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,

v.

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,

v.

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

MOTION TO STRIKE RESPONSE, OR ALTERNATIVELY, FOR PERMISSION TO FILE A REPLY TO THE RESPONSE

Appellants move to strike the "Respondents' Response to Supplemental Authorities," filed on October 12, 2017, on the ground that the response violates the limitations in NRAP 31(e). If the court declines to strike the response, appellants request permission to file a reply to the response.

On September 19, 2017, appellants filed a notice of supplemental authority. Appellants' notice complied with the limitations contained in NRAP 31(e). That rule mandates that a notice of supplemental authorities "shall provide references to the pages(s) of the brief that is being supplemented," the notice "shall further state concisely and without argument the legal proposition for which each supplemental authority is cited," and the notice "may not raise any new points or issues." In other words, the rule establishes four mandatory requirements: (1) **page references** to briefs; (2) **a concise statement** of the legal proposition for which the authority is being cited; (3) **no argument**; and (4) **no new points or issues**.

Appellants' notice complied with all four limitations. The notice cited and quoted Comment b to the Restatement (Second) of Contracts, § 309, with a quotation of an illustration in the comment, providing citations to the pages of appellants' briefs being supplemented. The notice provided a concise (one-sentence) non-argumentative statement of the legal proposition for which the Restatement comment was being tendered. And the notice raised no new points or issues. The

body of appellants' notice was one and one-half pages in length, including the quoted parts of the comment in the Restatement and the comment's illustration.

On September 27, 2017, after the oral argument, this court issued an order inviting respondents to file a response, pursuant to NRAP 31(e). That rule governs the content of notices of supplemental authorities **and** responses to such notices. After reciting the four limitations on notices of supplemental authorities (references to pages of the briefs; concise statement of legal proposition; no argument; and no new points or issues), Rule 31(e) allows a response, but the response "**must be similarly limited**." In other words, the response is subject to the same four limitations that apply to the notice of supplemental authorities. The rule reflects basic fundamental fairness—with both parties being subject to the same limitations in their supplemental authorities.

On October 12, 2017, respondents filed their response, which fails to comply with any of the four limitations in Rule 31(e). Specifically, (1) it fails to cite the pages in the answering brief that are being supplemented; (2) it consists of eight pages that cannot possibly be viewed as a "concise" statement of a legal proposition; (3) it is entirely argumentative; and (4) it raises new points and issues. Respondents did not seek relief from the limitations in Rule 31(e).

Appellants' supplemental authorities merely brought the court's attention to the Restatement comment (and the comment's illustration). Appellants were

precluded from presenting anything more than a concise, non-argumentative statement of the legal proposition for which the Restatement comment was being cited. Appellants complied.

Nevertheless, the response filed by respondents goes into great depth regarding factual and legal arguments that are far beyond appellants' supplemental authorities. The response contains arguments regarding the multiple contracts involved in this case; the different causes of action relating to those contracts; other causes of action relating to the contracts or involving tort claims; and priority of payments under the JVA and the promissory note.[1] Also, the response contains arguments dealing with election of remedies; the scope of default judgments against other defendants; post-settlement conduct of the parties; and possible waiver of appellants' rights under the settlement agreement.

These arguments are much more that the concise, non-argumentative notice of supplemental authorities that appellants filed—and much more than Rule 31(e) contemplates. Although the court invited respondents to file a response, respondents have improperly used the court's invitation as an opportunity to file a supplemental answering brief, adding eight pages of argument to the lengthy

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[1] Priority of payments under the JVA was a topic on which one of the justices asked a question at oral argument. Thus, respondents' Rule 31(e) response now is an obvious attempt to supplement counsel's oral argument on this point—a point completely unrelated to the Restatement comment.

answering brief they already filed. In these circumstances, it would be grossly unfair for respondents to be allowed to violate the limitations in Rule 31(e), after appellants complied with the rule.

Accordingly, appellants request the court to strike respondents' improper response to appellant's notice of supplemental authorities. Respondents should be ordered to file a substitute response that complies with NRAP 31(e).

In the alternative, if this court declines to strike the response, appellants request an opportunity to file a reply, to address the improper expanded arguments in the response. The proposed reply is attached to this motion.

DATED: 10/17/17

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing 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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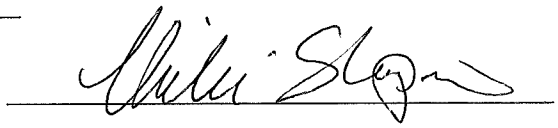
DATED: 10/17/17



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Respondents.

NO. 70864

REPLY TO RESPONDENTS' RESPONSE TO SUPPLEMENTAL AUTHORITIES

Appellants hereby reply to respondents' response to appellants' notice of supplemental authorities.

