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.

/

No. 69333

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.

/

No. 69889

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.

/

No. 70864

APPELLANTS' REPLY BRIEF

APPEAL FROM JUDGMENT AND POST-JUDGMENT ORDERS IN THE NINTH JUDICIAL DISTRICT COURT, DOUGLAS COUNTY, THE HONORABLE THOMAS W. GREGORY, DISTRICT JUDGE

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INTRODUCTION

Respondents' answering brief (RAB) fails to comply with NRAP 28(e)(1), requiring assertions in a brief to be supported by a volume and page number of the appendix. Most assertions in the RAB are not supported by *any* appendix citation. No appendix citations have volume numbers, and many fail to support the brief's assertions.

This court should ignore assertions in the RAB for which no appendix citations are provided. And the court should exercise caution before relying on the remaining factual assertions in the brief.

IRRELEVANT AND CONTRIVED FACTS IN THE ANSWERING BRIEF

The RAB provides "facts" that are completely irrelevant and are often simply contrived.

1. Involvement of Price and Shackelford

The RAB asserts: "There is no evidence in the record of fraud committed by Price or Shackelford." RAB 3. There are similar assertions throughout the brief, contending that Price and Shackelford had little or no involvement with the joint venture agreement (JVA) or the Settlement Agreement, or any involvement with the $1 million loan from the Cains. These assertions are false. Because this case was decided on summary judgment, *any reasonable inferences must be drawn in*

favor of the Cains. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). There is abundant evidence from which inferences of fraud and other involvement can be drawn against Price and Shackelford.

Price and Sackelford were officers and directors of C4.[1] RAB 3. C4 maintained a bank account containing only $40 at the beginning of November 2009, before the Cains' $1 million loan on November 30. 5 A.App. 1074. The *next day* C4 distributed more than $350,000 of the Cains' money to C4's principals, including $12,000 to Shackelford. 5 A.App. 1079. This money should have gone toward purchase of the CMOs. 5 A.App. 1053. Shackelford received another $5,000 three weeks later, and the next day Price obtained $6,000 from C4. 5 A.App. 1080 (Shackelford); 11 A.App. 1612 (Price). An inference can be drawn that this money was also from the Cains. The RAB contends that Price did not receive a distribution from the Cains' loan in December 2009. RAB 4. He received $6,000 on December 24, 2009. 11 A.App. 1612.

Additionally, Price signed the corporate resolution approving the JVA. 5 A.App. 1060. He signed bank documents on behalf of C4. 2 A.App. 400-04.

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[1] C4 and Heli Ops had a joint venture relationship. Members of a joint venture owe each other fiduciary duties, including the duty of loyalty for the duration of the venture. *Brinkerhoff v. Foote,* 2016 WL 7439357 (No. 68851, December 22, 2016) (unpublished); *Leavitt v. Leisure Sports, Inc.,* 103 Nev. 81, 86, 734 P.2d 1221, 1224 (1987).

Nearly $400,000 was distributed to C4's principals from the Cains' money the day after the loan; and the RAB concedes: "*Price testified he was the person who executed the transfers.*" RAB 4 (emphasis added); 5 A.App. 1114:11-13 (Price testimony).

Price was uncomfortable with the $125,000 wire transfer to Rawson, but authorized the transfer anyway. 5 A.App. 1112:23-1113:8. He did so after speaking with other C4 board members, including Shackelford. 5 A.App. 1115:16-21.

There is other evidence of fraud by Price and Shackelford. C4's website contained glowing descriptions of C4's principals. 12 A.App. 1889. This page identified Price as the vice-president and chief financial officer, with an MBA and worldwide financial experience. *Id.* The page described Shackelford as the vice president of C4, with a CPA and an MBA, and also with vast experience in industry and finance.[2] *Id.*

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[2] The website information was part of the effort to entice investors into loaning huge amounts of money. 1 A.App. 166:15-19 (reliance on the website information); 13 A.App. 2033-34 (reliance on website information regarding individual defendants). The website contained glowing exaggerations of C4 as a successful worldwide company; the Cains later discovered that C4 "never had any revenues" other than the loans. 12 A.App. 1867:3-4.

The RAB contends that "nothing in the record shows that Price or Shackelford participated in the negotiation of the JVA or the [Settlement] Agreement." RAB 20. This ignores that Price and Shackelford were officers and board members of C4 (RAB 3), and there were board meetings and approvals of the agreements and bank/securities activity. 1 A.App. 213:9-14.

Regarding Price's involvement, the record shows that he *did* participate in the JVA before the Cains funded the $1 million loan. For example, he participated in a conference call with Jeffrey Cain, in which Cain was given instructions on wiring the money to a bank; Cain was told that Price was handling the account; and Cain confirmed with the bank that Price was authorized on the account. 13 A.App. 2035:11-20. Price also reviewed the JVA before it was executed, pointing out a mistake in the maturity date. 12 A.App. 1975. The date was changed accordingly. 5 A.App. 1061.

