. Can tolerate infrequent, moderate losses through difficult market periods.

☐ **Income.** Primary objective is income generation. Client seeks the highest income oriented rate of return consistent with a suitable level of risk.

a._____ Inflation adjusted returns modestly exceeding risk free investment. Primary objective is to keep risk low and maximize income. Emphasis on avoiding negative returns.

b._____ Income returns consistent with broad domestic bond market returns.

c._____ Custom; income generating portfolio with investment characteristics specifically related to identified client objectives on timing, maturity, quality, etc.

CONFIDENTIAL CLIENT PROFILE

Investment Objectives (cont.)

(For all accounts)

9. What percentage of your total investable assets will WESPAC Advisors be managing (e.g" stocks, bonds)? _____ %

10. How long will these funds be committed to the stated purpose?

☐ Less than 3 years ☐ 3-5 years ☐ 10 years ☐ 10 years or more

11. State of legal residence _____

Please complete the following for all accounts except corporation; if corporate, proceed to page 5.

12. Date of birth _____ Spouse's date of birth _____

13. Occupation: _____

14. What year did you start your current occupation _____ Projected retirement age _____

15. Spouse's Occupation _____

16. What year did you spouse start current occupation _____ Projected retirement age _____

17. Annual income (combined if joint account). Check which applies:

Current Year	**Last Year**	**Year Before**
☐ Under $50,000	☐ Under $50,000	☐ Under $50,000
☐ $50,000- $100,000	☐ $50,000- $100,000	☐ $50,000- $100,000
☐ $1000,000 - $250,000	☐ $1000,000 - $250,000	☐ $1000,000 - $250,000
☐ Over $250,000	☐ Over $250,000	☐ Over $250,000

For taxable accounts, please complete the following; If nontaxable, proceed to question 20.

18. Are you subject to (please check all that apply and indicate percentages):

☐ State tax? _____ % ☐ Alternative minimum tax ? _____ %

19. Marginal federal income tax bracket _____ %

20. Primary source of income: ☐ Occupation ☐ Investments ☐ Retirement Funds

21. U.S. citizen? ☐ Yes ☐ No If no: A non-resident alien? ☐ Yes Do you pay U.S. taxes: ☐ Yes

22. Net worth (excluding primary residence) $ _____

23. Spouse/Dependent

Name	Age	Relationship

Wespac Advisors LLC Asset Management Services
Investment Policy Questionnaire

Introduction:

- The following series of questions are designed to develop a better understanding of your tolerance for investment risk.
- Understanding your tolerance for investment risk relative to your investment return expectations is an important first step in designing a portfolio.
- The answers you select will indicate your comfort level with investment risk and your ability to withstand it.
- Please carefully consider each question and select the answer that most closely fits your current situation.
- Consultation with your Investment Advisor while filling out this form is key to developing a recommended portfolio that fits your comfort level and is appropriate to reach your financial goals.

Instructions for completing this form:

- Please check the box next to each appropriate answer.
- The assigned points for each answer appear in red to the left of the box.
- After the conclusion (page 11), please add up the selected points for each question (1-15).

Date: _____ Financial Advisor _____

Family Information

Client Name _____ _____

First *M* *Last* *Birthdate*

Address: _____ ( ) _____

Street *City/St* *Zip Code* *Telephone*

Current Assets: $ _____

Please specify the type of account:

☐ A. Taxable ☐ Individual ☐ Trust ☐ Other _____

☐ B. Tax exempt ☐ Individual ☐ Trust ☐ Other _____

Risk Tolerance Profile

1. Risk Factor

Before you make a decision on any investment, you need to consider how you feel about the prospect of potential loss of principal. This is a basic principle of investing: *the higher return you seek, the more risk you face.* Based on your feelings about risk and potential returns, your goal is to:

15 ☐ **A.** Potentially increase my portfolio's value as quickly as possible while accepting higher levels of risk.
9 ☐ **B.** Potentially increase my portfolio's value at a moderate pace while accepting moderate to high levels of risk.
6 ☐ **C.** Income is of primary concern while capital appreciation is secondary.
3 ☐ **D.** The safety of my investment principal.

2. Investment Approach

Which of the following statements best describes your overall approach to investing as a means of achieving your goals?

3 ☐ **A.** Having a relative level of stability in my overall investment portfolio.
6 ☐ **B.** Moderately increasing my investment value while minimizing potential for loss of principal.
9 ☐ **C.** Pursue investment growth, accepting moderate to high levels of risk and principal fluctuation.
15 ☐ **D.** Seek maximum long-term returns, accepting maximum risk with principal fluctuation.

3. Volatility

The value of most investments fluctuates from year to year as well as over the short term. How would you feel if an investment you had committed to for ten years lost 20% of its value during the first year?

1 ☐ **A.** I would be extremely concerned and would sell my investment.
3 ☐ **B.** I would be concerned and may consider selling my investment
5 ☐ **C.** I would be concerned, but I would not consider selling my investment.
7 ☐ **D.** I would not be overly concerned given my long-term investment philosophy.

4. Variation

Realizing that any market-based investments may move up or down in value over time with which of the hypothetical portfolios below would you feel most comfortable?

	Year 1	Year 2	Year 3	Year 4	Year 5	Average Annual Return
1 ☐	3%	3%	3%	3%	3%	3%
3 ☐	2%	5%	6%	0%	7%	4%
5 ☐	-6%	7%	21%	2%	8%	6%
7 ☐	9%	-11%	26%	3%	18%	9%
10 ☐	14%	-21%	40%	-4%	31%	12%

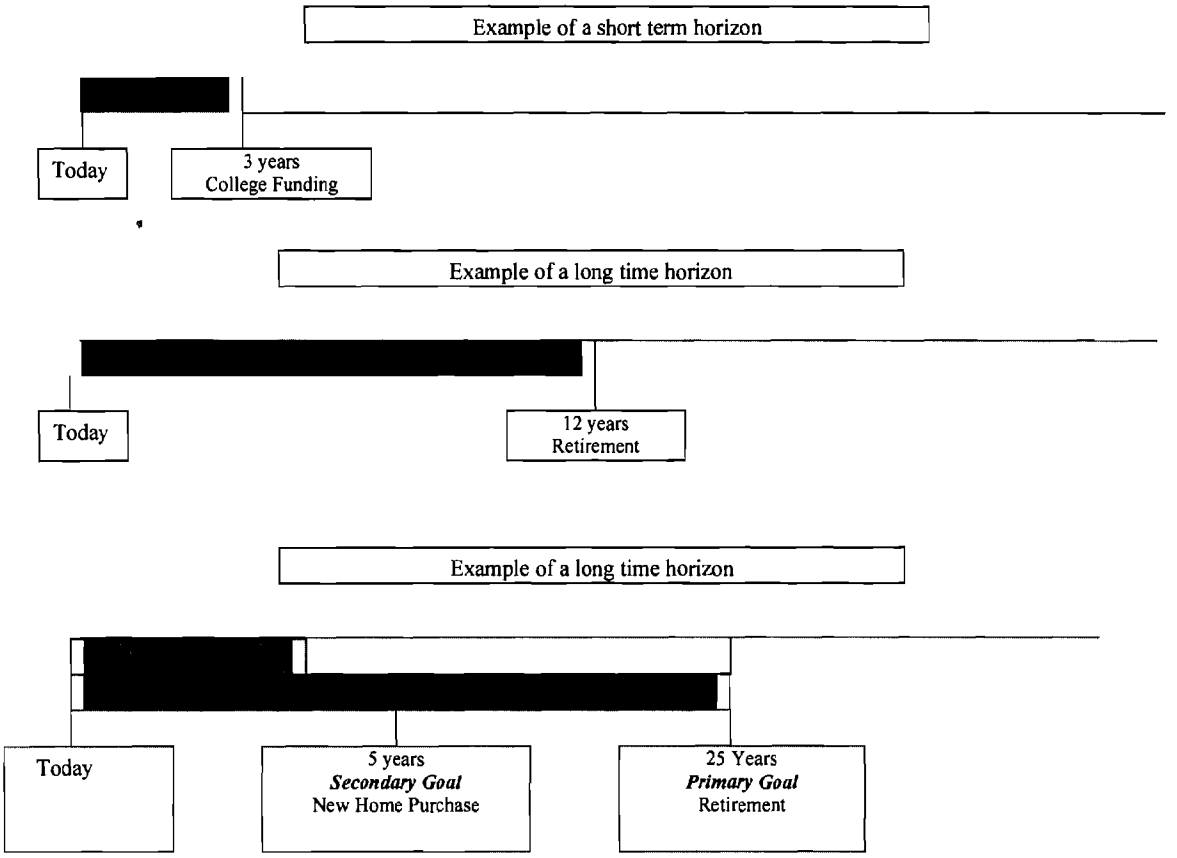
5. Investment Experience

Please select the type of security with which you have had the ***most*** investment experience?

2 ☐ **A.** U. S.Government securities.
4 ☐ **B.** Mid to high quality corporate fixed income securities.
6 ☐ **C.** Stocks of older, established companies.
8 ☐ **D.** Stocks of newer, growing companies.

6. Time Horizon

An important consideration when making investment decisions is where you are in your financial life cycle and how long you have before you will need to start withdrawing the assets. Through consultation with your Financial Advisor, please indicate your portfolio's appropriate time horizon, A multi-stage time horizon would indicate that you have several goals in the future that your investment portfolio needs to address.



1 ☐ **A.** Short(3- 5 Years).
3 ☐ **B.** Long (5-10 Years).
5 ☐ **C.** Multi-stage.

7. Primary Goal

Please indicate approximately how many years from today until you reach your primary goal.

1 ☐ **A.** Within 1 to 5 years
3 ☐ **B.** Within 5 to 10 years
7 ☐ **C.** Within 11 to 20 years
10 ☐ **D.** More than 20 years.

8. Secondary Goal

Some investors have a multi-stage time horizon with several goals for their portfolio. Please indicate approximately how many years from today until you reach your secondary goal?

1 ☐ **A.** Not applicable, I only have a single stage time horizon.
4 ☐ **B.** Within 1 to 5 years
7 ☐ **C.** Within 5 to 10 years
10 ☐ **D.** More than 10 years.

9. Age

What is your current age?

10 ☐ **A.** Under 35
8 ☐ **B.** Between 36 to 45
6 ☐ **C.** Between 46 to 55
4 ☐ **D.** Between 56 to 70
1 ☐ **E.** Over 70

10. Investment Earnings

Based on your current and estimated future income needs, what percentage of your investment earnings do you think you would be able to reinvest?

8 ☐ **A.** Reinvest 100% of my investment earnings.
5 ☐ **B.** Reinvest 20 to 80% of my investment earnings.
3 ☐ **C.** Reinvest 0% (receive all investment earnings for cash flow).
1 ☐ **D.** My investment earnings will not be sufficient and I will need to withdrawal principal.

11. Investment Value

Your portfolio design relates to your investment experience, which helps to determine your current investment philosophy. What is the current value of your total investment portfolio?

10 ☐ **A.** More than $1,000,000.
8 ☐ **B.** $500,001 to $1,000,000.
6 ☐ **C.** $300,001 to $500,000.
4 ☐ **D.** $100,000 to $300,000.
2 ☐ **E.** Less than $100,000.

12. Living Expense

Given interruptions of periodic income or other unforeseen circumstances, some individuals are forced to tap their investment resources to meet living expenses. In such an instance, how many months of living expenses could be covered by your current liquid investments?

5 ☐ **A.** More than 12 months, or not a concern.
3 ☐ **B.** Between 4 and 12 months.
1 ☐ **C.** Less than 4 months, or already withdrawing.

13. Household Income

Total earnings, which includes earned and investment income, is a requirement when assessing your risk tolerance and determining allocation of assets. What is your total annual household income (including interest and tax deferred income)

10 ☐ **A.** More than $500,000.
8 ☐ **B.** $250,000 to $499,999.
6 ☐ **C.** $100,000 to $249,999.
4 ☐ **D.** Less than $100,000 .

14. Income Saving

The percentage of your total income that you currently save is approximately:

1 ☐ **A.** I do not currently save any income.
3 ☐ **B.** Between 2% - 7%.
6 ☐ **C.** Between 7% - 12%.
9 ☐ **D.** Greater than 12%.

15. Future Earnings

In the next five years, you expect that your earned income will probably:

1 ☐ **A.** Decrease.
3 ☐ **B.** Stay about the same.
5 ☐ **C.** Increase modestly.
7 ☐ **D.** Increasc significantly.

Conclusion

Comments:

To the best of my knowledge, the information contained in this investment policy questionnaire is both accurate and complete. I understand that any recommendations are based upon the information supplied by me.

Client Signature _____ Date _____

Client Signature _____ Date _____

CONFIDENTIAL CLIENT PROFILE
Target Portfolio Design

Please select one management style most describing investment objective

☐ **Aggressive Growth**
- Can use margin and short selling when market conditions warrant.
- Can invest in smaller cap and more illiquid securities than Growth Accounts
- Can overweight favored sectors to a higher degree than other portfolio styles.

☐ **Growth**
- Emphasizes total return, but does not use margin or short selling
- Raising cash is the hedging strategy most likely to be used in the portfolio.

☐ **Growth & Income**
- Emphasizes dividend-paying issues and also focuses on the blue chip securities.
- Appropriate for investors oriented toward return that includes income.

☐ **Passive Growth**
- Uses Exchange Traded Funds to create a sector rotation portfolio. May include and ETF (domestic or foreign)
- ETPs with superior intermediate to long-term relative strength characteristics are buy candidates for the portfolio.
- May use margin if consistent with a clients goals.

☐ **Balanced**
- This style combines one of the above strategies with investments in fixed income securities to achieve greater stability and income.
- Instruments used may include corporate debt, government securities, preferred stock, and high yield or convertible securities.

CLIENT ACKNOWLEDGMENT

I understand that you are relying on the information provided in this Confidential Client Profile to design my investment portfolio and confirm to you, to the best of my knowledge, that the information contained herein is current, accurate, and complete. I agree to notify WESPAC Advisors, LLC of any significant changes in my financial situation or investment objectives.

Client Signature: _____ Date _____

Client Signature _____ Date _____

To be completed only after consultation with WESPAC Advisors

☐ Custom _____

_____

_____

_____

_____

FOR WESPAC USE ONLY

Reviewed by _____

Date _____

Hon. Philip M. Pro (Ret.)
JAMS
3800 Howard Hughes Parkway
11th Floor
Las Vegas, NV 89169
Phone: (702) 457-5267
Fax: (702) 437-5267
Arbitrator

JAMS ARBITRATION CASE REFERENCE NO. 1260003474

GREGORY GARMONG, Claimant, vs. WESPAC, and GREG CHRISTIAN, Respondents.	**ORDER RE: SUMMARY JUDGMENT**

This action was commenced in the Second Judicial District Court of the State of Nevada in and for the County of Washoe on May 9, 2012, by the filing of Plaintiff Gregory Garmong's Complaint for damages against Defendants Wespac, and Greg Christian. Garmong alleged that on August 31, 2005, he entered an Investment Management Agreement with Defendants to receive investment advice and management of a major portion of his life and retirement savings.

After nearly five years of litigation, on February 8, 2017, the parties entered a stipulation to proceed to arbitration pursuant to paragraph 16 of the Investment Management Agreement. The stipulation was approved by the Honorable Lynne K. Simons, District Judge, on February 21, 2017, and the undersigned was appointed as Arbitrator in March 2017. A Status Conference was conducted on April 17, 2017, and on August 11, 2017, a Discovery Plan and Scheduling Order was agreed to by the parties.

On September 18, 2017, Garmong filed an Amended Complaint setting forth claims for (1) Breach of Contract, (2) Breach of Implied Warranty in Contract, (3) Breach of the Covenant of Good Faith and Fair Dealing, (4) Tortious Breach of the Covenant of Good Faith and Fair Dealing, (5) Breach of Nevada Deceptive Trade Practices Act, (6) Breach of Fiduciary Duty, (7)

Breach of Duty of Full Disclosure, (8)Breach of Agency, (9) Negligence, (10) Breach of NRS 628A.030, (11) Intentional Infliction of Emotional Distress, and (12) Unjust Enrichment. Garmong seeks damages, including punitive damages, and double damages pursuant to NRS 41.1395, return of advisor fees, costs and attorney's fees.

On September 18, 2017, Defendants also filed their Opening Arbitration Brief, and Garmong filed a Pre-Hearing Statement providing a summary of the factual basis for his claims. On October 16, 2017, Defendants filed an Answer to Garmong's Amended Complaint. In accord with the Second Order Re Scheduling entered November 22, 2917, Garmong filed a Motion for Partial Summary Judgment on November 30, 2017. Briefing on that Motion was completed on January 11, 2018, and the Motion is now ripe for decision.

Garmong's claims are grounded in the alleged loss of $580,649.82 in capital from his investment accounts managed by Defendants between October 2007 and November 2008, and his payment to Defendants of $21,283.29 in unearned advisor fees. Garmong contends that in addition to recovery of those sums, he is entitled to recover punitive damages because of Defendants' fraudulent conduct, and double damages under NRS 41.1395, because Garmong is an older person vulnerable to exploitation by Defendants.

Defendants respond that the losses suffered by Garmong were the product of the great economic recession in 2008 and 2009, and not the result of investment advice and recommendations provided by Wespac or Christian. Defendants contend that against Christian's advice, Garmong terminated his relationship with Defendants on March 9, 2009, and transferred his accounts to another broker. Defendants argue Garmong now seeks to hold Defendants financially responsible for the consequences of his decision to terminate their relationship at the bottom of the market.

In assessing the instant Motion for Partial Summary Judgment, the undersigned evaluates the record in accord with the *Liberty Lobby, Celotex, and Matsushita* trilogy of United States Supreme Court cases embraced by the Nevada Supreme Court in *Wood v. Safeway,* 121 P.3d 1026, 1029-1031 (2005), and views all evidence in the light most favorable to the non-moving party. Under Rule 56(c), summary judgment is appropriate if the pleadings, the discovery produced, and any admissible declarations show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.". A fact is "material" if it might affect the outcome of the case, as determined by governing substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). An issue is "genuine" if sufficient evidence exists such that a reasonable fact finder could find for the non-moving party., and the moving party bears the burden of proving there is no genuine issue of material fact.

The briefing on the instant Motion is extensive, consuming nearly 100 pages

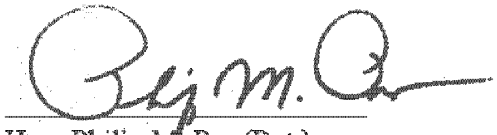
accompanied by voluminous declarations and exhibits. The parties deny most of the material facts cited as undisputed. Moreover, it appears that issues of fact and credibility pervade in assessing the merit of the claims in dispute. Under the circumstances, the Arbitrator finds the claims in dispute are not amenable to resolution on summary judgment.

Consistent with the goals of arbitration to provide an expeditious and fair resolution of the claims in dispute based on the credible evidence presented, and according to the applicable law. These goals can best be served by completion of any remaining discovery and the scheduling of a hearing on the merits as promptly as possible in accord with the Discovery Plan and Scheduling Order entered August 11, 2017.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary Judgment is Denied.

IT IS FURTHER ORDERED that the parties shall forthwith confer, and shall submit a joint status report on or before February 12, 2018, setting forth a revised schedule for the completion of remaining discovery, and the proposal of the parties for three alternative dates for the arbitration hearing.

Dated: January 25, 2018



Hon. Philip M. Pro (Ret.)
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Garmong, Gregory vs. Wespac et al.
Reference No. 1260003474

I, Mara Satterthwaite, Esq., not a party to the within action, hereby declare that on January 25, 2018, I served the attached ORDER RE: SUMMARY JUDGMENT on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Las Vegas, NEVADA, addressed as follows:

Carl M. Hebert Esq.
L/O Carl M. Hebert
202 California Ave
Reno, NV 89509
Phone: 775-323-5556
carl@cmhebertlaw.com
Parties Represented:
Gregory Garmong

Thomas C. Bradley Esq.
Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace
448 Hill Street
Reno, NV 89501
Phone: 775-323-5178
Tom@stockmarketattorney.com
Parties Represented:
Greg Christian
Wespac

I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on January 25, 2018.

Mara Satterthwaite, Esq.
msatterthwaite@jamsadr.com

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Attorney for plaintiff Gregory Garmong

JAMS ARBITRATION
LAS VEGAS, NEVADA

GREGORY GARMONG, Plaintiff, vs. WESPAC; GREG CHRISTIAN, Defendants.	**# 1260003474** **PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff moves for reconsideration of the arbitrator's Order of January 25, 2018 ("Order") denying Plaintiff's Motion for Partial Summary Judgment.

POINTS AND AUTHORITIES

1. BACKGROUND

Consistent with JAMS Rule 18, the Discovery Plan and Scheduling Order of August 17, 2017 provided at 2:12-13: "6. The parties may bring motions for summary judgment, pursuant to NRCP 56." The Second Order re Scheduling entered on November 22, 2017 set a deadline for filing dispositive motions by either party of November 30, 2017.

On November 30, 2017, Plaintiff filed his Motion for Partial Summary Judgment ("Motion"). At page 3:10-21, the Motion set forth the legal standard of NRCP 56 and supporting case authority. An Opposition and a Reply followed.

The arbitrator issued the Order on January 25, 2018, without a hearing as contemplated by NRCP 56, denying Plaintiff's Motion.

2. THE ARBITRATOR MAY NOT DISREGARD THE FACTS AND APPLICABLE LAW

An arbitrator has some discretion, but it is not unlimited. He must apply the applicable law to the facts. Clark County Educ. Ass'n v. Clark County School Dist., 122 Nev. 337, 341-42, 131 P.3d 5, 8 (2006) gave this guidance:

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

3. THE APPLICABLE PRINCIPLES OF THE LAW OF SUMMARY JUDGMENT

According to the principles of § 2, the arbitrator must follow the law of summary judgment and the substantive law in deciding the Motion.

NRCP 56(d), quoted at Motion 3:21 and referenced at Order, page 2, fourth paragraph, provides in relevant part:

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

(emphasis added). The granting of the summary judgment is mandatory

("shall") if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

Wood v. Safeway, 121 Nev. 724, 729, 121 P.3d 1026, 1028 (2005) emphasized the mandatory nature of the grant of summary judgment, stating, "Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'

NRCP 56(d) and the controlling case authority provide for a two-step process in analyzing a motion for summary judgment: (1) Determine whether there is a genuine issue as to any material fact, and (2), if there is no genuine issue as to any material fact, determine whether the moving party is entitled to a judgment as a matter of law.

Wood v. Safeway, quoting the United States Supreme Court and applying its reasoning to NRCP 56, further stated the policy and reasoning behind the grant of summary judgment, stating "[T]he Supreme Court in Celotex [Celotex Corp. v. Catrett, 477 U.S. 242, 327(1986)] noted that Rule 56 should not be regarded as a 'disfavored procedural shortcut' but instead 'as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' "

Regarding substantive law and what facts are material, Wood v. Safeway, 121 Nev. at 731, 121 P.3d at 1031, held: "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." The Motion set forth the substantive law and the material facts pertinent to deciding Plaintiff's Motion. Other facts and factual disputes are irrelevant. The thrust of the Opposition was to suggest that there were other facts out there, somewhere, which might be argued by the Defendants in some proceeding other than Plaintiff's

Motion.

4. THE ORDER

The Order at page 1-2, third paragraph, provides case history and summarizes the contentions of the parties. The Order at page 2, fourth paragraph summarizes some relevant law. The paragraph bridging pages 2-3 and the first paragraph on page 3, a total of 10 lines, is the entirety of the substance of the Order dealing with the Motion. After noting that the parties had expended a tremendous amount of energy and time on the Motion, Opposition, and Reply, "nearly 100 pages accompanied by voluminous declarations and exhibits," the Order states, "Under the circumstances, the Arbitrator finds the claims in dispute are not amenable to resolution on summary judgment." The basis of this statement is apparently that "Moreover, it appears that issues of fact and credibility pervade in assessing the merit of the claims in dispute."

There is no discussion at all of the Undisputed Material Facts ("UMFs") set forth at Motion 3:22-8:10. Those are the only relevant "issues of fact" to the Motion as presented. There was no discussion of the applicable substantive law. There was no discussion of any basis for the contention that there were credibility questions.

