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

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**Case No. 83356**

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Electronically Filed  
Jan 10 2022 04:41 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**GREGORY GARMONG,**

*Appellant*

--against--

**WESPAC; GREG CHRISTIAN,**

*Respondents*

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

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**APPELLANT'S APPENDIX VOLUME 6**

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

*Attorney for Appellant  
Gregory Garmong*

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Transcript of Proceedings  
Arbitration  
Thursday, October 18, 2018

4/JA 618-629

# EXHIBIT 1

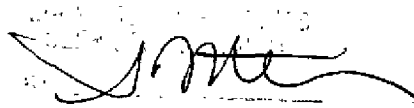
# EXHIBIT 1

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

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DC-9900038888-047  
GREGORY GARMONG VS WESPAC ET 4 PAGES  
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Code No. 1046  
Thomas C. Bradley, Esq.  
Bar No. 1621  
448 Hill Street  
Reno, Nevada 89501  
Telephone (775) 323-5178  
Fax: (775) 323-0709  
Counsel for Defendants

2012 SEP 13 PM 4:22



IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

Case No. CV 12-01271

vs.

Dept. No. 6

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

AFFIDAVIT OF GREG CHRISTIAN

STATE of NEVADA )

) ss.

COUNTY OF WASHOE )

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

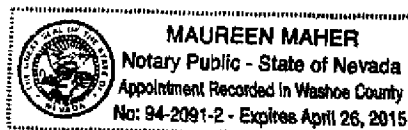
1. I am the named Defendant in this case and a registered investment advisor of Wespac.
2. Attached hereto is a true, correct, and complete copy of the Investment Management

Agreement signed by me and Gregory Garmong. (See Exhibit 1).



GREG CHRISTIAN

SWORN and SUBSCRIBED to before me  
this 19<sup>th</sup> day of September 2012.



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

CERTIFICATE OF SERVICE

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

Gregory Garmong  
11 Dee Court  
Smith, Nevada 89430

  
MOLLY E. STEWART

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SECOND JUDICIAL DISTRICT COURT  
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed.

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

- OR -

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

       A specific state of federal law, to wit:

\_\_\_\_\_

- OR -

       For the administration of a public program

       For an application for a federal or state grant

Date September 6, 2012

  
\_\_\_\_\_  
Attorney

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

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## EXHIBIT INDEX

1) Investment Management Agreement

7 pages

## EXHIBIT 2

## EXHIBIT 2

CV12-01271 DC-990003888-046  
GREGORY GARMONG VS WESPAC E. B Passas  
District Court 09/19/2012 04:21 PM  
Washoe County 2270  
E11 SMARTENC

**EXHIBIT 1**

**EXHIBIT 1**



## INVESTMENT MANAGEMENT AGREEMENT

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

1. **Appointment.** Client appoints WA as investment adviser of the Portfolio Assets (as hereinafter defined) with designated investment authority over the Portfolio Assets, and WA agrees to serve in that capacity on the terms and conditions as set forth in this Agreement.
2. **Acknowledgments of Client.** Client represents and acknowledges that Client is the sole owner of the cash and securities described in Exhibit A (the "Initial Portfolio Assets"), and that the Portfolio Assets are and will remain at all times during the continuation of this Agreement free, clear, and unencumbered. Client acknowledges that Client has reviewed the investment policies of WA as set forth in WA's Form ADV Part II, a copy of which has been provided to Client, and that these investment policies meet Client's overall criterias. In the event Client's financial situation changes, Client agrees to notify WA in writing of the change and new investment objectives, if different from those described. Client acknowledges that in the process of active portfolio management, cash may be held in the portfolio account at the discretion of WA. Client agrees to give WA immediate notice of any deposit to or withdrawal from the Portfolio Assets and to promptly confirm the same in writing.
3. **Procedures.** The following procedures shall be followed by WA in performing the services called for by this Agreement:
  1. **Records.** WA shall keep separate and accurate records of all of the Initial Portfolio Assets and additions to, dispositions from, and changes in the Initial Portfolio Assets (the "Portfolio Assets"). WA shall provide Client with a written summary and appraisal of the Portfolio Assets at least once each calendar quarter. The portfolio appraisal statement shall list the Portfolio Assets as of the last business day of the immediately preceding quarter, and shall indicate the fair market value of the Portfolio Assets on that date as determined in Paragraph 4a hereof.
  2. **Custody of Portfolio Assets.** The Portfolio Assets subject to WA's supervision will be maintained in street name in Client's account at Charles Schwab & Co., Inc. or at a brokerage house, bank, trust company, or other firm (the "Custodian") selected by Client as set forth in the attached Confidential Client Profile. Client shall be responsible for all Custodians' fees incurred in maintaining Client's account(s). In no event shall WA act as Custodian, and nothing herein shall be construed to authorize WA to take possession of any cash or securities comprising the Portfolio Assets. Client shall instruct the Custodian to provide WA with confirmations of all transactions with respect to Portfolio Assets and shall instruct Custodian to provide to Client a monthly account statement indicating all amount dispersed from Client's accounts (including the amount of any fee paid pursuant to Client's authorization to WA), all transactions occurring in the account during the

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

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

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

#### 4. Services of Adviser.

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

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

**b. Fee Billing Option.**

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

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

**c. Proxy Voting Option.**

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

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

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

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

6. **Representations of WA.** WA represents that it is registered with the Securities and Exchange Commission as an Investment Adviser under the Investment Advisers Act of 1940, as amended, and that such registration is currently in effect. If the Portfolio Assets are subject to ERISA, WA also acknowledges that it is a fiduciary as that term is defined in ERISA, with respect to the Portfolio Assets. In accordance with sections 405(b)(1), 405(c)(2) and 405(d) of ERISA, the fiduciary responsibilities of WA and any partner, employee or agent of WA shall be limited to his, her or its duties in managing the Portfolio Assets, and WA shall not be responsible for any other duties with respect to Client (specifically including evaluating the initial or continued appropriateness of Client's retention of WA or the diversification standard under section 404(a)(1) of ERISA).
7. **Representations of Client.** Client confirms that it has full power and authority to enter into this Agreement, that the employment of WA is authorized by its governing document relating to the Portfolio Assets and that the terms hereof do not violate any obligation by which Client is bound whether arising by contract, operation of law, or otherwise, and that: a) this contract has been duly authorized by appropriate action and is binding upon Client in accordance with its terms; and b) Client will deliver to WA such evidence of such authority as it may reasonably require, whether by way of a certified resolution, trust agreement, or otherwise. Client further agrees to provide WA with copies of all documents governing the Portfolio Assets. If the Portfolio Assets are subject to ERISA, Client hereby represents and confirms to WA that Client's employment of WA as the Investment Adviser to the Portfolio Assets, and any instruction Client has given to WA, is authorized by and does not violate any provision of any applicable plan or trust documents. Client hereby acknowledges that Client is a "named fiduciary" with respect to the control and management of the assets of Client's account, a trust qualified under Section 401 (a) of the Internal Revenue Code of 1986, and Client agrees to notify WA promptly of any change in the identity of the "named fiduciary" with respect to the account. In addition, in any directed brokerage transaction Client has determined, and will monitor the Portfolio Assets to assure, that the directed broker is capable of providing best execution for the account's brokerage transactions and that the commission rates that have been negotiated are reasonable in relation to the value of the brokerage and other services received.

8. **Liability.** WA does not guarantee the future performance of the Portfolio Assets, any specific level of the performance, or the success of any investment decision or strategy. Client understands that the investment decisions made by WA are subject to various market, currency, economic and business risks and those decisions will not always be profitable. Except as may otherwise be provided by law, WA will not be liable to Client for: a) any loss Client may suffer by reason of any investment decision made or other action taken or omitted in good faith by WA with the degree of skill, care, prudence or diligence under the circumstances that a prudent person acting in a like capacity would use; b) any loss arising from WA's adherence to the Client's instructions; c) any act or failure to act by the Custodian, any broker or dealer to which WA directs transactions for the Portfolio Assets or by any other third party; or d) its failure to purchase or sell any security on the basis of information known to any principal or employee of WA where the utilization of such information might constitute a violation of any federal or state laws, rules or regulations or a breach of any fiduciary or confidential relationship between any principal or employee of WA and any other person or persons. Federal and various state securities laws impose liability under certain circumstances on persons who act in good faith and therefore nothing in this Agreement shall waive or limit any rights, which Client may have under those laws.
9. **Confidentiality.** All information and advice furnished by either party to the other shall be treated as confidential information and shall not be disclosed to third parties except as required by law or with consent.
10. **Service to Other Clients.** WA acts as adviser to other clients and may give advice and take action with respect to such other clients' accounts which may differ from the action taken by WA with respect to the Portfolio Assets. WA agrees to act in a manner consistent with its fiduciary obligations to deal fairly with all clients when taking investment actions. WA shall have no obligation to purchase, sell or recommend for the Portfolio Assets any security which may be purchased or sold by WA, its principals, affiliates, employees or for the accounts of any other client. Client recognizes that transactions in a specific security may not be accomplished for all client accounts at the same time or at the same price.
11. **Termination.** This agreement may be terminated at any time by either party giving the other written notice of termination. However, this Agreement shall continue in effect until so terminated. Termination shall be effective when a notice of termination, properly executed, is actually received. Upon termination, any fees paid in advance will be prorated to the date of termination and any excess will be refunded to Client. If this Agreement is terminated by Client within five business days of the date it is executed or accepted, such termination shall be without penalty or liability for payment of fees. If Client is an individual, this Agreement shall terminate upon the death or adjudicated incapacity of Client, but shall take effect only upon actual receipt by WA of written notice of Client's death or adjudicated incapacity. Upon notice of termination, WA shall notify Custodian to deliver all assets held pursuant to this Agreement, according to Client's written instructions.

12. **Notices.** Unless otherwise specified herein, all notices, instructions, and advice with respect to all matters contemplated by this Agreement shall be deemed duly given when received in writing at the address set forth herein. Copies of all notices affecting the Custodian shall also be directed to the Custodian at the address which Client designates. Addresses may be changed by notice to the other parties given in accordance with this paragraph. WA may rely on any notice from any person reasonably believed by WA to be genuine and to have authority to give such notice. All written notices shall be addressed to: a) WESPAC, 2001 Broadway, 2nd Floor, Oakland, California 94612; and b) Client at the address set forth in the Confidential Client Profile attached hereto.
13. **Assignability.** This Agreement may not be assigned by WA without the prior consent of the Client. This Agreement may not be assigned by Client without the prior consent of WA.
14. **Miscellaneous.** This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties with respect to the management of the Portfolio Assets, supersedes all prior agreements, and, except as otherwise provided herein, may be amended only with a written document signed by the parties. This Agreement shall be governed by the laws of the State where the agreement is governed and so executed. If any provision of this Agreement is held to be unenforceable, such unenforceability shall not affect the remainder of this Agreement. This Agreement may be signed in one or more counterparts, and when taken together shall create a valid and binding Agreement as though all signatures appeared on the same document. The captions in this Agreement are otherwise for convenience of reference only and in no way define or limit any of the provisions hereof or otherwise affect their construction or effect. Except as otherwise provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors. No party intends for this Agreement to benefit any third party not expressly named in this Agreement.
15. **Acknowledgment of Receipt of Form ADV Part II.** Client hereby acknowledges that Client has received and had an opportunity to read WA's Form ADV Part II as required by Rule 204-3 of the Investment Advisers Act of 1940. WA's ADV Part II contains a clear and conspicuous notice of WA's privacy policy.
16. **Arbitration. The parties waive their right to seek remedies in court, including any right to a jury trial.** The parties agree that in the event of any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio Assets, such dispute shall be resolved exclusively by arbitration to be conducted only in the county and state at the time of such dispute in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS") applying the laws of the State where the agreement is governed and executed. Disputes shall not be resolved in any other forum or venue. The parties agree that such arbitration shall be conducted by an arbitrator who is experienced in dispute resolution regarding the securities business, that discovery shall not be permitted except as required by the rules of JAMS, that the arbitration award shall not include factual findings or conclusions of law, and that no punitive damages shall be awarded. The parties

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

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

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

State: ☐ California ☒ Nevada ☐ other \_\_\_\_\_

Gregory Garmon  
Client Name  
Gregory Garmon  
Client Signature  
\_\_\_\_\_  
Client Signature

**AGREED AND ACCEPTED BY INVESTMENT ADVISER: WESPAC ADVISORS, LLC**

By: Ray Christie  
Title: RA  
Date: 8/31/05

## **EXHIBIT 3**

## **EXHIBIT 3**



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

**EXHIBIT 1**

**EXHIBIT 1**

AFFIDAVIT OF GREG CHRISTIAN

STATE OF NEVADA )  
 )ss  
COUNTY OF WASHOE )

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

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

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

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

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

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

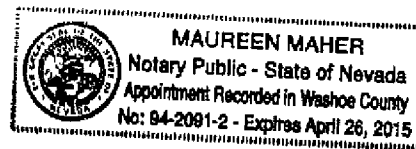
6. I am informed, believe and therefore allege that the incorrect page numbering on the Investment Management Agreement attached to my September 19, 2012 affidavit occurred solely as the result of a word processing and/or computer error.

Further, Affiant sayeth naught.

**GREG CHRISTIAN**

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

Maureen Baker  
Notary Public



## EXHIBIT 4

## EXHIBIT 4

Code: 2645  
Thomas C. Bradley, Esq.  
Bar No. 1621  
448 Hill Street  
Reno, Nevada 89501  
Telephone (775) 323-5178  
Fax: (775) 323-0709  
*Counsel for Defendants*

**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE**

GREGORY GARMONG,  
Plaintiff,  
v.

Case No. CV 12-01271  
Dept. No. 6

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


**DEFENDANTS' OPPOSITION TO PLAINTIFF'S COMBINED MOTIONS FOR LEAVE  
TO REHEAR AND FOR REHEARING OF THE ORDER OF DECEMBER 13, 2012,  
COMPELLING ARBITRATION AND REQUEST FOR ATTORNEY'S FEES**

Defendants WESPAC and GREG CHRISTIAN, by and through their attorney of record,  
THOMAS C. BRADLEY, ESQ., of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace*, hereby  
oppose *Plaintiff's Combined Motions For Leave To Rehear And For Rehearing Of The Order Of  
December 13, 2012 Compelling Arbitration*. Defendants additionally request an award of attorney  
fees.

Defendants' *Opposition* is made and based on the attached Memorandum of Points and  
Authorities, attached exhibit and affidavit, and all pleadings and papers on file herein.

DATED this 8 day of Jan, 2013.

*Sinai, Schroeder, Mooney,  
Boetsch, Bradley & Pace*

  
\_\_\_\_\_  
Thomas C. Bradley, Esq.  
Attorney for Defendants

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

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. BACKGROUND

On or about August 31, 2005, Plaintiff Gregory Garmong ("Garmong") and Defendant Wespac entered into an "Investment Management Agreement" whereby Garmong retained Wespac as his investment advisor. (The August 31, 2005, Agreement is attached to Defendants' *Motion To Dismiss And To Compel Arbitration* as Exhibit "1").

In approximately March 2009, Garmong terminated the services of Defendants.

On May 9, 2012, Garmong filed a *Complaint* with this Court alleging that Defendants had breached the "Investment Management Agreement." In his *Complaint*, Garmong 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, Garmong 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* to Defendants' *Motion*. In his *Opposition*, Garmong claimed that because the arbitration clause of the Agreement was unconscionable, he would not arbitrate his disputes with Defendants, and would instead engage in nonbinding mediation. *Opposition* at 12:26-13:1.

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

On December 13, 2012, this Court filed an *Order* in which it found that "the arbitration agreement contained in paragraph 16 of the "Investment Management Agreement" entered into

1 by the parties is not unconscionable and is therefore enforceable.” As a result of this finding, the  
2 Court ordered the parties to engage in binding arbitration and stayed further judicial proceedings  
3 pending the arbitration.

4 On December 31, 2012, Garmong filed a document entitled *Combined Motions For Leave*  
5 *To Rehear And For Rehearing Of The Order Of December 13, 2012, Compelling Arbitration.*

6 For the reasons set forth below, Defendants request that Plaintiff’s combined *Motions* be  
7 denied in their entirety and that Defendants be awarded reasonable attorney’s fees pursuant to NRS  
8 18.010 and NRS 7.085.

10 **II. LEGAL ARGUMENT**

11 Under Nevada law, “[a] district court may reconsider a previously decided issue if  
12 substantially different evidence is subsequently introduced or the decision is clearly erroneous.”  
13 *Masonry and Tile Contractors Ass’n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev.  
14 737, 741, 941 P.2d 486, 489 (1997).

15 Here, Garmong has asserted that this Court’s *Order* of December 13, 2012 “is clearly  
16 erroneous because it overlooked, or failed to address, important legal and factual matters which  
17 should properly govern its disposition and the ordered arbitration.” *Motions* at 2:6-8. In the body  
18 of his combined *Motions*, Garmong repeated the exact arguments contained in his *Opposition To*  
19 *Defendants’ Motion To Dismiss And To Compel Arbitration* but failed to introduce any new issues  
20 of law or fact.

21 While in the context of an appeal, reviewing courts have found a trial courts’s order to be  
22 “clearly erroneous” “if the reviewing court is left with a ‘definite and firm conviction that the  
23 district court’s interpretation of the statute was incorrect’” or “if a review of the entire record  
24 leaves the appellate court with a definite and firm impression that a mistake was made.” *United*  
25  
26  
27  
28

1 *States v. Grace*, 504 F.3d 745, 757 (9<sup>th</sup> Cir. 2007); *Mitchell v. State of Missouri*, 50 S.W.3d 342,  
2 343 (Mo.Ct. App. S. Dist. 2001). See also, *State of Nevada v. Lanning*, 109 Nev. 1198, 866 P.2d  
3 272 (1993)(finding that a district court's order suppressing a defendant's confession was clearly  
4 erroneous where previous decisions by the Court had made clear that in non-critical stage  
5 proceedings a defendant's Sixth Amendment rights are not violated by a non-custodial police  
6 interview or the taking of a defendant's handwriting exemplar); *Allyn v. McDonald*, 112 Nev. 68,  
7 910 P.2d 263 (1996)(finding that the trial court's findings of fact in its order granting summary  
8 judgment were clearly erroneous where the court's order resolved a genuine issue of material  
9 fact).

10  
11 Here, instead of claiming that rehearing is necessary because the Court overlooked a  
12 particular legal or factual matter, Garmong has taken the approach that the Court erred by ignoring  
13 every legal and factual matter contained in his *Opposition*, and that as a result this Court should  
14 now review again each and every argument contained in his *Opposition* to try to determine if it  
15 made an error. This 'shot gun' approach not only over burdens limited judicial resources it is also  
16 violates the Nevada Supreme Court's rule that "[o]nly in very rare instances in which new issues  
17 of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion  
18 for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246  
19 (1976).

20  
21  
22 In *Moore v. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244 (1976), the respondent had filed  
23 a motion for reconsideration after its motion for summary judgment had been denied. After the  
24 trial court denied the motion for reconsideration, the original trial judge lost his bid for re-election  
25 and the case was assigned to another judge. Respondents then filed a second motion for  
26 reconsideration, which was granted, as were their motion for summary judgment. On appeal, the  
27  
28



1 Nevada Supreme Court reversed and remanded the grant of summary judgment explaining that:

2 The only feature which distinguishes the second motion for rehearing from the two  
3 previous motions is the citation of additional authorities for a proposition of law  
4 already set forth and adequately supported by reference to relevant authorities in  
5 the earlier motions. We note particularly that the second motion for rehearing  
6 raised no new issues of law and made reference to no new or additional facts.

7 Under such circumstances the motion was superfluous and, in our view, it was an  
8 abuse of discretion for the district court to entertain it.  
9

10 *Moore*, 92 Nev. at 405, 551 P.2d at 246.

