IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT G. REYNOLDS, an Individual, and DIAMANTI FINE JEWELERS, LLC, a Nevada Limited Liability Company, Plaintiffs, vs. RAFFI TUFENKJIAN, an individual, and LUXURY HOLDINGS LV, LLC, a Nevada Limited Liability Company, DOES 1-10, and ROE CORPORATIONS 1-10, inclusive, Defendants.	CASE NO. 78187

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APPEAL

From the Eighth Judicial District Court, Department
The Honorable Mark R. Denton, District Judge
District Court Case No. A-17-753532-C

APPELLANTS' REPLY BRIEF

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Docket 78187 Document 2020-31543

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRA 26.1(a), and must be disclosed:

None other than the named parties.

This representation is made in order that the judges of this court may evaluate possible disqualification or recusal.

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SUMMARY OF THE ARGUMENT

This case presents an important question concerning whether a seller should be permitted to manipulate and misrepresent material information to the buyer then hide behind contractual clauses when the truth of those misrepresentations is made known. As a general rule, a buyer is responsible for conducting due diligence prior to completing a purchase. And there is no doubt a non-reliance clause and an independent investigation clause would protect a seller from a buyer that failed to perform due diligence.

The question here is whether anything changes when the seller intentionally misrepresents material information. That is, can a seller's misrepresentations frustrate due diligence and cause that exculpatory contractual clauses are inoperative? Or can a seller have unfettered authority to deliver important information to the buyer that he knows to be false and whose truth cannot be ascertained without completing the sale and running the business?

The Respondents argue for the latter. It asks the Court to shield them from overt deception simply because the contract provides a non-reliance clause and an independent investigation clause. Respondents barely challenge, let alone weaken, Appellants' right to accurate and reliable information when performing due

diligence. That is especially true here when that information was intentionally misrepresented. When the seller makes written misrepresentations about business revenue; title to furniture, fixtures and equipment (“FF&E”); customer lists; and cost of inventory, the buyer’s due diligence is completely frustrated. That is true for even the most experienced buyers. Here, Respondents were the only party with knowledge of the material misrepresentations made to induce Appellant Reynolds to purchase the jewelry store. Appellant Reynolds could not have known of their truth with any level of experience. Here, Appellant Reynolds is over 80 years old and was an “older person” for purposes of the protections provided by the State of Nevada. Respondents took advantage of him during the transaction, depriving him of his property under false pretenses.

This Court has concluded that contractual clauses are inoperative when a party makes active misrepresentations. *Blanchard v. Blanchard,* 108 Nev. 908, 839 P.2d 1320 (1992). Respondents agree, but claim the protections inherent in the non-reliance clause and independent investigation clause are so unique that they should be treated differently. This interpretation misses the mark. Unless the Court intervenes now, this state would sanction intentional and material misrepresentations

by sellers so long as they are cloaked in contractual disclaimers. This result cannot be endorsed.

ARGUMENT

I. Appellants Challenged the Enforceability of the Non-Reliance and Independent Investigation Clauses Before the District Court

Appellants argued before the District Court that the contractual clauses at issue could not be enforced because they could not perform due diligence. (AA 301-304). Appellants argued, "[W]hen matters are held to be peculiarly within defendant's knowledge, it is said plaintiff may rely without prosecuting an investigation, as he has no independent means for ascertaining the truth." *See Bank of Am. Corp. v. Braga Lemgruber*, 385 F. Supp. 2d 200, 230-31 (S.D.N.Y. 2005). (AA 301). Appellants also argued, "[W]here, as here alleged, the facts were peculiarly within the knowledge of the defendants and were willfully misrepresented, the failure of the plaintiffs to ascertain the truth by inspecting the public records is not fatal to their action." *See Todd v. Pearl Woods, Inc.*, 20 A.D.2d 911, 911, 248 N.Y.S.2d 975, 977. (AA 301-302). In short, Appellants argued that contractual disclaimers do not apply where the due diligence was frustrated. (AA 303).

Likewise, Appellants' arguments preserved their right to appeal dismissal of the fraud claim. A claim of fraudulent inducement requires a party to prove by clear and convincing evidence that (1) a false representation was made by the defendant, (2) the defendant knew or believed that the representation was false, (3) the defendant intended to induce the plaintiff to act in reliance upon the misrepresentation, (4) the plaintiff justifiably relied upon the misrepresentation, and (5) damages. *See Bulbman, Inc. v. Nevada Bell,* 108 Nev. 105, 111, 825 P.2d 588, 591 – 92 (1992). The above elements were argued extensively before the District Court and may be presented before this Court. (AA 295-300). That includes misrepresentations regarding the consumer base (AA 295-296) that inventory cost was manipulated (AA 296-297), and that the business revenue was misrepresented (AA 297-300). Appellants also brought evidence confirming Respondents' knowledge that the representations were false. For example, that Respondent Tufenkjian admitted that the customer names included non-customers (AA 296), that he artificially inflated costs of inventory by 10% (*Id.*), that Respondent Tufenkjian was aware the FF&E was not his to sell (AA 297), and that reported revenue combined with a second store that was not part of the sale (AA 299).