Initially, the court should note that the response goes far beyond the mandatory limitations in NRAP 31(e). This is thoroughly discussed in appellants' motion to strike the response.

Respondents state that the Cains only sought recovery based upon the settlement agreement, and not based upon the Joint Venture Agreement (JVA) or the promissory note. (Response, page 2.) Respondents' contention is false. The third amended complaint, which was the operative complaint for purposes of this appeal, contained nine claims for relief. The "background" portion of the complaint contained allegations regarding the initial loan, the JVA and the promissory note. 4 A.App. 759-60. Although the first claim for relief was based upon the subsequent settlement agreement, the other claims were based upon **all** of the transactions.

For example, the second claim was for fraud, contending that the defendants made false statements "in order [to] obtain funds from Plaintiffs." 4 A.App. 761:26-27. This fraud clearly related to the original loan transaction. 4 A.App. 761-62. The Cains also alleged that the defendants participated in a conspiracy, and that the defendants converted the Cains' funds. 4 A.App. 762-65. These claims related to

all of the defendants' conduct, including conduct relating to the original JVA and promissory note.

The response also states that default judgments against other defendants "relied exclusively on the Settlement Agreement." (Response, page 5.) Again, this is a flagrant misrepresentation of the record. In fact, respondents made the same misrepresentation in their answering brief, and the Cains' reply brief set the record straight on this point. ARB 20-22. Yet respondents now ignore the evidence cited in the reply brief, which unequivocally and undeniably shows that the default judgments were based upon **all** of the claims, including those relating to the original loan and the JVA.

For example, the default judgment against C4, Rawson and Kavanagh specifically states that the judgment was rendered under the first claim for relief (breach of the settlement agreement) **and** under the second, third, fourth, fifth and sixth claims for relief, all of which included allegations relating to the original loan transaction, not just the settlement agreement. 2 A.App. 295:16-24. Another default judgment (against defendant Edwards) also was based upon all of the claims, including those relating to the original loan and the JVA. R.App. 112:24-27.

Respondents argue that the language of the release is broad enough to include respondents (as third-party beneficiaries). (Response, pp. 3-4.) This issue was already fully argued in the briefs and discussed at oral argument. Respondents' contention is irrelevant to the Restatement comment, which really should be the only relevant focus of respondents' response to the Cains' supplemental authorities. In any event, the language of the release was extremely limited, as established at AOB 30-33 and ARB 14-16.

Respondents argue that the Cains' post-settlement conduct proves that the settlement agreement was valid and binding. (Response, pp. 4-5.) Again, the argument is irrelevant to the Restatement comment. Further, the alleged post-settlement conduct, on which respondents rely, relates to the default judgments that the Cains obtained against other defendants. As noted above, and as noted in the Cains' earlier briefing in this appeal, the default judgments were not limited to the settlement agreement, as respondents contend. And the default judgments are irrelevant to the liability of respondents Price and Shackelford.

Respondents seem to contend that the Cains failed to select an appropriate remedy. (Response, pp. 5-6, 8.) Yet the district court correctly ruled that "the doctrine of election of remedies is not applicable" regarding the Cains' claims. 5 A.App. 1159:13-15.

Respondents provide extensive argument on whether there was sufficient consideration for the release provision in the settlement agreement. (Response, pp. 3, 7.) Respondents fail to demonstrate how their argument is relevant to the Restatement comment in question here. The issue of consideration was already thoroughly briefed by both sides in this appeal, and respondents' response provides nothing new.

Respondents rely on *Clark v. Clark*, a Washington case to which respondents provide no citation. (Response, p. 86) The citation is 1999 WL106898 (Wash. App. 1999). *Clark* was an unpublished opinion in which the appellate court declined to consider whether the contract created immediate rights in the third-party beneficiary, or whether the rights were conditional. *Id.* at *7. The appellate court declined to consider this issue because the trial court had not made any findings on the issue. *Id.* at *8. *Clark* is completely irrelevant and inapplicable here.

In the present case, the settlement agreement cannot possibly be read as expressing the Cains' intent to release all of C4's officers and directors, unconditionally, even if C4 and Rawson never performed the settlement agreement and never paid even a single dollar to the Cains. The officers and directors were the very people who committed the fraud against the Cains in the first place, and who received distributions from the $1 million that the Cains loaned to C4. The language

of the settlement agreement does not support such an absurd interpretation, and no evidence supported the idea that the Cains intended to allow C4's officers and directors to walk away, without any obligations, even if the Cains received no money from C4 and Rawson, and even if C4 and Rawson completely failed to perform.

In conclusion, nothing in respondents' response to the Cains' supplemental authorities changes the fact that the Cains are entitled to a reversal in this appeal.

DATED: 10/17/17

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