11 However, in the event that this Court elects to reconsider the arguments contained in  
12 Plaintiff's *Opposition*, Defendants hereby incorporate by reference their *Reply To Plaintiff's*  
13 *Opposition To Defendants' Motion To Dismiss And To Compel Arbitration* in its entirety.  
14

15 In addition, Defendants would like to remind the Court that Mr. Garmong, who in his  
16 affidavit stated that: "I was given this document to sign at the office of Wespac in Reno. I was  
17 not given an opportunity to take it away and study it or obtain legal counsel to review it," was not  
18 entirely candid with the Court as evidenced by the many corrections and changes he made to the  
19 first and second drafts of the "Investment Management Agreement." (The drafts of the  
20 "Investment Management Agreement" with Mr. Garmong's handwritten notations and changes  
21 were attached to Defendants' *Reply* as Exhibit "2" and "3").  
22

23 Finally, in regard to the alleged missing pages and/or mis-numbered pages of the  
24 Agreement, Defendants hereby attach pages one through eleven which preceded the Final  
25 Investment Management Agreement. *See* Exhibit 1. These eleven pages were not part of the  
26 Investment Management Agreement and solely concerned Plaintiff's Client Profile. Thus, the fact  
27  
28

that the Agreement starts with page 12 is totally irrelevant.

## A. JAMS RULES

Plaintiff also raises meritless arguments regarding JAMS rules. JAMS rules provide that the amount of the claim determines which set of JAMS Rules apply. Thus, which set of JAMS Rules apply does not need to be specified in the arbitration clause of the agreement.

### JAMS Streamlined Arbitration Rules & Procedures:

#### Rule 1. Scope of Rules

(a) The JAMS Streamlined Arbitration Rules and Procedures ("Rules") govern disputes or claims that are administered by JAMS and...no disputed claim or counterclaim exceeds \$250,000, not including interest or attorneys' fees...

(b) The parties shall be deemed to have made these Rules a part of their Arbitration agreement... or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes meet the criteria of the first paragraph of this Rule.

### JAMS Comprehensive Arbitration Rules & Procedures

#### Rule 1. Scope of Rules

(a) The JAMS Streamlined Arbitration Rules and Procedures ("Rules") govern disputes or claims that are administered by JAMS and...any disputed claim or counterclaim exceeds \$250,000, not including interest or attorneys' fees...

(b) The parties shall be deemed to have made these Rules a part of their Arbitration agreement... or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes meet the criteria of the first paragraph of this Rule.

Clearly, the amount of the claim determines which set of JAMS Rules apply and, pursuant to the JAMS rules, the parties need not specify which rules apply. Mr. Garmong's attempts to mislead the Court are disingenuous.

#### B. REQUEST FOR ARBITRATION

In his Opposition, Plaintiff claims that this Court lacks jurisdiction because Defendants did not specifically allege in their Motion that Plaintiff had refused to arbitrate. Despite that oversight, the filing of a Complaint by Plaintiff in which he requested that this Court award him damages for Defendants' alleged breaches of the Agreement plus Plaintiff's statement that he "opposes forced mandatory arbitration" have made it perfectly clear that he has refused to arbitrate. *Opposition at* 12:26. Moreover, the filing of an *Opposition to a Motion* to require arbitration is sufficient proof Plaintiff has refused to arbitrate. Plaintiff's request to place form over substance is meritless

#### III. ATTORNEY'S FEES

As previously stated, the Nevada Supreme Court has made clear that "[o]nly 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." *Moore*, 92 Nev. at 405, P.2d at 246 (1976). Thus, in *Moore*, when a second motion for rehearing, which raised no new issues of law or fact was filed, the Court found that the motion was "superfluous" and further stated that "it was an abuse of discretion for the district court to entertain it." *Id.*

Here, Plaintiff, instead of claiming that the Court erred in its ruling by failing to take into account a particular legal or factual matter, now simply repeats every argument contained in his *Opposition*, and requests that the Court re-review each and every argument contained in his *Opposition* to try to determine if it made an error. Such an approach is not only unduly burdensome to the Court, it also requires Defendants expend additional legal fees to oppose a

1 superfluous motion, resulting in an unreasonable and vexatious extension of the current litigation.

2 Under Nevada law, “attorney’s fees are not recoverable unless allowed by express or  
3 implied agreement or when authorized by statute or rule.” *Miller v. Wilfong*, 121 Nev. 619,  
4 623, 119 P.3d 727 (2005)(quoting *Schouweiler v. Yancey Co.*, 101 Nev. 827, 830, 712 P.2d 786,  
5 788 (1985)). NRS 7.085(b) requires that this Court award attorney’s fees if it finds that an  
6 attorney has “[u]nreasonably and vexatiously extended a civil action or proceeding before any  
7 court in this State.” Similarly, NRS 18.010(2)(b), provides that a Court may award attorney’s fees  
8 where it finds that an opposing party maintained a claim or defense “without reasonable ground  
9 or to harass the prevailing party.” Because Plaintiff’s instant *Combined Motions For Leave To*  
10 *Rehear And For Rehearing Of The Order Of December 13, 2012, Compelling Arbitration* offer no  
11 new issues of fact or law to support a contrary ruling, Defendant can only surmise that these  
12 motions were filed for the purposes of unreasonably extending the current litigation or to harass  
13 Defendants. As a result, Defendants request that they be awarded the reasonable attorney’s fees  
14 they have expended in opposing the instant motions.  
15

#### 16 IV. CONCLUSION

17 In his *Opposition To Defendants’ Motion To Dismiss And To Compel Arbitration* to  
18 Defendants’ *Motion* Plaintiff had every opportunity to make his arguments opposing Defendants’  
19 *Motion To Dismiss And To Compel Arbitration*, and after Defendants had the opportunity to reply  
20 to Plaintiff’s arguments, this Court determined that the arbitration provision of the “Investment  
21 Management Agreement” was enforceable. Plaintiff’s current *Combined Motions For Leave To*  
22 *Rehear And For Rehearing Of The Order Of December 13, 2012, Compelling Arbitration* offer no  
23 new legal or factual matters for the Court to consider, and instead only requires the Court to  
24 revisit issues it has already reviewed and decided. Such a result is in direct contrast to the Nevada  
25  
26  
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28


1 Supreme Court's insistence that "[o]nly in very rare instances in which new issues of fact or law  
2 are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing  
3 be granted." *Moore*, 92 Nev. at 405, 551 P.2d at 246 (1976).

4 WHEREFORE, for the reasons stated above, Defendant Wespac and Defendant Greg  
5 Christian respectfully request that this Court deny Plaintiff Gregory Garmong's *Combined Motions*  
6 *For Leave To Rehear And For Rehearing Of The Order Of December 13, 2012, Compelling*  
7 *Arbitration* and that the Court award Defendants the reasonably attorney's fees they have been  
8 required to expend to oppose Plaintiff's *Motions*. Upon request of the Court, Defendants will  
9 submit an affidavit detailing their attorney fees.  
10

11 The undersigned does hereby affirm, pursuant to NRS 239B.030, that the preceding  
12 document does not contain the social security number of any person.  
13

14 DATED this 8 day of Jan., 2013.

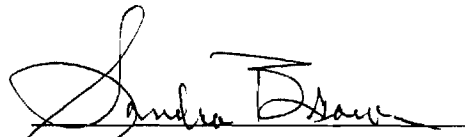
15 *Sinai, Schroeder, Mooney,*  
16 *Boetsch, Bradley & Pace*

17   
18 Thomas C. Bradley, Esq.  
19 Attorney for Defendants  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of *Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace*, and that on the 9<sup>th</sup> day of January, 2013, I electronically filed the DEFENDANTS' OPPOSITION TO PLAINTIFF'S COMBINED MOTIONS FOR LEAVE TO REHEAR AND FOR REHEARING OF THE ORDER OF DECEMBER 13, 2012, COMPELLING ARBITRATION AND REQUEST FOR ATTORNEY'S FEES with the Clerk of Court System who will send a notice of electronic filing to the following:

CARL M. HEBERT, ESQ.

  
Sandra Brown

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

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

**AFFIDAVIT OF GREG CHRISTIAN**

STATE of NEVADA           )  
  ) ss.  
COUNTY OF WASHOE       )


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

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

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

  
GREG CHRISTIAN

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





## **EXHIBIT INDEX**

- |    |                             |          |
|----|-----------------------------|----------|
| 1. | Confidential Client Profile | 13 pages |
|----|-----------------------------|----------|



## **EXHIBIT 5**

## **EXHIBIT 5**

**FILED**  
Electronically  
01-09-2013:10:49:15 AM  
Joey Orduna Hastings  
Clerk of the Court  
Transaction # 3452039

**EXHIBIT 1**

**EXHIBIT 1**



# CONFIDENTIAL CLIENT PROFILE

Investment Objective Assessment/Engagment Agreement

## Privacy Policy For Individual Clients

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

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

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

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

### Information Safeguarding

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

## TABLE OF CONTENTS

<b>I. Confidential Client Profile.....</b>	<b>Pg. 2 - 4</b>
• Account Information	
• Investment Objectives	
• Target Portfolio Design	
<b>II. Exhibits.....</b>	<b>Pg. 5 - 11</b>
• Exhibit A: Fee Schedule	
• Exhibit B: Portfolio Appraisal/Security Cost Basis Form	
<b>III. Investment Management Agreement.....</b>	<b>Pg. 12 - 19</b>

## SUPPLEMENT CLIENT ATTACHMENT

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

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

## CONFIDENTIAL CLIENT PROFILE

### Account Information

Answer all questions that apply

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

\_\_\_\_\_

2. Primary contact person/trustee \_\_\_\_\_

3. Custodian \_\_\_\_\_ Account \_\_\_\_\_

4. Social Security/Tax ID Number Primary \_\_\_\_\_ Secondary \_\_\_\_\_

Mailing Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_

E-mail \_\_\_\_\_

5. Should anyone else receive a copy of:

Quarterly reports?

☐

Yes

☐

No

Realized gain/loss reports?

☐

Yes

☐

No

Name \_\_\_\_\_ Relationship \_\_\_\_\_

Mailing Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_

6. Account type

☐

Individual (taxable)

☐

IRA/IRA Rollover

☐

SEP

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

☐

Irrevocable Trust

☐

Profit Sharing

☐

Endowment

☐

Revocable Trust

☐

Money Purchase

☐

Foundation

☐

Public Employee

☐

Defined Benefit

☐

Taft-Hartley

☐

Corporation (taxable)

☐

Limited Liability Company

☐

401 (K)

☐

S Corporation

☐

Partnership

☐

Other \_\_\_\_\_

☐

Non- Profit Corporation

7. Initial Investment ☐ Cash \_\_\_\_\_ or ☐ Cash/Securities\* \$ \_\_\_\_\_

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

8. Anticipated contributions \$. \_\_\_\_ ☐ Monthly ☐ Quarterly ☐ Annually ☐ None

9. Anticipated withdrawals \$. \_\_\_\_ ☐ Monthly ☐ Quarterly ☐ Annually ☐ None

**CONFIDENTIAL CLIENT PROFILE**  
**Investment Objectives**  
*(For all accounts)*

1. What is the purpose of your investment account?

\_\_\_\_\_

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

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

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

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

☐ Yes ☐ No

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

\_\_\_\_\_

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

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

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

\_\_\_\_\_

\_\_\_\_\_

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

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

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

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

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

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

b. \_\_\_\_\_ Income returns consistent with broad domestic bond market returns.

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

(For all accounts)

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

☐ Over \$250,000



**Wespac Advisors LLC Asset Management Services  
Investment Policy Questionnaire**

**Introduction:**

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

**Instructions for completing this form:**

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

Date: \_\_\_\_\_ Financial Advisor \_\_\_\_\_

### Family Information

Client  
Name

\_\_\_\_\_  
*First M Last Birthdate*

Address: \_\_\_\_\_ ( ) \_\_\_\_\_  
*Street City/St Zip Code Telephone*

Current Assets: \$ \_\_\_\_\_

Please specify the type of account:

- ☐ A. Taxable    ☐ Individual    ☐ Trust    ☐ Other \_\_\_\_\_
- ☐ B. Tax exempt    ☐ Individual    ☐ Trust    ☐ Other \_\_\_\_\_

### Risk Tolerance Profile

#### 1. Risk Factor

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

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

#### 2. Investment Approach

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

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

### 3. Volatility

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

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

### 4. Variation

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

	Year 1	Year 2	Year 3	Year 4	Year 5	Average Annual Return
1 <input type="checkbox"/>	3%	3%	3%	3%	3%	3%
3 <input type="checkbox"/>	2%	5%	6%	0%	7%	4%
5 <input type="checkbox"/>	-6%	7%	21%	2%	8%	6%
7 <input type="checkbox"/>	9%	-11%	26%	3%	18%	9%
10 <input type="checkbox"/>	14%	-21%	40%	-4%	31%	12%

### 5. Investment Experience

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

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

## 6. Time Horizon

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

Example of a short term horizon

Example of a long time horizon

Example of a long time horizon

1 ☐ A. Short(3- 5 Years).

3 ☐ B. Long (5-10 Years).

5 ☐ C. Multi-stage.

## 7. Primary Goal

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

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

## 8. Secondary Goal

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

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

## 9. Age

What is your current age?

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

## 10. Investment Earnings

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

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

## 11. Investment Value

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

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

## 12. Living Expense

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

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

### 13. Household Income

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

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

### 14. Income Saving

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

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

### 15. Future Earnings

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

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

### Conclusion

Comments:

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

\_\_\_\_\_  
Client Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Client Signature

\_\_\_\_\_  
Date

**CONFIDENTIAL CLIENT PROFILE**  
Target Portfolio Design

Please select one management style most describing investment objective

- ☐ **Aggressive Growth**
- Can use margin and short selling when market conditions warrant.
  - Can invest in smaller cap and more illiquid securities than Growth Accounts
  - Can overweight favored sectors to a higher degree than other portfolio styles.
- ☐ **Growth**
- Emphasizes total return, but does not use margin or short selling
  - Raising cash is the hedging strategy most likely to be used in the portfolio.
- ☐ **Growth & Income**
- Emphasizes dividend-paying issues and also focuses on the blue chip securities.
  - Appropriate for investors oriented toward return that includes income.
- ☐ **Passive Growth**
- Uses Exchange Traded Funds to create a sector rotation portfolio. May include and ETF (domestic or foreign)
  - ETPs with superior intermediate to long-term relative strength characteristics are buy candidates for the portfolio.
  - May use margin if consistent with a clients goals.
- ☐ **Balanced**
- This style combines one of the above strategies with investments in fixed income securities to achieve greater stability and income.
  - Instruments used may include corporate debt, government securities, preferred stock, and high yield or convertible securities.

**CLIENT ACKNOWLEDGMENT**

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

Client Signature: \_\_\_\_\_ Date \_\_\_\_\_

Client Signature \_\_\_\_\_ Date \_\_\_\_\_

To be completed only after consultation with WESPAC Advisors

- ☐ Custom
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

<b>FOR WESPAC USE ONLY</b>	
Reviewed by	_____
Date	_____

## EXHIBIT 6

## EXHIBIT 6



## INVESTMENT MANAGEMENT AGREEMENT

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

1. **Appointment.** Client appoints WA as investment adviser of the Portfolio Assets (as hereinafter defined) with designated investment authority over the Portfolio Assets, and WA agrees to serve in that capacity on the terms and conditions as set forth in this Agreement.
2. **Acknowledgments of Client.** Client represents and acknowledges that Client is the sole owner of the cash and securities described in Exhibit A (the "Initial Portfolio Assets"), and that the Portfolio Assets are and will remain at all times during the continuation of this Agreement free, clear, and unencumbered. Client acknowledges that Client has reviewed the investment policies of WA as set forth in WA's Form ADV Part II, a copy of which has been provided to Client, and that these investment policies meet Client's overall criterias. In the event Client's financial situation changes, Client agrees to notify WA in writing of the change and new investment objectives, if different from those described. Client acknowledges that in the process of active portfolio management, cash may be held in the portfolio account at the discretion of WA. Client agrees to give WA immediate notice of any deposit to or withdrawal from the Portfolio Assets and to promptly confirm the same in writing.
3. **Procedures.** The following procedures shall be followed by WA in performing the services called for by this Agreement:
  1. **Records.** WA shall keep separate and accurate records of all of the Initial Portfolio Assets and additions to, dispositions from, and changes in the Initial Portfolio Assets (the "Portfolio Assets"). WA shall provide Client with a written summary and appraisal of the Portfolio Assets at least once each calendar quarter. The portfolio appraisal statement shall list the Portfolio Assets as of the last business day of the immediately preceding quarter, and shall indicate the fair market value of the Portfolio Assets on that date as determined in Paragraph 4a hereof.
  2. **Custody of Portfolio Assets.** The Portfolio Assets subject to WA's supervision will be maintained in street name in Client's account at Charles Schwab & Co., Inc. or at a brokerage house, bank, trust company, or other firm (the "Custodian") selected by Client as set forth in the attached Confidential Client Profile. Client shall be responsible for all Custodians' fees incurred in maintaining Client's account(s). In no event shall WA act as Custodian, and nothing herein shall be construed to authorize WA to take possession of any cash or securities comprising the Portfolio Assets. Client shall instruct the Custodian to provide WA with confirmations of all transactions with respect to Portfolio Assets and shall instruct Custodian to provide to Client a monthly account statement indicating all amount dispersed from Client's accounts (including the amount of any fee paid pursuant to Client's authorization to WA), all transactions occurring in the account during the

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

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

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

#### 4. Services of Adviser.

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

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

**b. Fee Billing Option.**

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

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

**c. Proxy Voting Option.**

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

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

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

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

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

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

8. **Liability.** WA does not guarantee the future performance of the Portfolio Assets, any specific level of the performance, or the success of any investment decision or strategy. Client understands that the investment decisions made by WA are subject to various market, currency, economic and business risks and those decisions will not always be profitable. Except as may otherwise be provided by law, WA will not be liable to Client for: a) any loss Client may suffer by reason of any investment decision made or other action taken or omitted in good faith by WA with the degree of skill, care, prudence or diligence under the circumstances that a prudent person acting in a like capacity would use; b) any loss arising from WA's adherence to the Client's instructions; c) any act or failure to act by the Custodian, any broker or dealer to which WA directs transactions for the Portfolio Assets or by any other third party; or d) its failure to purchase or sell any security on the basis of information known to any principal or employee of WA where the utilization of such information might constitute a violation of any federal or state laws, rules or regulations or a breach of any fiduciary or confidential relationship between any principal or employee of WA and any other person or persons. Federal and various state securities laws impose liability under certain circumstances on persons who act in good faith and therefore nothing in this Agreement shall waive or limit any rights, which Client may have under those laws.
9. **Confidentiality.** All information and advice furnished by either party to the other shall be treated as confidential information and shall not be disclosed to third parties except as required by law or with consent.
10. **Service to Other Clients.** WA acts as adviser to other clients and may give advice and take action with respect to such other clients' accounts which may differ from the action taken by WA with respect to the Portfolio Assets. WA agrees to act in a manner consistent with its fiduciary obligations to deal fairly with all clients when taking investment actions. WA shall have no obligation to purchase, sell or recommend for the Portfolio Assets any security which may be purchased or sold by WA, its principals, affiliates, employees or for the accounts of any other client. Client recognizes that transactions in a specific security may not be accomplished for all client accounts at the same time or at the same price.
11. **Termination.** This agreement may be terminated at any time by either party giving the other written notice of termination. However, this Agreement shall continue in effect until so terminated. Termination shall be effective when a notice of termination, properly executed, is actually received. Upon termination, any fees paid in advance will be prorated to the date of termination and any excess will be refunded to Client. If this Agreement is terminated by Client within five business days of the date it is executed or accepted, such termination shall be without penalty or liability for payment of fees. If Client is an individual, this Agreement shall terminate upon the death or adjudicated incapacity of Client, but shall take effect only upon actual receipt by WA of written notice of Client's death or adjudicated incapacity. Upon notice of termination, WA shall notify Custodian to deliver all assets held pursuant to this Agreement, according to Client's written instructions.

