IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83356

GREGORY GARMONG,

Appellant

--against--

WESPAC; GREG CHRISTIAN,

Respondents

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

APPELLANT'S APPENDIX VOLUME 5

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JAMS ARBITRATION
LAS VEGAS, NEVADA

GREGORY GARMONG, Plaintiff, vs. WESPAC; GREG CHRISTIAN, Defendants.	**# 1260003474** **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEY FEES AND COSTS; MOTION TO RETAX COSTS**

Plaintiff opposes Defendants' "Motion for Attorney Fees and Costs" ("Motion"). Plaintiff further moves to retax the costs claimed by Defendants.

The Motion seeks payments in two areas, attorneys fees and costs. Neither is permitted under the controlling law.

I. Opposition to Motion for Attorneys fees and costs under NRCP Rule 68.

A. The basis of the Motion for Attorneys' Fees is Rule 68, which was excluded by the arbitrator from the present litigation.

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

contract applicable to this arbitration that authorizes an award attorneys' fees and costs.

The sole basis asserted for this portion of the Motion is Nevada Rules of Civil Procedure ("NRCP") Rule 68 Offer of Judgment (Motion 2:7-3:3).

On August 11, 2017, the arbitrator entered a "Discovery Plan and Scheduling Order" ("Scheduling Order"). The Scheduling Order stated at 1:17-18: "The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure and the deadlines for filing Oppositions and Replies found in Washoe District Court Rule 12 will generally govern this case unless the arbitrator rules otherwise." Scheduling Order at 2:23 states, "IT IS SO ORDERED." followed by the arbitrator's signature. Conspicuous by its absence is any inclusion of NRCP Rule 68 in the listing of rules governing the present case. That is, the parties agreed that NRCP Rule 68 would not be included and the arbitrator so ordered.

This aspect of the Scheduling Order, expressly stating the rules that would govern the arbitration, was not altered or amended by the two subsequent Orders (November 27, 2017 and March 19, 2018) issued by the arbitrator.

In direct contravention of the Scheduling Order, on September 12, 2017–a mere month after the arbitrator issued the Scheduling

Order–Defendants served an Offer of Judgment under NRCP Rule 68 (Motion Exhibit 1). The Offer of Judgment at 1:24-28 stated that it was based upon NRCP Rule 68. Plaintiff properly did not respond to this Offer of Judgment, as it was clearly outside the scope of the rules governing the arbitration proceeding agreed to by the parties and ordered by the Scheduling Order.

Motion at 7:8-9:10 argues that the Offer of Judgment was reasonable, and that Mr. Garmong's refusal of the Offer of Judgment was unreasonable. These arguments are both plainly false. The parties had agreed, and the arbitrator had ordered, about a month earlier, that only certain of the Nevada Rules of Civil Procedure would govern the case, and NRCP Rule 68 had been excluded. In fact, as with the case presented by Defendants, the statements at Motion 7:8-9:10 are a conscious effort to mislead both Plaintiff and the arbitrator. The defendants were fully aware that NRCP Rule 68 was expressly excluded by agreement of the parties and by order of the arbitrator from the rules governing this case; rather, the defendants appear to hope that the passage of time would allow this fact to be overlooked.

The present Motion, to the extent it seeks attorneys' fees and costs, is based exclusively on the NRCP Rule 68 Offer of Judgment. It is therefore improper. Attorneys' fees cannot be awarded on the basis of the NRCP

Rule 68 Offer of Judgment.

B. Even if Defendants had a basis in law, they present no hourly documentation of attorneys' fees.

The Motion includes no hourly documentation of the detail of the claimed attorneys' fees. Nor are there included copies of bills to the client for the alleged attorneys' fees. "Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

C. The "costs" expressly included in the Motion for Attorney's Fees and Costs based upon NRCP Rule 68 may not be recovered.

As best as can be understood, the "costs" expressly included in the Motion under NRCP Rule 68 are the amounts allegedly paid to "Hume" ($24,020.00) and the alleged "Wespac Costs" totaling $4,979.96. These "costs" may not be recovered, because NRCP Rule 68 was excluded from the rules governing the arbitration.

D. The "JAMS costs" may not be recovered.

There is an attempt to recover the JAMS costs pursuant to JAMS Rule 24(f). However, as explained in the following § II, any JAMS substantive rules such as the awarding of costs under JAMS Rule 24(f) are superseded by Nevada's substantive laws or rules. The only Nevada substantive law

under which the Motion sought costs was NRCP Rule 68, which is inapplicable because it was expressly excluded from the rules governing this case by agreement of the parties and the Scheduling Order. Accordingly, the "JAMS costs" may not be recovered under any theory.

E. The "Declaration of Thomas C. Bradley," Exhibit 3 to the Motion, is legally insufficient.

Nevada law provides for the use of a declaration instead of an affidavit. NRS 53.045 mandates the form of such a declaration:

> **53.045. Use of unsworn declaration in lieu of affidavit or other sworn declaration; exception**
> Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form:
> 1. If executed in this State: "I declare under penalty of perjury that the foregoing is true and correct."
>
> Executed on _____ _____
>
> Date Signature

The Declaration of Thomas C. Bradley," Exhibit 3 to the Motion, has no such declaration, nor is it sworn. It is a void document that cannot support an award of costs, as discussed more fully in the following § II.

II. Motion to Retax Costs

The Motion at 2:4-6 seeks the award of JAMS costs pursuant to

JAMS Rule 24.

A. Costs expressly included in the Motion for Attorneys Fees and Costs Under NRCP Rule 68 cannot be recovered.

As set forth in § I above, the Motion seeks costs based upon Nevada substantive law only under NRCP Rule 68, which was excluded from the rules governing this case by the agreement of the parties and the Scheduling Order. No costs may be awarded under NRCP Rule 68.

B. No costs may be awarded under JAMS Rule 24(f).

The Motion's other stated basis (11:15-24) for requesting an award of certain JAMS costs is JAMS Rule 24(f), which provides, "(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the Parties' Agreement."

JAMS Rule 24(f) does not supersede the substantive statutes and rules of Nevada that govern this proceeding and the arbitrator may award costs only as provided by Nevada law.

C. The choice-of-law provision of the Investment Management Agreement precludes any recovery of costs under JAMS rules.

The Investment Management Agreement ("Agreement"), ¶16, states in

relevant part:

> 16. Arbitration. 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.

(Citations omitted, emphasis added).

This provision of the Agreement, drafted and prepared by Defendants and their lawyers, provides a choice of law: JAMS rules and Nevada state law. The "laws of the State where the agreement is governed and executed" is Nevada.

The Nevada Supreme Court in WPH Architecture, Inc. v. Vegas VP, LP, 131 Nev. Adv. Op. 88, 360 P.3d 1145, 1147 (2015), following the decision of the United States Supreme Court in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58-61 (1995), described a similar choice-of-law situation presented in an arbitration agreement and concluded: "Therefore, we hold that the arbitration was substantively governed by Nevada law and procedurally governed by the AAA [in the present case, JAMS] rules." To the extent that the Defendants or the arbitrator consider the choice-of-law language drafted by Defendants ambiguous or unclear, "a court should construe ambiguous language against the interest of the party

that drafted it." Mastrobuono, 514 U.S. at 63; Anvui, LLC v. Dragon, LLC, 123 Nev. 212, 215-16, 163 P. 3d 405, 407 (2007). The interest of the party that drafted ¶16 is the interest of Defendants, which seek to improperly apply JAMS Rule 24(f). This principle requires that Nevada law be applied for awarding attorneys fees and/or costs.

With these principles in mind, the Agreement must be interpreted that all requests for attorneys fees or costs must be governed solely by Nevada substantive law, not a JAMS rule. In the present case where the Agreement provides a comparable choice of law between JAMS rules and Nevada law, the arbitration is substantively governed by Nevada law and procedurally by JAMS rules.

Any motion for an award of costs is substantive, not procedural, in nature. Alamo Rent-A-Car, Inc. V. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994 ("[S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights"). Accordingly, it must be governed by Nevada laws, not JAMS rules. In this case, the governing law put in issue by Defendants is NRCP 68, which is excluded from this arbitration by agreement of the parties and by Order of the arbitrator.

The Motion for Costs, as applied to JAMS costs, must be denied

because Defendants improperly attempt to base it upon JAMS rules.

D. The Verification presented in the Motion is not in accord with the requirements of law.

Costs also cannot be awarded because the Declaration supplied with the Memorandum is deficient and defective.

NRS 18.110(1) provides:

> The party in whose favor judgment is rendered, and who claims costs, must file with the clerk, and serve a copy upon the adverse party, within 5 days after the entry of judgment, or such further time as the court or judge may grant, a memorandum of the items of the costs in the action or proceeding, which memorandum must be verified by the oath of the party, or the party's attorney or agent, or by the clerk of the party's attorney, stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding.

(Emphasis added).

Statutes providing for the award of costs must be strictly construed. Gibellini v. Klindt, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994). Where a party refuses to follow the statutory scheme, costs may not be awarded, Henry Products Inc. v. Tarmu, 114 Nev. 1017, 1021, 967 P.2d 444, 446 (1998) ("Because Henry Products failed to follow the statutory scheme that was designed to allow adverse parties an opportunity to timely contest a request for costs, the award of costs is also reversed.")

The Motion is insufficient in at least two relevant ways.

First, neither the record of the District Court nor the certificate of service indicates that any Memorandum was filed with the "clerk" of the District Court.

Second, the attempted verification is insufficient. One of the strictest requirements is that the memorandum of costs must include a proper verification meeting the requirements of NRS 18.110(1). An unsworn statement by an attorney is not sufficient. Village Builders 96, L.P. v. U.S. Laboratories, Inc., 121 Nev. 261, 276-8, 112 P.3d 1082, 1092-93 (2005).

Nevada law provides that a declaration may meet the requirements of the verified oath required by NRS 18.110(1). NRS 53.045, see above, provides the mandatory form of such a declaration. The Declaration of Thomas C. Bradley, Exhibit 3 to the Motion, has no such declaration, nor is it sworn. It is a void document.

Neither the Declaration of Bruce P. Cramer (Motion Exhibit 2) nor the Declaration of Thomas C. Bradley (Motion Exhibit 3) states, specifically or in substance, "to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding." Because the portion of the Motion seeking an award of costs does not meet the requirements of Nevada law, the arbitrator may not award costs to the Defendants.

E. The Memorandum did not properly document the requested costs.

Village Builders 96, L.P. v. U.S. Laboratories, Inc., 121 Nev. 261, 276-78, 112 P.3d 1082, 1092-3 (2005), holds: "Likewise, in Bobby Berosini, Ltd. v. PETA, this court determined that the district court abused its discretion because it granted an award of costs based upon the prevailing party's submission of itemized materials that did not show how the costs 'were necessary to and incurred in the present action.' (114 Nev. 1348, 1352, 971 P.2d 383, 386 (1998).)"

Cadle Co. v. Woods & Erickson, LLP, 131 Nev. Adv. Op. 15, 345 P.3d 1049 (2015) elaborated:

> NRS 18.020 and NRS 18.050 give district courts wide, but not unlimited, discretion to award costs to prevailing parties. Costs awarded must be reasonable, NRS 18.005; Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998), but parties may not simply estimate a reasonable amount of costs. See Gibellini v. Klindt, 110 Nev. 1201, 1205–06, 885 P.2d 540, 543 (1994) (holding that a party may not estimate costs based on hours billed). Rather, NRS 18.110(1) requires a party to file and serve 'a memorandum [of costs] ... verified by the oath of the party ... stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding.' Thus, costs must be reasonable, necessary, and actually incurred. We will reverse a district court decision awarding costs if the district court has abused its discretion in so determining. Vill. Builders 96, L.P. v. U.S. Labs., Inc., 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005). In Bobby Berosini, Ltd., we explained that a party must 'demonstrate how such [claimed costs] were necessary to and

> incurred in the present action.' 114 Nev. at 1352–53, 971 P.2d at 386. Although cost memoranda were filed in that case, we were unsatisfied with the itemized memorandum and demanded further justifying documentation. Id. It is clear, then, that 'justifying documentation' must mean something more than a memorandum of costs. In order to retax and settle costs upon motion of the parties pursuant to NRS 18.110, a district court must have before it evidence that the costs were reasonable, necessary, and actually incurred.
>
> Without evidence to determine whether a cost was reasonable and necessary, a district court may not award costs. PETA, 114 Nev. at 1353, 971 P.2d at 386. Here, the district court lacked sufficient justifying documentation to support the award of costs for photocopies, runner service, and deposition transcripts. Woods & Erickson did not present the district court with evidence enabling the court to determine that those costs were reasonable and necessary.
>
> Photocopies
>
> Woods & Erickson did not submit documentation about photocopies other than an affidavit of counsel stating that each and every copy made was reasonable and necessary. In PETA, we rejected a claim for photocopy costs because only the date and cost of each copy were provided. See PETA, 114 Nev. at 1353, 971 P.2d at 386. We have also held that documentation substantiating the reason for each copy 'is precisely what is required under Nevada law.' Vill. Builders 96, 121 Nev. at 277–78, 112 P.3d at 1093.

(Emphasis added).

This last section of the quote on "photocopies" is presented to indicate the level of detail of documentation that Nevada requires to justify an award of costs. The requested costs are addressed only in Motion Exhibit 4, where no documentation of the type required by Nevada law is provided.

Nothing in the Motion shows how the costs were necessary to, and

incurred in, the present action.

Defendants may not supply the missing documentation in their reply. Baum v. Alan Waxler Group, Inc., 126 Nev. 693, at *3, ftn 3, 367 P.3d 749 (2010).

SUMMARY AND CONCLUSION

Defendants have sought an award of attorneys fees and costs under NRCP Rule 68, which by agreement of the parties and Scheduling Order of the arbitrator is not part of the governing law of the arbitration. The requested fees and costs may not be awarded under NRCP Rule 68.

Defendants were well aware that fees and costs could not be awarded under NRCP Rule 68. As a secondary plan, they also sought an award of one category of the costs, the JAMS costs, under JAMS Rule 24(f). They may not do so under the holding of WPH Architecture, which provides that "the arbitration was substantively governed by Nevada law and procedurally governed by the AAA [in the present case, JAMS] rules." The only Nevada law under which Defendants sought to recover costs was NRCP Rule 68, which, as agreed by the parties and ordered by the arbitrator, was not applicable in the arbitration proceeding.

No attorney fees or costs may be awarded to Defendants under the

controlling law for the reasons stated above and for those set out in the attached declaration of Gregory Garmong. Exhibit 1.

DATED this 6th day of March, 2019.

/S/ Carl M. Hebert
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 March 6 2019, 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 OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEY FEES AND COSTS; MOTION TO RETAX COSTS

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
435 Marsh Ave.
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775-323-5178

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

EXHIBIT 1

EXHIBIT 1

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 Second Judicial District Court Case No. CV12-01271, JAMS Arbitration # 1260003474, entitled Gregory Garmong v. Wespac et al. This Declaration is submitted in support of "Plaintiff's Opposition to Defendants' 'Motion for Attorney Fees and Costs' and Motion to Retax Costs" in that proceeding.

2. The arbitrator made no disclosure to me as required by NRS § 38.227.

3. In this Declaration I will address issues related to "Plaintiff's Motion for Partial Summary Judgment." Some examples as set forth in the following paragraphs illustrate that the arbitrator's actions were arbitrary, capricious, or unsupported by the agreement between the parties ("agreement"); that the arbitrator disregarded and refused to utilize the facts that were known to him; that there was manifest disregard of the law by the arbitrator; that the arbitrator was aware of the governing law and chose to deliberately ignore it; that the arbitrator knew the law and recognized that the law required a particular result, simply disregarded or missed the law, or paid no attention to it.

4. In this Declaration I will not address issues related to the document dated January 12, 2019 and entitled "Interim Award, as it is indicated at page 10, third full paragraph as not a final award.

5. The "Discovery Plan and Scheduling Order" of August 11, 2017, signed by the arbitrator, at 2:12-13 authorizes the parties to "bring motions for

summary judgment, pursuant to NRCP 56." The "Second Order re Scheduling" of November 22, 2017, signed by the arbitrator, provides at page 2, first full paragraph, that the parties must file any motions for summary judgment by November 30, 2017. I understood these two Orders to mean that any motion for summary judgment would be adjudicated by the arbitrator according to the substantive law of Nevada, in a fair and impartial manner. On November 30, 2017, I filed a Motion for Partial Summary Judgment," with 20 Undisputed Material Facts, extensive legal authority, and 21 Exhibits, plus Declaration of Gregory Garmong as Exhibit 22.

6. I have carefully reviewed the following materials bearing a relation to Plaintiff's Motion for Partial Summary Judgment: Plaintiff's Motion for Partial Summary Judgment, with 21 Exhibits plus Declaration of Gregory Garmong, served November 30, 2017; Defendants Opposition to Plaintiff's Motion for Partial Summary Judgment, served December 21, 2017; Plaintiff's Reply Points and Authorities in Support of Motion for Partial Summary Judgment, with 6 Exhibits and Declaration of Gregory Garmong served January 11, 2018; Order Re: Summary Judgment, filed January 25, 2018; Plaintiff's Motion for Reconsideration of Order Denying Plaintiff's Motion for Partial Summary Judgment, served February 12, 2018; Defendant's Opposition to Motion for Reconsideration of Order Denying Plaintiff's Motion for Partial Summary Judgment, served March 8, 2018; Order re Claimant's Motion for Reconsideration of Order Denying Summary Judgment, filed March 19, 2018; Plaintiff's Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment, and Appoint New Arbitrator, served July 22, 2018; and Plaintiff's Reply to Opposition to Motion to Disqualify Arbitrator; and all Exhibits, Declarations, Affidavits, and all other documents referenced in or served or included with these papers.

7. The Order of January 25, 2018 and the Order of March 19, 2018

evidence a complete disregard of the facts by the arbitrator, and a decision that is arbitrary, capricious, or unsupported by the agreement. Neither of the two Orders mentioned any of the 20 Undisputed Material Facts set forth in Plaintiff's Motion for Partial Summary Judgment, any of the other facts discussed in Plaintiff's Motion for Partial Summary Judgment, or any of the Exhibits submitted by Plaintiff. Neither of the two Orders mentioned any of the purported facts set forth in "Defendants Opposition to Plaintiff's Motion for Partial Summary Judgment."

8. The Order of March 19, 2018 at page 2 line 3, acknowledges and admits that "Many of the facts relied upon by Claimant are indeed undisputed" and at page 2, line 8-11 acknowledges that, under Nevada Rules of Civil Procedure ("NRCP") Rule 56, "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 are unnecessary." Having just admitted that "Many of the facts relied upon by Claimant are indeed undisputed," the Order of March 19 2018 does not indicate any effort by the arbitrator to comply with NRCP Rule 56 and to ascertain which facts are admitted by the arbitrator as "undisputed," and whether those admitted undisputed facts would be sufficient to support granting of the Motion for Partial Summary Judgment for some or all of the Claims. I had brought Plaintiff's Motion for Reconsideration of Order Denying Plaintiff's Motion for Partial Summary Judgment, and the Order of March 19, 2018 was responsive to that Motion for Reconsideration. The Motion for Reconsideration pointed out at several locations (*e.g.*, 4:15-19, 5:2-7, 5:7-18, 5:18-23, 5:23-6:4, 6:5-10, 6:11-18, 6:20-21, 8:13-15), that the Order of January 25, 2018 had not addressed the Undisputed Material Facts and requested reconsideration on that basis. The Order of March 19, 2018 does not mention the Undisputed Material Facts 1-20 other than to acknowledge

and admit that "Many of the facts relied upon by Claimant are indeed undisputed."

9. For example, as discussed at Motion for Reconsideration 5:18-23, Undisputed Material Facts 13-20 were not only undisputed, they were not even mentioned by Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment and the Christian Affidavit submitted with the Opposition. As they were not mentioned, there can be no dispute or credibility issue. Undisputed Material Facts 13-20 necessarily lead to judgment in my favor on the Fourth-Seventh and Ninth Claims, and on the Doubling of Damages. This, despite the arbitrator's acknowledgment that "Many of the facts relied upon by Claimant are indeed undisputed" and that NRCP Rule 56 requires that the arbitrator "shall 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 are unnecessary."

10. Plaintiff's Motion for Partial Summary Judgment at 3:11-21 quotes NRCP Rule 56(c) and communicates it to the arbitrator, and the arbitrator was fully aware of the provisions of NRCP Rule 56(c), which 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." As discussed above, the Order of March 19, 2018 at page 2 line 3, acknowledges and admits that "Many of the facts relied upon by Claimant are indeed undisputed." Nevertheless, the Order of January 25, 2018 proceeded to manifestly disregard and to deliberately ignore the mandatory procedure of

NRCP 56(c), and to disregard the Undisputed Material Facts.

11. The Order of January 25, 2018 and the Order of March 19, 2018 acknowledged the governing law, but evidence a manifest disregard of, and deliberately ignored, the procedure for evaluating a motion for summary judgment.

12. The Order of January 25, 2018 and the Order of March 19, 2018 manifest disregards, and deliberately ignores, the substantive law of summary judgment. The Orders do not evaluate the Undisputed Material Facts in light of the applicable substantive legal authority. The arbitrator was fully aware of the controlling legal authority from the briefs that Plaintiff had provided, which communicated this information to the arbitrator.

13. The Order of March 19, 2018, page 2, third paragraph, manifestly disregards, and deliberately ignores, the law governing summary judgment, by giving as its reason for refusing to decide Plaintiff's Motion for Partial Summary Judgment the desire for a "merits hearing," and refusing to address the law of Nevada. The law of Nevada has no provision for a "merits hearing" to test credibility in relation to the motion for summary judgment.

14. The Order of January 25, 2018 and the Order of March 19, 2018 manifestly disregards, and deliberately ignores, the law of evidence and the requirements for evidence in a summary judgment proceeding. The evidentiary requirements, set forth in Plaintiff's Reply Points and Authorities in Support of Motion for Partial Summary Judgment at, for example, 6:9-7:19 and 8:8-10:23, discuss the reasons that the purported evidence submitted by the Defendants does not meet the evidentiary requirements of NRCP Rule 56(e) and the Nevada statutes. The two Orders manifestly disregard, and deliberately ignore, this law of evidence, not mentioning it at all. The evidence submitted by the Defendants to oppose Plaintiff's Motion for Partial Summary Judgment is not admissible in a summary judgment proceeding.

15. As set forth and communicated to the arbitrator in Plaintiff's Motion for Partial Summary Judgment at 3:10-21, NRCP Rule 56(c) 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. The Order of January 25, 2018 and the Order of March 19, 2018 manifestly disregard, and deliberately ignore, the mandatory substantive law of NRCP Rule 56(c) and the authority.

16. The arbitrator used as his sole reason for denying Plaintiff's Motion for Reconsideration of Order Denying Plaintiff's Motion for Partial Summary Judgment, a determination that a "merits hearing" must be held. See Order filed March 19, 2018, second page, first-third paragraphs, stating, "A merits hearing is particularly appropriate where, as here, the resolution of the claims is so heavily dependent on the opportunity of the parties to test the credibility of the two principle [sic] witnesses[.]" Yet the arbitrator was fully aware that the credibility of affiants/declarants may not be determined on summary judgment. When he was a judge, the arbitrator admitted in Kulkin v. Town of Pahrump, 2012 WL 1019077 (D. Nev. 2012) at *19, "At summary judgment, the Court cannot evaluate credibility", and at footnote 2, "The Court cannot evaluate the credibility of Sullivan's testimony on summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)." Anderson v. Liberty Lobby states, at the cited location, 477 U.S. 255, "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." This principle set forth by the United States Supreme Court is precedent in Nevada and is applicable in Nevada. See Pegasus v. Reno Newspapers, Inc., 118

Nev. 706, 713-714, 57 P.3d 82, 87 (2002). The arbitrator was fully aware of the law forbidding credibility determinations by the judge on summary judgment, and chose to manifestly disregard and deliberately ignore it.

17. The arbitrator's disregard of the Undisputed Material Facts, even those that he admitted were "undisputed," and his manifest disregard of, and deliberate ignoring of, the law, not once but throughout the Order of January 25, 2018 and the Order of March 19, 2018, evidences evident partiality by an arbitrator supposedly appointed as a neutral arbitrator, refusal to consider evidence material to the controversy, and otherwise conduct of the hearing contrary to NRS § 38.231, so as to prejudice substantially my rights, demonstrates the meeting of the statutory basis of vacating an arbitrator's award pursuant to NRS § 38.241(1).

18. Plaintiff's Motion for Partial Summary Judgment at 8:15-10:13 demonstrates the elements of the First Claim for Relief, Breach of Contract. As stated there, the facts sufficient to demonstrate the elements are found in Undisputed Material Facts 1, 3, 4-11, and 13-19. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 8:16-27. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing.

It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

19. Plaintiff's Motion for Partial Summary Judgment at 10:14-11:25 demonstrates the elements of the Second Claim for Relief, Breach of Implied Warranty in Contract. As stated there, the facts sufficient to demonstrate the elements are found in Undisputed Material Facts 1 and 6-11. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 10:16-11:3. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

20. Plaintiff's Motion for Partial Summary Judgment at 11:26-15:9 demonstrates the elements of the Third Claim for Relief, Contractual Breach

of Implied Covenant of Good Faith and Fair Dealing. The facts sufficient to demonstrate the elements are found in Undisputed Material Facts 1, 3-7, and 9-11. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 11:28-12:27. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

Contractual Breach of Implied

21. Plaintiff's Motion for Partial Summary Judgment at 15:10-26:8 demonstrates the elements of the Fourth Claim for Relief, Tortious Breach of Implied Covenant of Good Faith and Fair Dealing. The facts sufficient to demonstrate the elements are found in Undisputed Material Facts 1, and 3-21. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority

governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 15:13-16:28, 22:18-23:1, and 24:9-25:27. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

22. Plaintiff's Motion for Partial Summary Judgment at 26:9-31:1 demonstrates the elements of the Fifth Claim for Relief, Breach of Nevada Deceptive Trade Practices Act, NRS Ch. 598. The facts sufficient to demonstrate the elements are found in Undisputed Material Facts 3, 6, 7-9, 11-20. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 26:18-28:19. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and

knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

23. Plaintiff's Motion for Partial Summary Judgment at 31:2-34:15 demonstrates the elements of the Sixth Claim for Relief, Breach of Fiduciary Duty. The facts sufficient to demonstrate the elements are found in Undisputed Material Facts 19-20. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 31:4-32:25 and 33:26-34:15. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

24. Plaintiff's Motion for Partial Summary Judgment at 34:16-37:24 demonstrates the elements of the Seventh Claim for Relief, Breach of Fiduciary Duty of Full Disclosure. The facts sufficient to demonstrate the elements are found in Undisputed Material Facts 13-18. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 31:4-32:25 and 33:26-34:15. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

25. Plaintiff's Motion for Partial Summary Judgment at 37:25-40:1 demonstrates the elements of the Eighth Claim for Relief, Breach of Agency. The facts sufficient to demonstrate the elements are found in Undisputed Material Facts 1 and 4-9. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited

legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 37:27-38:23. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

26. Plaintiff's Motion for Partial Summary Judgment at 40:2-43:2 demonstrates the elements of the Tenth Claim for Relief, Breach of NRS § 628A.030. The facts sufficient to demonstrate the elements are found in Undisputed Material Facts 1, 8-9, 13-19. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 40:3-41:25. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or

missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

27. Plaintiff's Motion for Partial Summary Judgment at 43:4 44:5 demonstrates the elements of the Twelfth Claim for Relief, Unjust Enrichment. The facts sufficient to demonstrate the elements are found in Undisputed Material Facts 4, and 6-9. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 43:5-22. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

28. Plaintiff's Motion for Partial Summary Judgment at 44:6-46:7 demonstrates the elements of Statutory Doubling of Damages Pursuant to NRS § 41.1395. The facts sufficient to demonstrate the elements are found in Undisputed Material Facts 9 and 12 and those cited in respect to individual claims. These Undisputed Material Facts were disregarded by the arbitrator in the Order of January 25, 2018 and the Order of March 19, 2018, and were not mentioned at all. The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in Plaintiff's Motion for Partial Summary Judgment at 44:13-45:22. The arbitrator was aware and conscious of this law, as it was cited in the Motion. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator did not dispute it. The arbitrator decided and willfully chose to manifestly disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the Order of January 25, 2018 and the Order of March 19, 2018, despite the fact that it was correct and governing. It was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The Order of January 25, 2018 and the Order of March 19, 2018 provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

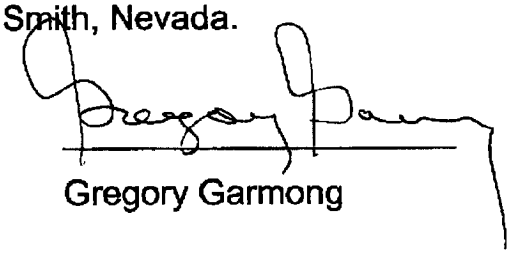
29. For the reasons set forth in my Opposition and herein, there should be no award of attorneys fees and/or costs to Defendants. Had the arbitrator followed the law of Nevada, this matter would have been fully resolved in my favor on Plaintiff's Motion for Partial Summary Judgment. It should never have reached the stage of discovery and a hearing designed to allow the arbitrator once again to disregard the facts and ignore the law to permit him to decide in favor of the Defendants.

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 March 6, 2019 at Smith, Nevada.



Gregory Garmong

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JAMS ARBITRATION CASE REFERENCE NO. 1260003474

GREGORY GARMONG,

Claimant,

vs.

WESPAC, and GREG CHRISTIAN,

Respondents.

FINAL AWARD

The Arbitration Hearing in this case was conducted in Reno, Nevada on October 16, 17, and 18, 2018. Claimant Gregory Garmong was represented by Carl M. Hebert, Esq. Respondents Wespac and Greg Christian were represented by Thomas C. Bradley, Esq. of the law firm of Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace. The testimony of percipient witnesses Gregory Garmong, Gregory Christian, and John Williams, and expert witness Bruce Cramer were presented at the hearing, and several dozen exhibits were received. Post-hearing briefing is complete, and case is ripe for decision on the merits.

The undersigned Arbitrator has jurisdiction to adjudicate the claims in this case in accord with the rulings entered by the Honorable Lynne K. Simons, District Judge of the Second Judicial District Court of the State of Nevada, the Stipulation of the Parties approved by Judge Simons, and the provisions of paragraph 16 of the Investment Management Agreement entered by the Parties on August 31, 2005.

In their pre-hearing and post-hearing briefs, Respondents cite to language in the Arbitration Clause, paragraph 16 of the Investment Management Agreement, which provides that the arbitration award in this case "*shall not include factual findings or conclusions of law.*"

Although this decision is narrative in form and does not employ a format which states specific "factual findings" and "conclusions of law" in numbered or headed paragraphs, it necessarily reflects my factual findings and legal conclusions flowing therefrom by a preponderance of the testimonial and documentary evidence adduced at the arbitral hearing.

This merits decision is titled an "Interim Award" because it is designed to provide the Parties the opportunity to brief the issue of entitlement to attorney's fees, costs, and interest resulting from this decision before the Award becomes final. Additionally, because there was significant duplication in numbered exhibits offered by the Parties, unless otherwise specified, exhibit number references are to Claimant's Exhibits.

I. DISCUSSION

The action giving rise to this Arbitration 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.

Dr. Garmong holds a Ph.D. in metallurgy and material science form Massachusetts Institute of Technology, a JD from UCLA Las School, and an MBA from UCLA. Wespac Advisors, LLC is an SEC Registered Investment Advisor. Mr. Christian has been a financial advisor since 1987 and has been employed as a financial advisor with Wespac since 2004. Wespac Advisors and Mr. Christian have been members of the Charles Schwab Advisor Network for many years.

As set forth more fully below, Garmong alleges that on August 31, 2005, he entered an Investment Management Agreement (Ex. 4) with Wespac and Christian to receive investment advice and professional management of a significant portion of his retirement savings. The professional relationship between the Parties formally ended in approximately March 2009. Garmong contends that during the final 16 months of their relationship, Wespac and Christian failed to adhere to his strict investment instructions and objectives causing Garmong the loss of $669,954 of his invested capital. Additionally, Garmong contends that Wespac and Christian acted fraudulently, thereby entitling Garmong to recover punitive damages, and double damages under NRS 41.1395 because Garmong, who was 61 years of age in 2005, was an older person vulnerable to exploitation by Respondents.

After nearly five years of litigation in the Second Judicial District Court, on February 8, 2017, the Parties entered a Stipulation to proceed to arbitration pursuant to paragraph 16 of the Investment Management Agreement. On February 21, 2017, the Honorable Lynne K. Simons, District Judge, approved the Stipulation and the undersigned was appointed as Arbitrator.

Several discovery and scheduling issues were resolved throughout the arbitration proceedings and Claimants' Motion for Summary Judgment was denied on January 25, 2018.

On September 18, 2017, Claimant Garmong filed an Amended Complaint setting forth the twelve claims at issue in this Arbitration for (1) breach of contract, (2) breach of implied warranty in contract, (3) contractual breach of implied covenant of good faith and fair dealing, (4) tortious breach of implied covenant of good faith and fair dealing, (5) breach of Nevada Deceptive Trade Practices Act, (6) breach of fiduciary duty, (7) breach of fiduciary duty of full disclosure, (8) breach of agency, (9) negligence, (10) breach of NRS 628A.030 duties of a financial planner, (11) intentional infliction of emotional distress, (12) unjust enrichment, and a request for Doubling of Damages pursuant to NRS 41.1395. Each of these claims is based on the alleged conduct of the Parties during their relationship under the Investment Management Agreement.

In their Answer filed October 16, 2017, Wespac and Christian deny the allegations made by Garmong and assert 14 affirmative defenses. Additionally, they seek an award of reasonable attorney fees and costs incurred in defending the case.

Garmong's claims are grounded in his allegations that after he retained the services of Respondents' Wespac and Christian to manage his investments in four retirement investment accounts valued at approximately $2,000,000, Wespac and Christian disregarded his express investment objective to "moderately increase his investment value while minimizing potential for loss of principal." Garmong contends this investment objective was clearly expressed in the Confidential Client Profile (Ex. 3), and the Investment Management Agreement (Ex. 4). Garmong further agreed to pay Wespac, approximately $20,000 per year to manage his investments.

Specifically, the Confidential Client Profile (Ex. 3) signed by Garmong on August 18, 2005,expressly stated his investment goal as "moderate growth, low-moderate risk." Garmong more fully explained his investment goals in the Comments section of the Profile as follows:

> "My goal is providing for retirement. I'm uncertain when I will finally retire. I expect in 2006 my income will be in the $250,000 range, but almost certainly decreasing after that to about if I don't continue to work. Don't expect to start drawing on retirement accounts for about 5 years."

However, the testimony of Garmong and Christian is congruent and shows that from September 2005 through October 2007, Garmong and Christian worked reasonably well together to advance Garmong's investment goals. At about this time, however, the testimony of Garmong and Christian reflect a distinctly different view of what occurred.

Two significant events occurred in Garmong's life in 2007 which he explained altered his perspective on the management of his retirement savings. Garmong testified that the psychological impact of his retirement on August 31, 2017, and finalizing his divorce on October 7, 2017, was "enormous." It is undisputed that such events would profoundly affect anyone.

Garmong explained that by 2007 he had become a certified emergency medical technician and volunteered with the El Dorado, California fire department in the Desolation Wilderness area of Lake Tahoe to participate in wilderness search and rescue. Garmong further testified that he also was actively engaged as a volunteer fireman in wilderness settings; for a time trained a dog rescue team; and volunteered an average of 20 hours per week at a local animal shelter.

According to Garmong, adjusting to retirement and his divorce also caused hm to reevaluate his financial circumstances. Garmong testified that during a regular quarterly meeting with Christian in early October 2007, they discussed the changes in Garmong's life and the status of his investments with Wespac. Garmong testified Christian "gratuitously offered" to take over his Wespac accounts completely and all Garmong had to do "was to state the objectives." Garmong accepted Christian's offer stating his objective as: "Don't lose capital" which Garmong contrasted with the objective stated in his earlier Client Profile for moderate growth with low-moderate risk.

Garmong introduced Ex. 11, a letter to Christian dated October 22, 2007, which he testified he mailed to Christian at Wespac. The letter is titled "Quarterly meeting and future management strategy." The two-page letter recites a summary of Garmong's investment relationship with Wespac and Christian and memorializes Garmong's decision to turn the management of his Wespac accounts over to Christian entirely. Attached to the letter of October 22, are approximately 18 pages of news articles regarding the impending housing crisis on the eve of what has come to be known popularly as "The Great Recession."

Significantly, Christian denies ever receiving Garmong's letter dated October 22, 2007, and cites to Garmong's testimony at the arbitral hearing that Wespac and Christian never acknowledged its receipt, and no other communications between the Parties occurring prior to the end of his relationship with Wespac made any reference to the letter.

Christian and Wespac argue Garmong's proffered letter of October 22, 2007, represents a curiously comprehensive summary of Garmong's currently expressed view of his investment relationship with Wespac. Combined with the attached articles from 2006 regarding the housing market decline, they suggest it was authored by Garmong more recently in preparation for this litigation. Moreover, Christian denies Garmong's characterization of their professional relationship in several other respects.

It is unnecessary to resolve the question of precisely when the Garmong letter dated October 22, 2007 (Ex. 11) was authored, because I find by a preponderance of the evidence that it was never received by Wespac or Christian during their professional relationship with Garmong.

Dr. Garmong is a highly intelligent and educated individual. While he professes no expertise in securities investment, before he engaged the professional services of Wespac and Christian, Garmong had considerable experience in managing a comfortably large individual portfolio of assets.

In 2005, Garmong had amassed five to seven million dollars in the bond and stock market and money market funds before engaging Wespac and Christian. Garmong's acumen in understanding securities investment is further reflected in his personal editing of Wespac's Client Profile; his use of the "laddering" technique he employed in connection with his investments in the bond market; and his ability to understand the financial reports he received regularly from Wespac and Charles Schwab relating to his investment portfolio.

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

The testimony of expert witness Bruce Cramer shows that Christian and Wespac employed a conservative "growth and income" investment strategy throughout their relationship with Garmong which he made more conservative over time to accommodate Garmong's circumstances and the marketplace. According to Christian, he communicated regularly with Garmong through phone, emails, and quarterly meetings. He testified that Garmong was fully engaged in managing his portfolio.

This strategy was consistent with Garmong's investment objectives set forth in his Client Profile, and as otherwise expressed when the Parties regularly reviewed his accounts with Wespac. While it did not and could not entirely insulate Garmong's stock portfolio from losses influenced by the marketplace and especially the recession which befell all sectors of the United States economy commencing in 2007, the strategy employed by Wespac and Christian was consistent with Garmong's stated investment objectives. Clearly Wespac and Christian did not subvert those objectives by their actions.

Christian acknowledged that Garmong's "life situation changed" when he retired but explained that he knew of Garmong's intended retirement from the beginning of their

professional relationship and had factored that into the investment strategy employed for Garmong's accounts with Wespac.

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

Christian further testified that from the beginning of Garmong's affiliation with Wespac, the two regularly discussed Garmong's accounts, and that Garmong's portfolio trended toward more conservative investments as he moved into retirement and as the economy began its slide into recession. Christian acknowledged that Garmong became upset at the investment losses he suffered as the economy worsened in 2007 and 2008. He further testified, however, that at no time did Garmong express a change in his core investment objectives, nor did he give Christian instructions to "not lose capital" or to shift his assets to a 100% cash position.

