SUPREME COURT OF THE STATE OF NEVADA

LEWIS HELFSTEIN, MADALYN HELFSTEIN, SUMMIT LASER PRODUCTS, INC., SUMMIT TECHNOLOGIES LLC Appellants vs. UI SUPPLIES, UNINET IMAGING AND NESTOR SAPORITI, Respondents.	No. 56383 District Court No. A587003

RESPONDENTS' ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

I. JURISDICTIONAL STATEMENT

Respondents UI Supplies, Inc. ("UI"), UniNet Imaging (UI and UniNet Imaging are collectively referred to as "UniNet"), and Nestor Saporiti ("Mr. Saporiti") (UI, UniNet, and Mr. Saporiti are collectively referred to as the "Respondents") are not dissatisfied with Appellants' Lewis Helfstein ("Mr. Helfstein"), Madalyn Helfstein, Summit Laser Products, Inc. ("Summit"), and Summit Technologies, LLC. (also referred to as "Summit") (all collectively referred to as "Appellants") (collectively referred to as "Appellants") jurisdictional statement.

II. STATEMENT OF THE ISSUES

1. Did Plaintiffs' The Ira and Edythe Seaver Family Trust, Ira Seaver ("Mr. Seaver"), and Circle Consulting Corporation ("Circle Consulting") (all collectively referred to as "Plaintiffs") instigation of the underlying action arise under the 2004 Consulting & Non-Competition Agreement ("Consulting Agreement") or the 2007 Agreement for Purchase and Sale of Assets by and between UI Supplies, INC., and SUMMIT TECHNOLOGIES, LLC ("Asset Purchase Agreement")?

2. Are Appellants indispensable parties to the adjudication of the Consulting Agreement, which does not contain a mandatory arbitration clause and sets Nevada as the proper forum?

III. STATEMENT OF THE CASE

A. Nature of the Case

On April 3, 2009, Plaintiffs filed a Complaint against both Appellants and Respondents. Plaintiffs asserted ten causes of action: (1) Breach of Circle Consulting Contract (against Appellants and Respondents); (2) Breach of Summit Technologies Formation Agreement (against Appellants only); (3) Breach of Summit Technologies Operating Agreement (against Appellants only); (4) Breach of Fiduciary Duty (against Appellants only); (5) Promissory Estoppel (against Respondents only); (6) Unjust Enrichment (against Respondents only); (7) Accounting (against Appellants only); (8) Declaratory Relief (against Appellants and Respondents); (9) Breach of Implied Covenant of Good Faith and

Fair Dealing (against Appellants and Respondents); and (10) Alter Ego (against Appellants and Respondents). (App. Vol. I at AA00001 - 16.) However, on November 23, 2009, Plaintiffs executed a voluntary dismissal of Appellants. *Id.* at AA000038-39.

In turn, on January 19, 2010, Respondents filed a Cross Claim against Appellants. The Cross Claim asserts twelve claims against Appellants: (1) Breach of Contract; (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Unjust Enrichment; (4) Fraud; (5) Fraudulent Misrepresentation; (6) Intentional Misrepresentation; (7) Negligent Misrepresentation; (8) Breach of Express and Implied Warranties; (9) Implied Indemnity; (10) Express Indemnity; (11) Apportionment; and (12) Equitable Estoppel.[1] *Id.* at AA00040 - 73.

Plaintiffs are asserting claims for alleged breach of the Consulting Agreement against the Respondents. *Id.* at AA00008-13 at ¶¶ 24-27, 48-53. However, Respondents were not a party to that contract. Only Appellants were parties to both the Consulting Agreement and the Asset Purchase Agreement. In that light, they are "indispensable" to the adjudication of the dispute over the Consulting Agreement, and to Respondents' defense from Plaintiffs' frivolous litigation. Similarly, Appellants are liable to Respondents under a theory of indemnification for any damages they may incur as a result of the claims arising under the Consulting Agreement.