The Order then states that the goals of arbitration "can best be served by completion of any remaining discovery and the scheduling of a hearing[.]" Plaintiff disagrees, and believes that the goals of arbitration can best be served by deciding the Motion according to the facts and law, because the goal of summary judgment, as part of the Nevada Rules of Civil Procedure, is "to secure the just, speedy and inexpensive determination of every action," including the present action.

5. LEGAL AND FACTUAL BASIS OF REQUEST FOR RECONSIDERATION

The arbitrator is required to apply the governing law to the facts (in this case the UMFs), see §§ 2-3 above. The Order did not do this. The parties are entitled to have their dispute resolved by the summary judgment procedure "to secure the just, speedy and inexpensive determination" of this action, if at all possible.

The reference in the Order to "issues of fact and credibility pervade in assessing the merit of the claims in dispute" is not correct in assessing the Motion. The UMFs were fully supported in the submitted evidence. They were carefully selected to support the claim-by-claim discussion of Plaintiff's entitlement to judgment, as set forth at Motion 8:12-46:7. The UMFs were chosen so that there was no basis to dispute them, and in fact they were not disputed by the Christian Affidavit, the sole piece of "evidence" submitted in the Opposition. The UMFs were selected so that, when they were undisputed by the Defendants, as turned out to be the case, they were fully sufficient to support the Claims for which judgment was sought, and would necessarily lead to a judgment in Plaintiff's favor on those Claims.

For example, UMFs 13-20 were not only undisputed, they were not even mentioned by the Opposition and the Christian Affidavit. As they were not mentioned, there can be no credibility issue. As discussed in the Motion and Reply, UMFs 13-20 necessarily lead to judgment in Plaintiff's favor on the Fourth-Seventh and Ninth Claims, and on the Doubling of Damages.

The Opposition made some arguments about other facts that Defendants say they might want to investigate in the future, but these other facts were not relevant in the slightest to the UMFs and to the substantive law necessary to decide the present Motion as it was presented by Plaintiff. Had the Defendants thought they had a basis in some other facts for deciding the

case in their favor on some other legal theory, they could have filed their own summary judgment motion. They did not. Defendants could have objected to the schedule set by the arbitrator for filing summary judgment motions to give themselves more time. They did not.

Defendants were bound to oppose, if they could, the UMFs, and the substantive law as they were advanced by Plaintiff in the Motion. Had Defendants believed that there was any discovery that could have aided them in opposing the Motion brought by Plaintiff by disputing any of the UMFs, NRCP 56(f) provides a mechanism to request time to conduct discovery. They did not do so.

Additionally, as discussed at Reply at § 3, pages 6-26, the Christian Affidavit is not legally sufficient evidence and may not be considered because it is not made on personal knowledge. That is, contrary to the statement of the Order, quoted above, that there were issues of fact that precluded summary judgment, there were no disputed issues of material fact both because the UMFs were not disputed, and were not even mentioned in most cases, and because the only "evidence" submitted in opposition was not legally sufficient.

7. THE REASONS FOR THIS MOTION

First, as discussed in § 2, the Order did not apply the law to the undisputed material facts, as the arbitrator is required to do.

Second, as discussed in § 3, the Order cited and quoted at page 2, fourth paragraph, but did not apply, the law and objective of summary judgment.

Third, as discussed in § 3, the Order did not implement the purpose of summary judgment, which is "designed to secure the just, speedy and inexpensive determination of every action."

Fourth, the Order seeks to establish an approach whereby the matter

is shunted out to irrelevant discovery and a hearing, at additional cost to the parties, and most particularly to Plaintiff. Plaintiff is an individual who has already been damaged by Defendants for $580,649.82 in capital losses and $21,283.29 in unearned "advisor fees." (Plaintiff notes that the Order, page 2, second paragraph, uses the term "alleged" to describe these facts. Unchallenged UMFs 8-9 conclusively establish these facts, so they are no longer "alleged" but established). Defendants are a financially powerful company dealing in hundreds of millions of dollars, with the financial resources to grind Plaintiff, who is 74 years old, into the ground with the kinds of delaying tactics suggested by its Opposition and the Christian Affidavit. The provision that summary judgment should be applied "to secure the just, speedy and inexpensive determination" of an action is especially applicable here.

Fifth, the Order did not apply the substantive law, as discussed throughout the Motion and the Reply.

Sixth, by not conducting the summary judgment proceeding by applying the governing law to the undisputed material facts, and by not applying the law and objectives of summary judgment, and by not applying the substantive law, the Order implies that further proceedings will be conducted without regard to the applicable facts and law. Plaintiff cannot accept without objection that approach, which is contrary to law, see § 2 above. Under Nevada law, the arbitrator is not a settlement judge who can adjudicate cases by fiat. Nor is arbitration a stylized negotiation without controlling facts and governing law. Arbitration is a statutory legal proceeding that must be decided according to the relevant established facts, procedures and substantive law.

Seventh, Plaintiff makes of record his objections to the failure to apply the law to the facts as required in arbitration, the failure to apply the law and

objectives of summary judgment, and the failure to apply the substantive law, so that the arbitrator is fully aware of the errors of the Order, and for presentation to the District Court and on appeal. Clark County Educ. Ass'n, 122 Nev. at 342, 131 P.3d at 8, addressed the obligations of the arbitrator, stating,

> He is confined to interpreting and applying the agreement, and his award need not be enforced if it is arbitrary, capricious, or unsupported by the agreement. But, "[j]udicial inquiry under the manifest-disregard-of-the-law standard is extremely limited. A party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration. In such instance, the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law.

(internal quotation marks omitted).

There is no question that the Order did not consider the facts, as it did not mention the UMFs a single time, and that it disregarded the law governing arbitrators, the law governing summary judgment, and the substantive law.

Finally, the arbitrator is required to sift the facts and determine which are undisputed for the trial or hearing:

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

NRCP 56(d). The Order does not specify which facts appear without substantial controversy, which would streamline further proceedings.

CONCLUSION

Plaintiff is entitled to partial summary judgment for the reasons set forth above and urges the arbitrator to reconsider his Order of January 25, 2018.

DATED this 12th day of February, 2018.

CARL M. HEBERT, ESQ.
Counsel for plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CARL M . HEBERT, ESQ., and that on February 12, 2018, I

_____hand-delivered

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

___X___ e-mailed

_____telefaxed, followed by mailing on the next business day,

a copy of the attached

PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

addressed to:

Hon. Phillip Pro (Ret.) — Arbitrator
JAMS
3800 Howard Hughes Parkway
11th Floor
Las Vegas, NV 89169
702-457-5267

Thomas C. Bradley, Esq. — Counsel for defendants
448 Hill Street
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Judicial Arbitration and Mediation Service
Las Vegas, Nevada

GREGORY GARMONG,

Plaintiff,

Case No. 1260003474

v.

WESPAC, GREG CHRISTIAN, and
Does 1-10,

Defendants.
_____/

Defendants' Opposition to Plaintiff's Motion for Reconsideration of Order Denying Plaintiff's Motion for Summary Judgment

Defendants WESPAC and GREG CHRISTIAN, by and through their attorney of record, THOMAS C. BRADLEY, ESQ., of Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace, hereby oppose Plaintiff Gregory Garmong's *Motion for Reconsideration of Order Denying Plaintiff's Motion for Summary Judgment*. Defendants' *Opposition* is made and based on the attached Memorandum of Points and Authorities and all pleadings and papers on file herein.

DATED this 8 day of March, 2018

Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace

Thomas C. Bradley, Esq.
Attorney for Defendants

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POINTS AND AUTHORITIES

I. Summary

Plaintiff, Mr. Garmong filed a Motion for Partial Summary Judgment on November 30, 2017. Defendants filed their Opposition on December 21, 2017, and Plaintiff filed his Reply on January 11, 2018. Judge Pro entered his Order denying Partial Summary Judgment on January 25, 2018.

Judge Pro determined that, "it appears that issues of fact and credibility pervade in assessing the merit of the claims in dispute. Under the circumstances, the Arbitrator finds the claims in dispute are not amendable to resolution on summary judgment." *See* Order dated January 25, 2018. Plaintiff then filed the present *Motion for Reconsideration* without any legal or factual basis. Defendants made clear in their *Opposition* that Plaintiff has failed to meet the standards under Rule 56 of the Nevada Rules of Summary Judgement. Defendants, Greg Christian and Wespac, deny that they are liable to Plaintiff, deny they caused Plaintiff to suffer any damages, and emphasize that had Plaintiff followed Defendants' advice that Plaintiff's accounts would have tripled in value by 2017.

II. Legal Argument

Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already rendered should a Motion for Rehearing be granted. *See Moore v. City of Las Vegas*, 92 Nev 402 (1976).

Essentially, Plaintiff did not agree with the Court's Order so he filed this *Motion for Reconsideration*. Plaintiff routinely files Motions for Reconsideration despite the fact they have no legal or factual basis.

III. Summary Judgment Standard

NRCP Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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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." *NGA #2 Limited Liability Co. v. Rains*, 113 Nev. 1151, 1157, 946 P.2d 163, 167 (1997) citing *Ferreira v. P.C.H. Inc.*, 105 Nev. 305, 306, 774 P.2d 1041, 1042 (1989). "A litigant has a right to a trial when there remains the slightest doubt as to remaining issues of fact." *NGA #2*, 946 P.2d at 167 citing *Clauson v. Lloyd*, 103 Nev. 432, 435, 743 P.2d 631, 632 (1987); *Pine v. Leavitt*, 84 Nev.507, 513, 445 P.2d 942 ("NRCP 56(c) authorizes summary judgment only where . . . the truth is clearly evident and no genuine issue remains for trial.")

IV. Material Facts in Issue

Mr. Garmong's fifty-page *Motion for Partial Summary Judgment* was convoluted, hard to comprehend, and its reasoning highly questionable. Defendants hereby incorporate the entirety of their *Opposition* to the original *Motion for Partial Summary Judgment*. Defendants will just highlight the genuine issues of material fact on each of Plaintiff's claims. Defendants also rely upon the prior Affidavit of Greg Christian which was attached to their Opposition to the Original Motion.

V. Defendants Deny Material Facts in Each of Plaintiff's Claims.

For each cause of action, Defendants dispute various factual elements which Plaintiff must prove to obtain relief. Defendants will briefly discuss each cause of action below.

1. Breach of Contract Claim

Here, Plaintiff alleges that Defendants breached the Agreement by "fail[ing] to manage Plaintiff's managed accounts according to his investment objective and instructions not to lose capital." *Motion For Partial Summary Judgment* ("Motion") at 10:3-4. Plaintiff further alleges that "Defendants' breach was the proximate cause of Plaintiff's loss, inasmuch as Defendants had sole responsibility for managing the managed accounts." *Motion* at 10:7-8.

Plaintiff fails to allege exactly what was "unsuitable" about the investments that Defendant

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Christian recommended, except that they declined in value. But an investment is not unsuitable just because it declines in value at some point. In fact, because of the economic situation in late 2008 and 2009, most types of investments sustained sharp declines. Subsequent events have demonstrated that Mr. Christian's advice to Plaintiff that Plaintiff should stay the course would have prevented the purported losses about which he now complains.

Mr. Christian fulfilled his responsibility to the Plaintiff. He inquired about his financial situation and objectives when Plaintiff first opened his accounts, and he continued these discussions with Plaintiff, through phone calls, personal meetings, and written communications, up to the point that he closed his accounts. Based upon these discussions, Mr. Christian had a reasonable basis to believe not only that his recommendations were sound, but that they were appropriate and suitable for the Plaintiff – both as individual transactions and in light of his entire portfolio. The information Mr. Christian provided the Plaintiff throughout their relationship was accurate and fulfilled his obligation to the Plaintiff.

Mr. Christian made recommendations to the Plaintiff and monitored his accounts. Mr. Christian acted reasonably to ensure that the Plaintiff appreciated the risk of his investment decisions and did his best to discourage him from making decisions that he believed were inconsistent with his investment objectives. Plaintiff did not rely on Mr. Christian's advice to stay the course, he disregarded it. Plaintiff cannot blame Mr. Christian for giving bad advice when it was his disregard of that advice which caused his losses.

As stated in Defendant Christian's Affidavit, a letter instructing him to assume complete control over Mr. Garmong's accounts was never received by Mr. Christian, nor did Mr. Garmong ever ask Mr. Christian, at any time, either in writing or in person, to solely manage Plaintiff's accounts without any input from Mr. Christian. Mr. Christian believes the self-serving letter, allegedly dated October 11, 2017, was fraudulently created by Mr. Garmong to provide false evidence to support Plaintiff's claims in this litigation.

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Although Mr. Christian technically possessed discretionary control over Mr. Garmong's accounts, in reality, Mr. Garmong insisted upon reviewing and approving all important investment strategies before the strategies were implemented. In fact, Mr. Garmong approved of all important investment strategies and investment recommendations that were made throughout the life of the accounts.

Mr. Christian's investment advice to Mr. Garmong was at all times suitable and prudent. As a result, any monetary losses suffered by Plaintiff were not proximately caused by Defendants, and summary judgment is not appropriate. Accordingly, Defendants deny that they breached any terms of the agreement and deny that Plaintiff suffered any damages. *See* Greg Christian Affidavit.

2. Breach of Implied Warranty Claim

To state a claim for breach of warranty: "[A] plaintiff must prove that a warranty existed, the defendant breached the warranty, and the defendant's breach was the proximate case of the loss sustained." *Nevada Contract Services, Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157, 161, 68 P.3d 896, 899 (2003).

To the extent that a warranty for investment advice services may exist, Defendants deny that they failed to provide inadequate services, that at all times Defendants provided suitable investment advice, and deny that Plaintiff suffered damages. *See* Greg Christian Affidavit.

3. Contractual Breach of Implied Covenant of Good Faith and Fair Dealing Claim

Here, the parties agree that a contract existed between them, however, Defendant Christian asserts that Plaintiff Garmong never instructed him to make changes to Plaintiff's investment accounts without Mr. Garmong's approval. At all times, his investment advice to Mr. Garmong was suitable and prudent. In addition, Mr. Garmong asserted control to make the final decision on all important investment strategies and to pre-approve of all material investment decisions. Defendants were faithful at all times to the purpose of the parties' Agreement. In any event, Defendants deny that they violated the covenant of good faith and fair dealing and deny that

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Plaintiff suffered damages. *See* Greg Christian Affidavit.

4. Tortious Breach of Implied Covenant of Good Faith and Fair Dealing

Defendants never assumed sole control over Gregory Garmong's accounts, Mr. Garmong remained in control of making all important investment strategies and approved of all material investment recommendations throughout the parties' relationship. As a result, Plaintiff had not established that Defendants breached the implied covenant of good faith and fair dealing or that Defendants' conduct was grievous and perfidious. In any event, the Defendants deny they violated any applicable covenant of good faith and fair dealing and deny that Plaintiff suffered any damages. *See* Greg Christian Affidavit.

5. Breach of Nevada Deceptive Trade Practices Act Claim

"Under NDTPA's [Nevada Deceptive Trade Practices Act] plain language, to establish a cause of action, a plaintiff must show a defendant engaged in a consumer fraud of which the plaintiff was a victim. Because a prevailing party may recover 'damages that he has sustained,' a plaintiff also must demonstrate damages. Implicit in that language is a causation requirement." *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657 (D.Nev. 2009)(emphasis added). As further stated by the *Picus* Court, "Under Nevada Revised Statutes §41.600(3) a party can recover only those damages sustained as a result of the defendant's act of consumer fraud." *Id.*

As previously stated, Defendant Christian has asserted that Plaintiff Garmong never instructed him to assume complete control over Plaintiff's investment accounts, and that Mr. Garmong was in control of making all important investment strategies and approved of all investment recommendations made by Defendants. Mr. Christian has further stated that any losses suffered by Mr. Garmong were directly attributable to the sharp declines in the overall stock market and were not the result of Defendants failure to follow Mr. Garmong's investment objective and instructions. As a result, Plaintiff cannot establish the causation element of his claim and summary judgment should be denied. In any event, Defendants deny that they committed any acts prohibited

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by the Nevada Deceptive Trade Practices Act and deny that Plaintiff suffered any damages. *See* Greg Christian Affidavit.

6. Breach of Fiduciary Duty Claim

Plaintiff's breach of fiduciary duty claims are premised on his allegations of unsuitability. However, Plaintiff has failed to present any evidence that the investments recommended were unsuitable. The investments recommended and trades made were all suitable based on Plaintiff's objectives, risk tolerance and financial situation. The suitability obligation, however, is not tantamount to an investment insurance policy which protects against losses. At the proper time, Defendants will present expert evidence on this issue.

As stated above, Plaintiff Garmong never instructed Mr. Christian to assume complete control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong were not caused by Defendant Christian's failure to follow Mr. Garmong's investment instructions, but were due solely to the sharp declines in the stock market. Further, Mr. Garmong never instructed Defendants to assume complete control over his investment accounts, and instead, remained in control of all important investment strategies and approved of all recommendations made by Defendants throughout their relationship. As a result, Defendants never breached their fiduciary duty to Plaintiff.

Further, Defendants adamantly deny that they ever concealed any information from Plaintiff, let alone "as part of a deliberate, intentional, willful, and conscious program of dishonesty, deceit, and fraud, planned and perpetrated even from before the first meeting of Defendants and Plaintiff and continuing after the Investment Management Agreement, exhibit 18, was signed." *Plaintiff's Motion For Partial Summary Judgment* at 33:14-19. Such accusations are ludicrous.

In any event, Defendants deny any applicable duty owed to Plaintiff and maintain that they provided suitable investment advice to Plaintiffs at all times. Defendants further deny Plaintiff

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suffered any damages. *See* Greg Christian Affidavit.

7. Breach of Fiduciary Duty of Full Disclosure Claim

Defendants incorporate their response as if set fully herein to their Breach of Fiduciary Duty section discussed above. *See* Greg Christian Affidavit.

8. Breach of Agency Claim

According to the Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006), "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."

As previously stated, Plaintiff Garmong never instructed Mr. Christian to assume complete control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong were not caused by Defendant Christian's failure to follow Mr. Garmong's investment instructions, but were due solely to the sharp declines in the stock market. Further, Mr. Garmong never instructed Defendants to assume complete control over his investment accounts, and instead, remained in control of all important investment strategies and approved of all recommendations made by Defendants throughout their relationship. Indeed, as Mr. Christian stated in his Affidavit, "If Mr. Garmong had followed my advice to stay in the market and not panic, his accounts would likely have tripled in value since March 2009." As a result, Defendants never breached their agency duty to Plaintiff. In any event, Defendants deny committing any breach of agency duty that may have been owed to Plaintiff and deny that Plaintiff was damaged. *See* Greg Christian Affidavit.

9. Negligence Claim

Defendants deny that they were negligent in any manner in this case and deny that Mr. Garmong proximately suffered any damages. *See* Greg Christian Affidavit.

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10. Breach of NRS 628A.030 Claim

As previously stated, Plaintiff Garmong never instructed Mr. Christian to assume complete control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong were not caused by Defendant Christian's failure to follow Mr. Garmong's investment instructions, but were due solely to the sharp declines in the stock market. Further, Mr. Garmong never instructed Defendants to assume complete control over his investment accounts, and instead, remained in control of all important investment strategies and approved of all recommendations made by Defendants throughout their relationship.

Defendants deny they were grossly negligent. The duties of brokers to their customers are limited. They are not insurers against investment risk. That is the obligation that Plaintiff wishes to impose on Defendants. Unfortunately for Plaintiff, this is directly contrary to well established law. A stockbroker is simply not an insurer of his investment advice. *Powers v. Francis I. duPont Co.*, 344 F. Supp. 429 (E.D. Pa. 1972).

As a result, Defendants never violated any element of a fiduciary duty to Plaintiff, nor were Defendants "grossly negligent in selecting the course of action" they advised. Further, Plaintiff has pointed to no law Defendants violated "in recommending" any investment to Mr. Garmong. The violations of Nevada law alleged by Plaintiff had nothing to do with any recommendations Mr. Christian may have made. Further, Defendants deny that they violated Nevada law. In any event, Defendants deny they violated NRS 628A.030 in any manner and deny that Plaintiff was damaged. *See* Greg Christian Affidavit.

11. Unjust Enrichment Claim

"An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Leasepartners Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997). Here, the parties agree that they entered into a written "Investment Management Agreement" (See

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Material Facts Not In Issue, above). The "advisor fees" Plaintiff now complains about by Plaintiff were included in that Agreement. In any event, Defendants deny that they were unjustly enriched and affirm that they earned all fees paid to them. *See* Greg Christian Affidavit.

12. Intentional Infliction of Emotional Distress Claim

Defendants deny that they engaged in extreme and outrageous conduct with the intent, or reckless disregard for Mr. Garmong's emotional distress and deny that Mr. Garmong suffered any injuries by Defendant' conduct. *See* Greg Christian Affidavit.

VI. <u>Damages Claim</u>

Defendants adamantly deny that they engaged in a "deliberate, intentional, willful, and conscious" plot "of dishonesty, deceit, and fraud" before they even met Plaintiff. These wild accusations are specifically denied by the Defendants and not supported by any evidence and thus do not support Plaintiff's claim for doubling of damages pursuant to NRS 41.1395. *Motion* at 33:15-17. Punitive damages are likewise unavailable as Plaintiff has failed to establish that Defendants engaged in any fraudulent conduct with the intent to depriving Plaintiff of his money or assets. Defendants deny they engaged in any fraudulent activity and at all times provided suitable investment advice. *See* Greg Christian Affidavit.

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VII. Conclusion

In short, Defendants deny that there are undisputed facts sufficient to support any of the Plaintiff's claims for relief. To the extent that the Arbitrator wishes Defendants to address specific factual allegations made by the Plaintiff in his *Motion*, Defendants will do so promptly. As a result, Defendants Wespac and Greg Christian respectfully request that Plaintiff Gregory Garmong's *Motion for Reconsideration of the Order Denying Plaintiff's Motion for Partial Summary Judgment* be denied.

Submitted this 8 day of March, 2018.

Sinai, Schroeder, Mooney, Boetsch,
Bradley & Pace

Thomas C. Bradley, Esq.
Attorney for Defendants

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Arbitrator

JAMS ARBITRATION CASE REFERENCE NO. 1260003474

GREGORY GARMONG, Claimant, vs. WESPAC, and GREG CHRISTIAN, Respondents.	**ORDER RE: CLAIMANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING SUMMARY JUDGMENT**

On January 25, 2018, the undersigned Arbitrator entered an Order denying Claimant Garmong's Motion for Partial Summary Judgment and directed that the parties submit a joint status report proposing a revised schedule for the completion of remaining discovery.

On February 12, 2018, Claimant filed a Motion for Reconsideration of the Order denying Partial Summary Judgment. Having considered the arguments set forth in Claimant's fully briefed motion and the arguments of counsel presented at the hearing conducted on March 8, 2018, the Arbitrator finds that the Motion for Reconsideration should be denied.

The relevant history of this litigation is briefly recited in the Order denying Claimant's Motion for Partial Summary Judgment entered January 27th and need not be repeated here. Claimants 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 Claimants 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 Respondents 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 Arbitrators opportunity to assess and weigh the credibility of each witness, and all the evidence in that context.

IT IS THEREFORE ORDERED that Claimant's Motion to Strike Respondent's Opposition to Claimant's Motion for Reconsideration is Denied.

IT IS FURTHER ORDERED that Claimant's Motion for Reconsideration of Order Denying Plaintiff's Motion for Partial Summary Judgment is Denied.

DISCOVERY SCHEDULING ORDER

Both parties agree that to prepare this case for trial on the merits further discovery is needed, including the deposition of Claimant Garmong and Respondent Christian. This case has been pending since 2012 in State Court, and already has consumed nearly one year in arbitration. It is imperative that the parties conclude necessary discovery and prepare this matter for a hearing on the merits at which a complete and final adjudication of all claims can be provided.

At the telephonic hearing conducted on March 8th, the parties were unable to agree to a discovery schedule, and efforts to schedule the arbitration hearing were complicated by the Arbitrator's availability. Since that hearing, however, the Arbitrator has been able to make adjustments to his schedule to allow for scheduling of the arbitration hearing and can offer the parties 2 alternative hearing weeks: September 24-28, and October 15-19. A trial setting for either week would allow the parties ample time to complete remaining discovery in this case.