Price was also personally involved in advance preparations for disbursement of the Cains' loan money. In an email on November 29, 2009, from Rawson to Price and others, Rawson told Price: "Let's make sure the client [Heli Ops] does put their money in our Wells Fargo account on Monday as promised." 12 A.App. 1974. The email included additional advance planning between Rawson and Price as follows:

> Richard [Price], as soon as it hits, you and I will have to start making disbursements to the Securities House first, a new general joint account with Heli Ops so that we have a place to deposit some of their funds. We'll also want to take care of some of the extreme needs of our C4 people. It looks as though December and even January are going to be FANTASTIC months for us.

Id. (capitalization in original).

This email shows that Rawson *and Price* were already making plans for distribution of the Cains' loan money to C4's principals, before the loan was funded, despite the fact that the JVA specifically earmarked the money for purchase of CMOs, and for no other purpose.

Regarding the Settlement Agreement, the record shows that Price *and* Shackelford were involved in pre-agreement discussions. An email on February 28, 2010, from Rawson to various individuals, included Price and Shackelford, with a subject line "Cains Matter," and indicating "Per our discussion on Friday." 12 A.App. 1988. The next day, Price sent an email to Shackelford, with attachments including "Settlement Agreement.pdf." *Id.*

Other evidence shows Price's participation in the transaction. Respondents' Appendix contains a motion for partial summary judgment filed by

Price and Shackelford, conclusively establishing Price's involvement. R.App. 1. The document discusses a conference call with Jeffrey Cain and officers/directors of C4, "definitely" including Price. R.App. 8:17-20. During the call, in which Price personally participated, Rawson stated that the Cains would receive $20 million "within 30 days." R.App. 8:25-27.

The call included discussions that led Jeffrey Cain to believe C4 and its board of directors "were all extremely experienced individuals, very successful businessmen." R.App. 9:1-2. Cain was aware of Price's background from information contained in Price's biography on the C4 website, and because Price's name appeared on corporate resolutions. R.App. 9:24-10:2. After the conference call, Cain had another call with Price "regarding where the money should be wired for the loan to C4." R.App. 9:14-16.

Respondents' Appendix also contains testimony from Jeffrey Cain, indicating that during the conference call with Price, "he made me feel really comfortable with the investment." R.App. 11:22-23. Cain also received an email from Price regarding Wells Fargo bank (where the Cains' money was to be transferred.) R.App. 12:9-10.

Jeffrey Cain's testimony was corroborated by other witnesses, who testified that Price participated in a conference call regarding the transaction. R.App.

13:8-9. The Cains' CPA testified that Price and Shackelford influenced his thinking regarding C4 and the CMO transaction, based upon the "high management level and ownership and responsibility there and also their standing in a professional community." R.App. 103:15-18. When asked about whether Price and Shackelford did anything with respect to the Cain transaction, the witness mentioned the fact of "Richard Price receiving the wired funds" (R.App. 17:15), as well as Shackelford's influence as a fellow CPA. R.App. 108:2-9, 109:3-6.

2. Other involvement of Price and Shackelford

Other documents filed by respondents show direct involvement in the Cain transaction. The defendants filed a motion, conceding that before the Cain loan was funded, Price and Shackelford, as officers and directors of C4, approved a corporate resolution authorizing a brokerage account to purchase and sell securities. 1 A.App. 213:9-11. Respondents conceded that "Defendants [including Price and Shackelford] voted for and approved a corporate resolution to proceed with a joint venture agreement with the Cains." 1 A.App. 213:13-14.

Respondents also conceded that "C4 conducted innumerable corporate meetings since the day of inception, including during the time when C4 became involved with Plaintiffs." 1 A.App. 214:7-8. They also stated that the C4 board,

which included Price and Shackelford, met telephonically to move the CMOs from one fund to another. 1 A.App. 214:28.

Shortly after Price and Shackelford made these concessions, Judge Gibbons issued an order denying the motion. 2 A.App. 262. The judge held that all five defendants had knowledge of the transaction with Cain before loan, and following the receipt of funds, and all defendants received some of the funds. 2 A.App. 269. The court then held: "The court finds additional evidence has been submitted regarding the involvement of the Five Defendants, both before and after the Cain transaction, *showing they were aware of the loan arrangements.*" 2 A.App. 270:8-11 (emphasis added). The court found: "Evidence shows Cain relied on the background personal skills and abilities of the Five Defendants as advertised in C4's promotional materials and its website." 2 A.App. 270:15-17.

The district court also recognized that the evidence supported an inference of the defendants' knowledge of the Settlement Agreement. 2 A.App. 270:20-25. Nothing in the record shows that Price and Shackelford ever challenged any of these findings.