B. Course of Proceedings and Disposition Below

On April 20, 2010, Appellants filed a Motion to Stay or Dismissal and to Compel Arbitration ("Compel Motion"). (App. Vol. I at AA00074-120) On May 25, 2010, the District Court heard oral arguments in support of the legal briefs from the Parties regarding the Compel Motion. *Id.* at AA000199-200. After entertaining all Parties, it denied the Compel Motion. *Id.* It found that:

> Cross-Claimants' cross claims against Cross-Defendants do not arise under the 2007 Agreement for Purchase and Sale of Assets by and between UI Supplies, INC., and SUMMIT TECHNOLOGIES, LLC. ("Asset Purchase Agreement"). As such, the binding arbitration

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[1] In terms of classifying the cross-claims, the first eight claims arise under Nevada Rule of Civil Procedure 13(h). The remaining claims arise under Nevada Rule of Civil Procedure 14(a) based on a theory of indemnification, which constitute third-party claims. This is addressed in more detail in section I(A).

clause, choice of forum, and choice of law provisions of the Asset Purchase Agreement do not apply.

Id. at 200. On July 16, 2010, Respondents entered this Order.

On July 7, 2010, Appellants filed a Notice of Appeal, Case Appeal Statement, and this instant Motion. *Id.* at 201-203. Thereafter, they filed another motion to stay crossclaim pending appeal ("Appeal Stay Motion") on July 7, 2010. (App. Vol. II at AA000204-209.) Notably, Plaintiffs' filed an opposition to the Appeals Stay Motion, asserting that Appellants "appear now to be indispensable parties to this action and any further delay is costly to plaintiffs." *See* Pls.' Opp. To Appeal Stay Motion at 2:2-3 attached as Exhibit "A". Similarly, Plaintiffs stated that "[t]o allow Mr. Helfstein to distance himself from the trial at this point will result in both the plaintiffs and [Respondents] being prejudiced, as well as causing a great inconvenience to this court." *Id.* at 2:23-25. On August 20, 2010, the District Court, without entertaining oral arguments and reviewing the briefing only, denied the Appeal Stay Motion. *Id.* at AA000281.

VI. STATEMENT OF THE FACTS

A. Consulting Agreement

The following facts are taken from Plaintiffs' Complaint. On or about August 12, 2004, Appellants entered into an Agreement with Mr. Seaver to form Summit. (App. Vol. I at AA00003 at ¶ 5.) Appellants would manage and control Summit, but would need Mr. Seaver's approval on decisions concerning the capital structure of Summit. *Id.* On September 1, 2004, Circle Consulting entered into the Consulting Agreement that established Circle Consulting would provide consulting services to Summit from January 1, 2005 to December 31, 2014. *Id.*; *see also* AA000142-51 (Consulting Agreement). In terms of the material provisions of the Consulting Agreement to the Motion, it contained a paragraph stating that:

14. Governing Law.

The agreement shall be governed by and construed in accordance with the laws of the State of Nevada. If any provision of this agreement shall be unenforceable or invalid, such unenforceability or invalidity shall not affect the remaining provisions of this agreement. In the event of any such action, proceeding or counterclaim brought by either

> party hereto in connection with or arising under this Agreement, the parties hereby agree to waive trial by jury in any such action or proceeding.

Id. at AA000149-50 at ¶ 14.

B. Agreement For Purchase and Sale of Assets

On or about March 27, 2007, UI and Summit entered into the Asset Purchase Agreement. (App. Vol. I at AA000089-108 [partial copy, does not include all exhibits].) With regard to employment contracts and other benefits, the Asset Purchase Agreement specifically provided that:

> Employment Contracts and Benefits: "**Exhibit E** attached is a list of all Seller's employment contracts, collective bargaining agreements, and pension, bonus, profitsharing, stock options, or other agreements providing for employee remuneration or benefits. To the best of Seller's knowledge, as of the date of this Agreement, Seller is not in default under any of these agreements, nor has any event occurred that with notice, lapse of time, or both, would constitute a default by Seller of any of these agreements. **Seller's obligations under these agreements shall cease as of the Closing Date**, and Seller makes no representations as to the assignability of such agreements."