I asked Dr. Garmong why in October 2007 he did not convert his stocks to all cash if his goal was solely to protect capital after his retirement and in the face of a worsening economy. Garmong responded, "Because you don't need to do that to get gains and preserve capital...What I was trying to do was to stay even with inflation and not lose purchasing power to inflation." (Tr. 10/17/18, page 119, line 17 to page 120, line7). Garmong further explained that based upon a Wespac brochure he thought the company had sophisticated computer programs which could achieve this goal.

Thereafter, Garmong and Christian continued their regular communications regarding Garmong's accounts at Wespac in which he manifested active participation in the management of his investments. Respondents Wespac and Christian offered several exhibits reflecting meaningful communications regarding the status of Garmong's investments after October 2007.

On December 10, 2007, Garmong sent a fax to Christian outlining the structure of his "bond ladder" and plans for its future development (Respondent's Ex. 27). On January 21, 2008, Garmong sent a fax to Christian concerning the status of his retirement accounts and in which he repeated his willingness to "sacrifice potential gains to ensure that I don't have capital losses" (R's Ex. 28).

On March 17, 2008, Garmong sent a fax to Christian in which he expressed concern regarding the drop in the value of his retirement accounts but did not direct Christian to shift his accounts to cash or make other specific changes (R's Ex. 30). On June 12, 2008, Garmong sent a fax to Christian registering his continued concern about the decline in value of his investments and in which he solicited Wespac's recommendations (R's E. 32).

Garmong's concern was elevated in his fax to Christian of September 26, 2008, in which he stated he was upset by the destruction of so much of his retirement funds and the failure of Wespac and Christian to follow his instructions to avoid losses during the "major stock market fall in 2008" (R's Ex. 35). Garmong stated his intent to seek from Christian a plan that would restore the value of his accounts in light of the then existing financial disaster.

Christian responded to Garmong's fax in a letter dated September 30, 2008 (R's Ex. 36). Therein, Christian expressed his empathy over the losses suffered by Garmong but reiterated that there "is risk in the financial markets." Christian also disagreed with Garmong's allegations that he had ever told Christian that "there could be no losses from my accounts in 2008." Importantly, Christian added, "If any client told me that I would have offered you two alternatives: (1) go to 100% cash or (2) to close your accounts." Christian continued that he could not comply with the demands made by Garmong to restore the losses experienced. In this regard, Christian wrote:

> "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."

On October 24, 2008, Garmong sent a fax advising Christian that he remained under Garmong's express instruction of not losing money in his accounts as long as he had any management responsibility for them (R's Ex. 40).

Christian replied with a letter on October 29, 2008 (R's Ex. 41) in which he reiterated his efforts to handle Garmong's investment accounts to the best of Wespac's abilities based upon their previous meetings and conversations. Christian stated that at no time did he or anyone at Wespac imply that Garmong would not suffer any losses in 2008. Finally, Christian advised Garmong that he needed to either let Wespac continue managing his accounts or should look elsewhere for a manager that better fits his needs, and that unless he heard otherwise, he would assume Garmong wished to leave his accounts under Wespac's management. Five months later, in March 2009, Garmong formally ended his investment management relationship with Wespac and Christian.

The foregoing exchange of communications between Garmong and Christian from late 2007 and throughout 2008 compel the conclusion that although Garmong was understandably upset about losses he experienced during the decline in the stock market during that period, Christian and Wespac did not fail to abide Garmong's investment objectives and instructions,

that Christian could not have avoided all loss of capital without converting Garmong's accounts to 100% cash as he offered in September 2008, and that Garmong did not instruct Christian to move all of his accounts to 100% cash.

A final factor which weighs against Garmong's claim that Wespac and Christian caused a loss in the value of his portfolio by failing to adhere to his investment objectives is that Garmong was free to terminate his relationship with Wespac and Christian at any time. Instead, Garmong maintained that relationship thru October 2008, which Garmong claims resulted in a loss of $648,670.88 in wasted capital and $21,283.29 in management fees (Ex. 24).

Through the testimony of expert Bruce Cramer, Wespac and Christian contend that Garmong's damages calculation is flawed as it fails to consider the overall performance of his retirement accounts, including income from dividends and interest in assessing the overall performance of his retirement accounts during his relationship with Wespac and Christian. Under his analysis, Cramer concludes Garmong's retirement accounts generated a net profit of $5,403.88 over the life of his relationship with Wespac and Christian.

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

I find it unnecessary to reconcile the conflicting damages calculations offered by the Parties because the question of the amount of damages to which Dr. Garmong might be entitled. Such a determination becomes material to the resolution of this case only if a finding in favor of Dr. Garmong is made on any of the 12 claims alleged in his Amended Complaint.

On the record adduced in this case I find that Dr. Garmong has failed to prove the liability of Wespac or Christian on any of his claims by a preponderance of the evidence. As a result, Garmong is not entitled to recover any loss he alleges he sustained during his professional relationship with Wespac and Christian from 2005 through 2009.

Specifically, Garmong's breach of contract claim fails because he has failed to prove that Wespac and Christian failed to manage his investment accounts in accord with his express investment objectives and instructions. Garmong understood portions of his Wespac portfolio were in stocks and that such investments carry no guarantee of profit. The evidence adduced at the arbitral hearing fails to show that Christian breached any duty to consider Garmong's financial condition or investment objectives, or otherwise failed to fulfill his responsibilities as an investment advisor and manager during Garmong's relationship with Wespac.

Garmong's claim for breach of implied warranty fails as a matter of law. As argued by Wespac and Christian, the overwhelming weight of authority holds that a breach of implied warranty claim cannot be sustained in the context of a contract for services. See, e.g. *Lufthansa Cargo A.G. v. County of Wayne,* 2002 WL 31008373 at *5 (E.D. Mich).

Garmong's claim for breach of the implied covenant of good faith and fair dealing fails because it is not supported by sufficient evidence of breach by Wespac or Christian. Similarly, Garmong's claim for tortious breach of the implied covenant of good faith and fair dealing fails for the same reason.

Garmong's claim for breach of Nevada's Deceptive Trade Practices Act fails because the evidence does not show deception or fraud by Wespac or Christian causing damage to Garmong. Merely showing a loss of value in an investment does not support a claim that the loss was a product of misrepresentation. There is simply no evidence in the record of this case to show that it was.

Garmong's breach of fiduciary duty of full disclosure claim fails because the evidence shows Garmong was regularly engaged in communications with Christian concerning his investment accounts at Wespac, never surrendered complete control over his accounts to Wespac or Christian, and Christian kept Garmong apprised of the decline in the stock market and the option of shifting Garmong's accounts to 100% cash if he so desired. For the same reason, Garmong's breach of agency claim fails. Garmong's negligence claim fails because the evidence has not established Christian was negligent in performing his services to Garmong.

Similarly, the evidence presented does not establish that Christian or Wespac intentionally inflicted emotional distress to Garmong in accord with the elements set forth in *Posadas v. City of Reno,* 851 P.2d 438 (Nev. 1993), or that Christian and Wespac violated NRS 628A.030.

Finally, Garmong's unjust enrichment claim fails because such an action is not available when there is, as here, an express written contract. *Leasepartners Corp. v. Robert L. Brooks Trust,* 942 P.2d 182 (1997).

Claimant Gregory Garmong having failed to establish his claims by a preponderance of the evidence, Respondents Wespac and Greg Christian are entitled to an Award of Judgment against Claimant on all claims alleged in this Arbitration which is entered below.

II. ATTORNEY'S FEES AND COSTS

On January 12, 2019, the undersigned Arbitrator entered an Interim Award as reflected above and permitted Respondents Wespac and Christian to file a Motion for Attorneys Fees and Costs. Respondents Motion was filed on February15, 2019, and briefing thereon is now complete.

Respondents seek an award of attorney's fees and costs totaling $111,649.96 pursuant to Nevada Rule of Civil Procedure 68, and JAMS fees and costs in the amount of $16,353.41 pursuant to JAMS Rule 24(f).

In his Opposition filed March 6, 2019, Claimant Garmong argues Respondents are not entitled to attorney's fees under Rule 68 because the Scheduling Order entered in this case on August 11, 2017 enumerated specific provisions of the Nevada Rules of Civil Procedure as applicable to this Arbitration, but omitted any reference to Rule 68 thereby rendering it inapplicable to these proceedings. This is a novel argument which the Arbitrator rejects.

There is no dispute that the issues in this case are governed by Nevada law, and procedurally by JAMS Rules and the provisions of the Nevada Rules of Civil Procedure enumerated in the Stipulation for arbitration entered by the Parties on February 8, 2017. However, the agreement of the Parties to specific NRCP Rules relating to discovery does not automatically exclude the applicability of others, particularly where the Arbitrator determines that necessary. *See* JAMS Rule 24.

In its Reply memorandum of March 14, 2019, Respondents cite the important purpose of NRCP 68 to encourage resolution of cases and conserve resources of the Parties and the court. *Dillard Department Stores v. Beckwith,* 989 P. 2d 882, 888 (1999). When WESPAC made its Offer of Judgment of $10,000 on February 12, 2017 to Garmong, no objection was made and there is no basis in the record to support the argument that by entering the Stipulation for Arbitration Respondents had clearly demonstrated the intent to waive their right to seek attorney's fees and costs. In accord with NRS 38.238 an arbitrator has discretion to consider an award of fees and costs and finds it appropriate to do so in this case. *WPH Architecture, Inc. v. Vegas VP, LP,* 360 P.3d 1145, 1149 (2015).

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

viability of the Offer of Judgment with an understanding of the potential consequences and he made his decision to proceed for whatever reasons he deemed prudent.

The Arbitrator finds the attorney's fees and costs sought by Respondent's Motion are reasonable and appropriate for the work done in the case. *Schuette v. Beazer Homes Holding Corp.*, 124 P.3d 530, 548 (2005). In making this determination the Arbitrator finds that the quality of Respondents counsel; the quality and difficulty of the work performed; the amounts charged for the services performed; and the overall benefits derived warrant the finding that the fees and costs requested are reasonable. *Bunzell v. Golden Gate Nat's Bank*, 455 P.2d 31, 33 (1969). *See also*, JAMS Rule 24(g).

The Arbitrator further finds that the corrected declaration and exhibits attached to Respondent's Motion and Reply memorandum support the fees and costs reflected as reasonable. Additionally, the Arbitrator finds no good cause to strike the original Declaration of Mr. Bradley dated February 15, 2019 which was appended to Respondent's Motion for Attorney's Fees and Costs. The error therein was properly corrected by Mr. Bradley on March 14, 2019, and before the filings of the Parties in connection with the Motion were considered by the Arbitrator.

However, the Arbitrator declines exercise discretion under JAMS Rule 24(f) to require that Garmong pay 100% of the JAMS Arbitration Fees. Resolution of the case in this forum was required under Paragraph 16 of the Investment Management Agreement prepared and required by Respondents when the relationship of the Parties was established on August 31, 2005. No adjustment of those Arbitration fees is warranted here.

IT IS SO ORDERED.

AWARD

Based upon the foregoing findings of fact, conclusions of law, and Orders, the Arbitrator finds that Respondents WESPAC and Gregory Christian are entitled to an Award of Judgment on each of Claimant Gregory Garmong's claims. The Arbitrator further finds that Respondent WESPAC is entitled to and Award of reasonable attorney's fees and costs of this action from Claimant Garmong in the total sum of $111,649.96.

Dated: March 11, 2019

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 April 11, 2019, I served the attached DUPLICATE ORIGINAL FINAL AWARD 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 April 11. 2019.

Mara Satterthwaite, Esq.
msatterthwaite@jamsadr.com

CODE: 3790
Thomas C. Bradley, Esq.
NV Bar. No. 1621
435 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 323-5178
Facsimile: (775) 323-0709
Attorney for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

v.

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

Defendants.
_____/

Case No. CV12-01271

Dept. No. 6

REPLY TO OPPOSITION TO MOTION FOR ATTORNEY FEES AND COSTS AND OPPOSITION TO MOTION TO RETAX COSTS

COME NOW, WESPAC and GREG CHRISTIAN (hereinafter "Wespac"), hereby reply to Plaintiff's Opposition to Motion for Attorney Fees and Costs and Opposition to Motion to Retax Costs. This Motion is based upon the attached Points and Authorities.

DATED this 14th day of March, 2019.

By _____
THOMAS C. BRADLEY, ESQ.

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
RENO, NEVADA 89509
(775) 323-5178 • (775) 323-0709 FACSIMILE

POINTS AND AUTHORITIES

I. SUMMARY OF OPPOSITION

In his Opposition, Mr. Garmong does not contest, and essentially concedes, that:

(1) Mr. Garmong received an Offer of Judgment on September 12, 2017;

(2) Mr. Garmong failed to accept the Offer of Judgment;

(3) Mr. Garmong's suit was brought in bad faith and was frivolous;

(4) Wespac's Offer of Judgment was reasonable and made in good faith both as to its timing and amount;

(5) Mr. Garmong's refusal of Wespac's Offer of Judgment was unreasonable and in bad faith;

(6) Wespac's Attorney and Paralegal fees were reasonable both as to the hourly rate and the number of hours expended; and

(7) Wespac's mathematical calculation of attorney fees, and costs, JAMS' fees and expenses, were accurate.

Instead, Mr. Garmong claims that Wespac is not entitled to its fees and costs based on a variety of irrelevant and inconsequential legal authorities. Mr. Garmong's claims are without merit.

II. WESPAC DID NOT WAIVE THEIR RIGHTS TO FILE AN OFFER OF JUDGMENT

Mr. Garmong's primary argument in his Opposition to Wespac's Motion for Attorney Fees and Costs is that Wespac waived its right to make an Offer of Judgment pursuant to NRCP 68 when Wespac agreed which discovery and time-computation rules of civil procedure would govern as stated in the Arbitrator's "Discovery and Scheduling Plan (herein after referred to as "Discovery Order"). This argument is without merit.

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

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

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

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

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

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

Under Nevada law:

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

To establish waiver, the party claiming the existence of waiver must prove a clear intent that the party intended to relinquish its right. *See Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. Of Clark*, 123 Nev. 44, 50, 152 P.3d 737, 740 (2007). To constitute waiver, there must be an actual intention to relinquish the known right or conduct from which one should infer the intention to relinquish that right. *See Am. Home Assur. Co. v. Harvey's Wagon Wheel, Inc., 398 F. Supp. 379, 383–84 (D. Nev. 1975), aff'd sub nom.; Am. Home Assurance Co. v. Harvey's Wagon Wheel, Inc.*, 554 F.2d 1067 (9th Cir. 1977); *see also Morris v. Cadence Design Sys., Inc.*, 289 F. App'x 998, 1002 (9th Cir. 2008) ("waiver of a legal right requires a clear, unequivocal, and decisive act or inaction of the party demonstrating the party's intention to relinquish the right"); *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 696 (9th Cir. 2003)(Waiver of a statute of limitations "cannot be established without a clear showing of an intent to relinquish that right, and doubtful cases will be resolved against waiver).

Essentially, Mr. Garmong argues that by agreeing which discovery and time-computation rules of civil procedure would apply, Wespac intentionally relinquished its right to make an Offer of Judgment. There is no language contained in the Discovery Order that expressly references (1) a waiver of the right to make Offers of Judgment; (2) a waiver of rights under NRS 38.238(1); or (3) a waiver of any unspecified rights.

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

A) Counsel has Attached a Corrected Declaration

First, Counsel acknowledges that the Declaration of Thomas Bradley failed to include the requisite provision that "I declare under penalty of perjury that the foregoing is true and correct." Counsel apologizes to Judge Pro and Mr. Garmong and his counsel for the oversight. Counsel has attached a corrected Declaration with the requisite language. Moreover, although no changes were

made to the dollar amounts requested, Counsel has endeavored to better verify various fees and costs to ensure that every dollar awarded is justified and deserved.

B) Wespac Submitted Proper Documentation of its Attorney Fees

Mr. Garmong claims that Wespac failed to properly document the attorney fees and costs it incurred. In his corrected Declaration, Counsel complied with both Nevada law and the Local Rules for the Federal District of Nevada governing the documentation of legal fees. There is no statutory requirement that copies of bills be included. Counsel will, however, provide copies if requested by the arbitrator. To the extent that JAMS Rule 24(f) may require compliance with NRS 18.110(1), counsel added the requisite verification language to his Declaration.

Also, there does not appear to be a requirement that a memorandum be filed with the clerk of the Court following an 'Interim" decision in a JAMS arbitration. As noted above, Counsel supplemented his Declaration to provide additional, documentation of fees and costs. To the extent needed, Wespac respectfully requests leave to do so. Mr. Garmong's reliance upon *Baum v. Alan Waxler Group, Inc.*, 126 Nev.693 (2010) is misguided and incorrect. Moreover, the case is unpublished and may not be cited as precedent under NRAP 36.

C) Nevada Law Permits the Award of Costs Pursuant to JAMS Rules

A district court is permitted to award attorney fees or costs if authorized to do so by a statute, rule or contract. *See U.S. Design & Const. Corp. v. Int'l Bhd. Of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). In this case, the parties agreed to arbitrate any "dispute shall be resolved ... in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS") applying the rules of the State where the agreement is governed and executed." *See* Investment Management Agreement, Section 16. Accordingly, the parties agreed to the application of JAMS Rule 24(f) and Nevada law permits parties to include such a provision in their agreements. Thus, contrary to Mr. Garmong's argument, there are no conflicts of law.

D) Nevada Law Permits the Award of Fees Paid to Non-Attorneys

Mr. Garmong contends that the fees paid to Michael Hume are not recoverable. This argument is baseless.

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The Nevada Supreme Court has stated that

> [A] "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. .... We thus take as our starting point the self-evident proposition that the "reasonable attorney's fee" provided for by statute should compensate the work of paralegals, as well as that of attorneys. *See LVMPD v. Yeghiazarian*, 129 Nev. 760, 769–70, 312 P.3d 503, 510 (2013)(the district court did not abuse its discretion by including charges for paralegal services in its calculation of attorney fees).

The Ninth Circuit and other jurisdictions have also adopted this position. *See Richlin Sec'y Serv. Co. v. Chertoff*, 553 U.S. 571, 580–83, 128 S.Ct. 2007, 170 L.Ed.2d 960 (2008) (reaffirming Jenkins); *Trs. Of Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir.2006) ("[F]ees for work performed by nonattorneys such as paralegals may be billed separately, at market rates, if this is the prevailing practice in a given community." (internal quotations omitted); *U.S. Football League v. Nat'l Football League*, 887 F.2d 408, 416 (2d Cir.1989) ("Paralegals' time is includable in an award of attorney's fees."); *Todd Shipyards Corp. v. Dir., Office of Workers' Comp. Programs*, 545 F.2d 1176, 1182 (9th Cir.1976) ("Paralegals can do some of the work that the attorney would have to do anyway and can do it at substantially less cost per hour."); *Guinn v. Dotson*, 23 Cal.App.4th 262, 28 Cal.Rptr.2d 409, 413 (1994) (reasonable attorney fees include necessary support services for attorneys).

Clearly, fees paid for work performed by nonattorneys such as Mr. Hume are permissibly included within an attorney's total costs and fees.

E) MR. GARMONG'S IRRELEVANT DECLARATION

Mr. Garmong attached a sixteen (16) page Declaration to his Opposition which is almost exclusively devoted to an attack on Judge Pro's Order Denying Partial Summary Judgment. Mr. Garmong attempts to make the garbled and almost unintelligible Declaration somewhat relevant by adding paragraph 29 which essentially argues that had Judge Pro granted Mr. Garmong's Motion for Partial Summary Judgment, then Judge Pro would be unable to award fees and costs. Wespac will not waste the Arbitrator's time by responding to Mr. Garmong's arguments in the Declaration because the arguments were previously and correctly decided by Judge Pro.

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IV. CONCLUSION

It is important to note that Mr. Garmong does not truly dispute in his Opposition that his claims against WESPAC were frivolous and primarily based on his fabricated October 22, 2007, letter, and his false, misleading, and self-serving testimony. Mr. Garmong also does not truly dispute the amount of fees and costs, except to the extent that they allegedly lack certain "technical" verifications which may not even be required in a JAMS' arbitration. The failure to dispute these allegations is tantamount to admitting them under these circumstances. Since 2012, Mr. Garmong has engaged in a pattern and practice of harassing Mr. Christian with meritless claims, motions to disqualify, motions for reconsideration, motions to strike, and appeals. It appears to counsel that Mr. Garmong's purpose was not to further the merits of his claims, but rather to torment Mr. Christian and force him to incur substantial legal fees to defend himself. Accordingly, WESPAC should be awarded all requested attorney fees and costs, including all JAMS' expenses.

Thus, WESPAC respectfully requests that pursuant to NRCP 68, the Arbitrator enter an award granting reasonable fees and costs incurred since the date of the Offer of Judgment against Plaintiff, Gregory Garmong and in favor of Defendants, WESPAC and Greg Christian. This amount totals ONE HUNDRED ELEVEN THOUSAND SIX HUNDRED FORTY-NINE AND 96/100 DOLLARS ($111,649.96), which does not include the JAMS expense.

WESPAC also requests that, pursuant to JAMS Rule 24(f), Mr. Garmong be ordered to pay 100% of the Arbitration fees and Arbitrator compensation and expenses in this case. This amount totals SIXTEEN THOUSAND THREE HUNDRED FIFTY-THREE AND 41/100 DOLLARS ($16,353.41).

Thus, the total award should be ONE HUNDRED TWENTY-EIGHT THOUSAND THREE DOLLARS ($128,003).

Dated this 14 day of March, 2019.

Attorney for Defendants/Respondents
435 Marsh Ave.
Reno, Nevada 89509

DECLARATION OF THOMAS C. BRADLEY

I, Thomas C. Bradley, declare under penalty of perjury that the following is true and correct:

1. I have been counsel of record in Garmong v. WESPAC since 2012.
2. I charged WESPAC $300.00 per hour, which I believe is a fair and reasonable hourly rate based upon the following:
   a. I graduated from Arizona State University School of Law in 1984;
   b. I clerked for the Honorable Bruce R. Thompson for two years;
   c. I am a member of both the Nevada and California Bar Association;
   d. I worked as an Associate for Lawrence J. Senenza for five years;
   e. I have worked in private practice for over twenty years;
   f. I was President of the Local Chapter of the Inns of Court;
   g. I have successfully represented parties in over 200 securities arbitration cases, many of which I have tried to an arbitration panel;
   h. My current hourly rate for security arbitration cases is $395.00 per hour;
   i. It is my understanding that a majority of attorneys in Reno, Nevada charge $300.00 or more per hour; and
   j. WESPAC has paid all of my fees and costs, including all expert witnesses' fees and costs.
3. Although I believe that Mr. Garmong's case lacked legal and factual foundation, the area of securities arbitration is complicated and requires specialized knowledge and experience.
4. In this case, thousands of pages of discovery and complicated damage calculations had to be reviewed, evaluated, analyzed, and presented at the arbitration hearing. I believe that I provided zealous and superior representation on behalf of my clients. The quality of such representation, however, required me to spend many hours working on the case. Additionally, Mr. Garmong filed frivolous motions such as the one to disqualify the Arbitrator. Mr. Garmong also filed unduly lengthy briefs such as the pre-hearing brief which was 58 pages long. I hereby certify that I worked a total of 275.5 hours and billed a total of EIGHTY-TWO THOUSAND SIX HUNDRED FIFTY

DOLLARS ($82,650), and that all such bills were accurate, and all hours worked were necessary to the defense of the case and were reasonable. Wespac paid all of my invoices.

5. I retained Michael Hume to assist me in the defense of Mr. Garmong's claims. I paid Mr. Hume $100.00 per hour. Mr. Hume is a very experienced securities arbitration consultant. He has assisted lawyers throughout the United States on over one thousand security arbitration cases over the past 25 years. Mr. Hume's services and fees are both reasonable and customary in this jurisdiction. I have carefully reviewed, approved, and verified all of Mr. Hume's work was necessary to the defense of the case and the accuracy and reasonableness of his invoices. Mr. Hume worked a total of 240.2 hours. The total amount of his invoices following service of the Offer of Judgment total TWENTY-FOUR THOUSAND TWENTY DOLLARS ($24,020). Wespac paid all of Mr. Hume's fees.

6. The costs without including JAMS totaled FOUR THOUSAND NINE HUNDRED SEVENTY-NINE AND 96/100 DOLLARS ($4,979.96). I verify, under penalty of perjury, that to the best of my knowledge and belief, the items of cost attached in Exhibit "1," are correct, accurate (and not mere estimates), reasonable, necessary to the defense of the case, actually incurred, and fully paid by Wespac. I have attached copies of the Sierra Document Management invoices which were necessarily incurred to prepare discovery and exhibits in the case. *See* Exhibit "2." I have also attached copies of Sunshine Litigation invoices which were incurred for court reporter services and transcripts of depositions taken in this case. *See* Exhibit "3." The FedEx charges were necessarily incurred to send heavy exhibit binders to Judge Pro. Those costs do not include the expert witness costs, which were substantial.

7. The consequence was that the total expense, not including JAMS fees, to defend the case totaled ONE HUNDRED ELEVEN THOUSAND SIX HUNDRED FORTY-NINE AND 96/100 DOLLARS ($111,649.96).

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THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
RENO, NEVADA 89509
(775) 323-5178 • (775) 323-0709 FACSIMILE

8. The JAMS fees totaled SIXTEEN THOUSAND THREE HUNDRED FIFTY-THREE AND 41/100 DOLLARS ($16,353.41). Wespac paid all of the JAMS fees.

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

DATED this 14 day of March, 2019.

By _____
THOMAS C. BRADLEY, ESQ.

INDEX OF EXHIBITS

Exhibit No.	Description	No. of Pages
1	Wespac Costs	1
2	Sierra Document Management invoices	3
3	Sunshine Litigation Services invoices	5

EXHIBIT 1

EXHIBIT 1

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
Reno, Nevada 89509
(775) 323-5178
Fax (775) 323-0709

WESPAC COSTS

DATE	COSTS	AMOUNT
9/5/2018	Sierra Document Management Invoice AUG 18 091	$ 1,304.70
9/21/2018	Sunshine Litigation Services: One Certified Copy - Desposition of Christian Garmong.	$ 582.84
9/26/2018	Sunshine Litigation Services: One Certified Copy - Transcripts of John Williams.	$ 352.00
10/1/2018	Sierra Document Management Invoice OCT 18 062	$ 56.56
10/3/2018	Sunshine Litigation Services: One Certified Copy - Deposition of Bruce Cramer.	$ 513.45
10/8/2018	Sunshine Lititgation Services: Original and One Certified Copy - Transcript of Gregory Garmong Vol. II.	$ 700.60
10/8/2018	Sunshine Lititgation Services: Original and One Certified Copy - Transcript of Gregory Garmong Vol. I.	$ 1,230.00
10/9/2018	Sierra Document Management Invoice OCT 18 025	$ 162.40
10/9/2018	FedEx Charges to send over Exhibit Binders to Judge Pro #873886406482	$ 77.41

TOTAL COSTS	$	4,979.96
TOTAL	**$**	**4,979.96**

EXHIBIT 2

EXHIBIT 2

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
Reno, Nevada 89509
(775) 323-5178
Fax (775) 323-0709

Sierra Document Management
3545 Airway Dr. #109
Reno, NV 89511
(775) 786-8224
support@sdmnv.com
www.sdmnv.com

Invoice

BILL TO
Michael Hume
Securities Arbitration Consulting, LLC
4900 Thompson Ct.
Reno, NV 89511

INVOICE #	DATE	TOTAL DUE	DUE DATE	TERMS	ENCLOSED
AUG 18 091	09/05/2018	$1,304.70	09/05/2018	C.O.D.	

CLIENT MATTER
FID

QUANTITY	DESCRIPTION	PRICE EACH	AMOUNT
2,122	Scan B&W 8.5 x 11	0.16	339.52T
2,122	Bates Numbering	0.07	148.54T
4,244	Printing B&W 8.5 x 11	0.16	679.04T
1	Flash Drive 16GB	35.00	35.00T
3	Re-Bind	1.00	3.00T

"Please see our new remit and office address above"

SUBTOTAL	1,205.10
TAX (8.265%)	99.60
TOTAL	1,304.70
BALANCE DUE	**$1,304.70**

Please pay by this invoice. No Monthly statement will be sent. Terms: Net 30 days, interest rate of 1.5% (18.0% per annum) will be added after 30 days. Now for your convenience, we accept Visa, Master Card, Discover and American Express.

Sierra Document Management
3545 Airway Dr. #109
Reno, NV 89511
(775) 786-8224
support@sdmnv.com
www.sdmnv.com

Invoice

BILL TO
Tom Bradley
Law Office of Thomas C. Bradley
448 Hill St.
Reno, NV 89501

SHIP TO
Tom Bradley
Law Office of Thomas C. Bradley
448 Hill St.
Reno, NV 89501

INVOICE #	DATE	TOTAL DUE	DUE DATE	TERMS	ENCLOSED
OCT 18 025	10/09/2018	$162.40	11/08/2018	Net 30	

SHIP DATE
10/08/2018

CLIENT MATTER
WesPac

QUANTITY	DESCRIPTION	PRICE EACH	AMOUNT
250	Index Tabs Reg	0.60	150.00T

"Please see our new remit and office address above"

SUBTOTAL	150.00
TAX (8.265%)	12.40
TOTAL	162.40
BALANCE DUE	**$162.40**

Please pay by this invoice. No Monthly statement will be sent. Terms: Net 30 days, interest rate of 1.5% (18.0% per annum) will be added after 30 days. Now for your convenience, we accept Visa, Master Card, Discover and American Express.

Sierra Document Management
3545 Airway Dr. #109
Reno, NV 89511
(775) 786-8224
support@sdmnv.com
www.sdmnv.com

Invoice

BILL TO
Tom Bradley
Law Office of Thomas C. Bradley
448 Hill St.
Reno, NV 89501

SHIP TO
Tom Bradley
Law Office of Thomas C. Bradley
448 Hill St.
Reno, NV 89501

INVOICE #	DATE	TOTAL DUE	DUE DATE	TERMS	ENCLOSED
SEP 18 062	10/01/2018	$56.46	10/31/2018	Net 30	

SHIP DATE
09/28/2018

CLIENT MATTER
Wespac

QUANTITY	DESCRIPTION	PRICE EACH	AMOUNT
49	Import	0.05	2.45T
49	Bates Numbering	0.07	3.43T
49	OCR	0.07	3.43T
1	Flash Drive 16GB	35.00	35.00T
49	Printing B&W 8.5 x 11	0.16	7.84T

"Please see our new remit and office address above"

SUBTOTAL	52.15
TAX (8.265%)	4.31
TOTAL	56.46
BALANCE DUE	**$56.46**

Please pay by this invoice. No Monthly statement will be sent. Terms: Net 30 days, interest rate of 1.5% (18.0% per annum) will be added after 30 days. Now for your convenience, we accept Visa, Master Card, Discover and American Express.

EXHIBIT 3

EXHIBIT 3

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
Reno, Nevada 89509
(775) 323-5178
Fax (775) 323-0709

INVOICE

151 Country Estates Circle
Reno, NV 89511
Phone: 800-330-1112
litigationservices.com

Invoice No.	Invoice Date	Job No.
1260908	9/21/2018	496109
Job Date	**Case No.**	
9/13/2018	Arbitration Case Reference No.1260003474	
Case Name		
Garmong, Christian vs. Wespac		
Payment Terms		
Net 30		

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

One Certified Copy - Deposition of:
Christian Garmong 529.85

TOTAL DUE >>>	**$529.85**
AFTER 10/21/2018 PAY	$582.84

Please note, disputes or refunds will not be honored or issued after 30 days

(-) Payments/Credits:	0.00
(+) Finance Charges/Debits:	52.99
(=) New Balance:	**$582.84**

Tax ID: 20-3835523

Phone: 775-323-5178 Fax:775-323-0709

Please detach bottom portion and return with payment.

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

Invoice No. : 1260908
Invoice Date : 9/21/2018
Total Due : $582.84

Remit To: **Sunshine Reporting and Litigation Services, LLC**
P.O. Box 98813
Las Vegas, NV 89193-8813

Job No. : 496109
BU ID : RN-CR
Case No. : Arbitration Case Reference No.1260003474
Case Name : Garmong, Christian vs. Wespac

INVOICE

Litigation
151 Country Estates Circle
Reno, NV 89511
Phone: 800-330-1112
litigationservices.com

Invoice No.	Invoice Date	Job No.
1262050	9/26/2018	497947
Job Date	**Case No.**	
9/19/2018	Arbitration Case Reference No.1260003474	
Case Name		
Garmong, Christian vs. Wespac		
Payment Terms		
Net 30		

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

1 CERTIFIED COPY OF TRANSCRIPT OF:

John Williams 352.00

TOTAL DUE >>>	**$352.00**
AFTER 10/26/2018 PAY	$387.20

Please note, disputes or refunds will not be honored or issued after 30 days

(-) Payments/Credits:	0.00
(+) Finance Charges/Debits:	0.00
(=) New Balance:	**$352.00**

Tax ID: 20-3835523 Phone: 775-323-5178 Fax:775-323-0709

Please detach bottom portion and return with payment.

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

Invoice No. : 1262050
Invoice Date : 9/26/2018
Total Due : $352.00

Remit To: **Sunshine Reporting and Litigation Services, LLC**
P.O. Box 98813
Las Vegas, NV 89193-8813

Job No. : 497947
BU ID : RN-CR
Case No. : Arbitration Case Reference No.1260003474
Case Name : Garmong, Christian vs. Wespac

INVOICE

Litigation

351 Country Estates Circle
Reno, NV 89511
Phone: 800-330-1112
litigationservices.com

Invoice No.	Invoice Date	Job No.
1263568	10/3/2018	498221
Job Date	**Case No.**	
9/24/2018	Arbitration Case Reference No.1260003474	
Case Name		
Garmong, Christian vs. Wespac		
Payment Terms		
Net 30		

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

One Certified Copy - Deposition of:

Bruce Cramer 513.45

TOTAL DUE >>>	**$513.45**
AFTER 11/2/2018 PAY	$564.80

Please note, disputes or refunds will not be honored or issued after 30 days

(-) Payments/Credits:	0.00
(+) Finance Charges/Debits:	0.00
(=) New Balance:	**$513.45**

Tax ID: 20-3835523 Phone: 775-323-5178 Fax:775-323-0709

Please detach bottom portion and return with payment.

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

Invoice No. : 1263568
Invoice Date : 10/3/2018
Total Due : $513.45

Remit To: **Sunshine Reporting and Litigation Services, LLC**
P.O. Box 98813
Las Vegas, NV 89193-8813

Job No. : 498221
BU ID : RN-CR
Case No. : Arbitration Case Reference No.1260003474
Case Name : Garmong, Christian vs. Wespac

INVOICE

Litigation

151 Country Estates Circle
Reno, NV 89511
Phone: 800-330-1112
litigationservices.com

Invoice No.	Invoice Date	Job No.
1264432	10/8/2018	500722
Job Date	**Case No.**	
10/2/2018	Arbitration Case Reference No.1260003474	
Case Name		
Garmong, Christian vs. Wespac		
Payment Terms		
Net 30		

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:

Gregory O. Garmong, Volume II	700.60
TOTAL DUE >>>	**$700.60**
AFTER 11/7/2018 PAY	$770.66

Please note, disputes or refunds will not be honored or issued after 30 days

(-) Payments/Credits:	0.00
(+) Finance Charges/Debits:	0.00
(=) New Balance:	**$700.60**

Tax ID: 20-3835523

Phone: 775-323-5178 Fax:775-323-0709

Please detach bottom portion and return with payment.

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

Invoice No. : 1264432
Invoice Date : 10/8/2018
Total Due : $700.60

Remit To: **Sunshine Reporting and Litigation Services, LLC**
P.O. Box 98813
Las Vegas, NV 89193-8813

Job No. : 500722
BU ID : RN-CR
Case No. : Arbitration Case Reference No.1260003474
Case Name : Garmong, Christian vs. Wespac

INVOICE

Litigation
151 Country Estates Circle
Reno, NV 89511
Phone: 800-330-1112
litigationservices.com

Invoice No.	Invoice Date	Job No.
1264583	10/8/2018	499034
Job Date	**Case No.**	
9/26/2018	Arbitration Case Reference No.1260003474	

Case Name

Garmong, Christian vs. Wespac

Payment Terms

Net 30

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:

Gregory Garmong, Volume I	1,230.00
TOTAL DUE >>>	**$1,230.00**
AFTER 11/7/2018 PAY	$1,353.00

Please note, disputes or refunds will not be honored or issued after 30 days

(-) Payments/Credits:	0.00
(+) Finance Charges/Debits:	0.00
(=) New Balance:	**$1,230.00**

Tax ID: 20-3835523

Phone: 775-323-5178 Fax:775-323-0709

Please detach bottom portion and return with payment.

Thomas C. Bradley, Esq.
Law Office of Thomas C. Bradley
448 Hill Street
Reno, NV 89501

Invoice No. : 1264583
Invoice Date : 10/8/2018
Total Due : $1,230.00

Remit To: **Sunshine Reporting and Litigation Services, LLC**
P.O. Box 98813
Las Vegas, NV 89193-8813

Job No. : 499034
BU ID : RN-CR
Case No. : Arbitration Case Reference No.1260003474
Case Name : Garmong, Christian vs. Wespac

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that on the 14 day of March, 2019, I served a true and correct copy of the above document via e-mail upon the following person(s):

CARL HEBERT
carl@cmhebertlaw.com
202 California Avenue
Reno, Nevada 89509
Attorney for Plaintiff

DATED this 14 day of March, 2019.

Employee of Thomas C. Bradley, Esq.

THOMAS C. BRADLEY, ESQ.
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 323-0709 FACSIMILE

JAMS ARBITRATION
LAS VEGAS, NEVADA

GREGORY GARMONG, Plaintiff, vs. WESPAC; GREG CHRISTIAN, Defendants.	**# 1260003474** **MOTION TO STRIKE BRADLEY DECLARATION ATTACHED TO REPLY IN SUPPORT OF MOTION FOR ATTORNEY FEES AND COSTS**

Plaintiff moves to strike the Declaration of Thomas C. Bradley and the Exhibits 1-3 attached to Defendants' "Reply to Opposition to Motion for Attorney Fees and Costs and Opposition to Motion to Retax Costs." ("Reply).

Defendants continue to believe that invective substitutes for following the law. Defendants' Motion for Attorney Fees and Costs ("Motion") simply failed to follow the law and now they hope that the arbitrator will rescue them from their mistakes. Defendants' Motion sought attorney's fees and part of their alleged costs under Nevada Rule of Civil Procedure 68. The Reply does not disagree that Mr. Bradley himself expressly, on behalf of his clients, did not include Offers of Judgment under Rule 68 in the rules governing the present arbitration and the arbitrator so ordered; however, they now attempt to repudiate that agreement. The Defendants' Motion sought other costs under JAMS Rule 24(f), which cannot be used for a substantive award of costs under the controlling case law of the United States and Nevada

Supreme Courts.

As Defendants concede, attorney's fees and costs can be awarded only in accordance with, and in compliance with, the authority governing a case. There was no such authority in the present case.

Because the question of whether costs may be awarded spans the issues of the applicability of Rule 68 and JAMS Rule 24(f), Plaintiff here addresses Defendants' arguments assembled to support their effort to supply the missing requirement of NRS § 18.110(1) in the totality of the context of their attempt to justify their misuse of the law governing fees and costs in this arbitration.

