IN THE SUPREME COURT OF THE STATE OF NEVADA

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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
District Court Case No. CI 22918

Supreme Court Case No. 69889

Supreme Court Case No. 70864

On Appeal from Judgment and Post-Judgment Orders
in the Ninth Judicial District Court, Douglas County
The Honorable Thomas W. Gregory Presiding

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record for Respondents certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: *None*

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Oshinski & Forsberg, Ltd.

Scarpello & Huss, Ltd.

Kelly Chase, Esq.

3. If litigant is using a pseudonym, the litigant's true name: *N/A*

Dated this 4th day of January, 2017.

OSHINSKI & FORSBERG, LTD.

By /s/ Mark Forsberg
Mark Forsberg, NSB 4265

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JURISDICTIONAL STATEMENT

Respondents agree with Appellants' Statement of Jurisdiction.

ROUTING STATEMENT

NRAP 17(a) enumerates cases that are to be heard and decided by the Supreme Court. NRAP 17(a)(14) provides that the court will hear matters raising as a principal issue a question of statewide public importance. Respondents do not discern issues of first impression or statewide public importance required by Rule 17 to be heard by the Supreme Court.

STATEMENT OF ISSUES

Respondents do not disagree with Appellants' Statement of Issues.

STATEMENT OF THE CASE

Respondents do not disagree with Appellants' Statement of the Case.

STATEMENT OF FACTS

Facts Regarding The Transactions

Appellants' Statement of Facts is, for the most part, immaterial to this Court's consideration of the issues raised on appeal because the district court did not decide any of Appellants' claims on the merits, nor were any of the orders appealed from based on the facts set forth in the Opening Brief. Rather, the district court dismissed the case based on a Settlement Agreement and Release of All Claims ("Settlement Agreement") executed by Appellants Jeffrey and Peggy Cain and their company,

Heli Ops ("Cains"), *A.App. 1119-1122,* and a joint venture agreement ("JVA") and promissory note ("Promissory Note" or "Note") entered into between Heli Ops (but not the Cains individually) and C4 Worldwide, Inc. ("C4"). *A.App. 1053.* Accompanying the JVA as an exhibit was the Promissory Note which memorialized Heli Ops' $1,000,000 loan to C4 and C4's agreement to pay Heli Ops $20,000,000 by November 30, 2009 (as per the terms specified in the joint venture agreement between these two parties dated November 29, 2009). *A.App. 1054.*

The express terms of the JVA conflict with the Statement of Facts in Appellants' Opening Brief and, in a more general sense, with the underpinnings of the litigation and appeal. The litigation and the major arguments of the Opening Brief depend wholly upon the assertion that the JVA and Note unconditionally required C4 to pay Heli Ops $20,000,000. The terms of the JVA do not support this contention, as the district court recognized in issuing the challenged orders. Rather, JVA Article 4, Section 4.04 provides:

> JVP Compensation. The ***first*** Twenty Million USD ($20,000,000) received ***from the proceeds and profits of leveraging the CMOs in international trade*** will go to the JVP [Heli Ops] on a priority basis prior to any disbursements to C4WW.

Emphasis added. C4 was to receive profits from the success of the joint venture only after the JVP (Heli Ops) had been fully compensated as set forth in Section 4.04.

It is not disputed that C4 purchased CMOs, that CMOs were legitimate investment vehicles or that no proceeds and profits were generated from leveraging the purchased CMOs in international trade..

While the Cains persistently argue that C4 was a sham corporation, they also cite in their Opening Brief a corporate resolution adopted by the C4 board of directors. *A.App. 181:1-4.* Respondents Richard Price ("Price") and Mickey Shackelford ("Shackelford") were officers and/or directors of C4.

There is no evidence in the record of fraud committed by Price or Shackelford. The Cains assert, without factual support, that a "nearly identical fraud" was committed by C4 with another entity called New Hope Capital Foundation. New Hope Capital Foundation is not a party. There is no evidence that New Hope was defrauded or claimed to be, or that its transactions with C4 show that the Cains were defrauded. And, while C4 may not have informed the Cains of the New Hope JVA as claimed in the Opening Brief, there is no evidence that C4 had an obligation to provide such information to the Cains.

After the Cains funded their loan, C4 made distributions to some of its officers and directors, almost all of which went to defendants DR Rawson and Jeffrey Edwards. *A.App. 1078-1081*. Shackelford received one distribution of $12,000, *A.App. 1079*, and another of $5,000, *A.App. 1080*, the latter of which came after funds from New Hope Capital were received, *A.App. 1080*, and cannot be linked to

the money loaned by Heli Ops. The Cains cite no evidence showing whether the payments to Shackelford were the repayment of loans he made, compensation for work performed for C4 or for another purpose. *A.App. 1078-1082* shows that Price received no distributions from the C4 account between December 1 and December 31, 2009. There is no evidence cited in the Opening Brief that Price received a distribution. The Cains assert that Price executed the wire transfers from C4 to others during December of 2009, relying on a fragment of a transcript of Price's deposition. *A.App. 1111-1115.* Price was asked to look at what had been marked as Exhibit 12, *A.App. 1114,* consisting of four pages of bank records showing a series of withdrawals, most of them wire transfers. Price testified he was the person who executed the transfers. *Id. at lines 7-13.* Price was asked why Rawson was paid $125,000 on December 1, 2009. Price answered, "because I was instructed to do that." He was not asked who instructed him to make the transfer.

The Cains assert that after receiving the loan from Heli Ops, C4 gave "false excuses" to the Cains regarding the purchase of the CMOs, citing a letter from Rawson, *A.App. 182:18-24,* blaming a trader/broker for the problems with the transaction, but *A.App. 182:18-24* is a pleading called Statement of Undisputed Material Facts signed by the Cains' counsel and containing references to exhibits and counsel's characterizations of the meaning of each exhibit. The document is argument, not evidence. The exhibits are not part of Appellants' Appendix.

There is no citation to the record to prove or support the inference that Price or Shackelford made false promise of any kind to the Cains. Jeffrey Cain testified at his deposition that neither Price nor Shackelford made any false representations to him, and could not recall any substantive conversation he had with either. *See Respondents' Appendix* ("R. App.") *at 67: 10-24; 68:21-24; 67:25; 68:1-24; 51:11-19; 54:1-13.*

The Cains contend that the "individual defendants" took loans from C4 between December 1 and 23, 2009. Shackelford is alleged to have borrowed $17,000 (the amount he was distributed from the C4 account), and Price is alleged to have borrowed $6,000. *A.App. 182:9-14* (part of counsel's Statement of Undisputed Facts referenced above). No evidence is presented to show that such loans occurred, or that if made were wrongful or not repaid. In short, each of the purported statements of undisputed facts is disputed in defendants' statement of facts filed in support of their motion to dismiss or for summary judgment. *A.App. 209-215.*

The Statement of Undisputed Facts mentioned above contains a reference to an interpleader action pending in Texas in which ownership of the CMOs was in dispute, and asserts that the Cains and Heli Ops were parties to that litigation. *A.App. 186:19-27.* This crucial piece of information shows that the CMOs exist and that the Cains have an ownership interest in them.

In short, the Cains' statement of facts is misleading, incomplete and designed to paint Price and Shackelford with the same brush used to accuse C4 and Rawson. The Court should not take it at face value.

Facts Regarding The Settlement Agreement

The Cains make several assertions of fact relating to the Settlement Agreement that was the basis for the dismissal of this action by the district court. They suggest that Rawson did not sign the Agreement in his capacity as CEO of C4. Nonetheless, the Cains obtained a default judgment against C4 based only on the Settlement Agreement. The Cains also fail to point out that although the Settlement Agreement states that it was an agreement between Peggy and Jeffrey Cain *and* Heli Ops, the signature block for the Cains, like the signature block for Rawson, contains no statement that they are signing in their capacity as principals of Heli Ops.

The Cains assert that the Settlement Agreement "merely repeated and confirmed the fact that C4 already owed, and still owed, $20,000,000 that was due on December 30, 2009, and which remained unpaid." As set forth above, this proposition is based on the false premise that the JVA contained an unconditional promise by C4 to pay Heli Ops $20,000,000. The Opening Brief quotes verbatim a portion of the release provision from the Settlement Agreement at Section 2.1. *A.App. 10*. The provision speaks for itself, but Appellants characterize it as meaning that the only claims the Agreement was intended to release were those obligations

arising from C4's "financial misfortunes and resultant inability to timely pay the promissory note and security interest in the CMO securities dated November 29, 2009," a reference to the JVA, which was attached to the Settlement Agreement. This characterization of what Section 2.1 states was properly rejected by the district court.

The Cains further assert that C4 and its principals had neither the capacity nor the intention of honoring the Settlement Agreement. For this proposition, Appellants cite *A.App. 1040-1041*, which is their own pleading filed in the district court making the same argument. This circularity of argument infects the entirety of the pleadings and the Appellants' Opening Brief. There is no evidence in the record to support any part of the statement.

