Mark Forsberg, Esq., NSB 4265
OSHINSKI & FORSBERG, LTD.
504 E. Musser St., Suite 302
Carson City, NV 89701
T 775-301-4250 | F 775-301-4251
Mark@OshinskiForsberg.com
Attorneys for Respondents

Electronically Filed
Oct 12 2017 10:09 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEGGY CAIN, an individual; JEFFREY CAIN, an individual; and HELI OPS INTERNATIONAL, LLC, an Oregon limited liability company,

Appellants,

vs.

RICHARD PRICE, an individual; and MICKEY SHACKELFORD, an individual,

Respondents.
_____/

Supreme Court Case No. 69333
Supreme Court Case No. 69889
Supreme Court Case No. 70864
District Court Case No. 11 CV 0296

RESPONDENTS' RESPONSE TO SUPPLEMENTAL AUTHORITIES

Respondents RICHARD PRICE and MICKEY SHACKELFORD, by and through their counsel, Mark Forsberg, Esq. and Oshinski & Forsberg, Ltd., hereby submit their Response to Supplemental Authorities pursuant to this Court's September 27, 2017 order.

INTRODUCTION

The Court directed that Respondents Richard Price and Mickey Shackelford address supplemental authorities that were untimely submitted by Appellants. The supplemental authorities consisted of the Restatement (Second) of Contracts § 309 (1981) and specifically Comment b to § 309. The comment states that the right of a third-party beneficiary is subject to any limitations imposed by the terms of the contract and that such limitations may be imposed by

virtue of considerations of fairness and public policy. The comment also states: "Thus, the failure of the promisee to perform a return promise ordinarily discharges the promisor's duty to a beneficiary to the same extent that it discharges his duty to the promisee." As set forth below, these Restatement comments do not compel the result that Price and Shackelford may not enforce the release provisions of the Settlement Agreement and Release of All Claims ("Settlement Agreement") at issue in this case.

ARGUMENT

A. The Governing Documents.

The governing documents consist of the Joint Venture Agreement ("JVA") and the Promissory Note attached to it as an exhibit; the Settlement Agreement; and, to the extent they demonstrate Appellants' interpretation of the Settlement Agreement, the default judgment entered against C4, DR Rawson and Mike Kavanagh *(A.App. 2:293)* and the default judgment entered against Jeffrey Edwards *(R.App. 112-116).* In addition, both the Second Amended Complaint and the Third Amended Complaint bear on the issue of whether § 309 of the Restatement defeats the release of Respondents under the Settlement Agreement.

Neither the Second Amended Complaint nor the Third Amended Complaint (which is the controlling complaint) alleged a claim for breach of contract with respect to the JVA and Promissory Note. Hence, Appellants were not seeking by their lawsuit to enforce the JVA and Promissory Note. The JVA, *A.App. 1063-64*, provides that the joint venture partner (Appellants' company Heli-Ops, LLC) was to be compensated by payment of the "first twenty million USD ($20,000,000) received from the proceeds and profits of leveraging the CMOs in international trade" . . . "on a priority basis prior to any disbursements to C4WW." The word "first" in this provision prioritizes the payment as between Appellants and C4, while the term "received from

the proceeds and profits of leveraging the CMOs" identifies the contingent source of the compensation. The Promissory Note *(A.App. 1071)* provides that the payment of $20,000,000 to Appellants was to be "as per the terms specified in the Joint Venture Agreement . . . " As set forth above, Appellants elected not to seek to enforce the JVA and Promissory Note by stating a claim for breach of contract as to these agreements in their complaints.

When the Appellants did not receive payment as expected under the JVA and Promissory Note, they entered into the Settlement Agreement with C4 and DR Rawson dated March 1, 2010. The Settlement Agreement memorialized an unconditional promise by Rawson and C4 to pay Appellants $20,000,000, plus nine percent (9%) interest on that amount from December 31, 2009 until the debt was paid and further provided that the principle and interest were to be paid within 90 days of February 25, 2010. Section 1 of the Settlement Agreement, entitled Consideration, provided that the releases set forth at Section 2 of the Settlement Agreement were given in exchange for C4's stipulation they owed Appellants $20,000,000 and its further stipulation that the amount was due on December 30, 2009 and remained unpaid. The Settlement Agreement stated the intent of the parties "to resolve issues having to do with C4 Worldwide's unpaid financial obligations arising out of the Promissory Note and Security Interest in the CMO Securities dated November 29, 2009. . ." The JVA and Promissory Note were signed on November 29, 2009.