Summary of Opposition

Rely 2: 2-16 (and 7: 2-12) sets out what it contends "Mr. Garmong does not contest, and essentially concedes." Plaintiff Mr. Garmong does contest, and does not concede, these points (1)-(7) (and those argued at 7: 2-12), because they were not relevant to the dispositive issues. The dispositive issues are, for attorney's fees and costs sought under Rule 68, that the Rule 68 Offer of Judgment upon which the motion for attorney's fees is based was improper because Rule 68 was excluded from the governing rules of the arbitration, the documentation of attorney's fees and cost was insufficient, and the Declaration of Thomas C. Bradley was legally

insufficient. As to the costs sought under JAMS Rule 24(f), the dispositive issues were that the Verification required by NRS 18.110(1) was legally insufficient, that Nevada law, rather than a JAMS rule, governs under the choice-of-law provisions placed into the Investment Management Agreement by Defendants, and that the documentation was insufficient. As is their habit, Defendants seek to shift the discourse away from the law.

Offer of Judgment under Rule 68

Reply 2:17-4:23 does not dispute that Rule 68 was excluded from the rules governing the arbitration. Reply 2:26-3:16 instead seeks to persuade the arbitrator to broaden the scope of the governing rules, over the objection of the plaintiff, to include Rule 68, 19 months after the arbitrator ordered that Rule 68 was not part of the governing rules of this case and 18 months after Defendants made their improper offer of judgment under Rule 68. Such an act would contravene the agreement made knowingly and voluntarily by the parties and very substantially prejudice the plaintiff, who governed his conduct by the adopted Nevada Rules of Civil Procedure. Defendants give no reason why they deliberately ignored that fact in their Motion, other than to attempt to circumvent the plain language of the agreement.

Reply at 3:17-4:12 argues that Defendants did not waive the use of

Rule 68 in the arbitration proceeding. Waiver does not apply in this situation: the Defendants chose which Rules of Civil Procedure they would accept and then deliberately violated the agreement by asking for a punitive amount of attorney's fees. If there was waiver or estoppel, it was that of the Defendants. The Scheduling Order stated at 1: 17-18: "The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure and the deadlines for filing Oppositions and Replies found in Washoe District Court Rule 12 will generally govern this case unless the Arbitrator rules otherwise." Had Defendants disagreed with the exclusion of Rule 68, they should have objected at the time, not led Plaintiff and the arbitrator to believe that they did not want to use Rule 68 in this proceeding. Had the plaintiff known that attorney's fees were in play, he might have made other litigation choices. *See* Davidsohn v. Steffens, 112 Nev. 136, 139-40, 991 P. 2d 855, 857 (1996)(party in whose favor judgment entered delayed filing motion for attorney's fees until after time to appeal had run; held prejudicial to losing party because attorney's fees was an important factor in whether to appeal).

Regardless of whether Rule 68 might provide some benefits in other cases, the parties and the arbitrator agreed that it would not be applicable in the present arbitration, and the arbitrator so ordered.

Reply at 4:13-17 apparently attempts to justify an award of attorney's fees on some theories other than Rule 68. The alleged Offer of Judgment and Defendants' Motion were brought under NRCP 68, not any of these other theories, and they are irrelevant.

The argument presented at Reply 4: 18-23 has an Alice-in-Wonderland flavor to it. After the Scheduling Order recorded that Defendants had agreed that Rule 68 was not part of the governing law for this arbitration, Defendants argue that they really didn't mean what they agreed to, because they violated their agreement only a month later.

Not surprisingly, Reply at 4: 21-23 attempts to blame Mr. Garmong because Defendants got caught red-handed in their attempt to side-step governing law of the arbitration. It was not Mr. Garmong's obligation to raise any question of waiver, when Defendants intentionally broke the agreed-upon scope of rules governing the case.

Ruling now that Rule 68 was part of the governing law of the arbitration as of September 12, 2017 would amount to an *ex post facto* ruling that substantially prejudices Plaintiff. As of that date, and until the Motion, Plaintiff understood, based upon the clear language of the Scheduling Order of August 11, 2017, that Rule 68 was not a governing rule in this case. At the time Defendants' alleged Offer of Judgment under Rule 68 was made

on September 12, 2017, the parties and the arbitrator all agreed that offers of judgment under Rule 68 were not permitted in this arbitration. There is no explanation why Defendants intentionally violated an agreement of a month earlier.

The Declaration of Thomas C. Bradley and attached Exhibits must be struck from the record.

Reply 4: 24-28 admits that the original "Declaration" of Thomas C. Bradley, filed with Defendants' Motion, was legally insufficient and that therefore no Verified Memorandum of Costs was filed within the time period set by the Arbitrator.

The attempt to file a new Declaration of Thomas C. Bradley and three new Exhibits is an admission that Defendants failed to comply with NRS 18.110(1) in their defective Verified Memorandum of Costs.

Defendants cite no authority for deviating from the procedure of NRS § 18.10(1), sandbagging the Verified Memorandum of Costs, learning as they go from the opposing party, and then attempting to file required material in a reply to a Motion to Retax, so that they opposing party does not have a fair opportunity to respond.

NRS 18.110(1) requires that the attorney declaration and evidence be filed with the Court as part of the Verified Memorandum of Costs, not as part

of a reply to a motion to retax. The Nevada Supreme Court disapproved attempts to file the required documentation in response to a motion to retax in Baum v. Alan Waxler Group, Inc., 126 Nev. 693, *3 (note 3), 367 P. 3d 749 (2010), stating, "We also note that providing documentation in response to a motion to retax costs is not the same as providing the necessary documentation to support a memorandum of costs."

Statutes providing for the award of costs must be strictly construed. Gibellini v. Klindt, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994). Where a party refuses to follow the statutory scheme, costs may not be awarded, Henry Products Inc. v. Tarmu, 114 Nev. 1017, 1021, 967 P.2d 444, 446 (1998) ("Because Henry Products failed to follow the statutory scheme that was designed to allow adverse parties an opportunity to timely contest a request for costs, the award of costs is also reversed.").

Defendants simply refused to follow the statutory scheme for their motion and for a Verified Memorandum of Costs.

Reply's argument at 5: 3-9 that the original documentation was sufficient is belied by the late attempt to file more documentation, and by the offer at Reply 5: 7-8 to provide yet more documentation at a later time. The time to file supporting documentation expired with the filing deadline of the Motion. Defendants cite no authority for the filing of additional

documentation, such as the new Bradley Declaration and the new Exhibits 1-3 after the deadline of NRS 18.110(1).

The argument at 5:10-15 that the law should not apply to an "interim" decision is an attempt to avoid a proper application of the JAMS rules and particularly JAMS Rule 24(f). The Interim Award, page 9, third paragraph, ordered that any attempt to seek attorneys fees and costs for the arbitration must be pursued at the time set in the interim decision, not later. This was a procedural, not a substantive, order in accordance with JAMS Rule 24(f) and other JAMS rules.

Attempt to claim costs under JAMS Rule 24(f)

Defendants' Reply 5: 16-24 argues that the Investment Management Agreement ¶ 16 permits the use of JAMS rules. Under the controlling law, JAMS rules can be applied only for procedural matters, not substantive matters such as awards of costs. See the controlling authority of WPH Architecture, Inc. v. Vegas VP, LP, 131 Nev. Adv. Op. 88, 360 P. 3d 1145, 1147 (2015) and Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58-61 (1995) discussed at Opposition § II(C).

The Reply does not disagree with these precedents of the United States and Nevada Supreme Courts.

Costs related to Mr. Hume

The Reply at 5:25-6:19 misrepresents the reason that costs of Mr. Hume may not be awarded. The award of these costs was sought under the Offer of Judgment provision, Rule 68. For the reasons stated above, no fees or costs may be awarded under Rule 68, primarily because Defendants agreed, and the arbitrator ordered, that Rule 68 would play no part in this case. See Opposition at §§ 1(A) and (C). Also, any costs associated with Mr. Hume are not properly documented.

CONCLUSION

Attorneys fees and costs may not be awarded under Rule 68 primarily because the parties agreed, and the arbitrator expressly ordered, that Rule 68 was not a rule governing the arbitration. Costs may not be awarded under JAMS Rule 24(f) because costs are substantive under Nevada statutes. The new Declaration of Thomas C. Bradley and the new Exhibits 1-3 must be struck as being submitted in violation of NRS § 18.110(1) and case authority.

DATED this 16th day of March, 2019.

/S/ Carl M. Hebert
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 March 16, 2019, 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

MOTION TO STRIKE BRADLEY DECLARATION ATTACHED TO REPLY IN SUPPORT OF MOTION FOR ATTORNEY FEES AND COSTS

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
435 Marsh Ave.
Reno, NV 89509
775-323-5178

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

Thomas C. Bradley, Esq.
NV Bar. No. 1621
435 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 323-5178
Facsimile: (775) 323-0709
Attorney for Defendants

Judicial Arbitration and Mediation Service

Las Vegas, Nevada

GREGOR Y O. GARMONG,

Claimant,

v.

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

Respondents.

Case No. 1260003474

OPPOSITION TO MOTION TO STRIKE

COME NOW, WESPAC and GREG CHRISTIAN (hereinafter "Wespac"), hereby submits their Opposition to Mr. Garmong's Motion to Strike ("Opposition"). This Opposition is based upon the attached Points and Authorities.

DATED this 19th day of March, 2019.

By _____
THOMAS C. BRADLEY, ESQ.

THOMAS C. BRADLEY, ESQ.
435 Marsh Avenue
RENO, NEVADA 89509
(775) 323-5178 • (775) 323-0709 FACSIMILE

POINTS AND AUTHORITIES

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

The quote is originally derived from noted English poet, Alexander Pope, who said in his "Essay on Criticism: 'To err is human, to forgive, divine.'" Apparently, Mr. Garmong is unwilling to forgive counsel's oversight. Counsel relied upon a temporary legal assistant but accepts full responsibility for his failure to include the requisite language that the declaration was true and correct under penalty of perjury. Counsel again apologizes and again requests leave to file the corrected declaration along with backup documents to ensure that the Arbitrator only awards the fees and costs that should be awarded. *See Pruco Life Ins. Co. v. Martin*, No. 2:11-CV-00186-GMN, 2011 WL 3627282, at *4 (D. Nev. Aug. 16, 2011) (district court allowed attorney the opportunity to file an appropriate affidavit after attorney failed to submit proper affidavit required by rule to authenticate the information contained in the attorneys fee motion which confirmed that the bill has been reviewed and edited and that the fees and costs charged are reasonable).

Counsel will not respond to the remaining meritless arguments of Mr. Garmong which were previously addressed in Wespac's Reply.

Wespac respectfully requests that the Arbitrator issue a formal decision denying Mr. Garmong's Motion to Strike. Wespac makes this request so that the record will be clear should Mr. Garmong seek to vacate the Arbitrator's decisions. Wespac also respectfully requests that their Motion for Fees and Costs be granted because they have complied with the requirements of NRCP 68 and JAMS Rule 24. Hopefully, despite his substantial wealth, Mr. Garmong will learn that it is expensive to file frivolous lawsuits against innocent persons like Mr. Christian.

Dated this 19th day of March, 2019.

By _____
THOMAS C. BRADLEY, ESQ.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that on the 19th day of March, 2019, I served a true and correct copy of the above document via e-mail upon the following person(s):

CARL HEBERT
carl@cmhebertlaw.com
202 California Avenue
Reno, Nevada 89509
Attorney for Plaintiff

DATED this 19th day of March, 2019.

By: _____
THOMAS C. BRADLEY, ESQ.

THOMAS C. BRADLEY, ESQ.
448 HILL STREET
RENO, NEVADA 89501
(775) 323-5178 • (775) 333-0709 FACSIMILE

JAMS ARBITRATION
LAS VEGAS, NEVADA

GREGORY GARMONG,

Plaintiff,

vs.

WESPAC; GREG CHRISTIAN,

Defendants.

 # 1260003474

PLAINTIFF'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

Plaintiff replies to the Opposition, such as it is, and requests the arbitrator's permission to file this Reply.

The failure and refusal of Mr. Bradley to adhere to the requirements of NRS § 18.110(1).

At the outset, it is important to be clear as to Mr. Bradley's position. At Opposition 2:2-17, he admits that the original Declaration of Thomas C. Bradley did not conform to the requirements of NRS § 18.110(1). He blames a "temporary legal assistant." He does not cite any Nevada authority that would permit him to file a second, revised Declaration or the new Exhibits 1-3, in an opposition to a motion to retax, or for the arbitrator to grant leave to do

so.

The primary argument in support is a plea that Dr. Garmong and the arbitrator forgive the admitted error. The plaintiff wonders whether, if it had been his "oversight," the defendants would have been equally forgiving. This is a very doubtful proposition.

Further, Defendants' Motion for Fees and Costs, authored by Mr. Bradley, is packed with hateful, false, invective directed against Dr. Garmong that is inappropriate in litigation, and the sole purpose of which is to inflame the arbitrator. There is no reason that Dr. Garmong should be in a "forgiving" mood toward the Defendants or Mr. Bradley.

Addressing the law, which the Opposition refuses to do, neither a party nor the arbitrator can overlook admitted, intentional noncompliance with a statute, NRS § 18.110(1), particularly in light of the construction given it by the Nevada Supreme Court. As discussed in the Motion to Strike, Gibellini v. Klindt, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994) held: "[S]tatutes permitting recovery of costs are in derogation of common law, and therefore must be strictly construed." The law of Nevada is clear as to the interpretation of statutes permitting recovery of costs. Where a party fails and refuses to follow the statutory

scheme, costs may not be awarded. Henry Products Inc. v. Tarmu, 114 Nev. 1017, 1021, 967 P.2d 444, 446 (1998), held: "Because Henry Products failed to follow the statutory scheme that was designed to allow adverse parties an opportunity to timely contest a request for costs, the award of costs is also reversed."

Defendants attempt to support their Opposition at 2:13-17 with reference to Pruco Life Ins. Co. v. Martin, 2011 WL 3627282 at *4 (D. Nev. 2011). Pruco has no applicability here for at least two reasons. Most significantly, Pruco deals with the failure to conform to then-local rule LR 54-16 of the District Court of Nevada, which a federal district judge has authority to suspend or waive pursuant to (current) LR IA 1-4. In the present case, the violations by Defendants and Mr. Bradley are of Nevada statutes and precedential authority cited in the preceding paragraph, which the arbitrator does not have authority to suspend, waive or forgive. Pruco is a federal, not state, case conducted under federal, not Nevada, law as to the award of attorney's fees and costs.

Neither Plaintiff nor the arbitrator have the power to "forgive" Defendants' admitted noncompliance with NRS § 18.110(1), in violation of Nevada Statutes and precedent.

The Opposition's refusal to respond to the arguments concerning the offer of judgment under NRCP Rule 68, award of costs under JAMS Rule 24(f), and request for award of costs for Mr. Hume.

The Motion to Strike addresses these issues, and the Opposition refuses to respond, thereby implicitly conceding Plaintiff's position. There is no question that offers judgment under Rule 68 were excluded from the arbitration, that JAMS Rule 24(f) cannot be applied in Nevada to justify a substantive award of costs, that the originally filed Declaration of Thomas C. Bradley and exhibits were deficient, that the Motion for Costs was not verified as required, and that the request to award costs for Mr. Hume is not made according to any substantive law for the award of costs that is applicable in this case.

The Opposition's request that the arbitrator issue a formal decision on the Motion to Strike.

Plaintiff joins the request made at Opposition 2:20-21 that formal decisions be rendered on the Motion to Strike and on the Motion for Fees and Costs, although Plaintiff requests that the Motion to Strike be granted and that Defendants' Motion for Fees and

Costs be denied in its entirety. It is important to have formal decisions to preserve any errors for later review.

Plaintiff continues to oppose the granting of Wespac's Motion for Fees and Costs (Opposition 2:22-24) for the reasons set forth in Plaintiff's Opposition to the Motion for Fees and Costs, and in the Motion to Strike.

The Opposition at 2:24-25 argues that the Motion for Fees and Costs should be granted because Dr. Garmong has "substantial Wealth." The arbitrator blocked Plaintiff's attempts to investigate the financial status of Wespac and Mr. Christian during discovery. The fact is that whatever wealth that the Plaintiff managed to retain after the advice given by the Defendants is not a basis upon which to ignore the law.

The mischaracterization at Opposition 2:24-25 of Mr. Christian as "innocent" completes the hypocrisy of Defendants' Opposition. This is the same Mr. Christian who concealed from Dr. Garmong his prior disciplining and suspension by the SEC and Wespac's failure to comply with Nevada and federal law, who made other intentional misrepresentations, who recklessly lost nearly $700,000 of Dr. Garmong's life savings, and

who intentionally violated his contractual, fiduciary, and agency duties of Dr. Garmong.

CONCLUSION

The plaintiff respectfully requests that his Motion to Strike be granted.

/S/ Carl M. Hebert, Esq.
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 March 22, 2019, 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 OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEY FEES AND COSTS; MOTION TO RETAX COSTS

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.
435 Marsh Ave.
Reno, NV 89509
775-323-5178

Counsel for defendants

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

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.
_____/

Case No. CV 12-01271

Dept. No. 6

DEFENDANTS' PETITION FOR AN ORDER CONFIRMING ARBITRATOR'S FINAL AWARD AND REDUCE AWARD TO JUDGMENT, INCLUDING, ATTORNEYS' FEES AND COSTS

Defendants WESPAC and Greg Christian, by and through their counsel, Thomas C. Bradley, Esq., petition this Honorable Court for a judgment and order confirming the Arbitrator's Final Award dated April 11, 2019, and request that the Court reduce the Final Award to Judgment, including attorney fees and costs. This Petition is brought pursuant to NRS 38.239 and is based upon the accompanying Memorandum of Points and Authorities and upon all of the pleadings, papers and documents on file herein.

RESPECTFULLY SUBMITTED THIS 15th DAY OF APRIL, 2019.

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

As this Court is aware, this case has a long and sordid history.

In or about July 2005, Plaintiff Gregory Garmong, who was then a licensed California attorney, met with Defendant Greg Christian, an investment advisor at Defendant WESPAC Advisors, LLC, to discuss the possibility of Plaintiff becoming a client of Defendants.

On or about August 31, 2005 Plaintiff and Defendants Greg Christian and WESPAC entered into an "Investment Management Agreement" ("Agreement") whereby Plaintiff retained Defendants as his investment advisor. The Agreement contained an arbitration provision which provided, in pertinent part, that any disputes between the parties would be resolved by arbitration in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS").

On or about March 9, 2009, Plaintiff terminated the services of Defendants.

On May 9, 2012, Plaintiff filed a *Complaint* with this Court alleging Defendants had breached the Investment Management Agreement. In his *Complaint*, Plaintiff also alleged claims of breach of Nevada Deceptive Trade Practices Act, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, malpractice, and negligence. In his prayer, Plaintiff sought general and special damages, punitive damages, and attorney's fees and costs.

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*, Plaintiff 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. On December 3, 2012, Defendants filed a reply to Plaintiff's *Opposition*.

On December 13, 2012, this 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, this Court ordered the parties to engage in binding arbitration and stayed further judicial proceedings pending the arbitration.

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

On January 13, 2014, the Court filed an *Order For Response Or Dismissal* in which it ordered the Plaintiff to file a status report within thirty days. This Court further informed the Plaintiff that if there was no response to its order, the case would be dismissed with prejudice.

On February 3, 2014, over a year after Defendants had filed their *Opposition* to Plaintiff's *Motion for Rehearing*, Plaintiff filed a *Reply*.

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

On April 2, 2014, this Court denied *Plaintiff's Motion for Rehearing*, stating that "the Plaintiff's motion is substantively the same as his original opposition [and] the Plaintiff has not raised any new issues of fact or law in his present motion." This Court did not address Defendants' request for attorney's fees in its Order.

About two months later, on June 20, 2014, Plaintiff filed a *Petition For Writ Of Mandamus Or Prohibition* with the Supreme Court of Nevada, in which Plaintiff urged the Court to reverse

the District Court's order mandating arbitration. Defendants were thereafter directed by the Court to answer the *Petition*, and on August 15, 2014, Defendants filed an *Answer*. Plaintiff filed a *Reply* on September 3, 2014 and on December 12, 2014 the Court filed an *Order Denying Petition For Writ Of Mandamus Or Prohibition.*

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

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

On February 21, 2017, the Court appointed the Honorable Phillip M. Pro as arbitrator.

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

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

On August 11, 2017, Arbitrator Hon. Philip M. Pro issued a *Discovery Plan and Scheduling Order*. In addition to setting forth discovery rules and deadlines for the arbitration proceeding, the *Scheduling Order* stated that "[w]ithin 20 days after the entry of this Discovery Plan and Scheduling Order, the plaintiff may file an amended complaint." In accordance with the Arbitrator's *Order*, both parties thereafter filed opening briefs in the arbitration proceeding on September 18, 2017. However, Plaintiff simultaneously filed an *Amended Complaint* with this Court. In his *Amended Complaint*, Plaintiff repeated claims previously made in his initial *Complaint* and added additional claims. Nowhere in his *Amended Complaint* did Plaintiff refer to the pending arbitration or to the prior orders of this Court regarding arbitration. In response to this new pleading, Defendants' attorney requested that the parties stipulate that the *Amended Complaint* be withdrawn, but Plaintiff refused to do so.

On October 11, 2017, Defendants filed their *Motion to Strike Plaintiff's Amended Complaint.* Plaintiff filed his *Opposition* on October 30, 2017. Defendants filed their *Reply* on November 6, 2017. This Court granted *Defendants' Motion to Strike* through its Order dated November 13, 2017.

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

Now, six years after the State Court first ordered the parties to engage in binding arbitration, the arbitration hearing was finally held on October 16, 17, and 18, 2018. On January 12, 2019, Judge Pro issued an "Interim Award" wherein he ruled that Mr. Garmong failed to prove any of his claims and permitted WESPAC and Mr. Christian to file a motion for attorneys' fees and costs. *See* Exhibit "1." After this issue was fully briefed, Judge Pro issued a "Final Award" and awarded $111,649.96 as reasonable attorneys' fees and costs. *See* Exhibit "2."

II. DISCUSSION

Pursuant to Nevada law, the Defendants may petition the Court for an order confirming the Award. NRS 38.239 provides that, "[a]fter a party to an arbitral proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to NRS 38.237 or 38.242 or is vacated pursuant to NRS 38.241." Once the court confirms the award, judgment is entered on the award and it is enforced like any other judgment. *See* NRS 38.243.

Defendants seek confirmation of the Award entered on April 11, 2019, and respectfully requests that the Court confirm the Award in its entirety including the award of attorneys' fees and costs and enter judgment in favor of WESPAC and Greg Christian. A proposed Judgment and Order confirming the Arbitration Award is attached hereto as Exhibit "3." Defendants request that the proposed Judgment and Order be entered by the Court. Defendants further request that interest accrue on the $111,649.96 at the legal rate of interest, currently 7.5% per annum, from the date this court enters Judgment until the date the Judgement is satisfied in full.

III. REQUEST FOR ATTORNEYS' FEES IF THIS PETITION IS CONTESTED

Further, pursuant to this Petition and pursuant to NRS 38.239,38.241, and 38.242 as well as 38.243(3), Defendants hereby request attorneys' fees should this Petition be contested. If any such opposition is filed, Defendants request that the additional fees be included the final Judgment amount.

IV. CONCLUSION

This Court should enter an order confirming the Arbitrator's Final Award dated April 11, 2019, and reduce the Final Award to Judgment, including the award of $111,649.96 in attorneys' fees and costs.

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

RESPECTFULLY SUBMITTED THIS 15th DAY OF APRIL, 2019.

/s/ Thomas C. Bradley
THOMAS C. BRADLEY, ESQ.
Attorney for Defendants,
WESPAC and Greg Christian

CERTIFICATE OF SERVICE

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

____ Personal Delivery

____ Professional Courier

____ Federal Express or Other Overnight Delivery Service

____ US Mail with Sufficient Postage Affixed

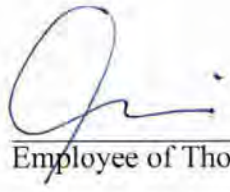
____ Facsimile to the Facsimile Number specified

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

✓ Second Judicial District Court Eflex system

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

Dated this 15day of April, 2019.



Employee of Thomas C. Bradley, Esq.

INDEX OF EXHIBITS

Exhibit No.	Description	No. of Pages
1	Interim Order in JAMS Arbitration Case Reference No. 126003474	11
2	Final Award in JAMS Arbitration Case Reference No. 126003474	12
3	Proposed Judgment and Order	2

EXHIBIT 1

EXHIBIT 1

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.

INTERIM AWARD

The Arbitration Hearing in this case was conducted in Reno, Nevada on October 16, 17, and 18, 2018. Claimant Gregory Garmong was represented by Carl M. Hebert, Esq. Respondents Wespac and Greg Christian were represented by Thomas C. Bradley, Esq. of the law firm of Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace. The testimony of percipient witnesses Gregory Garmong, Gregory Christian, and John Williams, and expert witness Bruce Cramer were presented at the hearing, and several dozen exhibits were received. Post-hearing briefing is complete, and case is ripe for decision on the merits.

The undersigned Arbitrator has jurisdiction to adjudicate the claims in this case in accord with the rulings entered by the Honorable Lynne K. Simons, District Judge of the Second Judicial District Court of the State of Nevada, the Stipulation of the Parties approved by Judge Simons, and the provisions of paragraph 16 of the Investment Management Agreement entered by the Parties on August 31, 2005.

In their pre-hearing and post-hearing briefs, Respondents cite to language in the Arbitration Clause, paragraph 16 of the Investment Management Agreement, which provides that the arbitration award in this case "*shall not include factual findings or conclusions of law.*" Although this decision is narrative in form and does not employ a format which states specific

"factual findings" and "conclusions of law" in numbered or headed paragraphs, it necessarily reflects my factual findings and legal conclusions flowing therefrom by a preponderance of the testimonial and documentary evidence adduced at the arbitral hearing.

This merits decision is titled an "Interim Award" because it is designed to provide the Parties the opportunity to brief the issue of entitlement to attorney's fees, costs, and interest resulting from this decision before the Award becomes final. Additionally, because there was significant duplication in numbered exhibits offered by the Parties, unless otherwise specified, exhibit number references are to Claimant's Exhibits.

I. DISCUSSION

The action giving rise to this Arbitration 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.

Dr. Garmong holds a Ph.D. in metallurgy and material science form Massachusetts Institute of Technology, a JD from UCLA Las School, and an MBA from UCLA. Wespac Advisors, LLC is an SEC Registered Investment Advisor. Mr. Christian has been a financial advisor since 1987 and has been employed as a financial advisor with Wespac since 2004. Wespac Advisors and Mr. Christian have been members of the Charles Schwab Advisor Network for many years.

As set forth more fully below, Garmong alleges that on August 31, 2005, he entered an Investment Management Agreement (Ex. 4) with Wespac and Christian to receive investment advice and professional management of a significant portion of his retirement savings. The professional relationship between the Parties formally ended in approximately March 2009. Garmong contends that during the final 16 months of their relationship, Wespac and Christian failed to adhere to his strict investment instructions and objectives causing Garmong the loss of $669,954 of his invested capital. Additionally, Garmong contends that Wespac and Christian acted fraudulently, thereby entitling Garmong to recover punitive damages, and double damages under NRS 41.1395 because Garmong, who was 61 years of age in 2005, was an older person vulnerable to exploitation by Respondents.

After nearly five years of litigation in the Second Judicial District Court, on February 8, 2017, the Parties entered a Stipulation to proceed to arbitration pursuant to paragraph 16 of the Investment Management Agreement. On February 21, 2017, the Honorable Lynne K. Simons, District Judge, approved the Stipulation and the undersigned was appointed as Arbitrator. Several discovery and scheduling issues were resolved throughout the arbitration proceedings

and Claimants' Motion for Summary Judgment was denied on January 25, 2018.

On September 18, 2017, Claimant Garmong filed an Amended Complaint setting forth the twelve claims at issue in this Arbitration for (1) breach of contract, (2) breach of implied warranty in contract, (3) contractual breach of implied covenant of good faith and fair dealing, (4) tortious breach of implied covenant of good faith and fair dealing, (5) breach of Nevada Deceptive Trade Practices Act, (6) breach of fiduciary duty, (7) breach of fiduciary duty of full disclosure, (8) breach of agency, (9) negligence, (10) breach of NRS 628A.030 duties of a financial planner, (11) intentional infliction of emotional distress, (12) unjust enrichment, and a request for Doubling of Damages pursuant to NRS 41.1395. Each of these claims is based on the alleged conduct of the Parties during their relationship under the Investment Management Agreement.

In their Answer filed October 16, 2017, Wespac and Christian deny the allegations made by Garmong and assert 14 affirmative defenses. Additionally, they seek an award of reasonable attorney fees and costs incurred in defending the case.

Garmong's claims are grounded in his allegations that after he retained the services of Respondents' Wespac and Christian to manage his investments in four retirement investment accounts valued at approximately $2,000,000, Wespac and Christian disregarded his express investment objective to "moderately increase his investment value while minimizing potential for loss of principal." Garmong contends this investment objective was clearly expressed in the Confidential Client Profile (Ex. 3), and the Investment Management Agreement (Ex. 4). Garmong further agreed to pay Wespac, approximately $20,000 per year to manage his investments.

Specifically, the Confidential Client Profile (Ex. 3) signed by Garmong on August 18, 2005,expressly stated his investment goal as "moderate growth, low-moderate risk." Garmong more fully explained his investment goals in the Comments section of the Profile as follows:

> "My goal is providing for retirement. I'm uncertain when I will finally retire. I expect in 2006 my income will be in the $250,000 range, but almost certainly decreasing after that to about if I don't continue to work. Don't expect to start drawing on retirement accounts for about 5 years."

However, the testimony of Garmong and Christian is congruent and shows that from September 2005 through October 2007, Garmong and Christian worked reasonably well together to advance Garmong's investment goals. At about this time, however, the testimony of Garmong and Christian reflect a distinctly different view of what occurred.

Two significant events occurred in Garmong's life in 2007 which he explained altered his perspective on the management of his retirement savings. Garmong testified that the psychological impact of his retirement on August 31, 2017, and finalizing his divorce on October 7, 2017, was "enormous." It is undisputed that such events would profoundly affect anyone.

Garmong explained that by 2007 he had become a certified emergency medical technician and volunteered with the El Dorado, California fire department in the Desolation Wilderness area of Lake Tahoe to participate in wilderness search and rescue. Garmong further testified that he also was actively engaged as a volunteer fireman in wilderness settings; for a time trained a dog rescue team; and volunteered an average of 20 hours per week at a local animal shelter.

According to Garmong, adjusting to retirement and his divorce also caused hm to reevaluate his financial circumstances. Garmong testified that during a regular quarterly meeting with Christian in early October 2007, they discussed the changes in Garmong's life and the status of his investments with Wespac. Garmong testified Christian "gratuitously offered" to take over his Wespac accounts completely and all Garmong had to do "was to state the objectives." Garmong accepted Christian's offer stating his objective as: "Don't lose capital" which Garmong contrasted with the objective stated in his earlier Client Profile for moderate growth with low-moderate risk.

Garmong introduced Ex. 11, a letter to Christian dated October 22, 2007, which he testified he mailed to Christian at Wespac. The letter is titled "Quarterly meeting and future management strategy." The two-page letter recites a summary of Garmong's investment relationship with Wespac and Christian and memorializes Garmong's decision to turn the management of his Wespac accounts over to Christian entirely. Attached to the letter of October 22, are approximately 18 pages of news articles regarding the impending housing crisis on the eve of what has come to be known popularly as "The Great Recession."

Significantly, Christian denies ever receiving Garmong's letter dated October 22, 2007, and cites to Garmong's testimony at the arbitral hearing that Wespac and Christian never acknowledged its receipt, and no other communications between the Parties occurring prior to the end of his relationship with Wespac made any reference to the letter.

Christian and Wespac argue Garmong's proffered letter of October 22, 2007, represents a curiously comprehensive summary of Garmong's currently expressed view of his investment relationship with Wespac. Combined with the attached articles from 2006 regarding the housing market decline, they suggest it was authored by Garmong more recently in preparation for this litigation. Moreover, Christian denies Garmong's characterization of their professional

relationship in several other respects.

It is unnecessary to resolve the question of precisely when the Garmong letter dated October 22, 2007 (Ex. 11) was authored, because I find by a preponderance of the evidence that it was never received by Wespac or Christian during their professional relationship with Garmong.

Dr. Garmong is a highly intelligent and educated individual. While he professes no expertise in securities investment, before he engaged the professional services of Wespac and Christian, Garmong had considerable experience in managing a comfortably large individual portfolio of assets.

In 2005, Garmong had amassed five to seven million dollars in the bond and stock market and money market funds before engaging Wespac and Christian. Garmong's acumen in understanding securities investment is further reflected in his personal editing of Wespac's Client Profile; his use of the "laddering" technique he employed in connection with his investments in the bond market; and his ability to understand the financial reports he received regularly from Wespac and Charles Schwab relating to his investment portfolio.

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

The testimony of expert witness Bruce Cramer shows that Christian and Wespac employed a conservative "growth and income" investment strategy throughout their relationship with Garmong which he made more conservative over time to accommodate Garmong's circumstances and the marketplace. According to Christian, he communicated regularly with Garmong through phone, emails, and quarterly meetings. He testified that Garmong was fully engaged in managing his portfolio.

This strategy was consistent with Garmong's investment objectives set forth in his Client Profile, and as otherwise expressed when the Parties regularly reviewed his accounts with Wespac. While it did not and could not entirely insulate Garmong's stock portfolio from losses influenced by the marketplace and especially the recession which befell all sectors of the United States economy commencing in 2007, the strategy employed by Wespac and Christian was consistent with Garmong's stated investment objectives. Clearly Wespac and Christian did not subvert those objectives by their actions.

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

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

Christian further testified that from the beginning of Garmong's affiliation with Wespac, the two regularly discussed Garmong's accounts, and that Garmong's portfolio trended toward more conservative investments as he moved into retirement and as the economy began its slide into recession. Christian acknowledged that Garmong became upset at the investment losses he suffered as the economy worsened in 2007 and 2008. He further testified, however, that at no time did Garmong express a change in his core investment objectives, nor did he give Christian instructions to "not lose capital" or to shift his assets to a 100% cash position.

I asked Dr. Garmong why in October 2007 he did not convert his stocks to all cash if his goal was solely to protect capital after his retirement and in the face of a worsening economy. Garmong responded, "Because you don't need to do that to get gains and preserve capital...What I was trying to do was to stay even with inflation and not lose purchasing power to inflation." (Tr. 10/17/18, page 119, line 17 to page 120, line7). Garmong further explained that based upon a Wespac brochure he thought the company had sophisticated computer programs which could achieve this goal.

Thereafter, Garmong and Christian continued their regular communications regarding Garmong's accounts at Wespac in which he manifested active participation in the management of his investments. Respondents Wespac and Christian offered several exhibits reflecting meaningful communications regarding the status of Garmong's investments after October 2007.

On December 10, 2007, Garmong sent a fax to Christian outlining the structure of his "bond ladder" and plans for its future development (Respondent's Ex. 27). On January 21, 2008, Garmong sent a fax to Christian concerning the status of his retirement accounts and in which he repeated his willingness to "sacrifice potential gains to ensure that I don't have capital losses" (R's Ex. 28).

On March 17, 2008, Garmong sent a fax to Christian in which he expressed concern regarding the drop in the value of his retirement accounts but did not direct Christian to shift his accounts to cash or make other specific changes (R's Ex. 30). On June 12, 2008, Garmong sent a fax to Christian registering his continued concern about the decline in value of his investments

and in which he solicited Wespac's recommendations (R's E. 32).

Garmong's concern was elevated in his fax to Christian of September 26, 2008, in which he stated he was upset by the destruction of so much of his retirement funds and the failure of Wespac and Christian to follow his instructions to avoid losses during the "major stock market fall in 2008" (R's Ex. 35). Garmong stated his intent to seek from Christian a plan that would restore the value of his accounts in light of the then existing financial disaster.

Christian responded to Garmong's fax in a letter dated September 30, 2008 (R's Ex. 36). Therein, Christian expressed his empathy over the losses suffered by Garmong but reiterated that there "is risk in the financial markets." Christian also disagreed with Garmong's allegations that he had ever told Christian that "there could be no losses from my accounts in 2008." Importantly, Christian added, "If any client told me that I would have offered you two alternatives: (1) go to 100% cash or (2) to close your accounts." Christian continued that he could not comply with the demands made by Garmong to restore the losses experienced. In this regard, Christian wrote:

> "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."

On October 24, 2008, Garmong sent a fax advising Christian that he remained under Garmong's express instruction of not losing money in his accounts as long as he had any management responsibility for them (R's Ex. 40).

Christian replied with a letter on October 29, 2008 (R's Ex. 41) in which he reiterated his efforts to handle Garmong's investment accounts to the best of Wespac's abilities based upon their previous meetings and conversations. Christian stated that at no time did he or anyone at Wespac imply that Garmong would not suffer any losses in 2008. Finally, Christian advised Garmong that he needed to either let Wespac continue managing his accounts or should look elsewhere for a manager that better fits his needs, and that unless he heard otherwise, he would assume Garmong wished to leave his accounts under Wespac's management. Five months later, in March 2009, Garmong formally ended his investment management relationship with Wespac and Christian.

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

A final factor which weighs against Garmong's claim that Wespac and Christian caused a loss in the value of his portfolio by failing to adhere to his investment objectives is that Garmong was free to terminate his relationship with Wespac and Christian at any time. Instead, Garmong maintained that relationship thru October 2008, which Garmong claims resulted in a loss of $648,670.88 in wasted capital and $21,283.29 in management fees (Ex. 24).

Through the testimony of expert Bruce Cramer, Wespac and Christian contend that Garmong's damages calculation is flawed as it fails to consider the overall performance of his retirement accounts, including income from dividends and interest in assessing the overall performance of his retirement accounts during his relationship with Wespac and Christian. Under his analysis, Cramer concludes Garmong's retirement accounts generated a net profit of $5,403.88 over the life of his relationship with Wespac and Christian.

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

I find it unnecessary to reconcile the conflicting damages calculations offered by the Parties because the question of the amount of damages to which Dr. Garmong might be entitled. Such a determination becomes material to the resolution of this case only if a finding in favor of Dr. Garmong is made on any of the 12 claims alleged in his Amended Complaint.

On the record adduced in this case I find that Dr. Garmong has failed to prove the liability of Wespac or Christian on any of his claims by a preponderance of the evidence. As a result, Garmong is not entitled to recover any loss he alleges he sustained during his professional relationship with Wespac and Christian from 2005 through 2009.

Specifically, Garmong's breach of contract claim fails because he has failed to prove that Wespac and Christian failed to manage his investment accounts in accord with his express investment objectives and instructions. Garmong understood portions of his Wespac portfolio were in stocks and that such investments carry no guarantee of profit. The evidence adduced at the arbitral hearing fails to show that Christian breached any duty to consider Garmong's

financial condition or investment objectives, or otherwise failed to fulfill his responsibilities as an investment advisor and manager during Garmong's relationship with Wespac.

Garmong's claim for breach of implied warranty fails as a matter of law. As argued by Wespac and Christian, the overwhelming weight of authority holds that a breach of implied warranty claim cannot be sustained in the context of a contract for services. See, e.g. *Lufthansa Cargo A.G. v. County of Wayne,* 2002 WL 31008373 at *5 (E.D. Mich).

Garmong's claim for breach of the implied covenant of good faith and fair dealing fails because it is not supported by sufficient evidence of breach by Wespac or Christian. Similarly, Garmong's claim for tortious breach of the implied covenant of good faith and fair dealing fails for the same reason.

Garmong's claim for breach of Nevada's Deceptive Trade Practices Act fails because the evidence does not show deception or fraud by Wespac or Christian causing damage to Garmong. Merely showing a loss of value in an investment does not support a claim that the loss was a product of misrepresentation. There is simply no evidence in the record of this case to show that it was.