Facts Relating To The Litigation

The Complaint, filed September 14, 2011 (the "Complaint"), *A.App. 1*, contained a section called "Background to Claims," which is evidently meant as a statement of facts supporting the claims for relief. The Complaint claimed that Rawson and C4 induced the Cains to loan $1,000,000 to C4 to enable C4 to purchase CMOs. It alleged that Heli Ops loaned the money pursuant to the terms of the JVA and Note that obligated C4 to pay Heli Ops $20,000,000 no later than 60 days from the date of the loan. This allegation was untrue because the JVA provides that compensation to the Cains and Heli Ops was conditional on profits being realized

from the CMOs. *A.App. 1054*. The Cains perpetuated the falsehood that the JVA unconditionally guaranteed them $20,000,000 throughout the litigation and in their Opening Brief. They mischaracterize the JVA as a means of supporting their allegation that the JVA ***guaranteed*** them a $20,000,000 payment and their argument that the Settlement Agreement was merely an affirmation of a pre-existing obligation. They pointedly do not, in a pleading or their Opening Brief, attempt to explain the meaning of Section 4.04 of the JVA stating that the JVP is to receive the first $20,000,000 received from the proceeds and profits of leveraging the CMOs.

Most important, the Complaint did not identify conduct by Price or Shackelford in the inducement of the Cains to make the loan to C4 or sign the Settlement Agreement. It alleged only conduct by Rawson and C4, the promise to pay and that Rawson and C4 failed to pay. The Settlement Agreement, but not the JVA, was an exhibit to the Complaint.

The first claim for relief in the Complaint alleges that Rawson and C4 breached the Settlement Agreement and does not allege that Price or Shackelford breached. It seeks a judgment against Rawson and C4, but not against Price and Shackelford.

The second claim alleges fraud only against Rawson for intentionally misrepresenting to Plaintiffs the use of the loan funds. Most important, the second claim for relief alleges that Plaintiffs "reasonably relied on Rawson's

representations" and does not mention reliance by the Cains on representations or conduct by Price or Shackelford. The Cains certainly knew at the time the Complaint was filed who they had relied upon in entering into the agreements with C4. The second claim for relief alleges that Plaintiffs were entitled to judgment against Rawson only, and not against C4, Price or Shackelford.

The third and final claim for relief alleges that Rawson, Baker, Price, Shackelford, Edwards and Kavanagh conspired and "knowingly participated in and/or lent their names to a fraudulent scheme to induce Plaintiffs to loan funds in the first instance, and then to defer from taking legal action thereafter." The third claim for relief does not identify the circumstances of the alleged fraud, including any allegations as to the time, place, identity of the specific parties involved, or the nature of the fraud, as required by NRCP 9.

On December 1, 2011, the defendants jointly moved to dismiss the Complaint. *A.App. 13.* They argued that the claim against Rawson individually failed to state a claim upon which relief could be granted; that the Settlement Agreement and its release language barred Plaintiffs' claims: that fraud was not pled with the specificity required by NRCP 9(b); and that the court lacked personal jurisdiction over the individual defendants. (Price is a resident of Texas, Shackelford of Oklahoma. *A.App. 2:11-17.*)

The district court denied the motion. Recognizing that the motion was brought pursuant to NRCP 12(b)(5), the court accepted the allegations of the Complaint as true and drew every inference in favor of the plaintiffs. The court concluded that Plaintiffs had presented "credible claims" that agreements were made in 2009 and 2010 and that Rawson and C4 breached the agreements. The court found that Plaintiffs, simply by alleging that the other defendants were involved in the corporation and/or in the transaction "and either committed fraud, conspired together, or both," met their pleading burden. However, the court also found that the Complaint was not sufficient to put Price, Shackelford and others on notice of a claim of fraud and granted leave to Plaintiffs to amend.

With respect to jurisdiction over the individual defendants, the court held only that Plaintiffs had made the prima facie showing needed to survive a pretrial motion, but directed that Plaintiffs would be required to establish jurisdiction by a preponderance of the evidence at trial. *Trump v. Eighth Jud. Dist. Court*, 109 Nev. 687 (1993). (In a later order, denying a renewed motion to dismiss based on jurisdiction or for summary judgment, the district court stated that, although Plaintiffs had made a prima facie showing of personal jurisdiction, they "still must establish personal jurisdiction by a preponderance of the evidence ***at a hearing*** or the trial."(Emphasis added.) *A.App. 271:25; 272:1-2.* Accordingly, the court denied the motion to dismiss for lack of personal jurisdiction without prejudice. *Id.*

On July 27, 2012, all defendants moved to dismiss or in the alternative for summary judgment. Based on limited discovery that had taken place to date, they argued again that Plaintiffs could not make a showing necessary for the court to assert personal jurisdiction over the out-of-state defendants. The court delayed its decision on personal jurisdiction, again stating that the Plaintiffs would have to demonstrate personal jurisdiction by a preponderance of the evidence at *a hearing* or at trial. Citing *Trump*, 109 Nev. at 694. *A.App. 271:25; 272: 1-2*.

With respect to the request for summary judgment, the court found that there were material facts in dispute as to whether Rawson acted on behalf of himself or C4 when he signed the Settlement Agreement. The court found that whether the other defendants were involved in the transaction was unclear and that therefore dismissal of the claim against them was not appropriate on a motion for summary judgment. The court denied the motion without prejudice.

On November 27, 2012, Plaintiffs filed a Second Amended Complaint. *A.App. 276-285.* The Second Amended Complaint attempted to cure the lack of specificity identified by the court. Paragraph 16 of the Second Amended Complaint contains language apparently intended to address the deficiency. It states "All of the individually named Defendants participated in communications with the Plaintiffs regarding the investments that are the subject of this Complaint and participated in the inducement for Plaintiffs to make the loan." *A.App. 278.* The Second Amended

Complaint contained no additional allegations against Price or Shackelford. It made no allegation as to the time, place or specific conduct of Price and Shackelford that allegedly constituted their "participation." The first claim for relief, for breach of contract, alleged only that Plaintiffs were entitled to judgment against Rawson and C4, but additionally stated that the individual defendants knew or should have known that the Settlement Agreement was "illusory" and that C4 was a shell corporation with no ability to pay and that Rawson had no intention of repaying the loan. The claim did not state facts showing how any defendant knew or should have known that the Settlement Agreement was "illusory" or that Rawson had no intention of paying under the Agreement. The breach of contract claim alleged that the individual defendants were the alter ego of the corporation in that they exercised total dominion and control over C4; that the individual defendants had intermingled their personal and financial affairs, such that C4 was the alter ego of the individual defendants and that the corporate entity was disregarded when individual defendants took loans from C4 to pay personal expenses. These are legal conclusions and no facts were alleged to support them.

The second claim for relief of the Second Amended Complaint alleged that the individually named defendants "created a false perception regarding C4 and Rawson, including their experience, professionalism, and expertise in financial matters." *A.App. 280:24-25.* There is no evidence in the record showing that

representations of Price and Shackelford about their qualifications were false, or how their truthful statements about their careers created a false perception by the Cains. The allegations do not meet the pleading requirements of NRCP 9(b).

Plaintiffs alleged as part of their fraud claim that the defendants "knowingly allowed Rawson to misrepresent to plaintiffs the intended use of the loan funds, the likelihood of obtaining the dramatic returns necessary to satisfy the obligation to plaintiffs, and his experience and capabilities in order to induce plaintiffs to advance the loan funds in the first place and to subsequently induce plaintiffs to continue to defer taking legal action against Rawson and C4 thereafter." There is no evidence in the record on appeal that Price or Shackelford knowingly allowed Rawson to misrepresent anything to the Cains, and especially no evidence that they had any role at all in the Settlement Agreement. In fact, the Second Amended Complaint states only that Rawson and C4 made promises to Plaintiffs, that Rawson and C4 agreed where any legal action would be filed, and that Rawson and C4 failed and refused to pay Plaintiffs as agreed. There is no evidence supporting the claim that Price or Shackelford had any knowledge of the Settlement Agreement.

The district court denied a renewed motion to dismiss or for summary judgment based on the allegations in the Second Amended Complaint. *A.App 262*. Applying summary judgment standards set forth in *Wood v. Safeway, Inc.*, 121 Nev. 724, 731 (2005), the court determined that the summary judgment as sought in the

second motion to dismiss or in the alternative for summary judgment was inappropriate "at this time." The court denied the motion to dismiss and for summary judgment without prejudice. *A.App. 274:21-22.* The denial without prejudice applied to allegations regarding whether the individual defendants were involved in the Settlement Agreement.