12. **Notices.** Unless otherwise specified herein, all notices, instructions, and advice with respect to all matters contemplated by this Agreement shall be deemed duly given when received in writing at the address set forth herein. Copies of all notices affecting the Custodian shall also be directed to the Custodian at the address which Client designates. Addresses may be changed by notice to the other parties given in accordance with this paragraph. WA may rely on any notice from any person reasonably believed by WA to be genuine and to have authority to give such notice. All written notices shall be addressed to: a) WESPAC, 2001 Broadway, 2nd Floor, Oakland, California 94612; and b) Client at the address set forth in the Confidential Client Profile attached hereto.
13. **Assignability.** This Agreement may not be assigned by WA without the prior consent of the Client. This Agreement may not be assigned by Client without the prior consent of WA.
14. **Miscellaneous.** This Agreement, including the Confidential Client Profile and all Exhibits attached hereto, constitutes the entire agreement of the parties with respect to the management of the Portfolio Assets, supersedes all prior agreements, and, except as otherwise provided herein, may be amended only with a written document signed by the parties. This Agreement shall be governed by the laws of the State where the agreement is governed and so executed. If any provision of this Agreement is held to be unenforceable, such unenforceability shall not affect the remainder of this Agreement. This Agreement may be signed in one or more counterparts, and when taken together shall create a valid and binding Agreement as though all signatures appeared on the same document. The captions in this Agreement are otherwise for convenience of reference only and in no way define or limit any of the provisions hereof or otherwise affect their construction or effect. Except as otherwise provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors. No party intends for this Agreement to benefit any third party not expressly named in this Agreement.
15. **Acknowledgment of Receipt of Form ADV Part II.** Client hereby acknowledges that Client has received and had an opportunity to read WA's Form ADV Part II as required by Rule 204-3 of the Investment Advisers Act of 1940. WA's ADV Part II contains a clear and conspicuous notice of WA's privacy policy.
16. **Arbitration. The parties waive their right to seek remedies in court, including any right to a jury trial.** The parties agree that in the event of any dispute between the parties arising out of, relating to or in connection with, this Agreement or the Portfolio Assets, such dispute shall be resolved exclusively by arbitration to be conducted only in the county and state at the time of such dispute in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS.") applying the laws of the State where the agreement is governed and executed. Disputes shall not be resolved in any other forum or venue. The parties agree that such arbitration shall be conducted by an arbitrator who is experienced in dispute resolution regarding the securities business, that discovery shall not be permitted except as required by the rules of JAMS, that the arbitration award shall not include factual findings or conclusions of law, and that no punitive damages shall be awarded. The parties

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

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

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

**State:** ☐ California ☒ Nevada ☐ other \_\_\_\_\_

Gregory Harmon  
Client Name  
Gregory Harmon  
Client Signature  
Gregory Harmon  
Client Signature

**AGREED AND ACCEPTED BY INVESTMENT ADVISER: WESPAC ADVISORS, LLC**

By: Gregory Harmon  
Title: WA  
Date: 8/31/05

## EXHIBIT A - FEE SCHEDULE

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

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

Please Initial

Client Acknowledgement: \_\_\_\_\_



# EXHIBIT 7

# EXHIBIT 7

# CONFIDENTIAL CLIENT PROFILE

## Account Information

Answer all questions that apply

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

2. Primary contact person/trustee Greg Garmong

3. Custodian Schwab Account # \_\_\_\_\_

4. Social Security/Tax ID Number Primary [REDACTED] (SSN)

Secondary \_\_\_\_\_

Physical Address 11 Dee Ct, Smith NV 89430

Mailing Address P.O. Box 310

City Smith State NV Zip 89430

Phone 775 465-2981 Fax 775-465-2861

E-mail none

5. Account type

☐ Individual (taxable)

☐ IRA/IRA Rollover

☐ SEP

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

☐ Irrevocable Trust

☐ Profit Sharing

☐ Endowment

☐ Revocable Trust

☐ Money Purchase

☐ Foundation

☐ Public Employee

☐ Defined Benefit

☐ Taft-Hartley

☐ Corporation (taxable)

☐ Limited Liability Company

☐ 401(k)

☐ S Corporation

☐ Partnership

☐ Other \_\_\_\_\_

☐ Non-Profit Corporation

Initial Investment ☐ Cash \$ \_\_\_\_\_ or ☐ Cash/Securities\* \$ \_\_\_\_\_

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

Anticipated contributions \$ \_\_\_\_\_ ☐ Monthly ☐ Quarterly ☐ Annually ☐ None

Anticipated withdrawals \$ \_\_\_\_\_ ☐ Monthly ☐ Quarterly ☐ Annually ☐ None

CONFIDENTIAL

WESPAC000039<sup>1</sup>

**CONFIDENTIAL CLIENT PROFILE**  
**Investment Objectives**  
(For all accounts)

1. What percentage of your total investable assets will WESPAC Advisors be managing (e.g., stocks, bonds)? 40 %

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

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

3. State of legal residence Nevada

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

4. Date of birth 12/15/43 Spouse's date of birth \_\_\_\_\_

5. Occupation: Patent attorney

6. What year did you start your current occupation 1979 Projected retirement age 65

7. Spouse's Occupation \*In divorce, leave out for planning purposes

8. What year did your spouse start current occupation \_\_\_\_\_ Projected retirement age \_\_\_\_\_

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

**Current Year**

- ☐ Under \$50,000  
☐ \$ 50,000 - \$100,000  
☐ \$100,000 - \$250,000  
☒ Over \$250,000

**Last Year**

- ☐ Under \$50,000  
☐ \$ 50,000 - \$100,000  
☐ \$100,000 - \$250,000  
☒ Over \$250,000

**Year Before**

- ☐ Under \$50,000  
☐ \$ 50,000 - \$100,000  
☐ \$100,000 - \$250,000  
☒ Over \$250,000

**For taxable accounts, please complete the following; if nontaxable, proceed to question 12.**

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

☒ State <sup>Income</sup> tax? 0 %    ☒ Alternative minimum tax? ? %

11. Marginal federal income tax bracket 35 %

12. Primary source of income:    ☒ Occupation    ☒ Investments    ☐ Retirement funds

13. U.S. citizen?    ☒ Yes    ☐ No    If no: A non-resident alien?    ☐ Yes    ☐ No

Do you pay U.S. taxes:    ☒ Yes    ☐ No

14. Net worth (excluding primary residence) \$ \$9 M

15. Spouse/Dependent

Name	Age	Relationship
<u>None</u>	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

# Wespac Advisors LLC Asset Management Services Investment Policy Questionnaire

## Introduction:

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

## Instructions for completing this form:

- Please check the box next to each appropriate answer.
- The assigned points for each answer appear in red to left of the box.
- After the conclusion (Page 7), please add up the selected points for each question (1-15) and compare the total with the investment objective ranges on page 8. This is the investment objective that is consistent with your responses.

Date: 8/18/05

Financial Advisor \_\_\_\_\_

### Family Information

Client<sub>1</sub> Name: Gregory O. Garmong 12/15/43  
First M Last Birthdate

Client<sub>2</sub> Name: \_\_\_\_\_  
First M Last Birthdate

Address: P.O. Box 310 Smith NV 89430 (775) 465-2981  
Street City/St Zip Code Telephone

Current Assets: \$ 10M

Please specify the type of account:

- ☐ A. Taxable, Individual  
☒ B. Tax exempt, Individual Mostly

### Risk Tolerance Profile

#### 1. Risk Factor

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

Question 2, Answer B is my goal

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

## 2. Investment Approach

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

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

## 3. Volatility

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

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

## 4. Variation

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

	Year 1	Year 2	Year 3	Year 4	Year 5	Average Annual Return
1 <input type="checkbox"/>	3%	3%	3%	3%	3%	3%
3 <input type="checkbox"/>	2%	5%	6%	0%	7%	4%
5 <input type="checkbox"/>	-6%	7%	21%	2%	8%	6%
7 <input checked="" type="checkbox"/>	9%	-11%	26%	3%	18%	9%
10 <input type="checkbox"/>	14%	-21%	40%	-4%	31%	12%

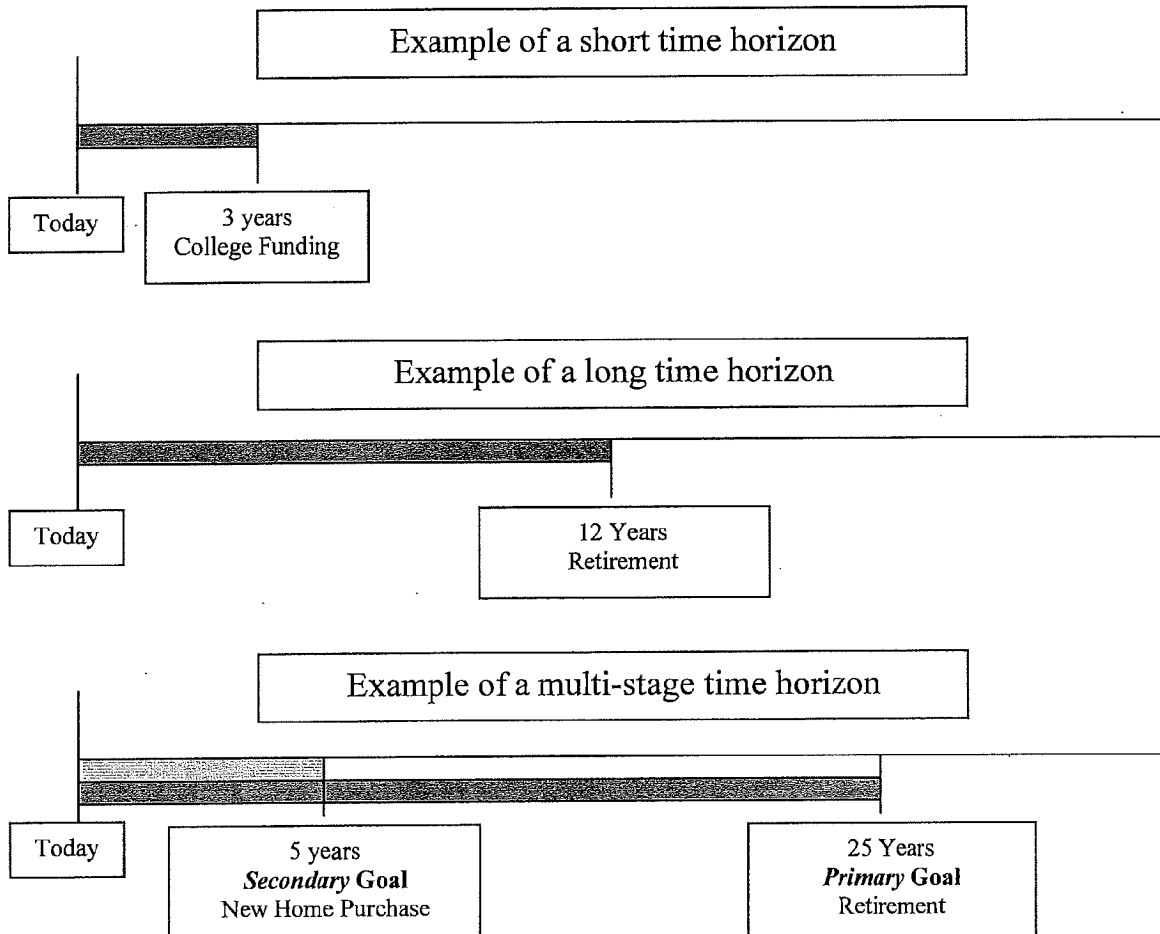
## 5. Investment Experience

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

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

## 6. Time Horizon

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



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

## 7. Primary Goal

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

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

*Start retirement - full reliance on investments for retirement*

## 8. Secondary Goal

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

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

## 9. Age

What is your current age?

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

## 10. Investment Earnings

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

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



### 11. Investment Value

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

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

### 12. Living Expense

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

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

### 13. Household Income

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

- 10 ☒ A. More than \$200,000
- 8 ☐ B. \$150,000 to \$199,999
- 6 ☐ C. \$100,000 to \$149,999
- 4 ☐ D. \$50,000 to \$99,999
- 2 ☐ E. Less than \$49,999

### 14. Income Saving

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

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

## 15. Future Earnings

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

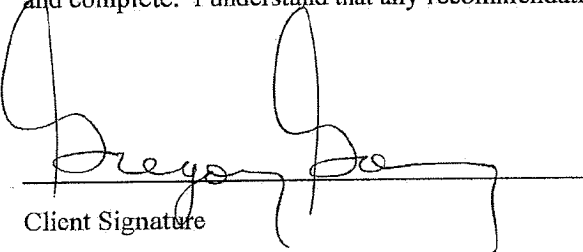
- 1 ☒ A. Decrease  
3 ☐ B. Stay about the same  
5 ☐ C. Increase modestly  
7 ☐ D. Increase significantly

## Conclusion

Comments:

My goal is providing for retirement. I'm uncertain when I will fully retire. I expect in 2006 my income will be in the \$250,000 range, but almost certainly decreasing after that to about \$100,000 range if I continue to work. Don't expect to start drawing on retirement accounts for about 5 years.

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

  
Client Signature

8/18/05  
Date

\_\_\_\_\_  
Client Signature

\_\_\_\_\_  
Date

## **EXHIBIT 8**

## **EXHIBIT 8**

JAMS ARBITRATION  
LAS VEGAS, NEVADA  
BEFORE THE HONORABLE PHILIP M. PRO (RETIRED)

-o0o-

GREGORY GARMONG,

Plaintiff,

vs

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

Defendants.

Case No. 1260003474

TRANSCRIPT OF PROCEEDINGS

ARBITRATION

THURSDAY, OCTOBER 18TH, 2018

Reno, Nevada

Reported By:

ERIN T. FERRETTO, RPR, CCR #281  
JOB NO. 503569

A P P E A R A N C E S

Page 2

FOR THE PLAINTIFF:

LAW OFFICE OF CARL M. HEBERT  
By: CARL M. HEBERT, ESQ.  
202 California Avenue  
Reno, Nevada 89509  
775.323.5556

FOR THE DEFENDANTS:

LAW OFFICE OF THOMAS BRADLEY  
By: THOMAS BRADLEY  
448 Hill Street  
Reno, Nevada 89501  
775.323.5178

THE ARBITRATOR:

HON. PHILIP M. PRO, Retired  
Arbitrator/Mediator  
3800 Howard Hughes Parkway  
11th Floor  
Las Vegas, Nevada  
ppro@jamsadr.com  
702.457.5267

ALSO PRESENT:

Michael Hume  
Greg Garmon

I N D E X

Page 3

WITNESSES FOR THE DEFENDANTS: PAGE

CHRISTIAN, Greg

Cross-Examination by Mr. Hebert 13

EXHIBITS: IDENT EVID

Exhibit Binders Pre-marked

Exhibit 47 Arbitration Award 9  
Westpac/Sharp

Exhibit 48 Certificate of Liability Insurance 13

1       Q     Okay. Quote:

2               Clients may instruct Wespac Advisors to  
3               utilize the services of designated  
4               brokers and all transactions involving  
5               portfolio assets separately designated in  
6               Exhibit B.

7               So have you ever seen an Exhibit B?

8               MR. HUME: Carl, we're not with you on 3. It says  
9               "Procedures."

10              MR. HEBERT: Mike, I understand that you're  
11              here --

12              THE WITNESS: I'm not following you either.

13              MR. BRADLEY: Excuse me.

14              You can't interrupt.

15              He won't interrupt again.

16              MR. HEBERT: That's okay.

17              ARBITRATOR PRO: Go back to your question. You  
18              quoted a part --

19              THE WITNESS: I'm not even following the part  
20              where you're quoting. I'm sorry.

21              MR. HEBERT: Let's back up for a second. I don't  
22              want to be discourteous.

23              THE WITNESS: Am I looking at the same one?

24              MR. HEBERT: I don't want to be discourteous to  
25              Mr. Hume, you know, but the --

1 MR. HUME: My apologies.

2 MR. HEBERT: It's okay.

3 ARBITRATOR PRO: We've got Exhibit 4, counsel,  
4 we're in paragraph 3 titled "Procedures," where were you  
5 quoting from, sub 1, sub 2?

6 MR. HEBERT: In Exhibit 4 -- I'm sorry, your  
7 Honor, this is my fault. You're way ahead of me -- it's  
8 part 3 of paragraph 3.

9 That's my fault, Mr. Christian.

10 ARBITRATOR PRO: Part 3 of paragraph 3 is on the  
11 next page --

12 MR. HEBERT: 49.

13 ARBITRATOR PRO: -- page 49, okay, titled  
14 "Brokerage." Go ahead.

15 MR. HEBERT: I'm suffering from paragraph shock.

16 BY MR. HEBERT:

17 Q Do you see subpart 3 on the next page that it says  
18 "Brokerage"?

19 A I do.

20 Q Okay. That's -- do you see that first sentence?  
21 That's the Exhibit B I'm talking about; have you ever  
22 seen that Exhibit B?

23 A No, because that's exactly what I was discussing  
24 with you a minute ago.

25 Q So Exhibit B is Exhibit A?



1       A       Well, obviously, yes. There's a typo or something  
2       in this document. I mean, we've changed this document to  
3       accommodate Mr. Garmong, and I'm sure whoever read it  
4       typed -- made a typo, didn't see it, transposed the data.

5       **Q       Do you have any direct knowledge of that or are**  
6       **you just guessing?**

7       A       I'm guessing on that one.

8       **Q       Thank you.**

9               **You've been hearing a lot about page 11 of the**  
10       **Investment Management Group -- actually, I'm sorry. I**  
11       **misspoke -- the Confidential Client Profile, if I've got**  
12       **my terminology correct?**

13       A       Correct.

14       **Q       Do you -- have you ever seen a completed page 11**  
15       **of the Confidential Client Profile?**

16       A       That particular page that we've shown here, not to  
17       my knowledge, no.

18       **Q       Would you say that Mr. Garmong was pretty faithful**  
19       **in communicating his position to you?**

20       A       Absolutely.

21       **Q       And that if he had had a page 11 which had several**  
22       **investment models to check, he would have checked it and**  
23       **given it to you?**

24               MR. BRADLEY: Objection; calls for speculation.

25               ARBITRATOR PRO: No, the witness can answer that

## EXHIBIT 9

## EXHIBIT 9

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY GARMONG,  
Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
WASHOE; AND THE HONORABLE  
BRENT T. ADAMS, DISTRICT JUDGE,  
Respondents,  
and  
WESPAC; AND GREG CHRISTIAN,  
Real Parties in Interest.

No. 65899

**FILED**

DEC 12 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER DENYING PETITION  
FOR WRIT OF MANDAMUS OR PROHIBITION*


This is an original petition for a writ of mandamus or prohibition challenging a district court order granting a motion to compel arbitration.

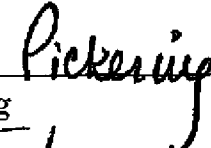
A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. See NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This court may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the district court's jurisdiction. See NRS 34.320; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Whether to consider a writ petition is within this court's discretion. *Smith*, 107 Nev. at 677, 818 P.2d at 851. Petitioner bears the burden of demonstrating that extraordinary

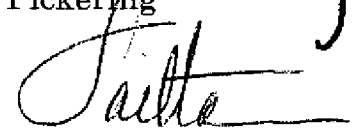
relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Having considered the parties' arguments and the documents before us, we conclude that petitioner has not met his burden of demonstrating that the district court either had a legal duty to deny the motion to compel arbitration or arbitrarily or capriciously abused its discretion or exceeded its jurisdiction by granting the motion. *See id.* We therefore deny the petition. *See Smith*, 107 Nev. at 677, 818 P.2d at 851.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Brent T. Adams, District Judge  
Carl M. Hebert  
Sinai Schroeder Mooney Boetsch Bradley & Pace  
Washoe District Court Clerk

1 CODE: 2645  
2 THOMAS C. BRADLEY, ESQ.  
3 Bar No. 1621  
4 435 Marsh Ave.  
5 Reno, Nevada 89509  
6 Telephone (775) 323-5178  
7 Tom@TomBradleyLaw.com

8 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
9 **IN AND FOR THE COUNTY OF WASHOE**

10 GREGORY GARMONG,

11 Plaintiff,

Case No. CV 12-01271

12 v.