Therefore, the parties are requested to confer forthwith and advise the Arbitrator, and his Case Manager, Mara Satterthwaite, on or before March 26, 2018, of which of the two trial dates

above fit their schedules, and how many trial days they will require for the merits hearing.

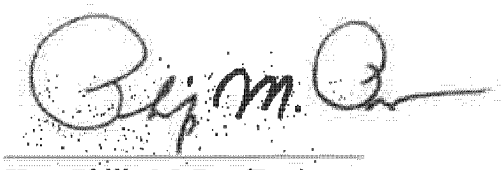
All discovery, including expert discovery, shall be completed on or before August 10, 2018. Additionally, because the Arbitrator finds that Garmong's damages are a relevant issue in this case, discover of documents revealing Claimant's investments from 2008 to 2014 will be permitted.

Any pre-hearing Motions in Limine shall be filed on or before August 24, 2018, and responses thereto shall be filed not later than September 3, 2018.

On or before September 17, 2018, the parties shall submit a list of witnesses, together with a brief description of the subject area of that witnesses' testimony; a list of exhibits each party proposes to offer at trial; and their pre-trial briefs.

If the parties intend to use the services of a Court Reporter for the Arbitration hearing, they shall make arrangements for the same and advise the Arbitrator's Case Manager, Ms. Satterthwaite on or before September 17, 2018.

IT IS SO ORDERED.



Dated: March 19, 2018

Hon. Philip M. Pro (Ret.)
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Garmong, Gregory vs. Wespac et al.
Reference No. 1260003474

I, Mara Satterthwaite, Esq., not a party to the within action, hereby declare that on March 19, 2018, I served the attached ORDER RE: CLAIMANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING SUMMARY JUDGMENT on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Las Vegas, NEVADA, addressed as follows:

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L/O Carl M. Hebert
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Parties Represented:
Gregory Garmong

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Parties Represented:
Greg Christian
Wespac

I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on March 19, 2018.

Mara Satterthwaite, Esq.
msatterthwaite@jamsadr.com

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JAMS ARBITRATION
LAS VEGAS, NEVADA

GREGORY GARMONG, Plaintiff, vs. WESPAC; GREG CHRISTIAN, Defendants.	**# 1260003474** **PLAINTIFF'S HEARING BRIEF**

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I. INTRODUCTORY COMMENT

This Hearing Brief is rather long, as it must be. Plaintiff bears the burden of persuasion on each of the twelve claims of the Amended Complaint. It is therefore necessary to identify the elements of each claim and to demonstrate that each element is met.

II. BACKGROUND

In 2005, Plaintiff Dr. Gregory Garmong, who was 61 years old at the time, had his retirement and life savings in the custodial care of Charles Schwab Company. Dr. Garmong had always admitted that he was better at earning money than investing money, and needed investment help. In about July, 2005, Schwab referred him to Defendant Wespac for investment advice and financial planning for retirement. Dr. Garmong met with Defendant Greg Christian, who became Plaintiff's sole contact at Wespac. Mr. Christian sold Plaintiff on Wespac using, in part, full-color brochures that made bold, sweeping claims about Wespac (e.g., Exh. 1-2)[1]. As a result of Schwab's recommendation and Wespac's claims, Plaintiff hired Wespac to manage five accounts: Three tax-deferred retirement accounts under the terms of applicable IRS regulations, including two Keogh plans and a defined benefit plan, and two non-tax-sheltered accounts. As part of the engagement process, Mr. Christian requested, and Plaintiff provided, Defendants with his conservative financial investment objectives on their form of an initial Confidential Client Profile (Exh. 3), stating his investment objective as "moderately increasing my investment value while minimizing potential for loss of principal." Dr. Garmong had been raised by conservative midwestern parents who had been subject to the brunt of the Great Depression, and he had adopted their conservative financial and personal ways.

Dr. Garmong and Wespac also signed a contractual document called an Investment Management Agreement ("Agreement", Exh. 4, incorporating Exh. 3) that was prepared in an incomplete form by Wespac. Some of the terms of the Agreement are noteworthy. Wespac acknowledged that it was registered by the Securities and Exchange Commission

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[1] References to "Exh." are to Dr. Garmong's hearing exhibits.

("SEC"), leading Dr. Garmong to believe (wrongly as it turned out) that Wespac and Mr. Christian complied with the rules of the SEC. Wespac appointed itself as an agent and fiduciary of its principal and client Dr. Garmong. Further, "Although WA [Wespac Advisors] may make investment decisions without prior consultation with or consent from Client, all investment decisions shall be made in accordance with the investment objectives of which Client has informed, and may inform, WA from time to time in writing." The Agreement provided that Wespac and Mr. Christian would be paid for their financial advice a percentage of the dollar value of the accounts under management, which worked out to be about $20,000 per year. In Dr. Garmong's mind, this was a reasonable price to pay to have a fiduciary closely watch his investments to be certain that his conservative investment objectives were followed, and for the peace of mind of having careful professional management.

During the period September 2005 to October 2007, Plaintiff and Mr. Christian worked together to accomplish Plaintiff's investment objectives. Typically, Dr. Garmong would contact Mr. Christian about his concerns, and Dr. Garmong and Mr. Christian would together devise and implement a financial approach in response. (See, e.g., Exh. 9) That approach worked reasonably well.

On August 31, 2007, Dr. Garmong retired from his vocation as a patent attorney and his life objectives and financial investment objectives changed significantly. The first 12-18 months of "retirement" were even busier than before retirement. Dr. Garmong had agreed to finish up existing projects for several clients without taking on new work, helped clients find new patent attorneys for the work he had been doing, and aided the new patent attorneys to assume his former work. As an avocation, Dr. Garmong had long been active in wilderness search-and-rescue, and as a fire department volunteer firefighter and medic. He planned these as his primary post-retirement activities. He was a formally qualified Wilderness Medic and formally qualified High-Angle (mountaineering) rescuer for search and rescue, and a formally qualified Emergency Medical Technical for fire-department work. These specialities required continuing extensive training and qualification. On October 3,

2007, his decree of divorce was entered, although much was left to be done to complete the divorce process in terms of correcting the divorce decree and disentangling his life from that of his former spouse as provided in the divorce decree. Dr. Garmong also continued to volunteer about 20 hours per week at the local animal shelter.

After his retirement on August 31, 2007, Dr. Garmong began to appreciate the psychological impact of retirement upon his financial future. Most significantly, he realized that he had to live on his retirement savings for the rest of his life–he had no other retirement plan than social security, and would not be earning any more money to replace investment losses, if any. He also realized that with conservative financial management, he had enough money. He did not need to build his retirement fund beyond keeping pace with inflation. All of this made him even more financially conservative than he already was. He resolved as an investment objective to avoid capital loss in his retirement plan and savings.

On about October 10, 2007 (Exh. 10), Dr. Garmong met with Mr. Christian for a regularly scheduled review of his savings and retirement plans under management by Wespac. Feeling overwhelmed by the changes in, and events of, his life at that time, Dr. Garmong discussed his concerns with Mr. Christian. He also told Mr. Christian of his decision to change his primary investment objective from "minimize" potential for loss of capital to an even more-conservative "avoid" capital loss. Mr. Christian gratuitously offered to lift the financial planning and management burden from Dr. Garmong's shoulders and to assume complete responsibility for achieving Dr. Garmong's investment objectives, without any involvement of, or input from, Dr. Garmong. This offer was not inconsistent with Wespac's responsibilities as stated in the Agreement, as long as it followed Dr. Garmong's investment objectives.

After some consideration in light of his changed circumstances and investment objectives, he orally accepted Mr. Christian's offer, but only under the condition that Mr. Christian manage his accounts even more conservatively, to avoid capital loss. Dr. Garmong emphasized that he was willing to sacrifice potential gains to avoid capital loss. Mr. Christian orally agreed. Because the Agreement required that all changes in Dr. Garmong's

life and investment objectives be communicated to Wespac in writing, Dr. Garmong mailed a confirming acceptance letter to Mr. Christian on October 22, 2007, repeating the points discussed at the meeting. (Exh. 11). The letter stated in part: "It is really important to me that you structure and manage my accounts so that they do not lose capital if the markets decline, as I believe they may, and if the markets do decline, to sell out the losers." and "I am trusting you to watch my accounts very, very carefully and act to avoid losses, even at the expense of potential gains."

Dr. Garmong later sent faxes to Mr. Christian dated January 21, 2008 (Exh. 12, stating in part: "As I told you, I'll sacrifice potential gains to ensure that I don't have capital losses. Now that I'm retired and won't be adding to my accounts, I have to avoid capital losses."); March 17, 2008 (Exh. 13, stating in part: "As I had said before, my big concern is losing money on these accounts. The volatility is just driving me nuts, and that mental insecurity is what I had hoped to avoid."); and June 12, 2008 (Exh. 14, stating in part: "At your suggestion, I had left my accounts in the sole care of Wespac for the first half of 2008. You advised me not to worry, and let Wespac handle the management. So, I did." and "The results are mixed, and in one respect very disturbing in light of my direction to Wespac that I expected the stock market to decline in 2008 and wanted to sacrifice potential gains to avoid loss."). These faxes dealt primarily with other subjects, but each fax incidentally confirmed specific aspects of the objectives and instructions set forth at the early October 2007 meeting and the October 22, 2007 letter.

During 2008 the stock market declined. At first, Dr. Garmong gave the reports in the popular press little or no attention, nor did he give much attention to the monthly reports he received from Schwab. He continued to be even busier than before retirement, and he was confident that Wespac was managing his accounts in accordance with his more conservative investment objectives. The result was that under Wespac sole management, during the period November 2007-February 2009, Dr. Garmong's accounts lost $648,670.88 of their total initial account value of about $2,893,145.67. Wespac charged Dr. Garmong a "management fee" totaling $21,283.29. The losses and management fee totaled **$669,954.17**.

Wespac has argued during this litigation that the losses were not its fault. The losses were due to the decline in the stock market, it urges. If Dr. Garmong had just been patient, eventually the stock market turned around and went up. But that defense begs answers to four inquiries, to which Wespac cannot satisfactorily respond. First, Dr. Garmong had expressly given to Defendants as an objective that his accounts not lose capital, and the decline in their capital value was directly contrary to that objective. The loss was not insignificant–nearly $700,000 in investment loss and "management fees." Wespac and Mr. Christian were bound by contract, fiduciary, and agency principles to Dr. Garmong's investment objective. Second, Dr. Garmong had engaged Wespac to follow his instructions, and in the Agreement it agreed to do so. If he had wanted his life savings and retirement funds to be subject to the vagaries of the stock market, there was no reason to pay Wespac over $20,000 a year. Dr. Garmong's brother, investing in fixed-rate CDs and without paying any "management fees," did far better than he did during this period. Stated alternatively, there is no reason to pay those who sell themselves as professional investment managers to refuse to follow his objectives. Third, Wespac knew techniques to avoid the losses but did not apply the techniques to realize Dr. Garmong's investment objectives. As part of their sales pitch to prospective clients in 2008, they recommended at least one of these loss-avoiding techniques, to be applied to "all" equities, at the very time they were wasting Dr. Garmong's retirement savings by not using the techniques. They failed to inform Dr. Garmong and did not use the loss-avoiding techniques on his accounts. Fourth, had Wespac followed Dr. Garmong's instructions and not lost his capital, he would have had $648,670.88 in additional capital to start the recovery.

This lawsuit and arbitration deal with Defendants' blatant disregard of Dr. Garmong's investment objectives, resulting in a total loss to him of nearly $700,000.

III. LIABILITY OF WESPAC AND MR. CHRISTIAN

The Amended Complaint has Twelve Claims for Relief, and a request for doubling of damages. All of these claims and the doubling of damages are grounded upon Nevada common law or Nevada statutory law. None of them are based in federal law, either general

federal law or federal securities law. This point is pertinent to the measure of damages, discussed in a subsequent section. The Claims are discussed in order.

A. First Claim for Relief, Breach of Contract.

1. Elements of Breach of Contract

The elements of breach of contract are:

> The parties entered into a valid and enforceable contract;
> Plaintiff performed all obligations required under the contract or was excused from performance;
> The defendant breached its obligations under the contract;
> The plaintiff suffered damages as a result.

Mason v. Artwork Pictures, 2007 WL 1100826 (D.Nev. 2007), citing Nevada Contract Services, Inc. v. Squirrel Companies, Inc., 119 Nev 157, 68 P.3d 896, 899 (Nev. 2003)("A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement."); Brown v. Kinross Gold U.S.A., Inc., 531 F.Supp.2d 1234 (D.Nev. 2008).

2. Application to the present facts

To prove the breach, the evidence establishes the following elements:

There was a Contract between the parties. (Exh. 4).

Dr. Garmong performed all of his obligations under the Contract. Dr. Garmong had three obligations and duties under the Investment Management Agreement (Exh. 4). The first was to pay the "advisor fees" (also termed "management fees") of Defendants (Exh. 4, ¶ 3(4)); the second was to provide access to the managed accounts held by Schwab to Defendants (Exh. 4, ¶ 3(2)); the third was to notify Defendants in writing of any changes in personal status, investment objectives and instructions (Exh. 4, ¶ 2).

Plaintiff fulfilled all of his obligations fully and in a timely manner. The first obligation, payment of "advisor fees," was set up in paperwork prepared and filed by Defendants as an automatic quarterly payment from each of the managed accounts directly to Wespac, and these payments are shown on Schwab's monthly reports (Exh. 24, fees paid quarterly). The second obligation, access to the managed accounts, was also set up in

paperwork prepared and filed by Defendants, and Wespac's access is shown on the monthly Schwab reports. He satisfied the third obligation, notification of changes, in the letters and faxes referenced above. (Exh. 3, 11-14).

Further, there are no counterclaims by Wespac and Mr. Christian suggesting that Dr. Garmong had any breach. See Answer of Defendants to Amended Complaint.

Defendant breached its obligations. Wespac and Mr. Christian had an obligation under the Contract to manage Dr. Garmong's managed accounts according to investment objectives and instructions given by Dr. Garmong to Wespac and Mr. Christian in writing. (Exh. 4, ¶ 5). Dr. Garmong provided investment objectives and instructions to Wespac and Mr. Christian in writing. (Exh. 3, 11-14). In August 2005, Dr. Garmong initially instructed Wespac and Mr. Christian to manage the managed accounts generally conservatively, as he expected to retire in 1-5 years and his principal objective was to provide for his retirement. (Exh. 3). Two years later, in August, 2007, Dr. Garmong's circumstances and objectives changed when he commenced retirement and could no longer earn money to replace any capital losses in the principal amount of the managed accounts.

Shortly thereafter, Dr. Garmong informed Wespac and Mr. Christian orally and in writing on October 22, 2007 of his changed circumstances and new objectives. (Exh. 11-14). At Defendants' urging Dr. Garmong appointed Wespac and Mr. Christian as solely responsible for managing his managed accounts. Dr. Garmong would no longer be involved in the management. Instead, Wespac and Mr. Christian would manage the managed accounts solely at their discretion but in strict accordance with the objectives and instructions given them by Dr. Garmong (Exh. 4, ¶ 5). Dr. Garmong provided Wespac and Mr. Christian in writing an objective and instruction that they were to avoid loss of capital (i.e., principal) from the managed accounts. (Exh. 11).

Dr. Garmong repeated the investment objective and instruction in several subsequent faxes. (Exh. 12-14).

Damages and causation.

(i) The proper measure of damages in Nevada actions for breach of contract is

"expectation damages."

The Nevada measure of damages is as set forth in Shaw v. CitiMortgage, Inc., 201 F.Supp. 3d 1222, 1254 (D. Nev. 2016), applying Nevada law: "Damages for a breach of contract claim are limited to those specifically outlined in the contract, if any, and those **expectation damages sufficient to put the non-breaching party in the position it would have been in had the breach not occurred.**" (Emphasis added). "Damages" are defined by Black's Law Dictionary as "Money claimed by, or ordered to be paid to, a person as compensation for loss or injury." In the present case, the loss or injury, and thus the damages, to Plaintiff first occurred after the letter of October 22, 2007, giving his investment objective and instructing Defendants: "It is really important to me that you structure and manage my accounts so that they do not lose capital." The Investment Management Agreement does not specify any damages upon breach, so the proper measure of damages is "expectation damages." See also Dynalectric Co. of Nevada, Inc. v. Clark & Sullivan Constructors, Inc., 127 Nev. 480, 484, 255 P.3d 286, 289 (2011), addressing the subject of expectation damages in contract, and holding: "Thus, under the Restatement, an award of expectation damages[4] is often an appropriate remedy for promissory estoppel claims." Footnote 4 explains, "Expectation damages attempt to place the plaintiff in the position that he or she would have occupied if the contract had been performed or if the promise had been kept. See Restatement (Second) of Contracts § 344(a) (1981)."[2]

In the present case, Dr. Garmong's **expectation** was that Defendants would carry out his objective of not losing capital after instructions as to his financial objectives were given in October 2007 and repeated several times thereafter.

(ii) Calculation of contract damages under Nevada's measure of damages.

During November 2007-February 2009, Wespac and Mr. Christian failed to manage Dr. Garmong's managed accounts according to his investment objective and instructions not to

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[2] Defendants have proposed the use of a "Net out of pocket" theory of damages that is unrelated and irrelevant to the "expectation" measure of contract damages used in Nevada.

lose capital. Under Wespac and Mr. Christian's sole management, Dr. Garmong's managed accounts lost $648,670.88 in capital from the start of November 2007 to the end of February 2009. (Exh. 27). Wespac and Mr. Christian's breach was the proximate cause of Dr. Garmong's loss, inasmuch as Wespac and Mr. Christian had sole responsibility for managing the managed accounts (Exh. 11-14). Defendants charged Dr. Garmong $21,283.29 in unearned "advisor fees." (Exh. 30) The total damages are $648,670.88 + $21,283.29 = **$669,954.17.**

Dr. Garmong has demonstrated the four elements required to prevail under this First Claim for Relief for breach of contract and the damages for breach of contract, using Nevada's measure of contract damages.

B. Second Claim for Relief; Breach of implied warranty in contract

1. Basis of claim

A contract to perform services includes an implied warranty of workmanship to perform the contract with care, skill, reasonable expediency, and faithfulness. As held by Robert Dillon Framing, Inc. v. Canyon Villas Apartment Corp., 2013 WL 3984885 at *3 (Nevada 2013):

> An implied warranty of workmanship accompanies a service contract as a matter of law. In this covenant, the performing party promises he will perform with care, skill, reasonable expediency, and faithfulness. 23 Richard A. Lord, Williston on Contracts ¶ 63:25, at 525 (4th ed.2002). And because the warranty of workmanship addresses the quality of workmanship expected of a promisor, the warranty sounds in contract.

2. Elements of claim for breach of warranty

Nevada Contract Services, Inc. v. Squirrel Companies, Inc., 119 Nev. 157, 161, 68 P.3d 896, 899 (2003) held:

> In a breach of warranty cause of action, a plaintiff must prove that a warranty existed, the defendant breached the warranty, and the defendant's breach was the proximate cause of the loss sustained.

The damages for a breach of warranty are the same as for a breach of contract.

3. Application to the present facts

The evidence establishes these elements:

Warranty existed. There was a contract between Defendant Wespac and Dr. Garmong. (Exh. 4). As a matter of law, that Contract carried an implied warranty to perform the contracted-for services in a workmanlike, professional manner and with care, skill, expediency, and faithfulness. Dr. Garmong instructed Wespac and Mr. Christian orally and in writing that they were to manage his managed accounts so as not to lose capital. (Exh. 11-14).

Defendants breached the implied warranty. Defendants failed to perform their duties with care, skill, reasonable expediency, and faithfulness, thereby breaching the warranty. Specifically, Wespac and Mr. Christian failed to manage the managed accounts so as to avoid loss of capital, the objective and instruction that Dr. Garmong had given them. (Exh. 27).

Damages and causation. Under Defendants' sole management, Dr. Garmong's managed accounts lost $648,670.88 in about 16 months. (Exh. 27). Defendants' breach was the proximate cause of Dr. Garmong's loss, inasmuch as Wespac and Mr. Christian had sole responsibility for managing the managed accounts (Exh. 11, 14). During that same period Wespac and Mr. Christian charged Dr. Garmong $21,283.29 in unearned "advisor fees". (Exh. 30). The losses and fees were incurred because Wespac and Mr. Christian failed to honor the implied warranty of the Contract. The total losses were $669,954.17.

Dr. Garmong has demonstrated the three elements required to prevail under this Second Claim for Relief for breach of implied warranty. The dollar damages are calculated as for the First Claim for Relief.

C. Third Claim for Relief; Contractual Breach of Implied Covenant of Good Faith and Fair Dealing.

"[A]n implied covenant of good faith and fair dealing exists in *all* contracts." (italics in original). A.C. Shaw Construction v. Washoe County, 105 Nev. 913, 914, 784 P.2d 9, 11 (1989). "Every contract imposes upon each party an implied duty of good faith and fair dealing in its performance and its enforcement." J.A. Jones Constr. v. Lehrer McGovern

Bovis, 120 Nev. 277, 286, 89 P.3d 1009, 1015 (2004). See also State, University and Community College System v. Sutton, 120 Nev. 972, 989-90, 103 P.3d 8 (2004). The implied covenant prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other. The parties must make a full and fair disclosure of material facts.

Hilton Hotels Corp. v. Butch Lewis Productions, Inc., 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993) ("Hilton Hotels-II") held, "Moreover, it is recognized that a wrongful act which is committed during the course of a contractual relationship may give rise to both tort and contractual remedies[.]" In the present case, Wespac and Mr. Christian contractually and tortiously breached the covenant. This Third Claim for Relief addresses the contractual breach, and the Fourth Claim for Relief addresses the tortious breach.

1. Basis of claim for contractual breach of the implied covenant

As held in Andreatta v. Eldorado Resorts Corporation,214 F.Supp.3d 943, 956-57 (D. Nev. 2016), applying Nevada law:

> A contractual claim for breach of the implied covenant of good faith and fair dealing exists where 'one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified **expectations** of the other party are thus denied[.]' Hilton Hotels Corp. v. Butch Lewis Productions, Inc., 107 Nev. 226, 808 P.2d 919, 923 (1991).

(Emphasis added). "Where one party to a contract 'deliberately contravenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing.'" Morris v. Bank of American Nevada, 110 Nev. 1274, 1278, 886 P. 2d 454, 457 (1994).

Hilton Hotels II further held, 109 Nev. at 1047, 862 P.2d at 1209, "A determination by the jury that the implied covenant was breached will give rise to an award of contract damages." As in breach of contract, the emphasis is on the "expectation" of the non-breaching party, here Dr. Garmong. See quote above from Andreatta. Hilton Hotels Corp. v. Butch Lewis Productions, Inc., 107 Nev. 226, 232, 808 P.2d 919, 922-23 (1991) (Hilton Hotels-I) observed, "Where the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract, that party can

incur liability for breach of the implied covenant of good faith and fair dealing."

2. Elements of claim for contractual breach of implied covenant of good faith and fair dealing.

Based upon Andreatta and Hilton Hotels, the elements of contractual breach of the implied covenant of good faith and fair dealing are:

A contract between the parties.

"One party performs the contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied[.]"

The other [non-breaching] party performed all obligations required under the contract or was excused from performance.

The party who performed all of his obligations was damaged as a result of the performance of the contract in a manner that is unfaithful to the purpose of the contract.

3. Application to the present facts.

The evidence establishes the following elements:

There was a contract between Dr. Garmong and Wespac. (Exh. 4).

Wespac and Mr. Christian were unfaithful to the purpose of the contract and Dr. Garmong's expectations. Pursuant to the terms of the contract, Wespac and Mr. Christian were to manage Dr. Garmong's managed accounts according to the objectives and instructions that Dr. Garmong gave Wespac and Mr. Christian in writing. (Exh. 4, ¶ 5). In the Confidential Client Profile (Exh. 3), prepared in August 2005, Dr. Garmong expressly instructed that his accounts were to be managed conservatively because he was close to retirement. Dr. Garmong's circumstances changed two years later in August 2007, when he commenced retirement. (Exh. 11). In October 2007, Dr. Garmong turned over sole management of his accounts to Wespac and Mr. Christian on the condition that they manage the accounts even more conservatively, with an objective and instruction in writing that Wespac and Mr. Christian manage the accounts so as not to lose capital. Dr. Garmong repeated and emphasized that objective and instruction in writing to Wespac and Mr.