Id. at AA000098 at ¶ 7.6 (emphasis added). "Exhibit E" explicitly states that "CONSULTING AGREEMENT WITH IRA SEAVER AND LEWIS HELFSTEIN NOT BEING ASSUMED." *Id.* at AA000108. Thus, the Consulting Agreement automatically terminated as of the Closing Date. *Id.*

Furthermore, on November 10, 2009, Mr. Helfstein provided a Declaration regarding the Consulting Agreement. He wrote that:

> I was responsible for negotiating and approving the [Asset Purchase Agreement] on behalf of Summit. As part of the [Asset Purchase Agreement], Uninet negotiated ***replacement*** consulting agreements between Uninet, myself and Mr. Seaver. I executed a ***replacement*** consulting agreement with Uninet on my own behalf. There were negotiations between Uninet and Seaver for a ***replacement*** agreement, but to the best of my knowledge was (sic) no such agreement was signed.

Id. at AA00174-75 at ¶ 7 (emphasis added). Thus, the Asset Purchase Agreement clearly establishes that Respondents did not assume the Consulting Agreement.

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1. *Warranties From Seller to Respondents*

The Asset Purchase Agreement provided Respondents with a series of warranties, which are directly applicable to their right to seek indemnification from Appellants from liability arising out of the Consulting Agreement. Summit represented that it had the approval and authority of all members to enter into the Asset Purchase Agreement. (App. Vol. I at AA000093-95 at ¶ 6.1.) Summit asserted that it had full power and authority to enter into the Asset Purchase Agreement "without any conflict with any other restriction or limitation, whether imposed by or contained in Seller's management agreement or by or in any law, legal requirement, or otherwise." *Id.*

Similarly, Summit also represented that there were no potential claims or threats of litigation involving the assets it was selling other than ACM Technologies v. Summit Technologies LLC. *Id.* at AA000096 at ¶ 6.6. It provided a general disclosure that:

> Seller does not know, or have reason to know, of any matters, occurrences, or other information that has not been disclosed to Buyer and that would materially and adversely affect the Acquired Assets purchased by Buyer or its conduct of the business involving such Acquired Assets. Moreover, no representations or warranty by Seller in this Agreement, or any documents furnished to Buyer by Seller, **contains or will contain any untrue statement of a material fact**, or omit to state a material fact necessary to make the statements contained in these sources accurate.

Id. at AA000096 at ¶ 6.7 (emphasis added).

Additionally, the Asset Purchase Agreement also stated that:

> The execution, delivery, and performance of this Agreement by Seller and the consummation of the transactions contemplated by this Agreement will not result in or constitute any of the following: (a) a default or an event that, with notice, lapse of time, or both, would be a default, breach, or violation of the management agreement of Seller or any lease, license, promissory note, conditional sales contract, commitment, indenture, or other agreement, instrument, or arrangement to which Seller is a party or by which any of them or any asset or properties of any of them is bound . . . .

Id. at AA000098 at ¶ 7.9. The Asset Purchase Agreement also provided that it had the necessary right, power, legal capacity, and authority to enter into the agreement, and "no approvals or consents of any person other than the Seller [was] necessary in connection with the sale" of Summit's assets. *Id.* at AA000098 at ¶ 7.10.

Finally, and most important, Summit stated that:

> to the best of Seller's knowledge, none of the representations and warranties made by Seller in this Agreement, or in any certificate or memorandum furnished or to be furnished, contains or will contain any untrue statement of material fact, or omits to state a material fact necessary to prevent the statement from being misleading.

Id. at AA000099 at ¶ 7.12.

In total, Appellants provided several warranties to Respondents that: (1) the Consulting Agreement was terminated; (2) it had the necessary authority and consent to terminate the Consulting Agreement; (3) there were no potential claims or threats of litigation; (4) there would not be a breach of the Consulting Agreement from the Asset Purchase Agreement; and (5) there were no misrepresentations of material fact that would make any of the foregoing misleading.