While the Settlement Agreement does not contain an express promise by Rawson to be responsible for payment to Appellants, the Appellants and the district court have construed the agreement to be a promise by Rawson to be personally responsible for the obligations set forth in the Settlement Agreement.

In exchange for the unconditional promises made by C4 and Rawson in the Settlement Agreement, Appellants (the Cains and their affiliated firms or corporations) "hereby fully and

forever releases and discharges C4 WorldWide, from any and all claims that exist arising out of C4 worldwide's financial misfortunes ***and*** resultant inability to timely pay the promissory note and security interest in the CMO Securities dated November 29, 2009…" Emphasis added. The release expressly covered the agents, employees, officers, directors and all other affiliated persons from "any and all past, present, and future claims, demands, obligations, causes of action for damages of any kind, known and unknown, the basis for which now exists or may hereafter be manifest that are directly or indirectly related to the facts in any of the claims of any kind asserted against or which could have been asserted against or which could have been asserted in any of the claims." The parties agreed in Section 3.2 of the Settlement Agreement that they warranted that no promise or inducement was offered except as set forth in the agreement and that the agreement was executed without reliance on any statement or representation by any other party concerning the nature and extent of damages or legal liability.

The Settlement Agreement contains no language that the release provisions were conditional upon payment by C4 or Rawson of the amounts set forth in the Settlement Agreement, and no such inference can be drawn. Rather, the language explicitly states that the releases were given in exchange for C4 and Rawson's stipulation that the money plus interest was owed, fundamentally changing the relationship between Appellants on the one hand C4 and its officers and directors on the other hand.

B. Appellants' Post-Settlement Agreement Conduct Proves That The Settlement Agreement Was a Valid and Binding Contract.

Appellants have consistently relied exclusively on the validity of Settlement Agreement to assert that C4, Rawson, Kavanagh, Edwards and Margaret Rawson, as well as Respondents, owe the Cains and Heli-Ops $20,000,000 plus interest and attorney's fees. Every complaint they filed

in this action alleged a breach of the Settlement Agreement, but not a breach of the JVA and Promissory Note. The default judgment they obtained against DR Rawson, C4 and Kavanagh, while reciting the liability of those parties on all claims for relief, relied exclusively on the Settlement Agreement for the judgments and the amount of damages. For example, the default judgment against C4, Rawson and Kavanagh states "When C4 breached the JVA, Rawson, the chairman/CEO of C4, executed a settlement agreement and release of all claims in which he acknowledged the indebtedness and agreed to repay plaintiffs Twenty Million Dollars ($20,000,000) with interest at the rate of nine percent (9%) by 25 May 2010. That agreement contained an attorney's fees clause. Rawson and C4 breached that agreement, as well." *A.App. 294.* Judgment was expressly entered against C4, Rawson and Kavanagh "under the First Claim for Relief for breach of the Settlement Agreement and Release of All Claims." The judgment was to bear interest as set forth in the Settlement Agreement and attorney's fees and costs were awarded as provided by the Settlement Agreement. The same is true of the default judgment entered against Edwards. *R.App.110*, although it refers to the Third Amended Complaint rather than the Second Amended Complaint.

Thus, in ***all*** of their pleadings and in obtaining default judgments against all the defendants except Respondents, Appellants relied on the unconditional promises of the Settlement Agreement to recover under a breach of contract claim, rather than the contingent promises of the Joint Venture Agreement.

In the district court, Appellants, when confronted with the legal conundrum they had created for themselves, declined the court's invitation to seek an equitable rescission of the Settlement Agreement on any ground, notwithstanding their arguments then and now that the Settlement Agreement failed for lack of consideration or because it was allegedly induced by fraud.

C. Restatement Section 309 is Not Authority For Extinguishing The Release Provisions As To Respondents.

Section 3.09 of the Restatement does not mean that Appellants' obligation to release Respondents is extinguished under the circumstance of this case. As set forth above, Appellants entered into a valid contract with C4 and Rawson in which C4 and Rawson each made the unconditional promise to pay them $20,000,000 plus interest and additionally gave them the right to enforce the contract against Rawson personally and to obtain attorney's fees, all of which promises they litigated to judgment. The prosecution of one remedy to judgment bars the right to prosecute another. *McKown v. Driver*, 54 Wash. 2d 46, 337 P.2d 1068 (1959). Hence, Appellants cannot now argue that the promises made by C4 and Rawson were valid and enforceable, while at the same time arguing that the Settlement Agreement fails for lack of new consideration, or that their rights under the Settlement Agreement remain viable while their promise to the Respondents are extinguished.