Garmong's breach of fiduciary duty of full disclosure claim fails because the evidence shows Garmong was regularly engaged in communications with Christian concerning his investment accounts at Wespac, never surrendered complete control over his accounts to Wespac or Christian, and Christian kept Garmong apprised of the decline in the stock market and the option of shifting Garmong's accounts to 100% cash if he so desired. For the same reason, Garmong's breach of agency claim fails. Garmong's negligence claim fails because the evidence has not established Christian was negligent in performing his services to Garmong.

Similarly, the evidence presented does not establish that Christian or Wespac intentionally inflicted emotional distress to Garmong in accord with the elements set forth in *Posadas v. City of Reno,* 851 P.2d 438 (Nev. 1993), or that Christian and Wespac violated NRS 628A.030.

Finally, Garmong's unjust enrichment claim fails because such an action is not available when there is, as here, an express written contract. *Leasepartners Corp. v. Robert L. Brooks Trust,* 942 P.2d 182 (1997).

II. INTERIM AWARD AND FURTHER PROCEEDINGS

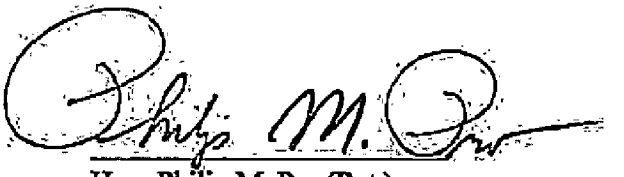
Claimant Gregory Garmong having failed to establish his claims by a preponderance of the evidence, Respondents Wespac and Greg Christian are entitled to Judgment against Claimant on all claims alleged in this Arbitration.

Respondents have requested that Claimant Garmong be required to pay 100% of the Arbitration fees and Arbitrator compensation and expenses pursuant to JAMS Rule 24(f), and further requests the opportunity to seek attorney's fees and costs as the prevailing Party in this action. Therefore, this Decision is styled an Interim Award to permit the Parties to brief the issues relating to Respondents requests.

Respondents shall be permitted to and including February 1, 2019, within which to file and serve a Motion for Arbitration costs under JAMS Rule 24(f), and attorney's fees and costs of this action. Claimant shall have to and including February 20, 2019, within which to Respond thereto. Respondents shall thereafter have to and including February28, 2019, within which to file a Reply. The Interim Award shall become Final upon resolution of the outstanding issues relating to fees and costs.

IT IS SO ORDERED

Dated: January 12, 2019



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 14, 2019, I served the attached INTERIM AWARD 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 14, 2019.

Mara Satterthwaite, Esq.
msatterthwaite@jamsadr.com

EXHIBIT 2

EXHIBIT 2

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.

FINAL AWARD

The Arbitration Hearing in this case was conducted in Reno, Nevada on October 16, 17, and 18, 2018. Claimant Gregory Garmong was represented by Carl M. Hebert, Esq. Respondents Wespac and Greg Christian were represented by Thomas C. Bradley, Esq. of the law firm of Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace. The testimony of percipient witnesses Gregory Garmong, Gregory Christian, and John Williams, and expert witness Bruce Cramer were presented at the hearing, and several dozen exhibits were received. Post-hearing briefing is complete, and case is ripe for decision on the merits.

The undersigned Arbitrator has jurisdiction to adjudicate the claims in this case in accord with the rulings entered by the Honorable Lynne K. Simons, District Judge of the Second Judicial District Court of the State of Nevada, the Stipulation of the Parties approved by Judge Simons, and the provisions of paragraph 16 of the Investment Management Agreement entered by the Parties on August 31, 2005.

In their pre-hearing and post-hearing briefs, Respondents cite to language in the Arbitration Clause, paragraph 16 of the Investment Management Agreement, which provides that the arbitration award in this case "*shall not include factual findings or conclusions of law.*"

Although this decision is narrative in form and does not employ a format which states specific "factual findings" and "conclusions of law" in numbered or headed paragraphs, it necessarily reflects my factual findings and legal conclusions flowing therefrom by a preponderance of the testimonial and documentary evidence adduced at the arbitral hearing.

This merits decision is titled an "Interim Award" because it is designed to provide the Parties the opportunity to brief the issue of entitlement to attorney's fees, costs, and interest resulting from this decision before the Award becomes final. Additionally, because there was significant duplication in numbered exhibits offered by the Parties, unless otherwise specified, exhibit number references are to Claimant's Exhibits.

I. DISCUSSION

The action giving rise to this Arbitration 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.

Dr. Garmong holds a Ph.D. in metallurgy and material science form Massachusetts Institute of Technology, a JD from UCLA Las School, and an MBA from UCLA. Wespac Advisors, LLC is an SEC Registered Investment Advisor. Mr. Christian has been a financial advisor since 1987 and has been employed as a financial advisor with Wespac since 2004. Wespac Advisors and Mr. Christian have been members of the Charles Schwab Advisor Network for many years.

As set forth more fully below, Garmong alleges that on August 31, 2005, he entered an Investment Management Agreement (Ex. 4) with Wespac and Christian to receive investment advice and professional management of a significant portion of his retirement savings. The professional relationship between the Parties formally ended in approximately March 2009. Garmong contends that during the final 16 months of their relationship, Wespac and Christian failed to adhere to his strict investment instructions and objectives causing Garmong the loss of $669,954 of his invested capital. Additionally, Garmong contends that Wespac and Christian acted fraudulently, thereby entitling Garmong to recover punitive damages, and double damages under NRS 41.1395 because Garmong, who was 61 years of age in 2005, was an older person vulnerable to exploitation by Respondents.

After nearly five years of litigation in the Second Judicial District Court, on February 8, 2017, the Parties entered a Stipulation to proceed to arbitration pursuant to paragraph 16 of the Investment Management Agreement. On February 21, 2017, the Honorable Lynne K. Simons, District Judge, approved the Stipulation and the undersigned was appointed as Arbitrator.

Several discovery and scheduling issues were resolved throughout the arbitration proceedings and Claimants' Motion for Summary Judgment was denied on January 25, 2018.

On September 18, 2017, Claimant Garmong filed an Amended Complaint setting forth the twelve claims at issue in this Arbitration for (1) breach of contract, (2) breach of implied warranty in contract, (3) contractual breach of implied covenant of good faith and fair dealing, (4) tortious breach of implied covenant of good faith and fair dealing, (5) breach of Nevada Deceptive Trade Practices Act, (6) breach of fiduciary duty, (7) breach of fiduciary duty of full disclosure, (8) breach of agency, (9) negligence, (10) breach of NRS 628A.030 duties of a financial planner, (11) intentional infliction of emotional distress, (12) unjust enrichment, and a request for Doubling of Damages pursuant to NRS 41.1395. Each of these claims is based on the alleged conduct of the Parties during their relationship under the Investment Management Agreement.

In their Answer filed October 16, 2017, Wespac and Christian deny the allegations made by Garmong and assert 14 affirmative defenses. Additionally, they seek an award of reasonable attorney fees and costs incurred in defending the case.

Garmong's claims are grounded in his allegations that after he retained the services of Respondents' Wespac and Christian to manage his investments in four retirement investment accounts valued at approximately $2,000,000, Wespac and Christian disregarded his express investment objective to "moderately increase his investment value while minimizing potential for loss of principal." Garmong contends this investment objective was clearly expressed in the Confidential Client Profile (Ex. 3), and the Investment Management Agreement (Ex. 4). Garmong further agreed to pay Wespac, approximately $20,000 per year to manage his investments.

Specifically, the Confidential Client Profile (Ex. 3) signed by Garmong on August 18, 2005,expressly stated his investment goal as "moderate growth, low-moderate risk." Garmong more fully explained his investment goals in the Comments section of the Profile as follows:

> "My goal is providing for retirement. I'm uncertain when I will finally retire. I expect in 2006 my income will be in the $250,000 range, but almost certainly decreasing after that to about if I don't continue to work. Don't expect to start drawing on retirement accounts for about 5 years."

However, the testimony of Garmong and Christian is congruent and shows that from September 2005 through October 2007, Garmong and Christian worked reasonably well together to advance Garmong's investment goals. At about this time, however, the testimony of Garmong and Christian reflect a distinctly different view of what occurred.

Two significant events occurred in Garmong's life in 2007 which he explained altered his perspective on the management of his retirement savings. Garmong testified that the psychological impact of his retirement on August 31, 2017, and finalizing his divorce on October 7, 2017, was "enormous." It is undisputed that such events would profoundly affect anyone.

Garmong explained that by 2007 he had become a certified emergency medical technician and volunteered with the El Dorado, California fire department in the Desolation Wilderness area of Lake Tahoe to participate in wilderness search and rescue. Garmong further testified that he also was actively engaged as a volunteer fireman in wilderness settings; for a time trained a dog rescue team; and volunteered an average of 20 hours per week at a local animal shelter.

According to Garmong, adjusting to retirement and his divorce also caused hm to reevaluate his financial circumstances. Garmong testified that during a regular quarterly meeting with Christian in early October 2007, they discussed the changes in Garmong's life and the status of his investments with Wespac. Garmong testified Christian "gratuitously offered" to take over his Wespac accounts completely and all Garmong had to do "was to state the objectives." Garmong accepted Christian's offer stating his objective as: "Don't lose capital" which Garmong contrasted with the objective stated in his earlier Client Profile for moderate growth with low-moderate risk.

Garmong introduced Ex. 11, a letter to Christian dated October 22, 2007, which he testified he mailed to Christian at Wespac. The letter is titled "Quarterly meeting and future management strategy." The two-page letter recites a summary of Garmong's investment relationship with Wespac and Christian and memorializes Garmong's decision to turn the management of his Wespac accounts over to Christian entirely. Attached to the letter of October 22, are approximately 18 pages of news articles regarding the impending housing crisis on the eve of what has come to be known popularly as "The Great Recession."

Significantly, Christian denies ever receiving Garmong's letter dated October 22, 2007, and cites to Garmong's testimony at the arbitral hearing that Wespac and Christian never acknowledged its receipt, and no other communications between the Parties occurring prior to the end of his relationship with Wespac made any reference to the letter.

Christian and Wespac argue Garmong's proffered letter of October 22, 2007, represents a curiously comprehensive summary of Garmong's currently expressed view of his investment relationship with Wespac. Combined with the attached articles from 2006 regarding the housing market decline, they suggest it was authored by Garmong more recently in preparation for this litigation. Moreover, Christian denies Garmong's characterization of their professional relationship in several other respects.

It is unnecessary to resolve the question of precisely when the Garmong letter dated October 22, 2007 (Ex. 11) was authored, because I find by a preponderance of the evidence that it was never received by Wespac or Christian during their professional relationship with Garmong.

Dr. Garmong is a highly intelligent and educated individual. While he professes no expertise in securities investment, before he engaged the professional services of Wespac and Christian, Garmong had considerable experience in managing a comfortably large individual portfolio of assets.

In 2005, Garmong had amassed five to seven million dollars in the bond and stock market and money market funds before engaging Wespac and Christian. Garmong's acumen in understanding securities investment is further reflected in his personal editing of Wespac's Client Profile; his use of the "laddering" technique he employed in connection with his investments in the bond market; and his ability to understand the financial reports he received regularly from Wespac and Charles Schwab relating to his investment portfolio.

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

The testimony of expert witness Bruce Cramer shows that Christian and Wespac employed a conservative "growth and income" investment strategy throughout their relationship with Garmong which he made more conservative over time to accommodate Garmong's circumstances and the marketplace. According to Christian, he communicated regularly with Garmong through phone, emails, and quarterly meetings. He testified that Garmong was fully engaged in managing his portfolio.

This strategy was consistent with Garmong's investment objectives set forth in his Client Profile, and as otherwise expressed when the Parties regularly reviewed his accounts with Wespac. While it did not and could not entirely insulate Garmong's stock portfolio from losses influenced by the marketplace and especially the recession which befell all sectors of the United States economy commencing in 2007, the strategy employed by Wespac and Christian was consistent with Garmong's stated investment objectives. Clearly Wespac and Christian did not subvert those objectives by their actions.

Christian acknowledged that Garmong's "life situation changed" when he retired but explained that he knew of Garmong's intended retirement from the beginning of their

professional relationship and had factored that into the investment strategy employed for Garmong's accounts with Wespac.

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

Christian further testified that from the beginning of Garmong's affiliation with Wespac, the two regularly discussed Garmong's accounts, and that Garmong's portfolio trended toward more conservative investments as he moved into retirement and as the economy began its slide into recession. Christian acknowledged that Garmong became upset at the investment losses he suffered as the economy worsened in 2007 and 2008. He further testified, however, that at no time did Garmong express a change in his core investment objectives, nor did he give Christian instructions to "not lose capital" or to shift his assets to a 100% cash position.

I asked Dr. Garmong why in October 2007 he did not convert his stocks to all cash if his goal was solely to protect capital after his retirement and in the face of a worsening economy. Garmong responded, "Because you don't need to do that to get gains and preserve capital... What I was trying to do was to stay even with inflation and not lose purchasing power to inflation." (Tr. 10/17/18, page 119, line 17 to page 120, line7). Garmong further explained that based upon a Wespac brochure he thought the company had sophisticated computer programs which could achieve this goal.

Thereafter, Garmong and Christian continued their regular communications regarding Garmong's accounts at Wespac in which he manifested active participation in the management of his investments. Respondents Wespac and Christian offered several exhibits reflecting meaningful communications regarding the status of Garmong's investments after October 2007.

On December 10, 2007, Garmong sent a fax to Christian outlining the structure of his "bond ladder" and plans for its future development (Respondent's Ex. 27). On January 21, 2008, Garmong sent a fax to Christian concerning the status of his retirement accounts and in which he repeated his willingness to "sacrifice potential gains to ensure that I don't have capital losses" (R's Ex. 28).

On March 17, 2008, Garmong sent a fax to Christian in which he expressed concern regarding the drop in the value of his retirement accounts but did not direct Christian to shift his accounts to cash or make other specific changes (R's Ex. 30). On June 12, 2008, Garmong sent a fax to Christian registering his continued concern about the decline in value of his investments and in which he solicited Wespac's recommendations (R's E. 32).

Garmong's concern was elevated in his fax to Christian of September 26, 2008, in which he stated he was upset by the destruction of so much of his retirement funds and the failure of Wespac and Christian to follow his instructions to avoid losses during the "major stock market fall in 2008" (R's Ex. 35). Garmong stated his intent to seek from Christian a plan that would restore the value of his accounts in light of the then existing financial disaster.

Christian responded to Garmong's fax in a letter dated September 30, 2008 (R's Ex. 36). Therein, Christian expressed his empathy over the losses suffered by Garmong but reiterated that there "is risk in the financial markets." Christian also disagreed with Garmong's allegations that he had ever told Christian that "there could be no losses from my accounts in 2008." Importantly, Christian added, "If any client told me that I would have offered you two alternatives: (1) go to 100% cash or (2) to close your accounts." Christian continued that he could not comply with the demands made by Garmong to restore the losses experienced. In this regard, Christian wrote:

> "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."

On October 24, 2008, Garmong sent a fax advising Christian that he remained under Garmong's express instruction of not losing money in his accounts as long as he had any management responsibility for them (R's Ex. 40).

Christian replied with a letter on October 29, 2008 (R's Ex. 41) in which he reiterated his efforts to handle Garmong's investment accounts to the best of Wespac's abilities based upon their previous meetings and conversations. Christian stated that at no time did he or anyone at Wespac imply that Garmong would not suffer any losses in 2008. Finally, Christian advised Garmong that he needed to either let Wespac continue managing his accounts or should look elsewhere for a manager that better fits his needs, and that unless he heard otherwise, he would assume Garmong wished to leave his accounts under Wespac's management. Five months later, in March 2009, Garmong formally ended his investment management relationship with Wespac and Christian.

The foregoing exchange of communications between Garmong and Christian from late 2007 and throughout 2008 compel the conclusion that although Garmong was understandably upset about losses he experienced during the decline in the stock market during that period, Christian and Wespac did not fail to abide Garmong's investment objectives and instructions,

that Christian could not have avoided all loss of capital without converting Garmong's accounts to 100% cash as he offered in September 2008, and that Garmong did not instruct Christian to move all of his accounts to 100% cash.

A final factor which weighs against Garmong's claim that Wespac and Christian caused a loss in the value of his portfolio by failing to adhere to his investment objectives is that Garmong was free to terminate his relationship with Wespac and Christian at any time. Instead, Garmong maintained that relationship thru October 2008, which Garmong claims resulted in a loss of $648,670.88 in wasted capital and $21,283.29 in management fees (Ex. 24).

Through the testimony of expert Bruce Cramer, Wespac and Christian contend that Garmong's damages calculation is flawed as it fails to consider the overall performance of his retirement accounts, including income from dividends and interest in assessing the overall performance of his retirement accounts during his relationship with Wespac and Christian. Under his analysis, Cramer concludes Garmong's retirement accounts generated a net profit of $5,403.88 over the life of his relationship with Wespac and Christian.

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

I find it unnecessary to reconcile the conflicting damages calculations offered by the Parties because the question of the amount of damages to which Dr. Garmong might be entitled. Such a determination becomes material to the resolution of this case only if a finding in favor of Dr. Garmong is made on any of the 12 claims alleged in his Amended Complaint.

On the record adduced in this case I find that Dr. Garmong has failed to prove the liability of Wespac or Christian on any of his claims by a preponderance of the evidence. As a result, Garmong is not entitled to recover any loss he alleges he sustained during his professional relationship with Wespac and Christian from 2005 through 2009.

Specifically, Garmong's breach of contract claim fails because he has failed to prove that Wespac and Christian failed to manage his investment accounts in accord with his express investment objectives and instructions. Garmong understood portions of his Wespac portfolio were in stocks and that such investments carry no guarantee of profit. The evidence adduced at the arbitral hearing fails to show that Christian breached any duty to consider Garmong's financial condition or investment objectives, or otherwise failed to fulfill his responsibilities as an investment advisor and manager during Garmong's relationship with Wespac.

Garmong's claim for breach of implied warranty fails as a matter of law. As argued by Wespac and Christian, the overwhelming weight of authority holds that a breach of implied warranty claim cannot be sustained in the context of a contract for services. See, e.g. *Lufthansa Cargo A.G. v. County of Wayne*, 2002 WL 31008373 at *5 (E.D. Mich).

Garmong's claim for breach of the implied covenant of good faith and fair dealing fails because it is not supported by sufficient evidence of breach by Wespac or Christian. Similarly, Garmong's claim for tortious breach of the implied covenant of good faith and fair dealing fails for the same reason.

Garmong's claim for breach of Nevada's Deceptive Trade Practices Act fails because the evidence does not show deception or fraud by Wespac or Christian causing damage to Garmong. Merely showing a loss of value in an investment does not support a claim that the loss was a product of misrepresentation. There is simply no evidence in the record of this case to show that it was.

Garmong's breach of fiduciary duty of full disclosure claim fails because the evidence shows Garmong was regularly engaged in communications with Christian concerning his investment accounts at Wespac, never surrendered complete control over his accounts to Wespac or Christian, and Christian kept Garmong apprised of the decline in the stock market and the option of shifting Garmong's accounts to 100% cash if he so desired. For the same reason, Garmong's breach of agency claim fails. Garmong's negligence claim fails because the evidence has not established Christian was negligent in performing his services to Garmong.

Similarly, the evidence presented does not establish that Christian or Wespac intentionally inflicted emotional distress to Garmong in accord with the elements set forth in *Posadas v. City of Reno*, 851 P.2d 438 (Nev. 1993), or that Christian and Wespac violated NRS 628A.030.

Finally, Garmong's unjust enrichment claim fails because such an action is not available when there is, as here, an express written contract. *Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182 (1997).

Claimant Gregory Garmong having failed to establish his claims by a preponderance of the evidence, Respondents Wespac and Greg Christian are entitled to an Award of Judgment against Claimant on all claims alleged in this Arbitration which is entered below.

II. ATTORNEY'S FEES AND COSTS

On January 12, 2019, the undersigned Arbitrator entered an Interim Award as reflected above and permitted Respondents Wespac and Christian to file a Motion for Attorneys Fees and Costs. Respondents Motion was filed on February15, 2019, and briefing thereon is now complete.

Respondents seek an award of attorney's fees and costs totaling $111,649.96 pursuant to Nevada Rule of Civil Procedure 68, and JAMS fees and costs in the amount of $16,353.41 pursuant to JAMS Rule 24(f).

In his Opposition filed March 6, 2019, Claimant Garmong argues Respondents are not entitled to attorney's fees under Rule 68 because the Scheduling Order entered in this case on August 11, 2017 enumerated specific provisions of the Nevada Rules of Civil Procedure as applicable to this Arbitration, but omitted any reference to Rule 68 thereby rendering it inapplicable to these proceedings. This is a novel argument which the Arbitrator rejects.

There is no dispute that the issues in this case are governed by Nevada law, and procedurally by JAMS Rules and the provisions of the Nevada Rules of Civil Procedure enumerated in the Stipulation for arbitration entered by the Parties on February 8, 2017. However, the agreement of the Parties to specific NRCP Rules relating to discovery does not automatically exclude the applicability of others, particularly where the Arbitrator determines that necessary. *See* JAMS Rule 24.

In its Reply memorandum of March 14, 2019, Respondents cite the important purpose of NRCP 68 to encourage resolution of cases and conserve resources of the Parties and the court. *Dillard Department Stores v. Beckwith,* 989 P. 2d 882, 888 (1999). When WESPAC made its Offer of Judgment of $10,000 on February 12, 2017 to Garmong, no objection was made and there is no basis in the record to support the argument that by entering the Stipulation for Arbitration Respondents had clearly demonstrated the intent to waive their right to seek attorney's fees and costs. In accord with NRS 38.238 an arbitrator has discretion to consider an award of fees and costs and finds it appropriate to do so in this case. *WPH Architecture, Inc. v. Vegas VP, LP,* 360 P.3d 1145, 1149 (2015).

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

viability of the Offer of Judgment with an understanding of the potential consequences and he made his decision to proceed for whatever reasons he deemed prudent.

The Arbitrator finds the attorney's fees and costs sought by Respondent's Motion are reasonable and appropriate for the work done in the case. *Schuette v. Beazer Homes Holding Corp.*, 124 P.3d 530, 548 (2005). In making this determination the Arbitrator finds that the quality of Respondents counsel; the quality and difficulty of the work performed; the amounts charged for the services performed; and the overall benefits derived warrant the finding that the fees and costs requested are reasonable. *Bunzell v. Golden Gate Nat's Bank*, 455 P.2d 31, 33 (1969). *See also*, JAMS Rule 24(g).

The Arbitrator further finds that the corrected declaration and exhibits attached to Respondent's Motion and Reply memorandum support the fees and costs reflected as reasonable. Additionally, the Arbitrator finds no good cause to strike the original Declaration of Mr. Bradley dated February 15, 2019 which was appended to Respondent's Motion for Attorney's Fees and Costs. The error therein was properly corrected by Mr. Bradley on March 14, 2019, and before the filings of the Parties in connection with the Motion were considered by the Arbitrator.

However, the Arbitrator declines exercise discretion under JAMS Rule 24(f) to require that Garmong pay 100% of the JAMS Arbitration Fees. Resolution of the case in this forum was required under Paragraph 16 of the Investment Management Agreement prepared and required by Respondents when the relationship of the Parties was established on August 31, 2005. No adjustment of those Arbitration fees is warranted here.

IT IS SO ORDERED.

AWARD

Based upon the foregoing findings of fact, conclusions of law, and Orders, the Arbitrator finds that Respondents WESPAC and Gregory Christian are entitled to an Award of Judgment on each of Claimant Gregory Garmong's claims. The Arbitrator further finds that Respondent WESPAC is entitled to and Award of reasonable attorney's fees and costs of this action from Claimant Garmong in the total sum of $111,649.96.

Dated: March 11, 2019

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 April 11, 2019, I served the attached DUPLICATE ORIGINAL FINAL AWARD 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 April 11, 2019.

Mara Satterthwaite, Esq.
msatterthwaite@jamsadr.com

EXHIBIT 3

EXHIBIT 3

CODE 2685
THOMAS C. BRADLEY, ESQ.
Bar No. 1621
435 Marsh Ave.
Reno, Nevada 89509
Telephone (775) 323-5178
Tom@TomBradleyLaw.com

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

v.

WESPAC, GREG CHRISTIAN, and Does 1-10,

Defendants.
_____/

Case No. CV 12-01271

Dept. No. 6

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

On April 11, 2019, Judge Pro, the JAMS Arbitrator, who was appointed by this Court issued his Final Award. In the Final Award, Judge Pro awarded $111,649.96 as reasonable attorneys' fees and costs. On April 15, 2019, Defendants WESPAC and Greg Christian filed a Petition for Confirmation of Arbitration, Including the Award of Attorneys' Fees and Costs.

Having reviewed the Defendants' Petition and having considered all responsive pleadings and papers filed in this case, the Court finds that the Arbitrator's Final Award shall be CONFIRMED by this Court pursuant to NRS 38.239.

IT IS THEREFORE ORDERED AND ADJUDGED, that this Court hereby CONFIRMS the Arbitrator's FINAL AWARD dated April 11, 2019.

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FURTHER, this Court finds that Defendants WESPAC and GREG CHRISTIAN recover of the Plaintiff the sum of $111,649.96 with interest thereon at the rate of 7.5% per annum as provided by law from today's date until satisfied in full.

DATED this _____ date of _____, 2019.

_____
DISTRICT JUDGE

Prepared and Submitted by:

/s/ Thomas C. Bradley
THOMAS C. BRADLEY, ESQ.
Attorney for Defendants,
WESPAC and Greg Christian

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

Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

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

DEPT. NO. : 6

Defendants.
_____/

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

Plaintiff moves that the Court vacate the arbitrator's decision denying Plaintiff's Motion for Partial Summary Judgment ("PMPSJ"). Plaintiff further moves that the Court decide and grant PMPSJ.

Plaintiff submits in this paper two related motions concerning PMPSJ. The first motion asks that the Court vacate the arbitrator's decision denying the PMPSJ. Vacating the denial does not necessarily require the District Court to grant the PMPSJ. The second motion asks that the Court consider the PMPSJ *de novo*, and decide and grant the PMPSJ.

Considering and granting PMPSJ by the District Court provides a proper and expeditious path to resolving this case without the District Court having to investigate the evidence presented in three days of hearings.

POINTS AND AUTHORITIES

I. BACKGROUND

During the course of the arbitration, Plaintiff filed PMPSJ (Exh. 1). After an Opposition (Exh. 2) and Reply (Exh. 3), the Arbitrator denied (Exh. 4) the PMPSJ while disregarding both the Undisputed Material Facts ("UMFs") and the applicable substantive legal principles[1]. The arbitrator stated as his sole reason for denial that he wanted to conduct a "merits hearing" as part of the summary judgment proceeding to assess witness "credibility." The use of a "merits hearing" as part of a summary judgment proceeding is forbidden by both the United States Supreme Court and Nevada.

Plaintiff moved for reconsideration (Exh. 5). After an Opposition (Exh. 6), the arbitrator issued an Order Denying Reconsideration (Exh. 7). The Order Exh. 7 again disregarded the UMFs and the applicable substantive legal principles. The Order Exh. 7 did admit that "Many of the facts relied upon by Claimant are indeed 'undisputed.'" The Order utterly and manifestly disregarded, and did not mention at all, the substantive law governing the twelve Claims for Relief. That is, the arbitrator disregarded the facts, did not mention any facts supporting his position, and manifestly disregarded the applicable substantive legal principles.

Nevada provides for vacating an arbitrator's decision under specific grounds, as will

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[1] As used herein and in Wood v. Safeway, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005), quoted below, the "substantive" law is the law governing the decision on each claim and controls which factual disputes are material and will preclude summary judgment, as distinct from "procedural" law which specifies procedures to be followed.

be discussed. Nevada law and this Court's orders allow this Court to assert its inherent authority and supervisory control over the arbitration proceedings conducted under its authority and supervision.

II. A QUICK LOOK. THE ARBITRATOR'S ORDERS DISREGARD BOTH THE UNDISPUTED MATERIAL FACTS AND THE GOVERNING SUBSTANTIVE LAW

At the outset, Plaintiff urges the Court to review briefly the two Orders (Exh. 4 and 7) of the arbitrator setting forth his decision on PMPSJ. The arbitrator's Order Re: Summary Judgment dated January 25, 2018 ("Order Denying Summary Judgment," Exh. 4) and Order Re: Claimant's Motion for Reconsideration of Order Denying Summary Judgment dated March 19, 2018 ("Order Denying Reconsideration," Exh. 7) (collectively the "two Orders") give the arbitrator's decision.

These two Orders do not bear any resemblance to conventional lawful orders deciding a summary judgment motion, which follow the procedure mandated by Wood v. Safeway, 121 Nev. at 729, 121 P.3d at 1028. Conventional orders first discuss the undisputed material facts and supporting evidence propounded by the moving party, and whether the non-moving party has brought forth admissible evidence in an attempt to controvert the movant's undisputed material facts. If after this evaluation, there are in fact undisputed material facts, conventional orders then apply the governing substantive law to determine whether "the moving party is entitled to a judgment as a matter of law," as Wood v. Safeway mandates.

The arbitrator's two Orders disregard both the UMFs and the governing substantive law of the Claims, except to admit that "Many of the facts relied upon by Claimant are indeed 'undisputed.'" (Order Denying Reconsideration, Exh. 7, page 2, line 3) without

mentioning which of the 20 UMFs are "undisputed." The UMFs are not mentioned at all, nor is any of the governing substantive law. The disregard of the UMFs and the manifest disregard of the law are two bases for this motion to vacate, and will be addressed in greater detail in subsequent sections.

III. LEGAL STANDARDS

A. Grounds for vacating an arbitrator's decision

An arbitrator's decision may be vacated on either statutory or common-law grounds. WPH Architecture, Inc. v. Vegas VP, LP, 131 Nev. Adv. Op. 88, 360 P.3d 1145, 1147 (2015) held:

> An arbitration award may be vacated based on statutory grounds and certain limited common-law grounds. At common law, an arbitration award may be vacated if it is arbitrary, capricious, or unsupported by the agreement or when an arbitrator has manifestly disregard [ed] the law. [citations and internal quotation marks omitted]

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

> 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.'

The present motion implicates both the statutory grounds and the common law grounds for vacating an arbitrator's Final Award.

B. The District Court has the authority to decide a motion for summary judgment in reviewing an arbitrator's actions.

Pursuant to its inherent authority to supervise arbitration conducted under its appointment of the arbitrator and to decide whether to approve the arbitrator's decision, the Court may also decide a motion for summary judgment that has been improperly addressed by the arbitrator. City of Sparks v. Sparks Mun. Court, 129 Nev. 348, 362-64, 302 P.3d 1118, 1128-1129 (2013). The District Court appointed the arbitrator (Exh. 18), and continued to control the arbitration proceedings (Exh. 8). It therefore has inherent authority to decide a motion for summary judgment improperly denied by the arbitrator.

Further, the Court authorized Plaintiff to appeal erroneous rulings of the arbitrator. See Court's Order of November 29, 2018 (Exh. 8) at 9:5-7; JAMS Rule 25 (Exh. 9); Coblentz v. Hotel Employees & Restaurant Employees Union, 112 Nev. 1161, 1167, 925 P.2d 496, 499 (1996); Castellanos ex rel. Castellanos Family Trust v. La Fuente, Inc., 124 Nev. 1456, 238 P.3d 800 (2008).

C. The governing procedural law of Summary Judgment

NRCP 56(c), quoted at PMPSJ 3:13-21 and cited at Order Denying Summary Judgment (Exh. 4), 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." Even though the arbitrator's Order cited NRCP 56(c), it did not apply this rule by determining whether there is any genuine issue as to any material facts and then determining whether the moving party is entitled to judgment as a matter of law.

Wood v. Safeway, 121 Nev. at 729-31, 121 P.3d at 1028-31, sets forth the procedural law of summary judgment, and emphasizes the mandatory nature of the grant of summary judgment where there are undisputed material facts and the moving party is entitled to judgment as a matter of law, holding,

> 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." This court has noted that when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.
>
> * * * * *
>
> This court has often stated that the nonmoving party may not defeat a motion for summary judgment by relying on the gossamer threads of whimsy, speculation and conjecture. As this court has made abundantly clear, "[w]hen a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." The United States Supreme Court employed similar language in Matsushita Electric Industrial Co. v. Zenith Radio.
>
> 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. [internal quotation marks omitted]

The Order Denying Summary Judgment (Exh. 4) at page 2, ¶ 4 cites and partially quotes Wood v. Safeway and other cases, demonstrating that the arbitrator was fully aware of this controlling authority. But that is all. The arbitrator refused to apply the controlling authority by determining which material facts are undisputed and then applying the substantive law.

IV. THE COURT HAS A DUTY TO REVIEW THE ARBITRATOR'S ACTIONS

The District Court has a duty to review the actions and rulings of the arbitrator to determine whether he disregarded the facts and/or manifestly disregarded the law. Graber v. Comstock Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995).

V. THE ARBITRATOR'S DENIAL OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT IS A PROPER SUBJECT OF A MOTION TO VACATE

These principles apply to the arbitrator's denial of PMPSJ.

The PMPSJ would have been dispositive of the entire matter had the arbitrator not disregarded the facts and manifestly disregarded the law, and had granted PMPSJ. The arbitrator has rendered his Final Award, so the denial of PMPSJ is final as well, and the District Court may address the denial of PMPSJ.

The statutes and the arbitrator's orders permit resolution of an arbitration by a motion for summary judgment. NRS 38.231(2) provides that an arbitrator may decide a request for summary disposition of a claim or particular issue. In the present case, the

arbitrator's initial Discovery Plan and Scheduling Order dated August 11, 2017 (Exh. 10), ¶6, page 2, lines 12-13, provided for resolution of the dispute by summary judgment, "The parties may bring motions for summary judgment, pursuant to NRCP 56." The arbitrator's Second Order re Scheduling dated November 22, 2017 (Exh. 11), page 2, lines 2-4, provided:

> Finally, counsel for Claimant [the arbitrator's term for Plaintiff] has advised in his email of November 13, 2017, that he intends to file a Motion for Summary Judgment in the immediate future. To ensure the orderly progress of these proceedings, the arbitrator hereby sets November 30, 2017, as the deadline for filing dispositive motions by either party.

Plaintiff timely filed and served his PMPSJ (Exh. 1) on November 30, 2017. Defendants did not file a motion for summary judgment.

VI. APPLICATION OF THE LAW TO THE PRESENT FACTS

A motion to vacate may be brought on either statutory or nonstatutory grounds. The following § A addresses the law and its application to vacating the two Orders (Exh. 4 and 7) on statutory grounds, and § B addresses the law and its application to vacating the two Orders on nonstatutory grounds. If any one or more of the bases for vacating the Orders are established, the arbitrator's denial of PMPSJ must be vacated.

A. Statutory grounds for vacating the arbitrator's decision.

NRS 38.241(1) sets forth the mandatary ("shall vacate") statutory grounds for vacating an arbitrator's decision:

> 1. Upon motion to the court by a party to an arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if:
> (a) The award was procured by corruption, fraud or other undue means;
> (b) There was:
> (1) Evident partiality by an arbitrator appointed as a neutral arbitrator;
> (2) Corruption by an arbitrator; or
> (3) Misconduct by an arbitrator prejudicing the rights of a party to the arbitral proceeding;
> (c) An arbitrator refused to postpone the hearing upon showing of sufficient

cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to NRS 38.231, so as to prejudice substantially the rights of a party to the arbitral proceeding;
(d) An arbitrator exceeded his or her powers;
(e) There was no agreement to arbitrate, unless the movant participated in the arbitral proceeding without raising the objection under subsection 3 of NRS 38.231 not later than the beginning of the arbitral hearing; or
(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in NRS 38.223 so as to prejudice substantially the rights of a party to the arbitral proceeding.

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

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

Defendants advanced a purported Contract that they alleged contained a provision to arbitrate. To support this argument, Defendants made of record two different version of Agreements (Exh. 12 and 13), two different versions of Confidential Client Profiles (Exh. 14, 15, 16), an unacknowledged form of one out of three Exhibits A (attached to Exh. 13) called for in the purported Contract, and none out of three Exhibits B called for in the purported Contract. Defendant Christian admitted that the purported Contract was incomplete, stating under oath (Exh. 17) that he was "guessing" that one of the papers Defendants called an Exhibit B was "obviously" an Exhibit A. He blamed the typist for what he characterized as a "typo" error. Additionally, when all of the different versions are sorted out, there are missing crucial pages 10-11 of the Confidential Client Profile.

In this Court and in the arbitration proceeding, Defendants never made of record a

complete Contract, because the Agreement provides, in ¶14), that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties." (Emphasis added).

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

> NRS 38.045 provides that if a party requests a court to compel arbitration pursuant to a written agreement to arbitrate, and the opposing party denies the existence of such an agreement, the court shall summarily determine the issue. See Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 729, 558 P.2d 517, 521–522 (1976). Since appellant set up the existence of the agreement to preclude the lawsuit from proceeding, it had the burden of showing that a binding agreement existed. After reviewing the facts, we cannot say that the district court erred in finding that appellant did not sustain that burden.

In the present case, Defendants have never met, or even attempted to meet, this burden of "showing that a binding agreement existed."

Any "agreement to arbitrate" must be a complete contract for any portion of it to be valid and enforceable. NRS 38.221(3). An incomplete pile of paper purporting to be an "Agreement" or contract cannot be enforced. See Dodge Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-4 (1930) ("There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite."); All Star Bonding v. State of Nevada, 119 Nev. 47, 49, 62 P.3d 1124 (2003) ("[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain."); May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite.").

Defendants prepared the incomplete pile of paper they assert is a contract and

forced it onto Plaintiff. Any incompleteness or ambiguity must therefore be interpreted against Defendants' interests. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-3, 115 S.Ct. 1212, 1219 (1995)

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

The "Contract" must also be interpreted against Defendants because they either can not or will not provide all of the parts of the Contract, in an unambiguous form. There is no question that Defendants had possession, custody, and control of all of the parts of the alleged Contract, if they ever existed. They prepared the papers, and never gave a copy of them to Plaintiff until the present lawsuit was filed. The unavailability of material evidence, through destruction or spoilation, results in either an adverse inference or a rebuttable presumption under NRS 47.250(3), against the controlling party. Bass-Davis v. Davis, 122 Nev. 442, 445 and 451-453, 134 P.3d 103, 105 and 109-110 (2006). In the present case, it is not necessary to determine whether Defendants lost or destroyed the relevant Exhibits A and Exhibits B, and the missing pages 10-11. The fact of the matter is that Defendants did not produce two of the three Exhibits A, any of the three Exhibits B, or the crucial missing pages 10-11 of the Confidential Client Profile, and they are not part of the record. The Court may not infer some content to the missing Exhibits A and Exhibits B in order to sustain the Contract. All Star Bonding, *Id.*

If they wished to enforce an arbitration provision, Defendants had an obligation to place into the record a complete Contract that unambiguously included all of the pieces in authenticated form–one Agreement, one Confidential Client Profile, the missing pages 10-

11 of the Confidential Client Profile, three separate and distinct Exhibits A, and three separate and distinct Exhibits B. They have not done so.

Certainly if they disagree, and can point out where in the record all of the parts of the Contract are unambiguously found, they may do so in their Reply to this Motion.

2. Second statutory ground: The arbitration provision ¶ 16 of the "Agreement" is "void" pursuant to NRS § 597.995 and/or Nevada common law. (NRS § 34.241(1)(e)).