Christian on several subsequent occasions. (Exh. 12-14). Wespac and Mr. Christian took over sole management on that condition, never suggesting or objecting that they could not or would not manage the accounts as instructed by Dr. Garmong until after nearly all of the losses to Dr. Garmong's managed accounts had already occurred.

Wespac and Mr. Christian knew they were dealing with an elderly person on the verge of retirement, and who in fact had retired in August, 2007. They knew from his Confidential Client Profile that he wanted them to give him generally conservative investment advice, and later to manage his investment accounts very conservatively. When they saw the stock market fall in 2007-2008, to be true to the purposes of the relation they should have acted conservatively. Mr. Christian has claimed that he monitored Dr. Garmong's accounts closely, but the actual results show that he did absolutely nothing as the accounts lost over $300,000 in the months of August-October 2008. (Exh. 27-29). Defendants should have opened communication with Dr. Garmong to make full disclosure that the stock market decline was putting pressure on his investment objectives, and that the only way to meet his goal was to sell out and put the cash in the bank or a CD (if in fact that was their position) or Treasury bills. They did not make such full disclosure to Dr. Garmong, or take such protective actions themselves. Instead, they allowed the value of his retirement savings to plummet. This is a straightforward violation of their duty of disclosure, and a breach of the covenant of good faith and fair dealing.

Wespac and Mr. Christian seek to shift the blame to their victim, Dr. Garmong, because he did not take over their role until their injury to him had become so severe that he could no longer overlook it. But the law recognizes that when a client hires a professional who has a fiduciary duty to the client, the client is permitted to turn over his affairs to the professional, who must act in good faith. The Investment Management Agreement provided that Dr. Garmong was to give his objectives to Defendants, and they were to act in accordance with those objectives, using their specialized skills in investment management as his fiduciary. Now, having utterly failed to perform their contractual, statutory, fiduciary, and agency duties, they seek to blame Dr. Garmong because he did not do their job as well

as his own.

The Agreement, Exh. 4 ¶ 5, was not the only legal basis upon which Wespac and Mr. Christian were required to follow Dr. Garmong's objectives and instructions. As investment advisors and managers, Wespac and Mr. Christian also had statutory, agency, and fiduciary duties to Dr. Garmong (see authority discussed in relation to the Sixth-Eighth Claims) and had a contractual and common-law agency relation to Dr. Garmong (see authority discussed subsequently in relation to the Eighth Claim). Under these fiduciary duty and agency relations, Wespac and Mr. Christian were required to perform according to Dr. Garmong's investment objectives, in this case to avoid loss of capital. But they were also required to perform in good faith to attempt to achieve his life objectives as well as his investment objectives.

Defendants performance, such as it was, under the contract was unfaithful to the purpose of the contract as Dr. Garmong had instructed Wespac and Mr. Christian, which was to conserve and to avoid the loss of the capital that was to sustain him in retirement. Under Defendants' sole management Dr. Garmong's managed accounts lost capital of $648,670.88 from November 2007 to February 2009 (Exh. 27). Wespac and Mr. Christian did substantially nothing to stem the tide of losses during most of this period, (Exh. 28-29), while charging Dr. Garmong $21,283.29 in unearned "advisor fees." (Exh. 30). Defendants' breach was the proximate cause of Dr. Garmong's loss, because Wespac and Mr. Christian had sole responsibility for managing the managed accounts according to Dr. Garmong's written objectives and instructions, and also his general guidelines. (Exh. 11, 14).

The Defendants were also unfaithful to the purposes of the contract by concealing material information and making overt misrepresentations, as will be discussed in relation to the Fifth Claim.

And from a common-sense perspective, imagine an investment advisor/financial planning knowing exactly what to do to control the situation, and then declining to do it.

Dr. Garmong performed all of his obligations under the contract. See discussion

above in relation to the First Claim.

Damages and causation. Dr. Garmong was damaged, as a result of Defendants' failure to follow Dr. Garmong's written investment objectives and instructions, in an amount of $648,670.88 in capital losses plus + $21,283.29 in unearned advisor fees, a total of $669,954.17 (Exh. 27, 30). These losses were proximately caused by Defendants' failure to follow Dr. Garmong's written investment objectives and instructions because Wespac and Mr. Christian had sole responsibility for the performance of the managed accounts. (Exh. 11, 14).

Dr. Garmong has demonstrated the four elements required to prevail under this Third Claim for Relief.

D. Fourth Claim for relief; Tortious Breach of Implied Covenant of Good Faith and Fair Dealing.

1. Legal basis of claim and contrast with contractual breach.

This tort originated in actions against insurance companies, but has since been extended to a range of other injuries that arise from a contract.

K Mart Corp. v. Ponsock, 103 Nev. 39, 49-50, 732 P.2d 1364, 1371 (1987), which deals with tortious deprivation of retirement benefits, provides the reasoning underlying the claim:

> One of the underlying rationales for extending tort liability in the described kinds of cases is that ordinary contract damages do not adequately compensate the victim because they do not require the party in the superior or entrusted position, such as the insurer, the partner, or the franchiser, to account adequately for grievous and perfidious misconduct; and contract damages do not make the aggrieved, weaker, 'trusting' party 'whole.' If we are to be consistent in trying to 'protect the weak from the insults of the stronger' (Blackstone, above), we should in the present case be asking ourselves these questions:
>
> 1. Is there, as in the insurance cases, such a superior-inferior power differential as to create a 'special element of reliance' resulting from the employee's reliance on the employer's credibility and the employer's promise and powerfully expectant guarantee of retirement benefits?
> 2. Would contract damages hold employers like K Mart accountable for this kind of misconduct?
> 3. Would contract damages, under circumstances such as these, make an aggrieved employee 'whole'?

More recently, Shaw v. CitiMortgage, Inc., 201 F.Supp. 3d 1222, 1254 (D. Nev. 2016), applying Nevada law, reaffirmed and applied Ponsock's approach:

> [A] breach of the implied covenants can give rise to tort liability when there is a special relationship between the contracting parties. Id. (stating that a tort action for an implied covenants claim requires a special element of reliance or fiduciary duty); see also Sutton, 103 P.3d at 19 (tort liability for breach of the implied covenants of good faith and fair dealing is appropriate where 'the party in the superior or entrusted position has engaged in grievous and perfidious misconduct.'); Max Baer Prods., Ltd. v. Riverwood Partners, LLC, 2010 WL 3743926, t *5, 2010 U.S. Dist. LEXIS 100325, at *14 (D.Nev.2010) ("Although every contract contains an implied covenant of good faith and fair dealing, an action in tort for breach of the covenant arises only 'in rare and exceptional cases' when there is a special relationship between 'he victim and tortfeasor.'"). A special relationship is 'characterized by elements of public interest, adhesion, and fiduciary responsibility.' Id. Under a tortious breach, 'a successful plaintiff is entitled to compensation for all of the natural and probable consequences of the wrong, including injury to the feelings from humiliation, indignity and disgrace to the person.' Sutton, 103 P.3d at 19.

Tortious breach of the covenant of good faith and fair dealing is a tort, not a breach of contract. Ponsock, 103 Nev. at 48-51, 732 P.2d at 1370-71.

2. Elements of claim for tortious breach of covenant of good faith and fair dealing.

Based upon this authority, the elements of tortious breach of the covenant are:

The existence of a contract between the parties.

A special element of reliance or fiduciary duty associated with the contract.

Breach by a party of the implied duty of good faith and fair dealing in the contract's performance and enforcement, specifically where the party in the superior or entrusted position has engaged in grievous and perfidious misconduct.'

The other (non-breaching) party fulfilled his obligations under the contract.

The breach is the cause of damage to the non-breaching party.

3. Application to the present facts.

To prove the tort, the evidence establishes the following elements:

Contract. There was a Contract between the parties. (Exh. 4).

Fiduciary duty. Contract, statute and case authority establish the special element of reliance and fiduciary duty of an investment advisor to his client. See authority discussed in relation to the Sixth-Seventh Claims for Relief. The Agreement acknowledges that Wespac and Mr. Christian had a fiduciary duty to Dr. Garmong. Exhibit 4, ¶ 3(3), WESPAC 00049.

"Grievous and perfidious" misconduct

Perhaps most egregiously, Wespac and Mr. Christian knew full well how to protect Dr. Garmong's retirement and savings accounts by using the "Stop Losses" investment-management technique. In fact, at the very time when the worst of the losses from his accounts were occurring, they were advocating the use of "Stop Losses" to prospective clients for "all" equity purchases. (Exh. 20). Yet they concealed the "Stop Losses" approach from Dr. Garmong, and never used it in his behalf. Mr. Christian was apparently too busy conducting seminars for prospective new clients, and spending his time on his side business of managing a mutual fund in which he had an ownership interest, to take the few minutes required to protect Dr. Garmong's accounts using the "Stop Losses" technique. Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d 429, 426 (2007)(suppression or omission of a material fact is equivalent to a false representation.).

Wespac and Mr. Christian also had the specific intent of deceiving Dr. Garmong by concealing the prior discipline and suspension of Defendant Christian at the outset of the relation in 2005 when they were attempting to persuade Dr. Garmong to enter the Investment Management Agreement and to become a customer, and thereafter during 2005-2008 when he did become a customer. (This and the following breaches are discussed more fully in relation to the Fifth Claim.) They had the specific intent to defraud him by concealing their failure to adhere to SEC and Nevada state law, and failure to disclose Mr. Christian's other conflicting business running his new company called Fusion Asset Management. They also had the specific intent to defraud him by concealing that they knew how to avoid capital losses in his accounts. When they set out to defraud and deceive him, Wespac and Mr. Christian knew that Dr. Garmong was over 60 years of age, was soon to retire (and had retired at the time they took over sole management of Dr. Garmong's retirement accounts in

late-October 2007, had instructed Wespac and Mr. Christian to manage his accounts conservatively and so as to avoid loss of capital, and that Dr. Garmong had relinquished to Wespac and Mr. Christian sole management authority over his managed accounts on the condition that they not lose capital. Defendants knew that they had made sweeping claims in their brochures and oral presentations to induce Dr. Garmong to become their Client and to trust them. Wespac and Mr. Christian knew they had contractual, statutory, fiduciary, and agency duties to Dr. Garmong.

Nevertheless, Wespac and Mr. Christian knowingly engaged in misconduct and breach of their contractual, fiduciary and agency duties by failing to follow Dr. Garmong's investment objectives and instructions, costing Dr. Garmong $648,670.88 in capital losses and $21,283.29 in unearned "advisor fees." in just 15 months.

Wespac and Mr. Christian argue that they did a proper, responsible job on Dr. Garmong's behalf, but the proof contradicts this position. How did they manage to lose $648,670.88 in 15 months, while taking very little action to attempt to avoid the wasting of Dr. Garmong's retirement and savings accounts, and refusing to employ the "Stop Losses" technique that they touted to prospective clients for use on "all" equity purchases?

The inquiry into "grievous and perfidious misconduct" expresses the result of a mixed factual and legal investigation by the arbitrator. A primary guide to whether Wespac and Mr. Christian engaged in such "grievous and perfidious misconduct" is prior decisions assessing the meaning and application of that term under Nevada law. The courts have recognized circumstances resulting in "grievous and perfidious" misconduct, considering both the nature of the wrongdoing and the person against whom it is perpetrated.

The nature of the contractual relation must first be considered, and the effect of Defendants' breach on Dr. Garmong. The Agreement and the business relation between Dr. Garmong, on the one hand, and Wespac and Mr. Christian, on the other, does not deal with a merchant sale of a crate of eggs, for example. It deals with the funds that Dr. Garmong had earned, saved, and set aside to support himself after retirement, for the rest of his life. Wespac and Mr. Christian were well aware of this, as three of the five managed accounts

were IRS-authorized, tax-deferred retirement accounts. The breach relates to the intentional deprivation of an older person's retirement benefits by his fiduciary and agent, who was bound to act according to investment objectives and instructions provided by Dr. Garmong.

Wespac and Mr. Christian could have easily earned the over-$20,000 a year that they charged Dr. Garmong, and he paid them, to avoid the disaster they imposed upon Dr. Garmong's life savings. They could have taken a few minutes, literally just a few minutes, to enter "Stop Losses" on all of the securities that they purchased for his accounts, and add "Stop Losses" to the other securities in his accounts. In July 2008, Mr. Christian and Wespac had pitched to a prospective customer, Mr. A. Dale Sharpe, that because of the volatile market that "Stop Losses" should be used on "all equity purchases." (Exh. 20, WESPAC 0970). At the very least they could have discussed this capital-conserving approach with Dr. Garmong, but they never did. Indeed, after Defendants had wasted a significant portion of his retirement savings, in his letter of September 30, 2008 (Exh. 17), Mr. Christian stated (ignoring the several occasions when Dr. Garmong had provided his objectives and instructions "not to lose capital" (Exh. 11-14)), "You never told me that 'there could not be losses from my accounts in 2008.' If any client had told me that I would have offered you two alternatives, (1) go to 100% cash or (2) to close your accounts." Perhaps Mr. Christian had forgotten the "Stop Losses" strategy on "all equity purchases" that he had touted to Mr. Sharpe just two months earlier. He had also forgotten about Wespac's hi-tech recordkeeping system where he could have manually evaluated Dr. Garmong's accounts as often as he wished: quarterly, monthly, weekly, or daily. (See Defendants' sales brochure Exh. 2, page GG 0345). Mr. Christian had only to check the value of the managed accounts and determine how they were doing. Presumably, Wespac's "hi-tech recordkeeping system" could even have been instructed to signal automatically changes in the value of capital in the accounts, a stop loss system independent of that of the custodian Schwab.

Mr. Christian has pointed to one of Dr. Garmong's accounts as exemplifying his good management, account 4935-0713. Exh. 28 is a summary of Mr. Christian's trading in that account in the period November 2007-February 2009. Briefly, the securities that Mr.

Christian purchased lost $163,863.75 in 12 months or less, or 45.7% of their as-purchased value. No one (other than the Defendants) would argue that to be good stewardship.

Five additional circumstances reflect Defendants' callous attitude and evidence their "grievous and perfidious misconduct."

First, when Dr. Garmong began to question their failure to follow his instructions, Wespac and Mr. Christian talked him out of taking action. Defendant Christian said that so much new business came into Wespac that he didn't have time to devote attention to Dr. Garmong's accounts, and that Dr. Garmong had not protested sufficiently forcefully to get his attention. He compounded this inattention by bragging that other Wespac clients were doing well (presumably because Mr. Christian did use the "Stop Losses" technique to protect them). He forgot to mention that he was spending part of his time on his conflicting side business, Fusion Asset Management (See Christian Deposition, Exh. 58, page 30:6-32:23). Of course, Wespac and Mr. Christian should have fulfilled their contractual, statutory, fiduciary, and agency duties to their existing client, Dr. Garmong, before taking on new business.

Second, after Dr. Garmong did start to become vociferous in the summer of 2008, Wespac and Mr. Christian did nothing to stem the tidal wave of losses, and instead focused on talking Dr. Garmong into remaining as a Client so that they could continue to accrue their "advisor fees." As seen by reviewing the financial summary results of Exh. 27-29, in just the six months of June-November 2008, Wespac and Mr. Christian wasted Dr. Garmong's managed accounts of $441,458.41, while blithely continuing to collect their "advisor fees" of over $10,000 (Exh. 30) for that six months. Even when Dr. Garmong did complain, Wespac and Mr. Christian did nothing to stop the losses, and accused him of being too aggressive in his complaints. (Exh. 19).

Third, as Dr. Garmong discovered in about November 2016 and as discussed more fully in relation to the Fifth Claim, during this entire period Defendant Wespac was a scofflaw, refusing to follow the federal SEC rules and the Nevada state laws governing their company and their business, and purposely deceived the SEC.

Fourth, Wespac and Mr. Christian even concealed Defendant Christian's prior lawbreaking, and discipline and suspension by the SEC. (Again, see the discussion under the Fifth Claim). Defendant Christian's prior lawbreaking and discipline by the SEC was first revealed in Defendants' Opening Arbitration Brief, page 4:26-5:4. This concealment is particularly "grievous and perfidious" misconduct.

The purpose of full disclosure by fiduciaries and agents is that the client may make informed decisions. Had Wespac and Mr. Christian informed Dr. Garmong that they were refusing to follow his objectives and instructions, were not obeying federal and state laws, or that Defendant Christian had been disciplined and suspended by the SEC for defrauding earlier clients by violating SEC rules, or that Mr. Christian was devoting a good deal of time to his conflicting business, Dr. Garmong would have had the information required to make an informed decision. Dr. Garmong would have been on notice that Wespac and Mr. Christian likely would not honor a private contract and their legal obligations, and he never would have dealt with them.

Fifth, Wespac and Mr. Christian had and have no remorse or concern for their having deprived their elderly client, Dr. Garmong, of a significant fraction of his life savings for retirement. On April 23, 2013, Defendant Christian sent a letter on behalf of Defendant Wespac to Schwab. (Exh. 21). This letter was unknown to Dr. Garmong until document production by Wespac and Mr. Christian in this case. Wespac and Mr. Christian continue to conceal the other documents associated with Exh. 21, but it can be surmised from the context that Schwab inquired of Wespac about its treatment of Dr. Garmong, and Wespac responded that "We have no plans of entering into a settlement offer with Mr. Garmong. We acted completely within our fiduciary duties to manage his assets in accordance with the stated objectives." and "We have not and do not intend to reimburse management fees." In the minds of Wespac and Mr. Christian, their "fiduciary duties" included concealing significant material information from Dr. Garmong and refusing to follow their customer's written objectives and instructions, costing Dr. Garmong about $650,000 in just 15 months. Neither Schwab nor Wespac informed Dr. Garmong of this exchange. Wespac and Mr.

Christian were not only dishonest with Dr. Garmong, but also dishonest with their major source of business, Schwab.

Another factor bearing on establishing "grievous and perfidious misconduct" is whether the behavior of Wespac and Mr. Christian was manifested in a single act, or there were multiple acts, see State, University and Community College System v. Sutton, 120 Nev. 972, 989-90, 103 P.3d 8, 19-20 (2004). Had Dr. Garmong expressed only a single time his instructions to be conservative and not to avoid loss of capital from his accounts, there might be some argument that Wespac and Mr. Christian did not understand, and were not ignoring his instructions intentionally. But in view of Dr. Garmong's repetitions of his instructions and objectives to manage conservatively and not to lose capital, Defendants' intentional failure to obey his instructions, extending over a period of time, evidences bad faith, grievous and perfidious misconduct. Moreover, the losses were not confined to a single month, but occurred repeatedly, month after month. (Exh. 27). Even after Dr. Garmong became vociferous in his demands that Wespac and Mr. Christian follow his objective of not losing capital, under their sole management Dr. Garmong's accounts managed by Defendants lost $441,458.41 in six months!

These factual circumstances, including intentional and willful breach of contractual, statutory, fiduciary, and agency duties and refusal to follow Dr. Garmong's express, written investment objectives and instructions, may be viewed in the context of prior Court decisions on the nature of"grievous and perfidious misconduct." In Ponsock, where the defendant had no contractual, statutory, fiduciary, or agency relation and the plaintiff was in his mid-50's, the intentional dishonest deprivation of retirement benefits constituted "grievous and perfidious misconduct." In the present case, Wespac and Mr. Christian knew that Plaintiff was "elderly," that he was already retired, that he had no pension other than social security, that he relied upon the managed accounts for support throughout the rest of his life, and that they had contractual, statutory, fiduciary, and agency duties to him. And in the present case, as discussed above, Wespac and Mr. Christian were particularly callous in their dealings with Dr. Garmong, by refusing to discuss with Dr. Garmong or to apply on Dr. Garmong's behalf,

the "Stop Losses" technique that they told prospective clients was a key to their success. (Exh. 20). Breach of a fiduciary duty to an already-retired elderly person, costing him a significant amount of his retirement savings, is "grievous and perfidious misconduct" by its very nature.

The courts have begun to take a special interest in protecting the elderly from physical and financial abuse. See, for example, Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043 (2000) and Estate of Wildhaber ex rel. Halbrook v. Life Care Centers, 2012 WL 5287980 (D. Nev. 2012). As the U.S. Supreme Court has stated in Washington v. Glucksberg, 521 U.S. 702, 731 (1997), "[T]he State has an interest in protecting vulnerable groups-including the poor, the elderly, and disabled persons-from abuse, neglect, and mistakes." In Parsons v. First Investors Corp., 122 F.3d 525, 530 (8th Cir. 1997), the Eighth Circuit quoted with approval the district court in upholding punitive damages: "Fraudulent representations which put the life savings of the elderly at risk are reprehensible and deserve punishment."

Nevada also has taken a special interest in protecting the elderly from acts of greed and neglect such as those committed by the Defendants. See the discussion of the Fifth Claim and the doubling of damages.

Never once did Wespac or Mr. Christian notify Dr. Garmong that they would not, or could not, manage his managed accounts as he had instructed them. In his letter of September 30, 2008 (Exh. 17), a time when under Defendants' management Dr. Garmong's accounts had lost over $600,000 in capital value, Defendant Christian calmly informed Dr. Garmong that he knew all along how to have avoided the wasting of Dr. Garmong's life savings: "Go to 100% cash" for the duration of the decline in the stock markets. But he did not do that, contrary to his contractual, statutory, fiduciary, and agency duties. And even in this letter, Mr. Christian concealed the "Stop Losses" technique that he had proclaimed only two months earlier to prospective-client Mr. Sharpe (Exh. 20) as a basis for Wespac's success in investment management

An agent is required to inform his principal if he does not intend to follow the

instructions of the principal. Restatement Agency (Third) § 8.09, comment (c), states: "When an agent determines not to comply with an instruction, the agent has a duty to so inform the principal. See § 8.11, Comment d."

Defendants' misconduct is properly considered "grievous and perfidious."

Dr. Garmong fulfilled all of his obligations under the contract. See discussion under the First Claim.

Damage and causation. Dr. Garmong, the party who performed all of his obligations, was damaged as a result of Defendants' failure to follow Dr. Garmong's written investment objectives and instructions in an amount of $648,670.88 plus $21,283.29 in unearned advisor fees, for a total of $669,954.17. These losses were proximately caused by Defendants' failure to follow Dr. Garmong's written investment objectives and instructions because Wespac and Mr. Christian had sole responsibility for the performance of the managed accounts.

4. The appropriate measure of damages.

As quoted above from Andreatta, "This additional tort liability is allowed where 'ordinary contract damages do not adequately compensate the victim because they do not require the party in the superior or entrusted position . . . to account adequately for grievous and perfidious misconduct, and contract damages do not make the aggrieved, weaker, 'trusting' party 'whole.' "

Contract damages of $$648,670.88 + $21,283.29 = $669,954.17 do not make Dr. Garmong whole nor hold Wespac and Mr. Christian to account for their "grievous and perfidious misconduct." Wespac and Mr. Christian will likely do the same thing to others unless proper action is taken.

The authority quoted above allows the arbitrator to award special damages for the tortious breach of the covenant of good faith and fair dealing.

Nevada law allows for a doubling of the damages for injury to the elderly pursuant to NRS 41.1395, see the subsequent discussion.

Additionally, Nevada law allows the assessment of punitive damages. Ponsock, 103

Nev. at 53, 732 P. 2d at 1373, endorsed the appropriate award of punitive damages and affirmed the jury's award of punitive damages, stating as a public policy:

> The use of punitive damages in appropriate cases of breach of the duty of good faith and fair dealing expresses society's disapproval of exploitation by a superior power and creates a strong incentive for employers to conform to clearly defined legal duties. Such duties are so explicit and so subject of common understanding as to justify the punitive award.