2. *Respondents Relied on Appellants' Representation that the Consulting Agreement was not Being Assigned*

Appellants induced Respondents into executing the Asset Purchase Agreement based on their representation that the Consulting Agreement was not being assigned through the Asset Purchase Agreement. Respondents did not want the Consulting Agreement. They merely wanted the technology and assets owned by Summit. Exhibit "E" and the Declaration of Mr. Helfstein all demonstrate that the Asset Purchase Agreement did not assign the Consulting Agreement. These are key facts that support Respondents' claims for indemnification and evidence Appellants' status as indispensable parties to Plaintiffs' claims arising out of the Consulting Agreement.

V. SUMMARY OF THE ARGUMENTS

Appellants are indispensable parties to claims arising out of the Consulting Agreement. The Consulting Agreement contains a mandatory clause making Nevada the proper forum for those disputes. Under Nevada Rule of Civil Procedure 13(h), Respondents are entitled to bring a cross-claim against Appellants based on the nature of Plaintiffs' action. Furthermore, they are also allowed to join Appellants to the underlying action under Nevada Rule of Civil Procedure 14(a) based on their right to seek indemnification. As such, this Appeal should be

denied in its entirety.

VI. ARGUMENT

Appellants argue that the arbitration and forum selection clauses of the Asset Purchase Agreement mandates that Respondents bring their cross/third-party claims in an arbitration separate from Plaintiffs' action. Appellants' Opening Br. at 6:18-20, 8:5-23. However, they did not address the District Court's ruling that Respondents' cross claims against Appellants arose out of Plaintiffs' action under the Consulting Agreement. (App. Vol. I at AA000149-50 at ¶ 14.) Similarly, Appellants also failed to address the Consulting Agreement's forum selection clause that made Nevada the proper forum. *Id.* at AA000149-50 at ¶ 14. Instead, Appellants completely ignored the underlying procedural issue that Plaintiffs instigated a lawsuit for the Consulting Agreement, not the Asset Purchase Agreement, in their attempts to enforce the arbitration and venue clauses of the Asset Purchase Agreement. Ultimately, Appellants' failure to refute that they are indispensable parties to Plaintiffs' litigation for the Consulting Agreement illustrates the futility of this appeal. *See* Ex. A *et seq.*

This Argument is organized into three Parts. Part A sets for the standard of review for the enforcement of an arbitration/venue appeal. Part B demonstrates how Appellants' status as indispensable parties to the Consulting Agreement permit claims against them under Nevada Rules of Civil Procedure 13 and 14. Finally, Part C explains that Respondents never assumed the Consulting Agreement,

A. Statement of the Standard of Review

Interestingly, Appellants omitted the statement of review, which is crucial to any appeal. Arbitration clauses and choice of forum are both questions of contract interpretation. *State ex rel. Masto v. Second Judicial Dist. Court ex rel.*, 125 Nev. 5, ___, 199 P.3d 828, 832 (2009) (citing *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990); *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990)). Thus, this Honorable Court reviews such questions under a *de novo* standard. *Id.*

District Courts have the discretion to determine the enforceability of an arbitration clause. *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005). "Nevada

courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration." *Int'l Assoc. Firefighters v. City of Las Vegas*, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988). However, "[i]f the court finds that there is no enforceable agreement, it may not . . . order the parties to arbitrate." NEV. REV. STAT. § 38.221(3).

Generally, arbitration is a matter of contract and " 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Truck Ins. Exchange v. Palmer J. Swanson, Inc.*, 124 Nev. 59, ___, 189 P.3d 656, 660 (2008) (quoting *Thomson-CSF. S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir.1995) (quoting *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). Thus, while Nevada recognizes a strong policy in favor of arbitration, "such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract." *see Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 252, 89 P.3d 36, 39 (2004). Nevertheless, the obligation to arbitrate, which was executed by another party, may attach to a nonsignatory. *Truck Ins. Exchange*, 189 P.3d at 660 (citing *Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 416-17 (4th Cir.2000)).