Dept. No. 6

13 WESPAC, GREG CHRISTIAN, and  
14 Does 1-10,

15 Defendants.  
16 \_\_\_\_\_/

17 **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTIONS TO VACATE**  
18 **ARBITRATOR'S AWARD OF DENIAL OF PLAINTIFF'S MOTION FOR PARTIAL**  
19 **SUMMARY JUDGMENT AND FOR THE COURT TO DECIDE AND GRANT**  
20 **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

21 Defendants Wespac and Greg Christian, by and through their counsel, Thomas C. Bradley,  
22 Esq., hereby submit to this Honorable Court their Opposition to Plaintiff Gregory Garmong's  
23 Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary  
24 Judgment and for the Court to Decide and Grant Plaintiff's Motion For Partial Summary Judgment.  
25 Defendants' Opposition is based on the following Memorandum of Points and Authorities, the  
26 attached affidavit of Greg Christian, filed on behalf of both Defendants, and all other pleadings,  
27 briefs, and exhibits filed herein.  
28

///

///

///

///

///

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.  
3 SUMMARY

4 Plaintiff Gregory Garmong seeks review of Judge Pro's interlocutory decision that the case  
5 should proceed to hearing and not be decided by Plaintiff's Motion for Partial Summary Judgment.  
6 It is well established that an order denying summary judgment is not appealable after a hearing on  
7 the merits. Even if such an Order was appealable, Judge Pro correctly ruled that there were issues  
8 of material fact precluding the granting of Mr. Garmong's Motion for Partial Summary Judgment.  
9 See Order attached as Exhibit "1."

10 II.  
11 AN ORDER DENYING SUMMARY JUDGMENT IS NOT APPEALABLE  
12 AFTER A HEARING ON THE MERITS

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

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

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

1 The Eighth Circuit held that a “ruling by a district court denying summary judgment is  
2 interlocutory in nature and not appealable after a full trial on the merits.” *Johnson Int’l Co. v.*  
3 *Jackson Nat’l Life Ins. Co.*, 19 F.3d 431 (8th Cir.1994). The *Johnson* Court explained that: The  
4 final judgment from which an appeal lies in the judgment on the verdict. The judgment on the  
5 verdict, in turn, is based not on the pretrial filings [to support summary judgment] under Federal  
6 Rule of Civil Procedure 56(c), but on the evidence adduced at trial. *Id.*

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

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

21 Thus, the *Metro Life* Court reasoned that such an approach that would require it to “craft  
22 a new jurisprudence based on a series of dubious distinctions between law and fact, inviting  
23 potentially confusing and inconsistent case law to benefit only those summary judgment movants  
24 who have failed to abide by the Federal Rules of Civil Procedure”; the court found such an approach  
25 to be “unjustified and decline[d] to adopt it.” 121 F.3d at 355. In rejecting the appellant’s proposed  
26 approach, the Court ruled as follows:

27 Further, we note that our decision is in harmony with the majority of the other  
28 circuits that have considered whether an appellate court may review a pretrial denial  
of a motion for summary judgment after a full trial and judgment on the merits. *See,*  
*e.g., Lama v. Borrás*, 16 F.3d 473, 476 n. 5 (1st Cir.1994) (citations omitted) (“The  
[appellant's] attack on the denial of summary judgment has been overtaken by

1 subsequent events, namely a full-dress trial and an adverse jury verdict. In these  
2 circumstances, we will not address the propriety of the denial of summary  
3 judgment.”); *Chesapeake Paper Prod. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d  
4 1229, 1237 (4th Cir.1995) (footnote omitted) (“[W]e follow the other Circuits and  
5 conclude that this Court will not review, under any standard, the pretrial denial of a  
6 motion for summary judgment after a full trial and final judgment on the merits.”);  
7 *Black v. J.I. Case Co.*, 22 F.3d 568, 569–70 (5th Cir.1994) (footnote omitted) (“We  
8 now conclude that this Court will not review the pretrial denial of a motion for  
9 summary judgment where on the basis of a subsequent full trial on the merits final  
10 judgment is entered adverse to the movant.”); *Jarrett v. Epperly*, 896 F.2d 1013,  
11 1016 (6th Cir.1990) (footnote omitted) (“We agree with the Ninth and Federal  
12 Circuits and here hold that where summary judgment is denied and the movant  
13 subsequently loses after a full trial on the merits, the denial of summary judgment  
14 may not be appealed.”); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 278 (7th  
15 Cir.1994) (“Absent an extraordinary circumstance ..., we will not review the denial  
16 of a motion for summary judgment once the district court has conducted a full trial  
17 on the merits of a claim.”); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250–51 (10th  
18 Cir.1992) (footnote omitted) (“[E]ven if summary judgment was erroneously  
19 denied, the proper redress would not be through appeal of that denial but through  
20 subsequent motions for judgment as a matter of law and appellate review of those  
21 motions if they were denied.”); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573  
22 (Fed.Cir.1986) (footnote omitted) (“[A] denial of summary judgment is not properly  
23 reviewable on an appeal from the final judgment entered after trial.”).

24 *Id.* at 355-356.

25 The *Metro Life* Court further noted that it should not ignore the persuasive policy and  
26 prudential considerations advanced by the aforementioned courts and allowing such appeals would  
27 unduly circumscribe the discretion of the district court to “deny summary judgment in a case where  
28 there is a reason to believe that the better course would be to proceed to a full trial.” 121 F.3d at  
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23 **III.**  
**JUDGE PRO PROPERLY DENIED**  
**GARMONG'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

24 During the Arbitration, Wespac and Mr. Christian demonstrated in their Opposition  
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8 See *Affidavit of Greg Christian* attached as Exhibit "3."

9 **IV.**  
10 **JUDGE PRO DID NOT EVALUATE WITNESS CREDIBILITY WHEN HE RULED**  
11 **UPON MR. GARMONG'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

12 Mr. Garmong attempts to mislead this Court by contending that Judge Pro evaluated the  
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The exhaustive analysis provided in Claimants original motion, and the voluminous  
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12 Judge Pro clearly determined that because there were disputed issues of material fact as to  
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V.  
CONCLUSION

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

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

RESPECTFULLY SUBMITTED THIS \_\_\_\_ DAY OF MAY, 2019.

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

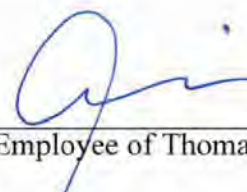
1 **CERTIFICATE OF SERVICE**

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

- 5 ☐ Personal Delivery  
6 ☐ Professional Courier  
7 ☐ Federal Express or Other Overnight Delivery Service  
8 ☐ US Mail with Sufficient Postage Affixed  
9 ☐ Facsimile to the Facsimile Number specified  
10 ☐ Electronic Mail to the e-mail address(es) specified  
11 ☒ Second Judicial District Court Eflex system

12 Carl Hebert, Esq.  
13 [carl@cmhebertlaw.com](mailto:carl@cmhebertlaw.com)  
14 202 California Avenue  
15 Reno, Nevada 89509  
16 Attorney for Plaintiff

17 Dated this 9th day of May, 2019.

18   
19 Employee of Thomas C. Bradley, Esq.  
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**INDEX OF EXHIBITS**

<b>Exhibit No.</b>	<b>Description</b>	<b>No. of Pages</b>
1	Order Re: Summary Judgment	4
2	Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment	18
3	Affidavit of Greg Christian	6
4	Defendants' Opposition to Plaintiff's Motion for Leave to Reconsider and Motion for Reconsideration of Order Granting Defendants' Motion to Strike	8
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1 CODE: 2645  
2 THOMAS C. BRADLEY, ESQ.  
3 Bar No. 1621  
4 435 Marsh Ave.  
5 Reno, Nevada 89509  
6 Telephone (775) 323-5178  
7 Tom@TomBradleyLaw.com

8 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
9 **IN AND FOR THE COUNTY OF WASHOE**

10 GREGORY GARMONG,

11 Plaintiff,

Case No. CV 12-01271

12 v.

Dept. No. 6

13 WESPAC, GREG CHRISTIAN, and  
14 Does 1-10,

15 Defendants.  
16 \_\_\_\_\_/

17 **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTIONS TO VACATE**  
18 **ARBITRATOR'S AWARD OF DENIAL OF PLAINTIFF'S MOTION FOR PARTIAL**  
19 **SUMMARY JUDGMENT AND FOR THE COURT TO DECIDE AND GRANT**  
20 **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

21 Defendants Wespac and Greg Christian, by and through their counsel, Thomas C. Bradley,  
22 Esq., hereby submit to this Honorable Court their Opposition to Plaintiff Gregory Garmong's  
23 Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary  
24 Judgment and for the Court to Decide and Grant Plaintiff's Motion For Partial Summary Judgment.  
25 Defendants' Opposition is based on the following Memorandum of Points and Authorities, the  
26 attached affidavit of Greg Christian, filed on behalf of both Defendants, and all other pleadings,  
27 briefs, and exhibits filed herein.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.  
3 SUMMARY

4 Plaintiff Gregory Garmong seeks review of Judge Pro's interlocutory decision that the case  
5 should proceed to hearing and not be decided by Plaintiff's Motion for Partial Summary Judgment.  
6 It is well established that an order denying summary judgment is not appealable after a hearing on  
7 the merits. Even if such an Order was appealable, Judge Pro correctly ruled that there were issues  
8 of material fact precluding the granting of Mr. Garmong's Motion for Partial Summary Judgment.  
9 See Order attached as Exhibit "1."

10 II.  
11 AN ORDER DENYING SUMMARY JUDGMENT IS NOT APPEALABLE  
12 AFTER A HEARING ON THE MERITS

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

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

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



1 The Eighth Circuit held that a “ruling by a district court denying summary judgment is  
2 interlocutory in nature and not appealable after a full trial on the merits.” *Johnson Int’l Co. v.*  
3 *Jackson Nat’l Life Ins. Co.*, 19 F.3d 431 (8th Cir.1994). The *Johnson* Court explained that: The  
4 final judgment from which an appeal lies in the judgment on the verdict. The judgment on the  
5 verdict, in turn, is based not on the pretrial filings [to support summary judgment] under Federal  
6 Rule of Civil Procedure 56(c), but on the evidence adduced at trial. *Id.*

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

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

21 Thus, the *Metro Life* Court reasoned that such an approach that would require it to “craft  
22 a new jurisprudence based on a series of dubious distinctions between law and fact, inviting  
23 potentially confusing and inconsistent case law to benefit only those summary judgment movants  
24 who have failed to abide by the Federal Rules of Civil Procedure”; the court found such an approach  
25 to be “unjustified and decline[d] to adopt it.” 121 F.3d at 355. In rejecting the appellant’s proposed  
26 approach, the Court ruled as follows:

27 Further, we note that our decision is in harmony with the majority of the other  
28 circuits that have considered whether an appellate court may review a pretrial denial  
of a motion for summary judgment after a full trial and judgment on the merits. *See,*  
*e.g., Lama v. Borrás*, 16 F.3d 473, 476 n. 5 (1st Cir.1994) (citations omitted) (“The  
[appellant’s] attack on the denial of summary judgment has been overtaken by

1 subsequent events, namely a full-dress trial and an adverse jury verdict. In these  
2 circumstances, we will not address the propriety of the denial of summary  
3 judgment.”); *Chesapeake Paper Prod. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d  
4 1229, 1237 (4th Cir.1995) (footnote omitted) (“[W]e follow the other Circuits and  
5 conclude that this Court will not review, under any standard, the pretrial denial of a  
6 motion for summary judgment after a full trial and final judgment on the merits.”);  
7 *Black v. J.I. Case Co.*, 22 F.3d 568, 569–70 (5th Cir.1994) (footnote omitted) (“We  
8 now conclude that this Court will not review the pretrial denial of a motion for  
9 summary judgment where on the basis of a subsequent full trial on the merits final  
10 judgment is entered adverse to the movant.”); *Jarrett v. Epperly*, 896 F.2d 1013,  
11 1016 (6th Cir.1990) (footnote omitted) (“We agree with the Ninth and Federal  
12 Circuits and here hold that where summary judgment is denied and the movant  
13 subsequently loses after a full trial on the merits, the denial of summary judgment  
14 may not be appealed.”); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 278 (7th  
15 Cir.1994) (“Absent an extraordinary circumstance ..., we will not review the denial  
16 of a motion for summary judgment once the district court has conducted a full trial  
17 on the merits of a claim.”); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250–51 (10th  
18 Cir.1992) (footnote omitted) (“[E]ven if summary judgment was erroneously  
19 denied, the proper redress would not be through appeal of that denial but through  
20 subsequent motions for judgment as a matter of law and appellate review of those  
21 motions if they were denied.”); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573  
22 (Fed.Cir.1986) (footnote omitted) (“[A] denial of summary judgment is not properly  
23 reviewable on an appeal from the final judgment entered after trial.”).

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25 The *Metro Life* Court further noted that it should not ignore the persuasive policy and  
26 prudential considerations advanced by the aforementioned courts and allowing such appeals would  
27 unduly circumscribe the discretion of the district court to “deny summary judgment in a case where  
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*Affirmation: The undersigned verifies that this document does not contain the personal information of any person.*

RESPECTFULLY SUBMITTED THIS \_\_\_\_ DAY OF MAY, 2019.

/s/ Thomas C. Bradley  
THOMAS C. BRADLEY, ESQ.  
Attorney for Defendants,  
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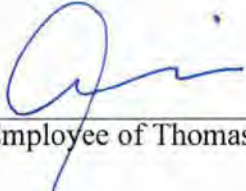
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10 ☐ Electronic Mail to the e-mail address(es) specified  
11 ☒ Second Judicial District Court Eflex system

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16 Attorney for Plaintiff

17 Dated this 9th day of May, 2019.

18   
19 Employee of Thomas C. Bradley, Esq.  
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**INDEX OF EXHIBITS**

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# EXHIBIT 1

# EXHIBIT 1

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

**JAMS ARBITRATION CASE REFERENCE NO. 1260003474**

GREGORY GARMONG,

Claimant,

vs.

WESPAC, and GREG CHRISTIAN,

Respondents.

**ORDER RE: SUMMARY JUDGMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: January 25, 2018

  
Hon. Philip M. Pro (Ret.)  
Arbitrator

**PROOF OF SERVICE BY EMAIL & U.S. MAIL**


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

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

Carl M. Hebert Esq.  
L/O Carl M. Hebert  
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carl@cmhebertlaw.com  
Parties Represented:  
Gregory Garmong

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

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

  
\_\_\_\_\_  
Mara Satterthwaite, Esq.  
msatterthwaite@jamsadr.com

# EXHIBIT 2

# EXHIBIT 2

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8 **Judicial Arbitration and Mediation Service**

9 **Las Vegas, Nevada**

10 GREGORY GARMONG,

11 Plaintiff,

Case No. 1260003474

12 v.

13 WESPAC, GREG CHRISTIAN, and  
14 Does 1-10,

15 Defendants.

16 **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION**  
17 **FOR PARTIAL SUMMARY JUDGMENT**

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

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## POINTS AND AUTHORITIES

### I. Summary

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

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

### II. Background

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

On May 9, 2012 Garmong filed a *Complaint* in Nevada Second Judicial District Court alleging that Defendants had breached the "Investment Management Agreement." In response, Defendants filed a *Motion To Dismiss And To Compel Arbitration*, in which they requested dismissal of the *Complaint* pursuant to NRCP 12(b)(1) and an order compelling arbitration pursuant to NRS 38.221.

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



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

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

### **III. Summary Judgment Standard**

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

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

1 **IV. Material Facts Not At Issue**

2 Defendants do not dispute the following material facts:

- 3 1. The parties entered into a written "Investment Management Agreement" in or about August  
4 2005.  
5 2. Beginning in 2008, the stock market, after a lengthy period of appreciation, rapidly decreased  
6 in value.  
7 3. Chart showing the values of the S&P 500 and NASDAQ from October 2005 through February  
8 2009, attached as an Exhibit to Defendants' *Opening Arbitration Brief*.

9 For a non-exhaustive list, see Exhibit 2.

10 **V. Material Facts At Issue**

11 Mr. Garmong's fifty-page *Motion for Summary Judgment* was convoluted, hard to  
12 comprehend, and its reasoning highly questionable. Defendants, however, dedicated substantial  
13 time and effort to explain why the *Motion for Summary Judgment* was meritless, in part because  
14 there are so many disputed material issues of facts that the *Motion* should be summarily denied.  
15 The Plaintiff's *Motion for Summary Judgment* was so voluminous, Defendants may have failed to  
16 specifically identify each and every detail material fact in dispute but believe that Mr. Christian's  
17 Affidavit adequately refutes the Plaintiff's baseless claims. Defendants hereby incorporate the  
18 Affidavit of Greg Christian, attached as Exhibit 1, in defense to all the claims discussed below.  
19 Rather than attempt to dissect Mr. Garmong's *Motion for Summary Judgment*, Defendants will  
20 instead focus on each claim brought by Mr. Garmong and explain which material facts are  
21 disputed.

22 For a non-exhaustive list, see Exhibit 3.

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1 VI. Legal Argument

2 1. Breach of Contract Claim

3 Under Nevada law:

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

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

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

13 Plaintiff fails to allege exactly what was "unsuitable" about the investments that Defendant  
14 Christian recommended, except that they declined in value. But an investment is not unsuitable  
15 just because it declines in value at some point. In fact, because of the economic situation in late  
16 2008 and 2009, most types of investments sustained sharp declines. Subsequent events have  
17 demonstrated that Mr. Christian's advice to Plaintiff that Plaintiff should stay the course would  
18 have prevented the purported losses about which he now complains.

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

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

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

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

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

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

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

4 **2. Breach of Implied Warranty Claim**

5 To state a claim for breach of warranty: "[A] plaintiff must prove that a warranty existed,  
 6 the defendant breached the warranty, and the defendant's breach was the proximate cause of the  
 7 loss sustained." *Nevada Contract Services, Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157, 161,  
 8 68 P.3d 896, 899 (2003).

9 Here, Plaintiff has asserted that an implied warranty existed in the Agreement signed by  
 10 the parties. Despite diligent research, Defendants have been unable to locate one case in which a  
 11 court found an implied warranty to exist in a contract solely for services. See, e.g. *Lufthansa Cargo*  
 12 *A.G. v. County of Wayne*, 2002 WL 31008373 at \*5 (E.D.Mich)("Plaintiff's claim for breach of  
 13 implied warranty fails as a matter of law. A breach of implied warranty claim cannot be alleged in  
 14 the context of a 'contract' for services . . ."); *Anthony Equip. Corp. v. Irwin Steel Erectors, Inc.*,  
 15 115 S.W.3d 191, 209 (Ct.App.Tx. 2003)("The Texas Supreme Court has recognized an implied  
 16 warranty for services only when the services related to the repair or modification of existing  
 17 tangible goods or property."); *Rochester Fund Municipals v. Amsterdam Municipal Leasing Corp.*,  
 18 746 N.Y.S.2d 512, 515, 296 A.D.2d 785, 787 ("No warranty attaches to the performance of a  
 19 service.")(quoting *Aegis Prods. v. Arriflex Corp. Of Am.*, 25 A.D.2d 639, 639, 268 N.Y.S.2d 185);  
 20 *City Services Contracting, Inc. v. Olen Properties Corp.*, 2002 WL 2017182 (Ct.App.4th Dist.  
 21 Cal.)(UNPUBLISHED); ("the well settled rule in California is that where the primary objective  
 22 of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not  
 23 apply.")(quoting *Allied Properties v. John A. Blume & Associates*, 25 CalApp.3d 848, 855, 102  
 24 Cal.Rptr.259 (1972).