II. Contractual Clauses Do Not Justify Intentional Misrepresentations

Respondents argued in the District Court and in their Opposition that they are protected by exculpatory clauses in the contract. How can those clauses preclude the current claims when Respondents actively concealed or altered information during the due diligence period? Contractual disclaimers cannot serve to justify concealment of information material to the sale. The evidence supporting the concealment must be presented at trial to determine fault.

The Blanchard case presents remarkably similar facts. In *Blanchard*, the appellant charged that respondent made several misrepresentations which were intended to cause her "to believe and rely on them so that [she] would compromise and settle the pending action." *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (Nev. 1992). Appellant further asserted that "had she known the actual facts, and that the representations of defendant were not true, she would not have entered into the aforementioned property settlement agreement but would have taken the matter to trial." *Id*. There, the respondent sought refuge in provisions in the agreement which provide that the appellant did not rely on the values provided in the financial statement or on any other representations made by respondent.

There, the Court acknowledged that, generally, a plaintiff making "an independent investigation will be charged with knowledge of facts which reasonable diligence would have disclosed. Such a plaintiff is deemed to have relied on his own judgment and not on the defendant's representations." *Id*. at 211 (*citing Freeman v. Soukup*, 70 Nev. 198, 265 P.2d 207 (1953)). However, the Court also recognized that "an independent investigation will not preclude reliance where the falsity of the defendant's statements is not apparent from the inspection, where the plaintiff is not competent to judge the facts without expert assistance, or where the defendant has superior knowledge about the matter in issue." *Blanchard*. at 211-12 (emphasis added) (citations omitted). Moreover, the issue of whether an independent investigation was made presents a question of fact which may not be dispensed of as a matter of law. *See Id*. at 212.

The Court continues:

> Respondent claims that appellant could have easily investigated the title of the Florida property and the respective values of the other disputed property assets without the aid of an expert. However, the marital estate was comprised of many assets and the record strongly suggests that respondent had superior knowledge and control of those assets. In addition, it is not at all clear whether appellant was competent to judge the facts without the assistance of experts. Thus, appellant is still capable of showing justifiable reliance despite respondent's claim that she made a reasonable investigation.

> A party is not under a duty to make a reasonable investigation unless "the recipient has information which would serve as a danger signal and a red light to any normal person of his intelligence and experience." Collins, 103 Nev. at 397, 741 P.2d at 821 (citations omitted). The record is void of any obvious facts which would place a reasonable person on notice that respondent may have withheld information or otherwise made erroneous representations to appellant. Specifically, there is no evidence which might indicate that appellant had reason to suspect that the Florida property was no longer a part of the marital estate. Since appellant accepted the Florida property as part of the property settlement, she clearly relied on respondent's representation that it was part of the marital estate and was damaged as a result.
>
> ... Appellant is entitled to argue before a trier of fact that the representations or omissions by respondent were calculated to mislead her into accepting marital property with little or no value.

Id.

In *Blanchard*, Court determined that contractual clauses are inoperative when a party makes active misrepresentations. This case is no different as the clauses Respondents use to shade themselves from the light of day—non-reliance clause and independent investigation clause—were frustrated by Respondents' own actions.

Other jurisdictions have not addressed the same situation here: whether one party can actively conceal or misrepresent information to the other party's detriment. It stands to reason that a party can rely on a non-reliance provision **only** when the other party has access to accurate, honest, and true information. However, if a party presents intentionally inaccurate information to mislead another during due

diligence, that same party cannot hide behind a contractual provision. This is true whether the buyer is a sophisticated party or not, whether the contract includes exculpatory clauses of any kind, or whether the sum exchanged was large or small. If a seller intentionally presents false information that the buyer must rely upon, the due diligence is frustrated and no clause in any contract may excuse that behavior.

III. Appellants Relied on Disclosures that Were Material to a Purchase

In *Blanchard*, this Court defined the element of justifiable reliance:

> In order to establish justifiable reliance, the plaintiff is required to show the following: the false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.

Id. at 911 (quoting *Lubbe v. Barba,* 91 Nev. 596, 600, 540 P.2d 115, 118 (1975)). A plaintiff that undergoes an independent investigation is charged with knowledge of facts which reasonable diligence would have disclosed. *Id.,* at 912. Here, reasonable diligence would **not** have disclosed the misrepresentations. Appellants presented the following to the District Court:

a. Customer Base

During due diligence, Respondents represented that the business had a base of 1,466 unique customers. (AA 532-570 and AA 329 at 73:16-74:12). Shortly after assuming operation of the business, Appellants discovered that more than half the people on the list had never even heard of jewelry store, much less purchased anything from the store. (AA 95 at 67:22-68:2).