NRS § 597.995(1)-(2) provide

> 597.995. Limitations on agreements which include provision requiring arbitration of disputes arising between parties
> 1. Except as otherwise provided in subsection 3, an agreement which includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision.
> 2. If an agreement includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement and the agreement fails to include the specific authorization required pursuant to subsection 1, the provision is void and unenforceable.

Even if the "Agreement" (Exh. 12 and 13) were otherwise valid (which it is not), the arbitration provision ¶ 16 has no "specific authorization" as mandated by NRS § 597.995(1). The arbitration provision is therefore void (not "voidable"), NRS § 597.995(2).

NRS § 597.995 is the codification of a long-established principle in Nevada common law requiring "specific authorization" of an arbitration provision for it to be valid. The Nevada Supreme Court has approved one form of such "specific authorization," where the parties initial the arbitration provision, Gonski v. Second Judicial Dist. Court of State ex rel. Washoe, 126 Nev. 551, 554, 245 P.3d 1164, 1167 (2010). The present "Agreement" had no such provision for initialing or otherwise giving "specific authorization" for the arbitration clause, ¶ 16. Absent such "specific authorization" the arbitration provision is void under

either NRS § 597.995 or common law.

Because of the abuse of arbitration by entities such as Defendant, the Nevada legislature went beyond the case authority such as Gonski and enacted NRS § 597.995, providing that an arbitration provision is "void" if it does not include "specific authorization." NRS § 597.995 does not limit itself to arbitration provisions enacted after the effective date of the statute, but extends to any arbitration provisions for which enforcement is sought after the effective date of the statute. Consequently, in this case any acts of the arbitrator are void.

3. Third statutory ground: The arbitration provision ¶ 16 of the "Agreement" is void because it is not "conspicuous" and does not warn the consumer that he is foregoing important rights under Nevada law. D.R. Horton, Inc. v. Green, 120 Nev. 549, 556-7, 96 P.3d 1159, 1164-5 (2004). (NRS § 34.241(1)(e)).

As held by Horton v. Green "[T]o be enforceable, an arbitration clause must at least be conspicuous and clearly put a purchaser on notice that he or she is waiving important rights under Nevada law...Nothing on the front page notifies the reader of the specific forum selection clause on the back page. The clause is not even in bold print." And at 120 Nev.552, 96 P.3d 1161, "With the exception of the paragraph title, which was in bold capital letters like the other contract headings, nothing drew special attention to this provision." That is, placing the paragraph title in bold print is not by itself sufficient to make the arbitration provision "conspicuous." The entire provision must be "conspicuous." This holding of Horton v. Green is consistent with that of Gonski, quoted in the prior section.

Nor is there any warning that the client was waiving important rights under Nevada law.

Para. 16 was clearly substantively unconscionable, because it provided 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." All of these are important rights under Nevada law, and the arbitration provision did not warn of the waiver of these rights.

4. Fourth statutory ground: The arbitrator...refused to consider evidence material to the controversy...so as to prejudice substantially the rights of a party to the arbitral proceeding. (NRS § 34.241(1)(c))

As discussed above, even though he admitted that "Many of the facts relied upon by Claimant are indeed 'undisputed,'" the arbitrator refused to consider the 20 UMFs set forth at PMPSJ 3:21-8:10. For each of the 20 UMFs, there was listed a respective Evidentiary Source that referenced the Exhibits submitted with the PMPSJ and listed at page 51 of the PMPSJ. The Evidentiary Sources were also disregarded.

The 20 UMFs and the respective Evidentiary Source for each UMF are not mentioned at all as being considered in the two Orders, even though the law in the form of NRCP 56, Wood v. Safeway, and other case authority required their consideration. By refusing to consider the UMFs, the arbitrator refused to consider and disregarded the respective Evidentiary Source for each Undisputed Material Fact.

Plaintiff was substantially prejudiced by the refusal of the arbitrator to consider the UMFs and the respective Evidentiary Sources, because PMPSJ was denied.

5. Fifth statutory ground: Evident partiality by an arbitrator appointed as a neutral arbitrator. (NRS § 34.241(1)(b)(1))

The arbitrator refused to consider the facts; admitted that "Many of the facts relied upon by Claimant are indeed ' undisputed' "; refused to identify which UMFs were admittedly "undisputed"; refused to apply the procedural law of deciding motions for

summary judgment; refused to apply the substantive law to make the further determination that Plaintiff was entitled to judgment; refused to apply the substantive legal authority cited in PMPSJ (Exh. 1) and Reply (Exh. 3); and refused to apply the law of evidence and admissibility of evidence in a summary judgment proceeding. Proper consideration of the UMFs and the law would have necessarily resulted in a judgment in Plaintiff's favor.

As an excuse for denying PMPSJ without addressing the facts and the law, the arbitrator stated as his only basis for denying PMPSJ that a "merits hearing" to assess witness credibility was required as part of the summary judgment procedure. Exh. 2, page 2, para. 3. Such a "merits hearing" to assess witness credibility is forbidden by both the United States Supreme Court, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986), and by the Nevada Supreme Court, Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-714, 57 P.3d 82, 87 (2002).

The refusal to consider the facts and apply the law, and the insistence on a "merits hearing" as part of a summary judgment proceeding were in Defendants' interest, because they were used as an excuse to avoid properly deciding PMPSJ. This evidences partiality on behalf of the Defendants, because a proper decision on PMPSJ would necessarily have been in Plaintiff's favor.

Partiality of the arbitrator is also established by his rulings on other matters in the case.

As discussed in Plaintiff's Motion to Vacate Arbitrator's Final Award, filed herewith, the arbitrator disregarded the fact that Defendants have never placed a complete arbitration contract into the record; alternatively, disregarded the terms of the fragment of the arbitration contract that was placed into the record; disregarded facts established by Plaintiff in documents and testimony; disregarded the factual evidence of the deceptions

and fraud perpetrated upon Plaintiff by the Defendants before and after Plaintiff hired them; disregarded the facts that Defendants had violated the laws of the United States and Nevada, to Plaintiff's detriment; disregarded and endorsed Defendants' multiple acts of perjury, and manifestly disregarded the law of Nevada in relation to the arbitration of the claims of the First Amended Complaint.

And in relation to Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees, filed herewith, the parties had expressly agreed as to which of the NRCPs would govern the arbitration, and these did not include NRCP 68. The arbitrator had formalized this agreement in the Scheduling Order (Exh. 10), leading Plaintiff to believe that these were the governing rules. The Defendants violated their agreement and the arbitrator's Order, and the arbitrator in his Final Decision made no mention of the violation, instead attempting to blame Plaintiff for Defendants' violations.

In summary, perhaps an innocent error or two could be overlooked, but in this case the arbitrator has consistently disregarded the established facts and the governing laws, in every case to the benefit of Defendants. This unvarying pattern of behavior clearly establishes the evident partiality of the arbitrator. The arbitrator refused to decide PMPSJ according to the UMFs and governing law, so that he could be free to ignore the facts and law presented at the arbitration hearing and decide in Defendants' favor.

These actions evidenced a partiality by the arbitrator in favor of Defendants.

B. Nonstatutory grounds for vacating the arbitrator's decision.

The approach of Safeway, 121 Nev. at 729, 121 P.3d 1026 at 1028, provides for a two-step process for analyzing a motion for summary judgment in accordance with NRCP 56(d):

Summary judgment is appropriate and shall be rendered forthwith when the

> pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.

That is, for each claim the facts must first be analyzed to determine if there is a genuine issue as to any fact material to the resolution of that claim. If, for a claim, there is no disputed material fact, there follows a determination whether the moving party is entitled to judgment as a matter of law.

The following § B.1 demonstrates that the arbitrator disregarded and did not properly evaluate the facts, and § B.2 demonstrates that the arbitrator manifestly disregarded and did not properly apply the governing substantive law.

1. The arbitrator's decisions were arbitrary, capricious, or were unsupported by the agreement, and disregarded the facts or the terms of the arbitration agreement.

Wichinsky v. Mosa, 109 Nev. 84, 89, 847 P.2d 727, 731 (1993) held in respect to an arbitrator's decision, " If an award is determined to be arbitrary, capricious, or unsupported by the agreement, it may not be enforced." "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." State v. Eighth Judicial Dist. Court (Zogheib), 130 Nev., Adv. Op. 18, 321 P.3d 882, 884 (2014) (internal quotations omitted).

(i) The arbitrator admitted that he disregarded the evidence of the Undisputed Material Facts

As Wood v. Safeway held, the first step in analyzing a motion for summary judgment is to determine whether "no genuine issue as to any material fact [remains]." The Order Denying Reconsideration (Exh. 7), pg. 2, line 3, admitted, "Many of the facts relied upon by Claimant are indeed 'undisputed.'"

The arbitrator stopped there. The arbitrator did not identify which of the twenty UMFs are undisputed, as is required to conduct the second part of the analysis, determining whether "the moving party is entitled to a judgment as a matter of law." The arbitrator manifestly disregarded the procedure of NRCP 56 and Wood v. Safeway.

(ii) None of the twenty Undisputed Material Facts is mentioned a single time in either of the two Orders.

The Order denying Partial Summary Judgment (Exh. 4) recognized the significance of the UMFs, stating at pg. 2, fourth full paragraph, "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."

Then, after candidly admitting that "Many of the facts relied upon by Claimant are indeed ' undisputed,' " the arbitrator did not identify which of the twenty UMFs, set forth at MPSJ 3:21-8:10, were "undisputed." The two Orders do not mention a single one of Plaintiff's UMFs. (In fact, none of the UMFs were disputed by the Defendants with admissible evidence.)

For example, UMFs 13-20 were not only undisputed, they were not even mentioned by Defendants' Opposition (Exh. 2), and they were not mentioned in either of the Orders (Exh. 4 and 7). As they were not mentioned in Defendants' Opposition, they are necessarily "undisputed." As discussed in PMPSJ (Exh. 1) and Plaintiff's Reply (Exh. 3), that UMFs 13-20 are undisputed necessarily leads to judgment in Plaintiff's favor on the Fourth-Seventh Claims, and on the Doubling of Damages. That other UMFs are undisputed necessarily leads to judgment in Plaintiff's favor on the other claims.

Having refused to address the UMFs, the arbitrator disregarded and did not conduct the next step of the two-step analysis, determining whether "the moving party is entitled to a judgment as a matter of law."

In short, the arbitrator manifestly disregarded and did not even attempt to follow the analytical approach mandated by Wood v. Safeway.

A second aspect of the arbitrator's disregarding of the twenty UMFs is his frustration of the letter and intent of NRCP 56(d)[1]:

> Case Not Fully Adjudicated on Motion. 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) was quoted, and Plaintiff requested the arbitrator to conduct the required hearing, at Motion for Reconsideration (Exh. 5) 8:16-27, and determine which facts were established for the hearing. The arbitrator ignored this request.

(iii) The arbitrator disregarded the evidence presented in support of each of the twelve Claims for Relief of the Motion for Summary Judgment.

This section discusses the failure of the arbitrator to pay attention to, and disregard of, the relevant facts for each of the twelve claims for relief and the doubling of damages.

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[1] This rule was in effect at the time the arbitrator denied the motion for summary judgment. It has since been revised; in its present form the rule is now NRCP 56(g) after the March 1, 2019 amendments to the Rules of Civil Procedure.

The action of the arbitrator was therefore arbitrary, capricious, or unsupported by the agreement.

PMPSJ (Exh. 1) at 8:15-10:13 demonstrates the elements of the First Claim for Relief, Breach of Contract. As stated there, the facts sufficient to demonstrate the elements are found in UMFs 1, 3, 4-11, and 13-19. These UMFs and their evidentiary bases were completely disregarded by the arbitrator in the two Orders.

PMPSJ at 10:14-11:25 demonstrates the elements of the Second Claim for Relief, Breach of Implied Warranty in Contract. As stated there, the facts sufficient to demonstrate the elements are found in UMFs 1 and 6-11. These UMFs and their evidentiary bases were completely disregarded by the arbitrator in the two Orders.

PMPSJ at 11:26-15:9 demonstrates the elements of the Third Claim for Relief, Contractual Breach of Implied Covenant of Good Faith and Fair Dealing. The facts sufficient to demonstrate the elements are found in UMFs 1, 3-7, and 9-11. These UMFs and their evidentiary bases were disregarded by the arbitrator in the two Orders.

PMPSJ at 15:10-26:8 demonstrates the elements of the Fourth Claim for Relief, Tortious Breach of Implied Covenant of Good Faith and Fair Dealing. The facts sufficient to demonstrate the elements are found in UMFs 1, and 3-21. These UMFs and their evidentiary bases were disregarded by the arbitrator in the two Orders.

PMPSJ at 26:9-31:1 demonstrates the elements of the Fifth Claim for Relief, Breach of Nevada Deceptive Trade Practices Act, NRS Ch. 598. The facts sufficient to demonstrate the elements are found in UMFs 3, 6, 7-9, 11-20. These UMFs and their evidentiary bases were completely disregarded by the arbitrator in the two Orders.

PMPSJ at 31:2-34:15 demonstrates the elements of the Sixth Claim for Relief, Breach of Fiduciary Duty. The facts sufficient to demonstrate the elements are found in

UMFs 19-20. These UMFs and their evidentiary bases were disregarded by the arbitrator in the two Orders.

PMPSJ at 34:16-37:24 demonstrates the elements of the Seventh Claim for Relief, Breach of Fiduciary Duty of Full Disclosure. The facts sufficient to demonstrate the elements are found in UMFs 13-18. These UMFs and their evidentiary bases were disregarded by the arbitrator in the two Orders.

PMPSJ at 37:25-40:1 demonstrates the elements of the Eighth Claim for Relief, Breach of Agency. The facts sufficient to demonstrate the elements are found in UMFs 1 and 4-9. These UMFs and their evidentiary bases were disregarded by the arbitrator in the two Orders.

PMPSJ at 40:2-43:2 demonstrates the elements of the Tenth Claim for Relief, Breach of NRS § 628A.030. The facts sufficient to demonstrate the elements are found in UMFs 1, 8-9, 13-19. These UMFs and their evidentiary bases were disregarded by the arbitrator in the two Orders.

PMPSJ at 43:4 44:5 demonstrates the elements of the Twelfth Claim for Relief, Unjust Enrichment. The facts sufficient to demonstrate the elements are found in UMFs 4 and 6-9. These UMFs and their evidentiary bases were disregarded by the arbitrator in the two Orders.

PMPSJ at 44:6-46:7 demonstrates the elements of Statutory Doubling of Damages Pursuant to NRS § 41.1395. The facts sufficient to demonstrate the elements are found in UMFs 9 and 12 and those cited in respect to individual claims. These UMFs and their evidentiary bases were disregarded by the arbitrator in the two Orders.

(iv) The arbitrator's insistence on an evidentiary "merits hearing" to avoid substantively deciding PMPSJ disregards and ignores the governing law that a motion for summary judgment must be based solely on the written evidence and does not permit "credibility" determinations.

The arbitrator used as his sole excuse for denying Plaintiff's Motion for Reconsideration (Exh. 5), a contention that a "merits hearing" must be held as part of the resolution of PMPSJ. See Order Denying Reconsideration (Exh. 7), second page, first-third paragraphs, stating, "A merits hearing is particularly appropriate where, as here, the resolution of the claims is so heavily dependent on the opportunity of the parties to test the credibility of the two principle [sic] witnesses[.]"

This is a mixed question of disregarding facts and manifestly disregarding the law. It is presented in this section relating to disregarding facts, because the arbitrator employed this argument as an excuse for ignoring the UMFs presented by Plaintiff.

The arbitrator was fully aware that the credibility of affiants/declarants may not be determined on summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986), states, "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." The arbitrator cited Anderson v. Liberty Lobby in the Order Denying Summary Judgment (Exh. 4) at page 2, fourth paragraph (in the abbreviated form *Liberty Lobby*), so he was clearly aware of its barring of credibility determinations in deciding motions for summary judgment. This principle set forth by the United States Supreme Court is precedent in Nevada and is applicable in Nevada. See Pegasus v. Reno Newspapers, Inc.,

118 Nev. 713-714, 57 P.3d 87,

> When a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue. "The non-moving party's documentation must be admissible evidence," as "he or she 'is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.' " However, all of the non-movant's statements must be accepted as true, all reasonable inferences that can be drawn from the evidence must be admitted, and neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion or the opposition. [emphasis added]

The arbitrator knew of the holding of Anderson v. Liberty Lobby from his own prior rulings as well. When he was a judge, the arbitrator admitted in Kulkin v. Town of Pahrump, 2012 WL 1019077 (D. Nev. 2012) at *19, "At summary judgment, the Court cannot evaluate credibility", and at footnote 2, "The Court cannot evaluate the credibility of Sullivan's testimony on summary judgment. [citing] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)."

The arbitrator was aware of the law forbidding credibility determinations on motions for summary judgment as pronounced by the United States Supreme Court, and chose to manifestly disregard and deliberately ignore it in the present case as an excuse to avoid the approach mandated by NRCP 56.

2. The arbitrator manifestly disregarded the governing procedural, evidentiary and substantive law.

The arbitrator manifestly disregarded and ignored the well-established procedural, evidentiary and substantive law in multiple areas. Plaintiff does not contend that the arbitrator made an error by attempting to apply the law and making a mistake in the interpretation of the law. It is apparent from the arbitrator's two Orders that he did not apply the governing procedural, evidentiary, and substantive law at all. There is no

interpretation to dispute. The arbitrator ignored the law and did not mention it at all. Such manifest disregard of the law is a basis for vacating the arbitrator's decision on PMPSJ.

Certainly, if the Defendants contend that the arbitrator did not manifestly disregard the governing evidentiary and substantive law, they can point out in their Reply precisely where, in the two Orders, the governing evidentiary and substantive law is addressed.

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

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

The following subsections identify and discuss specific instances of the arbitrator's manifest disregard of the law.

(i) The arbitrator manifestly disregarded the governing procedural law as set forth in NRCP Rule 56 and Wood v. Safeway.

Wood v. Safeway, 121 Nev. at 729-31, 121 P.3d at 1028-31, holds, in accord with NRCP Rule 56, that "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." The arbitrator had no discretion to ignore this authority. He was required to assess, first, whether any genuine issue as to any material fact remains (for each claim at issue), and, second, if there is no such disputed issue, whether Plaintiff was entitled to judgment as a matter of law.

The arbitrator admitted that "Many of the facts relied upon by Claimant are indeed 'undisputed.'" but failed to identify which of the twenty UMFs were in fact undisputed (in

fact, all twenty UMFs were undisputed). He then failed to conduct the second part of the analysis for those claims where the UMFs were undisputed. The arbitrator manifestly disregarded the procedural law of deciding summary judgment motions as set forth in Wood v. Safeway.

(ii) The arbitrator manifestly disregarded the governing law of evidence and admissibility of evidence in summary judgment proceedings.

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.

Adherence to NRCP 56(e), unequivocally requiring the use of admissible evidence, is mandatory ("shall"). Havas v. Hughes Estate, 98 Nev. 172, 173, 643 P.2d 1220, 1221 (1982). The "personal knowledge" requirement of an affidavit or declaration 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). 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.

Plaintiff's Reply (Exh. 3) at 6:9-26:12 and Motion for Reconsideration (Exh. 5) at 6:11-18 discussed the relevant law of evidence and admissibility of evidence in summary judgment proceedings, and the reasons that this law required exclusion of the material

submitted by Defendants as "evidence." The two Orders (Exh. 4 and 7) ignored this mandatory law completely. There is not one word in either Order addressing the matters of evidence and admissibility, even though the authority cited in the prior paragraph makes consideration of such matters mandatory. See also State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931-2, 267 P.3d 777, 780 (2011), dealing with evidence. The Orders manifestly disregarded the law of evidence and admissibility in summary judgment proceedings.

(iii) The arbitrator manifestly disregarded the governing substantive law for each of the twelve Claims for Relief.

Wood v. Safeway, 121 Nev. at 731, 121 P.3d 1031 (2005), held: "The substantive law controls which factual disputes are material and will preclude summary judgment[.]

A review of the two Orders (Exh. 4 and 7) shows that the arbitrator did not address at all, and utterly and manifestly disregarded, the substantive law. Not one word! The arbitrator instead presented the argument that he would not address the UMFs, and thence did not need to address the controlling substantive law, on a legally incorrect theory of a "merits hearing" as part of a summary judgment proceeding.

After candidly admitting that "Many of the facts relied upon by Claimant are indeed ' undisputed,' " the arbitrator ignored the substantive law that controls which factual disputes are material and will preclude summary judgment.

(iv) The arbitrator manifestly disregarded the governing substantive law presented in support of each of the Claims for Relief of PMPSJ.

This section addresses the substantive legal authority governing each of the claims for relief. All of this law was well-defined, explicit, clearly applicable, and correct, and the arbitrator and the Defendants did not dispute it. The arbitrator willfully chose to manifestly

disregard and knowingly, intentionally, and deliberately ignore, or missed, this legal authority in preparing the two Orders, despite the fact that it was correct, governing, and communicated to the arbitrator by Plaintiff. The substantive law was not mentioned at all in either Order, and the arbitrator paid no attention to it. The arbitrator did not acknowledge or apply this governing law. The two Orders provide the concrete evidence of the intent to disregard the governing legal authority, as it was not mentioned at all.

PMPSJ (Exh. 1) at 8:15-10:13 demonstrates the elements of the First Claim for Relief, Breach of Contract. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 8:16-27. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ. The arbitrator disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 10:14-11:25 demonstrates the elements of the Second Claim for Relief, Breach of Implied Warranty in Contract. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 10:16-11:3. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ. The arbitrator disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 11:26-15:9 demonstrates the elements of the Third Claim for Relief, Contractual Breach of Implied Covenant of Good Faith and Fair Dealing. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 11:28-12:27. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ, and disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 15:10-26:8 demonstrates the elements of the Fourth Claim for Relief,

Tortious Breach of Implied Covenant of Good Faith and Fair Dealing. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 15:13-16:28, 22:18-23:1, and 24:9-25:27. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ, and disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 26:9-31:1 demonstrates the elements of the Fifth Claim for Relief, Breach of Nevada Deceptive Trade Practices Act, NRS Ch. 598. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 26:18-28:19. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ, and disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 31:2-34:15 demonstrates the elements of the Sixth Claim for Relief, Breach of Fiduciary Duty. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 31:4-32:25 and 33:26-34:15. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ, and disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 34:16-37:24 demonstrates the elements of the Seventh Claim for Relief, Breach of Fiduciary Duty of Full Disclosure. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 31:4-32:25 and 33:26-34:15. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ, and disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 37:25-40:1 demonstrates the elements of the Eighth Claim for Relief,

Breach of Agency. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 37:27-38:23. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ, and disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 40:2-43:2 demonstrates the elements of the Tenth Claim for Relief, Breach of NRS § 628A.030. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 40:3-41:25. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ, and disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 43:4 44:5 demonstrates the elements of the Twelfth Claim for Relief, Unjust Enrichment. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 43:5-22. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ, and disregarded and ignored this law, as it is not cited or applied in either Order.

PMPSJ at 44:6-46:7 demonstrates the elements of Statutory Doubling of Damages Pursuant to NRS § 41.1395. The cited legal authority governed resolution of this claim by summary judgment, and was communicated to the arbitrator and discussed in PMPSJ at 44:13-45:22. The arbitrator was aware and conscious of this law, as it was cited in PMPSJ, and disregarded and ignored this law, as it is not cited or applied in either Order.

VII. MOTION TO DECIDE AND GRANT PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

As the Court now appreciates, the arbitrator did not decide PMPSJ in accordance with the UMFs and the applicable law, as mandated by Wood v. Safeway. Instead, he used as his sole excuse to avoid deciding PMPSJ that he wanted to conduct a "merits

hearing" to evaluate witness credibility, as part of the summary judgment process. (He never did conduct such a hearing in relation to PMPSJ, however, because that would have required him to perform the analysis set forth in NRCP 56(d), Case Not Fully Adjudicated on Motion.) The evaluation of credibility by the decision-maker in a summary judgment proceeding is contrary to law, under Anderson v. Liberty Lobby and Pegasus v. Reno Newspapers, Inc, *supra*.

Plaintiff moves that the Court evaluate PMPSJ, which was fully briefed by both parties and is ready for a fair, unbiased decision in accordance with Nevada law.

To summarize, PMPSJ (Exh. 1) at 3:21-8:10 sets forth twenty UMFs, together with the respective supporting evidentiary source for each. It then sets forth, for each of the twelve Claims for Relief and Request for Doubling of Damages, the legal authority supporting the respective claim, with reference to each the respective UMFs. The UMFs are sufficient to permit granting of each of the Claims for Relief and Request for Doubling of Damages.

Defendants' Opposition (Exh. 2) at 4:1-22 discusses some of its own facts, but significantly does not dispute any of the twenty UMFs found at PMPSJ 3:21-8:10 and does not explain how its alleged facts would prevent granting of PMPSJ. The Opposition at 4:17-18 incorporates a document "Affidavit of Greg Christian" to support its argument. As demonstrated at Plaintiff's Reply (Exh. 3) 6:10-7:19 and 8:10-10:23, the Christian Affidavit does not meet the requirements of an evidentiary submission to demonstrate "the existence of a genuine factual issue," as Safeway requires. For example, an affidavit seeking to dispute Undisputed Material Facts must be made on the "personal knowledge" of the affiant, and the Christian affidavit was not.

That is, all twenty of the UMFs of the PMPSJ were undisputed. Even the arbitrator

admitted in the Order Denying Reconsideration (Exh. 7), pg. 2, line 3, "Many of the facts relied upon by Claimant are indeed 'undisputed.'" Actually, they were all undisputed.

There remains only the application of the governing substantive law to the pertinent UMFs for each of the Claims. Plaintiff's Reply (Exh. 3) at 26:13-36:12 demonstrates the factual and legal errors in Defendants' discussion.

VIII. DAMAGES

PMPSJ at 46:8-50:7 summarizes the types and amounts of damages. Defendants did not dispute, or even discuss, the governing law of damages or the amounts set forth at PMPSJ 46:8-50:7.

The contract damages are established by law. The District Court is afforded some latitude concerning amounts of tort damages and punitive damages (within the limits imposed by law). But it is important to remember that Plaintiff would never have been involved with Defendants at all if they had been honest in disclosing the facts.

The proper amount of damages, as demonstrated at PMPSJ (Exh. 1) 46:8-49:18, is $9,630,929.76.

IX. SUMMARY AND CONCLUSION

The decision of the arbitrator concerning the PMPSJ must be vacated, and the PMPSJ should be considered and granted by the Court.

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

DATED this 22nd day of April 2019.

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

Counsel for plaintiff

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Attorney for plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

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

DEPT. NO. : 6

Defendants.
_____/

PLAINTIFF'S MOTION TO VACATE ARBITRATOR'S AWARD OF ATTORNEY'S FEES

Plaintiff moves that the Court vacate the arbitrator's decision to award attorney's fees to Defendants.

POINTS AND AUTHORITIES

I. BACKGROUND

During the course of the arbitration process, the parties and the arbitrator agreed that only certain of the Nevada Rules of Civil Procedure ("NRCP") would be applied to govern the arbitration, and the arbitrator entered that agreement as an order. On August 11, 2017, after a telephone conference between the attorneys for the parties and the arbitrator, in which the parties were heard, the arbitrator entered "Discovery Plan and Scheduling Order" ("Scheduling Order", Exh. 1[1]). One purpose of this Scheduling Order

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[1] This Motion will refer to the exhibits submitted herewith by the abbreviation "Exh. xx," where "xx" is the exhibit number. Some of the Exh. xx themselves include exhibits,

was to record and give notice to the parties and to the arbitrator exactly what rules would govern the arbitration. The Scheduling Order stated at 1:17-18:

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

Scheduling Order at 2:23 further states "IT IS SO ORDERED," followed by the arbitrator's signature. This aspect of the Scheduling Order, expressly stating the rules that would govern the arbitration, was not altered or amended by the two subsequent Orders (November 27, 2017, Exh. 3, and March 19, 2018, Exh. 4) issued by the arbitrator. Indeed, this aspect of the Scheduling Order was not ever altered or amended by the arbitrator, nor did the parties ever change their agreement as stated in the Scheduling Order.

Conspicuous by its absence from the Scheduling Order is any inclusion of NRCP Rule 68 in the agreed-upon designation of rules governing the arbitration. That is, the parties and the arbitrator did not include NRCP Rule 68, which provides for "Offers of Judgment"; therefore, it had no operative effect in the arbitration proceedings because it was outside the parameters of the agreement.

Plaintiff adhered to the agreement and Scheduling Order throughout the period of the arbitration. Defendants decided that they would break their agreement with Plaintiff and ignore the Order. Defendants served an Offer of Judgment (see Exh. 2, Exhibit 1) in the arbitration pursuant to NRCP Rule 68 on September 12, 2017, almost exactly one month after they agreed that NRCP Rule 68 would not be included within the scope of rules governing the arbitration, and the arbitrator had so ordered. Defendants did not, then or later, move the arbitrator for relief from the terms of the Scheduling Order so as to include NRCP Rule 68 in the rules governing the arbitration. Plaintiff did not accept Defendants' Offer of Judgment under NRCP Rule 68, because the parties had agreed, and the arbitrator had ordered, that NRCP Rule 68 would not be applicable to this arbitration.

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and these will be referred to by the fully spelled-out exhibit name and number, e.g., "Exhibit yy," where "yy" is the exhibit number of the included exhibit.

On February 15, 2019, after an Interim Award in their favor, Defendants filed a Motion for Attorney Fees and Costs (Exh. 2). The Motion for Attorneys Fees and Costs was based solely on their Offer of Judgment under NRCP Rule 68 of September 12, 2017. Plaintiff filed an Opposition (Exh. 5) based upon several grounds, and Defendants replied (Exh. 6).

In the arbitrator's Final Award of April 11, 2019 (Exh. 10), at pages 10-11, the arbitrator granted Defendants Motion for Attorneys Fees and Costs, and awarded Defendants $111,649.96.

The arbitrator rationalized his decision to allow an award of attorneys fees based solely on NRCP Rule 68 in the Final Award (Exh. 10, p. 10, ¶ 4) as follows: "However, the agreement of the Parties to specific NRCP Rules relating to discovery does not automatically exclude the applicability of others, particularly where the Arbitrator determines that necessary. *See* JAMS Rule 24."

This rationalization is absolute foolishness. The quoted statement from the Scheduling Order was an agreement between the parties, and no court or arbitrator can modify a contractual agreement between the parties with the intent of benefitting one party at the expense of the other. All Star Bonding v. State of Nevada, 119 Nev. 47, 49, 62 P.3d 1124 (2003) ("[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain."). The arbitrator never determined that adding the new provision was "necessary."

The Scheduling Order provided that only certain enumerated rules of the NRCP would "govern this case unless the arbitrator rules otherwise." Neither the Final Award nor any other order of the arbitrator attempted to rule that the Scheduling Order should be modified to add NRCP Rule 68 to the enumerated rules governing the arbitration, and that NRCP Rule 68 should be retroactively made part of the rules governing the arbitration. Had the Final Award attempted to make such a finding, the retroactive nature of the arbitrator's attempt to add NRCP Rule 68 would have been clear. And, in any event, the arbitrator could not alter the terms of the contractual agreement between the parties.

The Final Award (Exh. 10) also disregarded other facts and legal authority, as will be discussed subsequently.

II. SUMMARY OF ARGUMENT

The arbitrator's action in support of the Defendants is truly outrageous. After the parties agreed, and the arbitrator ordered, that "The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure" would govern the case, as set out in the Scheduling Order (Exh. 1), the arbitrator now seeks unilaterally and retroactively to alter that agreement of the parties, and his own Order to add NRCP Rule 68, 20 months after the parties had made their agreement and the Scheduling Order was entered.

Additionally, the approach taken by Defendants in their motion, Exhibit 2, did not meet the requirements of Nevada law.

III. LEGAL STANDARDS

A. Grounds for vacating an arbitrator's final award

An arbitrator's final award may be vacated on either statutory or common-law grounds. WPH Architecture, Inc. v. Vegas VP, LP, 131 Nev. Adv. Op. 88, 360 P.3d 1145, 1147 (2015) held:

> An arbitration award may be vacated based on statutory grounds and certain limited common-law grounds. At common law, an arbitration award may be vacated if it is arbitrary, capricious, or unsupported by the agreement or when an arbitrator has manifestly disregard[ed] the law.

(Citations and internal quotation marks omitted).

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

> 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.'

In the present case, there are both statutory and common law grounds.

B. JAMS Rules providing that the parties may agree upon the governing law of the arbitration.

JAMS Rule 24 provides in relevant part,

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law.

(Emphasis added).

The Scheduling Order (Exh. 1) defined the applicable law at 1:17-18:

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

Scheduling Order at 2:23 states, "IT IS SO ORDERED." followed by the arbitrator's signature.

In their agreement, and as ordered by the arbitrator, the parties did not agree that NRCP Rule 68 would be applicable law in the arbitration. NRCP Rule 68 is therefore not

"applicable law."

IV. THE COURT HAS A DUTY TO REVIEW THE ARBITRATOR'S ACTIONS

The District Court has a duty to review the actions and rulings of the arbitrator to determine whether he disregarded the facts or manifestly disregarded the law. Graber v. Comstock Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995).

V. APPLICATION OF THE LAW TO THE PRESENT FACTS

A motion to vacate may be brought on either statutory or nonstatutory grounds. The following § A addresses the law and its application to vacating the award of attorneys fees by the arbitrator (Exh. 10) on statutory grounds, and § B addresses the law and its application to vacating the award on nonstatutory grounds. If any one or more of the bases for vacating the Orders are established, the arbitrator's award of attorneys fees must be vacated.

A. Statutory grounds for vacating the arbitrator's final award.

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

> 1. Upon motion to the court by a party to an arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if:
> (a) The award was procured by corruption, fraud or other undue means;
> (b) There was:
> (1) Evident partiality by an arbitrator appointed as a neutral arbitrator;
> (2) Corruption by an arbitrator; or
> (3) Misconduct by an arbitrator prejudicing the rights of a party to the arbitral proceeding;
> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to NRS 38.231, so as to prejudice substantially the rights of a party to the arbitral proceeding;
> (d) An arbitrator exceeded his or her powers;
> (e) There was no agreement to arbitrate, unless the movant participated in the arbitral proceeding without raising the objection under subsection 3 of NRS 38.231 not later than the beginning of the arbitral hearing; or
> (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in NRS 38.223 so as to prejudice substantially the rights of a party to the arbitral proceeding.

1. First statutory ground: The award was procured by corruption, fraud, or other undue means. (NRS § 34.241(1)(a))

A. Governing law

a. Fraud

The elements of fraud are found in NRS 42.001:

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

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

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

b. Undue means

Sylver v. Regents Bank, N.A., 129 Nev. 282, 287-8, 300 P.3d 718, 721-2 (2013) sets forth the standard for "undue means."

> Accordingly, "[t]he best reading of the term 'undue means' under the maxim *noscitur a sociis* is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either."...Thus, " 'undue means' has generally been interpreted to mean something like fraud or corruption."
>
> Typically, to prove that an award was procured by undue means, the party seeking vacatur "must show that the fraud [or corruption] was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence." MCI Constructors requires the party seeking to vacate the award to prove a causal connection between the undue means and the resulting arbitration award. Id.

(Citations omitted).

B. Defendants' action contrary to agreement of parties and order of arbitrator, and failure to seek relief; granting of Defendants' motion for attorneys fees by arbitrator.

In the present case, the fraud and "undue means" included a joint action by the Defendants and the arbitrator to induce Plaintiff to agree that NRCP Rule 68 would not be part of the governing law of the arbitration, and for Plaintiff to act in reliance upon that joint action. Then a month later, Defendants served an Offer of Judgment under NRCP 68, directly contrary to their agreement with Plaintiff of the Scheduling Order, and the order of the arbitrator.

Defendants did not seek or obtain relief from the Scheduling Order (Exh. 1) in the form of a modification to their agreement with Plaintiff or to the Scheduling Order to permit such an Offer of Judgment under NRCP 68. The arbitrator did not *sua sponte* alter the terms of the Scheduling Order. A court order remains in effect until modified by the court or reversed/modified on appeal.

Over the next 20 months, there was no change to the relevant agreement of the Scheduling Order, that "The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure" would govern the case, or to the order of the arbitrator.

The attempted application of NRCP Rule 68 in the Final Award (Exh. 10) also constitutes a clear-cut violation of the equitable principle of laches. Under laches, a delay in action by the party later asserting a claim, coupled with resulting prejudice to the other party, establishes an equitable bar to the requested relief. Building and Const. Trades Council of Northern Nevada v State, 108 Nev. 605, 610-611, 836 P.2d 633, 636-37 (1992); City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 217-18 1478 (2005). The Defendants took no action to modify the applicable provision of the Scheduling Order (Exh. 1), allowing Plaintiff to believe that it remained fully effective. The arbitrator allowed Plaintiff to proceed under the belief that the agreement and order of the

Scheduling Order (Exh. 1), which enumerated the governing sections of the NRCP but did not include NRCP 68, governed the arbitration. Then, without ever modifying his Scheduling Order and to benefit Defendants, the arbitrator modified his own Scheduling Order without prior notice to Plaintiff.

The fraud and undue means perpetrated by Defendants and the arbitrator was accomplished in two parts.

First, the Defendants and the arbitrator agreed that the present arbitration would proceed without NRCP Rule 68 as part of the governing law, thereby waiving any claim to attorneys fees under NRCP Rule 68. The arbitrator recorded, accepted, and ordered this agreement in the Scheduling Order (Exh. 1). Plaintiff, accepting the terms of this agreement and order, did not pursue an offer of judgment under NRCP Rule 68, or any other actions that would otherwise have been appropriate in the arbitration, such as an action under NRCP Rule 11.

Second, when the Defendants brought their Motion for Attorneys Fees and Costs (Exh. 2), still they did not request relief from the terms of the Scheduling Order that excluded NRCP Rule 68, so as to bring the motion. Nor did the arbitrator modify his Scheduling Order (Exh. 1) that excluded NRCP Rule 68. Defendants filed their Motion that was utterly deficient in numerous aspects. See Exh. 5, opposition to motion for attorney's fees.

Instead, the arbitrator's Final Award (Exh. 10) offered at least three rationalizations for his obtaining the award of attorney's fees by fraud and undue means.

a. First rationalization by the arbitrator

The arbitrator rationalized his award of attorneys fees based solely on NRCP Rule 68 in the Final Award (Exh. 10 at 10, ¶ 4) as follows: "However, the agreement of the Parties to specific NRCP Rules relating to discovery does not automatically exclude the applicability of others, particularly where the Arbitrator determines that necessary. *See* JAMS Rule 24." This attempted rationalization constitutes fraud and/or undue means by the arbitrator in several respects.

- First, Plaintiff asks that the District Court consider the circumstances. The quoted portion of the Scheduling Order (Exh. 1) is clear that only certain of the NRCPs, the enumerated Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37, are applicable to the arbitration. The arbitrator's rationalization is an attempt to justify partiality in favor of the Defendants.

- Second, the arbitrator's argument that the agreement "does not automatically exclude the applicability of others" renders the Scheduling Order (Exh. 1) illusory. If the intent of the parties was not to exclude others of the NRCPs, then why have an agreement at all? The arbitrator's attempted rationalization suggests that the parties had actually agreed that all of the NRCPs would be applicable, which was not the case.

- Third, the arbitrator states that the agreement of the parties included only specific NRCP Rules "relating to discovery." This is an intentionally false and misleading statement intended to suggest that the scope of the parties' and the arbitrator's agreement, and the Order, was limited only to discovery issues, and arguably did not extend to offers of judgment. NRCP Rules 6 and 16.1, covered in the agreement, are not discovery rules, demonstrating that the agreement and Order were not limited to NRCP Rules "relating to discovery."