The Settlement Agreement was a third-party beneficiary contract intended to benefit Respondents. third-party beneficiary contract is formed when the parties intend that the promisor assume a direct obligation to a third party at the outset of a contract. *Clark v. Clark*, (Wash. App. Div. 1, 1999). The Washington appeals court in *Clark*, citing the Restatement (Second) of Contracts, § 309, Comment b, the very supplemental authority brought to this Court's attention by Appellants, held:

> If the contract between the promisee and the promisor is a bilateral contract, the promise made for the benefit of a third party may be unconditional or it may be conditional on performance of the return promise or tender thereof. If unconditional, a breach of duty by the promisee will not affect the right of the beneficiary against the promisor. If conditional and dependent, on the other hand, a failure by the promisee to perform his part may terminate the duty of performance by the promisor.

Id., citing § 309, Comment b; *Oman v. Yates*, 70 Wn. 2d 181, 422 P.2d 489 (1967).

Here, Appellants entered into a bilateral contract with C4 and Rawson which at the outset was intended to benefit Respondents: Appellants made an unconditional promise for the benefit of the officers and directors of C4, including Respondents. There is no language in the Settlement Agreement making the performance of that promise conditional upon the payment by C4 or Rawson of the sums identified in the Settlement Agreement. Rather, the consideration expressly exchanged was the mutual promises of the parties and was delivered at the moment the Settlement Agreement was executed. Consideration is a performance or return promise given in exchange for the initial promise. *Pink v. Busch*, 100 Nev. 684, 691 P.2d 456 (1984). A promise that imposes a legal duty or liability on the promisor is sufficient. *Mayer Hoffman McCann, P.C. v. Barton*, 614 F.3d 893 (Eighth Cir. 2010). The mutual promises given here were sufficient consideration to form a contract, and neither promise was conditional. Therefore, as in *Clark v. Clark, supra*, the breach by the promisee, C4 and Rawson, does not affect the right of Respondents as against Appellants, the promisors. C4 and Rawson assumed a duty to pay in the future, which was breached, and Appellants assumed a duty not to sue Respondents, which Appellants breached. Because the promise of Appellants was unconditional, a breach of the duty by the promisees, C4 and Rawson, will not affect the third-party beneficiaries against Appellants.

D. Appellants Waived Any Right To Claim The Invalidity of Any Part of The Settlement Agreement.

Appellants declined in the district court to assert any grounds for the invalidation of the Settlement Agreement, including fraud in the inducement or failure of consideration, and in fact insisted that it was valid and that their action was for breach of the agreement. They have waived any such attack on the Settlement Agreement. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623

P..2d 981 (1981) (a point not urged in the trial court is deemed to have been waived and will not be considered on appeal). They also cannot ask this Court to write provisions into the Settlement Agreement that make the release provision conditional upon payment by Rawson and C4. *Id.* (the court has no power to create a new contract for the parties which they have not created or intended for themselves).

CONCLUSION

The Settlement Agreement contained mutual and unconditional promises made by Appellants (to release the officers and directors of C4, including Respondents), and Rawson and C4 (to pay Appellants $20,000,000, plus interest and subject themselves to attorney's fees). Because the promises were unconditional, as in *Clark*, under Comment b of the Restatement the failure to pay by C4 and Rawson does not extinguish Appellants' obligation to release Respondents Price and Shackelford, and the district court was correct in dismissing them from this action based on the Settlement Agreement. Finally, Appellants expressly declined to attack the validity of the Settlement Agreement in the district court and prosecuted their breach of contract claim based on that agreement to judgment against five defendants. Because they have made this election, their continued arguments that the agreement fails because of fraud or failure of consideration should be disregarded.

Dated this 12th day of October, 2017.

OSHINSKI & FORSBERG, LTD.

By /s/ Mark Forsberg, Esq.
Mark Forsberg, Esq., NSB 4265
Attorneys for Respondents Richard Price and Mickey Shackelford

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Oshinski & Forsberg, Ltd., and that on October 12, 2017, I filed a true and correct copy of the foregoing **Respondents' Response To Supplemental Authorities** with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

Michael L. Matuska, Esq.
Matuska Law Offices, Ltd.
2310 S. Carson Street, Ste. 6
Carson City, NV 89701
Attorneys for Appellants

Robert L. Eisenberg, Esq.
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, NV 89519
Attorneys for Appellants

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

/s/ Linda Gilbertson
Linda Gilbertson