3. Speculation about reasons for the distributions

The RAB asserts that there is no evidence showing whether payments C4 made from the Cains' loan money was for repayment of loans, compensation for

work performed for C4, or for another purpose. RAB 4. The negative phrasing of this assertion suggests that there *was* evidence of these explanations. Yet the brief provides no citation to evidence supporting such speculation regarding alternative purposes of the payments.

Shackelford was aware of no legitimate reason why Rawson would be receiving a $125,000 distribution. 12 A.App. 1866:5-23. Shackelford conceded that a $45,000 distribution was made on December 1, 2009 to another of C4's principals, and Shackelford could think of no legitimate reason for this distribution. 12 A.App. 1870:4-13.

Respondents presented no evidence that the Cains were ever told that the loan money would be used for something other than purchase of the CMOs. The JVA required *all* of the Cains' loan money to be used solely for the purchase of the CMOs. 5 A.App. 1053. The express purpose of the joint venture "shall be to use the proceeds of the $1,000,000 USD loan from [the Cains] ... to acquire and then leverage Collateralized Mortgage Obligations." 5 A.App. 1053. C4 was authorized to borrow the $1,000,000 from the Cains "as a loan for the purpose as stated ... above." *Id.* The JVA referred to the "CMOs purchased from the one million USD ($1,000,000) [Cain] loan." 5 A.App. 1054.

Additionally, C4's Corporate Resolution, which was an exhibit to the JVA, authorized the JVA and the loan from the Cains, stating: "The purpose of which is to purchase CMOs that can be internationally leveraged to provide a return stated in the Joint Venture Agreement." 5 A.App. 1060. And the promissory note referred to "CMOs purchased with the proceeds of this loan." 5 A.App. 1062. The district court found that the JVA required the Cains' money "to be used by C4 as the capital to acquire and then leverage Collateralized Mortgage Obligations." 5 A.App. 1152:11-13.

Therefore, this court should reject respondents' invitation to speculate that there may have been alternative legitimate reasons for the distributions to C4's principals immediately after the loan was funded.

ARGUMENT

1. The district court erred by granting summary judgment based on the release.

a. The Cains never received their consideration.

The opening brief (AOB 25-27) discussed *Coles v. Glaser,* 205 Cal. Rptr. 3d 922 (Cal. Ct. App. 2016), where the plaintiff gave a release to the defendants, but where a portion of the money paid to the plaintiff was clawed back in a bankruptcy proceeding. The court held that the defendants could not gain the

benefit of the release, because the effect of the clawback was that the plaintiff effectively never received payment. *Id.* at 927.

Respondents try to distinguish *Coles* on the ground that the defendants in *Coles* were required by the *Settlement Agreement* to pay the plaintiff the amount of the loan. Respondents argue that the defendants in *Coles* were obligated to perform under the Settlement Agreement, and "because they did not perform, the release provision was ineffective as to them personally." RAB 26-27. This is a distinction without a difference. The holding in *Coles*, i.e., that the release was inapplicable where the plaintiff did not get paid, was based upon the proposition that the "purpose of the law of contracts is to protect the reasonable expectations of the parties." *Id.* at 928. The court held: "No one suggests that the parties intended for Coles to provide a release regardless of whether he got paid." *Id.*

Here, respondents cannot plausibly argue that the reasonable expectation of the parties was something other than payment of money to the Cains. Nor can respondents plausibly argue that the parties to the Settlement Agreement intended the release provision to be fully applicable and binding in favor of third-party directors and officers (who paid no money for the release) even if the Cains never received *any* of the $20 million payment that was the entire point of the Settlement Agreement.

Amazingly, respondents argue that "the Agreement here did not provide that payment was the consideration given for the release." RAB 27. Respondents rely on ¶1.1 of the Settlement Agreement. This provision recites that the consideration for the releases will be C4's agreement that it owes the Cains $20 million; that this amount was due on December 30, 2009; that it remains unpaid; and that "C4 Worldwide acknowledges its obligation to pay *and* agrees to pay" $20 million not later than 90 days from February 25, 2010. 5 A.App. 1119 (emphasis added).

Using a semantical sleight of hand, respondents argue that consideration for the release was not the payment of any money, but rather, was merely the promise to pay the money. RAB 27. The argument ignores the facts that (1) C4 was *already* obligated to pay the $20 million, as the Settlement Agreement expressly recognized in its recitation that C4 owed the Cains $20 million; (2) this amount was already due on December 30, 2009 (and remained unpaid); and (3) C4 "acknowledges its obligation to pay." 5 A.App. 1119. Further, both district judges, in two separate orders, made findings that the $20 million obligation already existed before the Settlement Agreement was executed. 2 A.App. 294:11-16; R.App. 111:21-112:5.