Ponsock, *Id.*, further commented:

> To permit only contract damages as the sole remedy for this kind of conduct would be to render K Mart totally unaccountable for these kinds of actions. If all a large corporate employer had to do was to pay contract damages for this kind of conduct, it would allow and even encourage dismissals of employees on the eve of retirement with virtual impunity. Having to pay only contract damages would offer little or no deterrent to the type of practice apparently engaged in by K Mart in this case. Further, an aggrieved employee, relying on, and anxiously awaiting his retirement benefits would not be made whole by an award of contract damages resulting from wrongful discharge, even if he were awarded the expected retirement benefit. The jury was entitled to believe that K Mart did more than merely discharge wrongfully and without cause, that it went further. After involving itself in a relationship of trust and special reliance between itself and its employee and allowing the employee to rely and depend on continued employment and retirement benefits, the *52 company, to serve its own financial ends, wrongfully and in bad faith, breached the employment agreement."
>
> * * * * *
>
> Given the relationship of the parties and the circumstances of this case, it does not appear that K Mart would be held adequately accountable by mere payment of contract damages. A thief or embezzler is not thought to be held accountable for his crime by merely being required to return the stolen or embezzled goods; an additional penalty must be imposed. Merely having to compensate for its breach of contract would not hold K Mart and other similarly situated employers accountable for this kind of bad faith.
> Similarly, contract damages do not make the Ponsocks of the world whole. Merely giving to Ponsock that to which he is contractually entitled does not make him whole, does not compensate him for the injury, the insult, the wrong suffered at the hands of K Mart. For these reasons we find that the jury's express finding that K Mart was guilty of bad faith was supported by the evidence and that the district court's allowance of bad faith tort damages in this case was without error.

Because Defendants' misconduct is particularly reprehensible, and "grievous and perfidious," punitive damages, assessed in addition to actual and general damages, equal to three times the actual damages should be awarded, per NRS 42.005.

Dr. Garmong has established the five elements required to prevail under this Fourth Claim for Relief.

E. Fifth Claim for Relief; Breach of Nevada Deceptive Trade Practices Act, NRS Ch. 598.

NRS Ch. 598 encompasses many of the considerations discussed in relation to the Fourth Claim, but adds a further consideration, explicit special protection for the elderly. That Dr. Garmong falls within the specially protected class of elderly persons is sufficient to invoke protection under NRS Ch. 598. The protection afforded by NRS Ch. 598 does not require "grievous and perfidious conduct," nor does it require a culpable state of mind.

1. Basis of claim–consumer protection under NRS Ch. 598.

NRS Ch. 598, the Nevada Deceptive Trade Practices Act, defines deceptive trade practices used to damage consumers, establishes private civil actions as remedies, defines penalties, and states Nevada's public policy against those who vicitimize the elderly by deceptive trade practices. Its significance in this action is that it provides special remedies for, and special penalties against, deceptive trade practices perpetrated against the elderly, including deceptive trade practices by financial planners and investment advisors such as Wespac and Mr. Christian.

Specific statutes define the prohibited deceptive trade practices, and the following quotations from the statutes set forth those pertinent here.

NRS 598.0915 defines two pertinent types of deceptive trade practices:

> NRS 598.0915 'Deceptive trade practice' defined. A person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she:
>
> 7. Represents that goods or services for sale or lease are of a particular standard, quality or grade, or that such goods are of a particular style or model, if he or she knows or should know that they are of another standard, quality, grade, style or model.
>
> 15. Knowingly makes any other false representation in a transaction.

NRS 598.092 defines another pertinent type of deceptive trade practice:

> NRS 598.092 'Deceptive trade practice' defined. A person engages in 'deceptive trade practice' when in the course of his or her business or occupation he or she:
>
> (f) Fails to comply with any law or regulation for the marketing of securities or other investments.

NRS 598.0923 defines three pertinent types of deceptive trade practices:

> "NRS 598.0923. 'Deceptive trade practice' defined. A person engages in a 'deceptive trade practice' when in the course of his business or occupation he knowingly:
> 1. Conducts the business or occupation without all required state, county, or city licenses.
> 2. Fails to disclose a material fact in connection with the sale or lease of goods or services. . . .
> 3. Violates a state or federal statute or regulation relating to the sale or lease of goods or services.

2. Special application to deceptive trade practices against the elderly.

NRS 598.0933 defines an "Elderly' person": "'Elderly person' means a person who is 60 years of age or older."

NRS 598.0977 creates a private civil action against those who perpetrate deceptive trade practices against the "elderly," and also provides for the assessment of actual damages, punitive damages, and attorney's fees:

> NRS 598.0977. Civil action by elderly person or person with disability against person who engaged in deceptive trade practice; remedies. If an elderly person or a person with a disability suffers damage or injury as a result of a deceptive trade practice, he or his legal representative, if any, may commence a civil action against any person who engaged in the practice to recover the actual damages suffered by the elderly person or person with a disability, punitive damages, if appropriate, and reasonable attorney's fees. The collection of any restitution awarded pursuant to this section has a priority over the collection of any civil penalty imposed pursuant to NRS 598.0973.

3. The awarding of punitive damages and reasonable attorneys fees expresses the public policy of the State of Nevada, and private parties may not agree to contravene or disregard the public policy of the State of Nevada.

NRS 598.0977 is the Nevada legislature's expression of the public policy of awarding actual damages, punitive damages and reasonable attorney's fees in cases where the elderly have been victimized by deceptive trade practices. The arbitration provision in the Investment Management Agreement, Exh. 4, ¶ 16, prohibits the award of punitive damages. Parties may not agree to waive Nevada's public policy, in this case expressed in NRS 598.0977. In Gonski v. Second Judicial District Court, 126 Nev. 551, 245 P. 3d 1164 (2010) *overruled on other grounds*, U.S. Home Corporation v. Michael Ballesteros Trust, 134 Nev.

Adv. Op. 25, 415 P.3d 32 (2018) the Nevada Supreme Court was confronted with an arbitration provision in the sale of a residential property which abridged statutory remedies. The court found the restriction on available remedies violated public policy and was therefore void as unconscionable:

> Like the California court [Armendariz v. Foundation Health Psychcare, 6 P.3d 669, 679-80 (Cal. 2000)], we agree that arbitration agreements cannot be used to avoid rights and liabilities imposed by statute when doing so would violate the public policy of this state. Kindred v. Dist. Ct., 116 Nev. 405, 414, 996 P.2d 903, 909 (2000) (citing Mitsubishi Motors, 473 U.S. at 628, 105 S.Ct. 3346). Indeed, contract terms that violate public policy are often one-sided in favor of the more powerful party, rendering them substantively unconscionable. See, e.g., State Farm Mut. Auto. Ins. v. Hinkel, 87 Nev. 478, 481–82, 488 P.2d 1151, 1153 (1971) (discussing a contractual exclusionary clause in light of Nevada public protections under insurance statutes and noting that '[i]t was not the intent of the legislature to require the appellant to offer protection with one hand and then take a part of it away with the other'); 8 Richard A. Lord, Williston on Contracts § 18:10 (4th ed.2010) (pointing out that substantively unconscionable terms are those that 'are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy').

245 P. 3d at 563. The prohibition in the arbitration provision in this case is void as against public policy; therefore, the arbitrator is free to award punitive damages and attorney's fees under NRS 598.0977. The arbitrator should award punitive damages and attorney's fees against Defendants for their blatant disregard of their contractual, statutory, fiduciary, and agency duties, in wasting hundreds of thousands of the retirement savings of their already-retired client, and their deceptions perpetrated against Dr. Garmong.

4. Elements and burden of proof.

Nevada state courts have not addressed the elements and burden of proof of a private civil action under NRS Ch. 598. The Nevada federal district court has, in interpreting NRS Ch. 598 of Nevada law, predicted how Nevada courts would rule. See Picus v. Wal-Mart Stores, Inc., 256 F.R.D. 651, 658 (D.Nev. 2009) and Sobel v. Hertz Corporation, 698 F.Supp.2d 1218, 1230 (D.Nev. 2010). Picus states:

> The Court therefore concludes that for a private NDTPA [Nevada Deceptive Trade Practices Act] claim for damages, the Nevada Supreme Court would require, at a minimum, a victim of consumer fraud to prove that (1) an act of consumer fraud by the defendant (2) caused (3) damage to the plaintiff.

(Bracketed explanation added).

The burden of proof in a private deceptive trade practices action under NRS 598.0977, as with all civil matters in the absence of legislative intent to the contrary, is "preponderance of evidence." Betsinger v. D.R. Horton, 126 Nev. 162, 165, 232 P.3d 433, 436 (2010).

5. Application to the present facts.

Standing to pursue a private-remedy civil action. Dr. Garmong is, and was at all relevant times, an "elderly person" as defined in NRS 598.093.

A preponderance of the evidence must establish the following elements:

Act of consumer fraud. Wespac and Mr. Christian engaged in multiple deceptive trade practices in their dealings with Dr. Garmong.

Wespac and Mr. Christian violated NRS 598.0915 (7) and (15), most significantly by representing and contractually agreeing that they would and did follow Dr. Garmong's instructions, and would provide competent investment advice and management to Dr. Garmong, when they were fully aware that was not the case. Indeed, they admitted that they had taken on so much work that they could not properly advise Dr. Garmong and manage his accounts that he had entrusted to Wespac and Mr. Christian. And, incredibly, Mr. Christian admitted in his deposition (Exh. 58) and in his letter (Exh. 17) that he had attempted to perform as Dr. Garmong had instructed but was unsuccessful for two reasons: first, that he would not go to an all cash-position to protect the client's assets even if that were in the client's best interest, and, second, that he knew what to do but was unable to perform properly. More generally, Wespac and Mr. Christian represented in their sales materials that they would provide personalized service to clients, of the highest quality. (Exh. 1-2). They concealed that they had not complied with the SEC requirements, and had not complied with at least three Nevada statutes. They concealed that Mr. Christian had been disciplined and suspended by the SEC, and that Mr. Christian was running a conflicting business, Fusion Investment Management. They concealed the "Stop Losses" approach that they were advocating to persuade new clients, even as they failed to use "Stop Losses" on Dr. Garmong's accounts.

Wespac and Mr. Christian conducted a deceptive practice as defined in NRS 598.092(f) by failing to comply with laws or regulations for the marketing of securities or other investments, specifically the rules of the Securities Exchange Commissioner (Exh. 38) and by not complying with NRS 90.330 requiring registration of investment advisors (Exh. 40). Defendants did not have the mandatory insurance required by NRS 628A.040 for financial planners.

Wespac and Mr. Christian perpetrated a deceptive trade practice as defined by NRS 598.0923(1) by conducting their business without all required state, county, and city licenses. Wespac and Mr. Christian were not licensed as investment advisors as required by NRS 90.330 (Exh. 40) and were not registered as a foreign LLC as required by NRS 86.544. (Exh. 41).

Wespac and Mr. Christian perpetrated a deceptive trade practice as defined by NRS 598.0923 (2) by failing to disclose material facts in connection with the sale or lease of goods or services, specifically Defendant Christian's prior illegal conduct resulting in discipline and suspension by the SEC (Exh. 56-57). Also, Wespac and Mr. Christian did not disclose that they were not properly managing Dr. Garmong's accounts according to his written objectives and instructions, and that they had overcommitted themselves so that they did not have the time to properly manage his accounts. They also were not in compliance with the rules of the SEC (Exh. 38-39) and the statutory law of Nevada (Exh. 40-41). Wespac and Mr. Christian concealed the fact that they did not make the mandatory disclosure of a Code of Ethics in their Form ADV-II (Exh. 49).

Wespac and Mr. Christian perpetrated deceptive trade practices as defined by NRS 598.0923(3) by violating the rules of the SEC concerning adopting a Code of Ethics and by failing to disclose a Code of Ethics in their Form ADV-II (Exh. 38-39), by not complying with NRS 90.330 requiring registration of investment advisors (Exh. 40), by not complying with NRS 86.544 requiring registration of a foreign LLC (Exh. 41), and by not being in compliance with NRS 628A.040 requiring errors and omissions insurance or a bond.

Causation of damages. Wespac and Mr. Christian were in sole management of Dr.

Garmong's managed accounts during November 2007-February 2009, and failed to follow his written objectives and instructions. Dr. Garmong will testify that if Wespac and Mr. Christian had made the disclosures of their failure to obey federal and state laws as required by their fiduciary and agency duties to Dr. Garmong, and the fact that the SEC had previously disciplined and suspended Defendant Christian, Dr. Garmong would never have dealt with Wespac and Mr. Christian in the first instance.

Damage to the plaintiff. As a direct result of Defendants' violations of the provisions of NRS 598.0915, 598.092, and 598.0923, Dr. Garmong's accounts under the sole management of Wespac and Mr. Christian lost $648,670.88 in value of invested capital in the period from November 2007 to February 2009, inclusive. (Exh. 29). During the same period, Wespac and Mr. Christian collected about $21,283.29 in unearned "advisor fees." (Exh. 30). Dr. Garmong should be awarded the total of these damages, $669,954.17.

NRS 598.0977 allows the award of actual damages, which can include special or general damages. Special damages have already been discussed. However, Dr. Garmong is also entitled to the award of general damages–damages for mental distress and anxiety that any elderly person would experience in this situation.

All of these damages should be doubled pursuant to NRS 41.1395, see later discussion.

Dr. Garmong should be awarded punitive damages (NRS 598.0977) in an amount of three times the actual damages (NRS 42.005), in conformance with Nevada's public policy to protect the elderly.

Shaw v. CitiMortgage, Inc., 201 F.Supp. 3d 1222, 1263-1265 (D. Nev. 2016), applying Nevada law, reviewed in detail the criteria for awarding punitive damages:

> Under Nevada law, in order to recover punitive damages, a plaintiff must show the defendant acted with oppression, fraud or malice. Pioneer Chlor Alkali Co. v. National Union Fire Ins. Co., 863 F.Supp. 1237, 1250 (D.Nev.1994). Oppression is a conscious disregard for the rights of others constituting cruel and unjust hardship. Id. at 1251 (citing Ainsworth v. Combined Ins. Co. of America, 104 Nev. 587, 763 P.2d 673, 675 (1988)). 'Conscious disregard' is defined as 'the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to

avoid those consequences.' NRS ¶ 42.001(1). Malice is conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights and safety of others. See NRS ¶ 42.005(1). In order to establish that a defendant's conduct constitutes conscious disregard, the conduct must at a minimum 'exceed mere recklessness or gross negligence.' Pioneer Chlor Alkali Co., 863 F.Supp. at 1251; see also Countrywide Home Loans, Inc. v. Thitchener, 124 Nev. 725, 192 P.3d 243, 255 (2008) (holding that conscious disregard requires a 'culpable state of mind' and therefore 'denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence.').

Based upon the substantial factual history in this action, and recognizing that CMI is a large home loan servicing company, the court finds by clear and convincing evidence that CMI's business practices and its specific conduct toward Shaw constituted oppression and a conscious disregard for Shaw's rights warranting punitive damages. Given the fact that Shaw's debt of over $900,000 was for his home, that a home is most Americans greatest asset and also greatest liability and is such an integral part of any homeowner's personal well being, the court finds that a homeowner is particularly vulnerable as a result of a tortious breach of the implied covenant of good faith and fair dealing oppressively committed by a large corporate servicing company such as CMI.

Here, there was a willful and unconscionable failure to avoid needless and harmful consequences in refusing to honor or recognize the May 2011 Modification Agreement (executed by CMI's Vice-President in May 2011). CMI's conduct in recognizing then continuously disavowing that agreement—despite a resolving document from CMI's Assistant General Counsel—was made with a conscious disregard for the harm that it was causing Shaw. Further, there was a willful and deliberate failure by CMI to avoid these consequences. Accordingly, the court finds that this is an appropriate case for punitive damages.

* * * * *

Given the obvious effects such a position would have upon any borrower/homeowner and the lack of any bargaining position to challenge CMI's position, it is clear that there would be dramatic and harmful consequences to a borrower which would cause feelings of utter frustration, worthlessness, and shame—shame and fear over losing a home—at the very time that the borrower was likely experiencing an insurmountable burden of debt. A non-attorney borrower would likely have caved in to CMI while an attorney like Shaw chose instead to rely upon his contract, though not without obvious compensable injury.

* * * * *

In Nevada, an award of punitive damages is limited to "[t]hree times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more." NRS ¶ 42.005(a). Here, the compensatory damages under Shaw's tortious breach of the implied covenants claim is $239,850.00 and the court finds that an appropriate amount of punitive damages for the conduct outlined above is the statutory limit. Thus, trebling this amount, the court shall enter judgment in the amount of $719,550.00 in favor of Shaw and against CMI for punitive damages.

Shaw v. CitiMortgage, Inc., 201 F.Supp. 3d 1222, 1264, continues:

But, the court now highlights several factors which particularly stand out in support of punitive damages and which have not been more specifically addressed. These include CMI's lack of policies, procedures, practices and

> management oversight in handling mortgage account issues such as Shaw's. The lack of company policies and management oversight in this action allowed CMI, through its Loss Mitigation, underwriting, and Executive Response Unit departments, to take the offensive position that CMI was entitled to require Shaw to abandon the fully executed May 2011 Modification Agreement in favor of the proposed July 2011 Modification Agreement despite upper management and assistant general counsel taking inconsistent and contrary positions. In essence, CMI chose to ignore its own agreement (and its own corporate counsel) because the company was aware that a financially strapped homeowner who was in default on a home loan during the post-recession economic downturn was in no position to hold CMI to the agreement it had unilaterally chosen to ignore. Given the obvious effects such a position would have upon any borrower/homeowner and the lack of any bargaining position to challenge CMI's position, it is clear that there would be dramatic and harmful consequences to a borrower which would cause feelings of utter frustration, worthlessness, and shame—shame and fear over losing a home—at the very time that the borrower was likely experiencing an insurmountable burden of debt. A non-attorney borrower would likely have caved in to CMI while an attorney like Shaw chose instead to rely upon his contract, though not without obvious compensable injury.
>
> Beyond the above, the court also finds that there was a serious lack of practices, policies and procedures to deal with and explain the company's positions and actions to the borrower/homeowner.

In the present case, Defendants' misconduct in wasting the retirement savings of an elderly, already-retired person is far more blameworthy than the lender's conduct in Shaw.

Dr. Garmong should also be awarded his attorney's fees, NRS 598.0977.

Dr. Garmong has demonstrated the three elements required to prevail under this Fifth Claim for Relief, and the basis for damages.

F. Sixth Claim for Relief; Breach of Fiduciary Duty

1. Legal Basis

Defendant financial planners/investment advisors/agents had a fiduciary duty to Dr. Garmong. The fiduciary duty arises out of statute, common law, and the provisions of the Agreement.

As to the statutory duty, see NRS 628A.010(3) and NRS 628A.020, providing that a financial planner has a fiduciary duty to his client.

The common law expressed in case authority states that an investment advisor and a financial planner have a confidential relation, and thus a fiduciary duty, to a client, including duties of full and fair disclosure, loyalty, and good faith and fair dealing. Randono v. Turk,

86 Nev. 123, 129, 466 P.2d 218, 222 (Nev. 1970).

The Agreement prepared by Wespac and Mr. Christian, Exhibit 4, ¶ 3(3) (WESPAC 000049), provides that Wespac and Mr. Christian have a fiduciary responsibility to Dr. Garmong, referring to "its fiduciary obligations to Client[.]" See also Exhibit 49, the Form ADV-II provided by Wespac and Mr. Christian to Dr. Garmong, document page GG 0371, stating that "The Advisor understands his fiduciary responsibility."

2. Some legal consequences of the determination that Wespac and Mr. Christian had a fiduciary duty to Dr. Garmong.

The determination that Wespac and Mr. Christian had a fiduciary duty to Dr. Garmong has important consequences.

Perry v. Jordan, 111 Nev. 943, 946-7, 900 P.2d 335, 337-8 (1995) held that the duty of a fiduciary requires the person in whom the trust and confidence are placed to act "in good faith and with due regard to the interests of the one reposing the confidence." Jory v. Bennight, 91 Nev. 763, 768, 542 P.2d 1400, 1404 (1975) found that fiduciary duties "include obligations of the utmost good faith, diligence, loyalty, fair dealing, and disclosure of material facts."

The case authorities take an exceedingly dim view of a fiduciary who breaches his fiduciary duties. Randono v. Turk, 86 Nev. at 129, 466 P.2d at 222, held: "This civil wrong, the breach of trust, is as reprehensible as the criminal act of embezzlement, from the point of view of equity."

3. Elements of the tort

The elements of breach of fiduciary duty or constructive fraud are therefore:

The existence of a confidential or fiduciary duty. and

a breach of that confidential or fiduciary duty.

There are no elements or requirements of intent, moral guilt, or justifiable reliance. Clark v. Lubritz, 113 Nev. 1089, 1096, 944 P.2d 861, 865 (1997).

Peardon v. Peardon, 65 Nev. 717, 767, 201 P.2d 309, 333 (1948), states "Where an

antecedent fiduciary relation exists, a court of equity will *presume* confidence placed and influence exerted." (Emphasis in original). Wespac and Mr. Christian are presumed to exert influence over Dr. Garmong.

4. The meaning of Defendants' "fiduciary duty" in the present circumstances.

The obligation of Defendants to Dr. Garmong includes adhering to his financial objective of avoiding capital losses. But it extends beyond that. Knowing that Dr. Garmong was retired and depending upon his accounts for financial support in his retirement, Defendants had an obligation to him of good faith, loyalty, fair dealing, and disclosure of material facts. They were aware of his extreme sensitivity to the diminution of his investment accounts. How hard would it have been for Defendant Mr. Christian to explain to Dr. Garmong, before Mr. Christian allowed the falling stock market to decimate Dr. Garmong's retirement savings, and to talk over with him the available alternatives. Those alternatives include the sale of securities, as discussed after-the-fact in Mr. Christian's letter of September 30, 2008 (Exh. 17), and the "Stop Losses" method, which Mr. Christian never disclosed or explained to Dr. Garmong, or utilized to stop the losses in Dr. Garmong's accounts. If Mr. Christian had a different view of his responsibilities, which he now professes, the purpose of the "full disclosure" of a fiduciary is to give the client all the facts, and let the client decide. When a client entrusts his affairs to a fiduciary, he properly expects the fiduciary to deal in good faith, to be loyal, and to make full disclosure. Dr. Garmong did not receive this kind of good faith, loyalty, and full disclosure.

According to his deposition testimony (Ex. 58, pg. 107:7-108:7), even in light of his fiduciary duty, Mr. Christian's view is that it was perfectly acceptable under the discredited net-out-of-pocket (NOP) theory of damages[3] to pursue a strategy to lose capital from Dr.

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[3] For reasons discussed in the accompanying Plaintiff's Motion to Exclude the Testimony and Opinions of Defendants' Expert Cramer regarding NOP damages Calculation and Hypothetical Comparisons," the NOP theory is not applicable in this case. But it has apparently guided the thinking of Mr. Christian to cause him to disregard his contractual,

Garmong's accounts as long as, in the end, the accounts had a value $1 greater than when Wespac started its management of the accounts.

> Q· ·Everything he had he had it under Wespac management.
> A· ·Correct.
> Q· ·So if he had $100 when he started and lots of stuff happened in between and he had $101 when he ended, he made money?
> A· ·Correct.
> Q· ·Would you call that net out-of-pocket?
> A· ·Yes.
> Q· ·Now, how does this view of his losses or his gains comport with the possibility that he should have had a whole lot more except for the investment strategy that you pursued?· It doesn't take account of that, does it?
> MR. BRADLEY:· Do you understand the question?
> THE WITNESS:· I don't understand the question.
> BY MR. HEBERT:
> If he had -- under my illustration he starts with $100 and he finishes with $101 and therefore, he's up by a dollar.
> Uh-huh.
> Q· ·But if Wespac had followed his advice on what to do with his accounts or followed his instructions, he would have had $150.
> Wouldn't you consider that a loss?
> · No.· I consider that a difference in valuations.· I would not consider it a loss, no.

When Dr. Garmong had been involved in the investment management strategy in September 2005-October 2007 (e.g., see Exh. 9). there had been a gain in the value of the accounts. When Mr. Christian took over sole management as discussed in Exh. 11-14, he felt that the NOP theory allowed him to ignore with impunity his contractual, statutory, fiduciary, and agency duties to Dr. Garmong as the stock market declined, as long as the bottom line showed a net profit compared to the value when Defendants got involved.

This is exactly the ill-conceived reasoning condemned by Federal Courts of Appeals in considering the net-out-of-pocket theory, which may apply in some securities litigation under federal law:

In Nesbit v. McNeil, 896 F.2d 380, 385-86 (9th Cir. 1990), the Ninth Circuit held:

> There is no reason to find that [plaintiffs] should be denied a recovery because

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statutory, fiduciary, and agency duties, with resulting severe wasting of Dr. Garmong's life savings and retirement funds.