B. Respondents' Claims Against Appellants Arise out of the Consulting Agreement

There is no enforceable agreement that requires arbitration in this matter. As stated earlier, Plaintiffs' claims arise under the Consulting Agreement. Without admitting the sufficiency of those claims, Plaintiffs allege that Respondents are liable to them for breach of that agreement. (App. Vol. I at AA00001-16.) Notably, Respondents were never a party to the Consulting Agreement, nor assumed it. *Id.* at AA000093-95 at ¶¶ 6.1, 6.6, 6.7, 7.9, 7.10, 7.12. The only parties to that Agreement were Plaintiffs and Appellants.

The Consulting Agreement does not require arbitration. *Id.* at AA000142-51. Plaintiffs should not be allowed to prosecute their claims against Respondents without joining Appellants in this matter. *See* Ex. A. Otherwise, gross injustice and unfairness would befall Respondents since they never assumed the Consulting Agreement. While Appellants are attempting to characterize the cross-claims as arising under the Asset Purchase Agreement,

they completely failed to acknowledge their status as indispensable parties to the Consulting Agreement. In that light, the cross-claims against Appellants are appropriate arise under the Consulting Agreement.

Similarly, the forum selection clause of the Asset Purchase Agreement is also inapplicable. As stated earlier, the Consulting Agreement clearly sets Nevada as the proper jurisdiction for claims arising out of it. (App. Vol. I at AA000149-50 at ¶ 14.) Plaintiffs are prosecuting a case solely based on the Consulting Agreement. As such, the forum selection clause of the Asset Purchase Agreement is inapplicable. Thus, enforcing those clauses to allow Appellants to escape this jurisdiction is improper.

Respondents respectfully request that this Honorable Court affirm the District Court. Plaintiffs' action arises under the Consulting Agreement. The Asset Purchase Agreement cannot be so broadly construed as to encompass claims arising under the Consulting Agreement. This is especially true since the plain language of the Asset Purchase Agreement specifically states that Respondents were not assuming the Consulting Agreement. Both the arbitration and venue clauses of the Asset Purchase Agreement are inapplicable as it pertains to the Consulting Agreement.

C. Appellants are Indispensable Parties to the Underlying Case

Appellants are indispensable parties to the adjudication of the Consulting Agreement. *See* Ex. A. "It would be impossible for [the District Court] to properly adjudicate [Plaintiffs'] action and all of the claims at issue between these parties without [Appellants] participating in it." *Id.* at 3:1-2. "[R]esolution of [Plaintiffs'] case will primarily depend on the actions and credibility of the principal parties to the [Asset Purchase Agreement] transaction, which were Mr. Saporiti and Mr. Helfstein." *Id.* at 2:21-23.

Thus, as indispensable parties Plaintiffs' claims arising under the Consulting Agreement, Appellants are proper parties under Nevada Rules of Civil Procedure 13(h) and 14(a). While Plaintiffs' allege that the Asset Purchase Agreement assigned the Consulting Agreement to Respondents, this does not invoke the arbitration/venue clauses of the Asset Purchase Agreement. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 252, 89 P.3d 36, 39

(2004) ("such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract"). Simply, Plaintiffs did not assert an action under the Asset Purchase Agreement. (App. Vol. I at AA000199-200.) As such, the Asset Purchase Agreement cannot be so broadly construed as to encompass Plaintiffs' action under the Consulting Agreement.