Almost two years later, on September 17, 2014, defendant Joe Baker moved for summary judgment, asserting that the Settlement Agreement released Baker from all of the claims set forth in the Second Amended Complaint, which by then had superseded by the Third Amended Complaint. On the date Baker's motion was filed, the action had been pending for more than three years. The Cains had engaged in extensive discovery and had ample time to obtain evidence (that they should have had before filing their complaint) of any wrongdoing alleged against Price or Shackelford with respect to the inducement of the Cains to execute the JVA or Settlement Agreement.

Price and Shackelford joined in Baker's motion. *A.App. 362-378.* In support of their joinder, they submitted affidavits denying participation in the inducement of Plaintiffs to enter the JVA or to enter into the Settlement Agreement.

On November 21, 2014, the district court denied Baker's motion for summary judgment and a motion for summary judgment filed by the Cains. *A.App. 577-586.* With respect to Baker's motion, the court stated:

> The court finds the liability of the remaining defendants depends on whether they can be protected, and also benefit, from the 2010 Release [Agreement] signed by Rawson. The court must apply general principles of contract law, as well as determining whether the corporate veil should be set aside. A determination of these issues rests on the material facts, which are all disputed.
>
> Cain's claims of fraud, conversion, conspiracy and negligence against the remaining defendants are material facts and remain in dispute. For these reasons Baker's motion for summary judgment is DENIED.

On March 30, 2015, Plaintiffs filed the Third Amended Complaint. It differed from the Second Amended Complaint only in that it added a claim for intentional interference with contractual relations. The Third Amended Complaint, like its predecessors, did not identify any conduct on the part of Price or Shackelford, other than their mere presence on the board of directors of C4 and their accurate biographies on the C4 website, that could give rise to a fraud claim. It did not allege misrepresentations or suppression of facts by Price or Shackelford to the Cains, or state facts implying their actual knowledge of Rawson's fraud or their participation in a conspiracy claim.

On April 21, 2015, Baker, joined by Price and Shackelford, filed a Rule 12(c) motion for judgment on the pleadings. At the time the motion was made the district court had never reached or decided the question of whether Baker, Price and Shackelford were benefited by the release provisions of the Settlement Agreement. Baker argued that the Settlement Agreement was a contract to be interpreted in accordance with contract law and provided authority that the interpretation of a

contract is a legal issue for the court to determine. *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 117 P. 3d 219, 233 (2005). *A.App. 794.* Baker pointed out that the Third Amended Complaint established that the Settlement Agreement was the basis for an unconditional $20,000,000 liability against C4 and/or Rawson and by its very broad terms, unequivocally and unambiguously released all claims against the officers and directors of C4, who were third party beneficiaries of the Agreement. The Cains claimed that Baker and the other officers and directors of C4 were not entitled to the benefit of the release provision because C4 and Rawson had not performed; that the Agreement failed for lack of consideration; and that the Agreement was merely an affirmation of a pre-existing debt arising under the JVA. Baker argued that the removal of the JVA contingency was a form of valuable consideration as was the fact that the Settlement Agreement created an additional unconditional personal obligation on the part of Rawson to pay Plaintiffs $20,000,000. *A.App. 759-760.* Baker pointed out that the Third Amended Complaint alleged that Rawson and C4 -- but not Baker, Price or Shackelford -- promised and failed to perform under the Settlement Agreement.

The court granted in part Baker's motion. *A.App. 935.* The court rejected the Cains' argument that the motion was an impermissible request for reconsideration of an earlier raised and disposed of motion to dismiss. The court also rejected the Cains' argument that the release of Baker, Price and Shackelford was ineffective

because of the failure of C4 to perform under the Settlement Agreement. The court found that under the Agreement, C4 and Rawson promised to be unconditionally obligated to the Cains in consideration of the releases. It found that the Settlement Agreement did not condition the release of those of the officers and directors of C4 on the payment of $20,000,000, but on the promise to pay at a later date. The court also relied on the Cains' successful efforts to enforce the Settlement Agreement (and therefore not treat it as illusory), pointing out that they had obtained judgments against four defendants based upon the language of the Agreement. The court held that the release provisions were extremely broad and encompassed the tort claims as well as the breach of contract claim.

The court dismissed the breach of contract claim, but recognized that the Third Amended Complaint alleged that the other defendants - - including Baker, Price and Shackelford - - knew the Agreement was "illusory" at the time it was executed (because C4 had no ability to pay the amount of money set forth in the Agreement and that Rawson had no intention of repaying the loan.) Because of this argument, the court declined to dismiss the remaining claims so that the Cains could consider whether they wished to seek to rescind the Agreement based on the alleged illusory promises contained therein, or to continue to assert its validity and be bound by all its provisions.

Plaintiffs did not seek reconsideration of the district court's order. Plaintiffs did not respond to the district court's observation that they could seek rescission of the Settlement Agreement in order to potentially avoid the provisions releasing the officers and directors of C4 from any liability to the Cains or Heli Ops.

On August 17, 2015, Baker moved the district court for an order "confirming plaintiffs' election of remedy and for summary judgment thereon." *A.App. 982-989.* Price and Shackelford joined in the motion and moved for summary judgment on the remaining claims. *A.App. 1028-1035.* The motions showed that the Cains had expressly rejected rescission of the Settlement Agreement, recognizing that they would likely lose the benefit of their default judgments against four other defendants if the Agreement were rescinded, and perhaps recognizing, without admitting it, that they were not owed $20,000,000 under the JVA because no profits were achieved as a result of leveraging the CMOs.

Price and Shackelford pointed out that they had pending before the court a motion for partial summary judgment with respect to the fraud, civil conspiracy and intentional interference with contract claims which demonstrated that those claims must fail because the decision by Plaintiffs to enter into the JVA with C4 admittedly was not induced by any misrepresentation by Price or Shackelford, and in fact was made in reliance on the advice of their own fiduciaries, a certified public accountant, Dan Witt, and financial advisor, Kerry Rucker. *R.App. 45:13-20; 46: 1-9;49: 1-10.*

Baker settled and was dismissed from the action before the motions were decided. *A.App. 1135-1139.*

On November 5, 2015, the court granted the motion for summary judgment as to Price and Shackelford. *A.App. 1150-1168.*

SUMMARY OF ARGUMENT

The central issue before this Court is whether the Settlement Agreement executed by Jeffrey and Peggy Cain and defaulted defendant D.R. Rawson released Richard Price and Mickey Shackelford from all of the claims set forth in the Third Amended Complaint. As demonstrated by the Cains' pleadings and their Opening Brief, they continue to insist that the Settlement Agreement is a valid and binding contract. The Agreement is the only contract alleged by the operative Third Amended Complaint to have been breached. The Agreement is the only basis for the default judgments obtained by Appellants against C4, Rawson, Kavanagh and Edwards. The district court relied on the Settlement Agreement and the JVA in granting Baker's motion for judgment on the pleadings with respect to the breach of contract claim set forth in the Third Amended Complaint. The district court again relied on the Agreement and the JVA, along with evidence outside the pleadings of the default judgments obtained by Appellants based on the Settlement Agreement in granting Price and Shackelford's motion for summary judgment.

Despite having presented this Court with more than 1,600 pages of appendix materials, nothing in the record shows that Price or Shackelford participated in the negotiation of the JVA or the Agreement. Nothing in the voluminous record shows that Price or Shackelford knowingly engaged in any wrongful conduct or made any representations of any kind to the Cains regarding the JVA or the Settlement Agreement. There is no evidence that the Cains justifiably relied on the mere existence of Price and Shackelford's biographies on the C4 website to enter into the JVA; the record clearly shows that they relied on their own counsel, CPA and financial advisor and the representations of Rawson to enter into the transaction. Nothing in the record shows that any party to the litigation or their advisors knew that the JVA was destined to prove unsuccessful. Even if the Court reviews and considers each page of the appendix, it will find no evidence of fraud or other wrongful conduct on the part of Price or Shackelford, no evidence that Price or Shackelford controlled C4 or intermingled their personal finances with those of the corporation such that the corporate veil could be pierced, and no evidence that Price or Shackelford even knew of the existence of the Settlement Agreement before it was executed.

Yet, this appeal does not concern the question of whether the Cains state viable claims for relief in their Third Amended Complaint. Rather, it is simply and directly a request to determine whether the valid and binding Settlement Agreement

released Price and Shackelford from liability under the claims set forth in the Third Amended Complaint.

Appellants' arguments will be addressed in the order and as numbered in the Opening Brief.

STANDARD OF REVIEW

Price and Shackelford do not disagree with the standards of review set forth in the Opening Brief, but will address their application below.

ARGUMENT

1. The district court properly granted judgment in favor of Price and Shackelford based on the release clause in the Settlement Agreement.