- Fourth, the reference to "exclude the applicability of others, particularly where the Arbitrator determines that necessary" states a patent falsity. The arbitrator never ruled, on the record at least, that NRCP Rule 68 should be included in the rules governing the arbitration or was "necessary." Rulings of this type are prompted by a stipulation or a noticed motion, and there was certainly nothing of the sort in the arbitration. The arbitrator gave no notice to Plaintiff that he was planning to alter the scope of this portion of the Scheduling Order (Exh. 2) to include NRCPs other than those enumerated, for the benefit of the Defendants, and to make such action retroactive by 20 months. Perhaps in their Opposition to the present motion, Defendants will identify exactly where in the record there is such a ruling by the arbitrator, if they contend that such a ruling was ever made by the arbitrator.

- Fifth, and further to the Fourth Point, the attempt to broaden the scope of the

NRCPs governing the arbitration is an improper attempt to change the governing law and apply it retroactively. This retroactive change in the governing law is a violation of Plaintiff's right to timely notice. The arbitrator might just as well have said that he was changing the applicable law retroactively so as to prejudice Plaintiff.

- Sixth, the reference to "See JAMS Rule 24" does not support the arbitrator's position. JAMS rules 24(c) and 24(g), quoted above, provide that "the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate." (Emphasis added). Here the parties agreed to the rules of law that would govern, so the arbitrator has no discretion to change those rules. Only in the absence of such agreement between the parties may the arbitrator select and be guided by other rules of law.

b. Second rationalization by the arbitrator

The arbitrator attempted to rationalize his action further at Final Award page 10, ¶ 5, stating "When WESPAC made its Offer of Judgment of $10,000 on February 12, 2017 [sic] to Garmong, no objection was made and there is no basis in the record to support the argument that by entering the Stipulation for Arbitration Respondents had clearly demonstrated the intent to waive their right to seek attorney's fees and costs." This further rationalization is erroneous, for the following reasons.

- First, the arbitrator could not even get the date of the Offer of Judgment correct–it was September 12, 2017.

- Second, more substantively, the arbitrator argues that "no objection was made." This is a straightforward attempt by the arbitrator to shift the burden of breaching an agreement and violating an order away from the violator. Agreements remain in effect until the parties themselves change the terms, and orders remain in effect until the arbitrator changes the order, or it is reversed on appeal. When a party, here Wespac, wishes to take action in contravention of an agreement and order, it is the responsibility of that party to approach the other party and the arbitrator for relief from the agreement and the order.

The other party, who wishes to live by his agreement and the order, is not required to object.

- Third, the arbitrator's argument that Respondents did not intend to "waive their right to seek attorney's fees and costs" is bogus. There is no such "right"–attorneys fees and costs may be sought only where they are provided for by the agreement of the parties, by statute, or by rule. Henry Prods., Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998). When Defendants agreed to proceed with the arbitration in the absence of NRCP Rule 68, they very clearly waived any basis to seek attorney's fees under the provisions of NRCP Rule 68.

- Fourth, Defendants and the arbitrator actively sought to mislead Plaintiff when they agreed in the Scheduling Order (Exh. 1) that NRCP Rule 68 was not included in the set of rules that would govern the arbitration, and then a mere month later Defendants served an offer of judgment pursuant to Rule 68.

c. Third rationalization by the arbitrator

Next, at Final Award, Exh 10, p. 10, ¶ 5, the arbitrator claims that "In accord with NRS 38.238 an arbitrator has discretion to consider an award of fees and costs and finds it appropriate to do so in this case." In making this statement, the arbitrator failed to read and apply NRS § 38.238, which provides,

> NRS 38.238 Remedies; fees and expenses of arbitration proceeding.
> 1. An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitral proceeding.

(Emphasis added).

In the present case, the arbitrator did not cite to any law which might authorize an award other than NRCP Rule 68, which was omitted in the Scheduling Order (Exh. 1). There was no agreement of the parties to allow attorney's fees. This rationalization by the arbitrator is simply an attempt to justify the arbitrator's partiality in favor of the Defendants.

2. Second statutory ground: There was evident partiality by an arbitrator appointed as a neutral arbitrator. (NRS § 34.241(1)(b)(1))

The proper standard of partiality in Nevada is whether there is a "reasonable impression of partiality." Thomas v. City of North Las Vegas, 122 Nev. 82, 127 P.3d 1057(Nev. 2006). This "reasonable impression" standard is largely a subjective conclusion by the District Court. It presumably relies upon the impression that a reasonable person would reach.

In the present case, the "reasonable impression of partiality" is evidenced in the entirety of the proceedings as conducted by the arbitrator. Let us consider the evidence of the arbitrator's partiality in other portions of the arbitration.

As discussed in 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, the arbitrator disregarded Plaintiff undisputed material facts (after admitting that "Many of the facts relied upon by Claimant are indeed 'undisputed.'"), and disregarded the governing procedural, evidentiary, and substantive law of summary judgment. The reason given by the arbitrator for disregarding the facts and the law was that a "merits hearing" to test credibility of witnesses was required as part of the summary judgment proceeding. The assessment of witness credibility in summary judgment proceedings is expressly forbidden by Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) and by Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-714, 57 P.3d 82, 87 (2002), and many other authorities. There could be no reason for the arbitrator taking these positions on a motion for summary judgment properly decided for Plaintiff, other than "evident partiality."

The District Court will recall that, in the wake of the evident partiality shown by the arbitrator in disregarding the facts and law in the summary judgment proceeding, on July 22, 2018 Plaintiff brought Plaintiff's Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator. This Motion to Disqualify 1:18-21, was based upon " Arbitrator Pro refuses to apply Nevada law and his

own established procedures, had and has an undisclosed conflict of interest, and has taken actions evidencing partiality to the defendant." After full briefing, the Court's Order of November 29, 2018 denied Plaintiff's Motion, with leave to re-present.

Also, as discussed in Plaintiff's Motion to Vacate Arbitrator's Final Award, the arbitrator disregarded the fact that Defendants have never placed a complete arbitration contract into the record; alternatively, disregarded the terms of fragment of the arbitration contract that was placed into the record; disregarded facts established by Plaintiff in documents and testimony; disregarded the factual evidence of the deceptions and fraud perpetrated upon Plaintiff by the Defendants before and after Plaintiff hired them; disregarded the facts that Defendants had violated the laws of the United States and Nevada, to Plaintiff's detriment; disregarded Defendants' multiple acts of perjury; and manifestly disregarded the substantive law of Nevada in relation to the arbitration of the claims of the First Amended Complaint.

In summary, perhaps an innocent error or two could be overlooked, but in this case the arbitrator has consistently violated the laws, in every case to the benefit of Defendants. This unvarying pattern of behavior clearly establishes the evident partiality of the arbitrator.

3. Third Statutory Ground: The arbitrator exhibited evident partiality by refusing to rule upon Plaintiff's Motion to Strike, and allowing Defendants to alter their submission to avoid the Motion to Strike. (NRS § 34.241(1)(b)(1))

Plaintiff filed a Motion to Strike (Exh. 7) the legally insufficient evidentiary submission made by Defendants with their Motion for Attorneys Fees and Costs (Exh. 2). Defendants then filed an Opposition (Exh. 8) and an untimely new submission, after the period permitted by the earlier order of the arbitrator. Defendants justified their legally insufficient initial submission by blaming a "temporary legal assistant," thereby admitting that their original, timely submission had been legally insufficient. In filing their new submission, Defendants did not move for an enlargement of time beyond the deadline established by the arbitrator, but went ahead without permission.

Defendants cited no authority that would permit them to make a new submission,

but they did anyway. Plaintiff replied (Exh. 9), citing extensive authority establishing that statutes allowing costs must be "strictly construed," and that consequently to allow a new submission after the permitted time had expired was improper. Plaintiff's Reply (Exh. 9) further pointed out flaws in the original and new submissions.

Defendants' Opposition requested a formal decision on the Motion to Strike, and Plaintiff's Reply joined that request. Plaintiff's Reply stated,

> It is important to have formal decisions, as any decisions to deny Plaintiff's Motion to Strike, to grant Defendants' Motion for Fees and Costs, and thereby to ignore the controlling law will provide further evidence supporting the forthcoming motions to vacate under NRS § 34.241(1)(b) and the common law of Nevada.

The arbitrator ignored this joint request for a formal decision. He issued no formal decision, or any decision for that matter. If the arbitrator had issued a formal decision, he would have had to confront the law and explain his decision, and the arbitrator has consistently shown that he refuses to address the applicable law in this case.

The arbitrator's refusal to address Plaintiff's Motion to Strike, under the circumstances where both parties requested a formal decision, further demonstrates his partiality in favor of Defendants.

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

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

Plaintiff's Motion to Vacate Arbitrator's Final Award addresses this first statutory ground in greater detail, and that discussion is incorporated here.

In brief summary, Defendants argued a purported Contract that they alleged contained a provision to arbitrate. The Contract was to have included an Agreement, a Confidential Client Profile, three different documents confusingly named "Exhibit A", and

three different documents confusingly named "Exhibit B. To support this argument, Defendants made of record two different version of the Agreement, two different versions of the Confidential Client Profile, an unauthenticated and unsigned one out of three Exhibits A called for in the purported Contract, and none out of three Exhibits B called for in the purported Contract. Defendant Christian stated under oath that he was "guessing" that one of the papers Defendants called an Exhibit B was "obviously" an Exhibit A. He blamed the typist for what he characterized as a "typo" error. Additionally, when all of the different versions are sorted out, there are missing crucial pages 10-11 of the Confidential Client Profile, which would have strongly support Plaintiff's case.

In this Court and in the arbitration proceeding, Defendants never made of record a complete Contract, because the Agreement provides that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties." (Emphasis added).

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

> NRS 38.045 provides that if a party requests a court to compel arbitration pursuant to a written agreement to arbitrate, and the opposing party denies the existence of such an agreement, the court shall summarily determine the issue. See Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 729, 558 P.2d 517, 521–522 (1976). Since appellant set up the existence of the agreement to preclude the lawsuit from proceeding, it had the burden of showing that a binding agreement existed. After reviewing the facts, we cannot say that the district court erred in finding that appellant did not sustain that burden.

In the present case, Defendants have never met this burden of "showing that a binding agreement existed." They have never even attempted to meet this burden.

Any "agreement to arbitrate" must be a complete contract for any portion of it to be valid and enforceable. NRS 38.221(3). An incomplete pile of paper purporting to be an "Agreement" or contract cannot be enforced. See Dodge Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-4 (1930) ("There is no better established principle of equity

jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite."); All Star Bonding v. State of Nevada, 119 Nev. 47, 49, 62 P.3d 1124 (2003) ("[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain."); May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite.").

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

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

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

If they wished to enforce an arbitration provision, Defendants had an obligation to place into the record a complete Contract that unambiguously included all of the pieces–one unambiguous Agreement, one unambiguous Confidential Client Profile, the missing pages 10-11 of the Confidential Client Profile, three separate Exhibits A, and three separate Exhibits B. They have not done so.

Certainly if they disagree, and can point out where in the record all of the parts of the Contract are unambiguously found, they may do so in their Reply to this Motion.

5. Fifth statutory ground: The arbitration provision ¶ 16 of the "Agreement" is "void" pursuant to NRS § 597.995 and/or Nevada common law. (NRS § 34.241(1)(e)).

NRS § 597.995(1)-(2) provide

> 597.995. Limitations on agreements which include provision requiring arbitration of disputes arising between parties
> 1. Except as otherwise provided in subsection 3, an agreement which includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision.
> 2. If an agreement includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement and the agreement fails to include the specific authorization required pursuant to subsection 1, the provision is void and unenforceable.

Even if the "Agreement" were otherwise valid, the arbitration provision ¶ 16 has no "specific authorization" as mandated by NRS § 597.995(1). The arbitration provision is therefore void (not "voidable"), NRS § 597.995(2).

NRS § 597.995 is the codification of a long-established principle in Nevada common law requiring "specific authorization" of an arbitration provision for it to be valid. The Nevada Supreme Court has approved one form of such "specific authorization," in which the parties initial the arbitration provision, Gonski v. Second Judicial Dist. Court of State ex rel. Washoe, 126 Nev. 551, 554, 245 P.3d 1164, 1167 (2010). The present "Agreement" had no such provision for initialing or otherwise giving "specific authorization" for the arbitration clause, ¶ 16. Absent such "specific authorization" the arbitration provision is void under either NRS § 597.995 or common law.

Because of the abuse of arbitration by entities such as Defendant, the Nevada legislature went beyond the case authority such as Gonski and enacted NRS § 597.995, providing that an arbitration provision is "void" if it does not include "specific authorization." NRS § 597.995 does not limit itself to arbitration provisions enacted after the effective date of the statute, but extends to any arbitration provisions for which enforcement is sought after the effective date of the statute. Consequently, in this case any acts of the arbitrator are void.

6. Sixth statutory ground: The arbitration provision ¶ 16 of the "Agreement" is void because it is not "conspicuous" and does not warn the consumer that he is foregoing important rights under Nevada law. D.R. Horton, Inc. v. Green, 120 Nev. 549, 556-7, 96 P.3d 1159, 1164-5 (2004). (NRS § 34.241(1)(e)).

As held by Horton v. Green: "[T]o be enforceable, an arbitration clause must at least be conspicuous and clearly put a purchaser on notice that he or she is waiving important rights under Nevada law...Nothing on the front page notifies the reader of the specific forum selection clause on the back page. The clause is not even in bold print." And at 120 Nev.552, 96 P.3d 1161, "With the exception of the paragraph title, which was in bold capital letters like the other contract headings, nothing drew special attention to this provision." That is, placing the paragraph title in bold print is not sufficient to make the arbitration provision "conspicuous." The entire provision must be "conspicuous." This holding of Horton v. Green is consistent with that of Gonski, quoted in the prior section.

Nor is there any warning that the client was waiving important rights under Nevada law.

Paragraph 16 of the purported Investment Management Agreement was clearly substantively unconscionable, because it provided 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."

B. Nonstatutory grounds for vacating the arbitrator's decision.

The following § 1 demonstrates that the arbitrator did not properly evaluate the facts,

and § 2 demonstrates that the arbitrator did not properly apply the governing substantive law.

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

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

If the arbitrator disregards the established facts, he acts in a manner that is "arbitrary, capricious, or unsupported by the agreement." "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." State v. Eighth Judicial Dist. Court (Zogheib), 130 Nev., Adv. Op. 18, 321 P.3d 882, 884 (2014) (internal quotations omitted).

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

a. The arbitrator disregarded the substance of the agreement between the parties as to the NRCPs that govern the arbitration.

The agreement of the parties as set forth in the Scheduling Order (Exhibit 1) was that "The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure...will generally govern this case unless the arbitrator rules otherwise." This agreement of the parties was never altered by them. The arbitrator "never rule[d] otherwise," and indeed is prohibited from interfering with a contractual agreement between the parties. The arbitrator disregarded this agreement.

b. The arbitrator disregarded the relevant term of his own Scheduling Order, which was never modified or altered in any respect.

Referring to the quotation in the prior subparagraph, no order of the arbitrator, including the Final Award, ever "rule[d] otherwise."

c. The arbitrator disregarded the fatal flaws in Defendants' Motion for Attorney's Fees and Costs.

Plaintiff's Opposition (Exh. 5), Motion to Strike (Exh. 7), and Reply (Exh. 9) pointed out numerous fatal flaws in Defendants' Motion for Attorney's Fees and Costs. The Final Award (Exh. 10 at 10-11) disregarded these flaws. Such flaws include:

- The arbitrator had set a deadline to submit a Motion for Attorneys Fees. The arbitrator disregarded the fact that the Declaration of Thomas Bradley (Exh. 2, Exhibit 3) submitted in a timely fashion by Defendants was not of the form and content required by NRS 53.045 (Exh. 5; Exh. 9). Plaintiff moved to strike this legally insufficient Declaration of Thomas Bradley, and Defendants admitted that it should have been struck. The arbitrator disregarded this fact in his Final Award.
- The arbitrator disregarded the fact that the Defendants did not file any motion to submit a revised version of the Declaration of Thomas Bradley and revised exhibits, after the deadline established by the arbitrator.
- The arbitrator disregarded the fact that "JAMS Costs" may not be recovered in a motion made pursuant to NRCP Rule 68, see Exh. 5.
- The arbitrator disregarded the fact that the amounts allegedly paid to "Hume" ($24,020.00) and the alleged "Wespac Costs" totaling $4,979.96 may not be recovered under NRCP Rule 68, yet the Final Award included them.
- The arbitrator completely disregarded Plaintiff's Motion to Strike, and the numerous reasons set forth therein that the "evidence" submitted by Defendants had to be struck.

2. The arbitrator manifestly disregarded the governing law.

The arbitrator manifestly disregarded and ignored the well-established evidentiary and substantive law in multiple areas. Plaintiff does not contend that the arbitrator made an error of law, because it is apparent that he did not apply the governing evidentiary and substantive law at all. In the present case, the arbitrator ignored the law known or communicated to him. Plaintiff again emphasizes that he is not disputing the arbitrator's

interpretation of the law. There is no interpretation to dispute. The arbitrator ignored the law and did not mention it at all. Such manifest disregard of the law is a basis for vacating the arbitrator's Final Award on PMPSJ.

Certainly, if the Defendants contend that the arbitrator did not manifestly disregard the governing substantive law, they can point out in their Reply precisely where the governing law is addressed.

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

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

These principles were further interpreted in Manor Health Care Center, Inc. v. Monsour, 126 Nev. 735, 367 P.3d 796 (2010), stating

> The arbitrator must have known the law, recognized that the law required a certain result, and then disregarded it. Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8 (2006). MHCC must provide evidence that not only did it communicate the correct law to the arbitrator, but the arbitrator "intentionally and knowingly chose to ignore that law despite the fact that it was correct." ABCO Builders v. Progressive Plumbing, 282 Ga. 308, 647 S.E.2d 574, 575 (Ga.2007). There must be concrete evidence of an intent to disregard known law in the findings of the arbitrator or in the transcript of the proceedings.

The following subsections identify the arbitrator's manifest disregarding of the law.

a. The arbitrator manifestly disregarded the agreement of the parties as set forth in the Scheduling Order (Exh. 1).

JAMS Rule 24(c) and Rule 24(g), quoted above, permit the parties to select the governing law for the arbitration, by agreement between the parties. In the present case, "The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure and the deadlines for filing Oppositions and Replies found in Washoe District Court Rule 12 will generally govern this case unless the arbitrator rules otherwise." This agreement did not include NRCP Rule 68. The parties never altered this agreement, and it still is in effect today. The arbitrator manifestly disregarded these

provisions of JAMS Rule 24(c) and Rule 24(g), and the governing law that does not permit a court to alter an agreement between parties.

b. The arbitrator manifestly disregarded the governing law as set forth in the Scheduling Order (Exh. 1).

As discussed in the preceding subsection, the parties had agreed to the governing law. Scheduling Order at 2:23 further states, "IT IS SO ORDERED." followed by the arbitrator's signature. This order cast the terms of the agreement between the parties into an order of the arbitrator stating the law to be applied in the arbitration. The arbitrator manifestly disregarded the terms of his own order and the law that he himself had established. Had the arbitrator wished to change the terms of his own Order, the parties were entitled to be heard prior to any such change. In fact, the arbitrator never had such a hearing, and never changed the terms of his Order. This Order remains in effect today.

IX. SUMMARY AND CONCLUSION

The portion of the Final Award granting attorneys fees and costs to Defendants must be vacated for the reasons set forth herein.

Although the vacating of the arbitrator's order must be accomplished under specific procedures, the matter boils down to whether it is fair for the parties to agree, and the arbitrator to order, that NRCP Rule 68 is not to be included in the procedures governing the arbitration, and then later for the Defendant and the arbitrator to reverse themselves and attempt to award attorneys fees and costs under NRCP 68.

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

DATED this 22nd day of April 2019.

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

Counsel for plaintiff

INDEX OF EXHIBITS

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

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

DEPT. NO. : 6

Defendants.
_____/

PLAINTIFF'S MOTION TO VACATE ARBITRATOR'S FINAL AWARD

Plaintiff moves that the Court vacate the arbitrator's Final Award (Exh. 4) on statutory and/or non-statutory grounds.

To avoid confusion, the portion of the Final Award dealing with attorney's fees is treated separately, as it involves distinct and different issues.

POINTS AND AUTHORITIES

I. BACKGROUND

Defendants are financial advisors and planners, who by law (NRS § 628A.020) have a fiduciary duty to their clients, including a duty of full disclosure. At age 61, Plaintiff entrusted a significant portion of his life savings to Defendants, to manage and provide for his retirement. At that time and later, Defendants concealed from Plaintiff that they were ignoring statutory their statutory obligations. They concealed that Defendant Greg Christian had previously been disciplined and suspended by the governing body of financial advisors and planners, the United States Securities Exchange Commission ("SEC"), for defrauding clients. They concealed that they

had violated, and were continuing to violate, numerous other SEC regulations, and that they had violated, and were continuing to violate, many of the laws of the State of Nevada governing financial advisors and planners, and their corporate entities such as Defendant Wespac.

These factual misrepresentations and the suppression of information are all highly material because Dr. Garmong testified (Exh. 2-1[1], 106:3-108:17) that he "never, never, never would have remotely considered doing business with" Defendants if he had known the truth of the information that they falsified and/or concealed.

This initial deception by Defendants, not discovered by Plaintiff Dr. Garmong until much later, set the tone for Defendants' dishonesty in their dealings. This dishonesty resulted in Defendants losing hundreds of thousands of dollars of Plaintiff's retirement savings, when they were in sole control of those savings, and at a time when he had retired and could not replace the losses by subsequent earnings.

Plaintiff filed his Complaint in this Court. It was referred to arbitration, and Philip Pro was appointed arbitrator. At the invitation of the arbitrator, Plaintiff filed a Motion for Partial Summary Judgment ("PMPSJ"), which the arbitrator denied. The denial of PMPSJ is the subject of a separate motion to vacate.

The case then proceeded to discovery and a three-day hearing, which resulted in the arbitrator's Final Award that is the subject of this Motion to Vacate.

These concealed facts and other material facts were established at the arbitration hearing, and disregarded by the arbitrator's Final Award. The law governing Plaintiff, and governing the relation between Defendants and Plaintiff was briefed, and manifestly disregarded by the arbitrator's Final Award.

One ongoing theme of the arbitrator's Final Award is to attempt to shift the blame for the losses to Plaintiff. There is no law of comparative liability of the injured party to damages

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[1] Exhibits to this brief are denoted as "Exh." followed by an exhibit number in which the first term is 1 (introduced exhibits), 2 (transcripts), or 3 (filed briefs), and the second term is the specific item within that group. In some cases, a bates number is provided. In many cases, a page number:line number within the exhibit is given.

resulting from Defendants' breaches of its contractual, fiduciary, and agency duties.

II. LEGAL STANDARDS FOR MOTION TO VACATE

An arbitrator's final award may be vacated on either statutory or common-law grounds. WPH Architecture, Inc. v. Vegas VP, LP, 131 Nev. Adv. Op. 88, 360 P.3d 1145, 1147 (2015) held:

> An arbitration award may be vacated based on statutory grounds and certain limited common-law grounds. At common law, an arbitration award may be vacated if it is arbitrary, capricious, or unsupported by the agreement or when an arbitrator has manifestly disregard [ed] the law.

(Citations and internal quotation marks omitted).

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

> 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.'

An arbitrator's final award may be vacated on either statutory grounds (NRS § 38.241(1)) or nonstatutory grounds. Nonstatutory grounds may include either whether the arbitrator's consideration of the facts was arbitrary, capricious, or unsupported by the agreement, or whether there was manifest disregard of the law. As to the disregarding of facts, Wichinsky v. Mosa, 109 Nev. 84, 89, 847 P.2d 727, 731 (1993) held, "If an award is determined to be arbitrary, capricious, or unsupported by the agreement, it may not be enforced."

The meaning of the "arbitrary, capricious, or unsupported by the agreement" standard in

reference to disregarding facts is this: "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." State v. Eighth Judicial Dist. Court (Zogheib), 130 Nev., Adv. Op. 18, 321 P.3d 882, 884 (2014) (internal quotations omitted).

Discussing the "manifest disregard of the law" standard, Graber v. Comstock Bank, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995), held:

> Review under the manifest disregard standard does not entail plenary judicial review. City of Boulder v. General Sales Drivers, 101 Nev. 117, 694 P.2d 498 (1985). Instead, when searching for a manifest disregard for the law, a court should attempt to locate arbitrators who appreciate the significance of clearly governing legal principles but decide to ignore or pay no attention to those principles. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir.1986). The governing law alleged to have been ignored must be well-defined, explicit, and clearly applicable. Id. at 934.

Further, "manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule . . . [M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will." State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 932, 267 P.3d 777, 780 (2011).

III. THE COURT HAS A DUTY TO REVIEW THE ARBITRATOR'S ACTIONS

The District Court has a duty to review the actions and rulings of the arbitrator to determine whether the arbitrator manifestly disregarded the law or the facts. Graber v. Comstock Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995).

IV. STATUTORY GROUNDS FOR VACATING THE ARBITRATOR'S FINAL AWARD

This section addresses the law and its application to vacating the Final Award on statutory grounds, NRS § 38.241(1). The following section addresses the law and its application to vacating the Final Award on nonstatutory grounds. If any one or more of the statutory or nonstatutory grounds for vacating are established, the arbitrator's Final Award must be vacated.

NRS § 38.241(1) sets forth the mandatary ("shall vacate") statutory grounds for vacating an

arbitrator's Final Award:

> 1. Upon motion to the court by a party to an arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if:
> (a) The award was procured by corruption, fraud or other undue means;
> (b) There was:
> (1) Evident partiality by an arbitrator appointed as a neutral arbitrator;
> (2) Corruption by an arbitrator; or
> (3) Misconduct by an arbitrator prejudicing the rights of a party to the arbitral proceeding;
> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to NRS 38.231, so as to prejudice substantially the rights of a party to the arbitral proceeding;
> (d) An arbitrator exceeded his or her powers;
> (e) There was no agreement to arbitrate, unless the movant participated in the arbitral proceeding without raising the objection under subsection 3 of NRS 38.231 not later than the beginning of the arbitral hearing; or
> (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in NRS 38.223 so as to prejudice substantially the rights of a party to the arbitral proceeding.

A. First statutory ground: There was no Agreement to arbitrate. No complete Contract was ever produced by Defendants and no complete Contract is of record in these proceedings. (NRS 34.241(1)(e)).

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

Plaintiff's Motion to Strike "Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reduce Award to Judgment, Including, Attorney's Fees and Costs" addresses this First Statutory Ground in greater detail. Plaintiff asks the Court to take judicial notice of the other papers filed in this case with the Court and with the arbitrator..

NRS 38.221(1) requires that the party asserting a contract having an arbitration provision, here Defendants, must show a single, complete, unambiguous, valid, binding contract that includes an arbitration provision. Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) held:

> NRS 38.045 provides that if a party requests a court to compel arbitration pursuant to a written agreement to arbitrate, and the opposing party denies the existence of such an agreement, the court shall summarily determine the issue. See Exber, Inc. v.

> Sletten Constr. Co., 92 Nev. 721, 729, 558 P.2d 517, 521–522 (1976). Since appellant set up the existence of the agreement to preclude the lawsuit from proceeding, it had the burden of showing that a binding agreement existed. After reviewing the facts, we cannot say that the district court erred in finding that appellant did not sustain that burden.

In the present case, Defendants never met, or attempted to meet, this burden of "showing that a binding agreement existed." They put forth one alleged contract to bring the case into arbitration, and then switched to a second alleged contract for arbitration. Neither alleged contract was complete and binding.

Any alleged contract containing an alleged "agreement to arbitrate" must be a complete, unambiguous, authenticated, binding contract for any portion of it to be valid and enforceable. NRS 38.221(3). An incomplete collection of paper purporting to be a contract cannot be enforced. See Dodge Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-84 (1930) ("There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite."); All Star Bonding v. State of Nevada, 119 Nev. 47, 49, 62 P.3d 1124 (2003) ("[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain."); May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite.").

Defendants prepared the two incomplete and different collections of paper they consider a contract and forced them onto Plaintiff. Any incompleteness or ambiguity must therefore be interpreted against Defendants' interests. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 (1995).

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

In this Court and in the arbitration proceeding, Defendants never made of record a single, unambiguous, complete, authenticated binding contract. Both versions of the Agreement (Exh. 1-4, Exh. 1-43) provide, in ¶14, that "This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties." (Emphasis added).

In the course of the proceedings, Defendants advanced two different versions of an alleged Agreement (Exh 1-4 and Exh. 1-43) and two different versions of an alleged Confidential Client Profile (Exh. 1-3 and Exh. 1-46). The two versions of the alleged Agreement and the two versions of the alleged Confidential Client Profile together identify a total of three different "Exhibits A" (found at Exh. 1-43 and Exh. 1-4, page WESPAC 000048; Exh. 1-43 and Exh. 1-4, WESPAC 000049, ¶ 4(a); Exh. 1-46 and Exh. 1-3, numbered "page 1", under Table of Contents, II. Exhibits), and three different documents termed "Exhibit B" (found at Exh. 1-43 and Exh. 1-4, WESPAC 000049, ¶3(3); Exh. 1-43 and Exh. 1-4, WESPAC 000049, ¶4(a); Exh. 1-46 and Exh. 1-3, numbered "page 1", under Table of Contents, II. Exhibits). None of the three Exhibits A and none of the three Exhibits B was ever produced by Defendants in an authenticated form, nor are they in the record.

Defendants themselves do not know the meaning of their alleged contracts. Defendant Christian stated under oath that he was "guessing" about the meaning of the alleged contract, and that one of the references to an Exhibit B was "obviously" meant to be reference to an Exhibit A (Exh. 2-3, 21:18-22:7). He blamed clerical personnel for a "typo" error, but admits that the "typo" is found in the both final versions of the alleged contract. Additionally, when all of the different versions are sorted out, there are missing crucial pages 10-11 of the Confidential Client Profile. (Exh. 1-3; Exh. 2-3, 21:18-22:7). Defendants give no explanation for why they did not produce these missing pages (leaving the inference that they would have been helpful to the plaintiff). This uncertainty by the Defendants indicates the degree of confusion about both versions of the alleged contract. Certainly Plaintiff and the Court cannot be held to understand or enforce the alleged contract if the Defendants, who prepared it, must "guess" at its meaning.

The "contract" must also be interpreted against Defendants because they either can not or will not provide all of the parts of the contract, in an unambiguous form. There is no question that Defendants had possession, custody, and control of all of the parts of the alleged contract, if they ever existed. They prepared the papers, and never gave a copy to Plaintiff until the present lawsuit was filed. The unavailability of material evidence, through destruction or spoilation, results in either an adverse inference or a rebuttable presumption under NRS 47.250(3), against the interests

of the controlling party. Bass-Davis v. Davis, 122 Nev. 442, 445 and 451-53, 134 P.3d 103, 105 , 109-10 (2006). In the present case, it is not necessary to determine whether Defendants lost or destroyed the relevant Exhibits A and Exhibits B. The fact of the matter is that Defendants did not produce the three Exhibits A, the three Exhibits B, or the crucial missing pages 10-11 of the Confidential Client Profile, and they are not part of the record. The Court may not infer some content to the missing Exhibits A and Exhibits B in order to sustain the contract. All Star Bonding, *supra.*

This problem was called to the attention of the arbitrator, and he disregarded it. There is not a word in the Final Award about the failure of the Defendants to meet their burden of demonstrating an enforceable Contract in the record.

If they wished to enforce an arbitration provision, Defendants had an obligation to provide a Contract that unambiguously included all of the pieces–one Agreement, one Confidential Client Profile, three separate Exhibits A, and three separate Exhibits B. They have not done so.

Certainly if they disagree, and can point out where in the record all of the parts of the Contract are unambiguously found, they may do so in their Reply to this Motion.

B. Second statutory ground: The arbitration provision ¶ 16 is "void" pursuant to NRS § 597.995. (NRS § 34.241(1)(e)).

NRS § 597.995(1)-(2) provides

> 597.995. Limitations on agreements which include provision requiring arbitration of disputes arising between parties
> 1. Except as otherwise provided in subsection 3, an agreement which includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision.
> 2. If an agreement includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement and the agreement fails to include the specific authorization required pursuant to subsection 1, the provision is void and unenforceable.

Even if the "Agreement" were otherwise valid, the arbitration provision ¶ 16 (Exh. 1-43 and Exh. 1-4, WESPAC 000053-WESPAC 00054) has no "specific authorization" as mandated by NRS 597.995(1). The arbitration provision is therefore void (not "voidable"), NRS 597.995(2).

The Nevada Supreme Court has approved one form of such "specific authorization," where

the parties initial the arbitration provision. Gonski v. Second Judicial Dist. Court of State ex rel. Washoe, 126 Nev. 551, 554, 245 P.3d 1164, 1167 (2010). The present "Agreement" had no such provision for initialing or otherwise giving "specific authorization" for the arbitration clause, ¶ 16.

Because of the abuse of arbitration by entities such as Defendants, the Nevada legislature went beyond the case authority such as Gonski and enacted NRS 597.995, providing that an arbitration provision is "void" if it does not include "specific authorization." NRS 597.995 does not limit itself to arbitration provisions enacted after the effective date of the statute, but extends to any arbitration provisions for which enforcement is sought after the effective date of the statute. Consequently, in this case any acts of the arbitrator are void.

C. Third statutory ground: The arbitration provision ¶ 16 is void because it is not "conspicuous" and does not warn the consumer that he is foregoing important rights under Nevada law. D.R. Horton, Inc. v. Green, 120 Nev. 549, 556-7, 96 P.3d 1159, 1164-5 (2004). (NRS § 34.241(1)(e)).

As held by Horton "[T]o be enforceable, an arbitration clause must at least be conspicuous and clearly put a purchaser on notice that he or she is waiving important rights under Nevada law . . . Nothing on the front page notifies the reader of the specific forum selection clause on the back page. The clause is not even in bold print." And at 120 Nev.552 , 96 P.3d 1161: "With the exception of the paragraph title, which was in bold capital letters like the other contract headings, nothing drew special attention to this provision." That is, placing the paragraph title in bold print is not sufficient.

Nor is there any warning that the client was waiving important rights under Nevada law.

Paragraph 16 was clearly substantively unconscionable, because it provided 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."

D. Fourth statutory ground: The award was procured by corruption, fraud or other undue means (NRS § 34.241(1)(a)).

1. Governing law

a. Fraud

The elements of fraud are found in NRS 42.001:

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

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

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

b. Undue means

Sylver v. Regents Bank, N.A., 129 Nev. 282, 287-88, 300 P.3d 718, 721-22 (2013) sets forth the standard for "undue means."

> Accordingly, "[t]he best reading of the term 'undue means' under the maxim *noscitur a sociis* is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either." . . . Thus, " 'undue means' has generally been interpreted to mean something like fraud or corruption."
>
> Typically, to prove that an award was procured by undue means, the party seeking vacatur "must show that the fraud [or corruption] was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence." MCI Constructors requires the party seeking to vacate the award to prove a causal connection between the undue means and the resulting arbitration award. Id.

(Citations omitted).

2. Specific acts of fraud and undue means (NRS § 34.241(1)(a))

a. Perjury by the Defendants.

Perjury by the prevailing party is recognized as a basis for vacating an arbitrator's final award on the grounds of fraud, undue means, or both.

Perjury is defined in NRS § 199.120 as making a knowingly false statement under oath.

NRS § 199.200 broadens the concept to include statements which the sworn party does not know to be true.

Although perjury as the basis for reaching a conclusion of "undue means" under NRS 34.241(1)(a) has not been addressed in Nevada law, it is well established in other jurisdictions wherein fraud and "undue means" are bases for vacating an arbitrator's final award. A challenge to an arbitration award on grounds of corruption, fraud, or undue means may be supported by evidence that the opposing party gave perjured testimony or presented perjured evidence at the arbitration proceeding. Speaking in the context of arbitration, Dogherra v Safeway Stores Inc, 679 F2d 1293, 1297 (9th Cir. 1982) *cert. den.* 459 US 990, held, "Obtaining an award by perjured testimony constitutes fraud." See also Arkansas Department of Parks and Tourism v Resort Managers Inc, 743 SW2d 389 (Ark. 1988).

The principal witness for Defendants, Greg Christian, perjured himself repeatedly in this case and the arbitration.

- Mr. Christian's testimony as to a key meeting of early October, 2007 is self-contradictory and raises significant doubts about his credibility in that he is willing to say whatever helps him at the moment. On September 13, 2018, Mr. Christian stated in his sworn deposition (Exh. 1-58, 110:21-24) in response to a question by Plaintiff's attorney:

> Q. This conversation, this meeting in October of 2007, was it your testimony that you don't recall anything that got said in that conversation?
> A Yes.

A month later at the hearing on October 18, 2018, after he had been carefully coached, Mr. Christian changed his story and testified that he recalled the substance of that meeting in full detail. For example, Mr. Christian stated in his sworn testimony on examination by his own attorney, TR3, 37:15-24:

> Q So at this meeting in October of 2007, was it just more of the same meeting with Mr. Garmong, talking about life and him checking on his investments?
> A I believe so. And I think we were talking about some other just financial planning, estate planning issues, things like that.
> Q You never got the sense in that meeting that he was asking you to be very conservative with his assets?
> A I didn't get the feeling that there was any change to the investment objective, no.

Inconsistency in testimony under oath is not an obstacle for Mr. Christian. Both of these statements cannot be true.

Dr. Garmong's unchallenged testimony was completely to the contrary, Exh. 2-1, 118:3-121:21.

- Mr. Christian falsified three affidavits by stating that the agreement presented as an exhibit was "true, complete, and correct," when it was missing three Exhibits A, three Exhibits B, and the Confidential Client Profile. Mr. Christian's three falsified affidavits are discussed in Plaintiff's Motion for Summary Judgment Reply at 15:20-19:11. In his deposition, under oath, Mr. Christian repeated his misrepresentations. Exh. 1-58 at 116:13-121:13. On the other hand, Plaintiff testified, Exh. 2-1, 69:15-87:9, without contradiction, that the Affidavits were falsified. The agreement was not "complete."

- Mr. Christian will deny anything, even facts put in front of him. At Exh. 2-3, 38:10-25,Plaintiff's counsel quoted the fax of January 21, 2007 (Exh. 1-12, which Mr. Christian admitted receiving), "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." A few moments later, at Exh. 2-3, 42:10-22, Plaintiff's counsel quoted a fax of Sept. 26, 2008 (Exh. 1-15), "I specifically instructed there could not be any losses from my accounts." Mr. Christian responded (Exh. 2-3, 42:21-22), "[H]e absolutely never told me that."

- Mr. Christian testified that he never used, or advised clients to use, the "Stop Losses" technique. Exh. 2-2, 241:8-13. According to Exh. 1-20, Mr. Christian described and advocated to potential new customers a "Stop Losses" technique, that was to be applied to "all equity purchases" to avoid capital losses. Exh. 1-20 at WESPAC 0970 ¶ 2. A letter by another employee of Wespac, Mr. Williams, confirmed Mr. Christian's statement to Mr. Sharpe, another client of Wespac. Exh. 1-20 at WESPAC 974 ¶ 1. Mr. Christian's response was to lamely deny what Mr. Sharpe and Mr. Williams had written. Exh. 2-3, 27:19-32:3. Mr. Christian's testimony is contradicted by Mr. Sharpe's letter, and by Mr. Williams' agreement with Mr. Sharpe's statements.