1. *Joinder of Additional Parties Under Rule 13(h)*

A cross claim is the proper procedural device for the joinder of additional parties when the joinder is necessary for just adjudication based on its status as an "indispensable party," or the relief arises out of the same transactions, occurrences, or series of transactions and occurrences with common questions of fact and/or law. NEV. R. CIV. PRO. 13(h). "An indispensable party is a party who is 'necessary' to an action, but for some reason, cannot be made a party to that action." *Potts v. Vokits*, 101 Nev. 90, 92, 692 P.2d 1304, 1306 (1985). If the court finds that a party is indispensable, it must decide whether in equity and good conscious the action should proceed. *Id.* "If in equity and in good conscious the action cannot proceed without the necessary party, that party is 'indispensable' . . . ." *Id.*

Nevada Rule of Civil Procedure 19 states that:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence **complete relief cannot be accorded** among those already parties, or (2) the person claims an **interest relating to the subject of the action** and is so situated that the disposition of the action in the persons absence may (I) as a practical matter **impair or impede the persons ability to protect that interest** or (ii) leave any of the persons already parties subject to a **substantial risk** of incurring double, multiple, or otherwise **inconsistent obligations** by reason of the claimed interest. If the person has not been so joined, the **court shall order that the person be made a party**. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

(Emphasis added).

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2. *Third-Party Practice Under Rule 14*

Third-party practice "is based upon a theory of indemnity." *Reid v. Royal Ins. Co.*, 80 Nev. 137, 140, 390 P.2d 45, 46 (1964). When a third-party may be liable to a defendant, the defendant may, as a third-party plaintiff, make a claim against the third-party defendant for all or part of the plaintiff's claim against the third-party plaintiff. NEV. RULE. CIV. PRO. 14(a). "The application of indemnity (when proper) shifts the burden of the entire loss from the defendant tort-feasor to another who should bear it instead." *Reid*, 80 Nev. at 141, 390 P.2d at 47 (citing Prosser, Torts § 46 (2nd Ed.)).

3. *Appellants are Proper Cross-Claimants Under Rule 19, and Proper Third-Party Defendants Under Rule 14(a)*

Appellants are indispensable parties to Plaintiffs' claims under the Consulting Agreement. *See* Ex. A. As a practical matter, Appellants' absence from this litigation impairs and impedes Respondents' ability to protect their interests. Similarly, there is a substantial risk of inconsistent outcomes if Respondents are obligated to defend this action without the presence of Appellants. Thus, Respondents respectfully request that this Honorable Court consider the extent that a judgment rendered without Appellants will prejudice Respondents. Additionally, they also request that the Court consider the extent that a judgment under the Consulting Agreement can actually be rendered without Appellants when Respondents were never a party to it nor assumed it.

Plaintiffs are suing Respondents for breach of the Consulting Agreement. *Id.* at AA000001-16. Nevertheless, in Plaintiffs' own words to describe how Appellants are "indispensable" to the underlying action, they explain:

> [Appellants appear now to be indispensable parties to [the underlying] action and any further delay is costly to plaintiffs. (Ex. A at 2:2-3) [R]esolution of this case will primarily depend on the actions and credibility of . . . Mr. Helfstein. To allow Mr. Helfstein to distance himself from the trial at this point will result in both the plaintiffs and [Respondents] being prejudiced, as well as causing a great inconvenience for [the District Court]." (*Id.* at 2:21-25) It would be impossible for [the District Court] to properly adjudiciate [the underlying] action and all of the claims at issue between these parties with [Appellants] participating in it.

Furthermore, this Honorable Court should take notice that Appellants' active fault actually and proximately caused 100% of Plaintiffs' alleged damages. Appellants were contractually obligated to Circle Consulting through the Consulting Agreement. (App. Vol. I at AA000142-51.) Thus, they had a legal obligation to abide by those terms and avoid materially breaching the Consulting Agreement. In terms of the Asset Purchase Agreement, Mr. Helfstein provided several warranties that he secured Mr. Seaver's consent to terminate the Consulting Agreement upon the sale of Summit's assets. *Id.* at AA000093-95 at ¶ 6.1.

Respondents' warranties in the Asset Purchase Agreement demonstrate that Respondents are entitled to indemnification from Appellants. These warranties included representations that: (1) the Consulting Agreement was terminated; (2) it had the necessary authority and consent to terminate the Consulting Agreement; (3) there were no potential claims or threats of litigation; (4) there would not be a breach of the Consulting Agreement from the Asset Purchase Agreement; and (5) there were no misrepresentations of material fact that would make any of the foregoing misleading. *Id.* at ¶¶ 6.1, 6.6, 6.7, 7.9, 7.10, 7.12.