Both the order dismissing the breach of contract claim on the pleadings and the order granting summary judgment were decided by the district court by considering matters outside the pleadings. In deciding Baker's motion to dismiss on the pleadings, the court considered the JVA and Settlement Agreement, and the fact that the Cains had obtained default judgments against Rawson, C4, Kavanagh and Edwards and executed on the judgment against Rawson NRCP 12(c) provides:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In opposing the motion, the Cains also presented evidence outside the pleadings to the court: the Agreement and the JVA and its exhibits. In addition, the Cains included many allegations of fact not evident from the face of any pleading or even the Agreement or JVA. For example, at *A.App. 806:7-14*, the Cains made factual allegations that they became aware of facts that led them to believe defendants were operating C4 as a shell company, solely used as a vehicle to perpetrate a pyramid scheme to defraud investors and lenders out of millions of dollars. They alleged that defendants took on a second investor, New Hope, to make up a shortfall of some sort. They alleged that C4 pledged an interest in CMOs, without identifying those CMOs, which meant that C4 held only a 2 percent interest in other unidentified CMOs when it executed the Agreement. These allegations, not supported by exhibits or any other evidence, are matters outside the pleading presented to the district court to influence its decision on the Rule 12(c) motion.

Even if Baker's motion did not include matters outside the pleadings, a court is not compelled to a "legal conclusion couched as a factual allegation" when considering a Rule 12 motion to dismiss. *Papasan v. Allison*, 478 U.S. 265, 286 (1986); see also *George v. Morton*, No. 2:06-CV-1112-PMP-GWF, 2007 WL 680787, at *6 (D, Nev. March 1, 2007) (stating that conclusory legal allegations and unwarranted inferences will not prevent dismissal). Here, then, mere conclusory

allegations of fraud or other torts by the Cains, especially when made after the close of discovery, are insufficient to resist dismissal of claims.

Nonetheless, Baker's motion must be treated as one for summary judgment and disposed of as set forth in Rule 56. Under Rule 56 analysis, a party opposing a motion for summary judgment cannot rest on its pleadings. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131 (2007); *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-1031 (2005). Because Baker's motion must be treated as one for summary judgment under Rule 56, the Cains' burden changed: it was no longer permitted to rely on the allegations of its complaint. But they did just that in opposing Baker's motion and they repeat this error in their Opening Brief. In the Opening Brief, at page 24 and throughout their arguments, the Cains rely on the *allegations* of the Third Amended Complaint. Since Baker's motion should be treated as one for summary judgment, Appellants' reliance on their pleadings is impermissible and their arguments must fail. Similarly, to the extent that the Cains challenge the propriety of granting Price and Shackelford's motion for summary judgment, they also fail. A party seeking summary judgment meets its burden by showing that there is an absence of evidence to support one or more of the *prima facie* elements of the claims of the non-moving party. *NRCP 56*(c*); Cuzze, supra.* Price and Shackelford pointed out that there are no facts supporting the Cains' tort claims. The burden then shifts to the non-moving party to point out to the court facts

supporting each element of their claims. *NRCP 56(c)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The Cains failed to provide any of the requisite evidence to the district court. They offered no facts to meet their evidentiary burden to show that Price and Shackelford participated in making misrepresentations to the Cains and committed fraud or any other tort.

Therefore, what remained for the district court to consider when deciding Baker's motion for judgment on the pleadings and Price and Shackelford's motion for summary judgment were the terms of the Settlement Agreement without considering any of the unsupported allegations of the Complaint. Appellants' repeated references to fraudulent schemes against the Cains in which Price and Shackelford participated, or fraud in the inducement to enter into the Agreement, or allegations that Price and Shackelford knew that C4 was a shell corporation, had no funds to perform under the Agreement or that the contract was illusory are simply unsupported by the record and should be disregarded by this Court as empty legal conclusions.

The court's interpretation is addressed in Subsections 1(a) and 1(c), below.

(a) Price and Shackelford can enforce the release provision in the Settlement Agreement irrespective of C4's failure to pay the Cains.

Appellants argue that Price and Shackelford failed to demonstrate the existence of an affirmative defense in the district court as required by NRCP 8(c).

NRCP 8(c) provides that in an answering pleading, a party must set forth certain affirmative defenses, including enumerated defenses, including release, and any other matter constituting an avoidance or affirmative defense. Price and Shackelford, in their answer to the Third Amended Complaint, set forth affirmatively the defense of release. *A.App. 775:5; 787:5.* In addition, Price and Shackelford presented evidence to the court that the Agreement contained a provision releasing them, as officers and directors of C4, from liability. *A.App. 11: Section 2.1.* Section 2.1 provides that the Cains:

> …hereby fully and forever release and discharge C4 Worldwide, its successors, predecessors, parents, assigns, agents, employees, officers, directors, insurers, and all other affiliated persons, firms, or corporations, of and 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 become manifest either directly or indirectly related to the facts in any of the claims of any kind asserted against or which could have been asserted in any of the claims.

Section 2.1 provides that the Cains released and discharged C4 from any and all claims that exist arising out of C4's "financial misfortunates and resultant inability to timely pay the Promissory Note and Security Interest in the CMO securities dated November 29, 2009, citing to the JVA and its exhibits. The Cains cite *Schwartz v. Schwartz*, 95 Nev. 202, 591 P.2d 1137 (1979) for the proposition that Price and Shackelford must prove they are entitled to enforce the Agreement. Appellants' purpose in citing to *Schwartz* is unclear, as its brief does not quote any

of the language of *Schwartz*. In fact, *Schwartz* does not stand for the proposition for which Appellants cite it.

The issue in *Schwartz*, as set forth in the first paragraph of the opinion, is whether the affirmative defense of res judicata, upon which the dismissal in the case was predicated, was properly before the court when it had not been pled. That isn't the case here, where the affirmative defense of release was properly pled.

Appellants next argue with respect to the release defense that fairness dictates that a release cannot be enforced by a third party beneficiary if the releasor has never been paid. For this proposition, Appellants cite but one case, *Coles v. Glaser*, 205 Cal. Rptr. 3d, 922 (Cal.Ct.App. 2016). In that case, the parties entered into a settlement agreement that required the president and vice president of a real estate investment company to repay a loan made to the company (Cascade) and guaranteed by its president and vice president. Payment, not the promise to pay, was the consideration bargained for by the lender.

The court concluded that the officers were not released by the settlement agreement because they had executed the agreement as defendants in the lawsuit and that all three defendants, Glaser, Taylor and Cascade, were required by the settlement agreement to pay Coles the full amount of the loan. Because of the wording of the settlement agreement, Glaser and Taylor were equally obligated to perform under the settlement agreement. Therefore, because they did not perform,

the release provision was ineffective as to them personally. The settlement agreement at issue in this case is different from the agreement in *Coles*. The settlement agreement upon which the parties here rely did not require Price or Shackelford to perform. Only C4 and Rawson were obligated to make payment to the Cains under the Agreement. Therefore, unlike Taylor and Glaser, Price and Shackelford did not breach the Agreement.

Moreover, unlike the settlement agreement in *Coles*, the Agreement here did not provide that payment was the consideration given for the release. Rather, the Agreement provided that:

> 1.1 In consideration of the releases set forth below in section 2 and the other terms set forth herein, C4 stipulates that it owes the Cains Twenty Million USD ($20,000,000) and that said amount was due on December 30, 2009 and remains unpaid. C4 Worldwide acknowledges its obligation to pay and agrees to pay the sum of $20,000,000, plus all accumulated interest, to Cains no later than 90 days from February 25, 2010, less any advance payments made, and C4 shall use all reasonable efforts to pay this obligation off in full as quickly as possible. *A.App.9, Section 1. Consideration.*

Section 1.1 unambiguously provides that the consideration for the releases of the officers and directors of C4 set forth in Section 2 of the Agreement was the stipulation, a promise, by C4 that it owed the Cains $20,000,000. C4 further acknowledged its obligation to pay and agreed to pay the debt within a certain amount of time and agreed to use all reasonable efforts to pay the obligation "as quickly as possible." In *Coles* the consideration for the release was the payment of

the debt. Here, the consideration for the releases was the acknowledgement of the debt and the promise to pay the debt as quickly as possible in the future. The value of the consideration offered by C4 was significant: absent the Settlement Agreement and the promise to pay $20,000,000, the Cains were not entitled to $20,000,000. The promises of C4 and Rawson to pay $20,000,000 formed the consideration for the release and the releases were granted in consideration of those promises, not in consideration of the payments. The court in *Coles* simply did not address the situation where the third party beneficiaries of the release were not the individuals required to perform under the agreement.

Finally, contrary to what Appellants argue, Price and Shackelford do not assert that the release bars the Cains from recovering damages. Price and Shackelford do not dispute the obligations of C4 and Rawson to satisfy the obligations set forth in the Agreement. Rawson and C4 would not be entitled to benefit from the release provisions, just as Taylor and Glaser were not entitled to the protection of the release, because in both cases those released parties were the obligors under a settlement agreement.