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

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

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

**3. Contractual Breach of Implied Covenant of Good Faith and Fair Dealing Claim**

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

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

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

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

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

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

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

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

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

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

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

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

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

22 **5. Breach of Nevada Deceptive Trade Practices Act Claim**

23 "Under NDTPA's [Nevada Deceptive Trade Practices Act] plain language, to establish a  
24 cause of action, a plaintiff must show a defendant engaged in a consumer fraud of which the  
25 plaintiff was a victim. Because a prevailing party may recover 'damages that he has sustained,' a  
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1 plaintiff also must demonstrate damages. Implicit in that language is a causation requirement."  
2 *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657 (D.Nev. 2009)(emphasis added). As further  
3 stated by the *Picus* Court, "Under Nevada Revised Statutes §41.600(3) a party can recover only  
4 those damages sustained as a result of the defendant's act of consumer fraud." *Id.*

5 The law does not support a "rearview" analysis of investment recommendations. The  
6 Plaintiff must demonstrate that the quality of the investment when it was purchased deviated from  
7 his or her investment goals. [citing cases] *Keenan, M.D., et al. v. D.H. Blair & Co., Inc.*, 838 F.  
8 Supp. 82, 87 (S.D.N.Y. 1993). A subsequent diminution in value reveals nothing about the quality  
9 of the investment when it was purchased and does not illuminate the reasons why the stock was  
10 unsuitable for investment objectives. *Id.* Conclusory allegations regarding inappropriate  
11 investments are not sufficient. *Id.* "[A]ny investment that turns out badly can appear to be – in  
12 hindsight a low return, high risk investment..." *Olkley v. Hyperion 1999 Term Trust, Inc.*, 98 F.3d  
13 2, 8 (2<sup>nd</sup> Cir. 1996). "It is the very nature of the securities markets that even the most exhaustively  
14 researched predictions are fallible..." "Not every bad investment is a product of  
15 misrepresentation." *Id.* To recover in a securities case, a customer "must offer more than  
16 allegations that [his] portfolios failed to perform as predicted." *Id.*

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

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

**6. Breach of Fiduciary Duty Claim**

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

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

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

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

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

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

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

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

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

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

15 **7. Breach of Fiduciary Duty of Full Disclosure Claim**

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

18 **8. Breach of Agency Claim**

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

23 As previously stated, Plaintiff Garmong never instructed Mr. Christian to assume complete  
24 control over Plaintiff's investment accounts, and as a result, any losses suffered by Mr. Garmong  
25 were not caused by Defendant Christian's failure to follow Mr. Garmong's investment  
26

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

10 **9. Negligence Claim**

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

- 13 a) That the defendant was negligent; and  
14 b) That the defendant's negligence was the proximate legal cause of damage to the plaintiff.  
15 Nevada Jury Instructions 4.02

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

18 **10. Breach of NRS 628A.030 Claim**

19 NRS 628A.030 provides:

20 1. If loss results from following a financial planner's advice under any of the  
21 circumstances listed in subsection 2, the client may recover from the financial  
22 planner in a civil action the amount of the economic loss and all costs of litigation  
23 and attorney' fees.

24 2. The circumstances giving rise to liability of a financial planner are that the  
25 financial planner:

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

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

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

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

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

19 **11. Unjust Enrichment Claim**

20 "An action based on a theory of unjust enrichment is not available when there is an  
21 express, written contract, because no agreement can be implied when there is an express  
22 agreement." *Leasepartners Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 755, 942 P.2d 182, 187  
23 (1997). Here, the parties agree that they entered into a written "Investment Management  
24 Agreement" (See Material Facts Not In Issue, above). The "advisor fees" Plaintiff now complains  
25 about by Plaintiff were included in that Agreement. In any event, Defendants deny that they were  
26

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

3 **12. Intentional Infliction of Emotional Distress Claim**

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

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

19 1.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

**VII. Damages Claim**

NRS 41.1395, in pertinent part, states:

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

NRS 41.1395(2)(emphasis added).

Subsection (4)(b) defines “exploitation” as:

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

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

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

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

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

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

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1 105, 770 P.2d 531 (1989).

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

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

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


14 **IX. Conclusion**

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

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

22 Submitted this 21 day of Dec., 2017.

23 *Sinai, Schroeder, Mooney, Boetsch,*  
24 *Bradley & Pace*

25   
26 Thomas C. Bradley, Esq.  
27 Attorney for Defendants  
28



# EXHIBIT 3

# EXHIBIT 3

AFFIDAVIT OF GREG CHRISTIAN

STATE of NEVADA            )  
                                      ) ss.  
COUNTY OF WASHOE        )

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

1. I am a named Defendant in this case and a Registered Investment Advisor with Wespac.
2. This affidavit is filed on behalf of both myself and Wespac and I swear to the averments in this affidavit, both in my individual capacity and as an authorized representative of Wespac Advisors LLC..
3. In or about July 2005, as a registered investment advisor with Wespac Advisors, I met with Gregory Garmong to discuss the possibility of Mr. Garmong becoming a client of Wespac. During the meeting, I gave Mr. Garmong a copy of Wespac's Investment Management Agreement. Mr. Garmong took that copy of the Agreement with him when he left our meeting.
4. Approximately a week later, Mr. Garmong returned to my office with his copy of the Agreement. Mr. Garmong had made numerous notes, underlines and cross-outs in his copy of the Agreement. Clearly he was provided with every opportunity to review and/or object and to seek independent legal advice regarding any and all terms.
5. At the meeting, Mr. Garmong then requested that I make changes to the Investment Management Agreement which I agreed to do.
6. Mr. Garmong then agreed to retain me and Wespac as his financial advisors and signed the agreement.
7. In or about September 2005, Mr. Garmong transferred securities into five new accounts at Charles Schwab to be managed by Wespac Advisors and myself. These five accounts consisted of

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

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

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

13 10. Initially, the IRA and the individual account increased in value, and the gains were  
14 consistent with the performance of the overall stock market. These two accounts, like the rest of  
15 the overall stock market, began to suffer declines beginning in the fall of 2007 and continuing into  
16 2009.

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

26 12. On September 26, 2008, Mr. Garmong faxed me a letter that stated, "I specifically  
27  
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 27. To the extent that gross negligence may apply in this case, Defendants deny that they were  
27  
28

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

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

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

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

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

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

26 33. To the extent the Arbitrator believes that additional evidence is needed to rebut Plaintiff's  
27  
28

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

12  
13 Further affiant sayeth naught.

14  
15 Dated this 21 day of December, 2017.

16  
17  
18   
GREG CHRISTIAN

19 SWORN and SUBSCRIBED to before me

20 this 21<sup>st</sup> day of December, 2017.

21   
22



# EXHIBIT 4

# EXHIBIT 4



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Counsel for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

GREGORY GARMONG,

Plaintiff,

Case No. CV 12-01271

v.

Dept. No. 6

WESPAC, GREG CHRISTIAN, and  
Does 1-10,

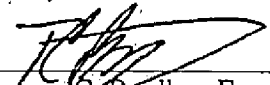
Defendants.

**Defendants' Opposition to Plaintiff's Motion for Leave to Reconsider  
and Motion for Reconsideration of Order Granting Defendants' Motion to Strike**

Defendants WESPAC and GREG CHRISTIAN, by and through their attorney of record, THOMAS C. BRADLEY, ESQ., of Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace, hereby oppose Plaintiff Gregory Garmong's *Motion for Leave to Reconsider and Motion for Reconsideration of Order Granting Defendants' Motion to Strike*. Defendants also request the award of attorney fees based upon NRS 7.085(b) and NRS 18.010(2)(b). Defendants' *Opposition* is made and based on the attached Memorandum of Points and Authorities, the attached exhibits, and all pleadings and papers on file herein.

DATED this 29 day of December 2017.

Sinai, Schroeder, Mooney, Boetsch,  
Bradley & Pace

  
Thomas C. Bradley, Esq.  
Attorney for Defendants

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. Summary**

Plaintiff has attempted to make a mockery of our judicial system by refusing to follow this Court's and the Nevada Supreme Court's repeated directions to arbitrate this dispute before JAMS.

Over five years ago, Judge Adams ordered Plaintiff to arbitrate this dispute. On December 13, 2012 the District Court filed an *Order* granting Defendants' motion to compel arbitration and denying Defendants' motion to dismiss. The Court ordered the parties to "engage in binding arbitration in conformance with the arbitration agreement entered into by the parties." *Order* of December 13, 2012.

On December 31, 2012, Plaintiff Garmong filed a document entitled *Combined Motions For Leave To Rehear And For Rehearing Of The Order Of December 13, 2012 Compelling Arbitration*. Defendants filed an *Opposition* to Mr. Garmong's *Combined Motions* on January 9, 2013, arguing that because Plaintiff's *Motion* offered no new legal or factual matters for the Court to consider, Nevada law required the Court to deny the *Motion*. In addition, Defendants requested an award of reasonable attorney's fees they had expended in opposing the *Motion*.

On January 13, 2014 the District Court filed an *Order For Response Or Dismissal* in which it ordered Plaintiff to "file a status report or proceed" within thirty days. The *Order* further stated that if there was no response to the 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*.

On February 10, 2014, 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 ... concurrently with a petition for writ of prohibition or mandate to vacate the order directing arbitration." *Response To Order Of January 13, 2014* at 2:2-6.

On April 2, 2014, the 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

1 raised any new issues of fact or law in his present motion.” *Order* filed April 2, 2014 at 2:25-27.  
2 The Court did not address Defendants’ request for attorney’s fees in its *Order*.

3 Approximately two months later, on June 20, 2014, Plaintiff filed a *Petition For Writ Of*  
4 *Mandamus Or Prohibition* with the Supreme Court of Nevada, in which Plaintiff urged the Court  
5 to reverse the District Court’s order mandating arbitration. Defendants were thereafter directed by  
6 the Court to answer the *Petition*, and on August 15, 2014, Respondents (Defendants below) filed  
7 an *Answer*. Petitioner Garmong filed a *Reply* on September 3, 2014 and on December 12, 2014  
8 the Court filed an *Order Denying Petition For Writ Of Mandamus Or Prohibition*.

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

11 On March 16, 2015 Garmong filed a *Petition For En Banc Reconsideration*. Garmong’s  
12 *Petition* was denied on April 22, 2015.

13 Thereafter, Plaintiff Garmong filed *Plaintiff’s Motion For A Court-Appointed Arbitrator*.  
14 Defendants opposed the *Motion*, and on July 12, 2016, this Court ordered the parties to each submit  
15 three names of JAMS certified qualified arbitrators from whom the Court would select one person  
16 to serve as arbitrator.

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

18 Plaintiff then filed an objection to the court ordered arbitration pursuant to NRS  
19 38.231(1)(e) and NRS 38.231(3) in which he claimed that there was no agreement to arbitrate.

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

22 On August 11, 2017, Arbitrator Hon. Philip M. Pro issued a *Discovery Plan and Scheduling*  
23 *Order*. In addition to setting forth discovery rules and deadlines for the arbitration proceeding, the  
24 *Scheduling Order* stated that “[w]ithin 20 days after the entry of this Discovery Plan and  
25 Scheduling Order, the plaintiff may file an amended complaint.”

26 In accordance with the Arbitrator’s *Order*, both parties thereafter filed opening briefs in  
27 the arbitration proceeding on September 18, 2017. However, Plaintiff simultaneously filed an  
28

1 *Amended Complaint* in the Second Judicial Court. In his *Amended Complaint*, Plaintiff repeated  
2 claims previously made in his initial *Complaint* and added additional claims. Nowhere in his  
3 *Amended Complaint* did Plaintiff refer to the pending arbitration or to the prior orders of this Court  
4 regarding arbitration. In response to this new pleading, Defendants' attorney requested that the  
5 parties stipulate that the *Amended Complaint* be withdrawn, but Mr. Garmong refused to do so.

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

10 Now Plaintiff again ignores the clear directive of this Court and filed his *Motion for Leave*  
11 *to Reconsider and Motion for Reconsideration of Order of November 13, 2017, Granting*  
12 *Defendants' Motion to Strike*.

13 Now, more than five years after this Court first ordered the parties to engage in binding  
14 arbitration, arbitration has still not taken place. Instead, Plaintiff Garmong has consistently ignored  
15 the Orders of this Court to proceed with arbitration and has continued to burden Defendants and  
16 the Court with his vexatious and seemingly endless attempts to avoid arbitration.

17 Defendants also rely upon the Court's Docket Sheet of this case which is attached as  
18 Exhibit 1 as well as the Nevada Supreme Court Docket Sheet of this case which is attached as  
19 Exhibit 2.

## 20 II. Legal Argument

21 Only in very rare instances in which new issues of fact or law are raised supporting a ruling  
22 contrary to the ruling already rendered should a Motion for Rehearing be granted. See *Moore v.*  
23 *City of Las Vegas*, 92 Nev 402 (1976).

24 Essentially, after Plaintiff did not agree with the Court's order striking his *Amended*  
25 *Complaint*, Plaintiff dreamed up a new District Court Rule that all arbitration pleadings must now  
26 be filed with the District Court. Although Plaintiff cites to a variety of rules to piece together a  
27 theory, there is simply no rule that requires arbitration papers be filed with this Court. Plaintiff  
28

1 cites no case from Nevada, nor elsewhere, holding that the failure to file arbitration papers deprived  
2 any court of appropriate jurisdiction to review and/or vacate an arbitration award. Had the Nevada  
3 Legislature or Nevada Supreme Court intended the procedural changes that the Plaintiff seeks,  
4 they would have already enacted such rules.

5 Moreover, if the Courts were to adopt the "Garmon Rule", then our already over-worked  
6 and understaffed Clerk's office would be inundated with filing hundreds and perhaps thousands of  
7 irrelevant arbitral pleadings every year, many of which would contain confidential information or  
8 facts otherwise improper to disclose. One of the main benefits of arbitration is that it is intended  
9 to save precious resources, both judicial and those of the parties, by allowing individuals to  
10 determine their chosen forum for dispute resolution. The "Garmon Rule" would defeat these  
11 benefits by increasing costs to all parties while involving the courts at all stages of arbitration.  
12 Finally, in a properly plead motion to review and/or vacate an arbitral award, the parties are free  
13 to attach pertinent arbitration pleadings as exhibits which would be individually file stamped by  
14 the Court.

15 Perhaps, Mr. Garmon does not like the rules of the Second Judicial Court, but his present  
16 *Motion* does not form the basis for this Court to re-write the Rules of the Second Judicial Court  
17 and the Nevada Rules of Civil Procedure.

### 18 III. Attorney's Fees

19 Under Nevada law, "attorney's fees are not recoverable unless ... when authorized by  
20 statute or rule." *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727 (2005)(quoting *Schouweiler*  
21 *v. Yancey Co.*, 101 Nev. 827, 830, 712 P.2d 786, 788 (1985)).

22 NRS 18.010 provides in pertinent part that:

23 (2) In addition to the cases where an allowance is authorized by specific statute,  
the court may make an allowance of attorney's fees to a prevailing party:

24 \* \* \*

25 (b) Without regard to the recovery sought, when the court finds that the claim,  
26 counterclaim, cross-claim or third-party complaint or defense of the opposing  
27 party was brought or maintained without reasonable ground or to harass the  
28 prevailing party. The court shall liberally construe the provisions of this  
paragraph in favor of awarding attorney's fees in all appropriate situations. It is  
the intent of the Legislature that the court award attorney's fees pursuant to this  
paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil

SINAI, SCHROEDER, MOONEY, BOETSCH,  
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1 Procedure in all appropriate situations to punish for and deter frivolous of  
2 vexatious claims and defenses because such claims and defenses overburden  
3 limited judicial resources, hinder the timely resolution of meritorious claims and  
4 increase the costs of engaging in business and providing professional services to  
5 the public.

6 NRS 18.010(2) and (2)(b).

7 As explained by the Nevada Supreme Court, a district court's discretion to award fees  
8 pursuant to NRS 18.010(2)(b) "promotes the efficient administration of justice without undue  
9 delay and compensates a party for having to defend a frivolous motion." *Rivero v. Rivero*, 125  
10 Nev. 410, 440, 216 P.3d 213, 234 (2009).

11 Similarly, NRS 7.085 (1)(b) provides that: "[i]f a court finds that an attorney has: . . . (b)  
12 Unreasonably and vexatiously extended a civil action or proceeding before any court in the State,  
13 the court shall require the attorney personally to pay the additional costs, expenses and attorney's  
14 fees reasonably incurred because of such conduct."

15 Here, as explained above, the parties have been engaged in litigation for over five years,  
16 involving dozens of pleadings initiated by Plaintiff re-arguing the issue of arbitration that was  
17 first determined as proper and binding on the parties in December 2012.

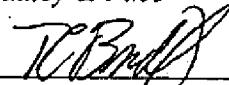
#### 18 IV. Conclusion

19 WHEREFORE, for all the reasons stated above, Plaintiff's *Motion for Leave to File a*  
20 *Motion for Reconsideration and the Motion for Reconsideration* should be denied and the Court  
21 should award attorney's fees to Defendants. If directed by the Court, Defendants' counsel will  
22 submit proper documentation of attorney's fees.

23 The undersigned does hereby confirm the preceding document does not contain the social  
24 security number of any person.

25 RESPECTFULLY SUBMITTED this 29 day of December, 2017.

26 Sinai, Schroeder, Mooney, Boetsch,  
27 Bradley & Pace

28   
Thomas C. Bradley, Esq.  
Attorney for Defendants

SINAI, SCHROEDER, MOONEY, BOETSCH,  
BRADLEY & PACE  
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### CERTIFICATE OF SERVICE

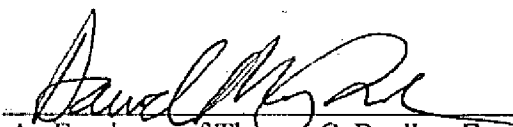
Pursuant to NRCP 5(b), I certify that I am an employee of SINAI, SCHROEDER, MOONEY, BOETSCH, BRADLEY & PACE, and that on this day I caused to be served a true and correct copy of the attached document Defendants' Opposition to Plaintiff's Motion for Reconsideration of Order Granting Motion to Strike to the following parties by:

X using the Court's CM/ECF Electronic Notification System:

\_\_\_ placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail (USPS) at Reno, NV addressed to:

ATTORNEY	PARTY(IES)
Carl Hebert, Esq. 202 California Avenue Reno, NV 89509	Plaintiff Gregory Garmong

Dated this 29 day of December 2017.

  
An Employee of Thomas C. Bradley, Esq.

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

EXHIBIT INDEX

<u>Exhibit</u>	<u>Description</u>	<u>Pages</u>
1	Second Judicial District Court Docket Sheet	6
2	Nevada Supreme Court Docket Sheet	2
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# EXHIBIT 5

# EXHIBIT 5

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

**JAMS ARBITRATION CASE REFERENCE NO. 126003474**

**GREGORY GARMONG,**

**Claimant,**

**vs.**

**WESPAC, and GREG CHRISTIAN,**

**Respondents.**

**ORDER RE: CLAIMANT'S MOTION  
FOR RECONSIDERATION OF ORDER  
DENYING SUMMARY JUDGMENT**

On January 25, 2018, the undersigned Arbitrator entered an Order denying Claimant Garmong's Motion for Partial Summary Judgment and directed that the parties submit a joint status report proposing a revised schedule for the completion of remaining discovery.

On February 12, 2018, Claimant filed a Motion for Reconsideration of the Order denying Partial Summary Judgment. Having considered the arguments set forth in Claimant's fully briefed motion and the arguments of counsel presented at the hearing conducted on March 8, 2018, the Arbitrator finds that the Motion for Reconsideration should be denied.

The relevant history of this litigation is briefly recited in the Order denying Claimant's Motion for Partial Summary Judgment entered January 27<sup>th</sup> and need not be repeated here. Claimant's basis for reconsideration is grounded in the well settled law of Nevada that summary judgment shall be granted, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). That is precisely the standard applied by the Arbitrator in concluding that summary judgment was not warranted.

The exhaustive analysis provided in Claimants original motion, and the voluminous declarations and exhibits attached thereto articulate Claimants view of the evidence supporting his claims. Many of the facts relied upon by Claimant are indeed "undisputed." Viewed in context, however, the conclusion of the Arbitrator then, and now is that they do not entitle Claimant to judgment as a matter of law without first affording Respondents the opportunity to defend the claims at a merits hearing.