- Mr. Christian denied receiving the letter of October 22, 2007 (Exh. 1-11). Exh. 2-2, 220:6-8. But he admitted that mail was normally received and processed by office staff before it

even reached him, and, remarkably for a company that requires client objectives to be stated in writing, admitted that no record of incoming mail was kept (Exh. 2-3, 34:15-35:8). Mr. Christian did not deny that the letter was received by his office and office staff. No staff member was called by Defendants to testify to the receipt and handling of this letter. There is a disputable presumption that a mailed letter is received, NRS 47.250(13). Lacking a factual basis for dispute, Defendants questioned the letter by innuendo, but have ignored the substance of the meeting of early October and the three consistent faxes. Exh. 1-12 to 1-14.

b. Refusal of the arbitrator to even mention one of the key Claims before him for arbitration.

The Sixth Claim for Relief of the First Amended Complaint ("FAC") was for "Breach of Fiduciary Duty." The Final Award does not address this Sixth Claim at all. It does address the Seventh Claim for Breach of Fiduciary Duty of Full Disclosure, but that is a distinctly separate claim.

The breach of fiduciary duty by Defendants was one of the key claims of the FAC, and was clearly established by the evidence and the controlling legal authority. The Final Award does not mention it at all.

c. Refusal of the arbitrator to disclose most of the facts and law upon which he was basing his Final Award.

When the arbitrator refuses to disclose most of the facts and law upon which he is basing his final award, the ruling is achieved by undue means, because the parties and the reviewing court cannot determine whether the arbitrator has relied upon all of the facts and the proper law.

The applicable law is presented on a claim-by-claim basis in Plaintiff's Hearing Brief, Exh. 3-1, at 6:3-58:17, for each respective claim and for the doubling of damages. The evidentiary facts established at the hearing are presented on a claim-by-claim basis in Plaintiff's Post-Hearing Brief, Exh. 3-2, at 1:21-20:5, with reference to the applicable law for each respective claim and for the doubling of damages.

Virtually none of this law and none of these facts are referenced in the Final Award. Consequently, neither the parties nor this District Court can determine whether the arbitrator

applied the correct law, and relied upon the established facts.

The Court will recall from Plaintiff's Motions to Vacate Arbitrator's Denial of Plaintiff's Motion for Partial Summary Judgment, and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment, and particularly the discussion of the arbitrator's decisions related to summary judgment, Exhs. 4 and 7 to that motion, that the arbitrator took exactly the same approach. There is nothing of record in this case that will establish whether the arbitrator applied the correct law, as applied to the established facts.

E. Fifth statutory ground: The award was procured by corruption, fraud or other undue means, specifically fraudulent inducement by Defendants to entice Plaintiff to enter into the purported Contract between Defendants and Plaintiff (NRS § 34.241(1)(a)).

As elaborated in § V.A-C below, Defendants made extensive false misrepresentations of material facts, and concealed extensive material facts, from Plaintiff in inducing him to enter the alleged Contract, which included the Investment Management Agreement (Exh. 1-4 and Exh. 1-43) having the arbitration provision ¶ 16. These fraudulent inducements included, for example, concealment of the fact that Defendant Christian had been disciplined and suspended by the SEC for defrauding clients, and Defendant Wespac's intentional breaking of numerous statutes and rules of the SEC and the State of Nevada.

These misrepresentations and concealments are material because Dr. Garmong testified (Exh. 2-1, 106:3-108:17) that he "never, never, never would have remotely considered doing business with" Defendants if he had known the truth of the information that they falsified and/or concealed. That is, Defendants used fraudulent inducement, and undue means to induce Plaintiff to do business with them and enter the alleged Contract, and continued with such undue means to induce Plaintiff to continue doing business with them.

Fraudulent inducement in contracts to arbitrate has not been discussed in Nevada cases, but other states have addressed it in the context of a motion to vacate an arbitration award for fraud or undue means. As explained by Thompson v. Lee, 589 A.2d 406 (D.C. App. 1991), "Claims of fraudulent inducement of a contract also may be asserted in a properly filed application to vacate the arbitration award." See also Security Const. Co. v. Maietta, 334 A.2d 133, 136 (Md. 1975)

holding, in the context of a motion for vacating an arbitration award, "'Fraudulent inducement' means that one has been led by another's guile, surreptitiousness or other form of deceit to enter into an agreement to his detriment." and Rice v. Loomis, 28 Ind. 399, 404 (Ind. 1867) (even though there was no claim that "the decision of the arbitrators was itself influenced by fraud," an agreement to arbitrate procured by fraud, "like any other contract so procured, [is] of no force whatever, and not binding upon the party thus induced to enter into it.").

F. Sixth statutory ground: The arbitrator . . . refused to consider evidence material to the controversy . . . so as to prejudice substantially the rights of a party to the arbitral proceeding. (NRS § 34.241(1)(c))

As has been discussed and will be discussed further in great detail, for example in the following section and in each subsection of § V, the arbitrator disregarded the most important facts presented in the testimony and exhibits of the hearing. This constitutes a statutory basis for vacating the Final Award.

G. Seventh statutory ground: Evident partiality by an arbitrator appointed as a neutral arbitrator. (NRS § 34.241(1)(b)(1))

The proper standard of partiality in Nevada is whether there is a "reasonable impression of partiality." Thomas v. City of North Las Vegas, 122 Nev. 82, 127 P.3d 1057 (2006). This "reasonable impression" standard is to a degree a subjective conclusion by the District Court. It presumably relies upon the impression that a reasonable person would reach.

In another court's view, under the "evidently partial" test, evident partiality will be found when a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration; this is a higher standard than "appearance of bias," but requires lesser showing than actual bias. Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308 (6th Cir. 1998).

In the present case, the "reasonable impression of partiality" is evidenced in the entirety of the proceedings as conducted by the arbitrator. These actions evidenced a partiality by the arbitrator in favor of Defendants.

As discussed herein, the arbitrator disregarded the fact that Defendants have never placed a complete arbitration contract into the record; alternatively, disregarded the terms of fragment of the

arbitration contract that was placed into the record; disregarded facts established by Plaintiff in documents and testimony; disregarded the factual evidence of the deceptions and fraud perpetrated upon Plaintiff by the Defendants before and after Plaintiff hired them; disregarded the facts that Defendants had violated the laws of the United States and Nevada, to Plaintiff's detriment; disregarded Defendants' multiple acts of perjury; and manifestly disregarded the substantive law of Nevada.

As discussed in 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, the arbitrator refused to consider the undisputed material facts (after admitting that "Many of the facts relied upon by Claimant are indeed 'undisputed.'"), and refused to follow the governing procedural, evidentiary, and substantive law of summary judgment. The reason given by the arbitrator for refusing to consider the facts and the law was that a "merits hearing" to test credibility of witnesses was required as part of the summary judgment proceeding. The assessment of witness credibility in summary judgment proceedings is expressly forbidden by Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), by Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002), and many other authorities. The arbitrator was fully aware of this authority, from his prior experience and because it was communicated to him in Plaintiff's papers. There could be no reason for the arbitrator taking these positions on a motion for summary judgment which should properly have been decided for Plaintiff than "evident partiality." The District Court will recall that, in the wake of the partiality shown by arbitrator Pro in refusing to apply the facts and law in the summary judgment proceeding, on July 22, 2018, Plaintiff brought Plaintiff's Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator. This Motion to Disqualify 1:18-21, was made because " Arbitrator Pro refuses to apply Nevada law and his own established procedures, had and has an undisclosed conflict of interest, and has taken actions evidencing partiality to the defendant." After briefing, the Court's Order of November 29, 2018 denied Plaintiff's Motion, with leave to re-present.

And in relation to the Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees,

the parties had expressly agreed as to which of the Nevada Rules of Civil Procedure would govern the arbitration, and these did not include NRCP 68. The arbitrator had formalized this agreement in the Scheduling Order, leading Plaintiff to believe that these were the governing rules. The Defendants violated their agreement and the arbitrator's Order by employing NRCP 68, and the arbitrator in his Final Award at 10-11 made no mention of the violation, instead attempting to blame Plaintiff for Defendants' violations.

In summary, perhaps an innocent error or two could be overlooked, but in this case the arbitrator has consistently disregarded the established facts and the governing laws, in every case to the benefit of Defendants. This unvarying pattern of behavior clearly establishes the evident partiality of the arbitrator.

V. NONSTATUTORY GROUNDS FOR VACATING THE ARBITRATOR'S FINAL AWARD

The Amended Complaint has twelve Claims for Relief, and a request for doubling of damages. The most efficient approach to demonstrating that the arbitrator's Final Award disregarded the facts and manifestly disregarded the law is to address these two points on a claim-by-claim basis, with reference to the Final Award.

For each of the claims, the controlling legal authority is set forth in Plaintiff's Hearing Brief, Exh. 3-1, at 6:3-58:17. The evidentiary facts established at the hearing are presented on a claim-by-claim basis in Plaintiff's Post-Hearing Brief, Exh. 3-2, at 1:21-20:5, with reference to the applicable law, for each respective claim and for the doubling of damages.

The Fifth-Eighth and Tenth Claims (subsections A-E below) deal with the disregard of the law, false representations, and concealment of information by Defendants. These matters impact the other claims, and will be addressed first, followed by the remaining claims (subsections F-L). For each claim, the disregard of the law will be discussed first, to establish the legal setting for the significance of the facts that were disregarded by the arbitrator's Final Award.

A. Fifth Claim for Relief. Breach of Nevada Deceptive Trade Practices Act ("NDTPA"), NRS Ch. 598.

1. Final Award

"Garmong's claim for breach of Nevada's Deceptive Trade Practices Act fails because the evidence does not show deception or fraud by Wespac or Christian causing damage to Garmong. Merely showing a loss of value in an investment does not support a claim that the loss was a product of misrepresentation. There is simply no evidence in the record of this case to show that it was."

2. Summary of the deficiency of the Final Award

The Final Award does not contain one word about either the law or the facts relevant to NDTPA, or the significance of Defendants' multiple breaches of it. It also fails to recognize that the concealment of, and failure to disclose, a material fact is equivalent to a false representation.

3. Manifest disregard of the law

a. Significance of suppression or omission of material information.

The Final Award's position is that only an overtly false representation meets the requirements of a "misrepresentation." The Final Award manifestly disregarded authority such as Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007) holding, "[T]he 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.'" Inasmuch as Defendants had a fiduciary relation to Plaintiff, they had an affirmative duty to disclose all material information to Plaintiff. NRS 628A.020; Randono v. Turk, 86 Nev. 123, 129, 466 P.2d 218, 222 (1970).

b. Substantive law of NRS Ch. 598

The Final Award manifestly disregards the relevant statutes of NRS Ch. 598, including NRS 598.0977 (civil cause of action by the elderly (defined by NRS 598.0933 as person 60 years of age or older)), and damages, for deceptive trade practices as defined by the following statutes: NRS 598.0915 (misrepresentation as deceptive trade practice), and NRS 598.092 (noncompliance with laws as deceptive trade practice), and NRS 598.0923 (failure to disclose material facts and violation of state or federal statute as deceptive trade practices).

The Final Award also manifestly disregarded the elements and burden of proof as set forth in Picus v. Wal-Mart Stores, Inc., 256 F.R.D. 651, 658 (D.Nev. 2009). This disregard of the elements of the claim led to the arbitrator's mischaracterization of this claim, as quoted above.

4. Disregard of the facts

Defendants suppressed and concealed material information from Dr. Garmong during their dealings with him, including: (1) Prior discipline and suspension by the SEC of Mr. Christian for defrauding securities clients (Exh. 1-49, Exh. 1-52; Exh. 1-58 at 70:13-16; Exh. 2-3, 13:21-14:11); (2) Violation of federal SEC law (Exh. 1-38; Exh. 2-2, 170:6-175:8; Exh. 2-1, 102:10-103:6, 104:5-18); (3) falsification of Forms ADV-I, for 2005, 2006, and 2007, submitted under oath to the SEC during the period of Wespac's dealings with Plaintiff (Exh. 1-48 to 1-52; Exh. 2-2, 142:13-157:21, especially 151:1-5; 153:11-15; 154:10-157:21); (4) Violations of NRS 90.330, NRS 86.544, and NRS 628A.040 (Exh. 1-40 to 1-41; Exh. 2-1, 104:21-106:14, 159:17-170:2); (5) Availability of "Stop Losses" strategy[2] and Defendants' recommendation to other clients that they employ this strategy (Exh. 1-20; Exh. 2-1, 125:16-126:9); (6) Mr. Christian's refusal to sell securities to avoid capital losses (Exh. 2-1, 125:16-126:9); (7) Mr. Christian's conflict of interest in Fusion (Exh. 2-1, 110:8-18; Exh. 1-58 at 30:6-31:3 and 43:10-46:2); (8) Mr. Christian's false statements to the SEC that he had no other business interests outside Wespac (Exh. 1-52, WESPAC 000852, ¶ 13); (9) refusal to conform to the insurance/surety bond requirement of NRS 628A.040 (Exh. 2-1:107:22-108:19)

The arbitrator's Final Award disregarded all of these facts.

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[2] Exhibit 20, written by another client and speaking of the period when Defendants were losing the greatest amount of money from Plaintiff's accounts, proves that Defendants knew a financial strategy, termed "Stop Losses," that they marketed to other clients and to prospective clients: "As part of your presentation, and in explaining your firm's past financial performance, 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." Defendants' testimony at Exh. 2-1, 125:16-126:9 establishes that they did not use this strategy to preserve Plaintiff's capital, the very instruction he gave them. Imagine Plaintiff's sense of betrayal and outrage when he learned that Defendant Christian was advising prospective clients to use Stop Losses, and not using it on his behalf as a long-established client. The arbitrator's Final Award has no mention of this failure of trust by Defendants.

5. Significance of the misrepresentations or suppressions of information

These misrepresentations or suppression of information are all highly material because Dr. Garmong testified (Exh. 2-1, 106:3-108:19) that he would not have done business with Defendants if they had disclosed the concealed information to him:

> Q· ·If you had that knowledge -- and I've taken you through what they didn't tell you -- if you had that knowledge, would you have done business with them in August of 2005?
>
> A· ·The answer is no, nor would I have done business with them at a later time.
>
> Q· ·And why is that?
>
> A· ·A couple of reasons.· First of all, one of the big arguments made by Mr. Christian was that Wespac and Mr. Christian were worthy of trust.· They were, after all, taking over the management of my life savings, what I expected to have in retirement. I had to trust them to do what they were supposed to do and honor the Investment Management Agreement.· So if they didn't disclose important information like this to me, I think it would be reasonable for me to be suspicious about whether they were honest and would properly deal with me. Just the notion that all of this important information is concealed by someone who is asking for your trust is just alien to the granting of that trust, when -- let me put it this way:· When I learned about these failures of disclosure and violations of law much later in 2016 -- '16 or '17-- I was dumbfounded.· I've been dumbfounded several times in this case and that was one of them. The other thing is -- the other part of my concern is, if someone will not obey the law of the SEC, the federal law governing their industry and will not obey the law of the State of Nevada governing their specific industry, why should I expect that they would agree to honor the terms of a private contract with an individual? Those two things together, the violation of trust and the willingness to scoff laws, if everyone knows that term, to me is just beyond the pale. I never, never, never would have remotely considered doing business with them if they had made any of those disclosures to me, particularly because, as I said, the matters at issue here were not whether they violated some traffic code or something like that.· These issues went precisely to the nature of their dealings with the government and the failure to disclose went to their dealings with me.
>
> Q· ·Let's isolate one instance.· Putting aside the other things they didn't mention to you, would you have done business with them knowing they had no insurance to be accountable if something went wrong?
>
> A· ·If the question of insurance had come up, I would have asked them.· And if the answer came back, We don't have insurance, then I would not.· I had had professional liability insurance for the entire time when I was self-employed and the law firm did for all of its partners and associates. So I understood what errors and omissions insurance was, and if they had said, We don't have that, the absence of it would have raised one question. But the second question is, Did they have it earlier and it got taken away from them, they couldn't be underwritten for some reason?· So that would have been a real concern to me.
>
> Q· ·Would it have been a reason not to go to enter into contractual relations with them, that if something went wrong, they couldn't respond financially?
>
> A· ·Yes.

Defendants did not challenge this statement. And the arbitrator disregarded it entirely. There is no mention of this or related testimony in the Final Award.

6. Conclusion

The arbitrator's disregard of the statutes, the elements of the tort, and the established facts, and his evident partiality for Defendants, led the arbitrator to his incorrect conclusion quoted above. Of particular significance was Mr. Christian's concealment of his prior discipline and suspension by the SEC for defrauding securities clients, Wespac's concealment of its multiple violations of federal and Nevada statutes and rules, and Mr. Christian's concealment from Plaintiff of the use of the "Stop Losses" strategy that he told other clients is to be used on all equity accounts. If any of this had been disclosed to Mr. Garmong, he never would have suffered the losses that he did at Defendants' hands.

B. Sixth Claim for Relief--Breach of Fiduciary Duty

1. Final Award

Remarkably, the Sixth Claim for Relief, Breach of Fiduciary Duty, was not addressed in the Final Award. This was a powerful claim that was established by extensive evidence.

2. Summary of the deficiency of the Final Award

The Breach of Fiduciary Duty by Defendants was a major subject of both exhibits and testimony at the hearing, and of the briefing by Plaintiff. The arbitrator's Final Award does not mention this Sixth Claim for Relief at all.

3. Manifest disregard of the law

a. Defendant financial planners/investment advisors/agents had a fiduciary duty to Dr. Garmong.

The fiduciary duty arises out of statute (NRS 628A.010(3) and NRS 628A.030(2)(a), common law (Randono v. Turk, 86 Nev. 123, 129, 466 P.2d 218, 222 (Nev. 1970)), the provisions of the Agreement (Exh. 1-4, ¶ 3(3) (WESPAC 000049), and Defendants' own admissions (Exh. 3-1, 33:20-34:6; Exh. 1-58, 69:6-7; Exh. 2-3, 13:21-14:11).

b. The determination that Wespac and Mr. Christian had a fiduciary duty to Dr. Garmong has important consequences.

Defendants knew what this fiduciary duty implied. In the words of Defendant Christian, the

fiduciary duty imposed upon Defendants "an obligation to do what's in the client's best interest." Exh. 1-58, 69:6-7; Exh. 2-3, 13:21-14:11. Defendant Christian and the arbitrator interpreted this duty to lose hundreds of thousands of dollars of Plaintiff's retirement savings entrusted to him, while taking virtually no action to stem the losses.

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 is 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." The arbitrator, on the other hand, condoned such a breach of fiduciary duty by ignoring it.

4. Disregard of the facts

Defendants' violations of their fiduciary duty are of several types. See summary at Exh 3-1, 35:4-39:16. They violated their duty of full disclosure. As discussed in more detail above under the Fifth Claim, they did not disclose Mr. Christian's disciplining and suspension by the SEC. (Mr. Christian admitted in his deposition Exh. 1-58 at 70:13-16 that he had such a fiduciary duty, "Q: Anyway, now, would this duty of disclosure include telling clients you've been disciplined by the SEC? A. Yes."). He then admitted at the hearing Exh. 2-3, 14:8-11, "·Q·So when you first met with Mr. Garmong, did you tell him about your SEC discipline and suspension from 1992? A·I did not."). Wespac and Mr. Christian did not disclose their numerous violations of federal and state law, they did not disclose the intentionally false filings by Wespac's Chief Compliance Officer of form ADV-I with the SEC, they did not disclose that they would never go to an all-cash position if necessary to protect Dr. Garmong's retirement savings entrusted to them (Exh. 2-1, 125:20-23), they did not disclose Mr. Christian's conflict of interest in Fusion (Exh. 2-1, 110:8-18; Exh. 2-2, 110:8-22; Exh. 1-58, 32:9-23), and they did not disclose their refusal to conform to the

insurance/surety bond requirements of NRS 628A.040 (Exh. 2-1:107:22-108:19). These failures to disclose are material, as set forth in relation to the Fifth Claim.

Nor did they advise Plaintiff how to stem the losses, or act to stem the losses in Plaintiff's accounts that they managed. They did not disclose the "Stop Losses" technique that they touted to prospective new customers (Exh. 2-1, 125:16-19). They admit that they knew exactly how to avoid the wasting of Dr. Garmong's retirement savings with the "Stop Losses" technique (Exh. 2-17). At the very time they were losing money from Dr. Garmong's retirement savings at the greatest rate, they were telling prospective clients (Exh. 1-20) that they use such techniques for "all equity purchases." They failed to do what was in Dr. Garmong's best interests. That is the very definition of a breach of fiduciary duty.

All of these breaches of fiduciary duty were established by the evidence. They were disregarded by the arbitrator.

C. Seventh Claim for Relief--Breach of Fiduciary Duty of Full Disclosure

1. Final Award

"Garmong's breach of fiduciary duty of full disclosure claim fails because the evidence shows Garmong was regularly engaged in communications with Christian concerning his investment accounts at Wespac, never surrendered complete control over his accounts to Wespac or Christian, and Christian kept Garmong apprised of the decline in the stock market and the option of shifting Garmong's accounts to 100% cash if he so desired."

2. Summary of the deficiency of the Final Award

The Final Award disregards the facts and manifestly disregards the law. There is no mention of either. The Final Award completely ignores the concealment of information, and Dr. Garmong's testimony that he "never, never, never would have remotely considered doing business with" Defendants if he had known the truth of the information that they falsified and suppressed. The Final Award also is based upon false statements: The Agreement (Exh. 1-4, ¶ 5, WESPAC 000050) shows Dr. Garmong surrendered complete control over his accounts to Defendants (Exh. 2-1, 118:23-121:21) and Christian never testified that he "kept Garmong apprised of the decline in

the stock market and the option of shifting Garmong's accounts to 100% cash if he so desired." The Final Award disregards these facts.

3. Manifest disregard of the law

As discussed in relation to the Sixth Claim for Relief, fiduciaries such as Defendants have a duty of full disclosure. The arbitrator completely disregarded this legal principle

4. Disregard of the facts

Defendants' violations of their fiduciary duty are of several types. Exh. 3-1 35:4-39:16. They violated their duty of full disclosure. As discussed in more detail above under the Fifth and Sixth Claims, Defendants did not disclose their numerous violations of federal and state law, they did not disclose the intentionally false filings by Wespac's Chief Compliance Officer of form ADV-I with the SEC, they did not disclose Mr. Christian's disciplining and suspension by the SEC. They did not disclose the "Stop Losses" technique that they touted to potential new customers (Exh. 2-1, 125:16-19), they did not disclose that they would never go to an all-cash position (Exh 2-1, 125:20-23), and they did not disclose Mr. Christian's conflict of interest in Fusion (Exh. 2-1, 110:8-18; Exh. 2-2, 110:8-22; Exh. 1-58, 32:9-23). These failures to disclose are material, because Dr. Garmong testified (Exh. 2-1, 106:3-108:17) that he "never, never, never would have remotely considered doing business with" Defendants if he had known the truth of the information that they falsified and suppressed.

It is difficult to understand how the arbitrator could have in good faith missed all of this evidence, as it was expressly discussed in Plaintiff's Post-Hearing Brief, Exh. 3-2, 12:21-16:15.

D. Eighth Claim for Relief--Breach of Agency

1. Final Award

"Garmong's breach of fiduciary duty of full disclosure claim fails because the evidence shows Garmong was regularly engaged in communications with Christian concerning his investment accounts at Wespac, never surrendered complete control over his accounts to Wespac or Christian, and Christian kept Garmong apprised of the decline in the stock market and the option of shifting Garmong's accounts to 100% cash if he so desired. For the same reason, Garmong's

breach of agency claim fails. Garmong's negligence claim fails because the evidence has not established Christian was negligent in performing his services to Garmong."

2. Summary of the deficiency of the Final Award

As discussed under the Summary section of the Seventh Claim, the Final Award disregards the facts that the stated events never occurred.

3. Manifest disregard of the law

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. 1-11), and reiterated the written instructions at several times thereafter (Exh. 1-12 to 1-14). 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."

Restatement (Third) Agency 8.09, comment c, last sentence, 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."

The Final Award attempts to shift the blame for the losses to Plaintiff, stating at 8:4-6 that Dr. Garmong "was free to terminate his relationship with Wespac and Christian," echoing the position of Defendants (Exh. 2-2, 106:10-107:8). The Final Award thereby disregards the fact that as long as Defendants did not resign (Exh. 2-3, 48:15-19) and continued to accept monthly pay as

shown on Exh. 1-30[3], and did not seek to revise the Agreement and their contractual duties, they were obligated to perform their agency, fiduciary, and contractual duties.

As discussed in Plaintiff's prehearing brief, Exh. 3-1, 23:28-24:3, and not refuted by Defendants or the arbitrator: "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 remained responsible for the losses they caused to Plaintiff's retirement savings as long as they removed their "advisor fee" from his accounts each month.

4. Disregard of the facts

The Agreement, Exh. 1-4, ¶ 5 establishes that Defendants were agents of Plaintiff, stating, "Client appoints WA as agent and attorney-in-fact[.]"

An agency establishes a contractual relation between the parties. Exh. 3-1 43:12-44:4. The elements, proofs, and damages are similar to those for breach of contract.

The significance of the agency relation lies in Defendants' unmet agency obligations. 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 (1988). Dr. Garmong instructed the Defendants/agents in writing before and while the agents acted (Exh. 1-3, Exh. 1-11 to 1-14), to conserve and avoid loss of capital. Restatement (Third) Of Agency § 8.09, last sentence of comment (c), states: "When an agent determines not to comply with an instruction, the agent has a duty to so inform the principal." TR1, 92:17-93:25. Mr. Christian never informed Dr. Garmong that he did not understand Dr. Garmong's objectives, or that he could not, or would not, comply with them. TR1, 92:17-93:25; 129:6-10; TR3, 32:12-15. Agency and fiduciary principles required him to do so, if in fact he did not understand them or would not comply.

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[3] Plaintiff has referenced documents for dollar amounts, so that this Motion need not be filed under seal.

Defendants were required to follow Dr. Garmong's instructions under contract, fiduciary, and agency principles. If they could not, or would not follow his instructions, they were obligated to tell him, or resign, under fiduciary or agency principles. Defendants testified that they never did so. Exh. 2-3, 48:15-19.

E. Tenth Claim for Relief--Breach of NRS 628.030

1. Final Award

"The evidence adduced at the arbitral hearing fails to show that Christian breached any duty to consider Garmong's financial condition or investment objectives, or otherwise failed to fulfill his responsibilities as an investment advisor and manager during Garmong's relationship with Wespac." "Similarly, the evidence presented does not establish that Christian or Wespac . . . violated NRS 628A.030."

2. Summary of the deficiency of the Final Award

There is clearly a manifest disregard of the law. The provisions of the governing statute are not even mentioned. Consequently, there is also a complete disregard of the facts.

3. Manifest disregard of the law

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 were not shown to be 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.

In the words of Defendant Christian, a fiduciary duty is "an obligation to do what's in the client's best interest." Exh. 1-58, 69:6-7; Exh. 2-3, 13:21-14:3. Mr. Christian decided that it was in the best interests of his client, Dr. Garmong, to conceal information and to lose a large amount of his retirement money--*without taking any action to stop the losses* and while acknowledging that he knew a "Stop Losses" technique for avoiding the losses (Exh. 1-20; Exh. 2-1, 125:16-126:9.

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. 1-11 to 1-14), they had a statutory duty to keep currently informed of that information. There is no evidence of record that they did so.

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."

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.

There is no evidence of record that Defendants maintained such insurance or bond during nearly all of the time that they maintained a business relation with him (Exh. 2-3, 9:23-13:8), nor did they disclose to him that they refused to conform to NRS 628A.040.

The Final Award disregards this important fact and Defendants' violation of statute. Taking notice of this fact would have mandated a decision for Plaintiff.

4. Disregard of the facts

Defendants are scofflaws, as discussed in detail for the Fifth Claim. But this Tenth Claim adds a further dimension, willful failure to maintain errors and omissions insurance as required by NRS 628A.040 for 2005-2007. Exh. 2-2, 131:18-134:24. Failure to maintain such insurance is not simply imprudent, but is a violation of statute. Dr. Garmong testified that he would never have dealt with Defendants if he had known they had no liability insurance. Exh. 2-1:107:22-108:19. Inasmuch as Defendant Christian was not an employee of Defendant Wespac at the time (Exh. 2-2, 129:10-25) both he and Wespac had the duty to maintain insurance.

The violations are set forth in NRS 628A.030(2), (a) violation of fiduciary duties, (b) gross negligence, and (c) violation of Nevada law. Most of these duties and their violations by Defendants are discussed above in relation to the Fifth, Sixth, and Ninth Claims, and at Exh. 3-1, 48:17-53:14.

An additional violation under subsection (c) is of NRS 628A.040, "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." Exh. 3-1, 51:16-52:1. Defendants were required to have insurance or a bond sufficient to cover any award of this litigation. Defendants had long been aware that the breach of NRS 628.040 would be an issue. Plaintiff's Request for Production No. 11, served May 24, 2018, requested "11. All records concerning insurance covering liability for errors or omissions, or surety bonds to compensate clients for losses, maintained by Defendants at any time." Defendants failed to produce any responsive records until the last day of the hearing, when they finally produced an insurance policy covering only a period at the very end of their relation with Plaintiff. (Exh. 2-3, 9:23-13:8.) Mr. Williams speculated that Wespac may have had insurance earlier through a parent company, but

had no policy. (Exh. 2-2, 130:2-136:24). Defendant Christian did not testify that he had insurance as mandated by NRS 628A.040.

Defendants violated NRS 628A.040, and are each liable under NRS 628A.030 to Plaintiff for his economic loss, costs, and attorneys fees, independent of, and in addition to, contract damages.

Once again, absent evident partiality on the part of the arbitrator, it is difficult to understand how the arbitrator could completely disregard the fact of Defendants' violation of NRS 628A.040. This violation was a major subject of the last two days of the hearing and was discussed extensively in Plaintiff's Post-Hearing Brief, Exh. 3-2 at 17:20-18:22. A person would have to be completely partial to the Defendants to disregard these facts and law, and come up with an excuse such as quoted at the start of this section: "Similarly, the evidence presented does not establish that Christian or Wespac . . . violated NRS 628A.030."

F. First Claim for Relief--Breach of Contract

1. Final Award

"Specifically, Garmong's breach of contract claim fails because he has failed to prove that Wespac and Christian failed to manage his investment accounts in accord with his express investment objectives and instructions. Garmong understood portions of his Wespac portfolio were in stocks and that such investments carry no guarantee of profit. The evidence adduced at the arbitral hearing fails to show that Christian breached any duty to consider Garmong's financial condition or investment objectives, or otherwise failed to fulfill his responsibilities as an investment advisor and manager during Garmong's relationship with Wespac."

2. Summary of the deficiency of the Final Award

The Final Award disregards evidence that the arbitrator recognizes. Beginning in October 2007, Plaintiff instructed Defendants Wespac and Christian on at least five occasions to manage his accounts so as not to lose capital. The Defendants disregarded this instruction, as did the arbitrator.

3. Manifest disregard of the law

The Final Award admits all elements of breach of contract except, apparently, that the

Defendant breached their obligations.

4. Disregard of the facts

The only reason given in the Final Award is that Plaintiff "has failed to prove that Wespac and Christian failed to manage his investment accounts in accord with his express investment objectives and instructions."

The Final Award disregards the fact that the working relation between Defendants and Dr. Garmong was that "Although WA [Wespac Advisors] may make investments without prior consultation with or consent from Client, all investments shall be made in accordance with the investment objectives of which Client has informed, and may inform, WA from time to time in writing." (Exh. 1-4, ¶ 5, WESPAC 00050-51). Defendants were to make investments according to Dr. Garmong's investment objectives. Exh. 2-1, 88:25-93:25. That is what Dr. Garmong expected from Wespac. Exh. 2-2, 108:5-24. Mr. Christian testified that he and Wespac were solely responsible for all the investing for Dr. Garmong. Exh. 2-3, 33:19-21. Dr. Garmong provided a written initial objective in 2005 in the Confidential Client Profile: "Moderately increasing my investment value while minimizing potential for loss of principal." (Exh. 1-3, WESPAC 00043).

The Final Award disregards the fact that Dr. Garmong testified that in a meeting with Mr. Christian in early October 2007, he provided an even more conservative objective, "Do not lose capital." Exh. 2-1, 119:19-120:3. Mr. Christian accepted these new circumstances. Exh. 2-1, 121:14-21. On September 13, 2018, Mr. Christian did not dispute this instruction, and stated in his deposition (Exh. 1-58, 110:21-24):

> Q. This conversation, this meeting in October of 2007, was it your testimony that you don't recall anything that got said in that conversation?
> A Yes.

Dr. Garmong testified that he mailed a confirming statement of investment objective on October 22, 2007 (Exh. 1-11; Exh. 2-1, 121:22-125:9). That letter confirmed the instructions of the meeting of early October, and that of the Agreement between the parties, that Defendants had complete control of account management, and restated 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."

Mr. Christian denied receiving the letter of October 22, 2007 (Exh. 1-11). Exh. 2-2, 220:6-8. But he explained that mail was normally received and processed by office staff before it even reached him, and, remarkably for a company that requires client objectives to be stated in writing, admitted that no record of incoming mail was kept (Exh. 2-3, 34:15-35:8). Mr. Christian did not deny that the letter was received by his office and office staff. No staff member was called to testify to the receipt and handling of this letter. There is a disputable presumption that a mailed letter is received, NRS 47.250(13). Lacking a factual basis for dispute, Defendants questioned the letter by innuendo, but have ignored the substance of the three consistent faxes to the same effect, which they admit receiving. Exh. 1-12 to 1-14.

The Final Award disregarded these facts and the disputable presumption of NRS 47.250(13), wrongly concluding that "the letter was never received by Wespac or Christian." (Final Award 5:2-5). There was absolutely no testimony that the letter was never received by Wespac.

The Final Award also disregards the facts that Plaintiff's revised objective and instructions were confirmed in faxes of January 21, 2008 (Exh. 1-12, "I have to avoid capital losses."), March 17, 2008 (Exh. 1-13), and June 12, 2008 (Exh. 1-14), all of which Mr. Christian admitted receiving.

Under both Dr. Garmong's original conservative objective and later even-more-conservative objective, Defendants had a contractual duty to manage Dr. Garmong's accounts to avoid loss of capital and protect his retirement savings. Yet from November 1, 2007 to February 28, 2009, Defendants breached their obligations under the contract and wasted a large amount of Dr. Garmong's retirement savings (Exhs. 1-24, 1-27, and 1-30; Exh. 2-1, 136:7-147:1).

The Final Award advances one defense, that " Garmong understood portions of his Wespac portfolio were in stocks and that such investments carry no guarantee of profit." This defense disregards the undisputed fact that Defendants were in complete charge of Plaintiff's retirement savings according to the Agreement. (Exh. 1-4, ¶ 5, WESPAC 00050-51); Exh. 2-1, 88:25-93:25;

Exh. 2-2, 108:5-24; Exh. 2-3, 33:19-21.).

The Final Award also disregards Mr. Christian's letter of September 30, 2008 (Exh. 1-17). After the second paragraph acknowledges that "go to 100% cash" was a viable strategy, the third paragraph states,

> 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.

Mr. Christian thus admitted that he knew that Mr. Garmong's objective was to protect his accounts from loss of capital. Mr. Christian sold a few securities to demonstrate that he knew what to do to avoid loss of capital, but admitted that he did not take action sufficient to stop the wasting of the accounts. He did not sell out all of the securities (i.e., "go to 100% cash"), as would have been prudent. The result was that it was "unfortunate" that he destroyed Dr. Garmong's retirement savings. But one party to the Agreement did not suffer–defendants collected all of their fees.

The Final Award at 8:4-6 asserts that Dr. Garmong "was free to terminate his relationship with Wespac and Christian," echoing the position of Defendants (Exh. 2-2, 106:10-107:8). The Final Award thereby disregards the fact that as long as Defendants did not resign (Exh. 2-3, 48:15-19) and continued to take an "advisor fee" from Plaintiff's accounts (Exh. 1-30), and did not seek to revise the Agreement and their contractual duties, they were obligated to perform their contractual duties.

The facts show that Defendants understood the objective, but did not minimize the potential for loss of capital and admittedly violated Dr. Garmong's later-stated objective, "Do not lose capital," thereby breaching their obligations under the Agreement. Mr. Christian argued that he did not breach the Agreement, and kept an infrequent watch on Dr. Garmong's life savings as he wasted them. Exh. 2-3, 52:3-25. The weight to be given Mr. Christian's testimony rests upon his credibility, which, as discussed above, is nil because he perjured himself in his early Affidavits and also at the hearing.

The Final Award further disregards extensive factual testimony of Defendant Christian and Defendants' expert Cramer. It disregards the fact that Mr. Christian testified about his ability to manage investments, specifically Dr. Garmong's non-tax-sheltered -0713 account. Exh. 2-2, 204:9-211:1. Yet he wasted a large amount from that account in 16 months. Exh. 1-27, Exh. 1-29; Exh. 2-1, 156:28-158:22. He testified that Defendants knew several techniques to avoid the capital losses, but did not apply them or even disclose them to Dr. Garmong. During the period of the greatest monthly losses in Dr. Garmong's accounts, June-September 2008, both Dr. Garmong (Exh. 2-1, 125:16-126:2; Exh. 131:11-14; 132:14-19) and Mr. Christian (Exh. 2-3, 26:25-26:18) testified that Mr. Christian never disclosed the "Stop Losses" technique to Dr. Garmong, or applied it for the benefit of Dr. Garmong's accounts. The Arbitrator so stipulated (Exh. 2-1, 152:4-11). Yet the Final Award disregards these facts. Mr. Christian also knew that he could sell securities to "raise cash," thereby reducing the risk in Dr. Garmong's accounts. Exh. 1-17. Mr. Cramer testified that an investment advisor would properly do so on a *temporary* basis while the market was in decline (Exh. 2-2, 76:13-78:2), and that the advice would change responsive to market conditions for the client's best interests (Exh. 2-2, 81:1-82:16). Mr. Christian, on the other hand, testified that he refused to recommend that Dr. Garmong's accounts be converted to an all-cash position to protect the investments, even *temporarily* during a market decline, so that if Dr. Garmong suffered losses, it was his own fault. Exh. 2-3, 37:5-14, 44:7-18. Mr. Christian refused to do the job he was paid to do, particularly during the worst months of the decline in Dr. Garmong's accounts.

G. Second Claim for Relief--Breach of implied warranty in contract

1. Final Award

"Garmong's claim for breach of implied warranty fails as a matter of law. As argued by Wespac and Christian, the overwhelming weight of authority holds that a breach of implied warranty claim cannot be sustained in the context of a contract for services. See, e.g. Lufthansa Cargo A.G. v. County of Wayne, 2002 WL 31008373 at *5 (E.D. Mich)."

2. Summary of the deficiency of the Final Award

The Final Award disregards the facts establishing breach of implied warranty, and asserts

a single reason for denying the Second Claim, that breach of implied cannot be sustained as a matter of law based upon the single best authority it can muster, Lufthansa Cargo, a cased based entirely upon the law of Michigan. It manifestly disregards the holding of the Nevada Supreme Court applying Nevada law.

3. Manifest disregard of the law

a. In Nevada, 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.

Robert Dillon Framing and the extensive authority cited in Williston on Contracts ¶ 63:25 establish that, in Nevada, there is an implied warranty accompanying service contracts.