(b) Baker's motion for judgment on the pleadings was not an improper or untimely motion for reconsideration.

Judge Gibbons' first order, in response to a motion to dismiss, or in the alternative for more definite statement, was a response to a motion to dismiss on the

pleadings filed by all defendants prior to the filing of an answer. Judge Gibbons did not rule on the question of whether Baker, Price and Shackelford were protected third-party beneficiaries of the Settlement Agreement. The complaint on file at that time did not include any claims for breach of the Settlement Agreement against any of the defendants other than C4 and Rawson and was deficient in its pleading of the tort claims. Therefore, the court denied the motion to dismiss, ordered the Plaintiffs to file an amended complaint that was compliant with NRCP 9, and delayed any hearing on jurisdiction.

Judge Gibbons' next order, denying a renewed motion to dismiss, also did not address Price and Shackelford's status under the Settlement Agreement. The court again put off any decision regarding personal jurisdiction. Judge Gibbons specifically stated that:

> Whether the Five Defendants [Price, Baker, Edwards, Kavanagh and Shackelford] were involved in the [settlement agreement] transaction, or whether they approved it is unclear, therefore, the dismissal of the claim against Rawson, as an individual, is not appropriate or justified under NRCP 56.

The court therefore denied the motion without prejudice, never deciding the substance of the motion as it regarded the Settlement Agreement.

Judge Gibbons' next order, *A.App. 577*, denied Plaintiffs' motion for summary judgment against Edwards. The order also addressed a motion for summary judgment filed by Baker seeking protection under the Settlement

Agreement. In response, the court held that whether the corporate veil should be pierced to reach Baker and its effect upon his liability notwithstanding the release provision of the Settlement Agreement was a determination that rested on "material facts, which are all disputed." The court noted, too, that the claims of fraud, conversion, conspiracy and negligence against the remaining defendants depended on material facts in dispute. Therefore, the court denied Baker's motion for summary judgment. The court did not decide whether the Settlement Agreement protected Baker, Price or Shackelford.

Appellants rely on DCR 13(7) for the proposition that Baker's motion for judgment on the pleadings was barred by the court's previous rulings. DCR 13(7) does not compel such a result. First, the prior rulings of the court did not dispose of any motion asserting protection under the Settlement Agreement. DCR 13 (7) does not bar a renewed motion after extensive discovery when it has become evident that a party has no evidence to support one or more elements of a claim it has raised in its complaint. Judge Gibbons recognized this in his earlier rulings by denying motions without prejudice or denying them based on what appeared at the time to be issues of material fact that were unresolved. By the time Baker filed his motion for judgment on the pleadings, the litigation had been pending for three years and still Plaintiffs had developed no evidence showing that Price, Shackelford or Baker were engaged in any fraudulent conduct, and particularly no wrongful conduct with

respect to the negotiation or execution of the Settlement Agreement. Baker's motion was therefore not a violation of DCR 13(7). Nor, was the motion an attempt to judge shop as alleged by Appellants.

Rather, the passage of time, which gave Plaintiffs the opportunity and obligation to obtain and provide evidence supporting their claims, led Baker to correctly conclude that the Plaintiffs had no evidence outside the plain language of the Settlement Agreement.

The lack of evidence showing that the contract was obtained by fraud changed the parameters not only of the motion, but of the court's consideration of it. The motion was timely given the many years the litigation had been underway and the complete lack of evidence to support the consideration of any extrinsic evidence in interpreting the Agreement. Thus, while Judge Gibbons never interpreted the Agreement, Judge Gregory did so with a different state of the litigation and evidence. Interestingly, Heli Ops and the Cains conclude this section of the argument by pointing out that the basic underlying facts were *undisputed* and unchanged. This conclusion is in direct conflict with Judge Gibbons' earlier rulings that decisions on the earlier motions were precluded by the existence of disputed facts in their Opening Brief.

Moore v. City of Las Vegas, 92 Nev. 402, 551 P.2d 244 (1976) is not dispositive of this issue. In *Moore*, the challenged decision of the district court was

a response to a second motion for summary judgment decided by a judge other than the judge who decided the first motion for summary judgment, where the only distinguishing feature between the first and second motion was the addition of additional authorities in support of the motion. There were no additional facts presented in the second motion. Here, the challenged motion is Baker's motion for judgment on the pleadings that resulted in the dismissal of the breach of contract claim against Baker, Price and Shackelford. As the district court noted in its order granting the motion, Baker had not previously moved for judgment on the pleadings nor sought summary adjudication on the Third Amended Complaint. Even if earlier motions sought relief based on the Settlement Agreement, the court never disposed of that argument and left its resolution for a time when, as set forth above, the facts were clear and the pleadings had been amended.

The district court rules are not to be used to unnecessarily prolong an issue that can be decided on motion. DCR 5 provides:

> These rules shall be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice by the court.

NJDCR 1(a) provides that the local rules are to be construed and administered to secure the just, speedy and inexpensive determination of matters before the court. Rule 1(c) permits the judge who will try a case, upon the judge's own motion, to determine that a case should not follow the regular procedure where the interests of

justice require. Thus, even if Judge Gregory considered a motion in a procedurally inappropriate order or context, he has the authority to do so and exercised his discretion properly in deciding the motion to expedite the resolution of this case.

(c) The release in the Settlement Agreement expressly pertains to all claims against the officers and directors of C4, including Price and Shackelford.

Plaintiffs argue that the release set forth in the Settlement Agreement only applied to claims "arising out of C4 Worldwide's financial misfortunes and resultant inability to timely pay" the Cains. *A.App. 1120*. Having said that, Heli Ops and the Cains immediately diverge from the facts supported by the record and their own Appendix by asserting, without support, that this provision in the Settlement Agreement "turned out to be part of the defendants' ongoing attempts to defraud the Cains." Appellants then discuss the Cains' disputed and unsupported view that the loan proceeds received from the Cains were wrongfully diverted by C4 to the personal benefit of C4's officers and directors and not for the purchase of CMOs, and further discussion of C4's alleged second agreement with another company promising security consisting of the same CMOs. Heli Ops and the Cains also assert that C4 gave false excuses to the Cains regarding problems with obtaining and leveraging the CMOs. There is no evidence, only allegations, in the record to show that the funds distributed to Baker, Price or Shackelford were wrongful or fraudulent,

nor that the agreement with New Hope, the second company, was fraudulent or that New Hope was defrauded at all or had any effect on the agreement with Heli Ops or the Cains, nor that the reasons given by C4 to the Cains for its inability to fulfill the desired result set forth in the JVA were not truthful.

Heli Ops and the Cains speculatively theorize that C4 entered into the Settlement Agreement because it was desperate to avoid litigation and desperate to avoid complaints with the SEC and Department of Justice and that C4 and Rawson (but not Baker, Price or Shackelford) used the Settlement Agreement to reaffirm their obligations to the Cains while not disclosing "the extent of their fraud."

Heli Ops and the Cains claim that the term "financial misfortunes" in the Settlement Agreement suggests negative market forces or factors beyond the control of C4. However, just as Heli Ops and the Cains argue that there is no evidence that C4's inability to pay was caused by "financial misfortunes," there is also no evidence showing that it was *not* the result of financial misfortunes. The characterization of the reason the JVA was unsuccessful does not limit its release terms of the Settlement Agreement: the release provisions are the operative terms, releasing the officers and directors from all claims of any kind, irrespective of the reasons the claims arose or might arise in the future.

Nor do subsequent events or discoveries affect the terms of the Settlement Agreement because it clearly stated in the release provision that it was intended to

release the officers and directors of C4 of all claims, whether known or unknown, the basis of which existed at the time the Agreement was executed or which became manifest in the future, directly or indirectly related to the facts of any claims of any kind asserted against or which could have been asserted in any of the claims against the released parties. The Cains were represented throughout this process by counsel as the Settlement Agreement itself demonstrates, and should be charged with understanding the agreement they signed.

Finally, there is simply no evidence in the record to support a conclusion that C4 had no ability at the time Rawson executed the Settlement Agreement to resolve the problems with the CMOs or to generate other revenue to pay the Cains as set forth in the Agreement. This Court should not fall into the trap of concluding that simply because the JVA plan was unsuccessful, or because the Settlement Agreement ultimately could not be fulfilled by C4, that fraud occurred or that C4's principals were of a state of mind to know that the payment would never be made. This is especially true with respect to Price and Shackelford, since there is absolutely no evidence that either had any knowledge or role in the execution of the Settlement Agreement, or even that they approved it after the fact. The fact that the JVA was unsuccessful or that the Settlement Agreement obligations were not fulfilled by Rawson or C4, absent evidence to the contrary, are circumstances just as easily explained by market forces or the conduct of others beyond the control of C4 or

Rawson (with respect to the JVA and Settlement Agreement) and Price and Shackelford (with respect to the Settlement Agreement, since they had no part in negotiating it and were not parties to it).