The undisputed facts demonstrate that the only defendants culpable for Plaintiffs' alleged damages are Appellants. Overwhelming evidence demonstrates that Respondents did not want to assume the Consulting Agreement. *See Id.* Respondents do not have any legal obligation to Plaintiffs. As such, any liability borne by Respondents should be completely shifted to Appellants. *See* NEV. R. CIV. PRO. 14(a). In total, the Nevada Rules of Civil Procedure demand that Appellants remain parties to this action in Nevada. The cross-claims and third-party claims do not arise against Appellants solely based on the Asset Purchase Agreement. They arise directly out of the Consulting Agreement itself. Under that contract, it specifically provides that Nevada is the proper forum.

VII. CONCLUSION

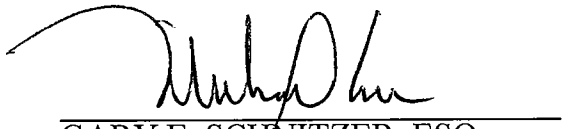
The District Court's opinion that Respondents' cross/third-party claims arise out of the Consulting Agreement should be affirmed. Appellants are clearly indispensable parties to both the Consulting Agreement and the Asset Purchase Agreement. *See* Ex. A. Their status as the only party with privity of contract to both agreements demonstrates how they are

indispensable to Plaintiffs' case. Furthermore, the plain language of the Consulting Agreement does not contain an arbitration agreement and explicitly states that Nevada is the proper venue for disputes arising under the Consulting Agreement. As the Consulting Agreement is the controlling document upon which the Plaintiffs are prosecuting this litigation, those terms should control.

Furthermore, the Nevada Rules of Civil Procedure permit Respondents to join Appellants in this action. Under Rule 13(h), Appellants qualify as indispensable parties who are participants in the same transactions arising under Plaintiffs' Complaint. Additionally, Appellants are obligated to indemnify Respondents for any damages Plaintiffs have allegedly incurred under the Consulting Agreement. Those damages would be directly related to the active fault of Appellants. This allows for a complete shift of liability from Respondents to Appellants.

DATED this 7 day of December, 2010.

KRAVITZ, SCHNITZER, SLOANE & JOHNSON, CHTD.



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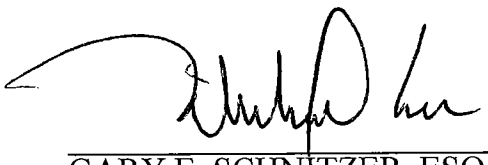
Certificate of Compliance

I hereby certify that I have read the **RESPONDENTS' ANSWERING BRIEF** in the above-entitled and captioned matter and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 27(e), which requires every assertion regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying Motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7 day of December, 2010.

KRAVITZ, SCHNITZER, SLOANE & JOHNSON, CHTD.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of ~~October~~ December, 2010, I placed a copy of the foregoing **RESPONDENTS' ANSWERING BRIEF** in the United States mail, postage pre-paid, and addressed as follows:

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EXHIBIT "A"

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DISTRICT COURT
CLARK COUNTY, NEVADA

IRA AND EDYTHE SEAVER FAMILY TRUST; IRA SEAVER; and CIRCLE CONSULTING CORPORATION, Plaintiffs, v. UI SUPPLIES; UNINET IMAGING, INC.; NESTOR SAPORITI; DOES 1 through 20; and ROE entities 21 through 40, inclusive, Defendants.	Case No.: A587003 Dept. No.: XI **PLAINTIFFS' OPPOSITION TO LEWIS HELFSTEIN, MADALYN HELFSTEIN, SUMMIT LASER PRODUCTS, INC. AND SUMMIT TECHNOLOGIES, LLC'S MOTION TO STAY CROSSCLAIM PENDING APPEAL**
AND RELATED ACTIONS.	DATE: 8-20-10 TIME: CHAMBERS

Plaintiffs, and each of them, hereby oppose the Motion to Stay Crossclaim Pending Appeal of defendants Lewis Helfstein, Madalyn Helfstein, Summit Laser Products, Inc. and Summit Technologies, LLC.