Moreover, Nevada law does not require that an arbitrator or judge parse and render a dispositive ruling on every fact asserted by each party as undisputed. The standard to be applied is to "if practicable ascertain what material facts exist without substantial controversy" which are material to the resolution of a claim such that a trial on the merits of that claim is unnecessary. *Id.*

A merits hearing is particularly appropriate where, as here, the resolution of the claims is so heavily dependent on the opportunity of the parties to test the credibility of the two principle witnesses, Gregory Garmon and Greg Christian, and on the Arbitrators opportunity to assess and weigh the credibility of each witness, and all the evidence in that context.

IT IS THEREFORE ORDERED that Claimant's Motion to Strike Respondent's Opposition to Claimant's Motion for Reconsideration is Denied.

IT IS FURTHER ORDERED that Claimant's Motion for Reconsideration of Order Denying Plaintiff's Motion for Partial Summary Judgment is Denied.

#### DISCOVERY SCHEDULING ORDER

Both parties agree that to prepare this case for trial on the merits further discovery is needed, including the deposition of Claimant Garmon and Respondent Christian. This case has been pending since 2012 in State Court, and already has consumed nearly one year in arbitration. It is imperative that the parties conclude necessary discovery and prepare this matter for a hearing on the merits at which a complete and final adjudication of all claims can be provided.

At the telephonic hearing conducted on March 8<sup>th</sup>, the parties were unable to agree to a discovery schedule, and efforts to schedule the arbitration hearing were complicated by the Arbitrator's availability. Since that hearing, however, the Arbitrator has been able to make adjustments to his schedule to allow for scheduling of the arbitration hearing and can offer the parties 2 alternative hearing weeks: September 24-28, and October 15-19. A trial setting for either week would allow the parties ample time to complete remaining discovery in this case.

Therefore, the parties are requested to confer forthwith and advise the Arbitrator, and his Case Manager, Mara Satterthwaite, on or before March 26, 2018, of which of the two trial dates

above fit their schedules, and how many trial days they will require for the merits hearing.

All discovery, including expert discovery, shall be completed on or before August 10, 2018. Additionally, because the Arbitrator finds that Garmon's damages are a relevant issue in this case, discovery of documents revealing Claimant's investments from 2008 to 2014 will be permitted.


Any pre-hearing Motions in Limine shall be filed on or before August 24, 2018, and responses thereto shall be filed not later than September 3, 2018.

On or before September 17, 2018, the parties shall submit a list of witnesses, together with a brief description of the subject area of that witnesses' testimony; a list of exhibits each party proposes to offer at trial; and their pre-trial briefs.

If the parties intend to use the services of a Court Reporter for the Arbitration hearing, they shall make arrangements for the same and advise the Arbitrator's Case Manager, Ms. Satterthwaite on or before September 17, 2018.

IT IS SO ORDERED.

Dated: March 19, 2018

---

Hon. Philip M. Pro (Ret.)  
Arbitrator

**PROOF OF SERVICE BY EMAIL & U.S. MAIL**


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

I, Mara Satterthwaite, Esq., not a party to the within action, hereby declare that on March 19, 2018, I served the attached ORDER RE: CLAIMANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING SUMMARY JUDGMENT on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Las Vegas, NEVADA, addressed as follows:

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 March 19, 2018.

  
Mara Satterthwaite, Esq.  
msatterthwaite@jamsadr.com

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,  
Defendants.

DEPT. NO. : 6

**PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTIONS TO VACATE ARBITRATOR'S AWARD  
OF DENIAL OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND FOR THE COURT TO DECIDE AND GRANT  
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The plaintiff submits the following points and authorities in support of his Motion to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment.

**I. A BRIEF LOOK-DEFENDANTS' OPPOSITION DOES NOT  
TAKE THE APPROACH MANDATED BY NEVADA LAW, AND  
INSTEAD RELIES UPON A LEGALLY UNTENABLE POSITION**

Defendants' Opposition is based either upon a misunderstanding of the governing law of motions to vacate an arbitrator's order or final award, or an attempt to mislead.

1 Plaintiff's Motion to Vacate sets forth the law and its application for both statutory and non-  
2 statutory grounds to vacate the arbitrators two Orders (Motion to Vacate, Exh. 4 and Exh.  
3 7) denying Plaintiff's Motion for Partial Summary Judgment ("PMPSJ"). An opposition to  
4 a motion to vacate on statutory grounds must attempt to controvert Plaintiff's showing that  
5 the arbitrator's two Orders are within the scope of the relevant portion of NRS § 38.241(1).  
6 An opposition to a motion to vacate on nonstatutory grounds must attempt to controvert  
7 Plaintiff's showing that the arbitrator's two Orders have disregarded material facts or  
8 governing substantive or procedural law. The governing law is discussed more fully in the  
9 following § II.  
10

11 Plaintiff's Motion includes two distinct motions—First, a Motion to Vacate the  
12 arbitrator's two Orders deciding PMPSJ, and, Second, a Motion for this Court to Decide  
13 and Grant PMPSJ.  
14

15 As to the Motion to Vacate, the two Orders must be vacated on both statutory and  
16 non-statutory grounds. As discussed in the following § III.A, Defendants' Opposition did  
17 not address most of the grounds set forth in Plaintiff's Motion to Vacate for vacating the two  
18 Orders on both statutory and non-statutory grounds, conceding the grounds not addressed.  
19 As discussed in the following § III.B, Defendants' Opposition did not address Plaintiff's  
20 Motion for this Court to Decide and Grant PMPSJ, thereby conceding it in its entirety.  
21

22 Instead of opposing the First and Second Motions, Defendants' Opposition 2:9-10  
23 and 5:16-18 took a daring approach of arguing "An Order Denying Summary Judgment is  
24 not Appealable after a Hearing on the Merits." Defendants' argument relies entirely on case  
25 authority from other jurisdictions, not Nevada, and dealing exclusively with appeals of  
26 decisions from a district court, not motions to vacate in a district court. Further, as will be  
27 demonstrated in § IV, the Nevada Supreme Court routinely allows appeals of pre-trial  
28

1 denials of motions for summary after a trial has been held.

2 **II. THE GOVERNING LAW OF MOTIONS TO VACATE-**  
3 **THE OPPOSITION COMPLETELY MISSES THE POINT**  
4 **OF THE GOVERNING LAW OF MOTIONS TO VACATE**

5 **A. An opposition to a motion to vacate on statutory grounds must at least**  
6 **attempt to demonstrate that the arbitrator's two Orders are not within the scope of**  
7 **the relevant portions of NRS § 38.241(1).**

8 The statutory grounds for granting a motion to vacate found in NRS § 38.241(1), are  
9 set forth in Plaintiff's Motion to Vacate 4:7-14 and 8:20-9:6. The five statutory grounds  
10 specific to the facts of this case are presented at Plaintiff's Motion to Vacate 9:7-16:22.  
11 Defendants' Opposition either does not address the points in most cases, see § III.A  
12 below, or presents arguments directly contrary to well-established precedent.

13 **B. An opposition to a motion to vacate on nonstatutory grounds must at least**  
14 **attempt to demonstrate that the arbitrator's two Orders have not disregarded**  
15 **material facts and/or governing substantive or procedural law, not present an**  
16 **appellate argument.**

17 Defendants' Opposition completely fails to appreciate, or deliberately seeks to  
18 mislead concerning, the governing law of motions to vacate based upon nonstatutory  
19 grounds.

20 Plaintiff's Motion to Vacate 4:7-5:6 sets forth the legal standards for a motion to  
21 vacate on nonstatutory grounds, so that Defendants would understand those legal  
22 standards. Two portions of the holding of Clark County Educ. Ass'n v. Clark County School  
23 Dist., 122 Nev. 337, 341-42, 131 P.3d 5, 8 (2006) are especially pertinent here, because  
24 Defendants' Opposition refuses to follow them:

25 There are two common law grounds recognized in Nevada under which a  
26 court may review private binding arbitration awards: (1) whether the award  
27 is arbitrary, capricious, or unsupported by the agreement; and (2) whether  
28 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



1        disregard the facts or the terms of the arbitration agreement.

2        ‘A party seeking to vacate an arbitration award based on manifest disregard  
3        of the law may not merely object to the results of the arbitration.’ In such  
4        instance, ‘the issue is not whether the arbitrator correctly interpreted the law,  
5        but whether the arbitrator, knowing the law and recognizing that the law  
6        required a particular result, simply disregarded the law.’

6        (Emphasis added).

7        Whether there was an error in law or fact is not the issue under Nevada law  
8        governing motions to vacate. The issue is whether the arbitrator “disregard[ed] the facts  
9        or the terms of the arbitration agreement” and/or “disregarded the law.” The present  
10       Motion to Vacate demonstrated that in many, if not most, instances of nonstatutory  
11       grounds, the present arbitrator “disregarded the facts” and/or “disregarded the law.”

12       The District Court can assess whether the arbitrator “disregard[ed] the facts or the  
13       terms of the arbitration agreement” and/or “disregarded the law” only by examining the two  
14       Orders (Motion to Vacate, Exh. 4 and Exh. 7) issued by the arbitrator, to see if the facts  
15       and law are addressed. As discussed in detail in the Motion to Vacate, the two Orders  
16       evidence near total-disregard for both the facts and the law.

17       The Opposition refuses to follow the approach mandated by the case authority.  
18       The Opposition argues its case as though this were an appeal of the two Orders, not a  
19       motion to vacate. The Motion to Vacate identifies the facts and law that Plaintiff believes  
20       were disregarded by the arbitrator’s two Orders. The Opposition could have properly  
21       responded by identifying the locations in the two Orders where Defendants contend that  
22       the pertinent facts and the applicable law are allegedly addressed. That is the nature of  
23       the inquiry in a motion to vacate, not attempting to re-argue the party’s case as though this  
24       were an appeal.  
25       were an appeal.

26       After setting forth the governing law, Plaintiff’s Motion to Vacate at 17:11-29:22

1 thereafter took care to demonstrate that there were multiple nonstatutory grounds for  
2 vacating the arbitrator's decision on PMPSJ. Defendants' Opposition did not respond to  
3 these nonstatutory grounds at all.

4       The Court will see the difference between the two different approaches taken by the  
5 Motion to Vacate and Defendants' Opposition. The Motion to Vacate argues, properly  
6 under Nevada law, that the arbitrator's two Orders disregarded the facts and disregarded  
7 the law. Defendants' Opposition refuses to discuss most of the matters raised in the  
8 Motion to Vacate, see § I above. Defendants' Opposition 5:22-6:8 does not address  
9 whether the arbitrator's two Orders disregarded the facts or the law. Instead, in the few  
10 instances where it does address the arguments of the Motion to Vacate, Defendants'  
11 Opposition improperly seeks to argue that it had presented a proper opposition to PMPSJ,  
12 and that the two Orders are correct.

### 13                   **III. WHAT DEFENDANTS' OPPOSITION DOES NOT ADDRESS IS** 14                   **MORE SIGNIFICANT THAT WHAT IT DOES ARGUE.**

15       Plaintiff's Motion includes two separate and distinct motions, addressed in the follow  
16 two subsections A and B.

#### 17                   **A.     Plaintiff's First Motion: Motion to Vacate**

18       Defendants' Opposition does not address the great majority of the issues and points  
19 raised in the Plaintiff's Motion to Vacate. The absence of an opposition to these issues  
20 and points may be taken as a concession by Defendants that they are correct. The  
21 following is a list of the issues and points raised in Plaintiff's Motion to Vacate, with the  
22 location they are found in Plaintiff's motion, that Defendants refused to address, and are  
23 therefore conceded by Defendants' Opposition. This list is presented in detail in reference  
24 to the arguments and points made in Plaintiff's Motion to Vacate, so that the Court may see  
25  
26  
27  
28

1 that Defendants did not oppose much of anything presented in that Motion.

2 A decision in Plaintiff's favor on any one of these point requires that the District  
3 Court grant the Motion to Vacate.

4 ● The arbitrator's two Orders (Motion to Vacate, Exh. 4 and Exh. 7) do not follow  
5 the approach mandated by Wood v. Safeway, 121 Nev. 724, 731, 121 P.3d 1026, 1031  
6 (2005) of first evaluating whether there are undisputed material facts, and, if so, of  
7 applying the governing substantive law to determine whether "the moving party is entitled  
8 to a judgment as a matter of law." Motion to Vacate 3:4-4:5.

9  
10 ● The proper grounds for vacating an arbitrator's decision. Motion to Vacate 4:6-  
11 5:6.

12 ● The procedural law governing the resolution of motions for summary judgment.  
13 Motion to Vacate 5:23-7:9.

14  
15 ● That this court has a duty and obligation to review the arbitrator's action in relation  
16 to PMPSJ. Motion to Vacate 7:10-15.

17 ● That a properly decided PMPSJ would have been dispositive of the issues in the  
18 arbitration and the case, and that the arbitrator had urged Plaintiff to bring PMPSJ. Motion  
19 to Vacate 7:15-8:12.

20  
21 ● The statutory legal grounds for vacating an arbitrator's order, NRS § 38.241(1).  
22 Motion to Vacate 8:13-9:7

23 ● First statutory ground: No complete, unambiguous Contract including an  
24 arbitration clause was ever made of record; there was no Agreement to arbitrate. (NRS §  
25 38.241(1)(e)). Motion to Vacate 9:7-12:5.

26 ● Second statutory ground: The arbitration provision ¶ 16 of the "Agreement" is  
27 "void" pursuant to NRS § 597.995 and/or Nevada common law. NRS § 38.241(1)(e).  
28

1 Motion to Vacate 12:6-13:9.

2 ● Third statutory ground: The arbitration provision ¶ 16 of the “Agreement” is void  
3 because it is not “conspicuous” and does not warn the consumer that he is foregoing  
4 important rights under Nevada law. D.R. Horton, Inc. v. Green, 120 Nev. 549, 556-7, 96  
5 P.3d 1159, 1164-65 (2004). (NRS § 38.241(1)(e)). Motion to Vacate 13:10-14:5.

6  
7 ● Fourth statutory ground: The arbitrator . . . refused to consider evidence material  
8 to the controversy . . . so as to prejudice substantially the rights of a party to the arbitral  
9 proceeding. (NRS § 38.241(1)(c)) Motion to Vacate 13:6-14:22. This is a particularly  
10 significant refusal on the part of Defendants’ Opposition, in light of the significance of  
11 undisputed material facts in the procedure mandated by Wood v. Safeway for evaluating  
12 a motion for summary judgment. After stating that “Many of the facts relied upon by  
13 Claimant [the arbitrator’s term for Plaintiff] are indeed ‘undisputed,’” the arbitrator did not  
14 identify which of the 20 Undisputed Material Facts (“UMFs”) set forth in PMPSJ were  
15 “indeed undisputed” as the basis for going forward with the second step required by Wood  
16 v. Safeway.

17  
18 ● Fifth statutory ground: Evident partiality by an arbitrator appointed as a neutral  
19 arbitrator. NRS § 38.241(1)(b)(1). Motion to Vacate 14:23-16:22. The proper standard  
20 of partiality in Nevada is whether there is a “reasonable impression of partiality.” Thomas  
21 v. City of North Las Vegas, 122 Nev. 82, 127 P.3d 1057(Nev. 2006). This “reasonable  
22 impression” standard is largely a subjective conclusion by the District Court. The District  
23 Court must seek to identify the impression that a “reasonable person” would reach. The  
24 Motion to Vacate 14:23-16:22 demonstrated the arbitrator’s partiality in this case.  
25 Defendants’ Opposition does not address this ground at all.

26  
27 ● Shifting to non-statutory (common law) grounds, Defendants’ Opposition refuses  
28

1 to discuss the fact that the arbitrator's decisions were arbitrary, capricious, or were  
2 unsupported by the alleged agreement, and disregarded the facts or the terms of the  
3 arbitration agreement. Motion to Vacate 17:11-29:22.

4 Included within this category of non-statutory grounds are

5       o The governing law of non-statutory grounds. Motion to Vacate 17:15-21.

6       o The arbitrator admitted that he disregarded the evidence of the Undisputed  
7 Material Facts. Motion to Vacate 17:22-18:5.

8       o None of the twenty Undisputed Material Facts is mentioned a single time  
9 in either of the two Orders. Motion to Vacate 18:6-19:21.

10       o The arbitrator disregarded the evidence presented in support of each of the  
11 twelve Claims for Relief of the Motion for Summary Judgment. Motion to Vacate 19:21-  
12 21:26.

13       o The arbitrator's insistence on an evidentiary "merits hearing" to avoid  
14 substantively deciding PMPSJ disregards and ignores the governing law that a motion for  
15 summary judgment must be based solely on the written evidence and does not permit  
16 "credibility" determinations. Motion to Vacate 21:2-23:20.

17       ● The arbitrator manifestly disregarded the governing procedural, evidentiary and  
18 substantive law of summary judgment. Motion to Vacate 23:21-28:22.

19 Included within this category of non-statutory grounds are

20       o The arbitrator manifestly disregarded the governing principles. Motion to  
21 Arbitrate, 23:23-24:11.

22       o The arbitrator manifestly disregarded the governing procedural law as set  
23 forth in NRCP Rule 56 and Wood v. Safeway. Motion to Vacate 24:13-25:5.

24       o The arbitrator manifestly disregarded the governing law of evidence and  
25

1 admissibility of evidence in summary judgment proceedings. Motion to Vacate 24:6-26:8.

2           o The arbitrator manifestly disregarded the governing substantive law for  
3 each of the twelve Claims for Relief. Motion to Vacate 26:9-22.

4           o The arbitrator manifestly disregarded the governing substantive law  
5 presented in support of each of the Claims for Relief of PMPSJ. Motion to Vacate 26:23-  
6 29:22.  
7

8           **B. Plaintiff's second motion: Defendants' Opposition also did not**  
9 **oppose Plaintiff's Motion to Decide and Grant Plaintiff's Motion for Partial Summary**  
10 **Judgment found at Motion 1:21-2:4; 5:7-22; 29:23-30:6; and 31:18-21.**

11           This is a separate motion from the Motion to Vacate. Nevada District Court Rules  
12 13(3) provides, "Failure of the opposing party to serve and file his written opposition may  
13 be construed as an admission that the motion is meritorious and a consent to granting the  
14 same." This motion asserts that this Court has the authority to decide PMPSJ properly,  
15 and that this Court should grant PMPSJ. Defendants' Opposition does not oppose.

16           As part of Plaintiff's Motion to Decide and Grant Plaintiff's Motion for Partial  
17 Summary Judgment, Plaintiff requested damages as detailed in PMPSJ, \$9,630,929.76,  
18 plus attorney's fees, costs, and interest as provided by law. Defendants' Opposition does  
19 not oppose this request.  
20

21           The Plaintiff next turns to the arguments that Defendants' Opposition did make.

22           **IV. AN ORDER DENYING SUMMARY JUDGMENT IS SUBJECT**  
23 **TO A MOTION TO VACATE AFTER A HEARING ON THE MERITS**

24           The heading at Defendants' Opposition 2:9-10 expresses Defendants' primary  
25 argument, "An Order Denying Summary Judgment is not Appealable after a Hearing on the  
26 Merits." This is a high-risk strategy because Defendants' Opposition did not address the  
27 points set forth in § III, and instead relies entirely upon this claim that the arbitrator's two  
28

1 Orders are not “appealable.” An argument follows at Defendants’ Opposition 2:11-5:22,  
2 concluding at Defendants’ Opposition 5:16-18, “For the reasons expressed above, the  
3 overwhelming majority of reviewing Courts have held that they need not consider the  
4 propriety of an order denying summary judgment once there has been a full hearing on the  
5 merits.”  
6

7 Defendants’ position and argument are absolutely wrong. None of the authority  
8 cited by Defendants is from Nevada, and in any event none of the cited authority supports  
9 Defendants conclusion.