Section 2.1 of the Settlement Agreement sets forth a broad release of all claims, known or unknown but which may become 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 in any of the claims. Section 2.1 is a contractual term agreed to by the parties. The parties both agreed that the reason for the Settlement Agreement was to resolve financial misfortunes of C4 and its resultant inability to pay the Cains and Heli Ops under the JVA. That is not the limit of the release provision. The release provision released C4 and its officers and directors from those claims, as well as "all past, present, and future claims," whether known at the time or not and whether the basis for which existed at the time of the Settlement Agreement or only became known later, and that were directly or indirectly related to the facts in any of the claims of any kind that might be asserted against C4 or its officers and directors. The Cains interpretation of Section 2.2 renders the actual releasing provisions of Section 2.1 superfluous and meaningless in addition to rendering the entire Settlement Agreement meaningless.

A settlement agreement containing release provisions is a contract. Appellants brush aside the actual release provisions of Section 2.1 by simply

denying their existence: "Here, the release provision did not call for a release of any and all claims of any nature." This is simply a deception. Rules of contract interpretation require a court to attempt to harmonize all provisions of a contract and interpret each provision so as not to render any other provision meaningless or superfluous. A court should not interpret a contract so as to make meaningless its provisions. *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. Adv. Op. 49, 306 P.3d 360 (2013). A basic rule of contract interpretation is that every word must be given effect if at all possible. *Id.* In keeping with these established rules, Sections 2.1 and 2.2 must be read together and not in the fashion the Cains suggest, which would render the broad release provisions of Section 2.1 meaningless.. Whatever the words "financial misfortunes" mean, they cannot be interpreted to negate the rest of the words in Section 2.1.

(d) There is no evidence in the record that the Settlement Agreement was procured by fraud.

The Cains urge in their Opening Brief that the Settlement Agreement was procured by fraud. The premise of their fraud claim is that C4 had no ability or intention to pay, and no ability to provide the CMOs as security for the obligation. There is simply no evidence in the record to support these factual assertions. Initially, it is important to recognize that the Settlement Agreement did not require immediate payment by C4 or Rawson of the $20,000,000. It required the payment

to be made within 90 days from February 25, 2010 and that C4 was to use all reasonable efforts to pay the obligation off as quickly as possible. *A.App. 9, Section 1.1.* There is no evidence in the record to establish that at the time of the Agreement C4 would be unable to make the payment required within 90 days or as soon as possible. Similarly, there is no evidence, and the Opening Brief cites to none, to prove that C4 or Rawson had no intention to pay or that it had no ability to provide CMOs as security for the obligation. There is simply no evidence that C4 would be unable to secure the CMOs on behalf of the Cains even if they had been transferred away from the account controlled by the Cains as suggested by the evidence.

(e) The Cains received substantial new consideration by executing the Settlement Agreement.

The Cains ignore or brush aside the significant benefits they received by executing the Settlement Agreement over the rights they had under the JVA. They are forced to admit that the JVA did not contain an unconditional promise to pay them $20,000,000. Rather, the JVA promised to pay the Cains, or more correctly, Heli Ops, $20,000,000 from the profits and proceeds obtained by leveraging the purchased CMOs. The promissory note that was Exhibit 2 to the JVA and is found at *A.App. 1071-1072*, did not make the promise to pay $20,000,000 unconditional, as Appellants urge. The promissory note provided:

> C4 WorldWide, Inc., a California corporation promises to pay, for value received, the amount of Twenty Million USD ($20,000,000) to

> Heli-Ops, LLC *as per the terms specified in the joint venture agreement* between these two parties dated November 29, 2009.

(Emphasis added.) Thus, the payment under the promissory note incorporated the term of the JVA providing that payment was conditional upon receipt of profits obtained from leveraging the CMOs.

In arguing that the Settlement Agreement provided the Cains with no new consideration, they impermissibly fall back on reliance on the allegations of the Third Amended Complaint to allege that the Settlement Agreement was "illusory." They cite *Shoen v. Amerco, Inc.*, 111 Nev. 735, 741-742, 896 P.2d 469, 473-74 (1995) for the proposition that an illusory obligation does not constitute adequate consideration for a contract. But in *Shoen*, an employee's *promise* to render lifetime services in a retirement contract was not illusory, and therefore constituted adequate consideration. Thus, a promise to act can constitute adequate consideration for the consideration offered in return in a contract. And, while it may be well settled, as Appellants argue, that a promise to perform an act that a person is already legally obligated to perform is not consideration, that is simply not the case here. The inconvenient truth for the Cains is that they entered into the Settlement Agreement and by doing so converted a conditional promise to pay $20,000,000 that had not been fulfilled into an unconditional promise to pay $20,000,000, irrespective of whether the CMOs ever generated the expected returns from leveraging. They acquired another new right, the personal obligation of Rawson to be responsible for

corporate debt that did not previously exist and was not otherwise required under NRS 78.138(7).

In a broader sense, the Cains advance no explanation for what the Settlement Agreement meant if not to provide the additional consideration of converting a conditional promise to an unconditional promise and obtaining a personal guaranty from Rawson. The Cains were sophisticated investors. The CMO program had been vetted by their own CPA and financial advisor. They were represented by counsel when they executed the Settlement Agreement. *A.App. 10-11*. ("Each party expressly represents and warrants that it has relied on its own knowledge of the facts and the advice of their/its own lawyer, knowing the right to consult with counsel before entering this Agreement, concerning the consequences of this Agreement…The parties further warrant that no promise or inducement has been offered, except as set forth in this Agreement, and that this Agreement is executed without reliance on any statements or representations by any other party concerning the nature and extent of damages or legal liability.") It is absurd to argue that the Cains would execute an agreement that achieved nothing. Rather, from the face of the document, it is irrefutable that the Cains obtained substantial consideration from the Agreement.

Appellants parsing of the words of the Settlement Agreement do not support the conclusion that the Settlement Agreement shows that the JVA created a non-

contingent obligation on the part of C4 and Rawson. In order to correctly interpret the contract using settled rules of contract interpretation set forth above, the Promissory Note, the JVA and the Settlement Agreement must be read together in a way that attempts to give meaning to all of the terms of each.

The Cains mischaracterize the terms of the Settlement Agreement. The Agreement states that "To the extent not modified herein, the Promissory Note and Security Interest in the CMO securities remains in full force and effect." Section 1 of the Settlement Agreement, entitled Consideration, at section 1.1, states as follows:

> In consideration of the Releases set forth below in section 2 and the other terms set forth herein, C4 Worldwide stipulates that it owes the Cains Twenty Million USD ($20,000,000) and that said amount was due on December 30, 2009 and remains unpaid.

Rather than a statement of what the JVA and Note stated, this is an expression of the exchange of consideration between the parties to the Settlement Agreement. C4 did not acknowledge a pre-existing unconditional debt. Rather, it stipulated that the debt was owed and remained unpaid ***in exchange for*** the releases set forth in the Agreement. This stipulation and the acknowledgement of the debt are precisely what the Cains bargained for in the Settlement Agreement: a change to the terms of the JVA and Note from a conditional promise to a stipulation and acknowledgement of unconditional obligations to them. The correct reading of the Settlement Agreement, which harmonizes all of its provisions and respects the terms of the JVA

and Note is that, as it clearly states, the stipulation by C4 and Rawson of unconditional debt is given in consideration of the releases.

Perhaps most important of all is that the Cains conducted themselves after the Settlement Agreement in reliance of the unconditional promise by C4 and Rawson by obtaining obtain default judgments against C4, Rawson, Kavanagh and Edwards. The Cains did not rely on the JVA in obtaining those default judgments, because they knew that in order to obtain a default judgment, a party must establish the amount of damages as a sum certain or sum which by computation can be made certain if the judgment is to be entered by the clerk, and if the default judgment is to be entered by the court, must submit evidence of the amount of damages so that the court may determine the amount of the default judgment. *NRCP 55(b)(1) and (2)*; *Esden v. May*, 36 Nev. 611, 135 P. 1185 (1913). If necessary to establish the amount of damages the court must conduct a prove up hearing. Under the JVA's unambiguous terms, damages could not be proven by a sum certain because the contingent nature of the payment promise in the JVA. The Settlement Agreement provided the only way for them to prove a sum certain to the district court so that a default judgment could be entered. The fact that the default judgments all relied on the Settlement Agreement, not the JVA, to establish the amount owed, including interest and attorney's fees (*see, e.g.* default judgment against Edwards, *R.App. 111:16-17; 112: 1-6; 113: 1-14; A.App. 942:5-8*) demonstrates that the Cains did

not treat the Settlement Agreement as illusory. They should not now be heard to deny the very terms they have previously enforced.