POINTS AND AUTHORITIES

These moving defendants appear now to be indispensable parties to this action and any further delay is costly to plaintiffs. As this Court may recall, plaintiffs previously filed their Motion for Good Faith Settlement with these moving defendants, but took that motion off calendar before it was even heard. Pursuant to the settlement agreement between plaintiff and these moving defendants, a copy of which was attached as an exhibit to plaintiffs' previous Motion for Good Faith Settlement with them, plaintiffs voluntarily dismissed (without prejudice) their pending claims against them. Correspondingly, these moving defendants were also required to do two things: (1) pay plaintiffs $60,000, and (2) cooperate (which appears to now mean "come clean") with plaintiffs with respect to litigation with the Uninet or Saporiti defendants. This contractual obligation to cooperate under the settlement agreement will continue until the plaintiffs case against the Uninet defendants concludes.

While these moving defendants funded the settlement, there is ample evidence that they may have breached their agreement to cooperate with plaintiffs. This includes, among other things, attempting to mislead this court concerning the operative version of the Asset Sale Agreement. In fact, it was Mr. Helfstein's actions in this regard that led to this Honorable Court denying Plaintiffs' recent motion for summary judgment, and denying the Heflstein defendants motion to remove the cross-action to arbitration in New York. In addition, the Helfstein defendants have not cooperated by providing evidence requested in the form of an affidavit, thus requiring the plaintiffs' to proceed with his deposition in New York.

As this Court correctly noted at the recent hearing, resolution of this case will primarily depend on the actions and credibility of the principal parties to the transaction, which were Mr. Saporiti and Mr. Helfstein. To allow Mr. Helfstein to distance himself from the trial at this point will result in both the plaintiffs and the Uninet defendants being prejudiced, as well as causing a great inconvenience for this court.

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It would be impossible for this Court to properly adjudicate this action and all of the claims at issue between these parties without the Helfstein defendants participating in it. At this point it appears that the Helfstein defendants are hoping for a delay of at least two years or more in their appeal to the Nevada Supreme Court of this Court's order denying their motion to remove their case with the Saporiti-Uninet defendants to New York, thereby further delaying the trial of this case during the interim.

The delay noted above is a significant factor in this case, as in addition to monetary damages, the plaintiffs are seeking a declaration from this court of the parties' rights and obligation under the Seaver Consulting Agreement which does not expire for almost another four years! Underscoring the problems and complexity of this issue is the fact that Uninet, by virtue of its cross-complaint against Mr. Seaver has put at issue Mr. Seaver's ability to function in his profession. This needs to be adjudicated as quickly as possible to he can go on with his life.

Other than asserting the arbitration contract provision, the Helfstein defendants have not demonstrated any justification, or prejudice that they would incur by their being required to remain in this case and denying a stay to them now. The court should simply allow the parties to finish discovery and proceed to trial as currently scheduled.[1]

Plaintiffs therefore respectfully oppose the Helfstein defendants pending motion and ask this Court to deny the same.

DATED this 23 day of July, 2010.

SANTORO, DRIGGS, WALCH,
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[1] Having said that, given the recent difficulties over the protective order and, accordingly, provision of documents to experts in order to meet the deadlines for expert disclosures in this case, the current schedule may have to briefly be continued, but not for some two years or more.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 23rd day of July, 2010, and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO LEWIS HELFSTEIN, MADALYN HELFSTEIN, SUMMIT LASER PRODUCTS, INC. AND SUMMIT TECHNOLOGIES, LLC'S MOTION TO STAY CROSSCLAIM PENDING APPEAL**, postage prepaid and addressed to:

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