Contracts are interpreted to avoid absurd or unreasonable results. See *Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947) ("A contract should not be construed so as to lead to an absurd result"). It would be absurd to believe that the Cains would have unconditionally released the officers and directors of C4, who facilitated the fraud, in exchange for C4's empty additional promise to pay money that was already owed.

b. There was an improper attempt to obtain rehearing.

The opening brief established that respondents took advantage of a change in judges, convincing Judge Gregory to second-guess earlier rulings by Judge Gibbons regarding the Settlement Agreement and the effect of the release. AOB 28. The answering brief argues that "Judge Gibbons never interpreted the Agreement." RAB 31. This is incorrect. Prior motions filed by the defendants raised arguments concerning the release—directly or indirectly—but Judge Gibbons never gave the arguments any credence, and he did not dismiss the action based upon the release.

For example, the first motion to dismiss argued that the release applied. 1 A.App. 14-15. Judge Gibbons denied the motion. 1 A.App. 45. Another order by Judge Gibbons dealt with various pending motions. 3 A.App. 577. He observed that one of the defendants had claimed no liability, based upon the

release. 3 A.App. 581:3-16, 585:9-12. Judge Gibbons denied relief, concluding that issues involving the release rest on material facts, "which are all disputed." 3 A.App. 585:15-16.

Respondents contend that the prior rulings by Judge Gibbons "did not dispose of any motion asserting protection under the Settlement Agreement." RAB 30. This is false. The prior orders *did* deal with the release, especially the order of November 21, 2014. 3 A.App. 585:9-16.

c. The release was limited.

The opening brief established that the release did not pertain to claims against Price and Shackelford, because the release only applied to claims arising out of C4's "financial misfortunes and resultant inability to timely pay." AOB 30.

The RAB concedes the existence of this limiting language. RAB 33. Respondents provide no rebuttal to the opening brief's authorities (AOB 31-32) establishing that the word "misfortune" means bad luck or an unlucky condition or event, and that the release's phrase "financial misfortunes and resultant inability to timely pay" would mean an inability to pay caused by an unlucky condition or event. Respondents' primary argument is that there is no evidence showing that C4's inability to pay "was *not* the result of financial misfortunes." RAB 34 (emphasis in original).

C4 had virtually no money before the loan from the Cains. Immediately upon receipt of the Cains' money, C4's principals began distributing the money to themselves, rather than purchasing CMOs. After depleting the bank account, C4 obtained a similar loan from another lender, and CR purchased one set of CMOs that constituted duplicate security for both loans. This was a classic Ponzi scheme (a swindle in which early investors are paid off with money put up by later investors, creating the illusion of profitability).[3] Merriam-Webster Online Dictionary (2016).

In arguing that that the release protects Price and Shackelford, the RAB asserts that the Cains have a "disputed and unsupported view" that loan proceeds were wrongfully diverted. RAB 33. If there was a dispute, as the brief concedes, summary judgment should have been denied. Additionally, it is false for respondents to contend that the Cains' allegation of wrongful diversion of funds is an "unsupported view." RAB 33. The fact that the Cains' loan money was wrongfully diverted to C4's principals was uncontested and established by bank records, emails and witness testimony, as summarized in the opening brief and

[3] Respondents contend there is no evidence that C4's agreement with New Hope, days after receiving $1 million from the Cains, had any effect on the agreement with the Cains. RAB 33-34. The argument is specious. The district court made an express finding that C4 borrowed from New Hope "to conceal the diversion of funds." R.App. 111:26.

earlier in this reply brief. Evidence was overwhelming that C4's inability to pay was not caused by mere financial "misfortunes." Accordingly, the release was not applicable as a matter of law. At the very least, there were disputed factual questions regarding the cause of C4's inability to pay.

Respondents seem to suggest that the release would be applicable even if C4's inability to pay was not caused by "financial misfortunes," due to broad language in the release. RAB 34. This ignores the first sentence, clearly stating that the Cains released claims "arising out of C4 Worldwide's [sic] financial misfortunes and resultant inability to timely pay...." 5 A.App. 1120. The release then describes the releasors and the releasees, in a second sentence that is not grammatically correct and does not indicate that it is intended to broaden the limited language in the first sentence.

As noted in the opening brief, releases should be narrowly construed to assure that the parties fully understand the rights being released and the resulting consequences. AOB 32-33, citing and discussing *Brown v. Drillers, Inc.,* 630 So. 2d 741, 753 (La. 1994). The RAB cites no contrary authority.

d. The release in the Settlement Agreement was procured by fraud.

The release portion of the Settlement Agreement was procured by fraud and is unenforceable. AOB 34-36. When C4 induced the Cains to give the release in exchange for $20 million secured by CMOs, C4 had no ability to pay, no intention to pay, and no ability to provide the CMOs as security because C4 had already transferred its ownership of the CMOs to New Hope. *Id.* The RAB's only response is a conclusory one-paragraph argument that there was no evidence of fraud relating to the Settlement Agreement. RAB 37-38. There was actually abundant direct evidence of fraud, as explained at AOB 34-36. At the very least, evidence supported an *inference* of fraud, which should have defeated summary judgment. *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

e. There was no new consideration for the release.