Respondent Tufenkjian also admitted that the 1,466 names on the customer list includes non-customers. (AA 329 at 72:14-75:13). Respondents knew the customer list they provided Appellants was artificially inflated. *See Id*.

Respondents presented an intentionally inflated customer list to artificially increase the sales price and induce the sale.

b. Inventory

Respondents were responsible for paying a 10% commission on the sale to a business broker. (AA 620). For whatever reason, the business brokers were so concerned that Respondent Tufenkjian would bypass this obligation that they reached out to Appellants to confirm that Appellants would not assist any effort by Respondent Tufenkjian to bypass this obligation. (AA 622). Respondent Tufenkjian admitted that he added an artificial 10% premium to the inventory cost entries to

offset the commission. (AA 332 at 85:1-10). Only after executing the contract and assuming operation of the store did Appellants discover that Respondent Tufenkjian added 10% to most of the inventory cost entries on February 22, 2015. (AA 624).

Respondents presented an intentionally inflated inventory list to artificially increase the sales price and induce the sale.

c. Furniture Fixtures and Equipment

Respondents provided Appellants with a list of items included in the sale. (AA 0269 at p.3. and AA 0271). The first nine entries in the FF&E include the built-in cabinets and counters. Those built in cabinets and counters, however, were not Respondents' property to sell. (AA 346 and AA 461). As such, 75% of the value of the FF&E were goods that Respondents leased from a third party and could not have been sold.

Respondents presented an intentionally inflated FF&E list to artificially increase the sales price and induce the sale.

d. Revenue

In addition to the store in Tivoli Village, Respondent Tufenkjian operated a second store through Luxury Holdings LV, LLC at the Galleria mall in Henderson, Nevada. (AA 463-466). Respondent Tufenkjian reported to the IRS revenue from

both the store and second jewelry store in the Galleria Mall was $748,801. That includes the Galleria store's $89,363.37 in revenue Respondent Tufenkjian reported to the Galleria Mall landlord from October to December 2014. (AA 678-689). That means that the store could only have generated $659,438 in revenue in 2014, far shy of the $800,000 in revenue that Respondents disclosed.

Respondents presented an intentionally inflated revenue figures to artificially increase the sales price and induce the sale.

IV. Appellant Reynolds Maintains a Claim for Elder Abuse

Appellant Reynolds is over 80 years old. Appellant Reynolds is also the sole member and sole manager of Appellant Diamanti Fine Jewelers, LLC. In order for the transaction at issue in this case to proceed, Appellant Reynolds contributed the purchase price of $529,253.44 to his LLC. Respondents assert that since Appellant Reynolds was not a party to the transaction at issue in this case, he has no standing.

The Nevada legislature intended NRS 41.1395 to protect "older persons" from financial exploitation, and so it is a reasonable for this Court to provide Appellant Reynolds with protection as an "older person" under the elder abuse statute. Reynolds is over 80 years old; he organized and funded the LLC, and is the sole member and manager of the LLC. Where required by equity or common sense,

Courts have found that an LLC is a person. *See e.g. Redmond v. CJD & Assocs., LLC (In re Brooke Corp.)*, 506 B.R. 560, 572 (Bankr. D. Kan. 2014) (LLC is a person as defined by 11 USC§ 101(2)(C); *Takacs v. American Eurocopter, LLC*, 656 F.Supp.2d 640, 645 (W.D.Tex.2009) (LLC is a person as defined by 28 USC§ 1442(a)(1)); *Orgain v. City of Salisbury*, 521 F. Supp. 2d 465, 476 n.34 (D. Md. 2007) (LLC is a "person" for purposes of the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

Contrary to Respondents' argument, Appellant Reynolds was a party to the transaction at issue in this case. (AA 113-116). Appellant Reynolds' assumption of the personal guarantee of the store's lease was also a necessary condition for the transaction at issue in this case. (AA 163 at i(8)). Further, Appellant Diamanti Fine Jewelers, LLC is owned, managed, and was organized, and funded by Appellant Reynolds. Finally, Respondents dealt exclusively with Appellant Reynolds and knew that he made decisions for the entity exclusively. Fairness, equity, and common sense support an interpretation of "older person" under NRS 41.1395(4)(d) to include a business entity 100% owned and managed by a natural "older person" meeting the definition.

CONCLUSION

For all of the above reasons, the district court's judgment should be reversed and remanded for further proceedings.

DATED this 26th day of August, 2020.

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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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 2,816 words.

FINALLY, I CERTIFY that I have read this Appellants' Reply 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 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of August, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Marx Law Firm, and that on the 26th day of August, 2020, I caused to be served a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF by United States Mail by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written:

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