Appellants urge that the district court's determination that a provision in the Settlement Agreement calling for interest on the unpaid debt did not constitute new consideration. Appellants argue that NRS 99.040(1)(a) provides that where a contract does not express that interest is due, interest must be allowed. Under the JVA, the Cains were not due any money and thus no interest. The Settlement Agreement changed all that, making the amount owed non-contingent and establishing the rate of interest, one which is not dependent upon the statutory calculation of prime plus two percent. Thus, the inclusion of interest in the Settlement Agreement was a term different from and more advantageous than the terms of the JVA and constituted additional consideration.

Finally, Appellants attack the district court's determination that consideration could be found in the fact that the JVA obligated only C4 to pay Heli Ops, while the Settlement Agreement required C4 and Rawson to pay. Appellants mischaracterize the district court's finding on the subject. The order granting summary judgment found that because Rawson was not a party to the JVA and did not have any personal financial obligations to Heli Ops. His promise in the Settlement Agreement to be personally responsible to Heli Ops and the Cains constituted new consideration. Additionally, the court noted that through the Settlement Agreement, C4 and

Rawson agreed to be liable not only to Heli Ops but to the Cains, who were not individually the beneficiaries of the JVA. Appellants propose no alternative interpretation of the JVA other than to argue that Heli Ops and the Cains are one and the same, apparently asking this Court to pierce the corporate veil by disregarding the Heli Ops entity. Further, Appellants falsely claim in their Opening Brief that the Cains paid the $1,000,000 to C4, a sum that was not paid by the Cains or Heli Ops, but by another entity called Skydance Helicopters. *A.App. 1075*.

2. The district court properly awarded attorneys' fees to Price and Shackelford.

Price and Shackelford moved for attorneys' fees on three separate legal theories. First, they argued that the Settlement Agreement provided for an award of attorneys' fees to prevailing parties and demonstrated unequivocally that they were the prevailing parties in the litigation brought primarily based on the Settlement Agreement itself. Second, they asserted they were entitled to an award of attorneys' fees pursuant to NRCP 68 and NRS 17.115 because they both made offers of judgment to Plaintiffs which were unreasonably rejected. Third, they argued that the litigation was brought and maintained in bad faith by Plaintiffs because after four and a half years of litigation, no evidence had been presented of any wrongdoing by Price or Shackelford, and more particularly, no evidence had been presented and no argument made that the Settlement Agreement was not a valid and binding contract.

The district court decided the motion based on this latter claim, brought pursuant to NRS 18.010(2)(b).

The district court decided the motion based exclusively on NRS 18.010(2)(b), but this Court may affirm the award of attorneys' fees on any ground raised in the district court. *Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) (holding that a correct result will not be reversed simply because it is based on the wrong reason); *McDonald v. Alexander & Las Vegas Blvd.*, 121 Nev. 812, 123 P.3d 784 (2005). If this Court finds that the attorneys' fee award was not merited under NRS 18.010, it may uphold the award nonetheless based on the two other arguments presented to the district court.

An award of attorneys' fees is reviewed for a manifest abuse of discretion. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). This Court reviews a district court's factual determinations deferentially and will not overturn such findings if supported by substantial evidence, unless clearly erroneous. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Furthermore, an award will not be disturbed on appeal if the record demonstrates that the district court considered the factors set forth in *Beattie v. Thomas*, 99 Nev. 979, 668 P.2d 268 (1983), and the district court's award is not arbitrary or capricious. *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995). As it is required

to do, the district court here applied the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

In their Opening Brief, Appellants mischaracterize the district court's order granting attorneys' fees. Appellants draw this Court's attention to two sentences to the exclusion of others in the order. Appellants quote the district court's statement that it did not "fault plaintiffs, who are not paid under either the JVA or the SA, for seeking legal recourse," (*A.App. 1451:1-2*), and its statement finding the "legitimacy of their dispute in general good faith." *A.App. 1451:3-4*. The Cains deliberately fail to direct this Court to portions of the district court's order that show the context of the above-quoted statements. The court pointed out that Plaintiffs "achieved success against many of the Defendants [which] demonstrates legitimacy of their dispute and general good faith." *A.App. 1451:1-4*. The court then noted that it was tasked with reviewing Plaintiffs' action as it related specifically to prevailing defendants Price and Shackelford, not those against whom the Cains were successful.

The district court stated as follows:

> While plaintiffs pursuit of damages against C4 and Rawson under the SA was not surprising or unreasonable, the same cannot be said of plaintiffs' pursuit of Price and Shackelford under the SA.

A.App. 1452:11-14. The court found that it was unreasonable to pursue Price and Shackelford because the Cains knew from the inception of the litigation that they

had executed an agreement that released the officers and directors of C4 from liability. The court stated:

> It is now clear to the Court that plaintiffs never intended to argue, as an alternative theory or otherwise, against the enforceability of the SA despite language in the TAC and prior versions of the Complaint, to the contrary and despite plaintiffs' pursuit of Price and Shackelford. Rather, plaintiffs always insisted that they should reap the benefits of the SA while being impervious to the required release of Price and Shackelford. Plaintiffs' position was unreasonable from the inception of the lawsuit through the granting of summary judgment.

In addition, the district court was aware, from Price and Shackelford's motion for attorneys' fees and from their submitted but undecided motion for summary judgment on the fraud and other claims, that Jeffrey Cain testified at his deposition that neither Price nor Shackelford made any false representation to him. There is no evidence in the record that Price or Shackelford knew of material facts regarding CMOs, C4 or the transactions that they failed to disclose to the Cains. The court also was aware that Cain testified he engaged his own advisors to perform the due diligence necessary for him to engage in the loan to C4. *R.App. 1; 54: 10-22; A.App. 1031: 26-28.* These facts also suggest that the Cains pursued the litigation knowing that crucial elements of several of their other claims were unprovable and knew it when the complaint was first filed. Yet, they pursued Price and Shackelford from the filing of the complaint through the ultimate grant of summary judgment in Price and Shackelford's favor, and even after obtaining default judgments against four other defendants based exclusively on the terms of the Settlement Agreement.

Under these circumstances, the district court's award of attorneys' fees was not a manifest abuse of its discretion, nor were its factual findings contained in the order clearly erroneous. The award should be upheld.

Even if this Court finds that the district court erred in awarding the fees under NRS 18.010, Price and Shackelford's other reasons for seeking attorneys' fees support the district court's order. As set forth in their motion for attorneys' fees, Price and Shackelford demonstrated that they had made valid offers of judgment to Plaintiffs. *A.App. 1330; 1334.* The offers were rejected, even though they were based on calculations of amounts Price and Shackelford were alleged to have received improperly when C4 distributed funds to its officers and directors after the Heli Ops loan was made and funded. The fees incurred by Price and Shackelford after the offers were substantial. In the period between the date the offers were made, April 30, 2015, Plaintiffs filed seven motions: two motions for sanctions pursuant to NRCP 11; a motion to strike not just some, but all the affirmative defenses asserted by Price and Shackelford; a motion to exclude the testimony of Price and Shackelford's expert witness; a motion for partial summary judgment against Price on the conversion claim; a motion to continue a hearing; and an ex parte motion to shorten time to respond to that motion (which was denied by the district court). None of the motions were granted. While Appellants repeatedly complained that they were burdened by repeated and unsuccessful motions throughout the litigation, those

complaints are laid waste by Plaintiffs' own litigation tactics. Many of Plaintiffs' motions were utterly without merit, yet caused Price and Shackelford to incur enormous additional and unnecessary legal fees. This conduct, well known to the district court and certainly supported its decision under NRS 18.010 as well as it supports the fees sought and entitled by NRCP 68 and NRS 17.115.

Finally, it is beyond dispute that Price and Shackelford prevailed in the district court. It is also not disputed that the Settlement Agreement is a binding contract, and it affords prevailing parties an entitlement to attorney's fees and costs. This Court may and should uphold the district court's award of fees on this basis, as well.

3. The district court did not err in denying plaintiffs' motion to compel production of their tax returns.

Appellants argue that their motion to compel production of Price and Shackelford's tax returns was adequately supported by the allegations of the Third Amended Complaint. The district court concluded otherwise and denied the motion.

First, it recognized that all three remaining defendants, Baker, Price and Shackelford, affirmed in their responses to the request for production that gave rise to the motion to compel that they did not receive W-2s or form 1099s from C4 for the tax years 2009 and 2010. The defendants denied possessing other documents sought by the Plaintiffs.