The opening brief explained why there was no new consideration for the release. AOB 36-41. Respondents make several rebuttal arguments.

(1) There was no new obligation to pay $20 million.

Respondents argue that C4's obligation to pay $20 million to the Cains was merely a conditional promise in the JVA, not an unconditional obligation. E.g., RAB 2, 6-8, 16, 38-42. The brief argues that the Cains were never entitled to any

money until after C4 received profits from the CMO investments, at which time the Cains would receive the first $20 million from the profits; and no money was owed to the Cains because no profits were generated. RAB 2-3. Yet in the district court, respondents repeatedly argued that the Cains' money was *not* intended as an investment, but was only intended as a loan. 1 A.App. 196:16-22.

Respondents were correct that the Cains' money was intended as a loan. The JVA and the promissory note created a loan, with an unconditional promise to pay $20 million; the CMOs would be purchased and leveraged; and the first $20 million received for the CMOs would be earmarked for the Cains and paid to them on the loan, before any compensation would be paid to C4. The JVA did *not* indicate that C4's obligation under the promissory note was conditioned upon receipt of the proceeds from the CMOs. Nor did the JVA indicate that the promissory note was something less than an unconditional promise to pay $20 million by December 30, 2009. A promissory note is an "unconditional written promise" to "pay absolutely and in any event a certain sum of money.." *Tri-Town Const. Co. v. Commerce Park Associates 12, LLC,* 139 A.3d 467, 471 n.2 (R.I. 2016). Here, the promissory note stated that C4 "promises to pay" $20 million,

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and that full payment will be made by December 30, 2009.[4] 5 A.App. 1061.

The Settlement Agreement unequivocally acknowledges the preexisting debt. First, it contains C4's acknowledgement that it "owes" the Cains $20 million. 5 A.App. 1119 (¶1.1). It further states that C4's obligation to pay the Cains $20 million "was due on December 30, 2009 and remains unpaid." *Id.* Without a preexisting debt, there would have been no reason for the Settlement Agreement to state that C4 "*owes*" the money, or to state that the money "*was due on December 30, 2009 and remains unpaid.*"

Judge Gibbons recognized that the JVA and the promissory note created C4's unconditional obligation to pay the Cains $20 million. He found: "Pursuant to the express terms of the JVA, Plaintiffs were to be repaid Twenty Million Dollars ($20,000,000) by 30 December 2009." 2 A.App. 294:11-14. He observed that the Settlement Agreement "acknowledged the indebtedness." 2 A.App. 294:15.

A default judgment against another defendant made similar findings. Referring to facts alleged in the pleadings and an affidavit, the court found:

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[4] As noted earlier, a draft of the promissory note contained a typographical error regarding the repayment date. Internal emails regarding the mistake recognized that the promissory note was creating a $20 million repayment obligation due by December 30, 2009. Nothing in the emails suggested that the obligation was conditional.

"Pursuant to the express terms of the JVA, Plaintiffs were to be repaid Twenty Million Dollars ($20,000,000) by December 30, 2009." R.App. 111:20-23. The Settlement Agreement "acknowledged the indebtedness." R.App. 112:3.

Every word in a contract must be given effect if at all possible. *Musser v. Bank of America,* 114 Nev. 945, 949, 964 P.2d 51, 54 (1998). A court should not interpret a contract so as to make a provision meaningless or superfluous. *Id.* at 949-50, 964 P.2d at 54. Contract provisions should be harmonized whenever possible. *Eversole v. Sunrise Villas VIII Homeowners Assn.,* 112 Nev. 1255, 1260, 925 P.2d 505, 509 (1996).

Here, a determination that the JVA and the promissory note merely created conditional obligations would amount to judicial amendment of the documents, giving no effect to the Settlement Agreement's recognition that C4 "owes" $20 million and that said amount "was due on December 30, 2009 and remains unpaid."

In arguing that the Settlement Agreement provided new consideration, respondents argue that "most important of all" is that the Cains obtained default judgments against other defendants based upon the Settlement Agreement, and the Cains did not rely on the JVA in obtaining those default judgments. RAB 42. Respondents argue that the Settlement Agreement "provided the only way for [the

Cains] to prove a sum certain to the district court so that a default judgment could be entered." And respondents argue that "the default judgments all relied on the Settlement Agreement, not the JVA, to establish the amount owed." RAB 42. Thus, respondents conclude that the Cains "should not now be heard to deny the very terms they have previously enforced." RAB 43.