> their portfolio increased in value, either because of or in spite of the activities of the defendants

and that "gains in portfolio will not offset losses."

Kane v. Shearson Lehman Hutton, Inc., 916 F. 2d 643 (11th Cir. 1990) observed,

> If the . . .[netting] . . . methodology espoused by [Shearson] were adopted, it could serve as a license for broker-dealers to defraud their customers with impunity up to the point where losses equaled prior gains."

(Exactly the approach espoused by Mr. Christian in his deposition testimony quoted above.)

The Eighth Circuit was similarly unsympathetic to the NOP theory. In a churning case, involving a commonly encountered form of securities fraud, Davis v. Merrill Lynch, Pierce, Fenner & Smith, 906 F. 2d 1206 (8th Cir. 1990) held:

> Merrill Lynch contends that Davis [the 87-year-old widow of the founder of the account] suffered no out-of-pocket losses because her account realized a net profit of over $53,000 during the time when the account was churned....
>
> We disagree with Merrill Lynch's argument that no actual damages were sustained because after deducting the unauthorized commissions, the account nevertheless realized a cumulative net profit of over $53,000 during the period it was churned. **The implications of this argument are disturbing. If we were to adopt Merrill Lynch's view, securities brokers would be free to churn their customers' accounts with impunity so long as the net value of the account did not fall below the amount originally invested. Churning is not excused by the fact that the account realizes a net profit.** In Nesbit, 896 F.2d at 386, the Ninth Circuit refused to offset the gains in portfolio against the losses in commissions . . . Because Mrs. Davis paid over $40,000 in commissions and would have earned over $50,000 more than she did had her account not been churned, it is nonsensical to argue that she did not suffer actual damages as a result of the churning."

(Bolding emphasis added).

The NOP theory has no place in determining damages in Nevada contract and tort claims at this time, and the people of Nevada can only hope that this situation never changes to encourage investment advisors to defraud their clients.

In summary of this section, Defendants' fiduciary duty to Dr. Garmong is not determined by the concept of NOP damages, nor is it limited to the instructions and objectives that Dr. Garmong gave Defendants.

5. Application to the present facts.

The evidence establishes the following elements:

Existence of a confidential or fiduciary duty of Wespac and Mr. Christian to Dr. Garmong. Wespac and Mr. Christian meet the definition of "financial planner." NRS 628A.010(3). A "financial planner" has a fiduciary duty to his customer. NRS 628A.020.

The case authority holds that an investment advisor has a confidential relation to his client, with consequent fiduciary duties. Randono v. Turk, 86 Nev. at 129, 466 P.2d at 222.

The Investment Management Agreement Exhibit 4 ¶ 3(3) (WESPAC 00049) prepared by Wespac and Mr. Christian expressly provides for a fiduciary obligation of Wespac and Mr. Christian to Dr. Garmong.

Breach of the fiduciary duty.

Beginning in November 2007, Defendants Wespac and Mr. Christian failed to follow Dr. Garmong's objective that they avoid loss of capital. They did not contemporaneously indicate any uncertainty or confusion in the meaning of Dr. Garmong's instruction and investment objective to avoid loss of capital. They did not inform Dr. Garmong that they would not seek to follow his objective, as required by Restatement Agency (Third) § 8.09, comment (c), which states, "When an agent determines not to comply with an instruction, the agent has a duty to so inform the principal. See § 8.11, Comment d."

On September 18, 2017, Wespac and Mr. Christian first disclosed to Dr. Garmong that Defendant Christian, Dr. Garmong's sole contact with Wespac and Mr. Christian, had been disciplined and suspended by the SEC in 1992 for a violation directly related to his illegal dealings with customers. (Exh. 56-57). Wespac and Mr. Christian had not previously disclosed these highly material facts to Dr. Garmong. Had Wespac and Mr. Christian disclosed these events to Dr. Garmong in a timely manner during the period August 2005-February 2009, he will testify that he would never have dealt with Wespac and Mr. Christian, because Defendant Christian's deceptions raised too many doubts about his honesty. These doubts, as it turns out, would have been well-founded.

When Defendants Wespac and Christian solicited Dr. Garmong in 2005 to hire them

as investment advisors, they both knew full well that Defendant Christian had been disciplined and suspended by the SEC in 1992 for dishonesty and fraudulent dealings with clients, but concealed this information from Dr. Garmong. Their concealment of this information from Dr. Garmong was part of a deliberate program of dishonesty and deceit, planned and perpetrated even from before the first meeting of Wespac and Mr. Christian and Dr. Garmong, and continuing after the Investment Management Agreement, Exhibit 4, was signed. Defendants' objective was to persuade Dr. Garmong to become their customer and pay them for "investment advice" that they did not earn.

Defendants Wespac and Christian never disclosed to Dr. Garmong that they did not comply with SEC regulations requiring a Code of Conduct and informing their clients of the Code of Conduct. (Exh. 38). They concealed that Mr. Christian was spending his time on his conflicting business, Fusion Financial Management.

That is, the entire relation between Wespac and Mr. Christian and Dr. Garmong was poisoned by the intentional breach of fiduciary duty by Wespac and Mr. Christian.

Dr. Garmong has demonstrated the two elements required to prevail under this Sixth Claim for Relief.

5. Damages

The arbitrator may award damages both in contract and in fraudulent breach of fiduciary duties, plus punitive damages. See Clark v. Lubritz, 113 Nev. at 1099-1100, 944 P.2d 861 at 867, where the jury found that the appellants were liable for breach of contract and awarded compensatory damages in the amount of $195,942.17 and stating, "Therefore, we conclude that the breach of fiduciary duty arising from the partnership agreement is a separate tort upon which punitive damages may be based." *Accord* Powers v. United Services Auto Assn, 114 Nev. 690, 703-04, 962 P.2d 596, 604-05 (1998) providing for the award of punitive damages for bad faith exercised in a fiduciary relationship. Clark v. Lubritz, 113 Nev. 1089 (1997) 944 P.2d 861, 867 at 1284 n. 24, states that the jury also found that the appellants breached their fiduciary duty to Lubritz, and awarded compensatory damages in tort in the amount of $195,942.17. The jury awarded Lubritz

punitive damages, which award was upheld on appeal.

G. Seventh Claim for Relief; Breach of Fiduciary Duty of Full Disclosure

This Seventh Claim is founded upon the same legal theory as the Sixth Claim, with a different set of facts. The Sixth Claim is based in part upon the truly reprehensible concealment by Defendants of Defendant Christian's discipline and suspension by the SEC for securities violations, a tort aimed directly and specifically at Dr. Garmong (and possibly other customers). The Seventh Claim relates to Wespac and Mr. Christian' failure to follow requirements of SEC rules and Nevada statutes, and the failure to disclose Mr. Christian's conflicting business interest.

The legal basis, consequences, and elements of the tort are the same as for the Sixth Claim, and that discussion is incorporated here.

1. Application to the present facts.

The evidence establishes the following elements:

Existence of a confidential or fiduciary duty of Wespac and Mr. Christian to Dr. Garmong. The same facts as cited for the Sixth Claim are applicable here, and that discussion is incorporated by reference.

Breach of the fiduciary duty. The failures of Defendants' disclosure include the following:

Defendants' concealment of their violation of federal SEC law.

Wespac and Mr. Christian represented in the very first sentence of their Investment Management Agreement, Exhibit 4, that "WESPAC Advisors, LLC [is] an investment advisor registered with the Securities Exchange Commission[.]" It was therefore reasonable for Dr. Garmong to believe that Wespac and Mr. Christian complied with the rules promulgated by the SEC for the protection of consumers, and made a full disclosure concerning SEC matters. Notably, Wespac and Mr. Christian relied upon this Agreement to bring this lawsuit to arbitration, see Defendants' Motion to Dismiss and to Compel Arbitration, filed September 19, 2012, and particularly Exhibit 1 thereto. Wespac and Mr. Christian cannot now disavow their representations made in the present Exhibit 4.

In 2004, the SEC amended 17 CFR parts 270, 275, and 290, to require that investment advisors must adopt Codes of Ethics, must include notice of their Codes of Ethics in their Form ADV Part II that is provided to clients, and must notify the clients in Form ADV that the Code of Ethics is available upon request. The effective date was August 31, 2004, and the mandatory compliance date was January 7, 2005. Exh. 38 is the SEC rule and explanation, and Exh. 39 is the interpretation and advisory by an industry trade group.

Exhibit 49 is the SEC Form ADV-II, dated March 22, 2005, that Dr. Garmong received from Wespac and Mr. Christian on or before August 31, 2005. The Investment Management Agreement of that date, Exhibit 4, includes an acknowledgment of the receipt by Dr. Garmong of Form ADV Part II (Exhibit 4, ¶2 (WESPAC 000048)). There is no disclosure at all in Exhibit 4 of the required Codes of Ethics, in direct violation of the SEC Order mandating compliance no later than January 7, 2005. (Exh. 38, page GG 0384, subsection I for form ADV Part II requirements; and Section III, page GG 0384-385 for compliance date.)

Nor did Wespac and Mr. Christian later disclose to Dr. Garmong their concealment of their Code of Ethics, if any, and their violation of the SEC rule requiring disclosure of a Code of Ethics. Dr. Garmong will testify that he learned about the SEC requirement only in November 2016 when he found the requirement on the SEC's internet site.

Dr. Garmong cannot be sure whether Wespac and Mr. Christian violated others of the SEC rules. But violation, and concealment of the violation, of the rule concerning Codes of Ethics is particularly significant, because it would appear that Wespac and Mr. Christian had no Code of Ethics when they dealt with Dr. Garmong in 2005-early 2009.

Defendants' concealment of their violation of Nevada state laws–duty of a foreign LLC to register.

Defendant Wespac is a California LLC. (Exh. 41, document page GG 0337). It is a "foreign" LLC under Nevada law. NRS 86.051. A "foreign" LLC must register with the Nevada Secretary of State, NRS 86.544, before doing business in Nevada. For most of the time that Dr. Garmong dealt with Wespac and Mr. Christian, from August 2005 to October

2008, Defendant Wespac had not registered with the Nevada Secretary of State as a foreign LLC in direct violation of NRS 86.544, and had concealed that fact from Dr. Garmong. Defendant Wespac registered with the Nevada Secretary of State as a foreign LLC effective October 22, 2008 (Exh. 41, GG 0339), shortly before the relation ended. Wespac and Mr. Christian did not disclose to Dr. Garmong at that time, or at any time, that they were and had been in violation of NRS 86.544. Dr. Garmong does not know how long prior to October 22, 2008 that Wespac and Mr. Christian learned they were not in compliance with NRS 86.544, but in any event they did not notify Dr. Garmong at any time, in violation of their fiduciary duty of full disclosure of all material facts to Dr. Garmong.

Defendants' concealment of their violation of Nevada state laws–duty of an investment advisor to register.

NRS 90.330 requires that investment advisors must register with the State of Nevada. During the period August 2005 to March 2009, Wespac and Mr. Christian acted as "investment advisors" to Dr. Garmong; see the first sentence of the "Agreement." (Exh. 4, WESPAC 000048). However, Wespac and Mr. Christian willfully refused to become licensed as required by NRS 90.330 until the very end of that period, with an effective date of September 24, 2008 (Exh. 40). When Wespac and Mr. Christian finally did decide to obey NRS 90.330, they concealed and failed to disclose to Dr. Garmong that they had refused to obey the law up to that point, contrary to their fiduciary duty of full disclosure to Dr. Garmong.

Wespac and Mr. Christian violated laws of the State of Nevada in recommending and taking the course of action they pursued in wasting Dr. Garmong's accounts, because they were not properly registered pursuant to NRS 86.544 and were not properly licensed pursuant to NRS 90.330. *See* NRS 598.0923(1)("Conducts the business or occupation without all required state, county, or city licenses").

Defendants' failure to disclose Mr. Christian's conflicting activity of owning and managing the Fusion Management.

The Deposition transcript of Mr. Christian disclosed to Dr Garmong for the first time

that Mr. Christian was spending part of his time on his conflicting side business, Fusion Asset Management. When Wespac was acquired in 2009 by Focus Financial, Focus required Mr. Christian to close Fusion as an indirect conflict. (Christian Deposition, Exh. 58, pages 30:6-32:23). Although he was spending a part of his time on this conflicting business during the period that he was wasting a significant part of Dr. Garmong's life savings and retirement fund, Mr. Christian never disclosed the "indirect conflict" to Dr. Garmong.

Dr. Garmong has demonstrated the two elements required to prevail under this Seventh Claim for Relief.

Damages are as discussed for the Sixth Claim.

H. Eighth Claim for Relief; Breach of agency.

1. Basis of Claim

An agency relationship bears some similarities to a fiduciary relationship, but they are distinct. An agency relation may exist when there is no fiduciary relation.

Restatement (Second) Agency § 14 provides "A principal has the right to control the conduct of the agent with respect to matters entrusted to him," cited by Hunter Min. Laboratories, Inc., 104 Nev. 568, 570, 763 P.2d 350, 352 (1988). As stated in Restatement (Second) Agency § 14 comment a, "The right of control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times." Dr. Garmong stated in writing what the agent was to do before the agent acted (Exh. 11), and reiterated the written instructions at several times thereafter (Exh. 12-14). As set forth in Restatement (Second) Agency § 385(1), "Unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform."

2. Elements of tort for breach of agency

As discussed in Hunter Min. Laboratories, Nevada recognizes the Restatement of Agency as defining the law of agency. The Restatement of Agency (Second) §§ 12-14, 383 and 385 provides the following four elements:

An agency relationship exists.

The Principal gave instructions to the Agent.

The Agent failed to follow the instructions.

The Principal suffered damages as a result.

3. Application to the present facts.

To prove the breach, the evidence establishes the following elements:

An agency relationship exists.

The Agreement that Defendants wrote, Exh. 4, states, ¶ 5 (WESPAC 000051), "Client appoints WA [Wespac Associates] as agent. . . ." Wespac and Mr. Christian acted as agents by transacting trades in the managed accounts.

Dr. Garmong gave oral and written instructions to Wespac and Mr. Christian in the form of investment objectives and instructions.

The initial written instructions were given in the Confidential Client Profile (Exh. 3, which were adopted into the Agreement, Exh. 4). Thereafter, according to NRS 628A.020, "A financial planner shall make diligent inquiry of each client to ascertain initially, and keep currently informed concerning, the client's financial circumstances and obligations and the client's present and anticipated obligations to and goals for his or her family." In accordance with this statute and the Agreement, Dr. Garmong gave Wespac and Mr. Christian updated written objectives and instructions to avoid losing capital when he commenced retirement and Wespac and Mr. Christian took over sole management of Dr. Garmong's managed accounts. (Exh. 11-14).

Defendant-agents failed to follow Dr. Garmong's written instructions not to lose capital.

Defendant agents did not follow the investment objectives and instructions not to lose capital, given to them in writing by Dr. Garmong. Under Defendants' sole management from November 2007 to February 2009, Dr. Garmong's accounts managed by Defendants lost $648,670.88 in the period from November 2007 to February 2008. (Exh. 27). During that

period Wespac and Mr. Christian did substantially nothing to stem the tide of losses, while charging Dr. Garmong $21,283.29 in "advisor fees". (Exh. 30).

Dr. Garmong suffered damages as a result.

The agency relation in this case was established both by the Agreement and as a matter of law, NRS 628A.020. Damages may therefore be awarded in contract and/or tort.

During the period from November 2007 to February 2009, Wespac and Mr. Christian were in sole control of Dr. Garmong's managed accounts. (Exh. 11-14). Wespac and Mr. Christian did not follow the objectives and instructions that Dr. Garmong gave them. As a result of Defendants' failure to follow Dr. Garmong's instructions and investment objectives, Dr. Garmong lost $648,670.88 plus $21,283.29 in unearned advisor fees, for a total of $669,954.17. (Exh. 27, 30).

Dr. Garmong has demonstrated the four elements required to prevail under this Eighth Claim for Relief.

I. Ninth Claim for relief; Negligence.

The Ninth Claim, like the Fifth-Eighth Claims, is not dependent upon any instructions or objectives given by Dr. Garmong. The Ninth Claim is based upon Defendants' breach of a standard of care enunciated by the Defendants themselves and applying to <u>all equity purchases</u>.

1. Basis and Elements

<u>Negligence.</u> "It is well established that to prevail on a negligence claim, a plaintiff must establish four elements: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages." <u>Sanchez Ex Rel. Sanchez v. Wal-Mart</u>, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (Nev. 2009).

<u>Negligent Misrepresentation</u>: As provided in <u>Barmettler v. Reno Air, Inc.</u>, 956 P.2d 1382, 1387 (Nev.1998), the Nevada Supreme Court has adopted the definition of the tort of negligent misrepresentation as stated in § 552 of the Restatement (Second) of Torts: "One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their

business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." Thus, to prevail on the negligent misrepresentation claim, Dr. Garmong must bear the burden of proving that (1) Defendants made a false representation; (2) the representation was made in the course of Defendants' business, profession or employment, or in any other action in which they had a pecuniary interest; (3) the representation was made for the guidance of others in their business transactions; (4) Plaintiffs justifiably relied on the representation; (5) Plaintiffs' reliance resulted in pecuniary loss to Plaintiffs; and (6) Defendants failed to exercise reasonable care or competence in obtaining or communicating the information.

2. Application to the present facts.

The existence of a duty of care.

The duty is care is established by Defendants' own representations to other clients. Defendants did not produce any of their own documents, but they did produce correspondence with the "mystery client." They redacted the identity of the mystery client, to hinder and delay discovery for as long as possible, but later revealed after the arbitrator's order that the mystery client was Mr. A. Dale Sharpe. Mr. Sharpe wrote a letter to Mr. Christian on April 9, 2009 (Exh. 20, page WESPAC 0970), stating,

> At the Charles Schwab office in Reno in July, 2008, my wife and I attended a presentation by you (representing Wespac) as a prelude to selecting you as a Financial Advisor for our daughter's Charles Schwab Account Number 6211-2897. As part of your presentation, and in explaining your firm's past financial performance, <u>you detailed your company's strategy of capital preservation through use of Stop Losses on all equity purchases. You emphasized the importance of this strategy in light of the stock market's volatility and the state of the economy.</u>

(Emphasis added).

The arbitrator may find it instructive to compare the date of the presentation by Mr. Christian to these prospective clients, July of 2008, with the period of the worst losses in Dr. Garmong's accounts managed by Mr. Christian, June 2008-November 2008. See Exh. 27. Mr. Christian <u>did not</u> use the "Stop Losses" strategy for "capital preservation" that he told

Mr. Sharpe must be used on "all equity purchases" on Dr. Garmong's accounts that he managed.

Mr. Christian did not respond to Mr. Sharpe's letter. Instead, Mr. John C. Williams, III, the Chief Compliance Officer of Wespac responded on May 14, 2009 (Exh. 20, WESPAC 0974-0975). Mr. Williams confirmed, and did not dispute or deny, Mr. Sharpe's understanding that Mr. Christian had unequivocally stated that Stop Losses[4] are to be used on all equity purchases:

> According to Mr. Christian, you are correct that in his presentation to you and your wife in July and at a subsequent meeting with you and your daughter (the beneficiary of the trust), he discussed the use of stop losses and sector rotation at length.

Wespac, Mr. Christian, and Mr. Williams have thus established a negligence standard of care, the use of "Stop Loss" orders on all equity purchases.

The correspondence between Mr. Sharpe, Mr. Christian, and Mr. Williams was particularly painful for Dr. Garmong when it was revealed by Defendants in discovery in this lawsuit on September 7, 2018, only a few weeks ago. At this very same time that Mr. Christian, on behalf of Wespac, was selling Mr. Sharpe on the use of "Stop Losses" on "all equity purchases," he did not take the few minutes to incorporate "Stop Losses" on his purchases on behalf of Dr. Garmong's accounts, and indeed on all the equities he was managing for Dr. Garmong. He did not even bother to mention the use of "Stop Losses" to Dr. Garmong. The use of such "Stop Losses" on Dr. Garmong's accounts would have prevented hundreds of thousands of dollars in capital losses in Dr. Garmong's accounts, and would have avoided the need for this lawsuit. At the time, Mr. Sharpe was only a potential client, and Wespac and Mr. Christian owed him no contractual, fiduciary, or agency duties. Dr. Garmong had been a paying client for over two years, and Wespac and Mr. Christian owed him contractual, fiduciary, and agency duties. Yet they did not use "Stop Losses" to

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[4] A "Stop Loss" is an order that a security be sold if its price falls below a pre-selected level. Stop Loss orders are usually implemented automatically through the custodian's computer system, but they could be implemented manually.

curb the destruction of his retirement savings.

Wespac and Mr. Christian did not use "Stop Losses" orders on the purchases they made for Dr. Garmong. The charts Exh. 27-28 show that for the purchases made for Dr. Garmong's accounts, such as account 4935-0713, the losses after Mr. Christian purchased the securities were unchecked. Consequently, Wespac and Mr. Christian breached their self-defined duty to use "Stop Losses" with all equity purchases.

This breach was the direct cause of the losses. Exh. 28 shows that the losses for this one account 4935-0713 were $194,713.82–nearly two hundred thousand dollars because Mr. Christian did not take 5 minutes to apply "Stop Losses" to the purchases he made in this account without informing Dr. Garmong. No effort was made by Mr. Christian to avoid these losses by using a "Stop Loss" order. He did, however, sell one of the purchases, Reddy, after about 6 months with a loss of $12,854.70, or 54% of the original purchase price. "Stop Loss" is normally applied to stop losses after a few percent loss at most, not over half the initial value. Mr. Christian gives no explanation why he did not sell the other losing equities. In the event, he breached his duty to use "Stop Losses" on these accounts.

Plaintiff has established the elements for this Ninth Claim for Negligence.

J. Tenth Claim for Relief; Breach of NRS 628A.030

Because financial planners and investment advisors hold such a powerful position over their clients, particularly elderly clients, and because there has been such great abuse of that position, Nevada has enacted an entire chapter of the Nevada Revised Statutes devoted to governing the behavior of financial planners. NRS Ch. 628A specifies the standards for financial planners and provides for injured clients a private civil action for violation of Chapter 628A. Although it includes some of the same bases for recovery as found in other statutes and common law, NRS Ch. 628A is a separate ground of recovery.

1. Basis of Claim

NRS Ch. 628A sets forth the statutory framework governing financial planners, including their duties, the breach of those duties, and the consequences of breaching those duties.

NRS 628A.010(3) defines "financial planner":

> 'Financial planner' means a person who for compensation advises others upon the investment of money or upon provision for income to be needed in the future, or who holds himself or herself out as qualified to perform either of these functions, but does not include:
> (d) An investment adviser licensed pursuant to NRS 90.330 or exempt under NRS 90.340.

Wespac and Mr. Christian are "financial planners" as defined by NRS 628A.010(3), and are not exempt from licensing.

NRS 628A.020 provides that a financial planner has a fiduciary duty:

> Duties of financial planner.
> A financial planner has the duty of a fiduciary toward a client. A financial planner shall disclose to a client, at the time advice is given, any gain the financial planner may receive, such as profit or commission, if the advice is followed. A financial planner shall make diligent inquiry of each client to ascertain initially, and keep currently informed concerning, the client's financial circumstances and obligations and the client's present and anticipated obligations to and goals for his or her family.

Even if Dr. Garmong had not provided his current personal status and investment objectives to Wespac and Dr. Christian in his letter of October 22, 2007 and subsequent faxes (Exh. 11-14), they had a statutory duty to keep currently informed of that information.

NRS 628A.030 defines a breach of duty by the financial planner and the private civil action to recover losses:

> Liability of financial planner.
> 1. If loss results from following a financial planner's advice under any of the circumstances listed in subsection 2, the client may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney's fees.
> 2. The circumstances giving rise to liability of a financial planner are that the financial planner:
> (a) **Violated any element of his or her fiduciary duty;**
> (b) Was **grossly negligent** in selecting the course of action advised, in the light of all the client's circumstances known to the financial planner; or
> (c) **Violated any law of this State in recommending the investment or service.**

(Bolding emphasis added).