10 Further, Defendants’ argument is inapplicable because it confuses motions to  
11 vacate filed in the district court with appeals from the district court. Graber v. Comstock  
12 Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995) holds that the District  
13 Court has an “obligation” to consider the rulings of the arbitrator when raised in a motion  
14 to vacate.” NRS § 38.247 expressly provides for an appeal from the District Court after a  
15 motion to vacate.  
16

17 But even for appeals, Defendants’ argument is incorrect, at least for Nevada. The  
18 Nevada Supreme Court routinely considers appeals of denials of pretrial motions for  
19 summary judgment. See, for example, GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d  
20 11, 13 (2001):  
21

22 An order denying summary judgment is not independently appealable;  
23 however, we may review the propriety of the district court's summary  
24 judgment ruling because GES has properly raised the issue in its appeal  
from the final judgment. Our review is de novo and without deference to the  
district court's findings.

25 Cromer v. Wilson, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010); Clark County School Dist.  
26 v. Virtual Educ. Software, Inc., 125 Nev. 374, 382, 213 P.3d 496, 502 (2009). In none of  
27 these cases was any argument raised or decided that there may not be an appeal of  
28

1 denial of a pretrial motion for summary judgment after judgment.

2 **V. AN ARBITRATOR'S ORDER DENYING A MOTION**  
3 **FOR SUMMARY JUDGMENT IS PROPERLY THE**  
4 **SUBJECT OF A MOTION TO VACATE**

5 As established at Motion 7:10-8:12, the District Court has an obligation to review the  
6 actions of the arbitrator in deciding a motion for summary judgment, when presented in a  
7 motion to vacate. Graber v. Comstock Bank, 111 Nev. at 1427-28, 905 P.2d 1112 held  
8 that the District Court had, for both statutory and common law grounds, "the authority and  
9 obligation to review the arbitrator's award to determine whether the arbitrator manifestly  
10 disregarded the law. To the extent the arbitration transcript and exhibits contained  
11 substantial evidence of a manifest disregard for the law, the district court acted improperly  
12 by failing to review the arbitration transcript and exhibits before confirming the arbitration  
13 award."  
14

15 Opposition 2:9-5:22 argues that the District Court may not follow the precedent of  
16 Graber, citing exclusively to authority from other jurisdictions. The Opposition is incorrect  
17 for at least three reasons. First, Graber sets forth the precedential law of Nevada,  
18 regardless of what course other jurisdictions may take. Second, the Opposition seeks to  
19 create confusion between appeals from the decision of the District Court, and motions to  
20 vacate brought in the District Court. This attempt to confuse appeals and motions to  
21 vacate runs throughout Defendants' Opposition, and in its other two Oppositions to the  
22 other two Motions to Vacate, as well. Third, the authority from other jurisdictions does not  
23 hold what Defendants' Opposition claims. As it does not relate to motions to vacate under  
24 Nevada's Uniform Arbitration Act NRS Ch. 38 and does not supersede Nevada authority,  
25 there is no point to discussing it in detail.  
26  
27  
28



1                   **VI. A MOTION TO VACATE DOES NOT DEAL WITH WHETHER**  
2                   **THE ARBITRATOR'S ORDERS ARE RIGHT OR WRONG, BUT**  
3                   **INSTEAD ON THE PROCESS OF THE ARBITRATION.**

4                   Defendants' Opposition 5:22-6:8 seeks to convert Plaintiff's Motion to Vacate into  
5 a debate on whether the arbitrator's final ruling on the Motion for Summary Judgment was  
6 correct, the subject of a conventional appeal. That is error, and contrary to the clear  
7 holdings of the Nevada Supreme Court, see the discussion in § II above, and especially  
8 the holdings of Clark County Educ. Ass'n v. Clark County School Dist.

9                   **VII. DEFENDANTS' OPPOSITION SEEKS TO DIVERT THE**  
10                  **COURT'S ATTENTION FROM THE FACT THAT THE**  
11                  **OPPOSITION DOES NOT ADDRESS THE ISSUES**

12                  Defendants' Opposition 6:9-7:18 seeks to obscure the fact that it fails to address the  
13 issues properly presented in Plaintiff's Motion to Vacate, by making false statements,  
14 attributing them to Plaintiff, and using these false statements as a springboard for  
15 Defendants' usual personal attacks on Plaintiff instead of following the law.

16                  Defendants' Opposition 6:10-11 falsely states, "Mr. Garmong attempts to mislead  
17 this Court by contending that Judge Pro evaluated the credibility of witnesses when he  
18 denied Mr. Garmong's Motion for Partial Summary Judgment. See page 13 Motion to  
19 Vacate Arbitrator's Award of Attorney's Fees."

20                  Defendants' Opposition uses this intentional mischaracterization of Plaintiff's  
21 position as the basis for personal attacks on Plaintiff throughout the rest of this section.  
22 Plaintiff will not be dragged down by Defendants' tactic, but needs to clarify what he and  
23 the arbitrator did in fact say, so that the Court will be able to evaluate exactly which party  
24 is attempting to mislead the Court.

25                  The referenced page 13 of Plaintiff's Motion to Vacate Arbitrator's Award of  
26 Attorney's Fees states  
27  
28

1 The reason given by the arbitrator for disregarding the facts and the law was  
2 that a 'merits hearing' to test credibility of witnesses was required as part of  
3 the summary judgment proceeding. The assessment of witness credibility  
4 in summary judgment proceedings is expressly forbidden by *Anderson v.*  
5 *Liberty Lobby, Inc.*, 477 U.S. 42, 255 (1986) and by *Pegasus v. Reno*  
6 *Newspapers, Inc.*, 118 Nev. 706, 713-714, 57 P.3d 82, 87 (2002), and many  
7 other authorities.

8 That is a true statement, and Plaintiff stands by it. Plaintiff never contended,  
9 suggested, or argued "that Judge Pro evaluated the credibility of witnesses when he  
10 denied Mr. Garmong's Motion for Partial Summary Judgment."

11 The arbitrator's Order Denying Reconsideration (Motion to Vacate, Exh. 7), second  
12 page, first-third paragraphs (also quoted at Motion to Vacate 22:7-13), states: "A merits  
13 hearing is particularly appropriate where, as here, the resolution of the claims is so heavily  
14 dependent on the opportunity of the parties to test the credibility of the two principle [sic]  
15 witnesses[.]" That is, the arbitrator used as his sole excuse for denying Plaintiff's Motion  
16 for Reconsideration (Motion to Vacate, Exh. 5), a contention that a "merits hearing" must  
17 be held as part of the resolution of PMPSJ. As discussed at Motion to Vacate 15:7-20 and  
18 22:17-23:20, and as the arbitrator was fully aware, such a "merits hearing" to assess  
19 witness credibility as part of the resolution of a motion for summary judgment is absolutely  
20 forbidden by both the United States Supreme Court, *Anderson v. Liberty Lobby, Inc.*, 477  
21 U.S. 242, 255 (1986), and by the Nevada Supreme Court, *Pegasus v. Reno Newspapers,*  
22 *Inc.*, 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002).

23 Plaintiff did not assert that the arbitrator "evaluated the credibility of witnesses  
24 when he denied Mr. Garmong's Motion for Partial Summary Judgment," as Defendants  
25 claimed in the quote above from Defendants' Opposition 6:10-11. Instead, Plaintiff stated  
26 that "The reason given by the arbitrator for disregarding the facts and the law was that a  
27  
28

1 'merits hearing' to test credibility of witnesses was required as part of the summary  
2 judgment proceeding." The arbitrator plainly wrote that such a "merits hearing" was  
3 needed to evaluate witness credibility as part of the summary judgment proceedings. That  
4 was his stated reason for not using the proper procedure to evaluate Plaintiff's Motion for  
5 Partial Summary Judgment, but that was simply an excuse to avoid deciding PMPSJ on  
6 the merits.  
7

8 This entire case has been characterized by false statements, both sworn and  
9 unsworn, by Defendants, in an attempt to smear Plaintiff, a technique that worked well with  
10 the arbitrator. The Court should look through Defendants' web of falsification.  
11

#### 12 **VIII. SUMMARY AND CONCLUSION**

13 Plaintiff's Motion to Vacate addresses the legal questions required by Nevada law,  
14 whether the arbitrator's two Orders are in violation of NRS § 38.241(1) and/or disregarded  
15 the material facts and/or the governing law, in deciding PMPSJ.

16 Defendants' Opposition refuses to address most of the issues (see § I above) and  
17 as to the others attempts to argue an appellate position, not the approach mandated by  
18 Nevada authority.  
19

20 The Court should grant Plaintiff's largely unopposed Motion to Vacate, and Plaintiff's  
21 separate and distinct unopposed Motion to Decide and Grant Plaintiff's Motion for Partial  
22 Summary Judgment.

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

25 DATED this 20th day of May, 2019.

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

28 Counsel for plaintiff

1 CODE NO. 3370  
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3  
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5

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE  
8

9 GREGORY O. GARMONG,  
10 Plaintiff,  
11

Case No. CV12-01271  
Dept. No. 6

12 vs.

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

15 Defendants.  
16 \_\_\_\_\_/

17 **ORDER RE MOTIONS**

18 Five related motions are pending before this Court.

19 **First pending is *Defendants' Petition for an Order Confirming Arbitrator's Final***  
20 ***Award and Reduce Award to Judgment, Including, Attorneys' Fees and Costs*** ("Motion  
21 *Confirm Final Award*"), filed by Defendant WESPAC and GREG CHRISTIAN (collectively  
22 "Defendants" unless individually referenced), by and through their attorney of record,  
23 Thomas C. Bradley, Esq. Plaintiff GREGORY GARMONG ("Mr. Garmong") filed *Plaintiff's*  
24 *Opposition to Defendants' Motion to Confirm Arbitrator's Award* ("Opposition to Motion to  
25 *Confirm Final Award*"), by and through his attorney of record, Carl M. Herbert, Esq.  
26  
27 Defendants filed *Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to*  
28

1 *Confirm Arbitrator's Award ("Reply to Motion to Confirm Final Award")* and the matter was  
2 submitted for decision thereafter.

3 **Second pending is *Plaintiff's Motion to Vacate Arbitrator's Final Award*** ("*Motion*  
4 *to Vacate Final Award*"), filed by Mr. Garmong. Defendants filed *Defendants' Opposition to*  
5 *Plaintiff's Motion to Vacate Arbitrator's Final Award (Opposition to Motion to Vacate)*. Mr.  
6 Garmong filed *Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion to Vacate*  
7 *Arbitrator's Final Award ("Reply to Motion to Vacate")* and the matter was submitted for  
8 decision thereafter.  
9

10 **Third pending is *Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's***  
11 ***Fees*** ("*Motion to Vacate Award of Fees*"), filed by Mr. Garmong. Defendants filed  
12 *Defendants' Opposition to Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees*  
13 *and Reply to Plaintiff's Opposition to Defendants' Petition for Order Confirming Arbitrator's*  
14 *Final Award and Reduce Award to Judgment, Including, Attorneys' Fees and Costs*  
15 *("Opposition to Motion to Vacate Award of Fees")*. Mr. Garmong filed *Plaintiff's Reply to*  
16 *Defendants' Opposition to Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees*  
17 *and Reply to Plaintiff's Opposition to Defendants' Petition for an Order Confirming*  
18 *Arbitrator's Final Award and Reduce Award to Judgment, Including, Attorneys' Fees and*  
19 *Costs ("Reply to Motion to Vacate Award of Fees")* and the matter was submitted for  
20 decision thereafter.  
21

22 **Fourth pending is the combined *Plaintiff's Motions to Vacate Arbitrator's***  
23 ***Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court***  
24 ***to Decide and Grant Plaintiff's Motion for Partial Summary Judgment*** ("*Motion to*  
25 *Vacate MSJ Decision*"), filed by Mr. Garmong. Defendants filed *Defendants' Opposition to*  
26  
27  
28

1 *Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial*  
2 *Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial*  
3 *Summary Judgment ("Opposition to Motion to Vacate MSJ Decision").* Mr. Garmong filed  
4 *Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motions to Vacate Arbitrator's Award*  
5 *of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and*  
6 *Grant Plaintiff's Motion for Partial Summary Judgment ("Reply to Motion to Vacate MSJ*  
7 *Decision")* and the matter was submitted for decision thereafter.

9 **Fifth pending is Defendants' Motion for an Order to File Exhibit as Confidential**  
10 *("Motion to File Exhibit as Confidential"),* filed by Defendants. Mr. Garmong filed *Plaintiff's*  
11 *Opposition to Defendants' Motion for an Order to File Exhibit as Confidential ("Opposition to*  
12 *Motion to File Exhibit as Confidential").* Defendants filed their *Reply to Plaintiff's Opposition*  
13 *to Defendants' Motion for an Order to File Exhibit as Confidential ("Reply to Motion to File*  
14 *Exhibit as Confidential"),* and the matter was submitted for decision thereafter.

16  
17 **I. FACTS AND PROCEDURAL HISTORY.**

18 This is an action for breach of contract. Mr. Garmong filed his Complaint on May 9,  
19 2012. On September 19, 2012, Defendants filed their *Motion to Dismiss and Compel*  
20 *Arbitration.* On December 13, 2012, this Court<sup>1</sup> entered its *Order* granting Defendants'  
21 request to compel arbitration but denying the motion to dismiss. Mr. Garmong then filed a  
22 motion to reconsider the Court's December 13, 2012 Order. The motion was opposed by  
23 Defendants. However, Mr. Garmong did not file a reply and this case was stagnant for  
24 nearly a year until January 13, 2014, when this Court entered its *Order to Proceed.* Mr.

25  
26  
27 

---

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

1 Garmong filed his reply on February 3, 2014. The motion for reconsideration was denied on  
2 April 2, 2014.

3 Mr. Garmong then sought writ relief from the Nevada Supreme Court. On December  
4 18, 2014, the Nevada Supreme Court entered its *Order Denying Petition for Writ of*  
5 *Mandamus or Prohibition*. The Supreme Court next entered its *Order Denying Rehearing*  
6 on March 18, 2015, and, subsequently, entered its *Order Denying En Banc Reconsideration*  
7 on May 1, 2015.

8  
9 After the Nevada Supreme Court's orders were entered, this Court again entered an  
10 *Order for Response*, instructing the parties to proceed with this case. *Order*, November 17,  
11 2015. In response, the parties indicated they had initiated an arbitration proceeding with  
12 JAMS in Las Vegas. *Notice of Status Report*, December 1, 2015.

13  
14 On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*,  
15 arguing Defendants prejudiced the JAMS arbitrators against Mr. Garmong. This matter was  
16 fully briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration*. The parties  
17 then stipulated to select one arbitrator, to reduce costs. *Stipulation to Select One Arbitrator*,  
18 October 17, 2016. In accordance, this Court entered its *Order Appointing Arbitrator* on  
19 October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator. After it was determined  
20 Mr. Ornstil was unavailable, Mr. Garmong stipulated to the appointment of either retired  
21 Judge Phillip M. Pro,<sup>2</sup> or Lawrence R. Mills. Esq.

22  
23  
24 On November 13, 2016, this Court entered its *Order Granting Motion to Strike*, which  
25 stayed the proceeding pending the outcome of the arbitration. *Order Granting Motion to*  
26

27  
28 <sup>2</sup> Mr. Garmong stipulated to Judge Pro although he previously moved to preclude a judge from  
serving as an arbitrator.

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

3 On March 27, 2017, Mr. Garmong filed *Plaintiff's Objection Pursuant to NRS*  
4 *38.231(3) and 38.241(e) That There is No Agreement to Arbitrate; Notification of Objection*  
5 *to the Court*. Despite prior determinative orders from this Court, Mr. Garmong again  
6 objected to arbitration on the basis there was no agreement to arbitrate.

7  
8 On May 23, 2017, this Court entered its *Order to Show Cause Why Action Should not*  
9 *be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)*, finding "Mr. Garmong and  
10 Defendants were ordered numerous times to participate in arbitration as early as December  
11 13, 2012. The Court held no evidence was presented establishing the parties had  
12 proceeded to arbitration as ordered. *Order*, p. 4. Accordingly, the Court ordered the parties  
13 to show cause why the action should not be dismissed for want of prosecution. *Order*, p. 4.

14  
15 The parties had their first arbitration conference in April 2017. On June 22, 2018,  
16 without asking for leave of Court, Mr. Garmong filed his *Motion to Disqualify Arbitrator Pro*,  
17 *Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator* ("*Motion*  
18 *to Disqualify*").

19  
20 Defendants thereafter filed the *Defendants' Motion for Limited Relief From Stay to*  
21 *File Motion for Attorney's Fees and Sanctions* ("*Motion for Sanctions*") requesting limited  
22 relief from this Court's order staying the proceeding pending the outcome of arbitration.  
23 However, on October 22, 2018, Defendants filed their *Notice of Completion of Arbitration*  
24 *Hearing*. The Court held that, with completion of the arbitration, Defendants' *Motion for*  
25 *Sanctions* was moot. Additionally, the Court took notice of Defendants' *Notice of*  
26  
27  
28



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

3 **II. PENDING MOTIONS.**

4 **A. Motion to Confirm Final Award**

5  
6 In its *Motion to Confirm Final Award*, Defendants petition the Court for an order  
7 confirming the arbitration award pursuant to Rule 38.239 of the Nevada Revised Statutes.  
8 *Motion to Confirm Final Award*, p. 5. Defendants assert the arbitration Final Award in JAMS  
9 Arbitration Case No. 1260003474 was entered April 11, 2019, in favor of Defendants and  
10 against Mr. Garmong in the total sum of \$111,649.96, including reasonable attorney's fees  
11 and costs. Defendants further request interest accrued on the total sum at the legal rate of  
12 7.5% per annum, from the date this Court enters judgment until the date judgment is  
13 satisfied in full. *Motion to Confirm Final Award*, p. 5.

14  
15 Mr. Garmong opposed the *Motion to Confirm Final Award* on the grounds he did not  
16 enter into a "binding contract including an agreement providing for arbitration" as required  
17 by NRS 38.221(1). *Opposition to Motion to Confirm Final Award*, p. 1. Mr. Garmong argues  
18 if Defendants "cannot identify one, and only one, true, complete, correct, certain,  
19 unambiguous, definite, verified and binding Contract in the record as it now exists, the  
20 arbitrator's Final Award cannot be confirmed because there was no agreement to arbitrate."  
21 *Opposition to Motion to Confirm Final Award*, p. 2. Mr. Garmong further argues Defendants'  
22 *Motion to Confirm Final Award* must be denied because Defendants perpetrated fraud upon  
23 the Court, arbitrator, and Plaintiff by falsely representing the first version of the Investment  
24 Management Agreement was correct.

25  
26 In their *Reply*, Defendants assert the parties entered into a valid and enforceable  
27  
28

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

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

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

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

26 **C. Motion to Vacate MSJ Decision**

27 In his *Motion to Vacate MSJ Decision*, Mr. Garmong requests an order from this  
28

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

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

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

16 In his *Motion to Vacate Award of Fees*, Mr. Garmong argues Rule 68 of the Nevada  
17 Revised Statutes does not apply to this case because the parties did not agree it would  
18 apply. *Motion to Vacate Award of Fees*, p. 5. In support, Mr. Garmong argues JAMS Rule  
19 24 provides the award of the arbitrator may include attorney's fees if agreed to by the  
20 parties. *Motion to Vacate Award of Fees*, p. 6. Moreover, Mr. Garmong argues the award  
21 was procured by corruption, fraud, or other undue means.

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

25 There is no dispute that the issues in this case are governed by Nevada law,  
26 and procedurally by JAMS Rules and the provisions of the Nevada Rules of  
27

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

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

7 In addition to arguing the award is proper under NRCP Rule 68 and JAMS Rule  
8 24(g), Defendants argue the evidence supports Judge Pro's determination that the fees are  
9 reasonable. *Opposition to Motion to Vacate Award of Fees*, p. 14.