These arguments are meritless. The Second Amended Complaint contained numerous claims for relief. The default judgment in May 2013 recited that the first claim (breach of the Settlement Agreement) was the basis of the initial part of the judgment. 2 A.App. 295:16-18. Nevertheless, the other claims for relief—all arising out of the original loan and the JVA—were the basis for the next part of the default judgment in the amount of $20 million. 2 A.App. 295:19-24. The judgment also recited that C4 was never funded, and the defaulting defendants diverted the Cains' investment funds and perpetrated a fraud. 2 A.App. 296:1-4. These facts all related to the original loan and the JVA, not the subsequent Settlement Agreement.

The second default judgment, in March 2015, also referred to the Second Amended Complaint. R.App. 111:16-17. The default judgment was entered against the additional defendant on all of the claims, including those that related to the original loan and the JVA. R.App. 112:24-27. The district court found the

defaulting defendant liable for breach of the Settlement Agreement, but this was "in addition to" liability imposed on other claims. R.App. 113:1-4. The default judgment noted that the defendant had diverted the Cains' investment funds, as a basis for liability. R.App. 113:6-8. This related to the original loan and the JVA, not the subsequent Settlement Agreement.

Accordingly, there is no merit to the RAB's arguments that the Cains relied solely on the Settlement Agreement as basis of liability, and that the Cains "should not now be heard to deny the very terms that they have previously enforced."[5] RAB 43.

(2) Interest was not new consideration.

The interest provision in the Settlement Agreement provided no new consideration, because interest was already required by statute. AOB 38. The RAB's only response is that the Cains were not due any money, and thus, no interest. RAB 43. Respondents' premise is wrong—the Cains *were* owed money under the JVA. Therefore, interest was not new consideration in the Settlement Agreement.

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[5] Respondents asked the district court to apply the doctrine of election of remedies, but the district court held: "The doctrine of election of remedies is not applicable." 5 A.App. 1159:13-15.

(3) Naming the Cains in the Settlement Agreement was not new consideration.

The opening brief established that naming the Cains in the Settlement Agreement, in addition to their company Heli Ops, added no new consideration, because Heli Ops and the Cains were one and the same, and the Settlement Agreement reflects the parties' understanding of this. AOB 38-39. The RAB provides only a conclusory and unsupported two-sentence response (RAB 44), which fails to rebut the arguments in the opening brief. It was simply irrelevant to everyone whether the $20 million went to the Cains or to the company they owned.

(4) There was no new consideration by adding Rawson to the Settlement Agreement.

Finally, appellants established that the district court erred by concluding that adding Rawson to the Settlement Agreement provided new consideration for the release. AOB 39-40. The RAB's only response is that Rawson was not a party in the JVA, and he therefore had no personal obligation to Heli Ops or the Cains. RAB 43. Even though Rawson was not a named party in the JVA, he was the person who directly committed the fraud, and he orchestrated distribution of hundreds of thousands of dollars the day after the Cain loan was funded. He had personal liability even though he was not a named party in the JVA. Adding

him to the Settlement Agreement was simply an acknowledgement of his personal liability, which was not new consideration for the release of C4's officers and directors.

2. The district court erred by awarding attorneys' fees.

Respondents moved for attorneys' fees based upon three grounds: offers of judgment, NRS 18.010(2)(b), and the prevailing-party section in the Settlement Agreement. 6 A.App. 1212. The district court awarded fees under the statute, expressly declining the other theories. 6 A.App. 1450:16-19.

Regarding the statutory ground for fees, respondents take issue with the opening brief's quotations from the district court's order, and respondents contend that the opening brief deliberately took the quotations out of context. RAB 46. The contention is baseless. The quotations were directly from the district court's order, accurately reflecting the district court's observations that the Cains cannot be faulted for seeking legal recourse, because they were not paid either under the JVA or the Settlement Agreement, and the Cains' success against many of the defendants demonstrates legitimacy and good faith in their lawsuit. 6 A.App. 1451:1-4. The opening brief also established that the Cains successfully defended against multiple dispositive motions before the new judge took over for Judge Gibbons. AOB 43. A plaintiff's success in defeating dispositive motions

can establish that the plaintiff's case was reasonable. *Bobby Berosini, Ltd. v. PETA,* 114 Nev. 1348, 1353-54, 971 P.2d 383, 386 (1998).

Respondents essentially ignore this argument. Instead, they suggest that the district court's order was based upon Jeffrey Cain's deposition testimony that neither Price nor Shackelford made any false representation to him. RAB 47. The brief provides no appendix citation. Further, the district court's order awarding fees does not mention any such testimony. When respondents moved for attorneys' fees, neither their motion nor their reply referred to Jeffrey Cain's alleged deposition testimony. 6 A.App. 1210-21, 1389-99.