A breach of fiduciary duty by a financial planner under NRS 628A.030 permits recovery of "the amount of the economic loss and all costs of litigation and attorney's fees."

2. Elements of claim

NRS 628A.030 has not been interpreted in case law. However, based upon the statutes, the elements of liability are:

The entity is a financial planner.

The financial planner meets any one or more of the following:

(a) Violated any element of his or her fiduciary duty;

(b) Was grossly negligent in selecting the course of action advised, in the light of all the client's circumstances known to the financial planner; or

(c) Violated any law of this State in recommending the investment or service.

The financial planner's advice resulted in an economic loss to, and/or incurring of attorney's fees by, the client.

3. Application to the present facts

The evidence establishes the following elements:

Wespac and Mr. Christian are "financial planners" as defined by NRS 628A.010(3), because for compensation they advise others upon the investment of money or upon provision for income to be needed in the future, or hold themselves out as qualified to perform either of these functions. (Exh. 1).

Wespac and Mr. Christian are liable under each of the grounds 2(a)-2(c) set forth in NRS 628A.030(2):

2(a). Wespac and Mr. Christian violated their fiduciary duty to Dr. Garmong as discussed previously, including but not limited to failing to make full disclosure to him of material information, by failing to follow his investment objectives and instructions, and by failing in their duties of loyalty, good faith, and fair dealing. Wespac and Mr. Christian breached their fiduciary duty of full disclosure by concealing Defendant Christian's discipline and suspension by the SEC.

2(b). Wespac and Mr. Christian were grossly negligent in failing to take measures to stop losses in Dr. Garmong's accounts, which measures they fully acknowledged were

required of them. See the discussion under the Ninth Claim.

2(c) In doing business in Nevada and thence making investment recommendations, Wespac and Mr. Christian violated the laws including not being properly registered pursuant to NRS 86.544, and not being properly licensed pursuant to NRS 90.330(1).

4. Defendants' actions resulted in Dr. Garmong's loss of $648,670.88 (security loss) + $21,283.29 ("advisor fees) = $669,954.17.

Ironically, as Wespac and Mr. Christian were wasting Dr. Garmong's managed accounts, they knew of several approaches that would have avoided the wasting, specifically automated or manual "Stop Losses" orders (Exh. 20), or "go to 100% cash." (Exh. 17). Or they could have used their advanced computer system (Exh. 2). But they did not, or advise Dr. Garmong to employ such approaches, until the wasting had occurred.

Accordingly, Wespac and Mr. Christian are liable to Dr. Garmong in "the amount of the economic loss and all costs of litigation and attorney's fees."

Dr. Garmong has demonstrated the three elements required to prevail under this Tenth Claim for Relief.

5. Defendants refused to obey the errors & omissions, or surety bond, requirement of NRS 628A.040.

NRS 628A.040 provides,

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

In discovery, Plaintiff requested copies of all insurance coverage or bonds maintained by Defendants during the period 2005-2009. Defendants at first refused, then later under pressure said they would provide the requested documents. The never provided any such documents, and it is therefore admitted that Wespac and Mr. Christian ignored this law, as they ignored NRS 90.330 and NRS 86.544. The important distinction is that each of Wespac and Mr. Christian should have had $1,000,000 or more in insurance or surety

bond, and they did not.

6. Defendants' defense that Dr. Garmong is to blame because he did not supervise Defendants sufficiently closely.

In the depositions leading up to the Hearing, Defendants have revealed a line of argument that seeks to shift their blame to Dr. Garmong on a theory that he did not supervise Defendants sufficiently closely. This is an comparative negligence argument, without actually characterizing it as such. Defendants line of argument can apply to this Tenth Claim, as well as others.

There are two responses. First, Wespac's Agreement (Exh. 4, ¶ 5) provides "Although WA [Wespac Advisors] may make investment decisions without prior consultation with or consent from Client, all investment decisions shall be made in accordance with the investment objectives of which Client has informed, and may inform, WA from time to time in writing." Wespac's own description of the roles of client and Wespac provides that it is the client's role to provide investment objectives, and Wespac role to make investment decisions in accordance with the client's investment objectives. The division of labor is clear: The client is not charged with taking over Wespac's role in making the investment decisions, and Wespac is not charged with taking over the client's role in setting investment objectives.

Second, and more generally, when a client hires a professional having specialized expertise, the client has a right to expect that the professional will perform properly without the client's supervision. A concise statement of this principle, in the context of the hiring of an attorney, is found in Gorski v. Smith, 812 A.2d 683, 703 (Pa. Superior Court 2002), stating:

> A client who retains an attorney to perform legal services has a justifiable expectation that the attorney will exhibit reasonable care in the performance of those services, since that is the attorney's sacred obligation to the client. The client is, therefore, under no duty to guard against the failure of the attorney to exercise the required standard of professional care in the performance of the legal services for which the attorney was retained. Imposing such a duty on the client would clearly defeat the client's purpose for having retained the attorney in the first place. Consequently, as a matter of law, a client cannot be

> deemed contributorily negligent for failing to anticipate or guard against his or her attorney's negligence in the performance of legal services within the scope of the attorney's representation of the client.

Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176 (1971), is consistent, speaking of "right of the client to rely upon the superior skill and knowledge of the attorney."

In the present case, Dr. Garmong relied upon what was sold and represented to him as the "superior skill and knowledge" of Wespac and Mr. Christian in financial management. (Exh. 1-2). If the matter at issue had been metallurgy, materials science, patent law, wilderness search and rescue, or wilderness medicine, Defendants might have an argument that Dr. Garmong should have been actively looking over their shoulders. However, financial management was as foreign to Dr. Garmong as his areas of expertise would have been to Defendants. Under both the terms of the Agreement (Exh. 1) and the legal principles set forth above, Dr. Garmong had no duty to guard against the failure of Defendants to do the specialized financial management work in which they claim their expertise.

Dr. Garmong has established the required elements for this Tenth Claim.

K. Eleventh Claim for relief; Intentional Infliction of Emotional Distress.

1. Basis and Elements

To establish a cause of action for intentional infliction of emotional distress, the plaintiff must establish the following: (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiffs having suffered severe or extreme emotional distress and (3) actual or proximate causation. Olivero v. Lowe, 116 Nev. 395, 398, 995 P.2d 1023, 1025 (Nev.2000); Burns v. Mayer, 175 F.Supp.2d 1259 (D. Nev. 2001).

What is "extreme and outrageous conduct"? Restatement (Second) Torts §46, comment f, provides, "The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity."

2. Application to the present facts.

Nevada has already recognized that the elderly are particularly susceptible to injury

and emotional distress, see discussion above in relation to the Fifth Claim and the following discussion in relation to the doubling of damages. Depriving an elderly person of a significant portion of his life savings in direct violation of the instructions to avoid capital loss is such extreme and outrageous conduct.

As stated in Plaintiff's fax of September 28, 2008 to Defendant Christian (Exh. 16):

> I am deeply upset at what you have done to me, not only in destroying so much of my retirement funds . . . Each time we talked, you assured me that I shouldn't worry, I should leave everything in your hands, and my accounts were doing just fine . . . I called a meeting on July 21 to discuss the financial disaster that you had brought about. By way of reply, you told me that nearly all of your clients were between -2% and +2% for the year, and that the money from new investors was rolling in . . . Your management has lost about $80,000 from my accounts in 25 calendar days in September, or $80,000 in 18 working days. And not one word, not one call, nothing from you as my life savings disappears at the rate of $4400 for each and every working day of September. I repeat those numbers because I want them to sink in. $80,000 in 18 working days. My retirement account is down $196,284, or 7.9% in just under 9 months for 2008. This is the money I have sweat my whole life to save for a financially secure retirement, and you are destroying my retirement at a phenomenal rate after you have repeatedly assured me that all was well . . . When we talked earlier today on the phone, you said that now was not the time to be emotional. Yes, it is, in that it is time for me to be greatly upset by what has been done to me. I have in good faith accepted what you have told me for the past 9 months, and look where it has gotten me: financial disaster. Massive losses at a time when I expressly instructed you to be conservative in view of my retirement and not to take any losses in my accounts, and when I correctly predicted that the market would fall greatly in 2008.

Defendants did not rebut these facts underlying Dr. Garmong's distress, or give any explanation of their tactics.

Plaintiff's emotional distress was thus a direct result of what Defendants had done to his hopes and plans of future financial security.

Additionally, Defendants have forced Dr. Garmong to pursue this lawsuit to recover for their injuries to him. Dr. Garmong will shortly be 75 years old. Now is not the time of life where he should be fighting for what was taken from him. Defendants had a chance to make amends, and they did not do so. (Exh. 21).

3. As to intentional infliction of emotional distress, whether Defendants exhibited "extreme and outrageous" behavior.

One example of the award of damages for intentional infliction of emotional distress is Dillard Dept. Stores, Inc. v. Beckwith, 115 Nev. 372, 989 P.2d 882 (1999). Beckwith held that the demotion and ridicule of a 64-year-old employee after returning to work from an injury was grounds for a holding of intentional infliction of emotional distress. Unlike the present case (see Exh. 13 and 16), there was no unrebutted contemporaneous evidence of emotional distress. The present facts establish a much greater degree of reckless disregard for causing emotional distress to Dr. Garmong than were present in Beckwith. Defendants wasted Dr. Garmong's life savings and retirement savings over an extended period of time after he had retired, and their response was to tell him to be patient, even though he had instructed them not to lose capital from his account. This is the definition of conscious disregard sufficient to impose punitive damages–"the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." NRS 41.001(1).

See also Branda v. Sanford, 97 Nev. 643, 637 P.2d 1223 (1981). A pattern of lies to justify failure to perform a fiduciary duty may be extreme and outrageous conduct, see concurring/dissenting opinion in Selsnick v. Horton, 96 Nev. 944, 947, 620 P.2d 1256 (1980).

Plaintiff has established the elements required to prevail on this Eleventh Claim.

L. Twelfth Claim for Relief; Unjust Enrichment

1. Basis of the Claim

This claim is an alternative to breach of contract, in the event that the arbitrator finds that there is no written contract. An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement. LeasePartners Corp. v. Brooks Trust, 113 Nev. 747, 756, 942 P.2d 182, 187 (1997).

2. Elements of the Claim

Unionamerica Mtg. v. McDonald, 97 Nev. 210, 212, 626 P.2d 1272-3 (1981) states "The terms 'restitution' and 'unjust enrichment' are the modern counterparts of the doctrine of quasi-contract. [citation omitted]. The purpose of quasi-contractual relief is to do justice to the parties regardless of their intention." That is, there is no element of intent. McDonald lists the elements of proof of unjust enrichment or "quasi contract":

> The essential elements of quasi contract are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof. . . [citation omitted]. . . Unjust enrichment occurs whenever a person has, and retains a benefit which in equity and good conscience belongs to another. [citation omitted].'

3. Application to the present facts

The evidence establishes the following elements:

Wespac and Mr. Christian charged Dr. Garmong $21,283.29 in "advisor fees", while ignoring his investment objectives and instructions to them (Exh. 30), and wasting $648,670.88 (Exh. 27) from his managed accounts.

Wespac and Mr. Christian should not be able to retain the "advisor fees" in good conscience in view of their complete failure to do the work for which they were hired.

Dr. Garmong has demonstrated the elements required to prevail under this Twelfth Claim for Relief, and the amount of recovery.

M. Doubling of Damages Pursuant to NRS 41.1395.

1. Legal Basis

As part of its multi-pronged program for protection of older or elderly persons, Nevada has provided for the doubling of damages in certain situations where an older or elderly person is exploited. NRS 41.1395 is not a separate cause of action, but provides for doubling of damages incurred under other causes of action in appropriate factual situations.

According to Doe v. Clark County School District, 2016 WL 4432683 at *13 (D. Nev. 2016), interpreting Nevada law:

This statute does not create an independent claim. Rather it is a means to recover special damages under certain circumstances. *Findlay Mgmt. Grp. v. Jenkins*, No. 60920, 2015 WL 5728870, at *2 (Nev. Sept. 28, 2015) (describing this statute as one for special damages that must be specifically pleaded under Nevada law); *Phipps v. Clark Cty. Sch. Dist.*, ___ F. Supp. 3d. ____, No. 2:13-CV-0002-GMN-PAL, 2016 WL 730728, at *7 (D. Nev. Feb. 22, 2016) (referring to this section as providing "enhanced damages").

NRS 41.1395 sets the legal requirements for a doubling of damages:

NRS 41.1395 Action for damages for injury or loss suffered by older or vulnerable person from abuse, neglect or exploitation; double damages; attorney's fees and costs.
1. Except as otherwise provided in subsection 3, if an older person or a vulnerable person suffers a personal injury or death that is caused by abuse or neglect or suffers a loss of money or property caused by exploitation, the person who caused the injury, death or loss is liable to the older person or vulnerable person for two times the actual damages incurred by the older person or vulnerable person.
2. If it is established by a preponderance of the evidence that a person who is liable for damages pursuant to this section acted with recklessness, oppression, fraud or malice, the court shall order the person to pay the attorney's fees and costs of the person who initiated the lawsuit.
3. The provisions of this section do not apply to a person who caused injury, death or loss to a vulnerable person if the person did not know or have reason to know that the harmed person was a vulnerable person.
4. For the purposes of this section:
(b) "Exploitation" means any act taken by a person who has the trust and confidence of an older person or a vulnerable person or any use of the power of attorney or guardianship of an older person or a vulnerable person to:
(1) Obtain control, through deception, intimidation or undue influence, over the money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that person's money, assets or property; or
(2) Convert money, assets or property of the older person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that person's money, assets or property.

"[O]lder person" is defined in NRS 41.1395(4)(d) the same as "elderly person", i.e., "a person who is 60 years of age or older."

2. Elements of Doubling Damages

The statutory elements of proof for a doubling of damages in the present circumstances are:

Plaintiff must be an older or vulnerable person.
The older person suffers a loss of money caused by exploitation, where

> "Exploitation" means any act taken by a person who has the trust and confidence of the older person to obtain control, through deception, intimidation or undue influence, over the money, assets or property of the older person with the intention of permanently depriving the older person of the ownership, use, benefit or possession of that person's money, assets or property.

3. Application to the present case

(1). "Older person"

Dr. Garmong was over 60 years of age at all times relevant hereto, and therefore is an "older person" under NRS 41.1395(4)(d).

(2). Loss of money

Dr. Garmong suffered a loss in the amount of $648,670.88 plus $21,283.29 in unearned advisor fees, a total of $669,954.17

(3). The loss resulted from "exploitation."

Wespac and Mr. Christian exerted control through deception and undue influence over Dr. Garmong's money, $21,283.29 (Exh. 30) in "advisor fees", with the intention of permanently depriving Dr. Garmong of its ownership, use, benefit or possession.

Dr. Garmong has demonstrated the elements required to prevail under the doubling of damages.

IV. CONCLUSION

The arbitrator should find in the favor of Plaintiff Dr. Garmong and award him damages consistent with the law presented above.

DATED this 9th day of October, 2018.

/S/ Carl M. Hebert
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Judicial Arbitration and Mediation Service

Las Vegas, Nevada

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.

_____/

Case No. 1260003474

DEFENDANTS' ARBITRATION BRIEF

SUMMARY OF THE CASE

Plaintiff Gregory Garmong ("Mr. Garmong") is an extremely well-educated patent attorney, engineer and businessman. He has a PhD in Metallurgy and Material Science from MIT, a law degree and MBA from UCLA. He is divorced and has no children.

When he opened his accounts with Defendants WESPAC and Greg Christian ("Mr. Christian"), Mr. Garmong stated that his annual income was more than $250,000 and his net worth was more than $10,000,000.

Mr. Garmong was an experienced investor with securities accounts at Charles Schwab valued at more than $5,000,000 and real estate investments worth another $5,000,000. Mr. Garmong admits that he lost money in the stock market in 1999 and 2000. Mr. Garmong also admits that he received a $3,000,000 windfall profit in a penny stock called Liquid Metal Technologies (symbol LQMT).

Mr. Garmong wrote his own Investment Objective and Risk tolerance for his WESPAC

accounts as "moderate growth, low-moderate risk." He further stated that he had a long investment time horizon of ten years or more.

Mr. Garmong transferred four accounts valued at approximately $2,000,000 to be managed ***jointly*** by WESPAC and himself. He did not transfer a $3,000,000 municipal bond account to WESPAC and chose instead to continue to manage that account by himself. The accounts Mr. Garmong transferred to WESPAC's management were heavily invested in stocks. Over time, WESPAC continuously decreased Mr. Garmong's exposure to the stock and bond markets by selling securities and reinvesting the proceeds in Schwab's money market fund ("cash").

Mr. Garmong was actively involved in the management of his accounts at WESPAC. He met with Mr. Christian quarterly and he frequently communicated through correspondence and phone calls. Mr. Garmong closely monitored the performance of his accounts and even calculated his investment returns.

As a result of WESPAC's prudent and conservative investment strategy, Mr. Garmong did not lose money while his accounts were managed by WESPAC, which included a period of financial crisis that many have described as the worse market decline since the great depression. Mr. Garmong terminated WESPAC's management on March 6, 2009, which was the exact bottom of the stock market.

However, Mr. Garmong did not sell the securities WESPAC was managing. In fact, he held onto them for at least another five years. These securities doubled in value over that 5-year period creating almost $300,000 in gains since Mr. Garmong terminated his relationship with WESPAC through April 2014, the end of the discovery period.

Mr. Garmong **DID NOT** lose any money while working with WESPAC. In fact, Mr. Garmong held many securities WESPAC had purchased for many years after he terminated his relationship with WESPAC and had, and may still have, significant gains on those securities.

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TIMELINE OF GARMONG'S RELATIONSHIP WITH WESPAC

The timeline below describes the ***documented*** key events in the Garmong-WESPAC relationship. The timeline includes the date of the event, the nature of the event and the documents supporting the description of the event.

July 2005, Initial Interview, Broker Notes: FINRA's Suitability Rule (Rule 2111) states that, "A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose..."

During Mr. Christian's initial meeting with Mr. Garmong he learned everything required in FINRA Rule 2111 as summarized above. Mr. Christian took extensive notes of this meeting.

August 2005, New Account Forms, Confidential Client Profile: To formally document the information Mr. Christian obtained during the initial meeting, Mr. Christian had Mr. Garmong complete a Confidential Client Profile, which was part of a new account package WESPAC requires its clients to complete to open accounts. Mr. Garmong filled out the form in his own handwriting and stated that, (1) WESPAC was only managing 40% of Mr. Garmong's investible assets (securities), (2) Mr. Garmong's investment time horizon was 10 years or more, (3) Mr. Garmong was a 61 year old patent attorney with annual income over $250,000, (4) Mr. Garmong's net worth (excluding his primary residence) was $9,000,000, (5) Mr. Garmong was in the highest federal income tax bracket of 35% and (5) Mr. Garmong had no dependents. The Confidential Client Profile was never modified during the life of Mr. Garmong's WESPAC accounts.

August 2005, New Account Forms, Investment Policy Questionnaire: To gain a better understanding of Mr. Garmong's tolerance for investment risk, Mr. Christian had Mr. Garmong

complete an Investment Policy Questionnaire, which was also part of a new account package WESPAC requires its clients to complete to open accounts. Mr. Garmong filled out the form in his own handwriting and stated that, (1) his investment objective and risk factor was "moderate growth, low-moderate risk", (2) his investment approach was, "moderately increasing my investment value while minimizing potential for loss of principal", (3) he understood investment values fluctuate and that he was "comfortable" with a portfolio that lost 11% in a year but that if the portfolio lost 20% in the first year he would "be concerned and may consider selling...", (4) he had a long time horizon, (5) he saved more than 12% of his income and (6) that meeting his living expenses with his investments were "not a concern" until he retired. The Investment Policy Questionnaire was never modified during the life of Mr. Garmong's WESPAC accounts.

August 2005, New Account Forms, Investment Management Agreement: A formal Investment Management Agreement was the final part of WESPAC's new account package. Mr. Garmong reviewed the agreement and demanded (in writing) that several changes be made to it before he would sign it. The primary change was that Mr. Garmong would not grant WESPAC with the authority to make all investment decisions on a discretionary basis. Mr. Garmong insisted that he have a voice in all investment decisions in his WESPAC accounts. WESPAC modified the Investment Management Agreement to meet Mr. Garmong's demands to his satisfaction. The fully executed Investment Management Agreement was never modified during the life of Mr. Garmong's WESPAC accounts.

September 2005, Transfer of Securities to WESPAC, Transaction Ledger Report: Mr. Garmong transferred four accounts to WESPAC. Three of the four accounts were virtually 100% invested in equities. The fourth account, a defined benefit pension plan was invested in equity and fixed income securities.

Over the next several months, Mr. Christian sold equities and increased cash in Mr.

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Garmong's accounts. Mr. Garmong's cash holdings as a percent of his total portfolio increased from less than 10% to approximately 25%.

May 2006, Termination of Defined Benefit Plan, Letter to TRI-AD: On May 24, 2006, Mr. Garmong sent a letter to its retirement benefits administrator stating, in part, "Delays in termination of my defined benefit plan are very costly to me, on the order of $10,000-$20,000 per month in lost potential gains. With the stock market doing so well at the moment, its hurting me badly that the plan gains are limited to the maximums. Right now about half of the plan's assets are in cash to hold the gains down, and I don't want to continue that any longer than necessary." Mr. Garmong's comments in this letter imply he was more interested in maximizing gains than minimizing losses, at least in his defined benefit plan.

July 2007, Meeting with Christian, Broker Notes: Mr. Garmong met quarterly with Mr. Christian to review the performance of his accounts and to discuss investment strategy and other topics. In July 2007, Mr. Garmong met with Mr. Christian and it was determined that he would "rollover" his defined benefit plan into an IRA. The "rollover" was completed on July 16, 2007.

August 2007, Garmong Expresses Stock Market Concerns, August 16, 2007 Fax: Mr. Garmong expressed concerns about the stock market in an August 2007 fax to Mr. Christian in which he states that, "I am concerned with what appears to be a worldwide free-fall in the stock markets resulting from the loan scandals." Further evidencing Mr. Garmong's understanding of his asset allocation and the role it plays in the potential gains and losses in his portfolio, his fax goes on to state that, "My defined benefit plan has a 46% cash position but the two Keogh accounts, the IRA account, and the taxable investment account are heavily invested." Mr. Garmong asks Mr. Christian, "What do you recommend...?" Mr. Christian's handwritten notes at the bottom of the fax state, "Called to discuss accounts, decided to raise cash, sold approx. 50% of

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holdings in QRPs and individual account. Left IRA alone already 50% cash."

October 22, 2007, Quarterly Meeting, October 22, 2007 Letter: Mr. Garmong produced a letter in discovery dated October 22, 2007 containing several allegations that WESPAC and Mr. Christian dispute. Indeed, neither WESPAC or Mr. Christian recall ever receiving this letter and it was not found in a review of their files. In the letter, Mr. Garmong states, in part, that (1) he retired on August 31, 2007 but it will take 6-12 months to wind down his practice, (2) I have taken sole responsibility for my finances since my late teens, (3) I agree to turn the management of my retirement and savings accounts over to you entirely, under the condition that you manage them very conservatively ... and that they not lose money, (4) I want to emphasize the basic instruction in the Client Profile ... I gave you ... when I started in 2005, and (6) I am willing to sacrifice gains to avoid losses. There are no subsequent references in writing by either Mr. Garmong or the Defendants to indicate the letter was ever received by Defendants. The evidence will show that Mr. Garmong's self-serving letter, allegedly dated October 22, 2017, appears to have been fraudulently created by Mr. Garmong to provide false evidence to support Plaintiff's claims in this litigation.

November 2007, Invest in "cash-flow generation model," November 2, 2007 Fax: Despite Mr. Garmong's purported concerns about stock market losses, less than two weeks later Mr. Garmong told Mr. Christian that it was "time to start thinking about changing account 4935-0713 over to the cash-flow-generation model you recommended." This model consisted of purchasing growth and income securities that Mr. Garmong knew could and would fluctuate in value as the stock and bond markets moved up or down. Mr. Garmong selected that model portfolio from a variety of other WESPAC model portfolios.