10 **E. Motion to File Exhibit as Confidential**

11 Defendants filed their *Motion to File Exhibit as Confidential* asking this Court for an  
12 Order to File Exhibit "4" to Defendants' *Reply to Motion to Confirm Final Award*, filed May 6,  
13 2019, as confidential. Defendants assert after filing their *Reply to Motion to Confirm Final*  
14 *Award*, Mr. Garmong informed Defendants' counsel Exhibit 4 contained his social security  
15 number. *Motion to File Exhibit as Confidential*, p. 2. Defendants maintain they immediately  
16 apologized for the inadvertent error and hand delivered a Stipulation to file the Exhibit as  
17 confidential to Mr. Garmong's counsel. *Motion to File Exhibit as Confidential*, p. 2.  
18 Defendants additionally called the Second Judicial District Court Clerk's office and  
19 requested the Exhibit be marked and filed as confidential. However, Defendants assert Mr.  
20 Garmong refused to sign the Stipulation. *Motion to File Exhibit as Confidential*, p. 2.

21 Mr. Garmong opposed the *Motion to File Exhibit as Confidential* on the grounds that  
22 he "seeks protection from the exposure by the Defendants and their attorney to potential  
23 identity or financial theft, but opposes the requested relief as insufficient and having no  
24 basis in law." *Opposition to Motion to File Exhibit as Confidential*, p. 3. Mr. Garmong further  
25  
26  
27  
28

1 maintains he “needs the Court’s help in protecting his sensitive personal and financial  
2 information . . . .” *Opposition to Motion to File Exhibit as Confidential*, p. 3.

3 **III. APPLICABLE LAW AND ANALYSIS.**

4 **A. Motion to Confirm Final Award**

5 Section 38.239 of the Nevada Revised Statutes provides,

6  
7 After a party to an arbitral proceeding receives notice of an award, the party  
8 may make a motion to the court for an order confirming the award at which  
9 time the court shall issue a confirming order unless the award is modified or  
10 corrected pursuant to NRS 38.237 or 38.242 or is vacated pursuant to NRS  
11 38.241.

12 NRS 38.239. “[T]he scope of judicial review of an arbitration award is limited and is nothing  
13 like the scope of an appellate court’s review of a trial court’s decision.” Health Plan of  
14 Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P.3d 172, 177 (2004). “A ‘reviewing court  
15 should not concern itself with the “correctness” of an arbitration award’ and thus does not  
16 review the merits of the dispute.” Bohlmann v. Byron John Printz, 120 Nev. at 547, 96 P.3d  
17 1158 (2004) (quoting Thompson v. Tega–Rand Intern., 740 F.2d 762, 763 (9th Cir.1984));  
18 see also Clark Ctv. Educ. Ass’n v. Clark Cty. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8  
19 (2006). Thus, “[a] party seeking to vacate an arbitration award based on manifest disregard  
20 of the law may not merely object to the results of the arbitration.” Clark Ctv. Edu. Ass’n,  
21 122 Nev. at 342, 131 P.3d at 8 (quoting Bohlmann, 120 Nev. at 547, 96 P.3d at 1158).  
22 Rather, “[t]he party seeking to attack the validity of an arbitration award has the burden of  
23 proving, by clear and convincing evidence, the statutory or common-law ground relied upon  
24 for challenging the award.” Rainbow Med., 120 Nev. at 695, 100 P.3d at 176.

25  
26 Here, Mr. Garmong argues the arbitration award must be set aside pursuant to NRS  
27 38.221 because Defendants “cannot identify one, and only one, true, complete, correct,  
28

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

4  
5 This Court has repeatedly ruled, unequivocally, that an enforceable agreement to  
6 arbitrate exists in the record and that the parties were properly ordered to arbitrate pursuant  
7 to NRS 38.221. See Order, December 13, 2012 (holding the arbitration agreement  
8 contained in paragraph 16 of the Agreement is not unconscionable and is enforceable);  
9 Order, April 2, 2014 (denying motion for reconsideration, and again holding arbitration  
10 agreement to be enforceable, based on identical arguments as raised in in Mr. Garmong's  
11 *Motion to Vacate Final Award*); *Order to Show Cause Why Action Should not be Dismissed*  
12 *for Want of Prosecution Pursuant to NRCP 41(E)*) (holding Mr. Garmong was ordered  
13 numerous times to participate in arbitration.  
14

15  
16 In accordance with this Court's prior Orders, the record in this case, and the pending  
17 *Motion*, the Court, again, holds a valid and enforceable agreement exists. As such, this  
18 Court grants Defendants *Motion to Confirm Final Award* pursuant to NRS 38.239.

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

20 Rule 13 of the District Court Rules for the State of Nevada provides, "No motion once  
21 heard and disposed of shall be renewed in the same cause, nor shall the same matters  
22 therein embraced be reheard, unless by leave of the court granted upon motion therefor,  
23 after notice of such motion to the adverse parties." DCR 13(7).  
24

25 Well-established authority in this State governs reconsideration of previously-decided  
26 issues. In Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., the  
27 Nevada Supreme Court held:  
28

1 A district court may reconsider a previously decided issue if substantially  
2 different evidence is subsequently introduced or the decision is clearly  
3 erroneous. See *Little Earth of United Tribes v. Department of Housing*, 807  
4 F.2d 1433, 1441 (8th Cir.1986); see also *Moore v. City of Las Vegas*, 92 Nev.  
5 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which *new*  
6 *issues of fact or law* are raised supporting a ruling contrary to the ruling  
7 already reached should a motion for rehearing be granted.") (Emphasis  
8 added).

9 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (alterations and citations in original). In  
10 Masonry & Tile Contractors Ass'n, the Nevada Supreme Court upheld a district court's  
11 reconsideration of a previously decided issue in light of new clarifying case law. Id.

12 Because of new case law, the decision by the prior district judge was properly determined to  
13 be "clearly erroneous." Id. When a motion for reconsideration raises "no new issues of law  
14 and [makes] reference to no new or additional facts," reconsideration is "superfluous" and  
15 constitutes an "abuse of discretion" by the district court to entertain such a motion. Moore v.  
16 City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Such motions are granted  
17 in "rare instances." Id. Further, it is well settled the decision of whether to grant  
18 reconsideration is within "the sound discretion of the court." Navajo Nation v. Confederated  
19 Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003); see also  
20 Riger v. Hometown Mortg., LLC, 104 F. Supp. 3d 1092, 1095 (D. Nev. 2015) (district court's  
21 decision to grant reconsideration after entry of an order is within its discretion).

22 Mr. Garmong filed two *Motions*, the subject of which have been previously decided by  
23 this Court and for which he does not raise new issues of law or fact. First, Mr. Garmong  
24 filed his *Motion to Vacate Final Award*, in which he argues the Final Award must be vacated  
25 pursuant to NRS 38.241(1) because there is no agreement to arbitrate. *Motion to Vacate*  
26 *Final Award*, p. 5. However, as stated, this Court has previously held a valid and  
27 enforceable arbitration agreement exists in the record pursuant to NRS 38.241. Moreover,  
28

1 Mr. Garmong does not raise new issues of law or fact. See Order, December 13, 2012  
2 (holding the arbitration agreement contained in paragraph 16 of the Agreement is not  
3 unconscionable and is enforceable); Order, April 2, 2014 (denying motion for  
4 reconsideration and again holding arbitration agreement to be enforceable based on  
5 identical arguments as raised in in Mr. Garmong's *Motion to Vacate Final Award*); Order to  
6 Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to  
7 NRCP 41(E) (holding Mr. Garmong was ordered numerous time to participate in arbitration).  
8

9 Second, Mr. Garmong filed his *Motion to Vacate MSJ Decision*, arguing the arbitrator  
10 disregarded the applicable substantive legal principles. Again, this Court previously  
11 considered and decided this issue. See Order Denying Plaintiff's Motion to Disqualify  
12 *Arbitrator Pro*; *Order Denying Motion to Vacate Order Denying Motion for Summary*  
13 *Judgment*; *Order Denying Motion to Appoint New Arbitrator*, entered September 29, 2018.  
14

15 Accordingly, Mr. Garmong did not properly move to renew the *Motions* pursuant to  
16 DCR 13(7). Moreover, Mr. Garmong does not present the Court with any new issues of law  
17 or fact; and as such, his *Motion to Vacate Final Award* based on a lack of enforceable  
18 agreement, and his *Motion to Vacate MSJ Decision* are meritless and should be denied.  
19

20 **C. Motion to Vacate Attorney's Fees**

21 Rule 24(g) of JAMS Comprehensive Arbitration Rules & Procedures (JAMS Rule)  
22 provides an arbitrator may award attorney's fees, expenses, and interest if provided by the  
23 Parties' Agreement or allowed by applicable law. JAMS Rule 24(g). Defendants made an  
24 Offer of Judgment in the amount of \$10,000 on February 12, 2017. *Final Award*, p. 10.  
25

26 //

27 //



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

2 (a) The Offer. At any time more than 10 days before trial, any party may  
3 serve an offer in writing to allow judgment to be taken in accordance with its  
4 terms and conditions.

\*\*\*\*\*

5 (e) Failure to Accept Offer...Any offeree who fails to accept the offer may be  
6 subject to the penalties of this rule.

7 (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to  
8 obtain a more favorable judgment,

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

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

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

19 Mr. Garmong argues Judge Pro's award of attorney's fees should be vacated  
20 because the Scheduling Order entered in Arbitration between the parties on August 11,  
21 2017 enumerated specific provisions of the Nevada Rules of Civil Procedure as applicable  
22 to discovery in Arbitration, but omitted any reference to NRCP 68.

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

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

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

3 **D. Motion to File Exhibit as Confidential**

4  
5 Section 205.4605(1) of the Nevada Revised Statutes provides, a person shall not  
6 **willfully and intentionally** post or display in any public manner the social security number  
7 of another person unless the person is authorized or required to do so by law. NRS  
8 205.4605(1). Here, it is clear that Defendants filed Mr. Garmong's social security number in  
9 their moving papers and took immediate steps to remedy the disclosure.  
10

11 Mr. Garmong opposes the *Motion to File Exhibit as Confidential* on the grounds the  
12 request is insufficient to protect his identity and has no basis in law. However, Mr. Garmong  
13 refused to sign the Stipulation which would provide for protection of his personal  
14 information. The Court further notes Mr. Garmong has offered no remedy for a clearly  
15 inadvertent disclosure of his social security number. It is clear from the parties'  
16 communications that Defendants were not aware of the disclosure and took all necessary  
17 steps to remedy the disclosure at the time they gained knowledge of such. See Motion to  
18 File Exhibit as Confidential, Exhibit 1-3. The Court finds this was not a willful and intentional  
19 disclosure. Moreover, the Court finds the inadvertent disclosure is remedied by ordering the  
20 Exhibit filed as confidential.  
21  
22

23 **IV. CONCLUSION AND ORDER**

24 Accordingly, and good cause appearing therefor,

25 IT IS HEREBY ORDERED:

26 1. *Defendants' Petition for an Order Confirming Arbitrator's Final Award and*  
27 *Reduce Award to Judgment, Including, Attorneys' Fees and Costs* is GRANTED;  
28

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

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

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

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

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

DATED this 16<sup>th</sup> day of August, 2019.

DISTRICT JUDGE

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CARL HEBERT, ESQ.  
THOMAS BRADLEY, ESQ.

Hudi Bore

JA 1111

1 CODE: 2540  
2 THOMAS C. BRADLEY, ESQ.  
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4 435 Marsh Avenue  
5 Reno, Nevada 89509  
6 Telephone: (775) 323-5178  
7 [Tom@TomBradleyLaw.com](mailto:Tom@TomBradleyLaw.com)  
8 Attorney for Defendants

9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

10 **IN AND FOR THE COUNTY OF WASHOE**

11 GREGORY GARMONG,

CASE NO. CV12-01271

12 Plaintiff,

DEPT. NO. 6

13 v.

14 WESPAC, GREG CHRISTIAN, and  
15 Does 1-10,

16 Defendants.

17 **NOTICE OF ENTRY OF ORDER**

18 PLEASE TAKE NOTICE that an ORDER was entered in the above-referenced case on  
19 August 8, 2019, a copy of which is attached.

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

22 DATED this 8th day of August, 2019.

23 /s/ Thomas C. Bradley  
24 THOMAS C. BRADLEY, ESQ.  
25 Attorney for Defendants  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

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

- 5 ☐ Personal Delivery  
6 ☐ Professional Courier  
7 ☐ Federal Express or Other Overnight Delivery Service  
8 ☐ US Mail with Sufficient Postage Affixed  
9 ☐ Facsimile to the Facsimile Number specified  
10 ☐ Electronic Mail to the e-mail address(es) specified  
11 ☒ Second Judicial District Court eFlex system

12 Carl Hebert, Esq.  
13 [carl@cmhebertlaw.com](mailto:carl@cmhebertlaw.com)  
14 202 California Avenue  
15 Reno, Nevada 89509  
Attorney for Plaintiff

16 Dated this 8th day of August, 2019.

17  
18 By: /s/ Mehi Aonga  
Employee of Thomas C. Bradley, Esq.  
19  
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1 CODE NO. 3370  
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE  
8

9 GREGORY O. GARMONG,  
10 Plaintiff,  
11

Case No. CV12-01271  
Dept. No. 6

12 vs.

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

15 Defendants.  
16 \_\_\_\_\_/

17 **ORDER RE MOTIONS**

18 Five related motions are pending before this Court.

19 **First pending is *Defendants' Petition for an Order Confirming Arbitrator's Final***  
20 ***Award and Reduce Award to Judgment, Including, Attorneys' Fees and Costs*** ("Motion  
21 *Confirm Final Award*"), filed by Defendant WESPAC and GREG CHRISTIAN (collectively  
22 "Defendants" unless individually referenced), by and through their attorney of record,  
23 Thomas C. Bradley, Esq. Plaintiff GREGORY GARMONG ("Mr. Garmong") filed *Plaintiff's*  
24 *Opposition to Defendants' Motion to Confirm Arbitrator's Award* ("Opposition to Motion to  
25 *Confirm Final Award*"), by and through his attorney of record, Carl M. Herbert, Esq.  
26 Defendants filed *Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to*  
27  
28



1 Confirm Arbitrator's Award ("Reply to Motion to Confirm Final Award") and the matter was  
2 submitted for decision thereafter.

3 **Second pending is Plaintiff's Motion to Vacate Arbitrator's Final Award** ("Motion  
4 to Vacate Final Award"), filed by Mr. Garmong. Defendants filed *Defendants' Opposition to*  
5 *Plaintiff's Motion to Vacate Arbitrator's Final Award (Opposition to Motion to Vacate)*. Mr.  
6 Garmong filed *Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion to Vacate*  
7 *Arbitrator's Final Award ("Reply to Motion to Vacate")* and the matter was submitted for  
8 decision thereafter.  
9

10 **Third pending is Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's**  
11 **Fees** ("Motion to Vacate Award of Fees"), filed by Mr. Garmong. Defendants filed  
12 *Defendants' Opposition to Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees*  
13 *and Reply to Plaintiff's Opposition to Defendants' Petition for Order Confirming Arbitrator's*  
14 *Final Award and Reduce Award to Judgment, Including, Attorneys' Fees and Costs*  
15 *("Opposition to Motion to Vacate Award of Fees")*. Mr. Garmong filed *Plaintiff's Reply to*  
16 *Defendants' Opposition to Plaintiff's Motion to Vacate Arbitrator's Award of Attorney's Fees*  
17 *and Reply to Plaintiff's Opposition to Defendants' Petition for an Order Confirming*  
18 *Arbitrator's Final Award and Reduce Award to Judgment, Including, Attorneys' Fees and*  
19 *Costs ("Reply to Motion to Vacate Award of Fees")* and the matter was submitted for  
20 decision thereafter.  
21

22 **Fourth pending is the combined Plaintiff's Motions to Vacate Arbitrator's**  
23 **Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court**  
24 **to Decide and Grant Plaintiff's Motion for Partial Summary Judgment** ("Motion to  
25 Vacate MSJ Decision"), filed by Mr. Garmong. Defendants filed *Defendants' Opposition to*  
26  
27  
28



1 *Plaintiff's Motions to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial*  
2 *Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial*  
3 *Summary Judgment ("Opposition to Motion to Vacate MSJ Decision").* Mr. Garmong filed  
4 *Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motions to Vacate Arbitrator's Award*  
5 *of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and*  
6 *Grant Plaintiff's Motion for Partial Summary Judgment ("Reply to Motion to Vacate MSJ*  
7 *Decision")* and the matter was submitted for decision thereafter.

9 **Fifth pending is Defendants' Motion for an Order to File Exhibit as Confidential**  
10 *("Motion to File Exhibit as Confidential"),* filed by Defendants. Mr. Garmong filed *Plaintiff's*  
11 *Opposition to Defendants' Motion for an Order to File Exhibit as Confidential ("Opposition to*  
12 *Motion to File Exhibit as Confidential").* Defendants filed their *Reply to Plaintiff's Opposition*  
13 *to Defendants' Motion for an Order to File Exhibit as Confidential ("Reply to Motion to File*  
14 *Exhibit as Confidential"),* and the matter was submitted for decision thereafter.

17 **I. FACTS AND PROCEDURAL HISTORY.**

18 This is an action for breach of contract. Mr. Garmong filed his Complaint on May 9,  
19 2012. On September 19, 2012, Defendants filed their *Motion to Dismiss and Compel*  
20 *Arbitration.* On December 13, 2012, this Court<sup>1</sup> entered its *Order* granting Defendants'  
21 request to compel arbitration but denying the motion to dismiss. Mr. Garmong then filed a  
22 motion to reconsider the Court's December 13, 2012 Order. The motion was opposed by  
23 Defendants. However, Mr. Garmong did not file a reply and this case was stagnant for  
24 nearly a year until January 13, 2014, when this Court entered its *Order to Proceed.* Mr.  
25  
26

27 <sup>1</sup> Judge Brent T. Adams originally presided over this proceeding in Department 6 before his  
28 retirement. Judge Lynne K. Simons was sworn in on January 5, 2015, and now presides in  
Department 6.

1 Garmong filed his reply on February 3, 2014. The motion for reconsideration was denied on  
2 April 2, 2014.

3 Mr. Garmong then sought writ relief from the Nevada Supreme Court. On December  
4 18, 2014, the Nevada Supreme Court entered its *Order Denying Petition for Writ of*  
5 *Mandamus or Prohibition*. The Supreme Court next entered its *Order Denying Rehearing*  
6 on March 18, 2015, and, subsequently, entered its *Order Denying En Banc Reconsideration*  
7 on May 1, 2015.  
8

9 After the Nevada Supreme Court's orders were entered, this Court again entered an  
10 *Order for Response*, instructing the parties to proceed with this case. *Order*, November 17,  
11 2015. In response, the parties indicated they had initiated an arbitration proceeding with  
12 JAMS in Las Vegas. *Notice of Status Report*, December 1, 2015.  
13

14 On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator*,  
15 arguing Defendants prejudiced the JAMS arbitrators against Mr. Garmong. This matter was  
16 fully briefed; and, on July 12, 2016, this Court entered its *Order re: Arbitration*. The parties  
17 then stipulated to select one arbitrator, to reduce costs. *Stipulation to Select One Arbitrator*,  
18 October 17, 2016. In accordance, this Court entered its *Order Appointing Arbitrator* on  
19 October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator. After it was determined  
20 Mr. Ornstil was unavailable, Mr. Garmong stipulated to the appointment of either retired  
21 Judge Phillip M. Pro,<sup>2</sup> or Lawrence R. Mills. Esq.  
22

23 On November 13, 2016, this Court entered its *Order Granting Motion to Strike*, which  
24 stayed the proceeding pending the outcome of the arbitration. *Order Granting Motion to*  
25  
26

27  
28 <sup>2</sup> Mr. Garmong stipulated to Judge Pro although he previously moved to preclude a judge from  
serving as an arbitrator.



### **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 6**

addressed to:

THOMAS C. BRADLEY, ESQ.

Bar No. 1621

435 Marsh Ave.

Reno, NV 89509

775-323-5178

[tom@tombradleylaw.com](mailto:tom@tombradleylaw.com)

Counsel for defendants/respondents

WESPAC; Greg Christian

/S/ Carl M. Hebert

An employee of Carl M. Hebert, Esq.