Respondents boldly state: "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." RAB 47. As established in the opening brief and in this reply brief, it is virtually undeniable that Price and Shackelford—who were officers and directors of C4—*did* have knowledge of these matters and approved multiple corporate resolutions.

An award of fees under the statute is authorized only if the claim is "not supported by any credible evidence." *Bobby Berosini,* 114 Nev. at 1354, 971 P.2d at 387. The RAB ignores this standard. Any fair review of this record shows

that the Cains did have legitimate bases, supported by evidence, for their claims against Price and Shackelford.

Respondents also invoke the "right result, wrong reason" doctrine, arguing that the district court's award of fees can be supported by offers of judgment and the Settlement Agreement's prevailing party clause. RAB 45, 48-49. Respondents cite no case in which a Nevada appellate court relied on an offer of judgment to affirm a fee award, where the district court did not rely on the offer of judgment. Appellants are aware of no such case.

Respondents rely on *Beattie v. Thomas,* 99 Nev. 579, 668 P.2d 268 (1983)." RAB 45. An award of fees based upon an offer of judgment requires the district court to evaluate and weigh the *Beattie* factors. This is not a task that can be done by the appellate court in the first instance. In the present case, the district court did not consider and evaluate the *Beattie* factors. 6 A.App. 1444-56. Accordingly, there is no legal basis for using the offers of judgment to uphold the fee award.[6]

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[6] This court can affirm a fee award based upon an offer of judgment, even if the district court did not make explicit written findings on the *Beattie* factors. E.g. *Schwartz v. Estate of Greenspun,* 110 Nev. 1042, 1049-50, 881 P.2d 638, 643 (1994). In that case, the *Beattie* factors were argued at the hearing, and the order indicated that the district court had considered and evaluated the factors. *Id.* at 1049-50, 881 P.2d at 643. In the present case, the district court did not consider the *Beattie* factors, and the court expressly declined to consider (continued)

Even if this court conducts its own independent evaluation of the *Beattie* factors, the court should reject an award of fees. The claims against respondents were brought in good faith. The offers of judgment were unreasonable in their amounts. The offer of judgment from Price was $7,000. 6 A.App. 1330. This was approximately one-third of one percent of the $20,000,000 amount the Cains were seeking. Shackelford's offer of judgment was for $2,500. 6 A.App. 1334. This was approximately one-tenth of one percent of the Cains' claim. Neither offer contained an amount reasonably calculated to settle the case. In light of the Cains' legitimate $20 million claim, their decision to reject the offers was not grossly unreasonable or in bad faith.

Finally, in one terse paragraph in their brief, respondents contend that this court should uphold the fee award because the Settlement Agreement contained a prevailing-party entitlement to fees. RAB 49. The brief cites no legal authority for the proposition that third-party beneficiaries should be considered "parties" within a contract's prevailing-party provision. To the contrary, a prevailing-party provision logically refers to signatories to the contract, not to third-party beneficiaries. See *IBEW Local 134 v. Chicago District Council of Carpenters,* 149 F.Supp. 2d 452, 459 (N.D. Ill. 2001).

(continued) the offers of judgment. 6 A.App. 1450:18-19.

Here, the "parties" are described in the first paragraph in the Settlement Agreement. 5 A.App. 1119. The only parties are the Cains, Heli Ops, Rawson and C4. *Id.* Although the release language included officers and directors, these people were not signatories, and they did not pay any consideration for the releases. They should not be considered prevailing "parties" under the fee provision.

3. The district court erred regarding the motion to compel.

The opening brief established that the district court erred by denying the Cains' motion to compel tax returns and financial information. AOB 44-48. The answering brief makes various factual arguments on three pages, without a single citation to the appendix. RAB 49-51. Consequently, this court must search the record with no help from respondents.

The opening brief showed that the requests for production legitimately sought documents relevant to the claim that C4 and its principals improperly diverted funds. AOB 44-46. The documents were also relevant and discoverable regarding the claim for punitive damages. AOB 46-47. The answering brief fails to provide any real rebuttal facts or arguments. Therefore, if the court reverses the summary judgment, the district court should be ordered to grant the motion to compel.

4. The district court erred regarding personal jurisdiction and alter ego liability.

With respect to personal jurisdiction, respondents contend that the original order by Judge Gibbons only held that the Cains had made a *prima facie* showing to survive a pretrial motion, but left the issue open for litigation at trial. RAB 10-11, 29. The brief argues that Judge Gibbons "put off any decision regarding personal jurisdiction" in a subsequent order. RAB 29. The brief further argues: "Prior to Judge Gregory's order, the district court [Judge Gibbons] had not decided those issues." RAB 52. The brief then argues that "Judge Gibbons never ruled on the issue of personal jurisdiction over Price or Shackelford." *Id.*

Actually, Judge Gibbons *did* rule on the issue of personal jurisdiction. 2 A.App. 267-72. He summarized evidence, observing that "evidence has been submitted regarding the involvement of the Five Defendants, both before and after the Cain transaction, showing they were aware of the loan arrangements." 2 A.App. 270:7-11. Based upon a consideration of all of the evidence, he concluded that there was sufficient evidence to establish minimum contacts and personal jurisdiction in Nevada. 2 A.App. 267-72.