December 2007, Invest in bonds or equities, December 10, 2007 Fax: Less than two months after purportedly expressing his stock market concerns with Mr. Christian, Mr. Garmong

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sent Mr. Christian a fax in which he states, "There is $300,000 in bonds maturing on 4/1/18. I'll have to decide whether to reinvest the money in bonds or put it in equities." The fax goes on to express Mr. Garmong's belief that interest rates on bonds are so low that they don't even keep up with inflation and that they "will be even lower when we get to April."

January 2008, Garmong calculates 2007 investment returns, January 21, 2008 Fax: After reviewing an account summary WESPAC sent to Mr. Garmong, he challenged the investment returns reported by WESPAC and prepared his own calculations, which depicted a combined return for the "three qualified plans" as earning 8.4% in 2007 and the return for the "taxable investment account" of 2.7% in 2007. Mr. Garmong's fax further notes that he will "wait for the end-of-January Schwab report." So, despite purportedly turning all management of his accounts entirely over to WESPAC, Mr. Garmong is still carefully reviewing his accounts monthly and even performed calculations of his investment returns.

February 2008, Purchase of $300,000 in securities, Transaction Ledger Report: On February 20, 2008, despite Mr. Garmong's purported October 2007 objective that "his accounts do not lose any money," WESPAC purchased more than $300,000 in securities in Mr. Garmong's taxable account pursuant to the mutually agreed decision to invest in the "cash-flow-generation model." Mr. Garmong received copies of Schwab confirmations for these transactions and they were reported on the February 2008 Schwab monthly statement.

March 2008, Garmong Discussion Items, March 17, 2008 Fax: In this fax, Mr. Garmong further evidences that he is reviewing (1) his accounts, (2) the volatility in the stock and bond markets, and (3) the economic news regarding the financial crisis such as "the Bear Sterns story." Mr. Garmong notes that he "just reviewed my various retirement accounts, and am of course very concerned. I think we should discuss where we are and where we should go, in view of the extreme volatility of the markets." Mr. Garmong further notes that, "The only bright spot

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in all of end-of-February reports from Schwab was the taxable investment account 4935-0713, that you are working to generate retirement income for me. Should we be using this same philosophy in the retirement accounts?" Mr. Garmong also again asks what he should do with the bond proceeds maturing in April.

May 2008, More Securities are Purchased, Transaction Ledger Report: On May 27, 2008 approximately $26,000 of a Nuveen income fund was purchased in Mr. Garmong's taxable account.

June 2008, Quarterly Review, June 12, 2008 Fax: In this fax, Mr. Garmong states that he has reviewed his account performance for the first half of 2008 and "the results are mixed." Mr. Garmong states that (1)" Account 4935-0713 ... is performing well, right on target ... Good job, as this fits with my retirement plan very well," and (2) "the retirement accounts that WESPAC manages, on the other hand, are being destroyed." Mr. Garmong notes that, "This is reminiscent of 1999-2000, when I lost amounts of this magnitude under a different manager."

July 2008, Quarterly Review, Broker Notes: At the July 2008 Quarterly Review, Mr. Christian noted that Mr. Garmong said his Individual account (what Mr. Garmong calls the taxable account) "is doing great, could live rest of life on that." Mr. Christian also noted that Mr. Garmong was "risk averse post retirement more now" and to "reevaluate risk tolerance." Mr. Christian noted that the accounts would be managed "more actively" to "lessen the volatility." There are no notes indicating that Mr. Garmong instructed WESPAC to not lose any money. Mr. Garmong knew that the only way to not lose money was to cash out all the securities. Mr. Garmong elected not to do this – even after he transferred the accounts from WESPAC.

September 2008, Quarterly Review, September 29, 2008 Fax: Mr. Garmong confirms a quarterly review meeting and complains that Mr. Christian destroyed his retirement accounts and must "take responsibility and cure the problem." The three-page fax contains numerous

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allegations that WESPAC and Mr. Christian dispute. The fax ends with a demand that, "The value of the accounts must cumulatively increase by at least $10,000 for the prior week. If the accounts do not cumulatively increase by $10,000 for the prior week, WESPAC will make up the difference by adding the difference to my non-retirement account..."

Mr. Christian responded to Mr. Garmong's fax by stating, in part, that, "I respectfully disagree with your recollection of events. You never told me that there could not be losses from my accounts in 2008. If any client told me that I would have offered you two alternatives; (1) got to 100% cash or (2) to close your accounts." Mr. Christian further informed Mr. Garmong that he cannot comply with Mr. Garmong's demands. This letter is strong evidence that Defendants never received the October 22, 2007 letter.

October 2008, Garmong Cashes Out the Retirement Accounts, Transaction Ledger Report: On October 10, 2008, Mr. Garmong instructed WESPAC to cash out all the securities in the retirement accounts, except for a relatively small mutual fund position, but left the taxable/individual account 4935-0713 invested.

Mr. Garmong memorialized this in an October 24, 2008 fax and further stated that WESPAC is "under the express instruction of not losing money in account 4935-0713." Mr. Christian responded in an October 29, 2008 letter, in which he reiterated that neither he or anyone at WESPAC stated or implied that Mr. Garmong would not suffer any losses in 2008. Mr. Christian concluded the letter by stating that, "Unless we hear otherwise, I will assume that we should leave the retirement accounts in money market and continue to manage the 0713 account in the same fashion." Mr. Garmong did not respond and continued to have WESPAC manage the 4935-0713 account for another four months.

March 2009, Garmong Terminates WESPAC, Transaction Ledger Report: Mr. Garmong verbally terminated the WESPAC relationship on March 6, 2009, which was the exact

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bottom of the stock market, by transferring the cash and small mutual fund balance in the retirement accounts and the cash and securities in the 4935-0713 account. Importantly, Mr. Garmong did not sell everything and go 100% to cash to "avoid losses."

July 2009, Garmong Transfers Accounts to Fidelity: In July 2009, Mr. Garmong transferred his Schwab accounts to Fidelity. He still held all the securities he had held in his accounts with WESPAC. Indeed, his April 2014 Fidelity monthly statement reveals that Mr. Garmong still held the WESPAC securities ***five years after*** he terminated WESPAC's management. These securities more than doubled in value during those five years providing appreciation of almost $300,000 since March 2009.

BATES ANALYSIS OF GARMONG ACCOUNTS

Defendants hired Bates Group (batesgroup.com) to prepare an account analysis of Mr. Garmong's accounts during the relevant period that WESPAC managed the accounts and to prepare an account analysis for the Fidelity account. The result was that the accounts WESPAC managed until March 2009 had a **net profit** of $5,403.86. It is also important to note that the "taxable/individual" account 4935-0713 that Mr. Garmong lauded as "performing well, right on target ... Good job, as this fits with my retirement plan very well," was the only account to have a net out of pocket loss. It had ***unrealized*** losses of $147,865.

Defendants also asked Bates Group to do an account analysis of the Fidelity "taxable/individual" account that received the securities that WESPAC had managed and that Mr. Garmong held when he terminated the investment relationship. The analysis revealed that these same securities appreciated $290,400 through April 2014. So, the net result is that even the "taxable/individual" account did not lose any money but instead, even after subtracting the unrealized losses at WESPAC, still had an overall net profit of $141,535 as of April 2014. With the stock market at an all-time high, if Mr. Garmong still holds those securities today, they have

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presumably continued to substantially appreciate since April 2014.

Bates also completed an analysis of the performance for Mr. Garmong's accounts if they had been invested 100% in the S&P 500 Total Return Index during the period WESPAC managed the accounts. The result is that Mr. Garmong's accounts would have lost a combined $972,973 in value. Bates also completed a "balanced" analysis of the performance of Mr. Garmong's accounts if they had been invested 60% in stocks and 40% in bonds. The result was that Mr. Garmong's accounts would still have lost a combined $432,415 in value. ***The WESPAC managed accounts did not lose any money!***

GARMONG ACCOUNT ANALYSIS

Mr. Garmong has provided Defendants with his own flawed account analysis. Conveniently, his analysis begins at the top of the stock market in November 2007. The analysis completely ignores the gains in excess of $550,000 he made from the inception of his investment relationship with WESPAC through October 2007. Moreover, the ***decline in value*** of the accounts depicted in Mr. Garmong's analysis is greater, by about $100,000, than the actual decline in value depicted in the Bates analysis. For these reasons, the Mr. Garmong analysis is faulty and without merit.

PLAINTIFF'S MERITLESS ALLEGATIONS

Mr. Garmong alleges that WESPAC and Mr. Christian (1) failed to follow his instructions, (2) intentionally caused his losses, (3) failed to disclose material facts, and (4) breached their fiduciary duties. Mr. Garmong's allegations regarding WESPAC's management of his accounts are not supported by any documentary evidence.

As presented above, (1) WESPAC and Mr. Christian thoroughly investigated Mr. Garmong's personal and financial situation before recommending any course action, (2) WESPAC and Mr. Christian had Mr. Garmong complete "new account package" that contained (a) a

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Confidential Client Profile, (b) an Investment Policy Questionnaire and (c) an Investment Management Agreement before opening the accounts, (3) Mr. Garmong is an intelligent, experienced investor who understood, and even modified, the terms and conditions stated in various documents in the new account package, (4) WESPAC and Mr. Christian communicated frequently with Mr. Garmong through meetings, correspondence and phone calls, (5) Mr. Garmong closely monitored his accounts, reviewed his monthly statements and even calculated his own investment returns, (6) Mr. Garmong ***never*** instructed WESPAC or Mr. Christian to invest solely in cash to avoid losses – even though Mr. Garmong knew that was the only way to guarantee no losses in his accounts, (7) the relevant period includes "the worst financial crisis since the Great Depression" – big banks, insurance companies and brokerage firms collapsed, (8) Mr. Garmong terminated WESPAC at the bottom of the market, (9) Mr. Garmong held on to the securities managed by WESPAC for at least five years after terminating its management and profited substantially by doing so, and (10) all of the above is documented, in contrast to Mr. Garmong's bald assertions of wrongdoing by WESPAC.

LEGAL ARGUMENT

1. Breach of Contract Claim

Under Nevada law:

> To prevail on a breach of contract claim, a plaintiff must prove: (1) the existence of a valid contract; (2) a breach of that contract by defendant; and (3) damages resulting from the defendant's breach. *Shaw v. Citimortgage, Inc.*, 201 F.Supp.3d 1222, 1248 (D.Nev. 2016).

Plaintiff alleges that Defendants breached their contract with Plaintiff by failing to manage Plaintiff's accounts according to his investment objective and instructions not to lose capital. Plaintiff further alleges that "Defendants' breach was the proximate cause of Plaintiff's loss, inasmuch as Defendants had sole responsibility for managing the managed accounts."

Plaintiff fails to allege exactly what was "unsuitable" about the investments that Defendant Mr. Christian recommended, except that they declined in value. But an investment

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is not unsuitable just because it declines in value at some point. Plaintiff knew he was invested in stocks and understood that no one, including Mr. Christian, has a crystal ball that can predict which stocks will not decrease in value over a period of days, weeks, or months. Thus, his alleged instruction to invest in stocks but not lose capital over a period of days, weeks, or months is an impossible task. In fact, because of the economic situation in late 2008 and 2009, most types of investments sustained sharp declines. Subsequent events have demonstrated that Mr. Christian's advice to Plaintiff that Plaintiff should stay the course would have prevented the purported losses about which he now complains.

Mr. Christian fulfilled his responsibility to the Plaintiff. He inquired about Plaintiff's financial situation and objectives when Plaintiff first opened his accounts, and he continued these discussions with Plaintiff, through phone calls, personal meetings, and written communications, up to the point that he transferred his accounts to another broker. Based upon these discussions, Mr. Christian had a reasonable basis to believe not only that his recommendations were sound, but that they were appropriate and suitable for the Plaintiff – both as individual transactions and in light of his entire portfolio. The information Mr. Christian provided the Plaintiff throughout their relationship was accurate and fulfilled his obligation to the Plaintiff. In short, the evidence will show there was no breach of contract.

2. <u>Breach of Implied Warranty Claim</u>

To state a claim for breach of warranty: "[A] plaintiff must prove that a warranty existed, the defendant breached the warranty, and the defendant's breach was the proximate case of the loss sustained." *Nevada Contract Services, Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157, 161, 68 P.3d 896, 899 (2003).

Here, Plaintiff has asserted that an implied warranty existed in the agreement signed by the parties. Despite diligent research, Defendants have been unable to locate one case in which a court found an implied warranty to exist in a contract solely for services. See, e.g. *Lufthansa Cargo A.G. v. County of Wayne*, 2002 WL 31008373 at *5 (E.D.Mich)("Plaintiff's claim for

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breach of implied warranty fails as a matter of law. A breach of implied warranty claim cannot be alleged in the context of a 'contract' for services . . .".); *Anthony Equip. Corp. v. Irwin Steel Erectors, Inc.*, 115 S.W.3d 191, 209 (Ct.App.Tx. 2003)("The Texas Supreme Court has recognized an implied warranty for services only when the services related to the repair or modification of existing tangible goods or property."); *Rochester Fund Municipals v. Amsterdam Municipal Leasing Corp.*, 746 N.Y.S.2d 512, 515, 296 A.D.2d 785, 787 ("'No warranty attaches to the performance of a service.'")(quoting *Aegis Prods. v. Arriflex Corp. Of Am.*, 25 A.D.2d 639, 639, 268 N.Y.S.2d 185); *City Services Contracting, Inc. v. Olen Properties Corp.*, 2002 WL 2017182 (Ct.App.4th Dist. Cal.)(UNPUBLISHED); ("'the well settled rule in California is that where the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply.'")(quoting *Allied Properties v. John A. Blume & Associates*, 25 CalApp.3d 848, 855, 102 Cal.Rptr.259 (1972).

The single case cited by Plaintiff, *Canyon Villas Apt. Corp. v. Robert Dillon Framing, Inc.*, 2013 WL 3984885, was a construction defect case wherein a property owner had brought an action against a subcontractor for breach of implied warranty of workmanship – it was not an action based on a contract solely for services. As case law makes clear, an implied warranty did not exist in the parties' Agreement, and this claim should be ignored. To the extent that a warranty for investment advice services may exist, the evidence will show that Defendants provided adequate service.

3. <u>Contractual Breach of Implied Covenant of Good Faith and Fair Dealing Claim</u>

According to the Nevada Supreme Court, to establish a claim for breach of the implied covenants of good faith and fair dealing, a plaintiff must prove:

> (1) the existence of a contract between the parties;
> (2) that defendant breached its duty of good faith and fair dealing by acting in a manner unfaithful to the purpose of the contract; and
> (3) the plaintiff's justified expectations under the contract were denied.
> *Shaw v. Citimortgage, Inc.*, 201 F.Supp.3d 1222, 1251 (D.Nev. 2016).

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As further explained by the Court, the implied covenants "'Prohibits arbitrary or unfair actions by one party that work to the disadvantage of the other.'" *Id.* (Quoting *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420, 427 (2007).

Here, the parties agree that a contract existed between them, however, Mr. Christian will testify that Mr. Garmong never instructed him to make changes to Plaintiff's investment accounts without Mr. Garmong's approval. At all times, his investment advice to Mr. Garmong was suitable and prudent. In addition, Mr. Garmong asserted control to make the final decision on all important investment strategies and to pre-approve of all material investment decisions. Defendants were faithful at all times to the purpose of the parties' agreement. There will be no evidence that Defendants violated the covenant of good faith and fair dealing.

4. <u>Tortious Breach of Implied Covenant of Good Faith and Fair Dealing</u>

A claim for tortious breach of the implied covenants is similar to a contractual breach of the implied covenants, but also requires that a special relationship of trust and dependency existed between the parties. *Andreatta v. Eldorado Resorts*, 214 F.Supp. 3d 943, 957 (D.Nev. 2016). "This additional tort liability is allowed only in cases where 'ordinary contract damages do not adequately compensate the victim because they do not require the party in the superior or entrusted position . . . to account adequately for grievous and perfidious misconduct, and contract damages do not make the aggrieved, weaker, 'trusting' party 'whole.'" *Id.*

A federal court has further explained that "an action in tort for breach of the covenant arises only 'in rare and exceptional cases' when there is a special relationship between the victim and tortfeasor. A special relationship is 'characterized by elements of public interest, adhesion, and fiduciary responsibility.'" *Max Baer Productions, Ltd. v. Riverwood Partners, LLC*, 2010 WL 3743926 at *5 (D.Nev.). As examples of a special relationship, the court cited relationships "between insurers and insureds, partners of partnerships, and franchisees and franchisers." *Id.* "In addition, we have extended the tort remedy to certain situations in which one party holds '<u>vastly superior bargaining power</u>.'" *Id.* (emphasis added).

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Here, Mr. Garmong was hardly a weaker and dependent party. Rather, Mr. Garmong had obtained a doctorate from MIT and a combined J.D. and M.B.A. from UCLA before spending nearly thirty years as a patent attorney. Mr. Garmong was also an experienced investor who transferred numerous securities, not solely cash, into the accounts managed by Defendants.

Further, because Defendants never assumed sole control over Gregory Garmong's accounts, Mr. Garmong remained in control of making all important investment strategies and approved of all material investment recommendations throughout the parties' relationship. As a result, Plaintiff had not established that Defendants breached the implied covenant of good faith and fair dealing or that Defendants' conduct was grievous and perfidious. In any event, the evidence will show that Defendants did not violate any applicable covenant of good faith and fair dealing.

5. Breach of Nevada Deceptive Trade Practices Act Claim

"Under NDTPA's [Nevada Deceptive Trade Practices Act] plain language, to establish a cause of action, a plaintiff must show a defendant engaged in a consumer fraud of which the plaintiff was a victim. Because a prevailing party may recover 'damages that he has sustained,' a plaintiff also must demonstrate damages. Implicit in that language is a causation requirement." *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657 (D.Nev. 2009)(emphasis added). As further stated by the *Picus* Court, "Under Nevada Revised Statutes §41.600(3) a party can recover only those damages sustained as a result of the defendant's act of consumer fraud." *Id.*

The law does not support a "rearview" analysis of investment recommendations. The Plaintiff must demonstrate that the quality of the investment when it was purchased deviated from his or her investment goals. [citing cases] *Keenan, M.D., et al. v. D.H. Blair & Co., Inc.*, 838 F. Supp. 82, 87 (S.D.N.Y. 1993). A subsequent diminution in value reveals nothing about the quality of the investment when it was purchased and does not illuminate the reasons why the

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stock was unsuitable for investment objectives. *Id.* Conclusory allegations regarding inappropriate investments are not sufficient. *Id.* "[A]ny investment that turns out badly can appear to be – in hindsight a low return, high risk investment..." *Olkley v. Hyperion 1999 Term Trust, Inc.*, 98 F.3d 2, 8 (2nd Cir. 1996). "It is the very nature of the securities markets that even the most exhaustively researched predictions are fallible..." "Not every bad investment is a product of misrepresentation." *Id.* To recover in a securities case, a customer "must offer more than allegations that [his] portfolios failed to perform as predicted." *Id.*

As previously stated, Mr. Garmong never instructed Mr. Christian to assume complete control over Plaintiff's investment accounts without input from Mr. Garmong, and that Mr. Garmong was in control of making all important investment strategies and approved of all investment recommendations made by Defendants. Moreover, any losses suffered by Mr. Garmong were directly attributable to the sharp declines in the overall stock market and were not the result of Defendants failure to follow Mr. Garmong's investment objective and instructions. In any event, the evidence will show that Defendants did not commit any acts prohibited by the Nevada Deceptive Trade Practices Act.

6. <u>Breach of Fiduciary Duty and Duty of Full Disclosure Claims</u>

Plaintiff's breach of fiduciary duty claims are premised on his allegations of unsuitability. However, Plaintiff has failed to present any evidence that the investments recommended were unsuitable. The investments recommended and trades made were all suitable based on Plaintiff's objectives, risk tolerance and financial situation. The suitability obligation, however, is not tantamount to an investment insurance policy which protects against losses. At the proper time, Defendants will present expert evidence on this issue.

According to the Nevada Supreme Court, "a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship." *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009).

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As stated above, Plaintiff Mr. Garmong never instructed Mr. Christian to assume complete control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong were not caused by Defendant Mr. Christian's failure to follow Mr. Garmong's investment instructions but were due solely to the sharp declines in the stock market. Further, Mr. Garmong never instructed Defendants to assume complete control over his investment accounts, and instead, remained in control of all important investment strategies and approved of all recommendations made by Defendants throughout their relationship. As a result, the evidence will show that Defendants kept Plaintiff fully apprised of his investments and did not breach their fiduciary duty to Plaintiff.

7. Breach of Agency Claim

According to the Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006), "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."

As previously stated, Plaintiff Garmong never instructed Mr. Christian to assume complete control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong were not caused by Defendant Mr. Christian's failure to follow Mr. Garmong's investment instructions but were due solely to the sharp declines in the stock market. Further, Mr. Garmong never instructed Defendants to assume complete control over his investment accounts, and instead, remained in control of all important investment strategies and approved of all recommendations made by Defendants throughout their relationship. As a result, the evidence will not support a finding that Defendants breached their agency duty to Plaintiff. In any event, Defendants deny committing any breach of agency duty that may have been owed to Plaintiff and deny that Plaintiff was damaged.

8. Negligence Claim

To the extent that Mr. Garmong seeks summary judgment on the claim of negligence,

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Mr. Garmong must prove:

a) That the defendant was negligent; and

b) That the defendant's negligence was the proximate legal cause of damage to the plaintiff.

Nevada Jury Instructions 4.02

In any event, the evidence will show that Defendants were not negligent.

9. <u>Breach of NRS 628A.030 Claim</u>

NRS 628A.030 provides:

1. If loss results from following a financial planner's advice under any of the circumstances listed in subsection 2, the client may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney' fees.

2. The circumstances giving rise to liability of a financial planner are that the financial planner:

(a) Violated any element of his or her fiduciary duty;

(b) Was grossly negligent in selecting the course of action advised, in the light of all the client's circumstances known to the financial planner; or

(c) Violated any law of this State in recommending the investment or service.

As previously stated, Plaintiff Garmong never instructed Mr. Christian to assume complete control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong were not caused by Defendant Christian's failure to follow Mr. Garmong's investment instructions but were due solely to the sharp declines in the stock market. Further, Mr. Garmong never instructed Defendants to assume complete control over his investment accounts, and instead, remained in control of all important investment strategies and approved of all recommendations made by Defendants throughout their relationship.

The duties of brokers to their customers are limited. They are not insurers against investment risk. That is the obligation that Plaintiff wishes to impose on Defendants. Unfortunately for Plaintiff, this is directly contrary to well established law. A stockbroker is simply not an insurer of his investment advice. *Powers v. Francis I. duPont Co.*, 344 F. Supp. 429 (E.D. Pa. 1972). In any event, the evidence will show that Defendants did not violate NRS 628A.030.

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10. Unjust Enrichment Claim

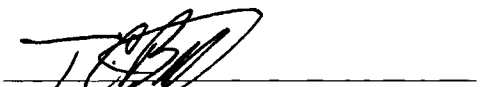
"An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Leasepartners Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997). Here, the parties agree that they entered into a written "Investment Management Agreement" (See Material Facts Not In Issue, above). The "advisor fees" Plaintiff now complains about by Plaintiff were included in that Agreement. In any event, the evidence will show support that that Defendants earned their fees and were not unjustly enriched.

11. Intentional Infliction of Emotional Distress Claim

In Nevada, the elements of a cause of action for intentional infliction of emotional distress are: "'(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation.' "*Posadas v. City of Reno,* 851 P.2d 438, 444 (Nev.1993) (quoting *Star v. Rabello,* 625 P.2d 90, 91–92 (Nev.1981)). "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Maduike v. Agency Rent–A–Car,* 953 P.2d 24, 26 (Nev.1998) (quotation omitted). "Liability for emotional distress generally does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Burns,* 175 F.Supp.2d at 1268 (quotations omitted).

In any event, the evidence will show that Defendants did not engage in extreme and outrageous conduct with the intent, or reckless disregard for Mr. Garmong's emotional state.

Submitted this 9 day of Oct., 2018.



Thomas C. Bradley, Esq.,
Attorney for Defendants

CERTIFICATE OF SERVICE

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

_____hand-delivered

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

_____e-mailed

_____telefaxed, followed by mailing on the next business day,

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

a copy of the attached

APPELLANT'S APPENDIX VOLUME 3

addressed to:

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