The district court also denied the motion to compel because tax returns are not to be had for "the mere asking." *Hetter v. District Court*, 110 Nev. 513 (1994). The court held that before tax returns or personal financial records are discoverable on the issue of punitive damages, "the plaintiff must demonstrate some factual basis for its punitive damage claim." In support of their motion to compel, the Cains identified factual allegations they claimed supported their punitive damages claim: the Cains transferred $1,000,000 to C4 on November 30, 2009; the loan proceeds were to be deposited into a separate account and used to purchase CMOs; the loan proceeds were deposited into C4's general account; in December 2009, the defendants diverted in excess of $804,000 from the account; Price was a signatory on the account and spoke with Jeff Cain about the transfer before it was made; and Price and Baker were signatories on a Bank of America account.

The court correctly held that punitive damages were available only on the Plaintiffs' noncontract claims, and otherwise only if the Cains established by clear and convincing evidence that Price and Shackelford were guilty of oppression, fraud or malice. *NRS 42.005(1).* The court denied the motion to compel but did so ***without prejudice***. The court gave Plaintiffs permission to renew the motion if they discovered new information demonstrating the existence of oppression, fraud or malice. Plaintiffs never renewed their motion, which stands as an admission that they did not have evidence of fraud against Price or Shackelford. The Cains offer

no authority for the proposition that a motion denied without prejudice to refile should be reversed on appeal when they never brought the motion as the court allowed.

4. The district court did not abuse its discretion by deciding to decide the issues of personal jurisdiction and alter ego prior to seating a jury.

Appellants argue that the district court abused its discretion by ordering a hearing at which it would decide the still-open issue of personal jurisdiction over the remaining defendants and also decide as a matter of law the claim that C4 was the alter ego of its officers and directors. The Cains admit that under *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 621, 173 P.3d 707, 712 (2007), the district court has the authority to bifurcate such issues. This Court must review the district court's actions for an abuse of discretion. In doing so, this Court may rely on *Awada*, which determined that the district court did not err in bifurcating consideration of the claims that were equitable and related breach of contract and contract based claims.

NRCP 42(b) gives the district court discretion to separate "any claim, crossclaim, counterclaim, or third party claim" and to conduct a separate trial on those matters as long as it does not deprive the plaintiff of its constitutional right to trial by jury. The issues the district court decided to hear separately were issues to be determined by the court as a matter of law. NRS 78.747(3) provides that the question of whether a stockholder, director or officer acts as the alter ego of a

corporation must be determined by the court as a matter of law. In *Trump*, 694, the court held that if a plaintiff has presented a prima facia case of personal jurisdiction prior to trial in a nonevidentiary hearing, the defendant may still require the plaintiff to prove personal jurisdiction by a preponderance of the evidence at a pretrial evidentiary hearing rather than being forced to wait until trial to put the plaintiff to full proof. When a separate evidentiary hearing occurs, the plaintiff's evidence does not receive the same presumption of credibility as it does when only a prima facia case is required. *Id.*, citing *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992). The *Trump* court also noted with approval that using the prima facia standard, if it means that personal jurisdiction is not finally resolved until trial, may be undesirable where the defendant will incur significant expense and burden of trial on the merits in a foreign forum that is unfair under the circumstances. *Id.*

Trump controls and the district court has the option to decide personal jurisdiction prior to trial.

Prior to Judge Gregory's order, the district court had not decided those issues. Contrary to Appellants' Opening Brief, Judge Gibbons never ruled on the issue of personal jurisdiction over Price or Shackelford, who reside in Texas and Oklahoma. Thus, it is not "amazing" that Judge Gregory granted the motion to bifurcate the personal jurisdiction issue based on an alleged claim that Judge Gibbons had

previously denied personal jurisdiction challenges based only on the prima facia standard.

Judge Gregory meticulously laid out the reasons for bifurcating the two issues from trial. He noted that the case was four years old. He noted that Baker, Price and Shackelford were being sued in their individual capacities only for their involvement as officers in a Nevada corporation and had few, if any, contacts with Nevada. He noted that when the court previously addressed the issue of personal jurisdiction, discovery was incomplete and that when the motion to bifurcate came to him on Baker's motion, discovery had been completed. Finally, he noted that both issues had the potential for being dispositive of the case. The court also determined that granting the motion to bifurcate would make the best use of judicial resources and benefit all parties, who would either not face a trial or potentially have the issues narrowed.

Appellants argue that the Cains would be prejudiced if the issues of personal jurisdiction and alter ego liability were tried "separately in two separate trials, with two separate finders of fact." Of course, the issues of alter ego liability and personal jurisdiction would have been decided by the court regardless, and there was no showing of prejudice in the district court.

The district court exercised its discretion appropriately in ordering these two issues be bifurcated, and this Court should not disturb its decision.

5. The district court acted properly in quashing post-trial subpoenas and awarding sanctions for the conduct of counsel.

On September 29, 2015, a month before this case was dismissed, the Cains obtained from the district court an order requiring the clerk to issue commissions for out-of-state depositions intended to obtain records from banks that once held C4 accounts.

After the case was dismissed, the matter was no longer pending in the district court and the court lacked jurisdiction to decide any issue bearing on the merits of the case because an appeal had been filed. The filing of an appeal deprives the court of jurisdiction to act in the matter being appealed. *Fishman v. Las Vegas Sun, Inc.*, 75 Nev. 13, 333 P.3d 988 (1959).

NRCP 5(a) provides that a subpoena must state the name of the court from which it is issued and the title of the action and the name of the court in which the action is ***pending***. *NRCP 45(a)(1)(B).* A subpoena duces tecum must issue from the court for the district in which the action is ***pending***. *NRCP 45(a)(2).* An attorney, as an officer of the court, may issue a subpoena on behalf of the court. *NRCP 45(a)(3).* Here, there was no action pending in the district court at the time the Cains' trial counsel issued the subpoenas to the two banks and electronically executed the certificates of service. *A.App. 1410; 1412.* The subpoenas were issued directly to the banks and not in furtherance of the commissions for out-of-state depositions

approved by the court on September 29, 2015. *A.App. 1147-1149.* Had that been the purpose, the out-of-state commissions would have been submitted to courts in other jurisdictions, which would have issued the subpoenas. Here, the subpoenas were issued under the caption of the Ninth Judicial District Court of the State of Nevada. The Cains do not claim to have issued the subpoenas as post judgment discovery against the defaulted defendants. The subpoenas were electronically signed by Appellants' trial counsel and another attorney who is not an attorney of record in this action, Trent W. Rexing, of Dallas, Texas, raising an inference that the subpoenas were being utilized in the interpleader action pending there involving Appellants.

Appellants incorrectly assert that the issuance of extrajudicial subpoenas is a discovery dispute requiring counsel for Price and Shackelford to meet and confer prior to filing a motion to quash the subpoenas. NCRP 26(c) provides that "upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred . . . the court in which the action is pending may make an order which justice requires to protect the party or person from annoyance, embarrassment, oppression, or undue burden or expense..." The subpoenas issued by counsel for Appellants were not directed to a party, and there was no action pending as to the merits of the case. The issuance of extrajudicial and extra-jurisdictional subpoenas after the dismissal of the case is not a discovery

dispute governed by NRCP 26. Rather, it is an abuse of the process of the court and a deception on the banks to whom the subpoenas were issued.

Appellants' argument that an attempt to meet and confer "would probably have resolved the dispute without the need for the motion," is belied by the record of this case, and especially by the fact that Appellants did not simply concede in the district court that the subpoenas should be quashed, but instead filed an opposition to the motion to quash, necessitating another responsive pleading by Price and Shackelford. This Court need not excuse deliberate conduct by Appellants' trial counsel when the excuse is "confusion resulting from the sequence of events involving issuance of the commissions…"

The district court properly found that Appellants' post-judgment discovery efforts were not authorized by law. It found that the utilization of the authority of the court to carry out this activity was a flagrant violation meriting a monetary sanction. The district court properly applied the factors set forth in *Brunzell*, *supra*. Finding that Price and Shackelford incurred the fees as a means of stopping Plaintiffs' post-judgment discovery efforts and the filing of fugitive documents (an unapproved sur-reply). The court recognized that the sanction was a proper form of deterrence. Obviously the court's effort at deterrence through a sanction was unavailing, as the Cains continue to try to justify their conduct and shift the blame to Price and Shackelford in this appeal.

CONCLUSION

For the reasons set forth herein, Richard Price and Mickey Shackelford respectfully request that this appeal be denied in its entirety.

Dated this 4th day of January, 2017.

OSHINSKI & FORSBERG, LTD.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

1. This brief has been prepared using Microsoft Word with a Times New Roman font (proportional spacing) with a 14 point font size.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 13,864 words.

3. Finally, I hereby certify that I have read this appellate brief, 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 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of January, 2017.

OSHINSKI & FORSBERG, LTD.

By /s/ Mark Forsberg
Mark Forsberg, NSB 4265

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Oshinski & Forsberg, Ltd., and that on this date, I filed a true and correct copy of the foregoing **Respondents' Answering Brief and Respondents' Appendix** with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

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

Executed on this 4th day of January, 2017, in Carson City, Nevada.

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