Less than six months later, Judge Gibbons had the opportunity to interpret his earlier order. In a default judgment against certain defendants, Judge Gibbons

found: "The issue of personal jurisdiction over Rawson, Kavanagh and *all other defendants was fully litigated and finally resolved* in favor of exercising jurisdiction over the Defendants." 2 A.App. 295:1-3 (emphasis added). Judge Gibbons cited his order of November 20, 2012, which is at 2 A.App. 262.

Later, Judge Gregory issued a nearly identical ruling in another default judgment, finding that personal jurisdiction over *all* defendants had already been "*fully litigated and finally resolved.*" R.App. 112:10-12 (emphasis added; citing order entered by Judge Gibbons on November 20, 2012).

The opening brief demonstrated that Judge Gibbons ruled on personal jurisdiction more than once, finding that there was sufficient evidence to establish personal jurisdiction. AOB 48-53. Nonetheless, respondents argue that personal jurisdiction was a "still-open issue." RAB 51. Thus, respondents want permission to litigate the issue again, in a pretrial hearing in which the jury will not hear any evidence.

Evidence regarding the activities of C4's officers and directors, including Price and Shackelford, will go directly to the issue of alter ego liability, in addition to direct relevance on the issue of personal jurisdiction. Personal jurisdiction and alter ego are also intertwined with the merits of the case. All these issues should

be resolved by the jury together. The district court manifestly abused its discretion by ruling otherwise.

5. The district court erred by quashing subpoenas and awarding sanctions.

Respondents have complicated an issue that is actually relatively simple. In August of 2015, the Cains initiated proceedings to take out-of-state depositions for C4's records at two bank branches in Texas. 4 A.App. 957. Respondents filed no opposition, and the district court entered an order authorizing the discovery. 5 A.App. 1147-48. The court clerk issued the commission, and depositions were scheduled for November 2015. 6 A.App. 1435-38. Near the end of this process, the district court issued its order granting summary judgment, but the depositions were apparently not canceled. 5 A.App. 1150; 6 A.App. 1410.

Respondents filed a motion to quash the subpoenas, for a protective order, and for sanctions. 6 A.App. 1401. They never satisfied the mandatory "meet and confer" requirement. 6 A.App. 1430-31. Despite the fact that the entire confusion resulted from an unusual sequence of events, the district court granted the motion and awarded sanctions against the Cains in the amount of $9,514. 7 A.App. 1585-89.

Respondents' primary argument seems to deal with the legitimacy and timing of the subpoenas. RAB 54-55. The Cains' appeal, however, is not attempting to convince this court that the subpoenas were validly issued and served after summary judgment was entered. Instead, the appeal deals with the fact that respondents failed to comply with the mandatory meet-and-confer requirement, and the award of nearly $10,000 in sanctions was wholly unjustified.

Respondents concede that NRCP 26 imposes a mandatory meet-and-confer requirement. RAB 55. They argue, however, that the requirement is not applicable here because the subpoenas "were not directed to a party," and because "there was no action pending as to the merits of the case" at the time of the motion. RAB 55. These arguments are not supported by any legal authority, and the arguments are frivolous. NRCP 26 (c) applies to any motion for a protective order. Price and Shackelford filed a motion for a protective order. The fact that their motion dealt with subpoenas issued to non-party banks is irrelevant under the rule. Similarly, the fact that the district court had already granted summary judgment is not an exception to the rule.

Respondents argue that the Cains should have simply conceded the motion, but instead, the Cains filed an opposition. RAB 56. Respondents seem to be contending that the Cains' opposition shows that the meet-and-confer requirement

would have been unsuccessful anyway. But the purpose of the meet-and-confer requirement is to avoid filing of unnecessary motions in the first place. Respondents had already filed their motion seeking monetary sanctions, and a concession by the Cains would not have turned back the hands of time to avoid filing of the unnecessary motion.

Finally, respondents provide no justification for the district court's award of sanctions. In the flurry of activity after summary judgment was granted, the Cains' effort to obtain bank records was not immediately halted. But this certainly did not justify imposition of sanctions of nearly $10,000.

CONCLUSION

For the reasons established in the opening brief and in this brief, the judgment should be reversed, and the case should be remanded with instructions regarding the errors discussed above.

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CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in Times New Roman in 14 point font size.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the brief contains 6,984 words.

Finally, I hereby certify that I have read this appellate brief, and it is not frivolous or interposed for any improper purpose, and that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume numbers, 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: April 12, 2017

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellants' Reply Brief was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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