The arbitrator was fully aware of Robert Dillon Framing and Williston on Contracts ¶ 63:25, at 525, as they were cited to the arbitrator in Dr. Garmong's pre-hearing brief, Exh. 3-1 at 9:12-20. Instead, the arbitrator exhibited manifest disregard for the law by relying on Lufthansa Cargo, which is founded upon and limited to statutory provisions of the State of Michigan. Lufthansa Cargo, 2002 WL 31008373 at *5, states, "A breach of implied warranty claim cannot be alleged in the context of a 'contract' for services, such as the contract at issue in the case at bar. See Allmand Assoc. v. Hercules, Inc., 960 F.Supp. 1216, 1230 (E.D. Mich. 1997) ("warranties of . . . fitness for a particular purpose are, by their nature, inapposite to a contract for services." In turn, Allmand Assoc. states that its holdings are controlled by Mich.Comp. Laws § 440.2202, expressing Michigan's version of Section 2–202 of the Uniform Commercial Code. Because Mich.Comp. Laws § 440.2202 expressly applies only to transactions in goods, it certainly follows that, in a case governed by Mich.Comp. Laws § 440.2202, there is no warranty for beach of contract for a services

contract in Michigan. The present second claim for relief is not brought under Mich.Comp. Laws § 440.2202 or the Uniform Commercial Code, but instead under Nevada common law.

The arbitrator manifestly disregarded the applicable law and chose that confined to application of a statute of Michigan.

H. Third Claim for Relief--Contractual Breach of Implied Covenant of Good Faith and Fair Dealing

1. Final Award

"Garmong's claim for breach of the implied covenant of good faith and fair dealing fails because it is not supported by sufficient evidence of breach by Wespac or Christian. Similarly, Garmong's claim for tortious breach of the implied covenant of good faith and fair dealing fails for the same reason."

2. Summary of the deficiency of the Final Award

The Final Award is deficient because it expresses only a conclusion. There is a complete disregard of the governing substantive law and the facts which constitute "evidence of breach."

3. Manifest disregard of the law

The Final Award completely disregards the law of contractual breach of the implied covenant of good faith and fair dealing, as set forth at Exh. 3-1, 10:23-12:1. Plaintiff does not question the Final Award's interpretation of this law, because none is set forth.

Based upon Hilton Hotels Corp. v. Butch Lewis Productions, Inc., 107 Nev. 226, 808 P.2d 919, 922-23 (1991) and Andreatta v. Eldorado Resorts Corporation, 214 F. Supp. 3d 943, 956-57 (D. Nev. 2016), applying Nevada law, the elements of contractual breach of the implied covenant of good faith and fair dealing are: 1) A contract between the parties; 2) "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[.]"; 3) The other non-breaching party performed all obligations required under the contract or was excused from performance and 4) 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.

There is absolutely nothing in the Final Award to suggest that it applied this standard.

4. Disregard of the facts

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[.]' "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.'" Hilton Hotels Corp. v. Butch Lewis Productions, Inc., 107 Nev. 226, 808 P.2d 919, 922-23 (1991). See Exh. 3-1, 11:12-12:12.

The Final Award disregards the following facts. The Confidential Client Profile, Exh. 1-3, dated August 18, 2005, states at WESPAC 00047, "My goal is providing for retirement." The letter of October 22, 2007, Exh.1-11, states at GG 0003, "I have retired as of August 31, 2007[.]" The purpose of Dr. Garmong's dealing with Defendants was to provide for his retirement by conservative investments so that his nest egg would keep pace with inflation and not lose capital (Exh. 2-1, 61:16-68:20; Exh. 2-1, 179:14-20; Exh. 2-2, 119:14-124:1). Dr. Garmong paid Defendants to accomplish these objectives. In the 16 months following retirement, Defendants wasted Dr. Garmong's retirement savings in the amount shown on Exh. 1-27 and 1-30, which was unfaithful to the purpose of the contract and Dr. Garmong's expectations.

I. Fourth Claim for Relief--Tortious Breach of Implied Covenant of Good Faith and Fair Dealing

1. Final Award

"Garmong's claim for breach of the implied covenant of good faith and fair dealing fails because it is not supported by sufficient evidence of breach by Wespac or Christian. Similarly, Garmong's claim for tortious breach of the implied covenant of good faith and fair dealing fails for the same reason."

2. Summary of the deficiency of the Final Award

The Final Award is deficient because it expresses only a conclusion. There is a complete disregard of the governing substantive law and which facts constitute "evidence of breach."

3. Manifest disregard of the law

The Final Award completely disregards the law of contractual breach of the implied covenant of good faith and fair dealing, as set forth at Exh. 3-1, 15:13-16:24. Plaintiff does not question the Final Award's interpretation of this law, because none is set forth.

Based upon K Mart Corp. v. Ponsock, 103 Nev. 39, 49-50, 732 P.2d 1364, 1371 (1987) and Shaw v. CitiMortgage, Inc., 201 F.Supp. 3d 1222, 1254 (D. Nev. 2016), applying Nevada law, 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.

4. Disregard of the facts

The presence, and violation, of a fiduciary duty converts the contractual breach into a tortious breach, with availability of tort damages. In the present case, the law provides, and Defendants readily admit, that they had a fiduciary duty to Dr. Garmong. (summarized at Exh. 3-1 17:1-4; 33:19-34:6) See also the discussion of the Sixth Claim.

Additionally, the cause of action requires that "the party in the superior or entrusted position has engaged in grievous and perfidious misconduct." K Mart Corp. v. Ponsock, 103 Nev. 39, 49-50, 732 P.2d 1364, 1371 (1987). Exh. 3-1, 15:16-16:24. The Final Award disregards an extensive array of facts. Defendants knew full well that Dr. Garmong was over 60 years of age, and relied upon them to protect and conservatively grow his retirement savings. They knew how to protect Dr. Garmong's retirement and savings accounts by using a conservative approach, "raising cash," (Exh. 1-17) and the "Stop Losses" investment technique. Mr. Cramer asserted that

a reasonable strategy to preserve capital in a declining market would be to sell securities and put the accounts entirely in cash equivalents, temporarily. Exh. 2-2, 77:11-82:8. Mr. Christian refused to consider this approach. Exh. 2-3, 37:5-14, 43:17-44:18. At the time when the worst of the losses occurred, June-September 2008 (Exh. 1-27), Defendants advocated the use of "Stop Losses" to prospective clients for "all equity purchases" (Exh. 1-20), but not to Dr. Garmong, with whom they already had contractual, fiduciary, and agency obligations.

Defendants "grievous and perfidious misconduct" is also evidenced by their conscious disregard of Dr. Garmong's objectives and welfare by, among other things, concealing their failure to adhere to SEC and Nevada state law, concealing Mr. Christian's prior discipline and suspension by the SEC for defrauding clients, and the failure to disclose Mr. Christian's other conflicting business– Fusion. (See discussion under Fifth and Sixth Claims.). When Wespac was acquired in 2009, the new owners forced Mr. Christian to end his involvement in Fusion because it was a conflict of interest, Exh. 1-58, 32:2-21.

Dr. Garmong testified (Exh. 2-1, 106:3-108:17) that he did not know these concealed facts and would never have dealt with Defendants if they had disclosed any of these concealed facts.

J. Ninth Claim for Relief--Negligence

1. Final Award

"The evidence adduced at the arbitral hearing fails to show that Christian breached any duty to consider Garmong's financial condition or investment objectives, or otherwise failed to fulfill his responsibilities as an investment advisor and manager during Garmong's relationship with Wespac."

"Garmong's negligence claim fails because the evidence has not established Christian was negligent in performing his services to Garmong."

2. Summary of the deficiency of the Final Award

This statement completely disregards the legal standards imposed upon fiduciaries, discussed above in relation to the Sixth Claim, and the requirements imposed upon financial planners under NRS Ch. 628A, discussed above in relation to the Tenth Claim, and the facts establishing the violations by Defendants.

3. Manifest disregard of the law

There is not one word in the Final Award suggesting that the arbitrator followed the law of negligence, which was communicated to him in Exh. 3-1 at 45:20-23.

Briefly, "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." Sanchez Ex Rel. Sanchez v. Wal-Mart, 221 P.3d 1276, 1280 (Nev. 2009).

4. Disregard of the facts

NRS 628A.020 establishes a clear negligence standard for financial planners such as Defendants: "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." NRS 628A.030 establishes the basis of a violation: (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 Final Award disregards the hearing exhibits and testimony which establish that Defendants had (1) duties of care as a result of their fiduciary duties to "to do what's in the client's best interest" (Exh. 2-3, 13:21-14:3; Exh. 1-58, 69:6-7) and also to disclose and use known techniques, such as "raising cash" (Exh. 1-17) and the "Stop Losses" technique (Exh. 1-20) to safeguard Dr. Garmong's retirement savings; (2) the duties were breached, as Defendants did not do what was in Dr. Garmong's best interests when they wasted a large amount of his lifetime retirement savings, and they did not act to avoid these losses and also did not apply the "Stop Losses" technique.

The Final Award disregarded all of this evidence.

K. Eleventh Claim for Relief--Intentional infliction of emotional distress

1. Final Award

"Similarly, the evidence presented does not establish that Christian or Wespac

intentionally inflicted emotional distress to Garmong in accord with the elements set forth in *Posadas v. City of Reno*, 851 P.2d 438 (Nev. 1993)[.]"

2. Summary of the deficiency of the Final Award

There is complete disregard of both the governing substantive law and the facts established by the exhibits and testimony.

3. Manifest disregard of the law

To establish a cause of action for intentional infliction of emotional distress, the plaintiff must establish: (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. Star v. Rabello, 97 Nev. 124, 125, 625 P.2d 90, 91-92 (1981); Exh. 3-1 at 53:17-26 and 55:1-19. There is no indication in the Final Award that this standard was followed.

4. Disregard of the facts

The Final Award disregards the extreme and outrageous conduct evidenced by Defendants' wasting of the lifetime retirement savings of the elderly Dr. Garmong, when they knew he was relying upon them to provide for his retirement, occurring during the period 2005 to the present. Generally, see Exh. 2-1, 152:18-156:13. Exh. 1-15, quoted at Exh. 3-1 54:5-17, expressed the emotional distress suffered by Dr. Garmong. See also Exh. 1-13. Dr. Garmong had also related this stress to Mr. Christian. But all of this did no good. It was received with the same icy detachment as seen in the letter of Mr. Christian to Schwab of Exh. 1-21, and in Mr. Christian's testimony at the hearing.

At Exh. 2-1, 155:14-156:9, the Arbitrator acknowledged that one source of emotional distress is litigation, and raised the question of whether this tort may be founded in part upon information, such as Exh. 1-20, learned during this proceeding. Plaintiff has located no authority that would bar such an award for emotional distress suffered after the filing of the lawsuit. Claim 11 is for emotional distress suffered at any time due to Defendants' acts, see First Amended Complaint ¶¶ 52-57.

L. Doubling of Damages Pursuant to NRS 41.1395

1. Final Award

Doubling of damage was not addressed in the Final Award.

2. Summary of the deficiency of the Final Award

Not applicable.

3. Manifest disregard of the law

The statutory elements of proof for a doubling of damages are (Exh. 3-1, 56:22-57:4):

> 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.

NRS 41.1395.

4. Disregard of the facts

The Final Award disregards all of the facts necessary to establish doubling of damages under NRS 41.1395. Dr. Garmong was at all relevant times an "older" person, as he was over 60 years of age. NRS 41.1395(4)(d). Dr. Garmong suffered a loss of his retirement savings as shown on Exh. 1-27.

The loss of money was caused by "exploitation," as that term is defined in NRS 41.1395. Wespac and Mr. Christian exerted control, through deception and undue influence, over Dr. Garmong's money charging him "advisor fees" in an amount shown on Exh. 1-30, with the intention of permanently depriving Dr. Garmong of its ownership, use, benefit or possession. See Exh. 1-21, where Mr. Christian states as point 5 that "We have not and do not intend reimburse management fees." and as point 4, "We have no plans of entering into a settlement offer with Mr. Garmong."

SUMMARY AND CONCLUSION

The Final Award may be vacated on either statutory or nonstatutory grounds. Multiple

statutory grounds are established here. Nonstatutory grounds are based upon disregard of facts or manifest disregard of the governing legal authority. The Final Award evidences disregard by the arbitrator of virtually all of the evidence established at the hearing to support the Claims and doubling of damages of the First Amended Complaint, and manifest disregard of virtually all of the governing legal authority.

The outcome of the arbitration by arbitrator Pro is just plain wrong. Under his ruling, notwithstanding their contractual, fiduciary, and agency obligations to Dr. Garmong, Defendants have gotten away with wasting hundreds of thousands of dollars of his retirement savings entrusted to them, and with extensive misrepresentations and dishonesty, all while collecting management fees.

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

DATED this 22nd day of April, 2019.

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

Counsel for plaintiff

INDEX OF EXHIBITS

NOTE: The following exhibits will be the subject of a motion to file under seal with access only to the parties and the court: 1-3, 1-9, 1-11, 1-12, 1-13, 1-14, 1-15, 1-20, 1-22, 1-24, 1-24-1, 1-25, 1-27, 1-28, 1-29, 1-30, 1-31, 1-32, 1-33, 1-34, 1-35, 1-58, 1-60, 2-1, 2-2, 2-3, 3-1 and 3-2.

Number	Description	Pages
1-1	Brochure "Wespac Advisors, LLC" (GG 0340-0341)	2
1-2-1	Brochure "Wespac"-Part 1 (GG 0342-0349)	8
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GREGORY O. GARMONG,

Plaintiff,

vs.

CASE NO. : CV12-01271

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

DEPT. NO. : 6

Defendants.
_____/

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO CONFIRM ARBITRATOR'S AWARD

Plaintiff opposes "Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reduce Award to Judgment, including, Attorney's Fees and Costs." ("Defendants' Petition").

SUMMARY

The first basis for this Opposition is that, contrary to the requirements of NRS § 38.231(1)-(3), as interpreted by Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985), Defendants have made no "showing [of] an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement."

When a party seeks arbitration based upon a purported contract containing an alleged agreement to arbitrate, NRS § 38.231(1)-(3), as interpreted by Obstetrics and Gynecologists, requires that the party offer to the Court and to the arbitrator, and make of record, a binding contract including an agreement providing for arbitration. That would seem to be a simple, straightforward matter if such a binding contract exists. It was not for

the Defendants in this case, because no such binding contract exists now, or ever existed.

In the present case, Defendants filed with the Court a First Version of a purported Contract with a First Version of an alleged Investment Management Agreement ("Agreement"), which by its terms required inclusion of a completed Confidential Client Profile, two different Exhibits A and two different Exhibits B. The First Version of the purported Contract included a First Version of a purported Confidential Client Profile that was blank, and by its terms required yet a third Exhibit A and a third Exhibit B. That is, the First Version of the Agreement and the First Version of the Confidential Client Profile together called for a total of three different Exhibits A and three different Exhibits B. The First Version did not include any Exhibits A or any Exhibits B.

Defendants later offered to the arbitrator a Second Version of a purported Contract with a Second Version of alleged Agreement, a second version of the purported Confidential Client Profile, no Exhibits A, and no Exhibits B. There was also missing from the Second Version critical pages 10-11 of the Confidential Client Profile.[1]

To add to the confusion, Defendant Greg Christian stated under oath in his hearing testimony (Exh. 8) that it was "obvious" that one of the Exhibits B is really an Exhibit A, blamed the clerical staff for his error, never corrected the confusion between "Exhibit A" and "Exhibit B" in the actual Agreement, and stated that he was really just "guessing" on the meaning of the Agreement.

If Defendants cannot identify one, and only one, true, complete, correct, certain, unambiguous, definite, verified and binding Contract in the record as it now exists, the arbitrator's Final Award cannot be confirmed because there was no agreement to arbitrate. Such a single true, complete, correct, certain, unambiguous, definite, verified and binding Contract would include a single valid Agreement, a single valid Confidential Client Profile, the mysteriously missing completed pages 10-11, three valid Exhibits A, and three valid

---

[1] It is too late to attempt to introduce the missing parts of the purported "Contract," attempt to verify them, and attempt to weave them into a valid, binding "Contract," as the arbitrator's Final Award was based on the record as it then existed.

Exhibits B. These three Exhibits A and three Exhibits B are called for in the various versions of the Agreement and the Confidential Client Profile advanced by the Defendants, and cannot be disregarded or explained away by a "guess."

In addition to the present Opposition, Plaintiff has filed "Plaintiff's Motion to Strike Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reduce Award to Judgment, Including, Attorney's Fees and Costs," requesting that the Court strike Defendants' current Petition in the absence of a single binding purported Contract containing an arbitration provision.

The second basis for the Opposition is the fraud perpetrated by Defendants and their attorney upon the Court, the arbitrator, and Plaintiff by falsely representing that the First Version was "true, complete, and correct" in order to persuade this Court to refer the case to arbitration, and by initially concealing the Second Version and later changing to the Second Version in arbitration.

The third basis for the Opposition is that the arbitrator's Final Award must be vacated for any of several other reasons as set forth in Plaintiff's Motion to Vacate Arbitrator's Final Award; 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, and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees.

NOMENCLATURE

Care is required in the nomenclature describing the documents at issue here. The inquiry is to determine whether Defendants have satisfied their burden of identifying in the record a complete, binding "Contract" including an arbitration provision. The term "Contract" is used to avoid confusion, because one part of the Contract is called the Investment Management Agreement, or "Agreement."

Defendants have included in the record multiple versions of some parts of the purported Contract, mischaracterized other parts of the purported Contract, and included

in the record no versions of yet other parts of the purported Contract.

Defendants filed at least two versions of the alleged "Agreement," one 7 pages in length and the other 8 pages in length. Paragraph 14 of both versions of the Agreement states in part: "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." Defendants also submitted at least two versions of the Confidential Client Profile, one 9 pages in length and the other 13 pages in length (the latter sometimes described by Defendants as being 11 pages in length and sometimes as being 13 pages in length), none of three Exhibits A in an executed form, and none of three Exhibits B.

That is, a complete binding Contract between the parties must include the Agreement, a document entitled "Confidential Client Profile" and all Exhibits A and B identified in either the Agreement or the Confidential Client Profile.

ARGUMENT

This Court and Plaintiff are entitled to have identified for them the documents from the record that the Defendants contend constitute the single, complete, binding purported Contract that they claim includes an arbitration provision. NRS § 38.221(1) and case authority such as Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) require that the party asserting an agreement to arbitrate, here Defendants, must make of record a binding Contract that includes an arbitration provision. Defendants have never done so.

A. Plaintiff's standing to challenge the existence of an Agreement to Arbitrate.

On March 27, 2017, before the arbitration had commenced, Plaintiff filed with this Court "Plaintiff's Objection Pursuant to NRS § 38.231(3) and § 38.241(1)(e) that there is no Agreement to Arbitrate; Notification of Objection to the Court." Such a filing is a prerequisite to contesting the existence of an agreement to arbitrate under NRS §

34.241(1)(e)).

B. Defendants' First Version of the "purported Contract."

On September 19, 2012, in support of their Motion to Dismiss and to Compel Arbitration, Defendants filed a (First) Affidavit of Greg Christian (Exh. 1 hereto) asserting under oath that Exhibit 1 thereto (Exh. 2 hereto) was a "true, correct, and complete copy of the Investment Management Agreement signed by me and Gregory Garmong."

Plaintiff thereafter pointed out that Exh. 2 started its page numbering at "page 12," ended at "page 18," (*i.e.*, 7 pages total) and that pages 1-11 were missing. Plaintiff also pointed out that Exh. 2 called for a Confidential Client Profile and for two different Exhibits A and two different Exhibits B, that were all missing. Exh. 2 hereto has no Exhibits A and no Exhibits B.

On December 3, 2012, Defendants filed a (Second) Affidavit of Greg Christian (Exh. 3 hereto) re-alleging in ¶ 5 the prior statement concerning Exh. 2, and further stating under oath in ¶ 6 that "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 a result of a word processing and/or computer error."

Plaintiff persisted, pointing out that a page numbering error does not explain the absence of a Confidential Client Profile, and the absence of two Exhibits A and two Exhibits B.

On January 9, 2013, Defendants filed "Defendants' Opposition . . . ." (Exh. 4 hereto). Attached to Exh. 4 is a (Third) Affidavit of Greg Christian stating at ¶ 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 Exhibit 1 referenced in Exh. 4 is Exh. 5 hereto. This quoted statement from Exh. 4 is at odds with the last page of Exh. 4, which asserts that the Confidential Client Profile has thirteen pages. By counting the pages, Exh. 5 indeed has thirteen pages, not eleven pages as the (Third) Affidavit of Greg Christian states. The page numbering style, beginning on the third page of Exh. 5 and not the first page, in the

lower right hand corner is "1", "2", etc., not "page 1", "page 2", etc. to follow the same numbering style as the Exh. 2.

Exh. 5 calls for an additional Exhibit A and an additional Exhibit B on page "1". That is, Exh. 2 and Exh. 5 together specify a total of three Exhibits A and three Exhibits B. Page "1" of Exh. 5 states that its Exhibit A and Exhibit B are to be found at pages "5-11" of Exh. 5. Page "1" states that this new Exhibit A is a "Fee Schedule" and that Exhibit B is a "Portfolio Appraisal/Security Cost Basis Form." Inspection of pages "5-11" of Exh. 5 shows that they are no such thing, and instead are an "Investment Policy Questionnaire," a "Risk Tolerance Profile," a "Target Portfolio Design," and a "Client Acknowledgment." No Exhibit A or Exhibit B are present as pages "5-11" or otherwise.

The "true, correct, and complete copy of the Confidential Client Profile," Exh. 5, is completely blank. No explanation was given as to how a blank Confidential Client Profile could be part of a "true, complete, and correct," binding purported Contract. Placing a blank form into a document that seeks to bind one party is illusory and fraudulent. The reference in Exh. 4 to the "first eleven pages of the document" establishes that the there is more than just an Investment Management Agreement. Plaintiff will refer to the entirety of these papers as the "purported Contract" between the parties.

To summarize, at the conclusion of this initial portion of the proceedings in 2012-2013, prior to referral to the arbitrator, the Defendants had represented to this Court, under oath, that the purported Contract includes an Investment Management Agreement (Exh. 2) having "page 12" to "page 18", a blank, thirteen-page Confidential Client Profile (Exh. 5) that according to the (Third) Affidavit of Greg "comprised the first eleven pages of the document," three different Exhibits A (none of which were provided) and three different Exhibits B (none of which were provided).

This assembly of paper cannot be a "binding" contract.

C. Defendants' Second Version of the "purported Contract."

Defendants foisted the First Version of the "purported Contract" upon the Court solely to persuade the Court to refer the case to arbitration, in circumstances where

Plaintiff was not able to do discovery with Defendants about this "purported Contract." Defendants knew they could not get away with the First Version under examination by Plaintiff. Defendants therefore introduced into the arbitration proceedings a Second Version of the "purported Contract."

Exh. 6 hereto is the Second Version of the Investment Management Agreement (the First Version being Exh. 2), bearing the Wespac Document Production numbers WESPAC 000048-WESPAC 000055. There are important, material differences between the two versions. The Second Version now has an additional page appended and numbered "page 19," for a total of 8 pages in this Second Version of the purported Agreement as compared with 7 pages in the "true, correct, and complete" First Version (Exh. 2). New page 19 is said to be "Exhibit A–Fee Schedule," but it is not executed at the bottom as required.

Inasmuch as the First Version was stated under oath by the (First) Affidavit of Greg Christian of September 19, 2012 to be "true, correct, and complete," no explanation is given why the new Investment Management Agreement (Exh. 6) was earlier concealed. Apparently the First Version (Exh. 2) is now admitted by Defendants not to be "true, correct, and complete," and the (First) and (Second) Affidavits of Greg Christian must necessarily be perjured.

Exh. 7 hereto is the Second Version of the Confidential Client Profile (the First Version being Exh. 5) bearing the Wespac Document Production numbers WESPAC 000039-WESPAC 000047. The differences between the two versions of the Confidential Client Profile are even greater than those between the two versions of the Investment Management Agreement. First, Exh. 7 is completed, while Exh. 5 is blank. And recall that Exh. 5 was numbered "1"-"11" in order to superficially match to "page 12"-"page 18" of Exh. 2 with a false suggestion of continuity. The Second Version of the Confidential Client Profile (Exh. 7) has page numbers only up to "9". Now it no longer is even superficially continuous in page numbering with Exh. 6, the Second Version of the Investment Management Agreement. There is no explanation for missing pages 10-11 that lie

between the last page "9" of Exh. 7 and the first "page 12" of Exh. 6, which were shown at the hearing to be critical omissions. Once again, inasmuch as the blank First Version was stated under oath by Greg Christian's Affidavit of January 9, 2013 to be "true, correct, and complete," Defendants now must admit that the (Third) Affidavit of Greg Christian is perjured.

Both the First Version and the Second Version are incomplete collections of paper. Neither is a complete, valid, unambiguous, binding contract.

These points were made to the arbitrator, but he disregarded them, despite the requirement that the party asserting a contract having an agreement to arbitrate has the burden of showing that a binding agreement existed. Obstetrics and Gynecologists, *supra*.

D. Defendants cannot successfully cobble together a "mix and match" version of a Contract having an agreement to arbitrate.

In desperation, Defendants might attempt to form a "mix and match" version of the purported Contract, by selecting the First Version of the Confidential Client Profile (Exh. 5) from the First Version of the "purported Contract," and the Second Version of the Agreement (Exh. 6) from the Second Version of the "purported Contract," in order to achieve superficial page numbering continuity between Exh. 5 and Exh. 6. That doesn't work, because Exh. 5 is blank, and therefore is not "complete, true and correct." Nor does any other "mix and match" combination work. And in any event, still missing are the three Exhibits A and the three Exhibits B. There is simply no way that Defendants can piece together a self-consistent version of a purported Contract.

E. Defendants, as the "party requesting arbitration," have a "burden of showing that a binding agreement existed."

A party requesting arbitration must, under Nevada law, show that a binding contract existed, including an agreement to arbitrate. Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) held,

> NRS 38.045 [now superseded by NRS § 38.221] provides that if a party requests a court to compel arbitration pursuant to a written agreement to arbitrate, and the opposing party denies the existence of such an agreement,

> the court shall summarily determine the issue. See Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 729, 558 P.2d 517, 521–522 (1976). Since appellant set up the existence of the agreement to preclude the lawsuit from proceeding, it had the burden of showing that a binding agreement existed. After reviewing the facts, we cannot say that the district court erred in finding that appellant did not sustain that burden.

See also NRS § 38.221.

In the present case, Defendants, having requested the arbitration, have the burden of "showing that a binding agreement existed." So far, they have attempted to finesse their way around this requirement by presenting the First Version of the "purported Contract" to the Court early in the case, and the Second Version to the arbitrator later in the case, all the while refusing to make of record three Exhibits A, three Exhibits B, and the crucial missing completed pages 10-11 of the Second Version Confidential Client Profile. Defendants' aim is that the Second Version of the "purported Contract" would never reach the Court for comparison with the First Version, and for this reason their Motion to Confirm did not include a copy of any version of the "purported Contract" as required by law. Defendants have never met, or even attempted to meet, this burden of "showing that a binding agreement existed," at least for the reason that they have offered two versions on the Court.

At the arbitration hearing Defendant Christian was asked (excerpt quoted at Exh. 8) to explain whether he had ever seen an Exhibit B in the Investment Management Agreement (Exh. 6 hereto, Exhibit 4 of the arbitration hearing exhibits). He responded lamely that the appearance of the reference to "Exhibit B" in the Investment Management Agreement was a "typo," blamed the clerical staff, incredibly asserted that "obviously" "Exhibit B is Exhibit A," and that he was "guessing" about the meaning of the Investment Management Agreement. The following is a quotation from the testimony of Defendant Christian transcript of the arbitration hearing Day 3, 21:18-22:7,

> Q. Do you see subpart 3 on the next page that it says "Brokerage"? [note–this refers to line 8 of "page 13" of Exh. 6].
> A. I do.
> Q. Okay. That's -- do you see that first sentence? That's the Exhibit B I'm talking about; have you ever seen that Exhibit B?
> A. No, because that's exactly what I was discussing with you a

minute ago.

Q. So Exhibit B is Exhibit A?

A. Well, obviously, yes. There's a typo or something in this document. I mean, we've changed this document to accommodate Mr. Garmong, and I'm sure whoever read it typed -- made a typo, didn't see it, transposed the data.

Q. Do you have any direct knowledge of that or are you just guessing?

A. I'm guessing on that one.

It was "obvious" to Mr. Christian that the document that Defendants rely upon as the Investment Management Agreement, Exh. 6, was incorrect, but he did nothing to correct the error. Instead, he must "guess" at the meaning of the document.

This further deception by the Defendants is part of their use of the First Version and the Second Version of the purported Contract to deceive the Court, the arbitrator, and Plaintiff. Neither the Court nor Plaintiff can be held to understand (and Plaintiff to be bound by) the purported Contract if the Defendants, who prepared it, states that "obviously" "Exhibit B is Exhibit A", and must "guess" at the meaning of Exh. 6.

Any "agreement to arbitrate" must be a complete, certain, definite contract for any portion of it to be valid, enforceable, and binding. NRS § 38.221(3). An incomplete, uncertain, indefinite collection of paper purporting to be a "contract" or an "agreement" cannot be enforced or binding on the victimized party. See Dodge Bros., Inc. v. Williams Estate, 52 Nev. 364, 287 P. 282, 283-4 (1930), holding that "There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite. As to the principle stated, there is no dispute"; All Star Bonding v. State of Nevada, 119 Nev. 47, 49, 62 P.3d 1124, 1125 (2003) ("[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain."); May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite.").

Defendants prepared the two different collections of paper, the First Version and the Second Version, that they assert are each the one true binding purported Contract and

forced them onto Plaintiff. Any incompleteness, uncertainty, indefiniteness, or ambiguity must therefore be interpreted against Defendants' interests. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 (1995).

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

The "purported Contract" must also be interpreted against Defendants because they either can not or will not provide all of the parts of the Contract, in an unambiguous form. There is no question that Defendants had possession, custody, and control of all of the parts of the purported Contract, if they ever existed. They prepared the papers, and never gave a copy of them to Plaintiff until the present lawsuit was filed. The unavailability of material evidence, through destruction or spoilation, results in either an adverse inference or a rebuttable presumption, under NRS § 47.250(3), against the controlling party. Bass-Davis v. Davis, 122 Nev. 442, 445 and 451-453, 134 P.3d 103, 105 and 109-110 (2006). In the present case, it is not necessary to determine whether Defendants lost or intentionally destroyed the relevant Exhibits A and Exhibits B, and the completed missing pages 10-11. The fact of the matter is that Defendants did not produce the three Exhibits A, the three Exhibits B, or the crucial missing completed pages 10-11 of the Confidential Client Profile, and they are not found in the record. The Court may not infer some content to the missing Exhibits A, Exhibits B, and pages 10-11 in order to sustain the Contract. All Star Bonding, *Id.*

If they wished to enforce an arbitration provision, Defendants had an obligation to place into the record a complete, binding Contract that unambiguously included all of the pieces in authenticated form–one Agreement, one Confidential Client Profile, the missing completed pages 10-11 of the Confidential Client Profile, three separate and distinct Exhibits A, and three separate and distinct Exhibits B. They have not done so.

Certainly if they now disagree, and can point out where in the record all of the parts

of the Contract are unambiguously found, they may do so in their Reply.

F. There is of record no allegation of Plaintiff refusing to arbitrate pursuant to any agreement.

NRS § 38.231(1) has the additional requirement that the record must include a factual allegation, prior to the lawsuit, of "another person's refusal to arbitrate pursuant to the agreement." There is no evidence of any such allegation prior to the commencement of the lawsuit.

G. Fraud upon the Court, the arbitrator, and Plaintiff, by Defendants and their attorney in misrepresenting that the First Version was "true, complete, and correct," when they had the different Second Version in their possession but concealed it, and first disclosed and relied upon the Second Version later.

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

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

In 2012-2013, when they represented to the Court that the First Version of the Contract was "true, correct, and complete," and asked the Court to take action by referring the case to arbitration, Defendants and their attorney also had in their possession the Second Version of the Contract, which they concealed until the arbitration phase in 2018. Defendants and their attorney knew that both the First Version and the Second Version could not be "true, correct, and complete."

The three elements of Nelson v. Heer are met: Defendants made a false representation with respect to the First Version, and concealed the Second Version. Their intent was to induce this Court and the Supreme Court to refer the case to arbitration, and they were successful. Damages resulted by deceiving the Court, the arbitrator, and Plaintiff, and from the time, fees, costs, and award by the arbitrator against Plaintiff.

Defendants perpetrated a straightforward fraud upon the Court, the arbitrator, and Plaintiff. In 2012-2013 they falsely represented that the First Version of the purported Contract was "true, correct, and complete," concealed the Second Version, and later switched to the Second Version for the arbitration. By this device, they fraudulently obtained a arbitrator's Final Award. The courts have addressed such fraudulent procurement of a judgment. As discussed in NC–DSH, Inc. v. Garner, 125 Nev. 647, 650, 218 P.3d 853, 856 (2009), "when a judgment is shown to have been procured by fraud upon the court, no worthwhile interest is served in protecting the judgment." Id. at 653, 218 P.3d at 858. A "fraud upon the court" is defined as "only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases. . . ." Id. at 654, 218 P.3d at 858. "An attorney is an officer of the court"; as such, an attorney "owes a duty of loyalty to the court . . . , [which] demands integrity and honest dealing with the court." Id. at 654–55, 218 P.3d at 858-59 (internal quotation marks omitted). "And when [an attorney] departs from that standard in the conduct of a case[,] he perpetrates fraud upon the court." Id. at 655, 218 P.3d at 859.

There is no question that the presentation of the First Version, while concealing the Second Version, to persuade the District Court to order arbitration, and then later revealing the Second Version during the arbitration process, is such a fraud upon the Court.

The 2019 version of the Nevada Rules of Civil Procedure provides for relief from any judgment procured by fraud:

> Rule 60. Relief from a judgment or order
> Rule 60 (b) Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party

Plaintiff has searched the law of Nevada and that of other states, and can find no authority that permits an arbitration defendant and its attorney to perpetrate, on the Court,

the arbitrator, and the plaintiff, two different versions of the mandatory "binding Contract" containing an agreement to arbitrate, at different times during the lawsuit to achieve different objectives. Here, the First Version was used to persuade this Court to refer the case to arbitration, while concealing the Second Version; the Second Version was used to persuade the arbitrator to find in favor of the Defendants.

A proper remedy is to deny the Motion to Confirm.

H. The "law-of-the-case" doctrine does not apply here.

In the arbitration hearing, Defendants argued that the "law-of-the-case" doctrine is applicable in view of the case being referred to arbitration based upon the First Version of the purported Contract. See Order of this Court of December 13, 2012 and Supreme Court Order denying Writ Petition of December 12, 2014. (Exh. 9).

This argument cannot be sustained for at least three reasons.

The governing law of the "law-of-the-case" doctrine and its exceptions is found in Hsu v. County of Clark, 123 Nev. 625, 629-30, 173 P.3d 724, 728-29 (2008),

> Under the law of the case doctrine, '[w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal.' . . . [F]ederal courts have adopted three specific exceptions to the law of the case doctrine, concluding that a court may revisit a prior ruling when (1) subsequent proceedings produce substantially new or different evidence, (2) there has been an intervening change in controlling law, or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced.

The first reason that the "law-of-the-case" doctrine does not apply in the present case is that the Supreme Court (Exh. 9) did not rule on the question of whether Defendants had demonstrated the existence of a binding Contract including an arbitration provision. Accordingly, no "law of the case" was established on this point, although Defendants argued at arbitration hearing Transcript Day 1, 72:1, that there was "law of the case" established. Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) was clear that any "law of the case" must be expressly ruled upon by the appellate court: "Under the law-of-the-case doctrine, when an appellate court decides a rule of law, that decision governs the same issues in subsequent proceedings. The

doctrine only applies to issues previously determined, not to matters left open by the appellate court." The Nevada Supreme Court in its Order, Exh. 9, did not address, explicitly or implicitly, the validity of the First Version, which was the only version available to it at the time.

Second, even if the Supreme Court had addressed the First Version in its Order, Exh. 9, at that time Defendants had concealed from this District Court and from the Supreme Court the Second Version of the purported Contract, which Defendants introduced for the first time in 2017-2018 in the arbitration phase of the proceeding. This fact pattern fits within the scope of exception "(1) subsequent proceedings produce substantially new or different evidence," that justify a change in the earlier position, as stated by Hsu.

Third, "(3) the prior decision was clearly erroneous and would result in manifest injustice if enforced" in view of the newly discovered fraud by the Defendants in relation to the First Version and the Second Version. Had Defendants disclosed to this Court and the Supreme Court the existence of the inconsistent Second Version of the "purported Contract" in 2012-2013, it is likely that the holdings would been different.

PROPOSED RESOLUTION OF THE CASE

Plaintiff proposes that the Court may expeditiously resolve this case by vacating the arbitrator's Final Award, and then considering and granting Plaintiff's Motion for Partial Summary Judgment, as discussed in "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." Defendants did not seriously oppose Plaintiff's Motion for Partial Summary Judgment, and all issues may be decided based upon this motion without referring the case to a new arbitrator with the attendant further delay and cost to the parties.

SUMMARY AND CONCLUSION

It is the policy and objective of the Legislature that arbitration should be conducted so as to achieve a "fair and expeditious disposition of the proceeding." (NRS § 38.231).

The same policy and objective are stated in NRS § 38.222, and multiple times in NRS § 38.233.

In 2012-2013, Defendants introduced to the District Court and to the Supreme Court the First Version of the purported Contract, while concealing the Second Version, swearing under oath that the First Version was "complete, true, and correct." The purpose of this deception was to persuade these Courts that the case should be referred to arbitration. Then in 2017-2018, during the arbitration portion of the proceeding, Defendants introduced to the arbitration, and thence to this Court, the different Second Version of the purported Contract, and based their argument on that Second Version. The Final Award does not state whether the arbitrator based his decision on the First Version or the Second Version of the purported Contract. But whichever it was, the Defendants perpetrated a serious deception upon the Courts and the arbitrator by first alleging the First Version while concealing the Second Version, and thereafter switching over to the Second Version, without explanation.

Significantly, Defendants had both the First Version and the Second Version in their possession at the time they misrepresented to this Court, to the Supreme Court, and to Plaintiff that the First Version was "complete, true, and correct." They never disclosed that they had concealed a Second Version that they would reveal and utilize only at a later time, when it suited their purposes. This is a straightforward fraud on the Court and on the arbitrator.

Defendants hoped to skate past this deception and avoid discovery by failing to include a purported Contract with their Defendants' Petition.

In view of the legislative policy and objective, in view of Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985), and NRS 38.221, and in view of the fraud perpetrated on the District Court, the arbitrator, and Plaintiff with the two different Versions of the purported Contract, the Court should deny

Defendants' Motion to Confirm.

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

DATED this 25th day of April, 2019.

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

Counsel for plaintiff

INDEX OF EXHIBITS

NOTE: The following exhibit will be the subject of a motion to file under seal with access only to the parties and the court: 7.

Number	Description	Pages
1	Affidavit of Greg Christian, dated 9/19/12	4
2	Exhibit 1 to Christian affidavit, Investment Management Agreement signed 8/31/05	8
3	Affidavit of Greg Christian, dated 12/3/12	3
4	Defendants' opposition to motion to reconsider, with attached affidavit of Greg Christian dated 1/8/13	12
5	First version of Confidential Client Profile referenced in Christian affidavit dated 1/8/13	14
6	Second version of Investment Management Agreement	8
7	Second version of Confidential Client Profile (redacted for SSAN)	9
8	Testimony of Greg Christian at arbitration hearing on 10/18/18	6
9	Order denying petition for writ, issued 12/12/14	2

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 5

addressed to:

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